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Review Symposium: Law and Society Meets Jurisprudence

Sociological Jurisprudence Past and Present

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COTTERRELL, ROGER. *Sociological Jurisprudence: Juristic Thought and Social Inquiry*. Abingdon, Oxon: Routledge, 2018.

Through the mid-twentieth century, jurisprudents considered sociological jurisprudence to be one of the most influential theories of law in the United States. By end of the century, however, it had virtually disappeared. The publication of Roger Cotterrell's Sociological Jurisprudence: Juristic Thought and Social Inquiry *(2018) provides an occasion to examine what this theory of law was about, why it disappeared, and its prospects for revival. The topics covered in this essay are the circumstances surrounding the origin of sociological jurisprudence, the tenets of sociological jurisprudence, the successes of sociological jurisprudence, its relationship with sociology of law, its relationship with legal realism, its place in contemporary jurisprudence, and finally, the need to keep jurisprudence open.*

Whatever happened to sociological jurisprudence? Early in the twentieth century, in a speech to the American Bar Association, Roscoe Pound declared "The Need of a Sociological Jurisprudence" (Pound 1907); four years later he provided a lengthy account of "The Scope and Purpose of Sociological Jurisprudence" (Pound 1911a, 1911b, 1912), and he returned to the topic on multiple occasions thereafter.[1] His arguments were well received. At mid-century it was stated that sociological jurisprudence "is still generally regarded as 'the most popular movement in jurisprudence in the United States'" (Geis 1963, 267). Edwin Patterson, the author of a leading jurisprudence text, wrote, "Looking backward at the social and legal changes that have occurred in the United States during the twentieth century one may well conclude that the most influential theories about law during this period were those to be found in Professor Roscoe Pound's sociological jurisprudence" (Patterson 1958, 395). In ensuing decades, however, sociological jurisprudence would virtually disappear from jurisprudence, typically mentioned as a historical footnote or waystation from Oliver Wendell Holmes to legal realism. Brian Bix's exhaustive text, *Jurisprudence: Theory and Context* (2015), for example, mentions sociological jurisprudence just once in passing (196).

In *Sociological Jurisprudence: Juristic Thought and Social Inquiry* (2018), Roger Cotterrell advocates the resurrection of sociological jurisprudence as "a useful label

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1. Roscoe Pound was extraordinarily prolific and one of the most influential American jurisprudents of the first half of the twentieth century, although his work has been eclipsed for reasons discussed in this essay.

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for an approach to legal inquiry that is essential at the present time" (xi). Cotterrell is the author of *The Sociology of Law* (1992), *The Politics of Jurisprudence* (2003), and many other illuminating works at the intersection of sociology and jurisprudence. His new book is less *about* sociological jurisprudence as a theoretical school, which he addresses mainly in the introduction and conclusion, than a work *of* sociological jurisprudence engaging various contemporary issues, including the role of jurists, the state of jurisprudence, legal pluralism, and global law and regulation, among other topics. The bulk of the chapters are previously published essays (with revisions), revealing insights gained through the lens of sociological jurisprudence.

The publication of *Sociological Jurisprudence* provides an occasion to examine what sociological jurisprudence originally was about—what gave rise to it, what it was informed by, the core ideas it espoused—and why it is seldom invoked today, as well as its prospects for revival. The primary focus will be on its acknowledged champion, Roscoe Pound, and how his conception of sociological jurisprudence relates to other close fields. Since this essay is about sociological jurisprudence, it is not a detailed review of Cotterrell's book, though core elements of his position will be conveyed.[2] The most distinctive feature of sociological jurisprudence set forth by Cotterrell, as I explain later, is that it enlists empirical knowledge to assist jurists in the normative project of advancing law's well-being. In this essay I consider, in the order mentioned, these topics: the circumstances surrounding the origin of sociological jurisprudence, the tenets of sociological jurisprudence, the successes of sociological jurisprudence, its relationship with sociology of law, its relationship with legal realism, its place in contemporary jurisprudence, and finally, the need to keep jurisprudence open.

SOCIAL, POLITICAL, AND ECONOMIC CIRCUMSTANCES

The final quarter of the nineteenth century and the early twentieth century witnessed vast and rapid changes in the United States—the rise of huge industrial corporations, the expansion of state and federal government bureaucracies and expansion of their activities, the growth of large cities, the spread of electrification, advances in modes of transportation and communication, and much more (Tamanaha 2010, 40–43). It was a time of great dislocation and social strife, exacerbated by a series of economic depressions.

Vociferous criticism was directed at courts during this period, particularly by Progressives, who charged judges with rendering decisions that time and again favored wealthy interests over workers and the public good, for instance, by issuing injunctions against strikes by organized labor, invalidating workman's compensation statutes, preserving monopolistic control while undermining antitrust laws, striking various forms of employment and welfare legislation, as well as other decisions that obstructed legislative

2. Because this essay is an overview of sociological jurisprudence, I focus on chapters that take up this topic, leaving aside substantial aspects of the book, including its extensive discussions of legal pluralism and transnational law. Scholars interested in these topics should examine the book.

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efforts at reform.[3] When the Supreme Court invalidated the income tax as unconstitutional in 1895, a prominent legal Progressive, Judge Seymour Thompson, excoriated the Court: "Our judicial annals do not afford an instance of a more unpatriotic subserviency to the demands of the rich and powerful classes" (Thompson 1896, 685). The Democratic Platform for the 1896 presidential election proclaimed, "we especially object to government by Federal Judges, in contempt of the law of States and rights of citizens, become at once Legislators, Judges, and executioners" (quoted in Warren 1937, 426). Progressive Senator Robert La Follette blasted judges as reactionaries: "The regard of the courts for fossilized precedent, their absorption in technicalities, their detachment from the vital living facts of the present day, their constant thinking on the side of the rich and powerful and privileged classes have brought our courts into conflict with the democratic spirit and purposes of this generation" (La Follette 1912, vi–vii). A critic spewed forth in the 1912 *Yale Law Journal*, "So long as our judicial opinions are formed by the mental processes of the intellectual bankrupts these will only be crude justifications of predispositions acquired through personal or class interests and sympathy, 'moral' superstitions, or whim and caprice" (Schroeder 1912, 26–27). Reflecting these sentiments, several states enacted recall provisions to unseat judges who issued unpopular decisions (Frost 1916).

