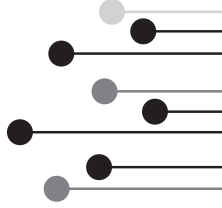


Law and Society

An Overview



Introduction

Any attempt to introduce something called the *sociology of law* has to deal with three difficulties right off the bat. These difficulties are encapsulated in the following three questions:

- What is law?
- What is sociology?
- What is the relationship between law and society?

Different perspectives and approaches give different answers to these questions. The massive plurality and complexity of human society gives rise to an equally complex and sometimes bewildering array of conceptual approaches for dealing with these and other questions. For now, it is crucial to answer these questions as straightforwardly as possible, along the way giving the reader a taste of the diverse ways law, sociology, and their relationship can be understood. This will also require bringing in selected writings from a very large literature, which has accumulated since the time of the ancient Greek philosophers (from around 300 B.C.).

From Savagery to Civilization: A Brief Overview

Long before sociology was institutionalized as a scientific discipline (which occurred in the late 1800s), philosophers, historians, and liturgical scholars turned explicit attention to the ways in which human beings organized their collective lives. Considering the development of human society as the transition from savagery to barbarism to civilization (Morgan, 2000 [1877]), the best historical and anthropological evidence indicates in the very earliest stages of savagery, before the advent of written language, human life was individualistic, episodic, and brutish. There was no real notion of propriety or the *ought*, that is, of morality. There was only the survival of the fittest where the strongest and most cunning survived for another day to pursue their life projects. In the state of nature, there were no *facultates morales*, that is, no rights to speak of (Olivecrona, 1971, p. 278).

This is the condition of natural right, that is, the ability to do what is necessary and expedient for the moment to ensure survival. When individuals did congregate together, it was usually simply for mutual protection, and the earliest human groupings consisted of small clans linked by blood (the so-called *ethnos*, the most primitive basis upon which society is organized). There were no broader social institutions to speak of, and no real mechanisms for holding people to certain standards of conduct beyond what could be enforced locally and face-to-face. With only physical (that is, biological) factors at play, at this early stage of human development this often meant *might makes right*.

By the time of the earliest glimmer of human organization, it was always on the basis of somebody stepping forth and taking control, either because of his or her sagacity, fighting prowess, charisma, or other reasons deemed important to the group. This is the beginning of the recognition of superiority, and it leads to ruling by decree. The ancient form of control and organization of a group of individuals is custom and traditions passed across the generations orally, through the folk stories told about great leaders who were celebrated and sometimes feared (Durkheim, 1965 [1915]; Tarde, 1903).¹ The first rules, even stretching back to the very earliest human organizations, were what Sumner (1906) called “folkways,” that is, the norms and customs of a group of people living together. These folkways represent the particular customs of the group, which emerged over time and which are considered efficacious as guidelines for navigating one’s way through a harsh physical environment.

Morgan (2000 [1877]) suggests that following the earliest stages of development (of savagery and then barbarism), the era of civilization began roughly around 850 B.C. This is the period in which the Homeric poems emerged. This artistic achievement represents the evolution and upgrading of the human intellect. This movement into higher art—compared against, say, more rudimentary art forms such as banging on a tree stump to make sound or making simple carvings on a cave wall—represents, as well, a stage of development in which humanity has relieved itself of the constant concern with the physical demands of living. In other words, some groups and persons discovered leisure and hence had time to contemplate how things worked and created new ways of communicating these insights and ideas to others. These creative elements—in diplomacy, in warfare, in food quests, in the arts—position persons so endowed to step forward and gain a following. Such individuals became leaders and kings, and their words were influential in directing the wider groups with whom they were associated.

In essence, with human evolution and the invention of written language, in the move from barbarism to civilization the customs and ancient traditions of a people were *thingified* via their textualization (into codes, tablets, doctrines, statutes, ordinances, or laws). The original reliance on custom, tradition, and the decree of leaders—previously carried orally—gives way to more formalized understandings of the prescriptions and proscriptptions of the group as embodied in the written word. This movement

is also associated with the rise of the state, that is, an organized system of government, which claims control of a territory and enforces laws or statutes through the specialized work of a constabulary force. The state emerged slowly, in the transition from nomadic to sedentary life. The sedentary stage, where groups of persons settle particular territories and call these home, is associated with the rise of property and the requirement to protect it against outsiders who did not contribute to its production. The rise of the state puts greater emphasis on social organization, and hence new social forms arise, the most significant of which is the bureaucracy. Governments are bureaucratic to the extent that rules pertaining to all things of importance to the ruling class and its subjects are specified in codes and backed by a coercive power vested in specified government functionaries.

What Is Law?

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How far back in time do such “imperatively coordinated associations” (Weber, 1978 [1922]) go? As noted above, even as Lewis Morgan (2000 [1877]), in his magisterial work *Ancient Society*, claimed that the epoch of civilization commenced around 850 B.C. with the early Greeks, he also noted that historical eras are primarily intellectual tools for organizing the complex and difficult subjects of human history. This means that even though an era is said to begin in a particular place or at a particular time, the nature of social development is such that there are glimpses of pertinent lines of development within the social sphere in question that predate the beginning of any historical era. What this means is that the great majority of social phenomena do not arise miraculously in an instant, but are the product of a long line of societal development whose earlier elements or fragments may be almost unrecognizable in comparison to the mature form. Given this caveat, and as far as the development of law goes, there is evidence that legal codes can be traced at least as far back as southern Mesopotamia, specifically ancient Babylonia and Hammurabi’s Code circa 1750 B.C. Hammurabi was king of Babylonia during this time, and his Code consisted of some 250 laws covering all manner of public, private, and criminal activity.

Based partially on Karl Polanyi’s (1977) study of ancient Mesopotamia, Dale (2013) discussed many aspects of the Code in relation to rules and regulations regarding economic activities in Babylonia. Rather than the modern idea of an open market where persons are free to purchase goods and services based on price and their own needs, the palace determined much of the actual economic activities of its citizens. One example from the Code illustrating this is the requirement that “If a free man strike a free man, he shall pay ten shekels of silver” (quoted in Pound, 1968, p. 45). In a condition where capital and ownership were rather new and tenuous, those who came into money felt the pressures of social leveling, and hence would make public displays of their wealth in the form of public feasts, gift giving, and

other conspicuous acts of charity. This meant for the most part that the economy of Babylonia under Hammurabi was “marketless.”

