THE INFLUENCE OF SOCIOLOGY ON AMERICAN JURISPRUDENCE: FROM OLIVER WENDELL HOLMES TO CRITICAL LEGAL STUDIES

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This paper analyzes the distinctive influence that sociology has had on legal scholarship during the past century. It examines some of the more significant contributions that sociology has made to four of the major jurisprudential "movements" of the twentieth-century: Holmesian legal science, sociological jurisprudence, legal Realism, and Critical Legal Studies. In essence, this paper shows how sociology has: (1) contributed to the language of the law some of its more important concepts, (2) given jurisprudence penetrating insight into the social dynamics of the law, (3) revealed the close relationship which exists between law and the other social institutions, (4) provided jurisprudence with a positivistic, structural methodology by which to study the law, and (5) inspired a legal approach that is perspectival and hermeneutical in orientation.

Introduction

Several scholars (Geis 1964; Hunt 1978; Hall, Wiecek, and Finkelman 1991:456-457; Horwitz 1992; Vago 1994) have noted the tremendous impact that social science has made on American jurisprudence. My intention in this paper is to engage in a more detailed, extended, and updated analysis than that previously rendered by these scholars, of the distinctive influence that sociology has had on legal scholarship during the last one hundred years or so. The rationale for undertaking such an analysis is to clarify and accentuate the contours of the ongoing discourse between theoretical sociology and jurisprudential thought.

In this paper I will examine some of the contributions that sociology has made to four intellectual legal traditions or "movements" of the twentieth century: (1) Holmesian legal science, (2) sociological jurisprudence, (3) legal Realism, and (4) Critical Legal Studies.[2]

Holmesian Legal Science

It may well be that Oliver Wendell Holmes, Jr. is indeed "the most important and influential legal thinker America has had" (Horwitz 1992:109). It is an acknowledged fact, however, that he did not develop an axiomatic social theory. Nor did he ever rely wholly or even partially on any well-formulated

sociological approach. Nevertheless, the ideas of certain sociological thinkers very likely did inform and impact upon Holmes' work.

Unlike most of his nineteenth-century contemporaries who considered the law to be a logical and autonomous system of axioms frozen for all time, Holmes saw the law as flexible and responsive to the changing needs of society. Even though he wavered from it throughout his life, this sociogenic premise guided Holmes' jurisprudence and made him a model for subsequent generations of legal scholars who favored a "realistic" approach to the law. As I will show presently, there is strong evidence indicating that several sociologists did indeed have a notable effect on Holmes' thinking and that Holmes was well versed in the sociological imagination.

Holmes and the Sociologists

A voracious reader all his life, Justice Holmes was also very critical of much of what he read. But, regardless of whether he felt positively or negatively about sociological writers and their conceptions, it is clear that Holmes was influenced by them.

While a student at Harvard Law School between 1864 and 1866, the young Holmes augmented his assigned readings on the law with the works of Auguste Comte, John Stuart Mill, and Herbert Spencer. Although ambivalent about Spencer's ideas, Holmes never ceased making reference to him. Just prior to its publication, Holmes reviewed favorably Spencer's The Study of Sociology remarking that "[e]very page of Mr. Spencer's writing is illuminated by those side lights which only a great scholar in books, or nature, or both, can throw upon the subject with which he is dealing" (1873 a:587).

The Justice also read Spencer's Principles of Sociology, calling its writer "dull." Holmes stated: "[Spencer] writes an ugly uncharming style, his ideals are those of a lower middle class British Philistine. And yet after all abatements I doubt if any writer of English except Darwin has done so much to affect our whole way of thinking about the universe" (Howe 1941:58). Holmes also invoked the social theorists' name and one of his most important works when, in writing his dissent to the 1905 U.S. Supreme Court case Lochner v. New York, he declared his now famous aphorism that the "Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." Clearly, Spencer's sociology evinced some direct influence on Holmes' juristic thinking.

Apparently unacquainted with the classic works of Emile Durkheim and Max Weber, Holmes, however, recognized the sociological writings of scholars as diverse as Georges Sorel, William F. Ogburn and Alexander Goldenweiser, Thorstein Veblen, and Gabrel Tarde. About the last, Holmes, went so far as to say that "Tarde is so fertile that I feel much indebted to him" (Howe 1941:78).

Other sociologists with whom Holmes was familiar included Franklin H. Giddings, Georg Simmel, and Gustave Le Bon. Holmes stated that he had gotten "little nourishment" from Gidding's The Principles of Sociology (1896) (Howe 1953:660). After perusing Simmel's Melanges de philosophie relativiste (1912),

Holmes referred to the German sociologist as "a dull maker of categories" (Howe 1953:653). Regarding Gustave Le Bon's Les opinions et les croyances (1911), Holmes wrote that the book is "not the flash of lightning that [Le Bon] seems to think it but with enough good sense to make me wish that all educated persons might read it" (Howe 1953:377). The Justice was obviously well read in general sociology.

In the area of the sociology of law, Holmes knew the works of Georges Gurvitch and Eugen Ehrlich. Harold Laski described to Holmes Gurvitch's L'idee du droit social (1932), as "... monumental. Full of learning, pointed, suggestive, it gives you a sense of legal philosophy changing to fit new needs which I found really exhilarating" (Howe 1953:1364). About Ehrlich, Holmes wrote: "I have just finished reading ... Ehrlich, Die Juristische Logik -- which I might call an elaborate proof of my old thesis that the life of the law has not been logic; it has been experience. ... I thought his Grundelung der Soziologie des Rechts the best book on legal subjects by any living continental jurist that I knew of" (Howe 1941:34).

Lester F. Ward, Edward A. Ross, and Albion Small were among the early American sociologists the Justice had added to his reading list. Holmes was familiar with the first's Outlines of Sociology (1898) and Dynamic Sociology (1883). He wrote to a friend in 1906: "Having heard that Lester Ward -- author of "Dynamic Sociology" and patriarch of the theme in this country --was about to leave Washington, I called, simply to express my homage" (Novick 1989:285). Holmes had also read Ross' Social Control and Foundations of Sociology, and being extremely impressed by these two volumes, recommended them to President Theodore Roosevelt. In a letter dated May 6, 1906 Holmes wrote to Ross:

> I cannot refrain from writing a word of appreciation of the two books to you. They are so civilized, so enlightened by side knowledge, often indicated by a single key word, so skeptical yet so appreciative even of illusion, so abundant in insight, and often so crowded with felicities, that it makes me happy to think that they come from America and not from Europe. They hit me where I live ... (Ross 1936:99).

