Sociological Jurisprudence

Juristic Thought and Social Inquiry

Roger Cotterrell

Routledge

In *Sociological Jurisprudence*, Roger Cotterrell convincingly argues that we need a broadly interdisciplinary, empirically grounded understanding of the social not only to understand how law actually operates in everyday life but to guide jurists in pursuing law's practical projects in the world. His insights are particularly useful for conceptualizing the very nature of a legal system given that legal and quasi-legal authorities inevitably operate in negotiation with each other and often do so without stable hierarchies to guide them. Providing both a summation of Cotterrell's prolific career and a forward-looking roadmap for scholars and jurists, *Sociological Jurisprudence* is a must-read for all who are interested in understanding and advancing law in the 21st century.

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Cotterrell offers a sustained statement of the vital role of the sociologically-informed jurist in exploring the general idea of law, and applies his account, suitably developed for the twenty-first century, to emerging transnational legal phenomena and the clarification of legal values. This book is essential reading for anyone interested in general questions about law, both within and across states.

Michael Giudice, *Associate Professor and Graduate Program Director, Department of Philosophy, York University, Toronto*

For much of the last century, jurisprudence has been pre-occupied by the question of its relationship to law as a social phenomenon. In this impressive volume, one the key figures in the debate builds a compelling case for the need for a sociological jurisprudence capable of articulating the idea of law amid diverse contexts and changing conditions for law's authority, systematicity and unity.

Nicola Lacey, *School Professor of Law, Gender and Social Policy, London School of Economics and Political Science*


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SOCIOLOGICAL JURISPRUDENCE

This book presents a unified set of arguments about the nature of jurisprudence and its relation to the jurist's role. It explores contemporary challenges that create a need for social scientific perspectives in jurisprudence, and it shows how sociological resources can and should be used in considering juristic issues. Its overall aim is to redefine the concept of sociological jurisprudence and outline a new agenda for this.

Supporting this agenda, the book elaborates a distinctive juristic perspective that recognises law's diversity of cultural meanings, its extending transnational reach, its responsibilities to reflect popular aspirations for justice and security, and its integrative tasks as a general resource of regulation for society as a whole and for the individuals who interact under law's protection.

Drawing on and extending the author's previous work, the book will be essential reading for students, researchers and academics working in jurisprudence, law and society, sociolegal studies, sociology of law, legal philosophy and comparative legal studies.

Roger Cotterrell is Anniversary Professor of Legal Theory at Queen Mary University of London. Educated as a lawyer and a sociologist, he has written widely on sociology of law, jurisprudence and comparative law and is a Fellow of the British Academy and of the (UK) Academy of Social Sciences.


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PREFACE

The term 'sociological jurisprudence', once familiar in the literature of legal thought, is now often neglected or misunderstood. What can it mean today? Using it here, I seek to link the ideas developed in this book with a century-old tradition of Anglophone jurisprudence. But the legal world today is very different from the one in which the American jurist Roscoe Pound famously announced his programme of 'sociological jurisprudence' at the dawn of the twentieth century – as a new approach to juristic theory and practice that, he claimed, would actively engage with the social sciences. Law in the twenty-first century is dramatically changed in its doctrines, institutions, and socioeconomic and political contexts. So too are juristic practice, legal philosophy, and the social sciences.

So, the orientation of sociological jurisprudence today must be very different from the one that Pound and his followers assumed. Nevertheless, this term is a good one to indicate the outlook that unites the studies in this book. Drawing them together here and integrating them, I hope to show that 'sociological jurisprudence' is a useful label for an approach to legal inquiry that is essential at the present time. The two words joined in it indicate the linked foci of the book: on the one hand, to explore the nature of *jurisprudence* as juristic knowledge and practice; on the other, to clarify the place that the *sociological* must occupy in the juristic enterprise.

With these foci, this book has two main aims. The first is to examine the nature and tasks of jurisprudence as a theoretical resource of jurists. Jurisprudence, I argue, is not identical with legal philosophy nor, indeed, with a social science of law. It is a theoretical tool oriented solely towards helping jurists to fulfil their practical professional tasks. These are not the tasks of every lawyer or other professional who works with law. Jurists can be seen as legal scholars with a particular concern for the general well-being of the idea of law as a value-oriented structure of regulation. So, I suggest, they should have a theoretical interest in such a general idea of law, yet always with a primary focus on practical regulatory issues in the particular legal system or systems that they serve.

A clear sense of the nature and purpose of jurisprudence depends on a clear conception of juristic work. This is not to suggest that one can really generalise about the work that jurists do in all legal systems – even all contemporary Western systems – because juristic roles in practice will be varied and the meaning of 'jurist' differs in different legal cultures. But progress can be made in thinking about jurisprudence if some explicit working conception of what a jurist is – an ideal type – is elaborated. Such an approach makes it possible to explore, for example, how far values should be the concern of jurists and in what ways, as they try to make the idea of law practically meaningful. The nature of jurisprudence and the juristic role is the focus of Part I of this book.

A second aim is to show that sociology – understood here not as a distinct, professionalised academic discipline but in a broad sense as any systematic, sustained, empirically oriented study of the social – can aid juristic tasks and, indeed, must do so. Sociological perspectives should be an important part of contemporary jurisprudence. How can such a claim be justified? It can be based in part on the incontrovertible fact that the context in which law exists is changing in very important ways and law itself seems to be assuming new forms or is, at least, being used in strikingly new ways. These changes in the context and forms of law open a space for new intellectual resources in juristic thought. They undermine old certainties, especially about the structures of legal authority and the nature of legal systems.

