LAW AND SOCIAL THEORY

SECOND EDITION

EDITED BY REZA BANAKAR AND MAX TRAVERS

LAW AND SOCIAL THEORY

There is a growing interest within law schools in the intersections between law and different areas of social theory. The second edition of this popular text introduces a wide range of traditions in sociology and the humanities that offer provocative, contextual views on law and legal institutions.

The book is organised into five sections, each with an introduction by the editors, on classical sociology of law, relating structure and action, critical approaches, postmodernism, and law in global society. Each chapter is written by a specialist who reviews the literature, and discusses how the approach can be used in researching different topics. New chapters include authoritative reviews of actor network theory, legal realism, critical race theory, postcolonial theories of law, and the sociology of the legal profession. Over half the chapters are new, and the rest include discussion of recent literature.

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Reza Banakar
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Contents

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Introduction

REZA BANAKAR and MAX TRAVERS

IN 2002, WE were fortunate to obtain the support of Hart Publishing to edit an advanced introduction to law and social theory that we know has helped many postgraduates and those teaching contextual courses in law schools over the last ten years. Despite the title of the first edition, the book was not really introductory. It contained authoritative review essays by experts who were knowledgeable about different theorists or had the experience of working within different theoretical traditions. These essays were organised into sections that grouped together theorists with comparable epistemological assumptions, in a similar way to how these are presented in textbooks on sociological theory. In addition, there were section introductions in which we tried as editors to explain and clarify what the reviewers covered in their introductions. The aim was to present the theoretical diversity of the field of law and society, to demonstrate how various sociolegal theories were related to—or distinguished themselves from—each other and to explore how one could conduct empirical research about law through employing the ideas rooted in different sociological traditions. More generally, however, we hoped to convey the pleasures and challenges of engaging with difficult ideas that can lead in a variety of directions.

We are pleased, ten years later, to have the opportunity to edit a second edition that makes it possible to cover some new topics and to allow the authors of different chapters to discuss some of the new theoretical literature and research studies published in different fields. It seems important to say that we see this book as supplementing, rather than replacing, the first edition. Although sociological theory does change, in the sense that each generation has to make sense of its own times, the main approaches have been around for some time. Because some readers may only see this edition, we have reprinted some of the original chapters with minor revisions. We have, though, recruited several new authors to give a different slant on particular theorists and traditions. Some contributors to the first edition have supplied new chapters. We have also commissioned chapters on a few new theorists and traditions, as well as some essays that apply different theories to particular topics such as globalisation and the legal profession.

In the introduction to the first edition, we felt it was important to convey the diverse character of the sociology of law through reviewing some debates in sociological theory. We have therefore provided a similar overview here, since this background helps in making sense of the relationship between different theories and traditions. We should add that these debates are not always mentioned or seen as important in law and society texts, because the distinctions are not seen as important, or they are seen as too difficult for law students, or because the authors are committed to a particular

viewpoint or perhaps have limited knowledge about other traditions. We will also explain the structure of this book and identify which chapters are new because they either address new topics or have different authors. Finally, we will make some general points about how to think about law sociologically, and we will also restate our views about the value of including contextual courses, particularly sociology of law, in the law school curriculum.

1. THE DIVERSE CHARACTER OF SOCIOLOGY OF LAW

The sociology of law, both as an academic discipline and an interdisciplinary field of research, embraces a host of disparate and seemingly irreconcilable perspectives and approaches to the study of law in society. This diverse character is celebrated by some scholars, who regard it as a source of theoretical pluralism and methodological innovation, and criticised by others, who see it as a cause of theoretical fragmentation, eclecticism and discontinuity in research.[1] Whether we approve of the theoretical diversity of the field of sociolegal research and view it as a source of innovation, or disapprove of it and describe it as 'an incoherent or inconclusive jumble of case studies', to borrow from Lawrence Freedman,[2] the fact remains that its diverse make-up entails a number of methodological challenges for students and researchers alike.[3] The present volume does not aim at resolving the problem of diversity and fragmentation in the field of sociolegal research, but instead hopes to offer insights into how various schools of thought, debate and discourse within the field have emerged. Although in the following we often refer to 'sociology of law' and borrow our main concepts and ideas from mainstream sociology, we nonetheless maintain that the thrust of our arguments is also applicable to sociolegal studies, law and society, or studies of law-in-society.

The sociology of law employs social theories and applies social scientific methods to the study of law, legal behaviour and legal institutions in order to describe and analyse legal phenomena in their social, cultural and historical contexts. It is therefore often considered as a subdiscipline of sociology or an interdisciplinary approach within academic law or legal studies. Whereas some sociolegal scholars, such as Mathieu Deflem, treat it as 'always and necessarily' belonging to the discipline of sociology,[4] others regard it as a field of research caught up in the disciplinary tensions and competitions between the two established disciplines of law and sociology.[5] Yet others regard it neither as a subdiscipline of sociology nor as a branch of legal studies, and instead present it as a field of research in its own right, within a broader social science tradition. For example, Roger Cotterrell describes the sociology of law, without reference

[1] Sociological studies of law have been criticised for being fragmented and theoretically undeveloped in relation to sociology. See A Hunt, *The Sociological Movement in Law* (London, Macmillan, 1978); M Travers, 'Putting Sociology Back into Sociology of Law' (1993) 20 *Journal of Law and Society* 438–51; R Banakar, *Merging Law and Sociology* (Berlin, Galda & Wilch, 2003).

[2] LM Friedman, 'The Law and Society Movement' (1986) 38 *Stanford Law Review* 779.

[3] For a discussion, see R Banakar and M Travers, 'Law and Sociology' in R Banakar and M Travers (eds) *Theory and Method in Socio-legal Research* (Oxford, Hart Publishing, 2005).

[4] M Deflem, *Sociology of Law: Visions of a Scholarly Tradition* (Cambridge, Cambridge University Press, 2008) 3; for a similar approach, see also M Travers *Understanding Law and Society* (London, Routledge, 2009).

[5] Banakar, above n 1.

to mainstream sociology, as 'the systematic, theoretically grounded, empirical study of law as a set of social practices or as an aspect or field of social experience'.[6] Cotterrell explains that academic lawyers interested in the study of law have often turned 'to sociology of law to escape the narrow disciplinary outlook of academic law',[7] which is why they do not wish to take refuge behind disciplinary walls, albeit those of legal studies or sociology. These researchers see the intellectual advancement in social studies as something which often occurs 'by ignoring disciplinary prerogatives, boundaries and distinctions'.[8] Similarly, Masaji Chiba avoided limiting his definition of the subject to the narrow conception of sociology and argued that the word 'sociology' referred to 'social sciences broadly' when it was used in combination with 'of law'.[9] Explicit in Cotterrell and Chiba's definitions is the desire to maintain sociology of law as an intellectually open and methodologically inclusive approach to the study of law. The intellectual openness flagged and practised by many sociolegal scholars has a number of implications for the development of the field. Admittedly, it safeguards the methodological diversity of the field by providing a 'space' for new and innovative thinking and approaches, but it also gives sociolegal research a non-cumulative, discursively scattered and theoretically eclectic appearance.[10] In the following, we shall adopt a broad and inclusive concept of sociology which acknowledges the relevance of other social sciences—in particular social and cultural anthropology and political science—for the development of sociology of law. We also refuse to make a sharp distinction between sociology of law's research interests and those of legal anthropology, law and politics, sociological jurisprudence, sociolegal studies, and the law and society movement in North America. Our argument is that an engagement with the central debates of social theory, in general, but with the theoretical concerns of mainstream sociology, in particular, is essential for the development of all social scientific studies of the law, irrespective of how 'law' and 'social' are conceptualised.

2. SOCIOLOGY OF LAW AND THE DEBATES WITHIN MAINSTREAM SOCIOLOGY

The starting point for sociology as a scientific discipline is the recognition that human beings are affected and shaped by—and yet at the same time influence—other people. Society exists before we are born and will be there after we die, so it was only natural for Durkheim to conceive it as having an independent existence, like the physical world, which could be studied using scientific methods. Moreover, the same can be said of the various organised and institutional groups that lay the foundations for social order in everyday life. The legal system consists, for example, of a set of institutions concerned with making and interpreting legal rules. Sociologists are interested in various groups

[6] R Cotterrell, 'Sociology of Law' in *Encyclopedia of Law and Society: American and Global Perspectives* (Thousand Oaks, CA, Sage, 2007) 1413.

