

LAW AND SOCIOLOGY

CURRENT LEGAL ISSUES 2005

VOLUME 8

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Law and Sociology

Current Legal Issues 2005

VOLUME 8

Edited by

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General Editor's Preface

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

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

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

Professor Michael Freeman

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1

Law and Sociology

Michael Freeman

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

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

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

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

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

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

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

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

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

For much of the twentieth century the sociology of law was eclipsed by sociological jurisprudence. It was Pound, rather than Weber or Durkheim, who was the dominant figure, despite the 'vagueness of his conceptual thinking'.⁸ From the 1960s the term 'sociological jurisprudence' was used less frequently, and what came to be known as 'socio-legal studies' took root. Advocates of socio-legal studies⁹ emphasize the importance of placing law in its social context, of using social-scientific research methods, of recognizing that many traditional jurisprudential questions are empirical in nature and not just conceptual.¹⁰ Socio-legal studies have been described by Cotterrell as a 'transition phase'.¹¹ It had a considerable impact: on the law, on legal education, on legal research, on law publishing. It also had shortcomings, well identified by Lawrence Friedman.

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

Socio-legal studies was largely lacking in any theoretical underpinning.¹³ The law—and this was often defined narrowly¹⁴—and the legal system were treated as discrete entities, as unproblematic, and as occupying a central hegemonic position.¹⁵ There was rarely any attempt to relate the legal system to the wider social order or to the state. When reforms were proposed, they were to make the legal system operate more efficiently or effectively. And the emphasis was more on the 'behaviour'¹⁶ of institutions, than on trying to understand legal doctrine.

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

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

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

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

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

¹³ And see A. Hunt, 'Dichotomy and Contradiction In The Sociology of Law' (1981) 8 *British Journal of Law and Society* 47.

¹⁴ See Cotterrell, n.11, above. ¹⁵ This was also the common juristic position, exemplified in the classic by H.L.A. Hart, *The Concept of Law* (Oxford, 1961; 2nd edn., 1994). He, of course, purported to be writing 'descriptive sociology'. And see N. Lacey, *HLA Hart* (Oxford, 2004), and H. Ross, *Law As a Social Institution* (Oxford, 2001).

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

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

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

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

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

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

¹⁸ 'Blinding Insights', 'The Limits of a Reflexive Sociology of Law' (1998) 25 *Journal of Law and Society* 407.

¹⁹ 'The Pull of the Policy Audience' (1988) 10 *Law and Policy* 97.

²⁰ n.18, above, 408.

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

²² *Ibid*, 190.

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

²⁴ *Ibid*, 284.

²⁵ n.18, above, 415.

²⁶ *Ibid*, 417.

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

²⁸ See further M. King and C. Thornhill, *Niklas Luhmann's Theory of Politics and Law* (Basingstoke, 2003).

²⁹ *The Oldest Social Science* (Oxford, 1997).

Cotterrell believes that the law can profit from sociologically-inspired resolutions, particularly when legal doctrine is rift by conflicting precedents. This is undeniably true, and it would be foolish for the lawyer to ignore social insights. However, as Nelken points out, the institution of such insights has ‘the potential to distort or at least change . . . legal practices rather than simply help them to sort out self-induced muddles’.³⁰ If only we knew when social science could guide us to the answer, and convince us it was the right one. Nelken may well be right that social insights function differently when they prise open legal closure (he cites Downs’s discussion of the so-called ‘battered women’s syndrome’ as a method of displacing law’s myths about women battering³¹), than when they are used to provide closure.³² But, as Trubek points out, ‘whatever social sciences can do for the law, it *cannot* offer . . . objectivist grounding for legal policy’.³³ This is not the view of all legal sociologists.

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

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

³⁰ n.18, above, 422.

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

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

³⁵ *Ibid.*, 19–22.