It is in the area of the control of sexual behavior that the Hammurabi Code was most fully developed. The codification of sex morals was not invented by Hammurabi, and as James Reynolds (1914) notes, some of the restrictions showing up in the Code were likely influenced by even more ancient legal treatises on sexual behavior stretching as far back as Sumeria circa 3500 B.C. By this time, a system of patriarchy had taken hold within the ancient family system in which wives and children were considered the property of the father. Sections of the Code were dedicated to marriage, abandonment, desertion—in time of war with the men off fighting, it was considered a particularly precarious situation in which the women must be supervised even more closely than normal by male kin or others as directed by the court—divorce, incest, rape, prostitution, and adultery. Among the Babylonians, wives but not husbands could be charged with adultery, and if found guilty, the punishment was death by strangulation. If not caught in the act, however, the accused could face an ancient trial by ordeal: She would be plunged into the sacred river. If she floated, she was innocent; if she drowned, she was guilty (Reynolds, 1914, p. 27).

These punishments are of course harsh and brutal in comparison to modern sensibilities, and this indicates a slow and inexorable movement across human development toward greater understanding and enlightenment in all spheres of life, including an expansion of humanistic sentiments regarding the treatment of fellow human beings. This is seen, for example, in Emile Durkheim's (1984 [1893]) theory of social development from an ancient mechanical solidarity typified by harsh punishment of deviants, to a modern organic solidarity that emphasizes more restitutive and restorative sanctions against norm violation.

Law emerges at a particular stage of human development, the characteristics of which must contain at a minimum (1) a written language and (2) imperatively coordinated associations. Evidence of writing tablets, which involves a symbol system (such as an alphabet) beyond simple direct representations of drawn objects, goes back to at least 3500 B.C., to the ancient Sumerians (as discussed above; see Stephenson, 1980). With regard to the second category, from the very beginning human beings have used available resources to sustain life projects in whatever social circumstances pertain. The primitive hunter-gatherer system was typically more solitary and poorly organized, consisting of no more than 60 to 70 members (Massey, 2002). With increasing social development and the move to sedentary living in organized human settlements, the informal system of directives, decrees, and use of force or its threat by local leaders operating on a small scale (for example, male heads of a clan) gave way to larger, more complex human organizations known as imperatively coordinated associations (ICAs). The imperatively coordinated association, reaching its most elaborate development in the emergence of the state, goes beyond the utilization of mere power—namely, the ability of an actor to carry out his or her will even in the

face of resistance—toward the institutionalization of a set of cultural ideals, role relations, and social structures which endow the leader and functionaries of the ICA with legitimacy (Weber, 1978 [1922]). The state, as the most elaborate version of an ICA, is a “ruling organization” to the extent that the leader is assisted by an administrative staff in the work of creating and maintaining an established order. For Weber, law makes sense only in relation to a specialized staff of functionaries—a so-called constabulary force—who are vested with the coercive power of the state for the primary purpose of law enforcement.²

Weber notes, however, that an ICA need not be based only on law as the focal point from which legitimacy flows. Before primitive legal systems developed, there were other types of ICAs whose legitimacy was based on psychic rather than on physical coercion or its threat. This even more primitive system was religion, which Weber calls a “hierocratic organization.” Such hierocratic organizations enforce “. . . order through psychic coercion by distributing or denying religious benefits” (Weber, 1978 [1922], p. 54). With further social development (reflecting the process of rationalization), advanced hierocratic organizations claim a stable group of true believers of the faith who congregate together (in a church) and who are guided into a proper interpretation of scripture by a priest practicing a well-established liturgy backed by a system of shared rituals.

The work of religion, though, is not confined merely to the afterlife and to questions of atonement and salvation, that is, teaching true believers how to remain in good standing with their god. (At later stages of social development, most religions are monotheistic, meaning belief in one *true* god.) Religions also provide a set of guidelines for living, and these exhortations necessarily impinge upon and direct the activities of human beings operating within physical and social environments. This means that well-established religions tend to promulgate law-like directives for true believers to follow, and these guidelines by necessity dip into the secular realms of economics, politics, and civil society. Indeed, from the time of the Norman Conquest in England (around A.D. 1066), the Catholic Church’s own laws governing church organization and the religious activities of its members and followers—so-called Canon Law—were incorporated at least partially into the secular law and played a role in the writing of the Magna Carta after the Norman Conquest (Daniell, 2003; McSweeney, 2014). It is widely acknowledged, for example, that the American Constitution incorporated broad understandings of morality and proper conduct reflected in its Judeo-Christian heritage (Levinson, 1988). Additionally, in some cases a religious system will become so dominant and all-encompassing that it informs all aspects of life. This is the case with both Talmudic Law and Islamic Law, whereby the nation-state recognizes the religious system as the infallible source of law. In such cases, sacred law and civil or public law are one and the same (Weber, 1978 [1922], pp. 815-831).

This means, then, that to speak of true law—in the sense of civil, secular, or public law—we must make one further specification with regard

to the characteristics of imperatively coordinated associations. A ruling organization fits the criterion of a legal system when it is *political* rather than hierocratic (or religious).³ According to Weber (1978 [1922], p. 54), a legal system is a politically oriented ICA (that is, a state) “. . . insofar as its administrative staff successfully upholds the claim to the monopoly of the legitimate use of physical force in the enforcement of its order.” This is an important distinction because power can be used in an ad hoc or case-by-case basis, such as the stronger dominating the weaker, and requires no further basis of organization, thereby lacking systematic legitimacy within shared social relations. With the advance of human social development into sedentary and organized life, there was a need to establish authority explicitly beyond the slapdash of personal power. Ralf Dahrendorf (1959, pp. 166-167) has summarized the points of legal organization based on the authority of a political (that is, state) formation:

- Authority relations are always on the basis of a superordinate or ruling class, standing over a subordinate class (that is, citizens);
- In established authority relations, superordinates control—through commands, warnings, and prohibitions—the behavior of subordinates;
- The tasks of the superordinate class are carried out by functionaries of the state (e.g., police, legislators, executives) by virtue of the system of social positions institutionalized within government, rather than on the basis of the particular characteristics of the functionaries; this objectivity or nonpartisanship imbues activities of the superordinates with legitimacy; and
- By virtue of this institutionalization and bureaucratization, those subordinates subject to regulation and oversight by superordinates are not chosen randomly but on the basis of rules made explicit via the codification into law pertinent to the area of regulation; by way of this process, social relations are “thingified,” thereby helping to de-randomize conduct and make explicit when and under what conditions such actions by the state are permissible.