[7] R Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Aldershot, Ashgate, 2006) 6.

[8] Ibid.

[9] M Chiba, 'Introduction' in *Sociology of Law in Non-Western Countries* (Oñati Proceedings 15, Oñati IISL, 1993) 12.

[10] For a discussion, see Banakar, above n 1.

working in legal institutions (lawyers, judges, clerks, police officers, etc) and in how laws are made through the legislative process. One encounters legal institutions and rules at various points in everyday life, from calling the police to getting divorced, setting up a company, or buying a house, and will come into contact with the technical specialists who know the law and decide upon disputes. A sociological approach to law is concerned with how this institution works and the relationship between law and other areas of social life. However, once one begins to think about law in this way, matters quickly become complicated. One classical challenge is posed by the realisation that although law is an institution produced through a series of interactions and processes, which can only be described as *social* and understood in the broader context of the society in which it operates, it is at the same time also a *system* with its own operations, forms of communications and above all a claim to autonomy from the social forces which produced it in the same place.[11] Had there not been some truth to law's claim to system autonomy, some argue, we could not distinguish legal norms from social or moral norms. Matters become even more complicated once we realise that there are also sociolegal approaches which do not define law and legality in terms of the legal system alone and argue that forms of legality may also emerge independently of the formal mechanisms of lawmaking, such as parliament and courts. One such approach is 'living law', inspired by Eugen Ehrlich's sociology of law, which is discussed in Chapter 2.

If you read sociology textbooks, it will be apparent that there are numerous ways of understanding the social world and thus describing and analysing the law. There are all kinds of divisions and subdivisions within particular traditions. There are also three general debates or concerns that cut across the whole subject: the 'consensus-conflict', the 'action-structure' debate and the challenge posed by postmodernism to sociology.

The Consensus and Conflict Debate

Sociologists differ considerably in their political views or normative assumptions, which they might or might not articulate in political terms, but which nevertheless influence the way they understand society generally, view and describe social events and processes, and problematise and investigate social issues.[12] One influential body of social thought has argued that this must depend ultimately on maintaining a shared set of values. Law can be viewed along with education as a 'neutral framework' for holding society together.[13] If you take this view, then lawyers are not simply another occupational group—they are custodians of a cultural tradition that we take largely for granted.[14] Once law is explored from a consensus-oriented standpoint, it balances rights and obligations, protects us from crime and social harm, brings a degree of certitude to our collaborative and contractual relations, and facilitates the exchange

[11] The best modern proponent of this view is Niklas Luhmann, presented in Chapter 3.

[12] For a discussion, see R Banakar, 'Can Legal Sociology Account for the Normativity of Law' in M Baier, and K Åström (ed), *Social and Legal Norms* (Aldershot, Ashgate, 2013). E-copy at: http://ssrn.com/abstract=2140756.

[13] S Vago, *Law and Society* (Boston, Prentice Hall/Pearsons, 2012).

[14] See Chapter 18 on the legal profession.

of goods and services in a capitalist economy. Law also evolves over time in response to new social and economic circumstances,[15] although by definition it tends to lag behind social developments. Law's unwillingness to stay abreast of social developments demonstrates its inherent social conservatism; expressed differently, a law which adapts itself immediately to every large or small change in society would be, arguably, unable to preserve sociocultural values and norms and ensure continuity in social behaviour and relationships. Changes in family law, such as the recognition of partnership and same-sex marriage, and new legal concepts and ideas concerning civil rights and equal opportunity, to give a few examples, are often forced upon the law from without the legal system by social movements which engage in public political discourse.[16] However, the fact that the law allows new ideas and values to enter its internal domain of operations does not necessarily change the organisation of the law or modify the courts' practices, which creates a gap between legislation, or the intention of the legislature, and the practices of the courts. Hence, we find the classical distinction made by Roscoe Pound over a hundred years ago between 'law in the books' and 'law in action'.[17]

The most popular modern-day social theories take issue with the consensus-oriented view of society, arguing that it is not based on shared values but on the values and aspirations of culturally or economically dominant groups, which by imposing their own standards and worldviews on subordinate groups establish and legitimate their own power. Once law is viewed from this standpoint, it becomes ideological and an integral part of society's power structure. Marxist tradition, for example, saw the rule of law as a fraud imposed by force on the working classes. One can, however, use similar arguments in relation to any subordinate group, such as women (in traditional or early modernity), homosexuals or ethnic and religious minorities. The underlying assumption of conflict-oriented social theory is that these conflicts cannot be resolved without a major shift of economic and political power. Since the law is implicated in perpetuating hegemonic ideologies and subsequently social inequalities, it is part of the mechanisms generating social injustice. The solution to the problems of social injustice must therefore be sought outside the legal system.

Although one might assume that 'consensus' and 'conflict' theorists are forever talking past each other, or are engaged in bitter political arguments, the main trend in social theory in the past fifty years has been in fact towards a compromise or synthesis between the two traditions. Here one might note that in the 1960s and 1970s there seemed to exist greater opportunities to transform society through youthful protests, social movements and industrial militancy. Moreover, the Soviet Union was still a superpower committed to supporting socialist revolution across the world. Today, on the other hand, neither anticapitalist protests nor Islamic fundamentalism appear to pose much of a threat to the neoliberal ideology of Western countries. Furthermore, neither the Arab Spring of 2010 nor in fact the Islamic Revolution which took place

[15] See T Parsons, 'A Sociologist Looks at the Legal Profession' in *Talcott Parsons: Essays in Sociological Theory* (Toronto, Collier-Macmillan, 1964) 370–85.

[16] See M Antokolskaia, 'Comparative Family Law: Moving with the Times' in E Örücü and D Nelken (eds), *Comparative Law: A Handbook* (Oxford, Hart Publishing, 2007) 241–62, 241; and R Banakar, 'When Do Rights Matter?' in S Halliday and P Schmitt, *Human Rights Brought Home* (Oxford, Hart Publishing, 2004).

[17] R Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12–36.

in Iran much earlier in 1979, and which for the first time established Islam as a state ideology and a basis for political action, were anticapitalist movements. They were, instead, social movements for democracy and a reaction against authoritarian rules, dictatorships, systematic human rights violations, political corruption and forms of neocolonialism.[18] Protest movements of various types have not died away and continue to make their voices heard, while the financial global crisis of 2007/08 has again demonstrated systemic flaws and fundamental internal contradictions, continuously threatening the integrity of the capitalist system from within. This does not mean that we are at the 'end of history', since we can still organise politically around all kinds of issues. However, it does mean that many contemporary theorists accept the values of liberal capitalism, whereas they were more critical towards established institutions, including the legal system, during the 1960s.

The Action–Structure Debate

Another reason why 'consensus' and 'conflict' traditions have tended to converge is because, despite their political differences, they are two sides of the same coin and, thus, adopt much the same approach to thinking about the social world. The key concepts one finds in liberal thinkers like Parsons and Luhmann, left-leaning liberals like Giddens, Bourdieu and Habermas, but also in hard-line Marxists like Althusser is that society can be understood as a system in which different elements can be related together. The terminology and the focus of analysis differ, so in Parsons and Luhmann one finds a focus on 'systems', whereas Bourdieu emphasises 'fields', Habermas 'communicative action' and Althusser 'practices'. The common objective, however, is to produce a grand, synoptic model of society that explains how different institutions fit together and how the whole changes over time.

The most systematic theory also addresses the relationship between the individual and society. Parsons offers the fullest and most explicit discussion, arguing that human beings acquire goals and values (eg a respect for the law) in the course of socialisation. The problem here is how to account or allow for 'free will' while at the same time retaining the notion of a social system. Anthony Giddens is one of the latest theorists to attempt to incorporate 'action' and 'structure' in the same theory, through his concept of the 'duality of structure'.[19] The basic idea is that social structures such as institutions are produced by people through their actions, but that these actions are constrained by the structural resources available to the actor (which can include cultural as well as material means).[20]

There are, however, difficult issues which are not resolved fully by attempts to solve

[18] The fact that they do not appear to have realised their democratic goals, however, is another matter, which cannot be explored here due to lack of space.