For example, how far can law still be thought of in terms of distinct *systems* when new or newly important forms of powerful, authoritative regulation are created outside – or at least are not limited within – the jurisdictions of nation-states, jurisdictions that in modern times have fixed the familiar, relatively settled boundaries of legal systems? How far is it becoming realistic to think of law in terms of diverse, intersecting, interacting networks of regulation rather than self-contained systems?

These developments disturb settled hierarchies of legal authority. How far is legal authority becoming a matter of negotiation between (or mutual support by) parallel or competing regulatory authorities existing in no settled hierarchy? How are jurists to deal with the phenomenon of legal pluralism, which requires some kind of normative order to be created within a plurality of legal regimes existing in the same social space? How can normative order be juristically established when relations between legal regimes are unclear or when the 'legal' character of some of these regimes is disputed and there is no unchallengeable juristic authority to end such disputes?

Many juristic issues present themselves once law spills out beyond the borders of state jurisdiction or where jurisdictions overlap or are of indefinite or contested scope. Can jurists assume an agreed understanding of what law is in such conditions? Can there be a single, governing concept of law to put to use in negotiating legal pluralism? Can such a concept be satisfactorily developed by specifying philosophically an a priori *essence* of law, so that particular kinds of regulation can be judged legal or nonlegal simply by reference to this? Alternatively, should the approach be first to study empirically the great variety of regulatory regimes that actually exist and make effective claims to authority – that is, claims generally accepted within the

regulated population? Generalising from such empirical evidence, should the jurist then assume a provisional working model of 'law' to facilitate initial juristic assessment of these regimes and a basis for negotiating with them?

The 'a priori' approach is in danger of failing to recognise processes of change occurring in the regulatory landscape and the need to engage juristically – indeed, experimentally – with them. The 'working model' approach is more realistic. It can support constant juristic sensitivity to wide-ranging sociolegal change and a sociological view of the contemporary regulatory landscape. Conceptual inquiries certainly remain very important on this view – but mainly to facilitate empirical understanding and wise legal evaluations and juristic strategies.

The chapters in Part II of this book all indicate that jurisprudence needs new resources. It must take full account of the social and political contexts in which problems about system, authority and plurality arise if it is to adapt to address effectively the developing transnational and international dimensions of law – as well as to recognise ways in which legal thinking inside nations is becoming diversified. Law's authority has long been parasitic on the political authority of the state, legitimated by democratic processes. But this may no longer be sufficient. It is necessary to consider more carefully how authority can arise and the various forms it can take. Sociological inquiry reveals authority being created in patterns of social interaction not necessarily regulated or supervised by the state and often unknown to or ignored or misunderstood by state officials and jurists.

Much juristic work is concerned with *values* that law serves and it might be thought that social science has little to offer the jurist here. Sociology is concerned with 'is' not 'ought', with understanding facts, not applying values. But I argue that a sociological perspective can clarify much about the role of values in law and society. This is the main focus of the chapters in Part III. Sociological inquiry cannot resolve value questions, but it can explain much about ways in which these questions arise, the forms they take, and why some become important to law and therefore prominent in juristic thought, in certain times and places.

Certain values are argued for in this book as particularly important to a juristic idea of law: values of justice and security as popularly understood in a variety of ways and solidarity as the value that law must serve if it is oriented towards integrating social life and limiting conflict. If efforts are made to promote these (or other) values in legal regulation, sociological resources may be important in helping to show how far and under what conditions these efforts can succeed. In this book, primarily Durkheimian sociological traditions are invoked to support such claims. Other sociological resources could certainly be used, but I try to show in Part III that Durkheimian ideas are especially instructive. They illustrate well some analytical resources of a sociologically oriented jurisprudence.

The following chapters can be treated to some extent as independent essays addressing different aspects of a set of interrelated problems. They indicate challenges facing jurisprudence and illustrate a sociological approach to this field. They are intended not to suggest that all problems of jurisprudence are sociological but rather to assert that a sociological perspective must be part of the jurist's outlook.

This is certainly not a claim that jurisprudence must accept dependence on any social science discipline (or, indeed, any other academic discipline). Its allegiance is simply to law as an idea of specific values to be embodied in regulatory practice. The task of the jurist is to expound and defend this idea. This entails recognising law's responsibility to reflect popular aspirations for justice and security and its integrative tasks as a general resource of regulation for important communal networks and for individuals interacting under its protection.

Despite advocating a sociological perspective, this book does not set out to explain comprehensively the social character of law in empirical terms. The juristic role is to promote law's well-being as an idea, not to observe it scientifically as a practice. But, in promoting law in this way, the jurist has to make the fullest possible use of systematic, empirical studies of law as a field of practice and experience, a social phenomenon in a social context. Sociologists need juristic knowledge if they are to understand law as ideas informing practice, but jurists need sociological insight if they are to fulfil their role in all its aspects.

Various chapters incorporate in extensively revised form material published elsewhere. I am grateful for permission to adapt content from the following journals and books: *Ratio Juris* (Wiley) vol 26 (2013) 510–22 (Chapter 3); *Jurisprudence* (Taylor & Francis) vol 5 (2014) 41–55 (Chapter 4); S. Taekema, B. van Klink and W. de Been eds, *Facts and Norms in Law* (Edward Elgar, 2016) 242–62 (Chapter 5); N. Roughan and A. Halpin eds, *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press, 2017) 20–39 (Chapter 6); S. Donlan and L. H. Urscheler eds, *Concepts of Law* (Routledge, 2014) 193–208 (Chapter 7); *Law & Social Inquiry* (Wiley) vol 37 (2012) 500–24 (Chapter 8); R. Cotterrell and M. Del Mar eds, *Authority in Transnational Legal Theory* (Edward Elgar, 2016) 253–79 (Chapter 9); V. Mitsilegas, P. Alldridge and L. Cheliotis eds, *Globalisation, Criminal Law and Criminal Justice* (Hart, 2015) 7–23 (Chapter 10); *International Journal of Law in Context* (Cambridge University Press) vol 4 (2009) 373–84 (Chapter 11); *Social & Legal Studies* (Sage) vol 20 (2011) 3–20 (Chapter 12); K. Dahlstrand ed, *Festskrift till Karsten Åström* (Juristförlaget i Lund, 2016) 111–29 (Chapter 14).