These are the four pillars of law within any legitimate political enterprise. Notice that power asymmetries are built into the system, namely, the power of legal functionaries to enforce the law and to punish those who run afoul of it. By the time of Cicero in ancient Rome (circa 70 B.C.), a system of Natural Law had been developed to solve the dilemma of this power imbalance and the question of how to hold the powerful accountable to the citizens. Cicero and other Natural Law scholars argued that it was by the growth of human reason that human beings come to understand that legal organization is *natural* to the extent that morality—doing what is right—emerges as a universal feature of any human social organization (Chernilo, 2013). That is to say,

at the appropriate point of human development, the collectivity of human beings—no matter their diversity by culture, geography, or tradition—will strike upon the same basic set of operating principles for organizing their lives. Here is some of what Cicero had to say on the matter:

There is in fact a true law—namely, right reason—which is in accordance with nature, applies to all men, and is unchangeable and eternal. By its commands this law summons men to the performance of their duties; by its prohibitions it restrains them from doing wrong. . . . It will not lay down one rule at Rome and another at Athens, nor will it be one rule today and another tomorrow. But there will be one law, eternal and unchangeable, binding at all times upon all peoples; and there will be, as it were, one common master and ruler of men, namely God, who is the author of this law, its interpreter and its sponsor (quoted in Cogley, 1966, p. 15).

For eons after Cicero, the idea of Natural Law fueled the ideology of the “divine right of kings,” thereby maintaining and further exacerbating this power asymmetry. It was the idea that certain families are ordained to rule, along the way marking strong social class (or caste) divisions between the ruling class on the one hand, and the mass of lowly citizens, on the other hand, subject to the whims of the king and his royal administrators. Even when the Magna Carta came into effect in 1215 with King John agreeing to limitations on the power of the English monarchy specified therein, there was no fundamental challenge to the idea that rulers are ordained to rule, nor that the people naturally seek to be led by wiser and nobler men (Turner, 2014). Obedience has always been a part of the human condition, first showing up in primitive society as mysticism (e.g., the worship of cats, serpents, or other animals as practiced in totemism), and later in the reverence paid to king-gods (Tarde, 1903, pp. 80-81).

By the time of King Charles I—monarch of England, Scotland, and Ireland beginning in 1625—the longstanding reverence paid to king-gods was coming to an end. From 1642, King Charles was embroiled in the English Civil War, and there were attempts to end his absolute monarchy in favor of a constitutional monarchy—whereby the king gives up unilateral sovereignty to a parliamentary or congressional body with whom power is shared—first dimly perceived in the concessions King John had agreed to some 400 years earlier. A political system that has a king operating alongside a parliament or other legislative body represents a precarious, transitional system referred to as “mixed government,” which later eventually gives way to a unified system with the advent of constitutionalism (Vile, 1998).

Unwilling to go along with the demands, King Charles was found guilty and executed by beheading in 1649 (Chriss, 2013, pp. 110-111). English royalist John Denham wrote a poem in 1642 titled “Cooper’s Hill,” and

part of that poem reflects a defense of the divine right of kings whereby the “brightness and wisdom” of kings is contrasted against the “dark cloud” of the ignorant masses they serve (Carson, 2005, p. 541). But this sentiment continued to wane with the emergence of a new era coinciding with the Reformation and the Enlightenment, giving rise to liberalism and the idea that governments are legitimate only to the extent that the governed consent to systems of ruling.

In the 1700s, Montesquieu developed the idea of the separation of powers, which later informed the framing and writing of the U.S. Constitution. In order to guard against the amassing of power in the hands of an autocrat or a small group of rulers, the ideal government should be characterized by a balance of power distributed across the executive, legislative, and judicial branches (Voigt, 1999). By the end of that century, philosopher Adam Smith was writing influential treatises championing the liberation of the individual. Instrumental in this perspective was the decline of feudalism and the idea that individuals should be free to be productive and seek employment guided by the “invisible hand” of an open economic market. This version of *laissez faire* liberalism was by definition suspicious of government regulations beyond those essential functions such as external defense (military) and domestic order (courts and law enforcement; see Rothschild, 2001).

By the late 1700s, English utilitarian philosopher and jurist Jeremy Bentham established an approach to the conceptualization of law that is still influential today. First, let us examine Bentham’s definition of law:

A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by the *sovereign* in a state, concerning the conduct to be observed in a certain *case* by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power.⁴

Bentham argues further that because law is attempting to accomplish something in the world, namely, the creation of an authoritative set of rules by which persons are directed or compelled to act, one must keep in mind these eight elements, which are always implicated in any system of law:

- The *source* of law, that is, the person or persons of whose will law is the expression of;
- The quality of its *subjects*, that is, the person and things to which the law applies;
- The *objects* of law, namely, the acts and circumstances therein to which law applies (here, Bentham is making a clear legal distinction between persons and acts, or the subjective and objective aspects of law);

- The *extent* of law, namely, the generality or amplitude of law's application in particular cases and circumstances (this is synonymous with substantive law);
- The *aspects* of law, namely, the various manners in which the will of the lawmaker may apply itself (this is synonymous with procedural law);
- The *force* of law, that is, the motives and machinery lying behind the enabling of law within particular contexts, events, and situations (this is the grounding or foundation of law, either in a constitution, parliament, or sovereign; this is the authoritative grounding for the source of law);
- The *expression* of law, that is, the nature of the signs by which the will of the lawmaker is known (this places emphasis on the textualization of law in casebooks and statutes through procedural enactment); and
- A catchall category referred to as *remedial appendages*, whereby other laws may be subjoined to the principal laws as deemed necessary or expedient (this provides flexibility to the attempt to “thingify” law through textualization, relying on a legislative branch to monitor the ways in which law is actually implemented and providing remedies, adjustments, or amendments as needed). (Bentham 1907 [1823], pp. 324-325).