[19] The structure–action, or structure–agency, debate should not be confused with discussions on the possibility of micro–macro integration, which according to Randall Collins concerns if 'one type of explanation takes priority over the other, or whether the two types can be integrated into a combined theory. The question of agency and structure is not an explanatory question but an ideological one. It is an argument to show that human beings control their own destinies; it is a defence of free will.' R Collins, 'The Romanticism of Agency/Structure versus the Analysis of Micro/Macro' (1992) 40 *Current Sociology* 77.

[20] A Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Cambridge, Polity Press, 1986, reprint).

the action–structure problem. Twentieth-century critics, such as the ethnomethodologist Harold Garfinkel, have argued that systems theory seems to require human beings who are 'cultural dopes'. Besides the question of 'free will', this kind of theorising also offers an impoverished view of human action. It cannot address, for example, how people account for their actions by giving reasons, or how they make judgements about other people. From this perspective, the initial focus on structure prevents theorists from seeing what lawyers, judges or police officers are doing in their day-to-day activities, but there is also a deeper issue here which goes back to nineteenth century debates about the nature of sociology. Admirers, like Durkheim, of natural sciences argued that sociology should produce causal laws through observing patterned human conduct: there was no reason to investigate how people understood their own actions. By contrast, the hermeneutic tradition in Germany argued that this was an inappropriate way of studying human beings. Unlike the objects studied by natural scientists, human beings can think, experience emotions and have free will, which is why sociology has to be concerned with interpretation and meaning.

This nineteenth-century debate has never been resolved, despite many attempts by theorists such as Giddens and Habermas to combine or reconcile the two traditions. One can see that any systems theory must be based ultimately on a Durkheimian conception of sociology as a science, since it looks at human beings from the outside, but this can be contrasted with interpretive sociology, such as symbolic interactionism and ethnomethodology, which address how people understand and justify their own actions. There is no need in these traditions to make ironic contrasts between our superior knowledge, and the limited or imperfect understanding of the people we study as sociologists. Instead, the objective is to explicate and describe common-sense knowledge.

The Poststructuralist and Postmodern Challenge

Poststructuralism and postmodernism may in retrospect turn out to have represented only a short-lived, *fin-de-siècle* movement, one that can perhaps be explained best as the response of utopian left-wing intellectuals to the fall of communism. Nonetheless, it is important to recognise the immense difficulties that they have created for sociology. Just as systems theorists felt they had made some progress in producing a model of society that combined insights and ideas from the old consensus and conflict traditions and which solved the action–structure problem, the discipline came under attack from a different direction. A group of mainly French philosophers set out to trash the Enlightenment assumptions underpinning sociological inquiry, including the ideas that the application of reason and science can produce truth and progress (an idea which is widely shared in many academic disciplines) and that it is possible to produce objective or unproblematic descriptions through using social scientific methods.

Although poststructuralism does have implications for conducting empirical research, it is best understood as a philosophical critique that makes us question the authority and coherence of classic texts. Like other radical movements in the discipline, it has been absorbed and tamed largely by mainstream theorists, and subversive thinkers such as Foucault are most usually understood in law and society circles as

saying something similar to Marx.[21] Both poststructuralism and postmodernism have exerted influence on the development of critical legal studies (CLS), feminism, theories of sexuality and legal pluralism, and more recently on parts of legal philosophy.

According to postmodernists, while modernity prolongs the aspirations of the Enlightenment and thus reproduces the values of universalism and reason, postmodernity denotes the dawn of a generically new age characterised by uncertainty, fragmentation and discontinuity. This marks a radical break from the totalising constraints of the metanarrative of reason (totalising knowledge, truths and beliefs) which constitute classical modernism. These metanarratives make foundational claims, in that they provide a unifying system of thoughts into which all other ideas can be ordered and their truthfulness and historical direction assessed. Consequently, metanarratives provide a means of social control, manipulation, oppression and marginalisation, and therefore they should be *deconstructed*.[22]

In recent years, as noted above, postmodernism has spread among certain socio-legal and even legal researchers, who often engage in social critiques of the law at a normative level. These scholars either have little interest in empirical research or actively seek to undermine the truth claims of empirical methods which are linked to the metanarratives of sociology. For these scholars postmodernism provides a new understanding of the operations of the legal system in terms of law's discursive practices and draws attention to the serious shortcomings of simplistic structuralist models which continue to dominate legal studies.[23] At the same time postmodernism has also been criticised; its critics question its transformative potential and its ability to offer an alternative practical vision of economy and polity.[24]

3. THE STRUCTURE OF THE BOOK

As in the first edition, there are numerous traditions that we have been unable to cover, and the reader will again notice some obvious omissions. There are still no chapters on Donald Black, on Talcott Parsons and structural functionalism.[25] There are also no chapters on legal consciousness or empirical legal studies, which have become influential movements in American law schools.[26] This may, of course, reflect our own theoretical bias and the company we keep, but the choice of theorists and topics is also constrained by the structure of the book. As in the first edition, we consider groups of

[21] For a recent study, see B Golder and P Fitzpatrick, *Foucault's Law* (London, Routledge, 2009).

[22] J Derrida, 'Force of Law: The "Mystical Foundation of Authority"' in D Cornell et al (eds), *Deconstruction and the Possibility of Justice* (London, Routledge, 1992) 2.

[23] Imaginative, albeit eclectic, postmodern theorising may be found in the works of Gunther Teubner and Andreas Philippopoulos-Mihalopoulos, both of whom conflate Luhmann's autopoiesis (which was developed theoretically and without empirical input) and postmodern theories. See G Teubner, 'Self-subversive Justice: Contingency or Transcendence Formula of Law?' (2009) 72 *Modern Law Review* 1–23, 9; A Philippopoulos-Mihalopoulos, 'Between Law and Justice: A Connection of No-Connection in Luhmann and Derrida' in KE Himma (ed), *Law, Morality, and Legal Positivism* (ARSP Beihefte, Stuttgart, Franz Steiner Verlag, 2004).

[24] JF Handler, 'Postmodernism, Protest, and the New Social Movements' (1992) 26 *Law and Society Review* 697–731, 727.

[25] For an example, see WM Evan, *Social Structure and Law: Theoretical and Empirical Perspectives* (New York, Sage, 1990).

[26] P Ewick and S Silbey, *The Common Place of Law: Stories From Everyday Life* (Chicago, University of Chicago Press, 1998).

theorists that have something in common and which align with contrasting traditions, rather than trying to do everything, or suggesting that it is desirable or possible to create a grand synthetic theory (although some sociologists, including Parsons, have tried to do this).

In this edition, we start with a section on the classical sociology of law which contains the challenging discussion of law in classical social theory by Alan Hunt, published in the first edition, but also a new review by Javier Treviño on the sociological jurists Pound, Ehrlich and Petrażycki. Then we have a section on systems theory. The last edition contained an interesting introduction to Niklas Luhmann by Klaus Ziegert, and in this edition we have an equally authoritative new review by Michael King, which represents a somewhat different presentation of Luhmann's systems theory. There is also a chapter on Jürgen Habermas by Mathieu Deflem (in the first edition this was authored by Bo Carlsson).

The next sections on critical approaches and postmodernism, which were also in the first edition, now include some new chapters and authors. In the section on critical theory, we have reprinted Robert Fine's review of Marxism. This is an example of an insightful and demanding review that would not be improved by, for example, discussing the global financial crisis or new theoretical work. We have included an abridged version of a previously published paper by Mikael Madsen and Yves Dezalay on Pierre Bourdieu, which in some ways develops the ideas presented in the first edition. Then, there is a new chapter on feminist legal theory by Harriet Samuel (Ruth Fletcher authored the chapter in the first edition), which provides an authoritative and up-to-date overview of the research and theoretical developments within law and feminism, as well as a new chapter on critical race theory by Angela Harris.

These theorists all have a structural bias, in that they start with a view of society as a whole and explain the actions of individuals within this framework. They can be contrasted with Bruno Latour's actor network theory and the interpretive tradition, which in different ways focus on individual actions and how they produce society. Max Travers supplies a review of symbolic interactionism and ethnomethodological research since the first edition. There is a new chapter on Latour written by Frédéric Audren and Cédric Moreau de Bellaing. To complicate matters further, the last chapter in this section by Stewart Macaulay and Elizabeth Mertz on the new legal realism, also new for this edition, attempts a synthesis or reconciliation of the different positions. For postmodernism, we have reprinted the chapter on Foucault by Gary Wickham and a revised version of Shaun McVeigh's chapter on postmodernism and common law which appeared in the first edition. We have, though, included a new chapter on postcolonial theories of law by Eve Darian-Smith.