Sometime in 1920 Holmes purchased a copy of Ross' Principles of Sociology. Not long thereafter in a letter to Laski, Holmes wrote, "I wish [Ross'] teaching in its substance were more taken to heart" (Howe 1953:272). Finally, having heard that the works of Albion Small had made a great impression on Roscoe Pound, Holmes took it upon himself to read Small's The Meaning of Social Science at the end of 1919. The Justice felt inclined to compare Small to the Yale sociologist William Graham Sumner. It appears, however, that Holmes, remained forever unimpressed with Small's work.

Whether he looked upon the aforementioned thinkers and their ideas in a favorable or unfavorable light Holmes was, at least latently, affected by the sociology of his time. Nevertheless, with or without the sociologists, the

fundamental premise of Holmes' jurisprudence -- that law "correspond with the actual feelings and demands of the community" -- affords his work a distinctly sociological caste. He began to articulate this "socio-legal" jurisprudence in his masterpiece, The Common Law.

The Common Law

Touster maintains that Holmes' goal in The Common Law was "to do from the materials of the common law what Sir Henry Maine in his Ancient Law had done from the materials of Roman law twenty years before" (1982:684). That is to say, Holmes traced the evolution of the common law by employing Maine's method of historical analysis. But by no means was Maine the sole influence. Holmes also internalized the ideas on evolution and competition proposed by Charles Darwin and Herbert Spencer. To be sure, Holmes utilized Spencer's concept of "integration" in explaining the evolution of tort law (See Holmes 1899:450-451; Elliot 1984:126-129). Moreover, the serious reader of The Common Law is sure to recognize that Holmes "uses common-law history in roughly the same way that Darwin used observations of animals and plants in nature, as raw material to be searched for evidence of patterns of gradual, evolutionary transformations" (Elliot,1984:120).

Generally accepted as commonplace today, Holmes' explanation of how the law emerges and unfolds was revolutionary, even heretical, when he first proposed it in the late nineteenth-century. According to him, society determines which legal rules are to survive and how they will be used. Holmes sees a close association between law and society when he writes that "The law embodies the story of a nation's development" (1963:5).

In contradiction to the formalist/conceptualist legal doctrine of the time, which held that the law was composed of perennial truths which, through logical and deductive reasoning, would yield certain obdurate rules, Holmes emphatically asserted that the law consists of rules which are fairly fluid and which are contingent upon the needs and demands of the social environment. Holmes' assertion sharply attacked Harvard Law School Dean Christopher Columbus Langdell's claim of being able to logically derive ultimate scientific principles by the case method which Langdell introduced at Harvard in 1870. In what is arguably the most famous passage in The Common Law, Holmes states:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage (1963:5).

Social Conflict and the Law

From the foregoing passage of his famous treatise, it is obvious that Holmes saw the law as emanating from one primary source: the "actual feelings and demands of the community." Holmes, however, did not believe that the law resulted from a general agreement of communal wishes. Indeed, for him it was not consensus, but social conflict that determined which public policies would be enacted into law and which ones would fall by the wayside.[3] Consequently, he regarded the true source of law as "the will of the de facto supreme power of the community" (Holmes 1873:583). In other words, Holmes maintained that in the Darwinian struggle for social existence, the public policy which becomes law is the one that satisfies the needs, desires, interests, beliefs, and preferences of that interest group which has the power to impose its will -- by force if need be -- on all the other groups in society. Holmes describes this process, in strict Spencerian (i.e., social Darwinist) terms as, "the struggle for life among competing [legal] ideas, and of the ultimate victory and survival of the strongest" (1899:449). Thus, for Holmes, the "law embodies beliefs that have triumphed in the battle of ideas and then have translated themselves into action" (1953:294-295).

Holmes' theory of social conflict and the law -- a theory which emphasizes force and self-preference -- is made abundantly clear in the following statements:

> But in the last resort a man rightly prefers his own interest to that of his neighbors. And this is as true in legislation as in any other form of corporate action. All that can be expected from modern improvements is that legislation should easily and quickly, yet not too quickly, modify itself in accordance with the will of the de facto supreme power in the community, and that the spread of an educated sympathy should reduce the sacrifice of minorities to a minimum. But whatever body may possess the supreme power for the moment is certain to have interests inconsistent with others which have competed unsuccessfully. The more powerful interests must be more or less reflected in legislation; which, like every other device of man or beast, must tend in the long run to aid the survival of the fittest. ... But it is no sufficient condemnation of legislation that it favors one class at the expense of another; for much or all legislation does that. ... If the welfare of the majority is paramount, it can only be on the ground that the majority have the power in their hands. The fact is that legislation in this country, as well as elsewhere, is empirical. It is necessarily made a means by which a body, having the power, put burdens which are disagreeable to them on the shoulders of somebody else (Holmes 1873b:583-584).

In "The Path of the Law" (1897), Holmes regards as "fallacies" two fundamental and interrelated assumptions of late nineteenth-century legal

orthodoxy: (1) that the law is inseparably linked with, and relies upon a system of moral standards, and (2) that the law is composed of a complete and inclusive set of fixed premises from which judicial opinions can be logically and deductively derived, and cases settled once and for all. A brief examination of this second assumption provides another example of Holmes' theory of social conflict.

Holmes' principal objective was to falsify the formalist notion that the "force at work in the development in the law is logic," and that, as a consequence, legal rules "can be worked out like mathematics from some general axioms of conduct" (Holmes 1897:465). As previously demonstrated, he had poignantly stated a few years earlier in The Common Law that, [t]he life of the law has not been logic: it has been experience" (emphasis added).