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1

INTRODUCTION

Recovering sociological jurisprudence

A view across a century

A century ago it was considered self-evident in the most progressive fora of Western legal scholarship that jurisprudence – juristic perspectives on the nature of law – would and should draw on the then newly emergent science of sociology, as well as on the developing social sciences in general. In a time of rapid legal and social change it could hardly be doubted, except by those who wished somehow to stop the clock of history, that legal scholarship needed resources from the new sciences of social life. By this means, legal thought could learn from social theory and reshape itself to confront the modern challenges for law arising in complex, diverse, industrialised Western societies.

At the beginning of the twenty-first century, however, social science has lost much of the lustre that, in its pioneer decades, attached to it as a new set of resources for understanding social life. Economics, not sociology, gradually established itself as the most prestigious among the various social sciences that could be called on to inform policy analysis. It seemed to offer objective technical knowledge to inform the management of modern capitalist societies, their increasingly elaborate financial systems, and eventually their interactions in a global system – this system appearing to have its own dynamics that have come to be called the processes of globalisation. But even economics – despite being attractively, from the policymaker's point of view, oriented to 'efficiency' – has now lost much of its prestige in many quarters as it has seemed to fail in predicting far-reaching economic crises and offering clear solutions to them or ways to prevent their recurrence.

Sociology was once seen as the master social science, embracing all others, because it studied social relations *in general* or 'society' *as a whole*, rather than specific aspects of society (e.g. the economy or polity) or specific types of social action (e.g. economic calculation). But it has tended to retreat from its early ambition to develop

firmly empirically oriented, historically grounded social theory, that is, theory that could map the broad contours of social change, the basic frameworks of order and cohesion enabling societies to exist, and the shifting patterns and structures of social relations. Instead, sociology has become, to a large extent, a fragmented intellectual discipline, split into distinct specialisms (e.g. sociologies of race, gender, class, sexual orientation, work, education, organisations, politics, religion, deviance, family life, popular culture). And the field of social theory has often been relinquished to philosophical speculation.[1]

However, insofar as jurisprudence has been seen as theoretical knowledge aimed at giving jurists an overall perspective on law in general (at least, law as understood in the legal systems the jurists serve), ambitious empirically oriented social theory, giving a perspective on social existence at large (not any particular region of it), has always been seen as potentially the most useful sociological contribution to jurisprudence. The generality of social theory's perspective on social life could mirror and inform the generality of jurisprudence's perspective on the whole life of law as jurists encountered it. Jurisprudence, on this view, ought to be able to draw on empirically oriented social theory to put its perceptions of law into a larger socio-historical perspective, just as it ought to draw on various strands of philosophy to put them into a broader intellectual, political, and ethical context.

Amenable to these ideas, jurisprudence, a century ago, looked to sociology for perspective. Thus, the early outlook of Roscoe Pound's sociological jurisprudence was significantly influenced by a broad idea of 'social control' (Pound 1942), especially as expounded by the pioneer American sociologist Edward Ross (Ross 1901; Hunt 1978: 19–20). Ross analysed types of such control (e.g. public opinion, custom, education, personal beliefs, moral sentiments), which he saw as guaranteeing the cohesion of social life in modern societies. He identified law as especially important among them – 'the most specialised and highly finished engine' of social control (Ross 1901: 106).[2] Thus, for jurists seeking to locate their subject, law, in a larger intellectual universe, sociology could seem to offer the potential to tie legal scholarship firmly into much wider regions of social inquiry; and it could validate law as an important topic for social analysis. As the epitome of a new kind of social inquiry offering enlightenment about the nature of contemporary society, sociology could help to place jurisprudence alongside the other leading sciences of modern life. To the extent that jurisprudence was sensitive to the new currents of social science, it had the prospect of being supported by them.

Today, sociology can still perform something of this integrative function for jurisprudence but only if it is appreciated just how radically the context for this has changed. Current resources of sociology for law are entirely different from what they were when the idea of a sociological jurisprudence was introduced in the Anglophone world and

1 See e.g. Elliott and Turner eds 2001, in which many chapters are devoted to the work of theorists who would usually be characterised as philosophers.

2 On the complex ambivalence of Ross's concept of social control, none of which is reflected in Pound's appropriation of it, see e.g. Ross 1991: 235–40. Social control became an enduring if variously interpreted concept in sociology, also widely invoked in sociology of law. See especially Black 1976; 1998.

explored in continental Europe in the decade before World War I.[3] Also, the nature of jurisprudence – its scope, tasks and relation to other spheres of knowledge – is now understood very differently. The idea of jurisprudence as the jurist's theoretical understanding of the nature of law needs much clarification after a century of transformation of legal theory and of reassessment of the resources on which it can draw.