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

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

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

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

In a riposte to standard conceptual jurisprudence he maintains that

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

This is to confront conceptual jurisprudence face-on by denying that there is a concept of law. That he does not go this far is apparent from later work,⁴¹ and from a response to this very criticism⁴² in his Symposium on the book.⁴³ There he says of theorizing about the concept of law that ‘we do it because law is a key social phenomenon that must be understood, analysed and discussed, which could not begin nor be carried far without conceptual analysis.’⁴⁴

It is rather a recognition—of course, not novel⁴⁵—that different phenomena fall under the concept ‘law’. Law is a concept conventionally applied to a ‘variety of multifaceted, multifunctional phenomena: natural law, international law, people’s law, and indigenous law . . .’⁴⁶ Tamanaha insists that there is not a ‘central case of law’:⁴⁷ he cites the example of international law which has its own integrity and has been functioning as a form of law for at least two centuries but which remains, under traditional and conceptual analysis, ‘a borderline form of law’.⁴⁸ He is concerned that the central case approach to the concept of law fits, and was the product of, the ascendancy of state law that accompanied the rise of the state. His alternative conceptualization of law is, he believes, ‘better able to account for the proliferation of different kinds of law than the traditional monotypical view of *the* concept of law’.⁴⁹

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

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

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

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

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

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

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

⁴⁷ n.43, above, 284. ⁴⁸ *Ibid*.

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

idea it purports to represent, describe, or define. . . . Third, the concept must have use value in the sense that it will enhance our understanding or help us achieve our objective.⁵⁰

Hart, as indicated above,⁵¹ purported to be writing ‘an essay in descriptive sociology’, but it contains no description of social practices drawn from any legal system. Can conceptual jurisprudence have autonomy, or at least relative autonomy, from empirical reality? For Tamanaha, it cannot. Thus, one of the overriding objectives of his *Realistic Socio-Legal Theory* is to ‘bring into legal theory an infusion of insights from the social scientific study of law. Socio-legal theory is a practice of theorizing about law that incorporates aspects of both (conceptual and socio-legal) approaches to legal phenomena.’⁵² Sociological inquiries into ‘the practices that legal theories purports to analyse and explain (and describe and prescribe) are essential to the enterprise of legal theory, or at least to a legal theory that wants to be good at what it does’.⁵³ But legal theory can neither be ‘subsumed within nor dictated to’ by legal sociology.⁵⁴

Much of interest emerges from Tamanaha’s realistic socio-legal theory. Most significantly, that law is a social practice amenable to social scientific study, and that legal theory and socio-legal theory have a lot to learn from each other.⁵⁵ It has long been recognized that sociological thinking about law would be considerably hampered without the insights of analytical jurisprudence. But analytical jurisprudence can look to sociology as well, and has much to gain, provided it uses the data appropriately. Thus, it is important for those studying the concept of law to know why people obey—or don’t obey—the law,⁵⁶ why people use extra-legal norms⁵⁷ and procedures to resolve disputes,⁵⁸ how other societies (not those in Hart’s central case, for example) deal with disputes. So long as it is recognized that analytical jurisprudence is not making empirical claims.

In the first essay in the volume Cotterrell asks what legal theory can learn from sociology, in particular from sociology’s disciplinary debates. And his answer applies to all legal theory, not just that which ties itself to sociology. As he points out, any juristic study is ‘a social practice, an intervention in the social world and a way of interpreting that world’.⁵⁹ The very diversity of legal theory may, he argues, be understood in terms of four categories of sociological practice described by the French sociologist Boudon.⁶⁰ Boudon distinguishes policy-oriented sociology

⁵⁰ n.43, above, 285. ⁵¹ At p. 2. ⁵² n.43, above, 287.

⁵³ *Ibid.* ⁵⁴ *Ibid.*, 288.

⁵⁵ One of Tamanaha’s best chapters is on the internal/external distinction, throwing light on a central problem in contemporary analytical jurisprudence. See also ‘The Internal/External Distinction and the Notion of a Practice in Legal Theory and Sociological Studies’ (1996) 30 *Law and Society Review* 163–204.

⁵⁶ On which see T. Tyler, *Why People Obey the Law* (New Haven, 1990).

⁵⁷ On which see R. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, Mass., 1991).

⁵⁸ A good example of which is B. Tamanaha, *Understanding Law in Micronesia: An Interpretive Approach To Transplanted Law* (Leiden, 1993). ⁵⁹ See p. 30. ⁶⁰ Post, p. 28.

(‘cameral/descriptive’) from cognitive/scientific sociology which is driven by a disinterested search for knowledge, and from expressive sociology and critical sociology. Each has its parallel in legal theory, which can be policy-oriented, expressive, or critical (this reflected in radical movements like critical race theory⁶¹ or Lat-Crit⁶²), and can also be cognitive/scientific though, as Cotterrell concedes, this is ‘as vague for legal theory as for sociology’,⁶³ challenging us, as it does, to examine methods, aims, and objects.