Lawyers and judges are trained to reason according to the method of syllogistic logic; it is the method "in which they are most at home," notes Holmes (1897:465). In addition, judges believe that, by applying logical reasoning to a case, they can arrive at a definitive judicial decision. Holmes' saw the judicial process in a more pragmatic and sociological manner. Thus, Holmes would have us believe that cases are decided on "battle grounds where the means do not exist for determinations that shall be good for all time, and where the [judicial] decision can do no more than embody the preference of a given body in a given time and place" (Holmes 1897:466). In other words, the opinion that a judge renders in a case is not determined by logical inference alone, but by the fluctuating wishes and feelings of the majority social group. Furthermore, because the judge must consider the competing social ends and temporal desires, court decisions are not certain and absolute; they are, in fact, transitory and historically contingent.

In Holmes' view, judicial decisionmaking is not a logico-deductive exercise with judges finding and applying predetermined legal postulates. Rather, cases are decided according to the policy choice that the judge makes as he or she weighs and measures the "conflict between two social desires ... which cannot both have their way. The social question is which desire is stronger at the point of conflict" (Holmes 1899:460-461).

Holmes believed that social science would help to answer the "social question." That is to say, in deciding a case, social science will simplify the judge's selection by showing him or her which of the competing public policies is more instrumental to a specific society and more responsive to the actual feelings and demands of a particular time. "I have in mind an ultimate dependence upon [social] science," Holmes states, "because it is finally for [social] science to determine ... the relative worth of our different social ends [and desires]" (1899:462).

Sociology's influence is evident in Holmes' argument for the development of an empirical legal science capable of weighing social goals. To this end Holmes proposed that "[f]or the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics" (1897:469). Holmes could just as easily have

included the "master of sociology" to his list, but it was up to his intellectual heir, Roscoe Pound, to consider more fully sociology's role in American legal thought. Nevertheless, we must agree with Laski when he states that "[i]t is almost inherent in [his] philosophy that Mr. Justice Holmes should have been the forerunner of the sociological interpretation of law" (1931:687).

Sociological Jurisprudence

Typically sluggish in keeping up with the changing times, the American legal system entered the twentieth century in its traditional nineteenth century guise, as formalist jurisprudence. Formalist jurisprudence, being politically congruent with the liberalism of the post-Civil War period, had previously kept legal intervention and regulation in social and economic matters to a bare minimum. This laissez-faire policy did not signify the complete absence of legal oversight, it merely meant shifting the responsibility of control from artificial entities like the polity to "natural" ones like the marketplace. The self-regulating market was said to be guided by universal principles.

The notion of universal or first principles -- that is, unchanging rules, fixed axioms, eternal truths, predetermined conceptions -- also affected the academic disciplines of biology, political science, economics, and sociology. Indeed, there existed an intense preoccupation with the idea that general absolutes governed the social and natural worlds; thus it was only a matter of time before American legal doctrine was likewise attracted to the universal principle.

Not long into the new century the natural and social sciences -- biology, economics, sociology -- took a sharp methodological turn and abandoned the attempt to deduce knowledge from predetermined conceptions. In contrast, legal formalism tenaciously held on to the traditional notion of authoritative precepts and universal principles. Noting the law's inability to keep up with social progress, Roscoe Pound complained that "law has always been dominated by ideas of the past long after they have ceased to be vital in other departments of learning" (1910:25). Accordingly, legal doctrine ran into the problem of not being able to adapt to the changing conditions of the time. Or, as Pound saw it, there existed a discrepancy between the "law in books" and the "law in action." The traditional legal doctrine revealed its inadequacy by failing to meet the social ends about which Holmes had previously been concerned.

Pound dropped the sociological jurisprudential bombshell in an address which he delivered before the American Bar Association in St. Paul, Minnesota on August 29, 1906. He stated resolutely that "our present system of courts is archaic and our procedure behind the times" (1937:180). Pound's speech was a clarion call for the reform and modernization of what he saw as an antiquated system of legal justice. "Law," he remarked in characteristically bold fashion, "is often in very truth a government of the living by the dead."[4]

This speech was pivotal in American legal history because it marked the beginning of a new movement in law that shook, challenged, and disturbed the existing system of legal orthodoxy. As John Wigmore so eloquently put it,

Pound's St. Paul speech was "the spark that kindled the white flame of [legal] progress" (1937:176).

For Pound, the overly scientific bent of analytical jurisprudence had turned the administration of justice into an abstract and artificial enterprise. Moreover, he noted that "there is a special tendency in the lawyer to regard artificiality in law as an end, to hold science something to be pursued for its own sake, to forget in this pursuit the purpose of law" (Pound 1908:607-608). In addition, the rigid exposition of hard and fast rules in analytical jurisprudence prevented the law from adjusting itself to the mutable conditions of a protean society. As a result, the law had ceased having a utilitarian function in dealing with the realities of everyday life. It had turned into a hopelessly self-sustaining entity completely out of touch with the human factor and social needs.

Analytical jurisprudence, with its a priori concepts and deductive calculus, had become a mechanical jurisprudence. Pound urged jurists to disavow the technical operations of mechanical legal doctrine, or what he sometimes referred to as "the jurisprudence of conceptions," and embrace a more realistic and action-oriented "jurisprudence of ends" (1908:610-611).

The central question to be considered, according to Pound (1908), must be "how will a rule or decision operate in practice?" His objective in asking it was to "attain a pragmatic, a sociological legal science," one that would "make rules fit cases instead of making cases fit rules."

In 1907, in his address to the Section on Legal Education of the American Bar Association, Pound advanced the idea that the conceptual, artificial, and technical nature of mechanical jurisprudence had created a discrepancy between the written law and the more substantive sentiments of the American people. That is to say, that the law's rigidity prevented it from considering the practical needs, wants, opinions, and interests of the individuals the law had been mandated to serve. Pound stated that "legal theory and doctrine reached a degree of fixity before the conditions with which law must deal to-day had come into existence" (1907:608). However, he noted optimistically, that "with the rise and growth of political, economic, and sociological science, the time is ripe for a new tendency;" a tendency that would consider the relations of law to society, a tendency that Pound labeled sociological jurisprudence.