Into this fray stepped Roscoe Pound, with a 1906 speech that brought him national renown, "The Causes of Popular Dissatisfaction with the Administration of Justice." The most fundamental problem (among several), he diagnosed, was "the individualist spirit of our common law, which agrees ill with a collectivist age" (Pound 1906, 447; 1905). Notions of property rights and liberty of contract ensconced within legal doctrine had developed under the influence of liberal individualism (laissez-faire ideas) that did not match the realities of modern mass society. "But to-day the isolated individual is no longer taken for the center of the universe. We see now that he is an abstraction, and has never had a concrete existence. . . . We recognize that society is in some wise a co-worker with each in what he is and in what he does, and that what he does is quite as much wrought through him by society as wrought by him alone" (Pound 1905, 346).

Respect for law was breaking down, Pound explained, because the current public sense of justice was contrary to the decisions of the courts. Social and economic conditions and public opinion change more swiftly than law, which is fixed in place by stare decisis and long-established doctrines, made more rigid when "law is in the hands of a highly cautious and conservative profession whose thought on such matters lags behind" (Pound 1907, 920). "In this sense, law is often in very truth a government of the living by the dead" (Pound 1906, 446).

> The law does not respond quickly to new conditions. It does not change until ill effects are felt; often not until they are felt acutely. The moral or intellectual or economic change must come first. While it is coming, and until it is so complete as to affect the law and formulate itself therein, friction must ensue. (446)

3. See, for example, Lochner v. New York, 198 U.S. 45 (1905) (invalidating limits on working hours); In re Debs, 158 U.S. 594 (1895) (upholding labor injunction); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (antitrust act not applicable to manufacturing); Pollock v. Farmer's Loan and Trust Co., 157 U.S. 429 (1895) (invalidating federal income tax). For a Progressive critique of these cases, see Thompson 1896. Informative accounts of Progressivism are provided in Skowronek, Engel, and Ackerman 2016 and Kalman 2018.

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In a flurry of speeches and articles (Pound 1907, 1908a, 1908b), the fine tack Pound took was to support sweeping changes in law advocated by Progressive reformers, while at the same time countering radical critics who condemned judges for serving elites' interests, explaining that judges were merely fulfilling their accustomed judicial role of rule application. General rules operate through mechanical application. The problem lies less with the judges than the relative fixity inherent to law. Once the rules are updated via legislation and judicial modification (piecemeal and halting) provoked by demands for reform, the common law will have a new basis that better reflects contemporary conditions and the legal system will work adequately again, though a degree of lag always exists. "Sooner or later what public opinion demands will be recognized and enforced by the courts" (Pound 1907, 925).

Pound's call for sociological jurisprudence articulated the very same themes but in jurisprudential terms. "Early twentieth century Sociological Jurisprudence could just have easily have been termed Progressive Jurisprudence," legal historian G. Edward White concluded (White 1972, 1024). Jurisprudential theories, as Pound recognized, are themselves influenced by surrounding social, political, and economic circumstances. "Legal philosophies have reflected and are sure to continue to reflect movements of the period in which they are produced, and hence cannot be separated from what these movements stand for," observed pragmatist philosopher John Dewey (Dewey 1941, 75).

Two additional influences on Pound's articulation of sociological jurisprudence merit emphasis. First, Pound endorsed William James's philosophical pragmatism, eschewing abstract, a priori theorizing in favor of an instrumental approach and experimental attitude of seeing what works, as well as adopting James's view that values are reflected in what people demand. Second, this period coincided with the establishment of the social sciences in higher education, bolstered by enthusiasm that knowledge about solutions to social problems would be forthcoming (Ross 1991). Pragmatists as well as Progressives were melioristic in orientation and shared an optimistic faith in the capacity of the social sciences to help identify justice and the public good, and the best means to achieve them (Lustig 1982, chap. 6; see, for example, Cohen 1916).

Sociological jurisprudence, therefore, was introduced by Pound on the side of Progressive reformers in the midst of a heated ongoing battle between legislative efforts aimed at advancing social welfare against barriers thrown up by judges invoking traditional legal doctrines. Although he was critical of law, his position was measured in that he remained fundamentally committed to the common law system and the legal order. He embraced philosophical pragmatism, and believed in the promise of social science. On a personal level, Pound was an ascendant jurist at Nebraska Law School, stepping onto a national stage, not yet forty years of age, fluent in German, Latin, and Greek, well read on continental legal and sociological theory, intellectually prone to be encyclopedic and to categorize, ambitiously articulating a theoretical perspective on law for the modern scientific age. What he formulated was a melding of these factors.

TENETS OF SOCIOLOGICAL JURISPRUDENCE

Before discussing the tenets of sociological jurisprudence, it is useful to repeat legal historian Thomas Grey's admonition that the label "sociological jurisprudence," when

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viewed today, carries "the seriously misleading implication that adherents of this school were devoted to what would now be called 'sociology of law.' Pound meant 'social' rather than 'having to do with sociology'" (Grey 1996, 497n12). What Pound propounded is best described as a "social theory of law" (the label he applied to Jhering's position, Pound 1911b, 143). Dewey put it concisely: "The standpoint taken is that law is through and through a social phenomenon; social in origin, in purpose or end, and in application" (Dewey 1941, 76). Hence "'law' cannot be set up as if it were a separate entity, but can be discussed only in terms of the social conditions in which it arises and of what it concretely does there" (77). Accordingly, the social theory of law necessitates scientifically produced knowledge about law. All social sciences—not just sociology—are essential to understanding what law is and what law does.

It is easy to miss that "the social character of law" lies at the heart of Pound's advocacy of sociological jurisprudence, as Alan Hunt pointed out, because today this would be "regarded merely as the painful elaboration of the obvious" (Hunt 1978, 19). What Pound objected to was the tendency of courts at the time to view legal rules, doctrines, concepts, rights, and principles in isolation without consideration of actual social circumstances or the consequences of application. His emphasis on law as a social institution had real bite against this stance. "Pound constantly reasserted, in many different ways, the social character of law. He was not alone in this endeavor, nor was he the first in the field, but he certainly kept at it for the longest and in so doing probably had a wider impact than any other on legal thought" (33).

A second preliminary clarification is that his target audience was not exclusively jurisprudents but legal academics generally. His immediate goal in the initial call for sociological jurisprudence was to change how law is taught.