Nobles and Schiff examine the implications of Luhmann’s systems theory for jurisprudence, in particular for some of Ronald Dworkin’s thinking. Luhmann’s theory offers, they argue, a sociological explanation for the long-running debates within jurisprudence over such questions as the source of law, its determinacy/indeterminacy, and the role of justice. His systems theory is projected as a response to the ‘paradox consequential to the tautology that the law decides what is and can be law ... it is the legal system that identifies its own boundaries’. Dworkin, it may be argued, achieves this, but Nobles and Schiff maintain that ‘Hercules’,⁶⁴ whether in human or ideal form, provides a poor description of law ‘or at least one that might appeal to a sociologist concerned to accommodate the given world of law’s vast numbers of operations within their descriptions’.⁶⁵

For Griffiths it is ‘social control’, and not ‘law’ that is the proper subject of sociology of law. The sociology of law is, in his view, not just one sociology among many, but that part of sociology which concerns itself with the ‘social element’ presupposed by all social life. It is not just one of the many sub-disciplines of sociology but it ‘deals with the *sine qua non* of all sociology. The rest is derivative.’⁶⁶ Among the subjects discussed within this framework are its implications for legal pluralism.

There seems little doubt that, despite his protestations to the contrary,⁶⁷ Hart was influenced by Max Weber. But was the arch-positivist (or normativist⁶⁸) Hans Kelsen also so influenced? This is explored in Hamish Ross’s essay. Is, as Tur argued,⁶⁹ Kelsen’s theory a model for ‘a collectivist *verstehende* sociology’? Ross argues that Kelsen’s concept of *Rechtssatz* and his concept of legal meaning (*rechtliche Bedeutung*) ‘gravitate’ towards Weberian interpretive sociology. Ross believes this is in spite of Kelsenian devices like imputation,⁷⁰ which, it may be

⁶¹ See K. Crenshaw, N. Gotanda, G. Pellar and K. Thomas, *Critical Race Theory—The Key Writings That Formed The Movement* (New York, 1995).

⁶² On which see B. Esperanza Hernández-Truyol, ‘Borders (En) Gendered: Normativities, Latinas and a LatCrit Paradigm’ (1997) 72 *New York University Law Review* 882. ⁶³ See p. 30

⁶⁴ First discussed by Dworkin in *Taking Rights Seriously* (London, 1977), 105–30.

⁶⁵ See p. 37.

⁶⁶ See p. 52. There are, as Griffiths notes, similarities with Durkheim’s thesis that law reproduces the principal forms of social solidarity (*The Division of Labour in Society* (London, 1984), 68).

⁶⁷ As discussed by Nicola Lacey, n.15, above, 230.

⁶⁸ See, e.g. J. Raz, ‘The Purity of the Pure Theory’ (1983) *Revue Internationale de Philosophie* 442–59.

⁶⁹ ‘The Kelsenian Enterprise’ in R. Tur and W. Twining, *Essays on Kelsen* (Oxford, 1980), 149.

⁷⁰ Though Ross does not so indicate, the fullest discussion of this is in H. Kelsen, *What is Justice?* (Berkeley, California, 1957), 324. See also W. Ebenstein ‘The Pure Theory of Law: Demythologizing Legal Thought’ (1971) 59 *California Law Review* 617–52, 635–7.

remembered, was scorned by the Scandinavian Realist Karl Olivecrona.⁷¹ But can a case be made, despite Kelsen's protestations, for Kelsen as an example of interdisciplinary? Or does this stretch credence too far? In Kelsen's view a science of law constructs its own objects and presents legal reasoning as a realm of thought and understanding wholly apart from sociological observation. To quote Kelsen: 'in so far as it is the method or form of understanding through which the object is determined, the antithesis of causal and normative sciences rests just as much on a difference in the direction of understanding as in a difference in the object of understanding.'⁷²

For Webb it is a trans-disciplinary worldview that needs to be adopted to deal with trans-legal problems. He concedes, however, that neither the epistemological nor the ontological assumptions of transdisciplinarity are settled. It is, he argues, 'complexity itself' that contributes the greatest challenge to traditional disciplinarity, so that what is required is 'a theory of knowledge that takes complexity seriously.'⁷³ Following Gibbons and his colleagues he looks to, what is called, 'mode 2' knowledge production as the purposeful direction. But he goes further and suggests that a "truly" better transdisciplinary system is likely to be based on "a mode-2 epistemology", not just mode-2 knowledge production'.⁷⁴ He concludes that mode 2 will be pushed by the agendas of universities, funding bodies and the state 'to a narrow, technocratic and scientific means-end rationality.'⁷⁵