Building on the utilitarian legal philosophy of Bentham in the 19th century, philosopher J.S. Mill elaborated an influential position on liberalism, as he sought to analyze the connections between liberty and authority. In the next section, we will briefly summarize the thought of Mill on this issue, for it will lay the foundation for understanding modern legal systems and the later attempts by sociologists and other social scientists to make sense of them.

Mill on Liberty

Mill (1971 [1869], p. 92) asks the question: “How much of human life should be assigned to individuality, and how much to society?” Mill was a philosopher committed to the doctrine of utilitarianism, which suggests that what is best for society is the maximization of the happiness of the individuals in that society. But, Mill also realized that complete, unbridled freedom of persons to pursue their satisfactions would not work, because in pursuit of their satisfactions persons could actually injure and stifle the life chances of others. Mill realized, then, that “the greatest good for the greatest number of people” is achieved only within the complex project of aligning the interests of the individual with the interests of the group. This is the constant and ongoing dilemma that any large-scale society must confront, namely, keeping people happy (that is, maximizing their liberty)

while also restraining them only to the extent that they do not interfere with others' pursuit of their own satisfactions (Chriss, 2016b).

In earlier societies founded in blood relationships—the so-called *ethnos*—there were high levels of homogeneity and familiarity to the extent that persons shared similar characteristics (biological, social, and cultural) with others in their groups, clans, or tribes. When there are high levels of cultural homogeneity and familiarity between members, the gap between the interests of the individual and the interests of the group is small. Much of social life is regulated informally, on the basis of socialization, relationships, group living, and shared beliefs about the sacred. (This is consistent with Durkheim's position, which we will analyze in the next chapter.) However, as a society develops and population densities increase, there tends to be an increasing diversity (on the basis of ethnicity, race, language, food choice, belief systems, and so forth) among the individuals entering into the formerly homogeneous society (through immigration but also through conquest). This move from homogeneity to heterogeneity also means that social members will share fewer and fewer things in common, and will seek objective third parties to settle any disputes that arise. This fuels more formalizations in all areas of life, to augment the informal customs and folkways, which previously were sufficient to maintain social order and solidarity. The premier system of formalizations that persons hit upon is law, and it becomes more complex, diverse, and specialized as befits the level of development of the society.

Mill believes that government regulation, including most importantly its legal apparatus, should not be in the business of policing morality. Instead, issues of the *ought* should be left to the people to decide informally how to deal with norm violations, which do not rise to the level of legally actionable. Those activities that are injurious to selves—Mill includes such things as gambling, drunkenness, incontinence, idleness, and uncleanness—must be dealt with by way of the moral indignation of the community—first family members, then neighbors and acquaintances, and possibly on to wider social circles—rather than by government functionaries. The danger of allowing the government to police morality is that, once this threshold is crossed, there is no meaningful limit to what can be construed as legally actionable. By this method, any liberal constitutional republic can slip into a totalitarian state whereby the invocation of punishing or regulation for the *public good* touches upon more and more areas of life. Mill is warning that law, once institutionalized and shown to be efficacious in one area (for example, the regulation of business contracts), tends to spread into other areas, including the formerly private preserves of families, friendships, religion, and other personal beliefs. In this sense, law is like water to the extent that it will seep into every crack and crevice if left unchecked. It represents the problem of “function creep,” namely, the continuing expansion of an intervention (or law or policy) into more and more areas beyond the original design (Greenleaf, 2007).

A good example of this is the growing use of biometrics—such as fingerprint readers—to monitor and regulate access to goods and services. For example, some schools are using fingerprint readers to monitor what children are eating at school. This may be especially handy for parents with a food allergic child, for warnings can be attached to his or her fingerprint that when scanned would inform school personnel not to serve particular food items. Yet the original intent of the fingerprint scanner, developed initially for keeping track of food consumption among students, can easily be expanded into other areas of school surveillance, including attendance, movement in and around the school (for scanners equipped with GPS), parking lot security, and riding the school bus (Gilliom & Monahan, 2013, p. 79).

The trouble that Mill runs into, with this liberal championing of the individual and outlining the boundaries of acceptable coercive authority in relation to individual behavior—all of which amounts to an attack on legal moralism—is that it is not at all clear how or on what basis a distinction can be made between morality—the *ought*—and the law. Before Mill, Kant attempted to make this distinction clear, as he argued that morality is reason internalized while law is reason externalized (Pojman, 2005). According to this Enlightenment style of thinking, all upgrades in the development of human society are traceable to the evolution of the human brain and the growth of reason and intellect, whereby primitive passions are subdued. With this triumph of the head over the heart, human beings are steered toward currently sanctioned notions of proper conduct. In this scenario, reason informs both morality and law.

Attempting to go beyond Kant, Mill argued that the individual is not accountable to society for actions, good or bad, which concern only his or her interests. Members of society may of course express their disapproval of individuals' actions as they deem fit, but the official enforcements mechanisms of the state should not be activated. When must the state get involved? Mill suggests state involvement when the actions of an individual negatively affect the interests of others. The negative effect can appear either in the form of relatively less severe damages affecting a wide range of people, or severe damage affecting one person or a handful of others. Yet even with this, the threshold that must be crossed to move from questions of morality, for which society is responsible, to questions of law, for which the state or government may claim jurisdiction, is not clearly specified. Absent a clear dividing line between morality and law, there is a tendency for law to take it upon itself—prodded along by moral entrepreneurs and others proclaiming “There ought to be a law!”—to monitor and punish activities that violate the sensibilities of the community (Chriss, 2016b).

One of the trends that has further muddled the picture in this regard is the growing emphasis placed on human psychology, including persons' sentiments, feelings, emotions, and self-concept. In other words, the law now attends to claims of not only physical or property damage but also

psychological harm (this represents the growth of substantive law and substantive due process, to be discussed further in Chapters 4 and 5). For example, there are already well-established laws on the books that give persons legal redress in the case of medical malpractice. If a person under a doctor's care dies as a result of a mistake made during surgery, the surviving family members may file a lawsuit and likely win a judgment against both the doctor and the hospital in which the surgery was performed. But in addition to receiving compensation for the loss of their family member, there is also the possibility that the surviving family members could sue for psychiatric harm. Although the evidentiary guidelines for legal remedy of psychiatric harm are narrower than for objective harm (for example, the physical loss of companionship or the calculation of the monetary loss from lost years of work), there are nevertheless movements within law that seek to elevate psychological distress or harm to the same level as physical harm (Case, 2004).