The new approach that Pound was proposing was an applied science in the tradition of positivist sociology. He underscored his preference for this tradition and subsequently alluded to sociology's influence on him when he wrote: "In common with most Americans who had a scientific training in the 80's of the last century, I was brought up on Comtian positivism and turned thence to Comtian sociology at the beginning of the present century" (Pound 1951:17).

Sociological Jurisprudence and Sociology

"In the past fifty years the development of jurisprudence has been affected profoundly by sociology," wrote Roscoe Pound in 1927. In truth, it was Pound

himself who, more than any other American legal thinker before him, brought sociology fully into the realm of law.

To a greater degree than Holmes ever did, Pound, throughout his academic life, purposefully forged intellectual ties and cultivated personal friendships with numerous sociologists.[5] He was a very active member of the American Sociological Society (having joined sometime between 1906 and 1910) and published several articles in The American Journal of Sociology In the mid-1930s, Pound became interested in the sociologies of law as promulgated by his Harvard colleagues, Georges Gurvitch and Nicholas S. Timasheff. During the 1940s, and shortly after the departure of these two scholars from Harvard, Pound taught graduate and undergraduate courses in the sociology of law in the Department of Social Relations at that institution. He also served on doctoral examination committees in sociology along with Pitirim Sorokin and Talcott Parsons. Finally, never relying only on contemporary sociological themes, Pound frequently cited the classic works of Comte, Durkheim, Marx, Tarde, Spencer, and Weber. The cumulative effect of these efforts was that Pound's sociological jurisprudence "significantly promoted the recognition of law as a social phenomenon" (Hunt 1978:19).

All these influences aside, Geis (1964), maintains that the sociological components of Pound's philosophy of law (and, as previously indicated, to a lesser extent, that of Holmes also) were derived largely from the writings of Albion Small, Lester Ward, and most especially, E.A. Ross who was a colleague of Pound's at the University of Nebraska during 1901-1906. In his autobiography Ross wrote of Pound, "I did not imagine that I was `making a dent' on him, but quietly he began to acquaint himself with the sociological view of law and courts. ... In 1906 he wrote to me, `I believe you have set me in the path the world is moving in'" (1936:89).

In 1901 Ross published Social Control, a book which quickly became an early American sociological classic, representing "an elaborate inventory of the methods by which a society induces conformity into human behavior" (Geis 1964:272). Here Ross contends that of all the manifold options of social control available --public opinion, belief, social suggestion, religion, and the like -- law reigns supreme as "the most specialized and highly finished engine of social control employed by society" (1939:106).

Pound, following Ross' lead, focused on the "social character of law" and looked at the law's input on society. Accordingly, Pound defined law as a "highly specialized form of social control, carried on in accordance with a body of authoritative precepts, applied in a judicial and administrative process" (1942:41). The upshot of all this, Hunt maintains, is that the notion of social control provided Pound's jurisprudence with a sociological starting point (1978:20).

The Theory of Social Interests

There is no exaggeration in saying, along with Hunt (1978:22), that Pound's theory of interests lies at the conceptual core of sociological jurisprudence. Further, it is in all likelihood the only truly sociological theory ever formulated by Pound.

He first presented the theory of interests in the keynote address which he delivered before the American Sociological Society in 1921. Although Pound, in his various writings, continued to revise and elaborate on the theory, he, nevertheless, consistently promulgated three types of interests: the individual, the public and the social. I will not here consider individual interests because they are largely tangential to a sociological analysis of Pound's jurisprudence. Further, because "[m]ost commentators agree that the category of public interests need not be advanced as a separate type and is best treated as a sub-type of social interests" (Hunt 1978:24), I will focus only on what Pound had to say about the latter.

Because Pound's notion of social interests evolved through many years, I have developed a composite description and define social interests very generally as the prevalent claims, demands, desires, or expectations which human beings collectively seek to satisfy and which society must recognize and protect through the law. Because the law protects them, they are given the status of legal rights. To put it slightly differently, a right is a legally protected social interest.

Pound regards social interests as empirical entities because they are to be found only in society; more to the point, they are to be found in the law and legal processes of society. Social interests, then, are not abstract presuppositions derived from such determinist sources as theological doctrine, the philosophical ideas about human nature, or the social psychological classification of instincts. Instead, Pound inveighed, the social interests can be inferred "by a less pretentious method" (1943:16) – that is, through the empirical investigation of objective data. The objective data on which he relied included court decisions, law reports, legislative declarations, committee reports, debates, and what is written in a wide array of works referring to the law. "The first step in such an investigation," writes Pound, "is a mere survey of the legal order and an inventory of the social interests which have pressed upon lawmakers and judges and jurists for recognition"(1943:17). Through a painstaking and thorough analysis of hundreds of legal documents, Pound inventories the social interests which have been asserted in "civilized society" (i.e., in general, European countries and in particular England and the United States) and which must be legally recognized and secured in order to maintain that society. He then proposes six broad categories of social interests and their subcategories. The six general interests are as follows:

1. The social interest in the general security.
2. The social interest in the security of social institutions.
3. The social interest in the general morals.
4. The social interest in the conservation of social resources.
5. The social interest in general progress.
6. The social interest in the individual life.

Through his program of sociological jurisprudence, Pound succeeded in directing the attention of the legal establishment of his time to the practical concerns of the study of law and to the law's relationship with society. Pound constantly highlighted the social character of law and for this he deserves, along with Oliver Wendell Holmes, to be recognized as a leading figure of the sociological movement in law. All this notwithstanding, however, it was only a matter of time before Pound's legal philosophy was replaced by another. As Pierre Lepaulle put it so prophetically as early as 1922: "Sociological jurisprudence, like all human creations, is not a permanent thing: it may represent the best forces of the present generation; it will certainly dissatisfy the next" (1922:850).

Legal Realism

American legal Realism was a pragmatic philosophy of law that, fueled by skepticism, was highly critical of the contention that legal formalism was characterized by certainty, predictability, and uniformity. Legal Realism emerged (in the late 1920s) during a period of profound social change in American society. The second decade of the twentieth century was a time ripe for the rise of such a movement in law. It was a time when the values and ideals of the Progressive era, its optimism and cheerfulness, had been utterly destroyed by the global upheaval created by World War I. The result, Savarese states, was "the decay of confidence in progress and the growth of a climate of suspicion from which the world has never quite recovered" (1965:181). "Earnestness, a favorite state of the prewar years," writes Edward G. White, "was replaced by cynicism; social responsibility gave way to alienation, virtuousness appeared as hypocrisy" (1972:1014).