Sociology in the study of law

Sociological jurisprudence was, and remains, an enterprise of *jurists* appealing to social science for aid in their own projects of analysing legal doctrine and institutions and improving juristic practice. But social scientists interested in law have certainly not remained content just to be on call to serve such juristic purposes. Sociologists have taken law as a topic of research for their own disciplinary projects. The special scientific enterprise of sociology of law evolved during the twentieth century, initially as a mainly speculative, theoretical inquiry built on the ideas of such thinkers as Karl Marx, Émile Durkheim, Max Weber, and Ferdinand Tönnies and, later, Georges Gurvitch, Talcott Parsons, Theodor Geiger, and Niklas Luhmann. However, from around the midpoint of the twentieth century, in the United States, Europe, and elsewhere, detailed empirical studies of the working of legal systems began to proliferate – especially studies of courts in operation, the varieties of lawyers' practice, the work of administrative and enforcement agencies, the processes of law creation, and citizens' experience of law. This research – often now termed 'law and society' scholarship or sociolegal studies – soon drew on the resources of all or any of the social sciences and has flourished especially in Anglophone countries. Law has become a major focus for empirical social scientific research. But this burgeoning research enterprise has rarely made links with jurisprudence.

As sociology of law has increasingly drawn on the social sciences at large, it has seemed unimportant for most purposes to distinguish it from explicitly multidisciplinary 'law and society' or sociolegal studies. So 'sociology' as a resource for research on law is now often seen in practice as a 'transdisciplinary' form of sociology. In other words, it is a compendium of theory, methods, and traditions of inquiry that, while certainly owing most to sociology's heritage as an academic discipline, is not tied to the protocols, priorities, and professional outlook of that discipline or any other. Instead 'sociology' in this context can be taken to refer to any inquiry that seeks to study some facet of the social world (for example its legal aspects) systematically and empirically, with a serious concern to identify *social variation* (Cotterrell and Selznick 2004: 296) – that is, the characteristics that distinguish social environments from one another – and the effects and causes of that variation. This is the way in which sociology is understood in the context of this book.

While most sociological study of law, in this sense, has studied observable social action (e.g. the practices of lawyers, police, administrators, legislators, litigants, or

3 See Pound 1907. The most influential of the theories of the 'free law' school in Germany, Austria, and France in the period before World War I pointed strongly to the need for sociological resources to be used in juristic practice and judicial decision-making: see generally Wigmore et al eds 1917.

citizens seeking informally to resolve disputes or get redress), there is no reason why *legal ideas* cannot be studied sociologically. Indeed, they should be so studied, if sociological inquiry is to be able to portray law realistically as practice and experience. It is possible, for example, to examine why and how legal ideas emerge in particular times and places, why certain issues become legally significant while others do not, why legal doctrine develops in certain directions rather than others, why legal ideas sometimes seem to reflect social change and sometimes seem to resist it. Sociology can, in such ways, illuminate the progress of legal thought in particular sociohistorical contexts and offer insight into legal problems.

There can – and should – be a sociology of legal ideas, and it can even be said that sociology of law is not complete without it. Sociologists need to study law as doctrine (rules, principles, concepts, values) as well as law as a focus for official or citizens' action if they are to be able to take into account juristic understandings and engage with law as normative ideas informing practice and experience.

Crucially, however, a scientific sociology of legal ideas is not, in itself, sociological jurisprudence. While in practice there might be much overlap in approaches and results, these are in essence different projects. A sociology of legal ideas has to justify itself as a disinterested, explanatory, social scientific study – although one that may often produce knowledge of great juristic interest. It is true that legal scholars have contributed to the development of sociology of law, turning themselves into social scientists for the purposes of inquiry. And sometimes their intention in doing so has been to produce scientific knowledge of the social character of law that might be juristically useful.[4] But sociological jurisprudence as a scholarly enterprise cannot purport to be a disinterested social science. It is necessarily always in the practical service of the jurist. Today, as a century ago, it needs to be understood not as a science in itself but merely as a way of doing jurisprudence, a way of intellectually informing juristic practice, contributing to the fulfilment of practical juristic tasks.

In this perspective, sociology, like philosophy, history, or any other field of knowledge, is just a resource on which the jurist – magpie-like – can draw for inspiration and enlightenment in the practical tasks of making law work. Jurisprudence, seen in this way, is not an academic discipline but a kind of bricolage – an assembly of bits and pieces of insight about law that can ultimately be of potential value for juristic practice, putting it into a broadening perspective.

This view of jurisprudence is developed in Chapter 4. A full justification of it, however, depends on an understanding and defence of the very specific role of the jurist which it presupposes. Chapter 3 is devoted to exploring this role. And, as a preliminary to that, an even more basic inquiry has to be pursued: it needs to be asked what special expertise jurists can and should claim and how far their expertise

4 A classic case is the work of one of the founders of sociology of law, the Austrian jurist Eugen Ehrlich, whose pioneer sociology (Ehrlich 1936) was intended in part to produce social knowledge that could inform the operation of state law, especially as applied by state courts. But, as sociology, it set out to explain the regulatory structures of social life, finding them in diverse forms of social association with variable relations to state law.

is to be understood as the (complex and perhaps elusive) expertise that every lawyer professes. So, in Chapter 2, the nature of lawyers' expertise is considered, and this exploration sets the scene for the discussion in the following two chapters of the juristic role – presented as an ideal type, not as an attempt to generalise about jurists in all times and cultures. Then, in Chapter 5, discussion returns to the question of the place that sociological inquiries can and should occupy in juristic practice.

In the rest of the present chapter, and as a prelude to these further discussions, two remaining questions need to be answered. First, how does the general conception of the nature of jurisprudence introduced earlier and elaborated later in this book correspond with currently dominant views of theoretical inquiries in law? In other words, how does jurisprudence, at least in the contemporary Anglophone world, stand? Second, what can be learned about the possibilities for new linkages between jurisprudence and sociology today from past experience of efforts to develop a sociological jurisprudence? What is worth retrieving (or perhaps reinterpreting) from this historical experience, and what past mistakes need to be avoided (or perhaps reassessed in the light of changed conditions for both jurisprudence and social science today)?