Keeping in mind this attempt by Mill to clarify the relationship between liberty and authority, and between morality and law, for purposes of this study of law and society from the perspective of sociology, law consists of three basic features:

- The **legal order**, which refers to the ways that relations are adjusted and conduct is ordered by the systematic application of force of a politically organized society;
- **Dispute resolution**, utilizing a body of authoritative precepts designed and applied through an authoritative technique recognized as legitimate within the context of the legal order; and
- The **judicial process**, that is, all the activities of legal actors engaging in some aspect of law within a particular legal order (Pound, 1945).

It should be noted that this tripartite understanding of law as consisting of a legal order, dispute resolution, and a judicial process makes it possible for more and more areas of life previously not defined as such to now be subject to legal treatment and remedy. For example, Mill attempted to draw boundaries between the *ought* or morality on the one hand, and law on the other, for the basic reason that the moral sphere should maintain autonomy and not be subject to usurpation by legal-bureaucratic reasoning and directives (this being the utilitarian version of legal positivism). But over time, the legal framework has encroached into more areas of life and is providing presumably authoritative and impartial guidelines for deciding any disputes that arise in these areas. Hence, under the sway of the invisible hand of the marketplace, private businesses could decide for themselves which customers to serve and which others to deny service to. Those of us who are old enough can remember when businesses posted such signs as “No shoes, no shirts, no service” (and some still do). Or, convenience stores near schools that, when

school is let out, tend to experience a crush of young persons arriving at the store simultaneously, prompting the hanging of signs on their doors such as “No more than three students in the store at any time.” Connected with this, many shopping malls require that persons under the age of 18 be accompanied by an adult during certain business hours.

Most of these examples of denial of service went unchallenged for decades, but more recently, especially with regard to the growth of “cause lawyering” (Sarat & Scheingold, 1998), persons are challenging private businesses particularly when the denial of service is alleged to be related to a federally protected status, whether gender, sexual orientation, religion, age, or other sociodemographic category.⁵ A prime area of cause lawyering are the disputes that have arisen over whether or not bakers can choose not to bake a cake for a same-sex couple as part of a planned wedding celebration. Law gets injected into these disputes because the denial of service is alleged to be a form of unlawful discrimination, and the courts are turned to with increasing regularity to decide whether a violation has occurred and, if it has, what type of legal remedy is warranted. Although most legal cases in this area have found the courts siding with plaintiffs against defendants (private businesses), a 2018 Supreme Court ruling in the case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission* found in favor of a baker who denied service to a same-sex couple on religious grounds.⁶

What Is Sociology?

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French philosopher Auguste Comte coined the term *sociology* in 1838 and conceptualized it as the *queen* of the sciences. Sociology was envisioned by Comte as the premier positivist science, positivism in this sense referring to the use of systematic observation utilizing the methods of the natural sciences to explain social phenomena. According to this positivistic vision, there is no meaningful distinction to be made between social phenomena on the one hand and physical or natural phenomena on the other. As Cairns (1945, p. 4) explains, “This means that the search for facts, the formulation of hypotheses, measurement, and the regard for system are methods applicable alike to both the natural and the social spheres.”

The idea of Comte and early founders of sociology was to treat sociology as a natural science, primarily to differentiate it from the *speculative* explanations of social phenomena founded in mysticism, religion, common sense, and even social philosophy. Sociology would not only develop theories of society and its elements; it would also gather systematic data about these phenomena and, using appropriate statistical techniques, test to see to what extent hypotheses about these phenomena found empirical support.

It was not until the 1880s, however, that sociology reached a point at which its development was considered worthy of institutionalization within the academy. In America, the early, now classical, founders of academic

sociology were Lester F. Ward, William Graham Sumner, Albion Small, and Edward A. Ross. Indeed, it was Ward's *Dynamic Sociology*, published in 1883, that launched the classical era of sociology (which ran from 1880 to 1920). Early on, then, there was unbridled optimism that scientific sociology was being developed, a science dedicated to the study and understanding of human society in its totality, along with the various parts or structures comprising that totality.

Even as positivism was seen as the way forward in the construction and institutionalization of sociology as the preeminent science of society, by the 1920s new voices were heard and new perspectives were being developed which fundamentally challenged the positivistic approach. Philosopher George Herbert Mead along with some sociologists at the University of Chicago felt that it was a mistake to treat human beings and the social phenomena arising from their activities as if they were natural objects to be studied and analyzed like rocks, trees, frogs, and so forth. The Chicago School sentiment was that studying human beings in this way did damage to their subjectivity, and because of this (among other reasons) a purely objective or value-free approach to the subject matter of sociology would not do. What was needed was a more interpretive, hermeneutic approach, which took into account the importance of feelings, emotions, and the sense of self that human beings (ideally) develop in their interactions with others. Also, in order to study society from the interpretive perspective, there would need to be developed more qualitative methods such as ethnography, participant observation, and small-group research in order to get at the level of understanding—or *Verstehen*—by which persons in interaction create shared realities.

Additionally, by the 1960s a new, critical approach to sociology emerged, one that coincided with social movements of that era such as civil rights, gay rights, the women's movement, antiwar protest, campus protests, and new lifestyle choices such as recreational drug use, cohabitation, and other ideas and activities that fundamentally challenged the status quo. These two challenges—interpretive and evaluative—did not displace positivism altogether, but it did make room in the cognitive space of sociology, which today can be described as consisting of three dominant paradigms or schools of thought. Following from our discussion above, Wagner (1963) describes these three sociological paradigms as the positivist, the interpretive, and the evaluative. The characteristics of positivism include:

- Treats sociology as if it were a natural science;
- Concerned with explaining “what is” and believes in the possibility of value-free or objective knowledge;
- Emphasizes causal analysis, that is, deductive-nomothetic causation, by way of quantitative methods;

- Searches for universal covering laws;
- Deals with observable phenomena (of the five senses);
- No special methods are needed beyond those already established within the natural sciences; and
- Examples of theories under the positivist rubric include behaviorism, functionalism, biological, ecological, mathematical, and some network approaches.