Along with the First World War, two other events, the stock market crash of 1929 and the resulting Great Depression, also marked a repudiation of some basic assumptions about American culture which had been fostered by Progressivism. Consequently, a more skeptical, even cynical, set of ideas replaced the optimism of the Progressive era: prosperity was not permanent; capitalism, whether regulated or not, was not omnipotent; people were not capable of mastering their economic environment; the future is not necessarily an improvement upon the past. And so, "one by one the truths of early twentieth century America were exposed as myths. The gap between illusion and reality seemed ever-widening" (White 1972:1017).

Despite the skepticism brought on by the social events mentioned above, there nevertheless endured an optimistic belief --a kind of unwavering faith -- in science. Throughout most of the nineteenth century, academic interest had focused principally on the impressive achievements of the natural and the physical sciences and on their methods of research. But by the end of World War I the term "science" increasingly included the behavioral and social sciences, most notably psychology, cultural anthropology, and sociology. Infused by this faith in science, it was only natural that the Realists would set out to discover how it was that the empirical method of induction applied to the social sciences in general and to the law in particular. Ultimately, the Realists' objective was the development of an empirical science in law.

Of all the behavioral sciences, psychology, and in particular some of its then novel variants, behaviorism and Freudian psychoanalysis, most influenced legal Realism. And of the social sciences it was sociology which proved an inspiration to the Realists in their investigations of the law in action. However, the greatest contribution to Realist jurisprudence was the fact that in the intellectual community of the 1920s (especially in the humanities and social sciences) there had been a reaction against abstractions and first principles and a movement toward the idea of a changing and developing society. The upshot of all this is that, at the time, there existed an intellectual trend rejecting conceptualism but accepting of pragmatism (Kalman 1986:15).

White posits that of all the Realists, the views of Karl Llewellyn and Jerome Frank have received the most attention within the legal community. The reason for this is "not because their views were most representative of the movement ... but because they were the most anxious of their peers to see themselves as members of a jurisprudential `school,' to attempt to state its canons, and to criticize other schools" (White 1972:1000-1001). Since Frank's jurisprudence was largely influenced by psychoanalysis (see Frank 1930; Glennon 1985), in the following section I will examine only Llewellyn's legal philosophy and how it was affected by sociology.

Karl N. Llewellyn

In 1911 Llewellyn enrolled at Yale and fell "under the spell" of William Graham Sumner. Although he had died in 1910, Sumner had previously taught at Yale and his ideas had been kept alive by his devoted disciple A. G. Keller. As a consequence of having been influenced by Sumner, "before he reached law school, Llewellyn came to the study of law with a predisposition to see law as a social institution embedded in its surrounding culture" (Twining 1973:94).

White sees Llewellyn's "A Realistic Jurisprudence -- The Next Step," as "the first self-conscious statement of Realism" (White 1972:1018). In this article Llewellyn distinguishes between "paper" rules and "real" rules. Paper rules are, very simply, "the accepted doctrine of the time and place -- what the books there say `the law' is" (Llewellyn 1930:448). Real rules, by contrast, are convenient shorthand symbols for the concrete actions -- that is, the tangible practices or

behaviors -- of the courts, administrative agencies, and public officials. Determining whether the courts abide by paper or real rules requires seeking "the real practice on the subject, by study of how the cases do in fact eventuate" (Llewellyn 1930:450). Taking a behaviorist, or what he calls a "behavior-content" approach, to the study of real rules, Llewellyn proposes that "the point of reference of all things legal" be consciously shifted away from the conceptual rules, precepts, and principles of legal formalism and toward an empirical study of the observable behavior of the courts and those affected by the courts. Indeed, "[w]hat [Llewllyn] insisted on as the next step in jurisprudence was to apply the [conception of human behavior] systematically to legal problems" (Yntema 1960:318).

By 1949, however, Llewellyn had gone beyond examining the law as mere social behavior and instead highlighted the sociological concept of "institution" in his analysis.

> I should wish to gather in also not only active conduct but the relevant attitudes and relevant lines of inaction, and the interactions of any portion of the institution with any other institution; and the machinery for recruiting and for breaking in the institution's specialized personnel; and a dozen or so obvious elements in any living major complex of the "institution" sort. Indeed the first direct contribution of the "law" discipline to sociology lies just here (Llewellyn 1949:453).

In his second major article, "Some Realism About Realism" (1931), Llewellyn lists several basic tenets which characterize the movement and which all its adherents essentially share. I will focus on only one of these tenets which most directly addresses sociological concerns.

According to Llewellyn, Realist jurisprudence accepts the idea that society changes at a faster rate than does the law. As a result, the "law needs re-examination to determine how far it fits the society it purports to serve." In proposing this notion Llewellyn relies on the concept of cultural lag formulated by William Ogburn in 1922. A closer examination of cultural lag will reveal the relationship between law and society as Llewellyn saw it.

Ogburn (1964) maintains that due to the tremendous increase in technological inventions there have been many frequent and rapid transformations taking place in the cultural conditions of society. Further, because there is a correlation and interdependence of the constituent parts in society, readjustment becomes necessary when the various components of culture do not change concomitantly. For example, an alteration in the material culture (this includes houses, factories, machines, raw materials, manufactured products, and foodstuffs) makes subsequent adjustments necessary through changes in the adaptive non-material culture (this includes customs, beliefs, philosophies, governments, and laws). The modifications in the adaptive non-material culture, however, are frequently delayed and there is said to be a maladjustment during

that period of time: a period which could last many years. This is the hypothesis of cultural lag, and Ogburn provides an illustration.