The next chapter in this collection, by Murphy, is entitled, intriguingly, 'Durkheim in China'. Weber, of course, took great interest in China, and his views on China and rationality remain of controversy even today.⁷⁶ But Durkheim was not so interested. Murphy chooses to examine some trends in China seeing it as a 'society and governmental system (and "tradition") which has been claimed to illustrate and exemplify Durkheimianism at the level of social and political practices'.⁷⁷ Confucius, the fount of traditional Chinese wisdom, believed that societal cohesion was furthered by example and established morality, not by regulation and punishment.⁷⁸ A distinction was drawn in Chinese culture between *Li* and *Fa*: *Fa* (law) is an unpleasant necessity; *Li* (an ethical system of proper behaviour) is the more worthy and more useful method of social control.⁷⁹ But what of contemporary

⁷¹ In *Law As Fact* (Copenhagen, 1939) who said of Kelsen's use of imputation to connect delict and punishment: 'A mystery it is and a mystery it will remain for ever' (21).

⁷² Quoted by A. Wilson in n.69 above, 53. ⁷³ See p. 99.

⁷⁴ See p. 101. 'Mode 1' is mono-disciplinary and homogeneous: mode 2 is 'applied, transdisciplinary and heterogeneous'. ⁷⁵ See p. 105.

⁷⁶ See M. Weber, *Reading and Commentary on Modernity* (Oxford, 2005).

⁷⁷ See pp. 107–8.

⁷⁸ On the Confucian attitude to law see B. Schwartz in J.A. Cohen, *The Criminal Process in the Peoples Republic of China 1949–1963* (Berkeley, California, 1968), 62–70.

⁷⁹ See Y. Liu, *Origins of Chinese Law: Penal and Administrative Law in its Early Development* (Hong Kong, 1998) and X. Ren, *Tradition of The Law and Law of the Tradition* (Westport, Conn., 1997).

China? Does Durkheimian sociology cast any light on how it functions? Or, as Murphy insinuates, is Tarde more likely to provide such an explanation? Certainly, the idea of government by example may be traced to Tarde's long-ignored writing. But, as Murphy points out, exemplarity is only part of the cement that holds Chinese society together. There is also *guanxi*.⁸⁰ Do either Durkheim or Tarde explain this? Indeed, can any Western sociology? Do Chinese law and sociology scholars have any insights? Perhaps in time we shall discover these.

Murphy alludes to the rediscovery of Tarde. Another theorist awaiting rediscovery is Leon Petrażycki.⁸¹ Motyka's essay offers a distinctively Petrażyckian perspective on law and sociology. There are similarities with Ehrlich.⁸² Significantly, Petrażycki saw law as including unofficial as well as official, and intuitive as well as positive forms. The importance of Petrażycki is that he placed law in the realm of the sociologist. It was of course the province of sociology of Petrażycki's era and so is unsurprisingly functionalist. It would be all too easy for contemporary law and sociology scholars to dismiss his contribution, but there are insights of value, particularly on legal socialization.⁸³

It is Lange's argument that the 'social' still matters for analysing legal regulation. She explores three sociological perspectives which helps to 'imagine' the social in legal regulation in new ways. These are the sociological analysis of emotions—a very different picture of which can be found in Motyka's examination of Petrażycki⁸⁴—actor-network theory and economic sociology. Together these raise questions about such issues as the nature of bureaucratic organizations, the relationship between structure and agency and between legal and economic normativity.

Barak-Erez returns us to Durkheim's social solidarity thesis and examines through the prism of a case study of Israel the part which law, in particular court decisions, can play in constructing this. As she indicates, Israel offers an interesting test case given the ways its society is divided by culture and conflict (one of these conflicts is at the root of Rosen-Zvi's paper discussed later in this introduction⁸⁵). The judicial system, with the Supreme Court in the vanguard, has become increasingly involved in normative decisions which claim to express shared basic

⁸⁰ Translated as 'relations'. See W. de Bary, 'Neo-Confucianism and Human Rights' in L. Rouser (ed.), *Human Rights and the World's Religions* (Notre Dame, Indiana, 1998), 183. On notions of *guanxi* in western societies see J.M. Ghéhenno, *The End of The Nation State* (transl by V. Elliott) (Minneapolis, 1995).