The main characteristics of the interpretive paradigm according to Wagner are as follows:

- Sociology is a social science requiring different theories and methods from those of the natural sciences;
- Believes in explaining “what is” but has less faith than the positivists in the idea that by following the protocols of the scientific method biases, preferences, predilections, and values can be held at bay;
- Emphasizes interpretive understanding (*Verstehen*);
- Rather than the uncovering of universal truths, the goal is the more pragmatic or limited development of sensitizing concepts;
- Deals with both objective and subjective phenomena;
- Because sociology’s objects of study are fundamentally different from those of the natural sciences, qualitative methods are preferred; and
- Examples include symbolic interactionism, dramaturgy, phenomenology, and ethnomethodology.

Finally, the main characteristics of the evaluative paradigm are the following:

- The unity of theory and practice, with practice informed by an explicit normative, ideological, or nonscientific agenda;
- Concerned with “what ought to be” even more than “what is”;
- Most are versions of humanitarian reform theory;
- The identification and amelioration of oppressive social conditions, especially those that produce inequality;
- Rejection of value-free knowledge (“the personal is political”); and
- Examples include Marxism, feminist theory, critical race theory, and queer theory (Chriss, 2016a).

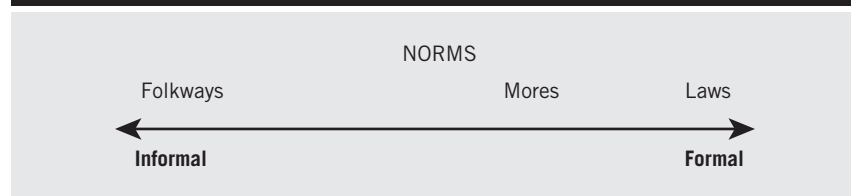
These three paradigms—the positivist, the interpretive, and the evaluative—approach the explanation or understanding of social phenomena in ways consistent with the above descriptions and summaries. For the most part in the book, I will be sticking more closely with the positivist and interpretive approaches in our discussion of legal matters. Occasionally, where appropriate, I will also provide examples of critical approaches to law embodied in the Marxist or evaluative approach. My treatment of law from the sociological perspective will emphasize that sociology is a science that aspires to general explanations of the structure, function, and culture of law, legal institutions, and the social actors operating within various legal spheres.

The Norm Continuum

All known human societies have systems in place to regulate the actions of their members. Beyond the most primitive, savage horde stage, human beings banded together for mutual support against hostile environments and the threats from the unknown, including other human beings and tribes. To reiterate, sociology is the scientific study of human association, and within the myriad associations forged between groups of human beings, there arise rules for conduct, that is, norms. The study of the creation and enforcement of norms—first the informal norms of custom and habit, then with societal development the setting-aside of those norms considered so vital to the well-being of the community that they are embodied in statutes and enforced by a special body of control agents, that is, a constabulary force.

As shown in Figure 1.1, the norm continuum runs from the tacit, uncodified norms of everyday life, which are passed along and inculcated through socialization and group living (located on the informal end of the continuum to the left), to the highly formalized and textualized norms embodied in statutes and legal codebooks (located on the formal end to the right). The norms and eventual laws of any particular society do not simply magically appear. Instead, they arise over (typically) a long period of time, and the form they take has much to do with the history of development of the society within which they are located. In other words, the first element to establish,

Figure 1.1 The Norm Continuum



within the explanatory framework of the sociology of law, is the relationship between law and society. It must be shown how societal development typically goes in the direction from primitive informal rules for conduct (the norms of custom and habit), to more formalized edicts coinciding with the rise of written language (for otherwise codification into a body of laws, or textualization, is not possible). The analytical framework for understanding how social systems start and maintain themselves has been developed by the functionalists, especially Durkheim and Parsons, and their thought will guide this section. At some point, though, primitive cooperation and consensus is challenged with increasing societal complexity and population densities. Whereas functionalism is excellent at explanation of consensus and order, and the norms sustaining them, it is less able to explain dissensus and conflict. This will be picked up in the next section.

Cooperation and Conflict

The informal norms of everyday life, whereby customs and folkways work to keep relatively simple and homogeneous societies orderly, are overlaid with more formalized rules and restrictions with the takeoff of modernity and the rise of the state. Indeed, Max Weber's work on power and authority in the rise of the state, especially the legal-bureaucratic framework that emerges to ensure efficiency, predictability, and rationality of the actions of the members of society, is the touchstone of explaining new pressures toward codification and textualization of the rules of social order into modernity. These new rules and regulations, backed with the coercive power of the polity, arise concomitant with new stresses and strains appearing in an increasingly disparate citizenry, that is, in the move from cultural homogeneity to cultural heterogeneity. In the move from primitive to modern society, a dialectic ensues between the forces of stability and order and the forces of dissensus and conflict, and the systems in place to provide continuity and stability—formal organizations, bureaucracies, and other related imperatively coordinated associations—create new concerns among the citizenry over the legitimacy of these rules and regulations. Ralf Dahrendorf (1959), drawing primarily from Marx and Weber, has explained well the types of conflict endemic to this move toward modernity and state control, and this theory will inform the explanation of modern social conflict in a variety of arenas, including the sort of class conflict that tends to arise in industrial society.

Law and Everyday Life

Even with increasing emphasis on formalization and textualization within the centralized activities of the state and its bureaucratic apparatus, informal, everyday life does not simply disappear. The incipient forms of order

and stability of the informal realm, for example, the arenas of family, friendship, business activity, schooling, religion, and so forth, remain as important aspects of informal control even into modernity, and it is important to understand how persons experience and think about the formal realm—that is, about law and bureaucracy—within the contexts of everyday life. Understanding law in everyday life means spending some time examining the pertinent social psychological literature on consciousness, identity, legal socialization, personality, and the self. What must always be kept in mind is explaining how the everyday life of modern actors are different from that of earlier times, and how and to what extent the rise of legal and formalized systems of understanding affect personality formation and the development of self. Here, the dramaturgical model of Erving Goffman (1959, 1974) will come into play, as all levels of social reality—micro, meso, and macro—can be effectively explained utilizing key concepts from Goffman’s dramaturgical framework, including front stage, backstage, impression management, presentation of self, interaction order, frame analysis, and keying (for examples of use within legal scholarship, see DeLand, 2013; Duck & Rawls, 2012). The dramaturgical model of social action helps us make sense of actors across the spectrum of social activities and structures, whether actors in their everyday lifeworlds or representatives of the criminal justice system (police, prosecutors, and judges for example). Examples of how law is understood by actors in their lifeworlds or in more formalized settings will include how social movement actors seek to frame their agenda and sell it to a mass public, whether moral entrepreneurs seeking new laws or regulations, or the implementation of public policies that require some level of assent from the citizenry.