The book concludes with a section in which we use law in the late modern world as a theme to bring together different traditions. We have printed a new chapter by Anne Griffiths on legal pluralism, which should be read alongside her introduction in the first edition of this text, and there is a new essay on globalisation by Ralf Michaels and a new chapter by Reza Banakar reviewing law in late modern society. Ole Hammerslev has supplied a new chapter considering different theoretical approaches to the legal profession. Finally, we have reprinted with minor revisions David Nelken's chapter from the first edition on comparative studies of law.

4. UNDERSTANDING LAW FROM A SOCIOLOGICAL PERSPECTIVE

In presenting these reviews, we should acknowledge that not all are written by sociologists—there are chapters by anthropologists (Darian-Smith, Nelken), by a legal theorist (Michaels) and by scholars interested in cultural studies and philosophy (Harris, McVeigh), which demonstrates that the boundaries between disciplines can be blurred in law and society studies, and some would argue that it should develop as an interdisciplinary field. However, our own interest in this collection lies in demonstrating and explaining the distinctive character of different sociological traditions and how they can be used to investigate law. Law is, of course, a complex social institution that is of central importance in modern societies. These chapters are worth reading because they show how a range of theorists and traditions approach law and understand the relationship between law and society. Further to the inclusion of contributors from different fields, it is also important to note that they do not simplify difficult ideas—there is nothing simple about the way in which Luhmann or Habermas understand law, or the ethnomethodologists, or Marxist and feminist theory, or postmodernism, so those who are new to the field have to spend some time getting to know these traditions to appreciate what they have achieved and to understand the differences between them.

Although there are significant differences, the different sociological approaches also have something important in common: they make it possible to investigate and understand law as a social institution, even as a form of reasoning. There are, of course, other ways of doing this in legal education, including offering courses in policy-oriented sociolegal studies, critical legal studies or disciplines in the humanities such as philosophy or cultural studies, and some of these courses can be quite political, in the sense of promoting different varieties of critical theory. By contrast, sociology asks students to reflect on the place of law in society through considering different theoretical traditions and perspectives. This in itself leads to students thinking about law critically (in our view a desirable educational outcome). Moreover, even if it has no direct practical value, sociological research makes one think about institutions and social processes in a way that is not possible through studying doctrinal (or black letter) subjects. Along with other contextualists influenced by Karl Llewellyn and Roscoe Pound, we would argue that studying sociology of law will make you a better lawyer.

In the first edition of this book we advanced this view in the introduction, and in the conclusion we even suggested that the law school curriculum should include courses on research methods and encourage students to conduct empirical research. Naturally, we were aware that nothing much would change, since there remain compelling institutional reasons why law schools should offer mainly doctrinal courses rather than looking critically at the nature of law and the place of lawyers in society.[27] What we could not have predicted is that law schools are facing profound challenges that might lead to even fewer contextual courses being offered. The legal profession

[27] We should hasten to add that a few textbooks have been published recently catering for multi-disciplinary research in law. But these remain few in number. See eg M McConville and WH Chui, *Research Methods for Law* (Edinburgh, Edinburgh University Press, 2010); R Cryer et al, *Research Methodologies in EU and International Law* (Oxford, Hart Publishing, 2011).

and courts also seem to be facing difficulties, partly because the state cannot properly fund legal services. Even corporate lawyers are affected by the uncertain economic outlook. Looked at more positively, social change often generates sociological reflection and eventually some kind of political response. In these circumstances, we would recommend sociology of law as a means of understanding changes in law as a social institution, even though none of the theorists or traditions reviewed in this book supplies definitive answers.

Section 1

Classical Sociology of Law

REZA BANAKAR and MAX TRAVERS

MOST UNDERGRADUATE COURSES on sociology of law begin with the three nineteenth-century 'founding fathers' of sociology: Karl Marx, Emile Durkheim and Max Weber. The two sides in the consensus–conflict debate we referred to in the general introduction take their lead from these theorists, who were writing about the massive social and economic changes that took place in nineteenth-century Europe which we now describe as the emergence of capitalism or modernity. Marx believed that the central dynamic of this new world would be a growing polarisation between rich and poor—between the minority who owned the means of production and the majority who had to sell their labour in order to make a living. The tension between these two opposing interests, Marx predicted, would result eventually in revolution. Weber offers a less deterministic view of human history, but one that places equal emphasis on the competition between different groups for wealth, power and status. Durkheim, on the other hand, believed that industrial unrest was simply a temporary symptom of adjustment and that political elites could re-establish a sense of order and wellbeing through fostering shared values.[1]

All three theorists were interested in law and legal institutions, although they regarded the subjects as only one constitutive element of society alongside the economy, political system and cultural institutions. For Marx, the idea of 'the rule of law', celebrated by British jurists, was a means of promoting the ideological idea that law benefits everyone, whereas in fact it only benefits the ruling class.[2] Durkheim took the opposing view that law embodies shared values, and he advanced his famous theory, expressed as a scientific law, on how laws change over time as society becomes more complex. Weber, on the other hand, was most interested in the development of law codes, as one example of a growing rationalisation of social life, and in contrast to both Marx and Durkheim he offered a pessimistic vision of modernity as a soulless 'iron cage' with no prospect of liberation through reason or science (since they were themselves partly responsible).

The first contribution by Alan Hunt to this collection contains a summary of Marx, Durkheim and Weber's ideas on law, but it does rather more than this and is

[1] For some useful introductions, see J Hughes et al, *Understanding Classical Sociology* (London, Sage, 1995); I Craib, *Classical Social Theory* (Oxford, Oxford University Press, 1997).

[2] This oversimplifies matters, since the few references to law in Marx can be interpreted in different ways. See H Collins, *Marxism and Law* (Oxford, Oxford University Press, 1982).

best read as a wide-ranging and provocative statement about the field of sociology of law as a whole. Hunt is provocative, in that he argues that the classical theorists have more in common than is generally realised: they each view law in a 'constructivist' way as a tool that can (and should) be used by the state in regulating human affairs. There was, Hunt suggests, a shift in the way intellectuals conceptualised law in the nineteenth century. Whereas in pre-modern times law was either viewed as a 'natural' phenomenon, deriving from tradition or ecclesiastical authority, or as representing the 'will of the sovereign', the new capitalist industrial economy required a different understanding thereof. Hunt argues that what has become dominant is 'legal constructivism' (which he contrasts to the idea of naturalism), the 'intentional deployment' of law 'to promote, secure or defend specific social interests'.

At the risk of oversimplifying a complex argument, Hunt implies that a common concern of these theorists (and also of the legal thinker Henry Maine) was the relationship between law and the state. Marx believed that law would eventually 'wither away' after a socialist revolution, but he recognised its importance for nineteenth-century governments as a means of controlling populations and securing the conditions for capitalist economic relationships. Similarly, a major theme in Weber's writings was the growth of 'professionalisation and bureaucratisation', which sustained 'the stability and security of the new capitalist order'. According to Hunt, Durkheim also saw 'modern law' and 'political democracy' as the only means of maintaining social solidarity in a complex, industrial society.

Hunt's chapter ends with some general reflections about law in the modern world, and about the sociology of law itself, which he argues still sees law 'as a manifestation of state sovereignty'. He contends that the relentless juridification that has occurred during the twentieth century (essentially the growth of the state) has solved many problems but created a reaction against the grip of law. However, initiatives intended to escape bureaucracy and law, such as the alternative dispute resolution movement or the rise of 'self-governance', end up promoting further juridification. Modern sociology of law should 'move beyond the state' and study 'new popular forms of engagement that reach out beyond … the classical period of state, law and sovereignty'.

Those familiar with Hunt's recent work will know that this is very much a neo-Foucauldian argument, and he also draws on Habermas's idea of the system's colonisation of lifeworld.[3] It is worth adding, however, that each of these theorists can be understood as developing and elaborating a theme that was already present in the writings of Max Weber. Juridification is, after all, one part of what Weber viewed as a process of rationalisation through human history. There is arguably a moral ambiguity in all these writers towards the state, as they could imagine no alternative to liberal democracy, but they were aware that excessive regulation reduced human creativity and freedom.