Jurisprudence declining, theory flourishing?

'It is ironic that at the same time that jurisprudence in the sense of a formal subject for study seems to be vanishing from the sight-line of the law school, theory has become more and more important to the legal academic' (Leith and Morison 2005: 147). This view, recently expressed in a United Kingdom context, entails two claims, both controversial but both substantially correct.

The negative claim is that jurisprudence as a taught subject for prospective lawyers has lost its way. Its purpose has become unclear and therefore its position in legal education has become uncertain. Indeed, this uncertainty may always have existed. A general, rather vague idea of jurisprudence as the 'lawyer's extraversion' (Stone 1968: 16) – that is, a theoretical perspective affirming the unity of the juristic craft while linking it to larger bodies of knowledge and wider culture – might have significance; in certain circumstances it might help to enhance the status of lawyers' legal thought and practice in both professional and political terms (Cotterrell 2003: 11–13). But jurisprudence has perhaps become less amenable to these kinds of professional and political uses – whatever their significance in the past – as it has been transformed in the Anglo-American legal world in the second half of the twentieth century into a self-consciously professionalised legal philosophy. As such, it presents itself as a branch of philosophy seeking legitimacy from the academic discipline of philosophy, rather than from any assumed direct practical relevance to lawyers' professional experience and thought. In Chapter 4 this transformation of jurisprudence into a subfield of philosophy is analysed and it is argued that while the benefits of this development in terms of philosophical credibility and status may be undeniable, the consequences for jurisprudence *as a resource for jurists* have been much less beneficial.

If legal philosophy essentially seeks intellectual legitimacy from the discipline of philosophy rather than from the requirements of lawyers' legal studies, its position in the law school is likely to be insecure. As jurisprudence in the law school curriculum has significantly allied itself with academic philosophy (for which law is just one topic for philosophical study among others) its relevance for juristic legal studies has become uncertain. Insofar as legal philosophy chooses its topics of study for their philosophical interest rather than for their juristic importance in the world of legal practice, its intellectual orientation can easily appear to be at a tangent to the jurist's or lawyer's professional orientation – a situation that has been explicitly recognised (and even welcomed) by some leading legal philosophers.[5]

The argument developed in subsequent chapters of this book is certainly not that contemporary legal philosophy is unimportant to jurisprudence; it is merely that these intellectual enterprises should not be confused. Jurisprudence is too important to be allowed to wither because its purpose has ceased to be understood. The decline of jurisprudence might easily appear as an unacknowledged marker of the loss of a clear, unambiguous recognition of the distinctive responsibilities – intellectual, ethical, political – of juristic work itself. The place of jurisprudence in the formation of the lawyer ought to be, amongst other things, a reminder that training in the arts and crafts of legal practice is not only a matter of technical efficiency in the interpretation, manipulation, and organisation of rules (important though that technical competence is).

It should be a means of affirming that (i) for all lawyers law is ultimately to be understood as involving value choices (expressed especially in the form of legal rules) for which they must take responsibility, and (ii) that the integrated, value-oriented *idea of law* (complex, fluid, and variable as that idea is) is something to be nurtured and endlessly rethought by those legal professionals who are willing to undertake the role and responsibility of jurists.

Much of what follows in this book – especially in the chapters in Part I – is intended to elaborate this now often underemphasised idea of a specific juristic consciousness. It follows that jurists – for whom jurisprudence is a necessary theoretical resource – are certainly not restricted to academic specialists who profess jurisprudence as a distinct law school subject. Indeed, to the extent that taught jurisprudence has been turned into professionalised legal philosophy, jurists will not necessarily and certainly not always be found among self-identifying jurisprudence specialists. They will be found among all kinds of committed lawyers with theoretical sensibilities who seek to develop broad perspectives on their intellectual practice in law. Today there are many such lawyers. Hence, as the earlier quotation states, 'theory has become more and more important to the legal academic', but also to practising lawyers, judges, and other professionals working with law who share the juristic outlook.

Juristic theory is, however, only one kind of legal theory and – as noted earlier – is a bricolage kind of knowledge packaged to be a useful compendium of insights for

5 See Chapter 4, pp 54–5.

juristic purposes. Theory can be of other kinds. It can also be theory that structures, orients, and legitimises distinct academic disciplines or knowledge-fields organised for purposes of scientific or philosophical inquiry. So, legal theory will mean something different in the context of legal philosophy from what it means for jurisprudence. In one formulation, it might mean 'the clarification of legal values and postulates up to their ultimate philosophical foundations'.[6] Similarly legal theory in sociology of law serves different purposes again; here it is scientific theory – empirically oriented, explanatory theory of law as a social phenomenon – properly oriented to the needs of disinterested social scientific inquiry.

All of these kinds of academically developed theory can sometimes be useful for juristic purposes but their nature and the reasons for their development should not be confused. The fact that they so often have been confused has resulted in much fruitless argument about what is 'genuine' legal theory or what can properly be admitted to the pantheon of theoretical inquiries about law.

On the one hand, legal theory is many mansions, juristic, philosophical, and social scientific. On the other hand, these distinct theoretical endeavours do not exist in inevitable isolation from one another. There is no reason why legal theory developed in different disciplines and practices cannot be used in common debates around law, as long as the purposes for which theory has been created in different regions of intellectual life are recognised and respected.