⁸¹ See further K. Motyka, *Challenging Legal Orthodoxy: Petrażycki, Polish Jurisprudence and the Quest for the Nature of Law* (forthcoming).

⁸² On which see K.A. Ziegert, 'The Sociology Behind Eugen Ehrlich's Sociology of Law' (1979) 7 *International Journal of the Sociology of Law* 225–73.

⁸³ See, generally, J.L. Tapp and F. J. Levine, *Law, Justice and the Individual in Society: Psychological and Legal Issues* (New York, 1977).

⁸⁵ See p. 11.

⁸⁴ See p. 119.

values. And, not surprisingly, it has been frequently criticized for its activism. But the court finds itself having to step into the breach when the legislature fails to act. In doing so, does it assist the creation of social cohesion or further undermine it? The question can be asked in the context of other legal systems too. What has been the effect in the United States of the Supreme Court decision in *Roe v. Wade*?⁸⁶ That controversial court decisions catalyse public discussion of issues by supplying a discursive framework that would otherwise not exist may well be true. But they may also exacerbate conflict. Or conflict may relocate: in the United States one of the consequences of *Roe v. Wade* is the politicization of appointments to the Supreme Court.⁸⁷

Culture is the key to the next contributions to this book. ‘Legal culture’, Friedman acknowledges, is a ‘troublesome concept’.⁸⁸ His main argument hinges on its centrality in the social study of law. But legal structure⁸⁹ is also important, and the relationship between the two is difficult to unpick. Which is the primary force? There is no agreement.⁹⁰ There may be differences also on what belongs to each category. Where, for example, do religion and history fit? The role that religion plays in the development of family law or the laws on embryo research or cloning cannot be underestimated. Is the reception of Roman law in continental Europe explained by structure or culture or both, and can we explain the English failure to receive Roman law in the same way?⁹¹

Nelken’s paper asks how the concept of ‘legal culture’ can be put to good use even by those who do not share Friedman’s premises or conclusions. There are, and he catalogues them, alternatives such as ‘legal tradition’⁹² and ‘legal ideology’.⁹³ The promise of the term ‘legal culture’ lies in its ability, if it can be shown to have this, to make comparisons of legal systems ‘more sociologically meaningful’.⁹⁴ But, as Nelken argues, there is a tendency for the term to be applied ‘both to elements within a society and to whole societies composed of these elements’ and so to end up ‘as an explanation of itself’.⁹⁵ Can this be avoided? Nelken shows that there are occasions when we want to explain this legal culture (or consciousness) and others when we think it can help us explain something else. The reference to ‘legal consciousness’ is significant. As Nelken points out: ‘Students of legal consciousness seek to understand how and how far people come to think of themselves as rights-bearing subjects and to describe “legality” as a structure of action and meaning’.⁹⁶ Such concerns are prior to the question of why people use

⁸⁶ 410 US 113 (1973). And see D. Garrow, *Liberty and Sexuality* (New York, 1994).

⁸⁷ As witness the preliminary skirmishes following the resignation of Sandra Day O’Connor in July 2005. For an earlier example see R. Bork, *The Tempting of America* (New York, 1990).

⁸⁸ See p. 188. ⁸⁹ See M.D.A. Freeman, *The Legal Structure* (Harlow, 1974).

⁹⁰ The work of E. Blankenburg is often cited (see, e.g. ‘Civil Litigation Rates as Indications for Legal Culture’ in D. Nelken (ed.), *Comparing Legal Cultures* (Aldershot, 1997)).

⁹¹ See R.C. van Caenegem, *The Birth of The English Common Law* (Cambridge, 2nd edn., 1988).

⁹² H. Patrick Glenn, *Legal Traditions of the World* (Oxford, 2nd edn., 2004).

⁹³ See R. Cotterrell, ‘The Concept of Legal Culture’ in Nelken (ed.), n. 90 above, 13–32.

⁹⁴ See p. 200.

⁹⁵ See p. 201.