Because of the changing material conditions of industry --that is, as a result of numerous workers using machines dangerous to life and limb -- there were, between 1850 and 1870, a great many accidents occurring in the workplace. During that period of time the cost of the injuries sustained by the workers was borne by the workers themselves. Although employer liability laws existed, under these laws the worker, in order to recover, had to sue the employer unless, as in some cases, settlement was made outside the courts. In either event, the legal expenses were high and the entire process was patently unfair to the worker. The employer liability laws were inadequate in dealing with the situation caused by the accidents arising from the development in industry. A cultural maladjustment existed between the accident situation (i.e., the material conditions of the complexity of machine industry) and the law (i.e., the non-material culture).

It was not until 1915 that all of the highly industrialized states (except Pennsylvania and Delaware) enacted workmen's compensation laws which made remuneration to the injured worker almost automatic. In sum, the material culture changed in the period 1850-1870 while the adaptive culture did not change until about 1915. During this time there was a maladjustment to the accident situation; that is to say, a less satisfactory adjustment than in the years which preceded and in the years which followed.

This idea of cultural lag and the law, combined with the rest of Llewllyn's propositions characterizing the Realist movement, can be stated in capsule form as follows: "the program implicit in legal realism was detailed, objective study of law as an instrument to achieve desired ends and in the context of a changing society" (Yntema 1960:320).

Critical Legal Studies

While no single social development can be credited with having led to the creation of a legal movement, in general, one event can, tacitly and overtly, have an impact on the formation of such a movement. One social event that, at least circuitously, contributed to the flourishing of one of the more recent intellectual trends in legal scholarship, Critical Legal Studies (CLS), was the Watergate affair of the early 1970s.

Clearly the biggest political scandal in U.S. history, the Watergate affair consisted of various illegal activities designed to help President Richard M. Nixon win reelection in 1972. Two years later it resulted in Nixon's resignation of the presidency after he became implicated in an attempt to cover up the scandal.

As a specific event "Watergate" referred to the break-in and electronic bugging of the Democratic National Committee headquarters with the objective, by the Nixon White House, to discredit Democratic candidates and disrupt their Party's 1972 presidential nomination. In time, about forty Nixon administration

officials and members of the Committee to Re-elect the President were found guilty of numerous crimes, including burglary, illegal wiretapping, violations of campaign financing laws, sabotage, and the attempted misuse of governmental agencies -- viz., the Federal Bureau of Investigation, the Internal Revenue Service, and the Central Intelligence Agency. The affair also involved the attempt by the White House to conceal and deny many of those illegal actions.

The Watergate scandal ultimately led to the conviction on criminal charges of top Nixon aides, among them U.S. Attorney General John N. Mitchell, Assistant to the President for Domestic Affairs John Ehrlichman, and White House Chief of Staff H.R. Haldeman. All three were convicted of conspiracy, obstructing justice, and perjury. Former counsel to the President, John Dean became the main witness against Nixon at the hearings of the Seneate Select Committee on Presidential Campaign Activities. Dean implicated a number of high-level Nixon administration officials, including Mitchell, who had approved the break-in at the Watergate building. Dean also stated that Nixon had previous knowledge of these activities. Facing certain impeachment by Congress, Nixon resigned the Office of the President of the United States on August 9, 1974.

Deeply troubled by the falsehoods, deceptions, fabrications, and contradictions of the Watergate scandal, the American people had, by the mid 1970s, experienced an unprecedented "crisis in confidence" in their governmental and legal institutions. Watergate had revealed that these institutions were not the stalwart and trustworthy entities many Americans had long considered them to be.

Sociologist Jeffrey Alexander states that "the Watergate crisis demonstrated America's capacity for self-criticism" (Ritzer 1992:464). In academe, this crisis manifested itself as in intense cynicism and criticism of the existing social and political structures. In law schools such as Yale and Harvard the crisis took the form of a critique of the received legal doctrine by the movement in law called Critical Legal Studies. In an attempt to defend legal liberalism[6] from the onslaughts of CLS, the traditionalists in those laws schools soon accused the Critics of being nihilistic, Marxist, and utopian. To be sure, the controversy between the proponents and opponents of CLS is certain to continue for some time to come.

According to Debra Livingston, Critical Legal Studies "does not have a definitive methodological approach" (1982:1669). We take this to mean that there is no one distinctive way of doing critical legal scholarship. Nonetheless, Livingston explains, CLS does have "recourse to the methodologies of other disciplines" (1982:1680-1681). She identifies three methodologies which CLS borrows from various fields -- of which foremost among them is sociology -- and utilizes to critique legal liberalism: (1) social theory, (2) pure critique, and (3) textual explication.

Social Theory

The "methodology" of social theory comes directly from sociology. The various sociological paradigms -- in particular Marxist theory, conflict theory, critical theory, Weberian theory, and even functionalism -- serve as useful guides for reconstituting society, human associations, and legal doctrine. Although social theory may produce an alternate vision of society which some would describe as impractical and inviable, it nevertheless provides CLS with a blueprint for changing what the Critics see as the tyrannical institutions currently in existence in capitalist society. Roberto Unger (1983), for example, makes use of social theory in proposing a "counterprogram" to social, political, economic, and legal liberalism.

In the first (and only) footnote to his pioneering article, "The Critical Legal Studies Movement," Unger presents two main tendencies of the CLS Movement. The first tendency sees legal orthodoxy as advancing one particular view of society and human associations. It also portrays liberal legal doctrine as indeterminate. The second tendency, grounded in the social thought of Marx and Weber and in the historical and social analysis of functionalist and critical theory, sees the law and liberal legal doctrine as reflecting, confirming, and reshaping "the social divisions and hierarchies" of capitalist society. In constructing his counterprogram to legal liberalism, Unger builds on these two main tendencies of the Movement.

The direct influence of German sociological theory is apparent throughout Unger's counterprogram. Indeed, Collins (1987:387) maintains that Unger's approach to legal studies leans mostly on the tradition of social theory marked out by Hegel, Marx, and Weber. Unger, for instance, is well aware of the time-honored sociological notion that, on the one hand, institutional structures mold and constrain individual's passions and personality, but on the other hand, "a vision of transformed personal relations may serve in turn to inspire major institutional change" (Unger 1983:586). With this dialectical connection in mind, Unger introduces his program of institutional reconstruction, which has as its main goal "the systematic remaking of all direct personal connections -- like those between superiors and subordinates or between men and women -- through their progressive emancipation from a background plan of social division and hierarchy" (1983:587). Unger's method of internal development, or the process whereby one imaginatively or practically pushes the abstract ideals (e.g., the market) of liberal legal doctrine -- and their institutional realizations (e.g., contract and property) -- to their utmost implication, serves as a heuristic device in the reconstitution of social institutional arrangements, in particular the organization of government, the organization of the economy, and the system of rights.