Revisiting early sociological jurisprudence

A century ago jurisprudence – as juristic legal theory – had a very different intellectual profile as a knowledge-field from the one it has today. Before its modern professionalization as a branch of the academic discipline of philosophy, it was a relatively open intellectual terrain in which the speculations of jurists on the nature and functions of law could be gathered and compared with scant regard to any need to organise these speculations as a rigorously defined discipline, unified by common aims, accepted methods, and tightly policed canons of philosophical rigour. It was not necessary to have been trained as a philosopher to be able to contribute to jurisprudence. One needed only to be a jurist with something of interest to say about law as a focus of juristic practice and social experience. One could, indeed, 'philosophise' about law without being a philosopher, and for many jurists their speculations about law in general were merely a complement to their practical activities in expounding legal doctrine or promoting law reform.

So, it was easy to use the terms 'jurisprudence' and 'legal philosophy' interchangeably to indicate a potentially unlimited range of topics for and approaches to speculation about law and to include in the scope of jurisprudence any studies in political theory, social theory, moral philosophy, ethnology, political economy, history, or other intellectual fields that could be considered to be relevant to the practical

6 Gustav Radbruch, quoted in Friedmann 1967: 4.

workings of law (e.g. Berolzheimer 1912). Such an approach courted many dangers – of dilettantism and superficiality – and the philosophical professionalization (and narrowing) of Anglophone jurisprudence from the mid-twentieth century, influenced by English analytical philosophy, was widely welcomed by scholars acutely conscious of these dangers. This development was initially seen by some of its supporters as helping legal studies to achieve full academic respectability in the university environment through their demonstrable disciplinary integrity founded on unifying, sophisticated legal theory and systematic, explicit methods of legal analysis.

From another point of view, however, the philosophical professionalization of jurisprudence could often be considered an impoverishment. Along with much disorganised, derivative, and directionless literature of bricolage jurisprudence created in the period before this modern professionalization, some works of great and wide juristic vision, insight, and imagination were produced.[7] The openness of 'pre-professionalised' jurisprudence at least allowed juristic thought to engage freely with many intellectual fields: the consequence was the easy production of hybrids such as historical jurisprudence, ethnological jurisprudence, psychological jurisprudence, and sociological jurisprudence. In all cases their potential was greater than their achievement, yet their greatest scholarly products are properly seen as juristic classics.[8]

What should be learned from the development of a sociological jurisprudence during this period prior to modern philosophical professionalization? What insights did it establish that are of lasting value? And what prevented its fuller engagement with modern social studies of law? This last question will be looked at in some detail in Chapter 5 as a prelude to considering how sociology today can be used for juristic purposes. Here it is important to focus more on the other questions – especially because few attempts have been made in recent times to defend the early projects of sociological jurisprudence, as set out most famously and influentially in Roscoe Pound's work.

Pound's reputation has suffered primarily because his programme of sociological jurisprudence was overtaken by more radical intellectual enterprises (first, legal realism and, second, sociology of law) that revealed it as conservative and intellectually compromised although it had at first been seen, with some justification, as daring and innovative (Wigdor 1974; Hull 1997; Hunt 1978).[9] Legal realism, with its detached, unromanticised view of the judicial process and its willingness to emphasise the all-too-human limitations of judges, was rejected by Pound insofar

7 Even after the advent of contemporary positivist legal philosophy, this continued to some extent. See e.g. Friedmann 1967, a wide-ranging, consistently thoughtful survey text that can still be consulted with profit.

8 A small, indicative sample from this literature might include Gierke 1950, Jhering 1913, Petrazycki 1955, Duguit 1921, and Gurvitch 1932.

9 Pound's work was extremely influential in popularising the idea that law's normative reasoning and processes should not be regarded as intellectually self-contained but must be informed by empirical social understanding. For recent reevaluations of Pound and early sociological jurisprudence in this respect in various contexts see Knepper 2016, Brock 2011, Astorino 1996. See also Simon 2008 (calling for a renewed sociological jurisprudence); Fischman 2013 (importance of linking normative legal analysis and empirical social research).

as it challenged his ultimate faith in common law judges' ability to safeguard the virtues and values of law. Sociological jurisprudence initially called in aid sociological insights into social conditions to reveal inadequacies in the administration of justice by courts and in the social policies that both legislatures and courts seemed to promote, but ultimately Pound saw judicial wisdom and the judicial function as the irreplaceable heart of Anglo-American law. So, sociological jurisprudence, as Pound promoted it, aimed to serve and improve the judicial process but not to undermine a basic faith in its soundness.[10]

Pound saw less of a threat from developing sociology of law, which he associated most often and most approvingly with Eugen Ehrlich's pioneer empirical studies of social norms (in Ehrlich's terminology 'living law') – norms that, for Ehrlich, courts and legislatures must take into account if state law is to work effectively (Ehrlich 1936; 1917: 77–81). But the effect of the development of sociology of law was eventually to bypass jurisprudence – making a sociological jurisprudence seem irrelevant – because legal sociologists rightly saw that legislators, not courts or jurists, would be the most powerful agents of change in modern law, and sociology of law could have most relevance and power if it guided and critiqued legislative and administrative action on the basis of empirical research, rather than focusing on the interpretation of legal doctrine by judges as Pound's sociological jurisprudence tended to do.

The major limitation of Pound's sociological jurisprudence in the context of its time was its almost exclusive court focus, even though in his early work he called on legislatures to correct the failings of courts and help to adapt the law to emerging socioeconomic conditions. By contrast, modern sociology of law, sociolegal studies, and 'law and society' research have developed a much wider view of law, certainly not ignoring the work of courts but seeing law existing in many other environments than the courtroom. Indeed, one of the primary contributions of modern empirical sociolegal research has been to show that much experience of law and much of the operation of law takes place entirely outside the purview of courts. Yet the early history of sociological jurisprudence shows it as very strongly associated with problems of judicial decision-making.