One thing that will be apparent from the preceding discussion is that classical sociologists were all concerned with how the relationship between law and society was taking shape against the backdrop of the emerging new industrial capitalist society and its counterpart, the modern state. In our second chapter, Javier Treviño offers a different perspective on this issue by reviewing the ideas of three jurists—Roscoe

[3] See A Hunt and G Wickham, *Foucault and Law: Towards a Sociology of Governance* (London, Pluto, 1994) and Wickham's chapter in Section 5. Also, see Mathieu Deflem's chapter on Habermas in Section 2.

Pound (1870–1964), Eugen Ehrlich (1862–1922) and Leon Petrażycki (1867–1931)—who were also concerned with the role of the state but expressed their disquiet by attempting to develop a science of law. They all shared mistrust of legal formalism, and in the case of Ehrlich and Petrażycki highlighted the limited impact of state law on social relationships in their own countries.[4]

Petrażycki and Ehrlich worked independently of one another, and yet their theories came to overlap partially. Firstly, they regarded social sciences, rather than moral or analytical philosophy, as the foundation upon which a science of law could be built. Secondly, taking issue with the jurisprudence of their time, they refuted natural law theories and contested the assumption of legal positivism that a social norm became a legal rule only if it was posited by the state. The state could not be the primary source of law for the simple reason that its existence presupposed and was conditioned by law. Petrażycki and Ehrlich, each in his own way, argued for an empirically based concept of law which was broader than state law and existed independently of any outside authority. While Durkheim or Weber studied law as part of their concern with the rise of modernity, Petrażycki and Ehrlich explored it in an effort to improve the science of law.

Petrażycki and Ehrlich both lived and worked in the Continental Europe of the early 1900s. An anti-formalist movement, initiated by Oliver Wendell Holmes (1841–1935) and Roscoe Pound, was also taking shape under the banner of 'legal realism' during the same period in North America.[5] Holmes famously declared that the life of law was not logic but experience: '[T]he prophecies of what the courts … [did] in fact, and nothing more pretentious' constituted the law'.[6] This implied that we could not grasp the law through the exegesis of legal rules and doctrine, but we could do so by attending to how legal authorities interpret and enforce the law and decide upon cases. This sociological insight was elaborated further in the works of Pound, who distinguished between 'law in the books' and 'law in action'—a distinction that continues to inform sociolegal research concerning the discrepancies between the claims of the law and the intentions of the legislature, on the one hand, and the de facto regulatory impact of the law on social behaviour, on the other (this discrepancy is also known as the 'gap problem').

There were certain similarities between Ehrlich and Pound's antiformalism and their belief that social sciences should occupy a privileged position in the study of law, but there were also significant differences. It is worth emphasising that their concept of 'science' was rather narrow and, as Treviño emphasises, concerned with the 'implementation of empirical positivism and induction'. Pound did use Ehrlich's ideas, as he used many other theories to develop his eclectic approach to legal engineering, but as David Nelken explains, his 'programme and the conceptual tools designed to further it

[4] Georges Gurvitch should be mentioned in this context as heir to the tradition of sociolegal thought developed by Petrażycki. Gurvitch's notion of 'social law', elaborated in *L'idée du droit social* (Paris, Librairie de Recueil Sirey, 1932), is reminiscent of Petrażycki's 'intuitive law' and Ehrlich's 'living law'. See R Banakar, 'Integrating Reciprocal Perspectives: On Georges Gurvitch's Theory of Immediate Jural Experience' (2001) 16 *Canadian Journal of Law and Society* 67–91. An e-copy is available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1777167.

[5] See R Pound, 'Sociology of Law and Sociological Jurisprudence' (1943) 5 *University of Toronto Law Journal* 1–20.

[6] OW Holmes, 'The Path of Law' (1897) 10 *Harvard Law Review* 457–78.

were very different indeed from those of Ehrlich'.[7] Although Holmes and Pound were critical of legal formalism, their concept of law recognises state law (or official law) as the law proper, and in this respect it is in line with the ideology of legal positivism. In contrast, Ehrlich's concept of law is broader than state law and includes non-official law and forms of ordering. The broadness of his concept comes, however, at a price—he is often criticised for vagueness and, to borrow from Treviño again, 'for lack of scientific rigour'. Furthermore, his theory of 'living law' has been misrepresented as a conflation of 'is' and 'ought' by no less than Hans Kelsen.[8]

There are also similarities between the ideas developed by Petrażycki and Axel Hägerström, who is regarded as the founder of Scandinavian legal realism. Whereas Pound and Ehrlich, as Treviño explains, were familiar with each other's works and Ehrlich visited Pound in Harvard, Petrażycki and Hägerström appear not 'to have communicated or exchanged ideas'.[9] The similarities found between the works of Petrażycki and Hägerström, on the one hand, and Ehrlich and Pound, on the other, provide a key to the intellectual climate which prevailed at the end of the nineteenth century and the beginning of the twentieth century. Two of the central questions raised and deliberated at this time—one regarding the separation of facts and norms (or the distinction made between the facticity and the normativity of the law) and the other concerning the relationship between law and the state—remain with us and continue to inform much of the debate within legal theory.

The extent to which these classical models of law, state and society are compatible and relevant to the study of current social problems would be an interesting issue to consider on a law and society course (which would require some consideration of empirical examples). Naturally, there have been many anthropological studies about customary law and how this relates to state institutions which support Ehrlich's argument.[10] These studies often demonstrate that state law may only have a limited relevance to how people in developed, industrial societies conduct many aspects of their everyday lives. Interestingly, the concern with the role of law vis-à-vis law and society retains a central position in the more recent debates on the consequences of globalisation, which we shall discuss in Section 6. We see, for example, that the ideas of Ehrlich, on the one hand, and various forms of legal pluralism, on the other, are employed once again to describe and make sense of the transformation of the state and the development of transnational law.[11] It is to Ehrlich's credit that his theory of 'living law' has retained its relevancy despite the sustained criticism directed at it from the direction of legal positivism.

[7] D Nelken, 'Law in Action or Living Law: Back to the Beginning in Sociology of Law' (1984) 4 *Legal Studies* 157–82, 159.

[8] For a discussion, see B van Klink, *Facts and Norms: The Unfinished Debate between Eugen Ehrlich and Hans Kelsen* (2006). Available at SSRN: http://ssrn.com/abstract=980957.

[9] H McCoubrey and ND White, *Jurisprudence*, 2nd edn (London, Blackstone Press, 1996) 168.

[10] See M Hertogh, *Living Law: Reconsidering Eugen Ehrlich* (Oxford, Hart Publishing, 2009).

[11] See eg G Teubner (ed), *Global Law Without a State* (Aldershot, Dartmouth, 1997).

1

The Problematisation of Law in Classical Social Theory

ALAN HUNT

THIS CHAPTER EXPLORES the relationship between what will be termed the 'classical tradition' of social and legal theories of the nineteen and early twentieth centuries and contemporary trends in theoretically oriented studies in the fields of 'law and society' and 'sociology of law'.[1] A feature which the sociology of law shares with other subdisciplinary fields is an almost reverential acknowledgement of the 'founding fathers', in particular the familiar trinity of Marx, Durkheim and Weber. This chapter will focus on the trinity with some brief comments on Sir Henry Maine (1861–1905).

This undertaking will be approached by exploring the forms in which classical theory problematised law. For this purpose, I shall draw upon Foucault's reflections on problematisation as opening up a new and fruitful avenue for the historical study of the human sciences. While the key figures had very different intellectual and political agendas, it will be argued that there was an underlying shared problematisation about the configuration of economic, political and legal relations that was taking shape during the course of the nineteenth century. While the problematic of Weber and Durkheim was conceived within the perspective of liberal capitalist rule, Marx exemplified a break with the problems posed by this tradition. In that tradition the problematisation of law was preoccupied by the question of how to facilitate the possibility of an extension of the capacity of political institutions to govern the economic and social conditions of a nation and its population. The liberal tradition was concerned that the capacity to rule should be exercised without transgressing proper limits that preserved the expanded economic and political rights won in the transition from monarchical to parliamentary sovereignty.

The classical sociological interrogation of the legal field demarcates the period in which 'the social' had come to the fore as the central target for the governance of the population.[2] Marx had signalled, but did not complete, the separation of the fields

[1] For present purposes nothing hangs on the differences between these fields of inquiry.