> The modern teacher of law should be a student of sociology, economics and politics as well. He should know not only what the courts decide and the principles by which they decide, but quite as much the circumstances and conditions, social and economic, to which these principles are to be applied; he should know the state of popular thought and feeling which makes the environment in which the principles must operate in practice. Legal monks who pass their lives in an atmosphere of pure law, from which every worldly and human element is excluded, cannot shape practical principles to be applied to a restless world of flesh and blood. The most logical and skillfully reasoned rules may defeat the end of law in their practical administration because not adapted to the environment in which they are to be enforced. (Pound 1907, 919–20)

Pound pointed out that historians, sociologists, economists, and the public already routinely examined and criticized judicial decisions and legislation in social terms, and law professors should do so as well (917). He believed that if lawyers were taught to see law in social terms, future judges would develop law with conscious consideration of social implications, in contrast to present judges who did so subconsciously at most. "To this end it is the duty of teachers of law, while they teach scrupulously the law that the courts administer, to teach it in the spirit and from the standpoint of the political, economic and sociological learning of today" (926). Sociological jurisprudence, in Pound's

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vision, was not exclusively or even mainly a matter for theorists—it was a theoretical perspective to be developed by law professors, to be taught to and internalized by lawyers, and thereafter utilized by judges in their decision making.

Pound filled out his jurisprudential argument in subsequent articles. Until recently, he observed, jurisprudence could be divided into three schools: analytical jurisprudence, natural law theory, and historical jurisprudence. These three schools had lately become intertwined in various ways and each in its own way had become sterile. The analytical school of Austin and Bentham propounded the will theory of law, which was amenable to legislation, but analytical jurists in America had become enamored with "a jurisprudence of conceptions, in which new situations are to be met always by deduction from old principles, and criticism of premises with reference to the ends to be subserved is neglected" (Pound 1911a, 596). Historical jurisprudence, on its part, held that law is the product of the slowly evolving collective life of the people, not of human will, which rendered historical jurists skeptical of legislation (598–604). Natural law theory was no longer taken seriously by Anglo-American jurists, Pound observed, owing to skepticism about the construction of abstract systems based upon reasoning from assumed principles (606–07); it had a tendency to "over-abstractness, of a purely abstract right and justice, which, instead of resulting in a healthy critique of dogmas and institutions or at least providing material therefor, leads to empty generalities, thus in the end leaving legal doctrines to stand upon their own basis" (610). All three jurisprudential schools contributed to the "too mechanistic" application of law, and were employed to "work out specious reasons for doctrines, instead of to criticize them, and thus [have] sometimes helped to intrench them in juristic thought where a real inquiry into their ethical foundations would have shaken their authority" (609, 610). All three schools thereby preserved the status quo of an individualist common law and constitutional tradition against legislative reforms enacted to ameliorate pressing social problems.

Pound's accounts of analytical and historical jurisprudence are tendentious, constructed to serve his polemic. Bentham loudly pressed for reform of the common law system (urging codification); the will theory of law backs legislation, and utilitarianism holds that law is an instrument to achieve ends and should be designed and evaluated as such—all consistent with receptivity to legislative reform. Thus Pound tempered his characterization, asserting, "In our common law system the analytical tendency coincides with the reform movement, inaugurated by Bentham, the force of which is not yet wholly spent" (613). The core insight of the historical school is that law is the product of and integrated with surrounding social, cultural, economic, and political circumstances—making it a direct forerunner to sociological jurisprudence (Stone 1950, 399–400; Tamanaha 2017, 16–24). To advance his argument that historical jurisprudence perpetuated an abstract, deductive view of law, Pound used the German understanding, although American historical jurists were not metaphysical or conceptualist (Rabban 2013; Tamanaha 2014). He partially acknowledged this in his account, saying "At first this wider historical jurisprudence was thought of as a comparative ethnological jurisprudence. But it was not long in assuming the name and something of the character of a sociological jurisprudence" (Pound 1911a, 614).

Setting aside questions about the veracity of his characterizations, his presentation pointed toward sociological jurisprudence as the theoretical approach most suited to modern law and society. "But with the rise and growth of political, economic and social

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science, even in the closing years of the nineteenth century, the time was ripe for a wholly new tendency and that tendency, which may be called the sociological tendency, has become well established in Continental Europe" (614). An inveterate encyclopedic categorizer, Pound then embarked on an extended discussion of various continental theorists who had in different ways developed social theories of law, and he described a series of sociological stages (mechanical, biological, psychological, unification) leading up to the emerging sociological jurisprudence (Pound 1911b, 1912)—an account that need not be conveyed here.

Rudolf von Jhering deserves mention because key aspects of Pound's sociological jurisprudence are taken from his work. Oliver Wendell Holmes is frequently held up by American jurisprudents as the first jurist with a realistic understanding of law, but Jhering has a strong claim of priority. Presaging Pound's sociological jurisprudence, Holmes famously observed:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development over many centuries. (Holmes [1881] 2005, 5)

Jhering made a parallel observation nearly a generation earlier:

> Let us break the charm, the illusion which holds us captive. All this cult of logic that would fain turn jurisprudence into legal mathematics is an error and arises from misunderstanding law. Life does not exist for the sake of concepts, but concepts for the sake of life. It is not logic that is entitled to exist, but what is claimed by life, by social intercourse, by the sense of justice—whether it be logically necessary or logically impossible. (Jhering [1865], translated and quoted in Vinogradoff 1920, 142n1).

In two widely read books—*Law as a Means to an End* ([1883] 1913) and *The Struggle for Law* ([1872] 1979)—Jhering argued that law is an instrument for individual and social ends. The moving forces in legal development are ongoing battles in society between competing individuals and groups seeking to advance their preferred interests. "In the course of time," he wrote, "the interests of thousands of individuals, and of whole classes, have become bound up with the existing principles of law in such a manner that these cannot be done away with, without doing the greatest injury to the former . . . . Hence every such attempt, in natural obedience to the law of self-preservation, calls forth the most violent opposition of the imperiled interests, and with it a struggle in which, as in every struggle, the issue is not decided by the weight of reason, but by the relative strength of opposing forces" (Jhering 1979, 10–11). Despite the bleak overtones of this vision, Jhering held an optimistic view that this struggle in the aggregate gives rise to a legal order that benefits individuals and society.