While Unger undoubtedly relies on some aspects of Marxist theory, his counterprogram appears rather tame relative to orthodox Marxist revolutionary practice. For instance, according to Unger, the route to take in transforming society must be a balanced, middle path between "conservative reform," which

seeks to change the pattern of personal relations between individuals, and "textbook revolution," the goal of which is praxis or the complete restructuring of the established large-scale social institutions. In order to act transformatively, Unger's counterprogram (which he also refers to as "superliberalism") must engage in a revolutionary reform which "alters [personal] relations, collectively and deliberately, in ways that prefigure or encourage some partial change of the institutional order" (Unger 1983:672). It appears that Unger has at least in part constructed his theoretical scheme in reaction to "vanguard" (Bolsehvik) Marxism. Hence, it seems quite likely that Unger's legal theory acts as an antithetical response or critical rejoinder to traditional Marxist social thought.

Pure Critique

The methodology of pure critique is also an important part of the CLS arsenal. Pure critique has several intellectual sources but it is best depicted by the critical theorists of the Frankfurt School -- Herbert Marcuse, Erich Fromm, Max Horkheimer, Franz Neumann, Theodor Adorno, Leo Lowenthal, and more recently, Jurgen Habermas. Duncan Kennedy's article "Form and Substance in Private Law Adjudication" (1976) serves as an example of the use of critical theory in CLS. To be sure, Kennedy is one of those rare scholars who candidly and publicly acknowledges the influence that past thinkers have had on his work. Among the critical theorists that Kennedy credits are Marx, Karl Mannheim, Georg Lukacs, and Marcuse (See Kennedy 1976:1712; 1980:24).

The critical social theory of the Frankfurt School has its roots in the negative dialectics of Hegel. Marcuse describes Hegel's negative dialectics as "motivated by the conviction that the given facts that appear to common sense as the positive index of truth are in reality the negation of truth, so that truth can only be established by their destruction" (1960:26-27). Thus, we arrive at true meaning when we deny, through contradiction, that which is presented as truth. For example, one of the dominant values upheld by legal liberalism is the value of individual self-interest: people should be allowed to pursue their own happiness their own way. On the other hand, there also exists the cultural value that individuals should consider the well-being of others. Pitting these two values against each other results in a contradiction, but it is a contradiction that gives us a better understanding of legal liberalism and the social context in which it exists. Kennedy refers to this process as "the method of contradictions." According to him this method is based on two premises. The first is "that the experience of unresolvable conflict among our own values and ways of understanding the world are here to stay." This is another way of saying that social reality is inherently dialectical. The second premise is "that there is order and meaning to be discovered even within the sense of contradiction."

In his seminal article Kennedy discusses the characteristics and qualities of what he considers to be the two antithetical "rhetorical modes" which impinge upon substantive legal issues: individualism and altruism. He also posits two opposed modes which influence "the form in which legal solutions to the

substantive problems should be cast": rules and standards. The relationship between the dual sets of rhetorical modes becomes salient in private law disputes because altruism favors standards while individualism jibes with the use of rules. Like all ideologies, different utopian visions of what is right and good undergird both sets of discursive genres. Kennedy's objective in employing the method of contradictions is to trace historically the conflict between the two sets of rhetorical modes by illustrating how individualism and altruism, which operate at the substantive level of law, are informed by rules and standards, which operate at the formal level of law.

Kennedy shows that the relationship between form and substance is based on several moral, economic, and political arguments which have, at least since the Civil War, influenced considerably the semantics of legal discourse and the direction of legal consciousness. One of the economic arguments is premised on the doctrine of social Darwinism.

The commentary runs as follows. At the substantive level, individualism presses the point that those persons with economic power (and who have thus proved themselves more fit to survive in the competitive marketplace) should be free from legal intervention. Only they have the knowledge and competence to use resources wisely and make financial investments. These investments are commercial transactions, the argument continues, which ultimately benefit society and regulating them only inhibits economic growth and production.

At the level of form, the rationale for using rules is also predicated on the ideology of social Darwinism. Unlike standards, which require the judge to discover the social values inherent in a specific legal situation, rules, because of their high degree of generality, are more arbitrary and difficult to apply to the particulars of a case. This whimsical feature of rules makes the economically powerful less fearful that legal intrusion will disrupt their commercial transactions. In other words, rules minimize the degree of judicial interference on the aggressive activities of self-interested parties.

In articulating these arguments Kennedy evinces that the social theory of Herbert Spencer had an extraordinary alignment with the political, economic, and legal thought extant throughout most of the nineteenth and twentieth centuries.

Textual Explication

Finally, the third methodology mentioned by Livingston, the explication of legal "texts" or written works, has to do with the process of interpreting legal rules, principles, concepts, cases, and doctrine. The hermeneutical techniques employed by the Critics are borrowed from several sources including deconstructionism. A recent trend in literary criticism, deconstructionism involves the strategy of closely reading a text for the purpose of penetrating the surface and getting at its hidden meaning and unexpressed assumptions.[7] The text, which the Critics consider intrinsicly unstable to being with, is taken apart -- deconstructed -- and its structure and logic are questioned. In the CLS program, the end result of textual explication is that the underlying inconsistencies and

contradictions of liberal legal doctrine are uncovered. Clare Dalton's (1985) attempt to deconstruct contract doctrine shows how this is accomplished.