⁹⁶ See p. 217.

the law. Legal culture can be seen as a specific pattern of attitudes, uses and discourses about law. But it can be made to work as an explanatory variable in other ways too: for example, the decision to introduce a rule, a practice, an institution may result from legal culture elsewhere: the ombudsman concept from Sweden⁹⁷ or restorative justice from New Zealand.⁹⁸

Rosen-Zvi tries to find an approach to the intractable problem of culture conflict. His starting point is an Israeli Supreme Court decision which sought a solution to the conflict between those who would ban the sale of pork and those who wished to eat it.⁹⁹ Rejecting the Court's solution as an essay in the 'ethics of provincialism', and finding no real answer in liberalism, multiculturalism or civil republicanism, Rosen-Zvi advocates an alternative vision based on Cass Sunstein's neo-republicanism¹⁰⁰ and Richard Ford's civic pluralism.¹⁰¹ He looks for the politics of difference to be replaced by political dialogue, negotiation, and compromise.

Fine and Vázquez offer an interpretation of Hegel's classic text for the social theory of law *Elements of The Philosophy of Right*.¹⁰² They explore the contrast between Hegel's recognition of subjective freedom as the great achievement of modern society, and his critique of subjectivism as its foremost pathology. Hegel, though he was the first to separate civil society from the state,¹⁰³ is neglected by law and sociology scholars. This essay may go some way towards addressing the balance.

If it helps to bring legal philosophy and legal sociology closer together—the adjustment has always been closer on continental Europe than it is in Anglophone countries—it will be grist to Patterson's mill. Patterson's note is an invitation to contemporary sociologists to engage with pragmatic philosophy.

Stewart is puzzled. Why, he asks, should generations of jurists have expended so much energy on the meaning of the word 'law' (as, of course, they have) when it is a meaning they need to keep obscure? The explanation then lies in legal ideology and in 'dark performatives'.¹⁰⁴ He proceeds to ask questions about the use of law, how one uses the word 'law'.

There is much about positivism in Stewart's pages. Marshall is also interested in positivism, in particular the positivist approach taken to law by small-town solicitors who were the subject of his empirical investigation. His research is derived from the conceptual framework of Bourdieu,¹⁰⁵ for whom the predictability of the

⁹⁷ See G. Drewry, 'The Ombudsman: Parochial Stoppag or Global Panacea?' in P. Leyland and T. Woods, *Administrative Law: Facing The Future* (London, 1997), 98.

⁹⁸ See A. Ashworth, 'Is Restorative Justice The Way Forward for Criminal Justice?' (2002) 54 *Current Legal Problems* 347–76; T. F. Marshall, *Restorative Justice: An Overview* (London, 1999).

⁹⁹ *Solodkin v. City of Beit Shemesh* H.C. 953/01 (2004).

¹⁰⁰ See C. Sunstein, *Free Markets and Social Justice* (Oxford, 1997), ch. 13.

¹⁰¹ R.T. Ford, 'Geography and Sovereignty: Jurisdictional Formation and Racial Segregation' (1997) 49 *Stanford Law Review* 1365.

¹⁰² And see G.W.F. Hegel, *Elements of the Philosophy of Right* (ed. A.W. Wood) (Cambridge, 1991).

¹⁰³ See S. Avineri, *Hegel's Theory of The Modern State* (Cambridge, 1972). See also F. Dallmayr, 'Rethinking The Hegelian State' (1989) 10 *Cardozo Law Review* 1337.

¹⁰⁴ See p. 271.
¹⁰⁵ P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 805.

law arises not from precedent but from the ‘consistency and homogeneity of the legal habitus,’¹⁰⁶ though it goes beyond Bourdieu’s conceptual perspective. Marshall’s findings are broadly what one might expect. Perhaps his most interesting finding is the contrast between legal outsiders who tended to be rather more positivistic and those who were part of the local legal community and thus able to rely on informal relationships and practices. There are further insights here into the meaning of law and into legal culture.

As there are in Sanders’ essay. The jury may be under attack in England¹⁰⁷ but there is a resurgence of interest in it in countries as diverse as Japan, Russia, and Spain.¹⁰⁸ Of course, the existence of various types of lay tribunals focuses our attention on the role of norms in society, and how norms and law interact to produce social order. One of the main justifications for the jury is the opportunity it offers for lay participation and hence the injection of community norms.¹⁰⁹ Juries have often acted as catalysts for law reform.¹¹⁰ The revived interest in norms has come from law and economics.¹¹¹ Law and economics scholars have begun to examine the relationship between norms and legal rules and how norms influence an individual’s decision whether to comply with or avoid a legal prescription. But there are factors in the law and economics discussion of norms which are under-emphasized. Sanders draws attention to three of these: power, role, and organization. He goes on to demonstrate how these factors are beneficial to our understanding of norms within the context of decision making of lay tribunals.