"Jhering's work has enduring value for sociological jurisprudence," Pound declared; "the conception of law as a means toward social ends, the doctrine that law secures

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interests, social, public, private, requires the jurist to keep in touch with life. Wholly abstract considerations do not suffice to justify legal rules under such a theory" (Pound 1911b, 146–47). One aspect of Jhering's thought that Pound considered of "capital importance" is the insight that legal rights are not self-standing but the product of interests that secure legal recognition: "as the actions are means for vindicating rights, so the rights are means conferred by law for securing interests which it recognizes" (143). Consequently, attention must be directed at the underlying interests, which are more fundamental than the rights. Legal rights represent the interests society chooses to recognize; as interests valued within society change, the law does and should change as well. Pound's only criticism was that Jhering failed to sufficiently credit the shaping significance of ideals of justice and morals in the development of law (145–46).

In addition to the work of continental legal theorists, Pound's sociological jurisprudence was also influenced by the newly emerging field of American sociology, particularly the ideas of Pound's colleague at the University of Nebraska, Edward Ross, author of *Social Control* (1906). Ross focused on identifying the sources of social order, explaining how social conformity is achieved, showing that social control ranges from informal mechanisms, like public opinion and socialization, to formal mechanisms like institutionalized law (see Geis 1963, 271–73). Sociologists accorded relatively little attention to law because they considered informal modes of social control far more influential. Following Ross, Pound conceived of law as "a highly specialized form of social control in a developed politically organized society—a social control through the systematic and orderly application of the force of such a society" (Pound 1941, 249).

Pound combined these influences. A sociological jurist "holds that legal institutions and doctrines are instruments of a specialized form of social control, capable of being improved with reference to their ends by conscious, intelligent effort" (Pound 1943a, 20). "The main problem to which sociological jurists are addressing themselves today is to enable and to compel law-making, and also interpretation and application of legal rules, to take more account, and more intelligent account, of the social facts upon which law must proceed and to which it is to be applied" (Pound 1912, 512–13). This requires "a scientific apprehension of the relations of law to society, and of the needs and interests and opinions of society of today" (Pound 1907, 918). Law is a mode of social engineering (Pound 1923, 141–65). Pound suggested six matters for social scientific study that will help enable sociological jurists to carry out this agenda: "the actual effects of legal institutions and legal doctrines, study of the means of making legal rules effective, sociological study in preparation for law-making, study of juridical method, a sociological legal history, and the importance of reasonable and just solutions of individual cases, where the last generation was content with the abstract justice of abstract cases" (Pound 1923, 153). Studies of the relations of law to society, he famously observed, will help reveal the presence of and reasons for gaps between "law in books and law in action" (Pound 1910)—gaps that exist between the stated legal rules, what legal officials do in connection with the rules, and actual social behavior in the community that the rules purport to govern.[4]

4. Pound's distinction focused on the gap between stated law and the actions of legal officials in connection therewith. The additional gap between the first two and actual behavior in the community, which I add owing to its importance, is implicit in his account, though not what he was getting at (see Nelken 1984).

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The end of law, which Pound borrowed from William James's formulation of the social good (Pound 1923, 157), is "to order the activities of men in their endeavor to satisfy their demands so as to enable satisfaction of as much of the whole scheme of demands with the least friction and waste" (Pound 1941, 251). To achieve this end requires jurists to consult ethics, economics, history, sociology, psychology, and political science (252–53). A critical task for jurists is to construct a theory to identify and value interests law should recognize (259–62). He defined an interest "as a demand or desire which human beings either individually or in groups or associations or in relations, seek to satisfy, of which, therefore, the ordering of human relations must take account" (259). Interests served by law can be identified, according to Pound, by surveying what rights are legally recognized in legislation and judicial decisions within a given society and across legal systems (since, per Jhering, rights reflect socially recognized interests) (Pound 1943b, 16). Pound acknowledged prevailing skepticism about the capacity to measure values, but suggested that this is a practical problem to be worked out scientifically through observing the actual consequences of law in concrete contexts (Pound 1941, 262). "Here, certainly, the pragmatic criterion is sound. The true juristic theory, the true juristic method, is the one that brings forth good works" (Pound 1911a, 598).

He identified five major points of difference between sociological jurisprudence and other theoretical approaches: it looks to the actual working of law rather than abstract content; law is seen as a social institution that can be improved by intelligent effort; stress is laid on the social purposes of law; "legal precepts are guides to results which are socially just and less as inflexible models"; and it consists of diverse philosophical views, including pragmatism, and various sociological and social philosophical schools (Pound 1912, 516).

Major planks of Pound's sociological jurisprudence quickly garnered assent (see Albertsworth 1922)—with the notable exception of his theory of valuing interests (more on this later). Other prominent jurists, beyond Oliver Wendell Holmes, had said much the same in the years before and immediately after his call. Consider Pound's repeated insistence, "Law is a means, not an end"; "The rules are not prescribed and administered for their own sake, but rather to further social ends" (Pound 1907, 920; 1911a, 598). In the 1903 Annual Address to the ABA, Second Circuit Judge LeBaron Colt told his audience that the special role of courts and lawyers is to "keep law in harmony with social progress, to make it more reasonable as social necessities and public sentiment have demanded" (Colt 1903, 674). "The law should always viewed from the standpoint of society, and not from the standpoint of law itself," he said (670). "The law is made for society, and not society for the law. The interests of society are primary; the interests of the law secondary. Society is the master, and the law its handmaiden" (673). Associate Supreme Court Justice Horace Lurton observed in 1911, "One may read and hear upon every hand such sentiments as this: 'The law is a means, not an end; a means for the public good, to be modified for the public good and to be interpreted for the public good'" (Lurton 1911, 10). "The theory that the law is only a means to an end is the truth" (24). Apparently jurists were already on board with the social theory of law and needed little persuasion.