[2] 'The social' came into being in the nineteenth century; it designated 'a certain region of society, a space between the economy and the state. It was an arena of collective needs, grievances and disruptions that were related to the transformations in the economic realm': G Steinmetz, *Regulating the Social: The Welfare State and Local Politics in Imperial Germany* (Princeton, Princeton University Press, 1993) 2.

of the economic, the political and the social. This separation and the emergence of the discipline which problematised 'the social' was furthered by Weber, but he was still concerned with the political problematic of liberalism, not posed in terms of the 'limits' of law, but rather in terms of the sphere of rational bureaucracy, the vehicle through which the state regulated the social. The separation and reification of the social, dissociated from the economic, was articulated in its most complete form by Durkheim for whom law was a major agent of 'moral governance' of the social totality. It is important to recognise that sociological reflection on law still remained heavily influenced by the political problematic of 'ruling too much' and the limits of legal infringement of personal autonomy. The emergent discipline of sociology was much less preoccupied with this question.

The influence of the way in which law was problematised that paralleled the emergent preoccupation with the 'social' is exemplified by 'social law', and the link between the welfarist regulation of the population as a whole was exemplified by the concern to grasp the connection between collectivist conceptions of welfare and social rights. This set of issues dominated sociologically inspired thought about law, more especially in Britain than in the United States, up until the emergence of 'law and society studies' in the 1960s.[3] This movement, without at first clearly defining its own problematic, was concerned with the limits of welfare and bureaucratic legal regulation.[4] With the eruption of the crisis of the welfare state in the late 1970s, the law and society movement, while still influential, has come under mounting criticism from both the Right, who have reinvigorated a concern with law as the guardian of individual liberty, and from the unstable radicalism of critical and postmodernist currents that have lost faith in the rational and bureaucratic potential of law.

The method to be pursued will seek to identify the problematisation of law present in theorisations of law. Problematisation serves to initiate a line of inquiry by drawing attention to the rudimentary organisation of phenomena which yields problems for investigation. I draw upon Foucault's reflections on problematisation but it should be stressed that Foucault's concept was far from completely developed. His historical method of study is a history of problematisations, that is, 'the history of the way in which things become a problem'.[5]

The trajectory of his own major works can be posed as the disarmingly simply questions: how did madness, health and sexuality come to be confronted as problems requiring intellectual work and political interventions? The present inquiry asks: how has law been problematised? Problematisation as a methodological strategy involves a commitment to challenging the 'taken-for-granted' nature of the 'problem' of law in different historical periods. One important implication of this approach is that it intentionally avoids any attempt to produce a chronological 'history' of the treatment of law in the social sciences.[6]

[3] See also: W Novak, *The People's Welfare: Law and Regulation in Nineteenth Century America* (Chapel Hill, University of North Carolina Press, 1996); J Handler, *Law and the Search for Community* (Philadelphia, University of Pennsylvania Press, 1990).

[4] Its most immediate concerns were the effectiveness of law as a means of securing social rights and welfare, policing discretion, and generally utilising law as an agent to promote social change.

[5] M Foucault, 'What Our Present Is' [1988] in S Lotringer and L Hohroth (eds), *The Politics of Truth* (New York, Semiotext(e), 1997) 164.

[6] This approach, which I now reject, informed my earlier discussion of the 'sociological movement in law' in A Hunt, *The Sociological Movement in Law* (London, Macmillan, 1978).

1. THE CLASSICAL PROBLEMATISATION OF LAW

How did classical social theory constitute law in relation to its object of inquiry? This question must be approached in a way that does not involve the implication that law necessarily formed a primary or even explicit focus of attention for the individual theorists. This is essential because, while Weber did devote self-consciously focused attention to law, with the 'sociology of law' forming an important component of his monumental *Wirtschaft und Gesellschaft*,[7] and though a similar sustained attention to the evolution of law was pursued by Sir Henry Maine, others did not accord law this centrality. In contrast, Durkheim devoted substantive attention to law primarily in the course of a study centred upon the transformation of the division of labour of which law served to provide convenient and accessible empirical evidence.[8] Nor did Marx ever take law as his immediate object of inquiry, although he and Engels had a great deal to say about law.

The impetus that causes human thought to shift has long been (but not always) a looming sense that something about life is new and different, and that things cannot or should not be discussed in the currently conventional terms. The prescient thinkers have been those able to encapsulate these shifts in ways that put together a narrative that makes sense of an array of symptoms and binds them together into a coherent account. The most popular narrative of our age has been that of 'modernity', a fact that is sustained, not controverted, by the recent extension of that storyline by the addendum effected by 'postmodernity'. I do not want to argue that the tropes of 'modern' and 'modernity' are wrong, but rather that they are dangerous. They are dangerous because a purely chronological label, one that distinguishes the past from the present, the traditional from the modern, is made the bearer of a whole complex of substantive dichotomous characterisations (agricultural–industrial, rural–urban, *Gemeinschaft–Gesellschaft* and the like) that have been the focus of early twentieth-century social thought.

The concept of modernity is especially precarious when applied to the phenomenon of law. Modernist theory conceives law as one of the important stars in the constellation of the modern. Yet it is usually remembered that law predates modernity, and the treatment of law thus becomes tarnished with an unexamined presentism in which the past of law is viewed as a long march towards modern rational law; the old pre-modern (irrational) elements are gradually sloughed off to reveal law in its glorious rational form. The great bulk of the writings on legal history, from Maine to the present, has been marked by the seductions of this presentism.

The issue of law comes to figure in the problematisation engaged with by classic social theory in so far as it becomes less and less feasible to treat law as a 'natural' phenomenon. The most obvious form of law as a natural phenomenon is that captured in both substance and in name by natural law theory. It was grounded on the presumption of a social order based on a taken-for-granted set of institutions and values constitutive of the social order. It makes little or no difference if these were articulated in theological form with a set of primary values stipulated in some principal religious

[7] M Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed G Roth and C Wittich, 2 vols (Berkeley, University of California Press, 1978).

[8] E Durkheim, *The Division of Labour in Society* [1893], trans WD Hall (London, Macmillan, 1984).

text, or if theology was partially secularised through a process of reflection upon the human condition. Typically such reflections were expressed in terms of a generalised problem of social order—a set of questions most powerfully articulated by Thomas Hobbes in terms of a problem of order that could only be addressed through obedience to a vision of a political order grounded in a unitary conception of sovereign power.

This vision came increasingly into conflict with the challenges posed by the emergence of a capitalist economic order. Capitalism as used here involves the coexistence of the production of commodities, industrial forms of production and the mobilisation of mass wage-earning labour, with these elements being co-ordinated through markets. The most profound impact of these developments, even outstripping the social dislocations they caused, was the primacy of economic markets that required nothing less than the radical separation of an economic from a political sphere. But the self-regulating market could never achieve full self-regulation, and continued to require inputs from the political system to sustain and protect the market order. Law was the primary mechanism for this linkage of the economic and political orders. The crucial fact is that *laissez-faire* itself was enforced by the state and at the same time there was a major expansion of the state; the free market was sustained by an enormous increase in continuous, centrally organised and controlled interventionism.

The emergence of law as an object of sociological investigation rests on the implicit view that legal systems are essentially constructed, social creations (not natural orders) and thus presuppose an instrumental conception of law. In line with the Enlightenment vision of 'progress' understood as a project that gives effect to an ever-expanding realm of the human capacity to control its conditions of existence, law comes increasingly to be perceived as a primary steering mechanism for societies marked by complex interdependence, a task that can no longer be fulfilled by more traditional 'direct rule' through the political system. A persistent line of thought within legal theory has counterposed a divide between law as autonomous and law as dependent on society; this has in many accounts been presented as the core distinction between the internal perspective of legal positivism and the external perspective of the socially informed approach to law. While this distinction should not be ignored, it is important to recognise that these views of law are not antithetical; the rise of law as autonomous system increasingly separated from the political sphere is consistent with a view of law as dependent on society, in the sense of being an historical achievement, one that has wider ramifications embodied in the strange coexistent reality and mythology of the idea of the separation of powers and the rule of law.

The next step in my argument is decisive. It involves a profound reversal of Hayek's rejection of the dominant 'constructivist' vision of the dynamic of the intervention of the political order in the economic order or self-regulating market. Before attending to the reversal, however, some attention to Hayek's thesis is necessary.[9] Hayek has long been a controversial figure; despite the favour he has found by providing the theoretical grounding of modern neoliberal politics, he was one of the most important thinkers of the twentieth century.