Sideri focuses on decentralized regulatory measures relating to the control of information in the European Union. She examines the ways modern governance techniques empower (or fail to empower) communities to participate in the decision-making process. Communication and co-operation are central and it would seem in this area they have failed. There are various ways of explaining this through relational actor-based theories or through using a Durkheimian approach. But these are not satisfactory, Sideri argues. She points instead to the importance of tacit knowledge ‘encapsulated in practice and operating beyond the conscious level’ (*phronesis* in Aristotle’s language).¹¹²

The impact of globalization on the invocation of public policy is investigated by Wahab. It, or its civilian counterpart (*ordre public*) is the classical filter to

¹⁰⁶ See p. 282. ¹⁰⁷ It has been the case since the 1960s.

¹⁰⁸ See S. Thaman, ‘Europe’s New Jury Systems: The Cases of Spain and Russia’ in N. Vidmar (ed.), *World Jury Systems* (Oxford, 2000), 319, J. Kodner, ‘Re-Introducing Lay Participation to Japanese Criminal Cases: An Awkward Yet Necessary Step’ (2003) 2 *Washington University Global Studies Law Review* 569.

¹⁰⁹ See M.D.A. Freeman, ‘The Jury On Trial’ (1981) 34 *Current Legal Problems* 65–111.

¹¹⁰ The introduction (in England) of the crimes of death by dangerous driving and infanticide are usually attributed to the refusal by juries to convict of more serious offences.

¹¹¹ For example, E. Posner, *Law and Social Norms* (Cambridge, Mass., 2000) and R.B. Korobkin and T.S. Ulen, ‘Law and Behavioral Science: Removing The Rationality Assumption from Law and Economics’ (2000) 88 *California Law Review* 1051.

¹¹² See p. 337.

protect the forum against offensive laws or institutions.¹¹³ But, Wahab points out, it is no longer an inherently exclusive national conception. Under the impact of globalization it has acquired transnational dimensions.¹¹⁴ Nevertheless, it remains a last defence, and in extreme circumstances national courts will resort to it. It is, for example, preserved within the Rome Convention on contract¹¹⁵ and the Brussels Regulation on Jurisdiction and Judgments,¹¹⁶ and these are documents which are the products of a close European family.¹¹⁷

The subject of international law is also at the heart of Hirsh's paper. It is a new form of international law (or rather law) that he calls, following Kant, 'cosmopolitan law'.¹¹⁸ It represents a break from international law 'because it does not put the rights of states above the rights of the people'. But cosmopolitan law could not emerge without the development of a cosmopolitan social collective memory. Hirsh points to the way that: 'Cosmopolitan courts receive nationally particularistic narratives as testimony that they transform into an authoritative cosmopolitan social memory'.¹¹⁹

Pölönen invites us to take a sociology of Roman law more seriously. I've studied (indeed, briefly, taught) Roman law and there was little sociology in the discipline then (the 1960s). UCL's last Professor of Roman Law, J.A.C. Thomas, would have reacted rather as Goering (or Hanns Johst) did to 'culture',¹²⁰ if encouraged to explore the sociology of his subject! And yet, as Pölönen points out, Rome and its law inspired many of the founding fathers of legal sociology. That it does not resonate with contemporary legal sociologists is hardly surprising, since very few of them will have any familiarity with Roman law. But Pölönen certainly makes out a case, and his detailed references point to much work that is being done and to leads that could be followed up. Indeed, he suggests insights which might enhance contemporary studies of law and sociology. He offers the challenge of Roman law as a test-case for modern sociological theories about law.

Puchalska's essay explains the Polish peoples' disillusionment with state institutions and the law in terms of Polish history, tradition, and character. A decade and a

¹¹³ See P.B. Carter, 'Transnational Recognition and Enforcement of Foreign Public Laws' (1989) 48 *Cambridge Law Journal* 417–35, and P. B. Carter, 'The Role of Public Policy in English Private International Law' (1993) 42 *International and Comparative Law Quarterly* 1–10.

¹¹⁴ See, e.g. *The Kribi* [2001] 1 Lloyd's Rep 76.

¹¹⁵ See Article 16.

¹¹⁶ Council Regulation 44/2001 Article 34(1). See *Maronier v. Larmer* [2002] 3 WLR 1060.

¹¹⁷ And thus in both public policy should only be invoked if the offensive law or judgment is manifestly contrary to public policy.