Receptivity to social science was also evident among legal academics. In "Path of the Law," Holmes advocated that "we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them. As a step toward that ideal

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it seems to me that every lawyer ought to seek an understanding of economics" (Holmes 1897, 15). The dean of Boston University Law School, Melville Bigelow, in 1905 published an article entitled "A Scientific School of Legal Thought," exposing several areas of law as outdated and dysfunctional, arguing that law schools should teach lawyers how to better keep law in sync with current social needs. "In a word a scientific school of law should make it one of its paramount objects to see that sufficient study is made of the sources whence the law is to be declared—the sources of whatever kind, not merely the precedents . . . but the direct and immediate sublegal sources—businesses and pursuits generally and the other less tangible influences which go to make up the sum total—the political, economic, psychological, and personal influences" (Bigelow 1905, 14). In "The Social Sciences as the Basis of Legal Education," William Draper Lewis, dean of Pennsylvania Law School, stated, "it is manifest that social science, and especially that branch of it which deals with group development and the growth of social ideas is a necessary part of legal education" (Lewis 1913, 536). An explicit endorsement of sociological jurisprudence was given by Joseph Beale in a 1914 speech to the Association of American Law Schools, urging "The Necessity for a Study of Legal System":

> The vocation of our age, then, is to study our law with a view to its readjustment and reform. For this purpose our study must take two directions. First, we must examine the law objectively to learn its social purpose and to see how far that purpose is being accomplished. Such a study is the object of the new sociological jurisprudence. The importance of these investigations cannot be overestimated. Every part of the law ought to be tested to find out how far it is conforming to its purpose. (Beale 1914, 39)

He urged fellow law professors to devote themselves to "new knowledge and new thought," which involves "the analysis of law and its adaptability to new circumstances" (44). His ratification is especially telling because Beale was held up by Jerome Frank—who mockingly labeled orthodox legal thought "Bealism"—as the antithesis of realism (Frank 1930, 48–58).

An effusive embrace of sociological jurisprudence was expressed by Judge Benjamin Cardozo in his celebrated lectures, *The Nature of the Judicial Process* (1921). Repeatedly citing Pound's articles on sociological jurisprudence, Cardozo endorsed the "sociological method" as necessary for judges to incorporate the community's moral sense:

> This conception of the end of the law as determining the direction of its growth, which was Jhering's great contribution to the theory of jurisprudence, finds its organon, its instrument, in the method of sociology. Not the origin, but the goal, is the main thing. There can be no wisdom in the choice of a path unless we know where it will lead. The teleological conception of his function must be ever in the judge's mind. This means, of course, that the juristic philosophy of the common law is at bottom the philosophy of pragmatism. Its truth is relative, not absolute. The rule that functions well produces a title deed to recognition. (Cardozo 1921, 102–03)

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"The final cause of law is the welfare of society," Cardozo held. "The rule that misses its aim cannot permanently justify its existence" (66). When rendering decisions judges must use the community's sense of right, not their own particular view. Cardozo observed that judges must manage multiple tensions: between the stability and certainty of law with the need for change, doctrinal consistency with social welfare, continuity with the past with the needs of the present, generality of rule application with justice in individual cases. There is no general solution for these tensions beyond pragmatically finding a working arrangement that accords due consideration to both sides (see Aronson 1938, 18–22). Owing to these views, Cardozo is often identified alongside Holmes and Pound as an early exemplar of sociological jurisprudence.

SUCCESSES OF SOCIOLOGICAL JURISPRUDENCE

American jurists evidently were ready for the social theory of law and application of social science to law. "In this country," observed legal sociologist Philip Selznick midcentury, "the premises of sociological jurisprudence achieved a rather quick and general victory, helped along by a pragmatic temper, and impatience with abstractions, and a setting of rapid social change" (Selznick 1959, 521).

With respect to the political battle, which would carry on for several decades, courts finally stopped impeding social legislation; liberty of contract and inviolable property rights gave way; courts eliminated previous common law rules immunizing employers and manufacturers from liability for harm suffered, respectively, by employees and consumers; the social welfare state came into existence. The change that symbolized the capitulation of traditional legal attitudes was the mid-century demise of the long-standing rule of construction wielded by judges that statutes in derogation of the common law must be narrowly construed. Subject only to constitutional restraints, instrumental legislation thereafter unreservedly trumps the common law. Indeed, the dominance of legislation might have gone further than Pound would have preferred, since he believed that the common law incorporated community values and judicial reason was important to doctrinal coherence and unity.

As for his urging judges to be cognizant of social reality and use social science, courts began to consider social scientific findings in their decisions. A well-known early instance was the Supreme Court's consideration of the Brandeis brief on the consequences for women of limiting working hours in *Muller v. Oregon* (1908), and a consequential instance was consideration of the social and psychological consequences of segregation in *Brown v. Board of Education* (1954). Judges, from Benjamin Cardozo then to Richard Posner today, as well as many others, also came to explicitly consider public policy and anticipated social consequences in their legal decisions.

The social scientific study of law—with various strains including the sociology of law, law and society in the United States, and sociolegal studies in the United Kingdom—"has grown tremendously in the past 40 years," producing "perhaps thousands" of studies of the actions and impact of law and legal institutions (Friedman 2005, 11, 12). The Introduction to a recent symposium on sociology of law is effusive: "The history of sociology of law and socio-legal studies is a remarkable success story of transforming different contextualizations and criticisms of general legal science

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and jurisprudence into mainstream legal thought" (Priban 2017, 1). "Studies of the social context and connections of law to culture, ideology, politics, economics, science, education, technologies, and other domains of social life are now detectable in all branches of legal science, from business regulation and legal professions to transitional justice and constitutional theory" (1). "A sociologist of law," Jiri Priban writes, "can immediately recognize that Pound's idea of sociological jurisprudence still informs the conceptual framework and general arguments of sociology of law and socio-legal studies" (10). Law and society conferences are held annually around the globe, the largest ones attracting over a thousand attendees, mixing participants from social science departments and the legal academy. A half dozen influential journals are dedicated to the subject, including the *Law & Society Review*, *Journal of Law and Society*, and *Law & Social Inquiry*, in addition to specialized journals on legal history, legal pluralism, law and economics, and others.

Another remarkable transformation is the pronounced trend in the United States in the past two decades toward hiring law professors with JDs along with PhDs in economics, history, sociology, political science, anthropology, psychology, philosophy, and other fields. A study found that in recent years two-thirds of newly hired law professors at the top twenty-six law schools held PhDs, and across all law schools one out of five new hires held PhDs (LoPucki 2016; see also McCrary, Milligan, and Phillips 2016). Presumably these law professors will bring their extensive backgrounds in other fields into their law school classrooms, as Bigelow, Lewis, and Pound advocated a century ago. It is common for law schools to offer courses in law and economics, law and society, legal history, law and literature, and so forth.