[9] F Hayek's ideas were developed through a mass of published work; they are accessible in their most concentrated form in his three-volume, *Law, Legislation and Liberty* (London, Routledge & Kegan Paul, 1973–79).

Hayek set out to challenge what he viewed as the ruling myth of the twentieth century, shared by both welfare liberalism and social democracy, which he designated as 'constructivism'.[10] The 'constructivist fallacy' views social institutions as potentially amenable to intentional creation, reform and intervention by means of legislation and interventionist economic strategy. His objection is based on the contention that social planning is impossible; it is impossible because it is never feasible to accumulate systematic knowledge of the actions of individuals in pursuit of their interests exemplified in uncountable market transactions. Only the impersonal mechanism of 'the market' is capable of aggregating these actions to produce outcomes that are not reducible to the intentions of economic actors. To intervene in ways that impact on the market with imperfect knowledge can only result in the disruption and distortion of the market in ways that, far from rendering markets calculable and controllable, result in unintended consequences.

In other words, faced with the most profound implications of the commoditisation of labour and its products that constitutes capitalism, namely the radical disjunction of the economic and political realms, Hayek endorses the necessity of that separation and the corollary that the political realm must abstain from intervention in the functioning of the self-regulating market. Thus, it follows that for Hayek the ruling vision of modern law, particularly in the increasingly dominant form of statutory legislation as a mechanism of deliberative intervention, is fatally flawed. Law can and should do no more than give authoritative endorsement to the necessary conditions for the functioning of the self-regulating market such as the protection of the rights of property, free labour and capital.

This is not the occasion to engage in a critique of Hayek, but two important lines of inquiry can be indicated. While he is logically correct in claiming that full knowledge is unattainable, it is disputable whether it follows that such complete knowledge is a necessary precondition for purposive intervention; what forms and degree of knowledge are sufficient grounds for purposive intervention remain a matter of investigation. The second question is, given Hayek's radical separation between economic and political realms, where does the concept of 'society' fit into his schema; is it the mere aggregation of economics and politics or is it a field not reducible to the other constituents? What is at stake here is whether society is the passive reflex of economics and politics on everyday life, or an active arena in which through co-operation and conflict people 'construct' forms of life through which they seek to take control of their existence.[11]

The radical reversal of Hayek which I propose is that, whether we approve of its consequences, the constructivism of law, that is its intentional deployment to promote, secure or defend specific social interests, is precisely what was 'new' about the legal

[10] F Hayek, *Law, Legislation and Liberty*, vol 1: *Rules and Order* (London, Routledge & Kegan Paul, 1973).

[11] Hayek's position on the question of 'society' is complex. He views the evolutionary formation of human instincts as being formed when hominids lived in small co-operative bands that survived through solidarity. He rejects Hobbes's primitive individualism as a myth. 'The savage is not solitary, and his instinct is collectivist. There was never a "war of all against all"': F Hayek, *The Fatal Conceit: The Errors of Socialism*, vol 1: *The Collected Works of FA Hayek*, ed WW Bartley (London, Routledge, 1988) 12. What is significant about this argument is that it explicitly contends that social evolution runs counter to the 'instincts' formed through evolutionary processes; learned rules that promote the individualism of market relations have to overcome primitive collectivism.

orders that emerged in the late eighteenth century. Legal constructivism has continued to advance over the next two centuries; this fact is most simply attested to by rapid extension of constructivism into the international arena with the growth of international criminal law and human rights law. Constructivism is no aberration or accident; it is, quite simply, a social fact that law is one of the primary techniques of governance. It has displaced the two previous visions of law as either the expression of a natural social order or as the expression of the will of the sovereign. This has been a displacement, but not a disappearance. The quest for a general normative order still infuses our ongoing concerns with justice and human rights. And Foucault is right in noting that we still have not 'cut off the King's head',[12] that is law remains heavily imbricated with state sovereignty. My contention is that the problematisation of law in classic social theory was grounded in the challenges posed by the constructivist reality of law.

2. LEGAL CONSTRUCTIVISM IN CLASSICAL SOCIAL THEORY

While the substantive analyses, theoretical apparatuses and political commitments of Maine, Marx, Durkheim and Weber are radically different, nevertheless they can be understood as addressing questions that are posed by the rise of constructivist law. The issues they engage with are ones in which law is no longer the expression of the will of political authority (typical of monarchist or absolutist regimes) or a concretisation of shared religious-moral values.

Maine

Maine has not acquired the same status as the other theorists under consideration here. His canvas, though broad, was not as expansive as the others and his preoccupation with legal history has largely confined his reputation to this field. This fate is compounded by the fact that Maine's intellectual universe was, like so many others at the time, framed by one of the many variants of social Darwinism. For this reason I will have less to say about him than the other figures; but this does not detract from his significance. His best-remembered thesis is that the history of legal evolution can best be grasped as a transition from status to contract.[13] The ascribed status attached to individuals in pre-modern societies determined the law to which they were subject. Despite recognising the huge productivity of legislation, Maine insisted that it was the emergence of the consensual contract, by means of which individuals made their own law, that is the decisive, albeit prolonged and complex, line of development that endows the law of 'progressive societies' with the innovative capacity that allows law to keep pace with the increasing rapidity of social change.

What is significant for present purposes is the implication that individual contrac-

[12] M Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977* (New York, Pantheon, 1980) 121.

[13] H Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (London, John Murray, 1861).

tual activity effects a decisive shift in the location of law within social life. It marks a radical break with the identification of law with sovereignty; and this is evident in Maine's sharp and telling criticism of the 'imperative theory of law', associated with Jeremy Bentham and John Austin, who reduced all law to commands of the sovereign. What Maine advances in contrast is a model in which law is attributed a distinctively liberal role as an autonomous entity that serves, as it were, the role of neutral umpire, determining the boundaries of the relations between contracting individuals. However, Maine never took the decisive step that could complete the liberal model which would have posited a separation between law and state such that courts could mediate the relations between individuals and the state.

Marx

Marx's relationship to the emerging liberal model of law was far more complex. Most obvious is the fact that law never presented itself as his primary object of inquiry.[14] Marx's primary concern was with the 'critique' of capitalist society. This critique involved the analysis of the mechanisms through which capitalism reproduced itself and in so doing revolutionised all social relations. It also concerned the political question of how the gross inequalities instituted through the very freedoms which capitalism promoted in overcoming pre-capitalist forms of social organisation could be superseded by the revolutionary transformation of society. His primary answer is well known; it is that one of the most important creations of capitalism, the conversion of the great majority of the population into wage-labourers, the proletariat, was the only force whose potential revolutionary action could conquer capitalism and institute a realm of equality based on the collective ownership of society's productive capacity.

Marx's treatment of law exhibits two very different emphases. While he viewed capitalism as a self-reproducing economic system, he also emphasised that capitalist economic relations secure dominance over all other major fields of social and political life. In particular, he emphasised the intimate connection between law and the state. Law in this manifestation is first and foremost a mechanism of state power giving effect to the state's monopoly of the legitimate means of violence and its capacity to use legally sanctioned coercion to advance and protect the interests of capital. Indeed, he argued that 'the bloody expropriation of the peasantry' effected by laws of enclosure and vagrancy law was a primary mechanism by which the rural population was driven to accept the necessity of submitting themselves to work in the mines and factories. Marx stressed the repressive character of law in order to redress the blindness of most liberal thought which played down the role of legal repression. But in reacting against the omissions of liberal theory Marx came perilously close simply to reversing liberalism's error by equating law with repression.

Marx's account of law exhibits a second line of analysis. Capitalist relations exhibit a powerful self-reproducing tendency, one that effects the general subsump-

[14] Because of the scattered character of Marx's engagement with law individual texts will not be cited. For general compilations and discussions of Marx's treatment of law, see: M Cain and A Hunt, *Marx and Engels on Law* (London, Academic Press, 1979); H Collins, *Marxism and Law* (Oxford, Oxford University Press, 1982); P Hirst, *On Law and Ideology* (London, Macmillan, 1979) and R Phillips, *Marx and Engels on Law and Laws* (Oxford, Martin Robertson, 1980).

tion of wider social and economic relations under the logic of commodity relations; consumption, leisure and family relations all succumb to a greater extent to the logic of the market. But Marx stressed the instability of capitalist societies, their tendency to crisis. It is in this context that he drew attention to the significant degree of law's autonomy and separation from the state. Most importantly law provides and guarantees a regime of property and of contractual exchange. The expansion of the forms of capital and their circulation require a regime that protects the multiple forms in which capital circulates as legal interests. Legal relations have distinctive effects. The most important of these is the extent to which legal relations actually constitute economic relations, as witnessed in the formation of corporations with limited liability; these are legal creations in that it is the ability to confer a legal status which determines the liability of participants and thus makes the corporation a viable vehicle for the co-operation of diverse capitals.