Dalton uses deconstructionism (or the poststructuralist approach of Jacques Derrida) to argue that contract doctrine is inherently indeterminate. She is primarily concerned with the tensions between concepts as they appear in the language of contract doctrine. These conceptual tensions Dalton describes as "dangerous supplements," a concept borrowed from Derrida (1976). This means that when terms unite with, or are added to each other -- the private and the public, for instance -- they define themselves in opposition, contrast, and reference to each other. Put another way, "the use of these terms always seems to imply the existence of the other" (Frug 1984:12). Derrida (1973) would say that the meaning of these terms is based on their difference. In effect, no linguistic construct can be reduced to an ultimate definition. Contrary to the assertions of received contract doctrine, Dalton argues that there is no consensus as to the literal meaning of the terminology used in legal discourse. Further, dualities of conflicting legal principles are not equal. One category is usually preferred and thus ranked higher than the other. Liberal legal doctrine, for instance, has traditionally favored the private aspect of contract over the public aspect.

Careful scrutiny of the three major methodologies employed by the CLS theorists -- social theory, pure critique, and textual explication -- reveals that they have introduced sociology into their legal philosophy. Critical Legal Studies will no doubt continue to look to sociological concepts, theories, and paradigms for help in formulating its critical program against the principles of legal liberalism.

Conclusion

Sociology, to be sure, has made several significant contributions to modern juristic thought. First, it has contributed to the language of the law some of its richest and most descriptive concepts: social evolution, social conflict, institution, social control, cultural lag, and the like. Second, it has given jurisprudence penetrating insight into the social dynamics of the law. Accordingly, the law is now seen and treated as a social phenomenon: an institution, a system, and a component of society. Third, sociology has disclosed and underscored the interdependence extant between law and the other social institutions, in particular the economy and the polity. Fourth, sociology has provided jurisprudence with a positivistic, structural methodology by which to study the law. Finally, sociology has most recently inspired an approach that is perspectival and hermeneutical in orientation. In short, then, it has attempted to demystify and relativize jurisprudence.

This paper has shown that some of the principles of sociology have had a marked influence on four of the main jurisprudential movements of the twentieth-century: Holmesian legal science, sociological jurisprudence, legal Realism, and Critical Legal Studies. It is of the utmost import, then, that present and future students of the law be cognizant of the contributions that

sociology in general, and its subdiscipline the sociology of law, have made to legal theory. Whether it is recognized or not, sociology will continue to make theoretical contributions to jurisprudence. It remains to be seen, however, if other sociological paradigms -- social exchange theory, symbolic interactionism, ethnomethodology, and phenomenological sociology, for instance -- also leave their imprint on legal theory. At bottom however, only a candid acknowledgment and affirmation of the confluence of sociology and jurisprudence will foster a fruitful collaboration between the two disciplines as well as vivify an enlightened intellectual dialogue of great worth to both of them.[8]

Endnotes

1. The author thanks Phoebe W. Williams, Marianne Constable, and two anonymous reviewers for their insightful comments on earlier drafts of this paper.

2. Although other trends, such as the Law and Economics movement and legal positivism, have played, and will continue to play, a prominent role in contemporary American jurisprudence, this paper will consider only Holmesian legal science, sociological jurisprudence, legal Realism, and Critical Legal Studies because it is these four traditions which have been influenced the most by sociology.

3. It may be said that Holmes' theory of social conflict, albeit in a social Darwinist vein, preceded the conflict theory formulated in sociology.

4. Compare this statement with Herbert Spencer's declaration that the "law embodies the dictates of the dead to the living" (1898:518).

5. For an excellent analysis of Pound's connection to sociology see, Hill (1989). I draw heavily from this work in delineating the accounts mentioned in this paragraph.

6. Legal liberalism refers to the legal doctrine which maintains that people have the right to do as they please, within the context of their private world. This doctrine demands that the state protect the private rights of individuals.

7. Deconstructionism is not limited to literary and philosophical studies. Recent developments in sociology have also pursued this approach. See Pfohl (1986), Denzin (1986), Kellner (1988), Brown (1990), Seidman and Wagner (1991), Game (1991), Dant (1991), Bauman (1988;1992). The poststructuralist tradition in the sociology of law may be found in the following: Palmer and Pearce (1983), Norris (1988), Turkel (1990).

8. An analysis of the other side of the sociology-jurisprudence relationship -- that is, how the latter discipline has influenced the former one -- is best left for another paper. In light of the fact that jurisprudence has now developed a social theory that it can claim as its own, such an analysis would be a tremendous asset to sociology.

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METHOD AS RUSE: FOUCAULT AND RESEARCH METHOD

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A ruse is a gimmick or device used as a strategy or instrument. For Foucault, method can best be understood as a ruse rather than as a method which promises truth. Methods regulate what can be discovered and the discourse about what can be discovered. In this essay, the realist and idealist models of method are criticized from Foucault's perspective. Both models rely on some transcendental reality which -- from Foucault's perspective -- are constructed by the practices of research itself. Even though Foucault rejects foundational assumptions, he does have a method which has its homogeneity, its systematicity, and its generality. Foucault's method is outlined, discussed, and related to similar methods. Finally, Foucault's critics are noted and answered.

Method in most social science is built on either the realist or the idealist model of epistemology (Smith 1983; Smith and Heshusius 1986). The realist model assumes a social reality independent of the knower that can be know if only the knower can be divested of values, that is, if the knower can be objective. Thus, the realist utilizes randomization, blind tests, the null hypothesis, the separation of the researcher from the subject, and numerous other devices practically to force a separation of fact and value in the practice of knowing. Claims about social reality which do not utilize such practices are criticized as being conditioned or biased by the values, emotions, or interests of the knower.

The idealist model assumes that knowing cannot be separated from the knowing subject. Regardless of practices used to separate the knower from sources of bias, the knower always actively selects theories, methods, and interpretations. Thus, fact can never be separated from value. For the idealist, one uses one's own capacity for understanding to attempt to understand the meaning that others give to situations. Since the subject in the only one who can confirm or modify a researcher's understanding of the subject, the independence of the subject and the knower from coercion is fundamental to the process of intersubjective understanding.

Both the reaslist and the idealist models represent a solution to Kant's question, "What is enlightenment?" (Kant 1963). As Gutting (1989) notes:

> His famous answer was that enlightenment is man's release from his "inability to make use of his understanding without direction from another," an inability that was to be overcome by finding the courage to use one's