Pound objected that legal educators focused exclusively on legal doctrine in their scholarship and teaching without attention to social circumstances. Recently, however, prominent members of the practicing bar have raised the opposite concern that legal educators are neglecting doctrine. A clarion call about the growing disjunction between legal education and the practice of law was issued by former law professor and current Federal Circuit Judge Harry Edwards, who wrote, "Over the past two decades, law and economics, law and literature, law and sociology, and various other 'law and' movements have come to the fore in legal education. We also have seen a growth in critical legal studies (CLS), critical race studies, and feminist legal studies" (Edwards 1992, 34–35). Edwards affirmed that this information has an essential place in the legal academy, but felt things had gone too far, lamenting that law professors no longer saw value in writing doctrinal articles and students were not being taught the legal fundamentals they need to engage in the practice of law.

By these measures, the agenda Pound set forth for sociological jurisprudence has been a resounding success, in certain respects exceeding what he advocated. Yet, as stated at the outset, sociological jurisprudence has virtually disappeared as a jurisprudential school and even law and society scholars seldom refer to it. It may be that once its basic tenets were accepted there was less reason for sociological jurisprudence as a distinctive theoretical perspective. To fully appreciate the reasons for its disappearance, first we must examine the relationship between sociological jurisprudence and sociology of law, as well as between sociological jurisprudence and legal realism, before moving to jurisprudence.

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SOCIOLOGICAL JURISPRUDENCE AND SOCIOLOGY OF LAW

A fundamental distinction was made by Pound: sociology of law comes out of sociology to examine law, whereas sociological jurisprudence comes out of historical jurisprudence and philosophy of law to utilize the social sciences to build an empirically informed social theory of law (Pound 1943a, 2–3). Sociology is the theoretical and empirical science of society, applying sociological concepts, methodologies, and objectives, etc. Texts on sociology of law typically build on sociological giants (Weber, Durkheim, Marx) and legal sociologists (Ehrlich), examining law-related matters of sociological concern (i.e., social order, social change, social integration, crime and punishment, regulation, legal profession) (see, for example, Cotterrell 1992; Deflem 2008). Jurisprudence is the theoretical wing of the juristic enterprise, drawing on legal concepts, materials, institutions, ideals, objectives, etc. Jurisprudential works typically build on canonical jurists (selection depending on one's branch), including Aquinas, Bentham, Austin, Maine, Holmes, Llewellyn, Kelsen, Hart, and so on. Sociology approaches law from the outside, jurisprudence from the inside. Another difference Pound identified is that continental sociologists tended to be theoretical, at high levels of abstraction, producing objective knowledge about society in general, compared to the empirical orientation of American sociologists, more often focused on social relations and concrete contexts, willing to look for solutions to specific social problems (Pound 1943a, 3–10). Sociological jurisprudence arose in connection with American sociology, sharing a contextual orientation and application to social and legal problems.

These orientations play out in contrasting responses to the classic question "What is law?" Continental sociologists like Timasheff, Gurvitch, and Ehrlich defined "law" in terms of norms actually followed in social life (i.e., the inner order associations) (see Ehrlich [1913] 1936). By in effect treating all forms of social control as law (Pound 1943a, 10–12), this leads to the irresolvable puzzle of how to distinguish law from customs, morals, and other norms coursing through social life (see Tamanaha 2017, 39–48). From Pound's juristic standpoint, and for applied sociology, this problem does not arise. Positing state law as the model, law can be defined as institutionalized social control backed by coercion in a politically organized society.

Another contrast, emphasized by both Gurvitch and Pound, is that sociology of law is purely descriptive, aimed at generating scientific knowledge about law, whereas sociological jurisprudence has practical ends and a normative commitment to improve the functioning of law (Gurvitch 1941). Sociological jurisprudence wrestles with concrete legal and social problems in a way that "cuts ice"—striving to solve problems and engage value questions to enhance the development of the legal order (Pound 1943a, 20).

A great deal has changed since this initial division, including the lapsing of sociological jurisprudence, while several permutations of the original fault line have emerged. A notable change is that abstract sociological theories of law have fallen out of favor. One contemporary theory in this vein is the functionalist account of law as an autopoietic system of communication developed by German sociologists Niklas Luhmann and Gunther Teubner (see Baxter 2013). A markedly different abstract theory is American sociologist Donald Black's positivist legal sociology, which purports to

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formulate universal causal laws of legal behavior (Black 1976). Both theories have dedicated followers, though lack broad support.

A permutation of the original distinction between detached objective scientific knowledge versus normatively committed sociological jurisprudence now appears in a series of tensions among a splintered group of scholars who apply an empirical lens to law: legal sociologists, law and society or sociolegal scholars, critical scholars, empirical legal scholars, and new legal realists. Sociologists of law take the position that they should approach law from sociology with the goal of producing systematic theoretical and empirical knowledge about society. Selznick expressed this sentiment: "Sociology can contribute most to law by tending its own garden" (Selznick 1959, 522). Those who hold strongly to this view have been critical of sociolegal and law and society scholars who conduct empirical studies of legal institutions for policy purposes—which helps secure research funding—because this uses sociology instrumentally in service of the legal order, compromising its independence as an external scientific perspective on law (see Campbell and Wiles 1976; Sarat and Silbey 1988).

A related tension arises between scholars who believe social science involves objective knowledge about law, and those who believe law and society studies should advance progressive goals. A recent overview acknowledged, "Law and society itself is sometimes presented as a social movement, which reflects the decidedly political and progressive intellectual roots of this interdisciplinary field" (Seron, Coutin, and White Meeusen 2013, 294). Consistent with this progressive orientation, a sizable number of studies show that law is a system of power concealed in an ideology of neutrality that maintains economic elites, patriarchy, racial domination, as well as other inequities and failings of law. This progressive bent raises the question whether this is science or politics dressed up as science. A split exists over whether empirical research is inevitably politically skewed (see Erlanger et al. 2005, 342–43). A critical wing of law and society scholars is avowedly committed to leftist politics (see Silbey and Sarat 1987), including some who have argued that postmodernism has shown that value-free objectivity is chimerical and should be abandoned (Trubek and Esser 1990). There is a tension, conveyed by insider Austin Sarat: "critical scholars believe that law and society scholars and the Association is not political enough: traditional social scientists, that it has been too politicized" (Sarat 1994, 617n6).