¹¹⁸ See M. Nussbaum, 'Kant and Cosmopolitanism' in J. Bohman and M. Lutz-Bachmann (eds.), *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (Cambridge, Mass., 1997).

¹¹⁹ See p. 389. See more fully D. Hirsh, *Law Against Genocide: Cosmopolitan Trials* (London, 2003).

¹²⁰ That 'he would reach for his revolver'. Though usually attributed to Hermann Goering, the *Penguin Dictionary of Modern Quotations* now says it was Hanns Johst who said this (Harmondsworth, 1980, 175). J.J. Good's response (also in the *Dictionary*, 135) is apposite: 'When I hear the word "gun" I reach for my culture'.

half after the collapse of Communism there has been no significant change in the perception of law. There is a crisis of legitimacy with social norms filling gaps. Economic and political changes of major proportions seem unable to shift a *Volksgeist*.¹²¹ Is this the same in other countries with similar histories? Or is Poland a unique case? If so are there features of its history (the Partitions, the Nazi occupation, its Catholicism) which explains this? Puchalska offers us insights into these, but we need explorations of other post-Communist countries to get a fuller picture.

Ferrari's article is the only one in this collection which looks at the implications of students studying the sociology of law. It concentrates on Italian experiences, appropriately so, not only because the author is a leading Italian thinker in the area, but also because the study of the sociology of law is arguably more firmly entrenched in Italy than elsewhere, and certainly more so than in England. The doyen of Italian sociology of law, Renato Treves,¹²² set out these approaches: grand theorizing; contributions to the general theory of law; and empirical research (which he thought the most promising and fertile, in view of the need to measure 'the distance between normative structures that are often obsolete and social contexts in endless development'¹²³). In fact, as Ferrari points out, the centre of gravity of Italian sociology of law has not lain in socio-legal studies, as Treves hoped, but in grand theorizing, with Marxism and then the writings of Luhmann the dominant influences.

The final two papers in this book look at aspects of family law. Van Krieken examines the relationship between law and sociology in family law against the background of a discussion of Luhmann's analysis of law's combined operational closure and cognitive openness. He relates these theoretical concerns to the particular empirical example of debates within family law about the socio-legal construction of the post-separation custody of children. Both sociological research and theoretical debate have played a significant role in this. He uses the empirical example to identify ways in which the theoretical conception of law's relationship to challenges to its epistemic authority might be developed, including an improved understanding of the highly fragmented character of the social sciences, as well as of the importance of a range of 'mediating' agencies on the border of law and science, and of the significance of 'lay' forms of knowledge-construction, and of the role of political bodies that are neither legal nor scientific.

Reece follows her examination of responsible divorce¹²⁴ by looking at current English policies on parental responsibility. Earlier changes in the meaning of the

¹²¹ To use the term we identify with F.K. von Savigny. See his *System of Roman Law* (1840) (English translation by W. Holloway, 1867) (the relevant passage is in M.D.A. Freeman, *Lloyd's Introduction To Jurisprudence* (London, 7th edn., 2001), 921–5).

¹²² See R. Treves, 'Co-operation Between Lawyers and Sociologists: A Comparative Comment' (1974) 1 *British Journal of Law and Society* 200–4.

¹²³ R. Treves, 'Tre Concezioni e Una Proposta' (1974) 1 *Sociologia del Diritto* 1.

¹²⁴ H. Reece, *Divorcing Responsibly* (Oxford, 2003).

concept of parental responsibility have been traced by others.¹²⁵ Reece looks at the way the concept has shifted from one which emphasized parental authority to one which stresses parental accountability. And she points out that whilst parental responsibility as authority was clear-cut, now 'responsibility has become an attitude for which the parent is held to account . . . [and] he or she is no longer able to be fully responsible or fully irresponsible, because there is no action that he or she must take or refrain from taking in order to be responsible . . . Responsibility now extends infinitely; it is therefore impossible to define, impossible to fulfil and, crucially, virtually impossible to regulate'.¹²⁶ It is, of course, a New Labour policy and, therefore, it sounds good—and, perhaps, this is all that matters.

¹²⁵ For example, J. Eekelaar 'Parental Responsibility: State of Nature or Nature of the State?' (1991) 13 *Journal of Social Welfare and Family Law* 37; S. Edwards and A. Halpern 'Parental Responsibility: An Instrument of Social Policy' (1992) 22 *Family Law* 113.

¹²⁶ See p. 483.