Just as important was that legal rules and procedures make provision for regulating the interrelations of capital, through commercial law, insurance, banking and other financial services. For Marx, these mechanisms function as background conditions which constitute the framework within which economic relations are conducted. Law also provides the central conceptual apparatus of property rights, contract and other legal relations that play the double role of both constituting a coherent framework for economic activity and providing important components of the ideological conceptions of rights, duties and responsibilities. Legal relations share important features of capitalist economic relations in that they abstract from real-life relations, and in so doing, they fetishise relations, viewing them as having an existence, such as ownership or liability, disconnected from their concrete conditions. It is in this respect that Marx's critique is at its most acute. The primary way in which law participates in securing the conditions of existence for capitalist social relations takes the form of endowing legal subjects with actionable rights. Marx scathingly denounced 'the so-called rights of man' and 'the rights of egoistic man', and called talk of equal rights, 'obsolete verbal rubbish'.[15]

Marx's problematisation of law shares with Weber, in particular, the pervasive concern with law as a mechanism of rule at a distance, as if the rules were abstracted from specific economic or political interests. He gives this problematisation his own distinctive inflection by focusing on the implications of this new proximity of law and capitalist economic relations by considering its implications for the forms of rule to be envisaged in a future communist society. Marx was adamant in his refusal to speculate on utopian models of future society. But it is clear that his critique of rights is not only a criticism of the fetishism of legal rules, but is asserting the proposition that since industrial capitalism operates increasingly through the medium of law, such a mechanism can play no significant role in the construction of egalitarian relations. This line of thought was taken to its logical derivation by the early Soviet legal theorist Evgeny Pashukanis who extrapolated from Marx to arrive at the conclusion that, under socialism, law would necessarily wither away.[16]

[15] K Marx, 'On the Jewish Question' [1843] in *Karl Marx, Frederick Engels: Collected Works*, vol III (London, Lawrence & Wishart, 1975) 150, 165; K Marx, 'Critique of the Gotha Programme' [1875] in *Karl Marx: Selected Writings*, ed D McLellan (Oxford, Oxford University Press, 1977) 565.

[16] E Pashukanis, *Pashukanis: Selected Writings on Marxism and Law*, ed P Beirne and R Sharlet (London, Academic Press, 1980).

Weber

There are strong lines of filiation between Weber's treatment of law and that embedded in Marx's writings. This connection is certainly not an identity, not least because Weber was always conscious, however much common ground he might cover, of a concern to distinguish his position from Marx's in what has come to be referred to as 'the debate with the ghost of Marx'. Another crucial difference is that Weber's treatment of law is far more systematic. With Marx, we have pithy pronouncements that are left hanging, tantalising suggestions that remained undeveloped. Weber meets just about all the hallmarks of a rigorous general theory of law. Thus in drawing attention to continuities between Weber and Marx, I will attend to the differences by pointing to the way in which a problematisation of law which exhibits continuity is inflected in different directions with respect to his substantive lines of inquiry.

Weber's problematisation of law derives from his central concern to understand 'the uniqueness of the West'; how it was that in Western Europe the extraordinary economic transformation of capitalism took place. It was this question that led him into his extensive explorations of the world's great civilisations. Underlying this concern was an anxiety about the long-term viability of industrial capitalism, the continued economic advance of which seemed to depend on an increasingly militant and organised working class. Weber did not share the almost religious faith in the evolutionary guarantee of progress which was still such a powerful influence into the opening years of the twentieth century. Nor did he have any great enthusiasm about the advance of mass political democracy, for this was endangered, particularly in the German context, by the advance of socialist parties.

Thus, the core problematic of Weber's social and political theory addressed the question of how the stability and security of the capitalist order could be sustained. The substance of this problem is readily apparent from a consideration of his tripartite model of the forms of authority.[17] Traditional authority was readily understandable; it was the force of habit, rationalised as tradition and surrounded by religious and other legitimations, that secured its authority; but an authority that was always vulnerable to conditions that could more or less rapidly undermine its legitimacy as was the fate of most of the *ancien regimes* of Europe and beyond. Nor could such a system take full advantage of the economic potential of nascent capitalism. Similarly, the legitimacy of the intermediate or transitional form of political authority that he termed charismatic was readily understandable. It was the response to the attributes of the charismatic leader that endowed the leader with legitimate authority; the personal nature of such authority is attested to by the primary difficulty encountered by charismatic regimes, namely that of securing succession or, as Weber called it, the routinisation of charisma.

In important respects the rational or rational-legal authority that Weber identified as the key characteristic of modern forms of political authority has none of the advantages of the other forms in that it lacks a readily available symbolic figurehead; rather it was, by its very nature, a faceless impersonal order. From the Enlightenment onwards, political authority systematically shifted its claims to legitimacy from tradition, emotion and religion to rational, bureaucratic and professional sources.

[17] Weber's writings on law from various sections of *Wirtschaft und Gesellschaft* are collected in an English translation in M Rheinstein (ed), *Max Weber on Law in Economy and Society* (Cambridge, MA, Harvard University Press, 1954).

Rational authority had to supply its own legitimacy by making a merit out of professionalisation and bureaucratisation; by no means an easy task. Such a legitimation might prove acceptable on pragmatic grounds such as its fairness or impartiality, but it starts out as a 'weak' legitimation unlikely to command strong allegiance until such ideals as the separation of powers and due process of law can be articulated as strong constitutional doctrines. Significantly, Weber himself barely made appeal to such ideals. Rational authority as he conceived it relied largely on the capacity of rational law to generate its own legitimation, requiring obedience to law in and of itself to provide the grounds for citizen compliance. The major functional attribute which Weber saw as inhering in rational law was that it facilitated predictability. While undoubtedly significant in the self-interested calculus of the market, predictability is unlikely to provide anything more than a weak legitimation. The three substantive features of rational law that he identified were a professional judiciary (always likely to be distant from popular sentiment), a bureaucratic public service following 'the rules laid down' (also distant and impersonal) and the codification of rules (only compelling when associated with democratic legitimation).

One important feature of Weber's version of rational authority is frequently overlooked, namely that he makes only minimal appeal to democratic legitimation. The significant strength of appeal to democracy is that it has the capacity to go a long way to bind citizens of a democratic regime by invoking the collective responsibility of the citizenry. In its simplest form, democratic legitimation derives from the assertion that one's fellow citizens have chosen a system of rule or a law to be implemented, and such a decision is binding on all by virtue of their shared status as citizens.

Weber's vision of modernity draws attention to a tension between individual autonomy and formal legal rationality. He saw the consequence of the rise of legal rationality as manifesting itself in what Habermas was later to term 'juridification processes' through which not only expanding realms of social relations become subject to legal regulation, but in a wider sense law-like processes, rules and procedures are adopted in many fields of social life. Weber saw the peculiarity of the West as centred in its legalistic rationality in which rational self-control and rational economic calculation form a unity. Rationality exhibits two dimensions, one impersonal and connected to control and mastery, and the other normative linked to choice and freedom. Legal rationality contributes to 'freedom' via purposeful self-regarding conduct. This is the root of the tension that Weber perceived between rationalisation and disenchantment.

Weber's project of solving the problem of articulating a political order for modern capitalist society capable of sustaining legitimacy is rendered more difficult by the tension which he recognised as built into the form of justice generated by rational law. There is an inescapable friction between formal and substantive justice. Formal justice generates its claim to realise justice from the impersonality of its decisions that arises solely from being the result of following the rules laid down such that any similar case would be decided in the same way. On the other hand, the claim of substantive justice requires not merely that the rules are followed, but that the results can be morally just by reference to some criteria external to the rules. Formal justice may fail to realise substantive justice, just as securing substantive justice may require the breach of the requirements of formal justice. Thus Weber tends to conflate 'law' with 'legality' and identifies 'law as order' with 'law as justice'. The 'paradox' at the heart of Weber's position is that the institutionalisation of Western rationalism raises the