A group based in law schools calling itself Empirical Legal Studies emerged with a commitment to positivist quantitative studies—largely statistical analyses of data sets—focusing on the operation of legal institutions and consequences of legal doctrine and actions, without an overtly progressive orientation (Eisenberg 2011). Another initiative born out of law schools was new legal realism, seeking to span theory, interpretivism, and positivism, to examine law in action in all its various manifestations (institutional, cultural, doctrinal, etc.) (Erlanger et al. 2005). While debates over whether these studies are objective social science remain unresolved, many researchers carry on with the implicit understanding that the "major contribution" law and society offers, as Lawrence Friedman wrote three decades ago, is "a kind of deliberate detachment," according to which "the best scholars try to *approach* objectivity" (Friedman 1986, 780).

A second permutation of the original fault line is the reemergence in studies of legal pluralism of the original debate over "What is law?" Legal pluralism is the notion that in many social arenas more than one manifestation of law coexists. The problem of

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defining law arises because scholars are called on to specify what counts as "law" for the purposes of legal pluralism. Leading legal pluralists have identified Eugen Ehrlich's living law—strongly held norms actually followed in social life—as a way to demarcate law (see Griffiths 1986). Proponents accept that "on this view all social control is *more* or *less* legal" (39n2). This resurrects the position Pound and other jurists criticized as a fundamental flaw of continental legal sociology early in the century. Felix Cohen objected, "under Ehrlich's terminology, law itself merges with religion, ethical custom, morality, decorum, tact, fashion, and etiquette" (Cohen 1960, 187). The same criticism is now being lodged against contemporary legal pluralists. In a review of the literature on legal pluralism, Sally Engle Merry protested, "calling all forms of ordering that are not state law by the term law confounds the analysis" (Merry 1988, 878). "Where do we stop speaking of law and find ourselves simply describing social life?" (878). All sociological attempts to define law using criteria based on form or function inevitably suffer the inability to identify the distinctively legal (Tamanaha 2017, 39–48). Despite this core difficulty, legal pluralism is increasingly a focus of sociology of law, legal anthropology, comparative law, international and transnational law, and jurisprudence (Roughan and Halpin 2017; Tamanaha 2019). Reflecting the growing attention it receives, Cotterrell extensively discusses legal pluralism in Chapters 6 and 7 of his book.

With this background, it is now possible to identify how Pound's sociological jurisprudence differs in key respects on social science compared to contemporary empirical studies and to legal realism (taken up next). Not only did he trust social science to provide objective knowledge on facts about the operation and consequences of law, he also believed social science could answer value questions. "For if the physical sciences have for their function to discover what *is*," he wrote, "the social sciences have for theirs to discover what *ought* to be and how to bring it about" (Pound 1940, 36, emphasis added). "What ought-to-be has no place in physical science. It has first place in the social sciences" (36). Legal realist Karl Llewellyn agreed that science could supply objective empirical results, but did not believe science could answer value questions. "As we move into these value-judgments we desert entirely the solid sphere of objective observation, of possible agreement among all normal, trained observers, and enter the airy sphere of individual ideals and subjectivity" (Llewellyn 1931b, 100). Today, scholars who apply social science to law break down into three groups. Positivists who apply quantitative methods tend to make objectivist claims about the results as facts or valid probabilistic findings. Law and society scholars make a softer claim to produce empirically valid results by striving for objectivity.[5] Critical and postmodern scholars say political influences are unavoidable and unapologetically get on with studies that advance progressive causes. None of the three groups assert that social science can establish what ought to be.

Another crucial difference lies in differing postures toward the relationship between science and law. Sociological jurisprudence for Pound enlists empirical studies to enhance the functioning of law as a mechanism of social engineering and social

5. The continued claim to objectivity is reflected in the standard disclosure statement at the end of articles in the *Annual Review of Law and Social Sciences*: "The authors are not aware of any affiliations, membership, funding, or financial holdings that might be perceived as affecting the objectivity of this review" (see Seron, Coutin, and White Meeusen 2013, 300).

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control—to work more effectively, to match social circumstances, to achieve social purposes, to comport with the prevailing sense of justice within society, to increase public respect for law. He was committed to law and its relationship with science was to be collaborative. This commitment was reflected in the measured critical stance he struck, supporting progressive legal reforms while also defending the integrity of courts from vocal attacks by radical critics, which he opposed as corrosive. In contrast to the supportive relationship to law Pound envisioned, contemporary legal sociologists and law and society scholars often assume an external, critical posture toward law. (see Seron, Coutin, and White Meeusen 2013). They see law as a system of power, are skeptical of judging as politics, and endeavor to expose law's various sins and flaws, including issuing frequent reminders that law often is not effective as a mechanism of social engineering because social life is thick with alternative forms of social ordering that are more immediately influential (see Moore 1973; Galanter 1981).

Epitomizing this external critical perspective is the thriving political science field of quantitative studies of judicial decision making.[6] For decades scholars have portrayed judges as "politicians in black robes" (Glick 1983, 243). Two leaders in the field declared, "with scattered exceptions here and there, the decisions of judges, and especially the decisions of Supreme Court justices, tend to reflect their own political values" (Epstein and Segal 2005, 3). Pound opposed such depictions in his own day as exaggerated distortions that failed to recognize the significant extent to which decisions are determined by rules.

The passage of time has transformed how Pound is viewed. Though he was an influential supporter of Progressive reforms in his day, Pound was committed to common law judging, to rule application and judicial reason in maintaining the coherence of law, and he believed social science could provide reliable findings about facts and values. This cluster of views makes him appear almost reactionary by comparison to law and society and critical scholars today, skeptical as they are of law and having less faith in objectivist social science.

A surprising number of law and society retrospectives and overviews omit any mention of Pound or sociological jurisprudence (see, for example, Friedman 1986, 2005; Garth and Sterling 1998; Seron, Coutin, and White Meeusen 2013). A recent survey of canonical law and society themes even mentions gap studies focused on the "iconic distinction" between "'law on the books' and the 'law in action'" without acknowledging Pound, crediting this instead to "American legal realism" (Seron, Coutin, and White Meeusen 2013, 294). (Poor Pound!—his iconic distinction taken over by the jurisprudential upstarts who charged him with failing to carry through his own insights.) The primary reason for the virtual erasure of Pound as a founding figure in law and society research appears to be that legal realism has secured this position. In his overview, David Trubek observes, "It is pretty well accepted that Legal Realism set the stage for the development of the law and society movement" (Trubek 1990, 18). This appears to be the consensus view (see Garth and Sterling 1998), never mind that the foci of many empirical studies are on matters first laid out by Pound.