Pound's work puts immense confidence in the ability of judges, properly guided and sometimes corrected, to develop law in accordance with social needs (with those needs perhaps clarified by using the resources of sociology). But this is not merely an Anglo-American common law outlook. Comparable developments in continental Europe early in the twentieth century show a similar orientation. The theorists of 'free law finding' (*freie Rechtsfindung* or *libre recherche scientifique*) in Germany, Austria, and France (Wigmore et al eds 1917) argued that where gaps existed in the law as expressed in legislation or code provisions, the judge should fill those gaps creatively and responsibly, balancing the interests at stake within the

10 Tidmarsh (2006: 522) notes that Pound 'always believed that an independent judiciary should be the principal organ for transmitting social scientific principles into action'.

framework of the legal provisions, and sociology would be among the important resources available to the judge in doing this.[11] Judges should not 'mechanically' apply legal provisions without carefully considering their social effects. The 'free law' arguments of continental European jurists were in this respect essentially identical with Pound's (1908) strictures against the myopic 'mechanical jurisprudence' of some American common law judges.

Moral distance as a juristic problem

Although, in its time, the fixation of sociological jurisprudence with the judicial function may have been a limitation (putting too much ultimate faith in judges and too little emphasis on the modern creation of law outside courts), it might not be seen in quite the same way today. The pervasive loss of faith in legislation as an instrument of change, the recognition of the limits of governmental regulatory power, and the ebb and flow of distrust in administrative processes and bureaucracies[12] have all tended to renew scholarly interest in debating how far courts (or less formally organised tribunals) might be intermediaries of some kind between the political regulatory processes of the state and the expressed or unexpressed interests and aspirations of diverse social and cultural groups.[13]

Courts surely have many inherent inadequacies in taking on any such intermediary role. But the idea of identifying some locus at which state regulation and everyday social experience are brought into direct, mutually respectful contact is not unimportant. What the sociological jurists sensed was a need for some kind of ongoing, regular *communication process* between the perceptions and ambitions of regulators and the experience and expectations of the regulated. The problem of moral distance (a many-sided problem of communication failures, inadequate information, regulatory hubris, and frequent popular alienation) between state policymakers and regulators, on the one hand, and the populations they purport to regulate, on the other (Cotterrell 1995: 302–6), seems to grow more serious as contemporary societies become more complex and diverse and as transnational pressures influence regulatory policies in many states seemingly irrespective of the wishes of their populations.

11 In a common law context outside the United States, the writings of the Australian jurist Julius Stone, following Pound's lead, 'suggested that the courts should identify the social interests or demands underlying legal disputes and . . . strike an appropriate balance between them . . . [so that judges would] avoid relying on categories of illusory reference . . . and . . . articulate . . . the real reasons for their decisions' (Aroney 2008: 132).

12 For a sample of views see Rottleuthner 1989, Teubner 1992, Yeager 1993, Delgado and Stefancic 1994, Banakar 2016: 55–8, noting (p 57) that the 'insight that law was not the effective vehicle for social engineering which many public policymakers and legislatures had envisaged or hoped for is shared commonly by various approaches within legal sociology'.

13 See e.g. Collins 1986 and Redlich 1988 (courts as agents of democracy), Galanter 1983 (courts' diffuse social influence), Mirchandani 2008 (social role of 'problem-solving' courts), Dumas 2018 (legislature and courts can represent the same public but in different ways).

Sociological jurisprudence, in implicitly recognising aspects of the problem of moral distance, assumed that well-functioning courts with able, socially aware judges – 'the intellectual and social flower of the nation', as Ehrlich (1917: 74–5) expansively put it – could be part of the answer. It never really tested this assumption and, in Pound's case, dismissed the American legal realists' efforts to do so (Pound 1931). So its answer to the problem of moral distance remained undeveloped and ultimately reliant on an unexamined faith.

Despite such limitations, what is of continuing importance about early sociological jurisprudence is that it saw problems of relating state regulatory ambitions to popular aspirations and experience as central to *juristic* responsibilities (perhaps the most important part of them). By contrast, sociology of law has often tended to see these only as *political* problems about the efficient formulation and implementation of state regulation, on which social science might advise. So, the fundamental lesson of sociological jurisprudence is that the need to make legal regulation socially responsive, properly informed about social conditions, and aware of popular sentiment and experience, is a necessary and fundamental concern for jurists, and not just for politicians, legislators, and administrators.

The need to obtain reliable empirical social knowledge and insight to address the problem of moral distance therefore points towards the significance of sociology in the administration of justice at all levels, as well as in the main processes of state law-making. It points to the importance of renewing and refurbishing some aspirations of sociological jurisprudence, but with a much more serious and sustained engagement with contemporary social science than happened in Pound's time.

It is, indeed, easy to pinpoint the stage in Pound's work at which the appeal to social science was permanently discarded (though he continued to label his jurisprudence as sociological). Pound saw the task of law as to balance conflicting interests – individual, social, and public – that were being pressed for recognition and protection. Law selects the interests it will recognise, the means of weighing them, and the degree of protection it will give to them. The crucial problem for law – and for sociological jurisprudence – is how to identify interests arising in social life and confronting the legal system.