Critical Analyses of Law

In making the distinction between lifeworld and system (Habermas, 1984, 1987), it must be shown how and under what circumstances the informal norms of everyday life are translated into mass movements whereby collectivities pursue public agendas, which, it is hoped, eventuate in acknowledgment of new configurations of law and policy. In these cases, law and the legal system are eyed as the premier mechanism for bringing about desired change. Many areas of contentiousness brought to the public and pushed by movement actors include redress of the government to correct inadequacies and deficiencies in the operation of some spheres of the informal or lifeworld realm, which then ramify into the operation of various higher order systems within the system and which thereby imperil full participation of all citizens in these arenas. For example, the long-standing privileges that males had secured historically under patriarchy were challenged in various legal settings. Critical analyses and uses of law, informed by sociological understandings of structural and cultural impediments to full participation on the basis

of race and class (in addition to gender, sexual orientation, immigration status, and other statuses), are contained within the evaluative paradigm to the extent that such movements seek recognition of and, ultimately, reparations for past inequalities in the operation of the system. This is social justice, and the next section will provide a brief summary of the sociological contributions to this project.

Social Justice and Constitutionalism

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Social justice is a movement of thought that focuses on the problem of distributive justice, that is, the reality that in many societies socially valued resources are not only unequally distributed, but that the inequality tends to show up along the dimensions of gender, race, ethnicity, or class disparities (Chriss 2016a, pp. 154-157). A variety of social movements have emerged, the most prominent of which appearing from the 1960s onward, to press for changes in law to ameliorate these inequalities (Cummings, 2018). Today, the representatives of such movements pressing for gay rights, women's rights, workers' rights, convicts' rights, marriage rights, and so forth are referred to as "social justice warriors" (Agresto, 2016).

Lester F. Ward was the first sociologist to actually use the term *social justice*, which appeared in his 1906 book *Applied Sociology*. Ward (1906, p. 24) noted that political justice had done a pretty good job (circa his time) of removing civil and political inequalities, in that "person and property are tolerably safe under its rule." Although this was a great step forward in social achievement, Ward believed one further step would be required. According to Ward (1906, pp. 24-25), society

... must establish social justice. The present social inequalities exist for the same reason that civil and political inequalities once existed. They can be removed by an extension of the same policy by which the former were removed. The attempt to do this will be attacked and denounced, as was the other, but the principle involved is the same. And after social justice shall have been attained and shall become the settled policy of society, no one will any more dare to question it than to question civil justice.

Ward was a big thinker and ahead of his time, but he was also Pollyannaish in his predictions. More than 100 years after Ward wrote this, by no means is social justice *settled policy* and will not likely become so for the foreseeable future. Under a constitutional republican form of government, the sky is definitely not the limit. Liberalism (referring here to the original liberalism of Adam Smith) is equated with limited government, that is, the systematic constraints placed on the government and government actors as instantiated in law. For the most part, then, a basically wide open and ambitious

social justice agenda conflicts with constitutional republicanism. More radical approaches embodied in progressivism, which bring to bear socialistic or communistic elements (for example, redistributive policies such as heavy graduated income taxes or the elimination of inheritance) gets you closer to ideal social justice outcomes, but again, a number of such policies would be deemed to be incompatible with constitutional republicanism as currently configured.

Constitutions are, by their very nature, statements concerning the limitations placed on government and how the political system should operate to solve interminable political disputes. For example, a constitutional monarchy is a type of mixed government that places limits on the king's power. A constitutional democracy emphasizes majoritarianism whereby rights are not seen as eternal but can be added or removed according to the will of the majority. A constitutional republic identifies certain rights as eternal (traced to Natural Law) and even majorities may have a difficult time eradicating old rights or inventing new ones. In constitutional republics, judicial review is often used to settle such political disputes, with many of the more important ones being decided by the Supreme Court.

The system of constitutional republicanism of the United States and other western countries seeks to ensure that the political system is bounded by the constraints of that constitution. However, there are four distinct threats to constitutional constraints on politics (Whittington, 2009). First, there can be *constitutional resistance*, which is the most severe of the four possible threats. In this scenario, political actors have lost faith in the constitution and actively use their positions within the political system to ignore it or circumvent it. If a critical mass is reached of political actors acting in this way, a constitutional crisis may ensue. Here, political actors know they are acting against the constitution and don't care, in essence taking the stance that that they are not bound by its restraints.

Second, there can be *constitutional forgetfulness*. Here, political actors have not lost constitutional faith, but have allowed themselves or other political actors within the system to forget how to maintain commitments to constitutional guidelines. Two types of forgetfulness are lack of expertise (not knowing what the constitutional restraints are in certain cases) or lack of oversight, which can result from the increasing complexity of government regulations for many federal, state, and local officeholders. In the case of the latter, ethics review boards are empowered to examine the claims of inadvertent or unplanned errors in the discharging of duties, with sanctions typically amounting to rebukes or similar lower-level sanctions.

Third, there can be *constitutional neglect*. This occurs when political actors value the principles embedded in constitutionalism but do not regard them as a high priority. This happens because in normal politics, where political actors have to contend with the demands of pressure groups and other constituents, politics can become an unprincipled game where short-term advantages are pursued. This is government by bargaining, compromise, and

expediency, and is one of the major charges levied against how the Trump administration operates, whereby backroom deals and personal fealty are favored over constitutional principles.

Fourth, there can be *constitutional contestation*. This represents a fundamental disagreement over what constitutional values mean or stand for in the first place. For example, an enduring disagreement over the interpretation of the constitution is what roles judges should play in their review of cases that come before them. Hardline originalist interpreters of the constitution argue that judges should merely interpret the law, while contextualists who view the constitution as a living document seek to have judges take a more active role in not only interpreting laws but also administering justice to comport with the vision of social justice actors who seek to use law to correct inequalities or make other adjustments that they claim are needed in an ever-changing world.

Conclusion

Although there are a number of debates—philosophical, epistemological, methodological, axiological—to conclude the chapter, I will cover two in particular within sociology that impact the way we understand law. One of these debates has to do with how law is actually felt and experienced by persons in society, with regard to both the practitioners of law themselves (e.g., lawyers and prosecutors) and persons who are the subject of law (e.g., as participants in lawsuits, as suspects in the criminal justice system, and so forth). Here, the debate centers on “law on the books,” that is, the substantive and procedural aspects of law as a set of definitive guidelines for action, versus “law in practice,” namely, the way law is actually carried out and understood by real flesh-and-blood human beings in the lifeworld. In other words, there is a debate between the ideal notion of law as a more or less self-enclosed and self-generating system with its own logic, codes, and operating principles. This is law on the books. But no law ever interpreted itself. You need real people—judges, lawyers, plaintiffs, and defendants—to work with law, interpret it, make pleas and rulings, and so forth. The real work of law—law in practice—is never isomorphic with law on the books. This gap needs to be explained and understood sociologically. Indeed, the sociological perspective would favor the law in practice side of the debate (emanating from the legal realism of Holmes, Pound, and Llewellyn, for example) over the law on the books, the latter of which would more likely be defended from the side of a jurisprudence or analytical law perspective.

The second debate is axiological, that is, the nature of values and how these shape the form, practice, and structure of law. How are values, or the broad evaluative standards of a community (in the areas, for example, of aesthetics, ethics, justice, individualism vs. collectivism), related to law?

I will argue that, even though we are aware of some of the blind spots of the consensus/functionalist view of the emergence and maintenance of a legal system (especially in relation to the opposing conflict paradigm), it is still the case that for the great majority of legal systems, law is simply a form of re-institutionalized custom (per Bohannon, 1965). All social norms, including the codification and textualization of them into laws and statutes, emanate from human will (Schopenhauer) and the work that human beings do in competition or cooperation with each other. This reflects the idea of the norm continuum discussed above. In other words, there are no radical breaks between the informal norms of everyday life, and the higher order legal statutes embodied in constitutional democracies or other forms of government (Habermas, 1996). However, laws appear only with the move toward greater modernity, with the launching of written language, and the creation of the state and other imperatively coordinated associations. This means that law needs the state in order to come into being and be maintained, through parliamentary and legal-discursive processes. It never stands above it (as suggested by Petrazycki, to be discussed below). But what about despotic governments, those that could be characterized as oppressive and/or totalitarian? How can the idea of a norm continuum be defended in these cases?

One of the solutions proposed to address this dilemma is the continuing development and expansion of international law, whereby legal tribunals declare that certain states are palpably operating in a way that violates the human rights of its citizens. However, one of the realities that continue to thwart the aspirations of international law toward intervention into the activities of sovereign nation-states is that they do not have their own constabulary forces. In other words, law always needs some mechanism of law enforcement to give it teeth; otherwise it will be resisted either actively or passively (Acemoglu and Jackson, 2017). Currently, international law relies on the voluntary cooperation of nation-states to utilize their own constabulary forces to carry out edicts emanating from international law tribunals.

In opposition to this position, there are the ideas of the Polish socio-legal scholar Leon Petrazycki (1867-1931). Petrazycki argued that there are two basic types of imperatives in human life, those of morality and those of law (an issue that both Kant and Mill, among others, grappled with as discussed above). Morality consists of a body of moral norms, directing persons to act out of a sense of duty, or honor, or kinship, or love (of persons, country, etc.). They are imperatives in the sense that notions of right or *ought* are instilled in all of us through the socialization process, and enforced by everyone else who has himself or herself been socialized into these forms of life. (This is simply informal control, which will be discussed in greater detail in Chapter 7.)

On the other hand, legal norms or laws not only are imperatives but also possess a dimension of attributiveness, which means that persons who are found to have violated them are the target of greater emotional and

cultural condemnation than those negative sanctions imposed against deviation from moral norms. This, then, is the extra attributive dimension that goes beyond simple imperatives, as is the case for moral norms. Petrazycki rejects the definition of law as simply a set of authoritative proclamations embodied in statutes and backed by the coercive powers of the state, which he refers to pejoratively as “absolute legal idiotism” (Fijalkowski, 2016, p. 46). For Petrazycki, law stands above the state, not below it. The law is not simply re-institutionalized custom but stands even above morality itself. This means that law is a type of super-morality, given extra muscle by the work of attribution it does in addition to its imperative functions. This also means that law cannot be contained within the value system of culture, but that it somehow transcends it.

I believe that the axiological position of Petrazycki cannot be sustained, for it requires far too much acquiescence to the status quo—to the currently existing legal systems of any jurisdiction—to make it a workable concept. It can lead to the sort of totalitarianism that Carl Schmitt (2007 [1932]) and Hannah Arendt (1979) (among others) warned against. But it is important to consider this debate, for it reveals some of the intricacies of attempting to flesh out analytically the relationship between morals, values, and laws. On this issue, I will argue that the legal positivists offer the most reasonable solution to the vexing dilemma of the relationship between law and morality.

Notes

1. Agamben (1998, pp. 77-78) notes that Durkheim operated with a dualistic notion of the sacred, namely the auspicious aspect, which emphasizes love, admiration, and respect for the deity, versus the inauspicious, which represents fear, disgust, and horror toward the deity.
2. Weber's insistence on the necessity of understanding law in relation to law enforcement provides a hint of his stance on the concept of international law. On this, Weber (1964, p. 128) stated that “As is well known it has often been denied that international law could be called law, precisely because there is no legal authority above the state capable of enforcing it.”
3. This is not to deny, however, that a political organization fitting the criteria of a legal order can also be hierocratic. As we have discussed, it is possible for the existence of a state-sponsored religion that informs all aspects of life, including the prevailing legal and justice systems.
4. This was first published in 1782. The passage is contained within a collection of Bentham's writings edited by H.L.A. Hart (1970, p. 1).

5. Cause lawyering turns lawyers into explicitly political actors, as this activity involves using law to promote social change according to some political cause or tenet, under the guise of protecting classes of citizens who are being denied protections under the First Amendment or other guiding principles (Boukalas, 2013).
6. See https://blogs.findlaw.com/law_and_life/2018/06/supreme-court-rules-in-favor-of-baker-who-denied-service-to-same-sex-couple.html

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