An ambitious and genuinely sociological approach would have been to look behind the interests being presented directly by litigants in court so as to identify the social forces that such interest claims reflected. Some 'free law' theorists advocated just such a step. But Pound, no doubt conscious of the pioneer limitations of early twentieth-century sociology, stepped back from using sociological inquiries to address juristic problems directly. The sociological vagueness and opacity of the concept of 'interest' would be bypassed, in his work, by the strategy of looking merely at the kinds of interests pressed in court and in legislative lobbying.

Instead of a rich picture of social life, the 'scheme of interests', as Pound called it, would represent claims actually already brought to the attention of the judicial and legislative systems. Sociological jurisprudence, in this way, turned in on itself, away from sociological inquiry and back to the existing experience of lawyers and officials. Despite the limitations of social science at the time, it is not obvious that early sociological jurisprudence had to sheer off its sociological promise so completely in this way.

Legal values and sociological jurisprudence

Classic sociological jurisprudence developed some insights that need re-emphasising. Pound rightly stressed that law is much more than just rules. Today, jurists and legal philosophers are familiar with Ronald Dworkin's (1978) critique of the 'model of rules' as the essence of the concept of law and his claim that law must also be seen in terms of principles, standards, and values. But while this critique has usually been understood as part of a debate about the intellectual identity of law and the criteria of unity and autonomy of a legal system, for Pound the reason for insisting that law was not just a matter of rules was to present law realistically as part of the value structure making up the civilisation (we might now say the culture) of the society in which it exists (Pound 1923: 141–51; 1958: ch 8).

So, law is less a matter of rights than of the recognition and ordering of interests by society's regulatory institutions. And law is directionless if thought of in terms of rules unless the rules link to principles and standards guided by and reflecting societal values. The experience of developing legal ideas within a larger framework of cultural values (what Pound called the jural postulates of law) is as important to the logical structure of law as is the positivist ordering of rules in juristic categories.

While sociology of law can concern itself with legal values, it cannot directly guide their appropriate development. It can only try to clarify the context of value debates, the conditions under which such debates seem relevant, and the consequences of seeking to implement particular values through law.[14] But jurisprudence, serving the jurist's professional commitment to law as an affair of values, can and should use the resources of sociology, along with any other intellectual resources that can be helpful, to inform its project. This does not mean that sociology, in the transdisciplinary sense proposed in this chapter, should be put into a distinct compartment on the jurist's shelf of available resources, separated from other potential inputs into juristic thought. The sociological perspective cannot monopolise juristic thought but has to *inform* all aspects of juristic thinking. The jurist has to understand law as a social phenomenon using all available resources for studying that phenomenon empirically, seeing it as a particular regulatory aspect or field of social life.

This is why sociological jurisprudence is not *a particular kind* of jurisprudence or a particular theoretical region within jurisprudence. It is not, for example, a 'third theory' of law to be set alongside (and quarantined from) legal positivist theory and natural law theory.[15] These other approaches to theory need also to be sociologically informed and

14 See especially Chapters 5 and 12.

15 This kind of categorisation is widespread in the literature, often as an attempt to mark out a secure place for sociological approaches in jurisprudence but also often with the implication that they are separate from other approaches. Thus Tamanaha 2015 sees 'social legal theory' as a 'third pillar of jurisprudence', requiring recognition and development as a sociological jurisprudence; Stone 1968: 18–20 distinguishes sociological or functional jurisprudence (or law and society), analytical jurisprudence (or law and logic), and critical, censorial, or ethical jurisprudence (or law and justice), consigning the treatment of each to separate books. Separate classification of sociological approaches from other jurisprudential approaches, however, facilitates their marginalisation in jurisprudence.

subjected to sociological critique, just as sociological perspectives need to be informed and critiqued by them. The term 'sociological jurisprudence', ideally, should indicate no more than jurisprudence *in general* that is aware of its responsibility to link law's enduring value commitments to a systematic, empirically grounded understanding of the diverse contexts of legal experience.[16] That is, it should indicate jurisprudence consciously oriented to address the need for sociological awareness in all its inquiries.

Part II of this book attempts to survey some newly prominent conditions that make this awareness especially important today. In the book's final part, an effort is made to illustrate, through particular inquiries about contemporary law, how sociological insight can illuminate specific juristic problems or clarify various fields of juristic interest.

How then should contemporary sociological jurisprudence differ most fundamentally from its pioneer forms? Above all, it must engage with sociological research far more seriously than it did a century ago, when there was perhaps some excuse for underestimating sociology's potential, given its fledgling intellectual status, the relative paucity of its empirical research, and the hesitant steps of its early creators. Today, the scope and ambition of sociolegal inquiry is immense. There is no shortage of theoretical and empirical contributions to the social study of law.

It is not necessary, however, to become a practising social scientist in order to be a jurist and to use and contribute to jurisprudence. What is necessary is to adopt a consistent interdisciplinary sensitivity; to read widely and carefully in sociologically oriented studies of law; to be prepared to explore and to seek out helpful guides; above all, to discard any idea that jurisprudence can be a self-contained discipline, a closed-in body of knowledge not dependent for its vitality on the progress of social inquiry. The closely interlinked studies in the rest of this book are intended to suggest how that broad sensitivity can be nourished in jurisprudence and to offer a sample of current work that shows some of the urgent challenges that jurisprudence faces today as well as some of the resources available to help in meeting those challenges.

Ironically, this effect may in turn tend to marginalise jurisprudence from other fields of legal inquiry in which insights from social science have now become familiar components of study.

16 If jurisprudence fully and universally embraced this responsibility, the consequence would be that the term 'sociological jurisprudence' would become redundant. For the present, however, it signals an emphasis in (not a branch of) jurisprudence that, so this book argues, needs to be nurtured and generalised.

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