6. For a critical look at how quantitative studies have been constructed and interpreted, see Tamanaha 2010, chaps. 7 and 8.

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The sociological jurisprudence Cotterrell advocates is a throwback to Pound in fundamental respects (albeit with significant differences indicated later). He sharply distinguishes sociology of law from sociological jurisprudence. Sociology of law involves the "disinterested, explanatory, social scientific study" of legal institutions, actions, and ideas from an empirical standpoint informed by sociological theories and methodologies (Cotterrell 2018, 3–5). Sociological jurisprudence, on the other hand, is not a disinterested science but "a way of doing jurisprudence" that is "necessarily always in the practical service of the jurist" (4). Law is an "idea structured by values," and the role of jurists is to be "committed to the well-being of this idea of law" (17). Though Cotterrell approaches from a different direction (via Radbruch), like Pound he sees sociological jurisprudence as thoroughly normative in that it serves an essential role in promoting the development of values in law and in serving to better law as a normative institution oriented to justice and morality (12–13). "Sociological jurisprudence was, and remains, an enterprise of jurists appealing to social science for aid in their own projects of analyzing legal doctrine and institutions and improving juristic practice" (3). Following Durkheim, he argues that sociologists can examine the facts of social life to "identify moral principles and practices compatible with (or even necessary to) stable social relations in particular kinds of societies" (174). Sociology can identify moral values prevailing within a given society and guide moral choices by revealing their possible consequences—which can be incorporated by sociological jurisprudence to preserve and facilitate the development of law as the repository of societal values (174).

SOCIOLOGICAL JURISPRUDENCE AND LEGAL REALISM

Two clichés are often repeated: we are all legal realists now, and it is unclear what legal realism was about. The broadly accepted core idea credited to the legal realists is that in a significant proportion of cases legal rules do not determine judicial decisions. Confusion about legal realism goes back to the originating spat between Pound and Llewellyn and Jerome Frank. (see Tamanaha 2016, 2010). In his often-cited article setting forth legal realism, Llewellyn repeatedly emphasized: "One thing is clear. There is no school of realists. There is no likelihood that there will be such a school. There is no group with an official or accepted, or even with an emerging creed" (Llewellyn 1931a, 1233). "Their differences in point of view, in interest, in emphasis, in field of work, are huge. They differ among themselves well-nigh as much as any of them differs from, say, Langdell" (1234). Several scholars he identified as legal realists denied knowing what realism meant and denied being a part of it (see, for example, Green 1933, 247). Understandably, then, debates over legal realism have continued for decades with no resolution in sight.

Granting uncertainty over the contours of legal realism, several points of similarity with sociological jurisprudence stand out.[7] Both emerged in legal reform efforts, the former by Progressives early in the century, the latter in support of the New Deal (White 1972). Both saw law in thoroughly social terms and urged the empirical study of law.

7. Illuminating studies of the relationship, which help inform this account, are Rumble 1965, Hunt 1978, and Duxbury 1995.

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Among the realist points of departure Llewellyn identified, the first three were previously included within sociological jurisprudence by Pound: "The conception of law in flux, or moving law, and of judicial creation of law." "The conception of law as a means to social ends and not as an end in itself; so that any part needs constantly to be examined for its purpose, and for its effect, and to be judged in the light of both and of their relation to each other." "The conception of society in flux, and in flux typically faster than the law, so that the probability is always given that any portion of law needs reexamination to determine how far it fits the society it purports to serve" (1236). His eighth proposition was also shared with Pound: "An insistence on evaluation of any part of law in terms of its effects, and an insistence on the worthwhileness of trying to find these effects" (1237). And both allocated a great amount of their jurisprudential attention to judging, though they also spoke about law more generally. Lastly, both viewed social science as useful and necessary to facilitate the reform of law. The substantial overlap in their positions explains Pound's bemused reaction that the purportedly new realistic jurisprudence was prefigured by sociological jurisprudence (see Duxbury 1995, 58).

Two differences stand out. First, already mentioned above, Pound believed sociological jurisprudence was pivotal to the identification and furthering of values in law, while the realists on a whole did not think social science could identify values. The second relates to apparently greater skepticism of realists about legal rules and judging. Among their common points of departure, Llewellyn included: "[d]istrust of legal rules and concepts insofar as they purport to describe what either courts or people are actually doing." "Hand in hand with this distrust of traditional prescriptive rule-formulations are the heavily operative factor in producing court decisions" (Llewellyn 1931a, 1237). The realists emphasized extralegal, subconscious factors, and responses to fact situations in judicial decision making. Denying that rules had determinative consequences was antithetical to Pound, though he was aware of gaps in law and the openness of law to multiple interpretations. He considered the routine judicial application of rules essential for predictability and certainty. "In matters of property and commercial law," he wrote, "where the economic forms of the social interest in the general security—the security of acquisitions and security of transactions—are controlling, mechanical application of fixed, detailed rules or of rigid deductions from fixed conceptions is a wise social engineering" (Pound 1923, 154).

A comparison of their respective positions suggests that legal realism "is best understood as an offshoot of sociological jurisprudence"; and "the 'rule-skepticism' of the legal realists is the root of their most distinctive doctrines" (Rumble 1965, 566). Both prongs of this conclusion help explain why law and society scholars identify their origins in legal realism, not sociological jurisprudence.

A distinguishing feature of the legal realists, what makes them an offshoot, is that they devised and conducted social scientific studies of law, while sociological jurisprudence remained a theoretical perspective. Pound advocated empirical studies of law but did not participate in any. Several realists founded the Institute of Law at John Hopkins University in 1928 to research the effectiveness of law, including "all relevant facts as to its origins, its relationship to social needs and conditions, its administration and its effects" (funding application, quoted in Schlegel 1995, 148). The Institute closed five years later when funding collapsed, but it was a start, and over time several legal realists engaged in pioneering studies (see Schlegel 1995). Llewellyn, on his part, collaborated

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with anthropologist Adamson Hoebel in a study of law among the Cheyenne that had an impact within legal anthropology through its introduction of the trouble case method (Llewellyn and Hoebel 1941). A few other studies of law existed at the time, for example the legal anthropology of Bronislaw Malinowski ([1926] 1985), but the realists were the first legal academics to systematically engage in them.

The connection to the second prong is that law and society studies "emerged in reaction to doctrinal analysis" as "a critique of formal law," involving a "critical perspective on law's internal accounts" (Seron, Coutin, and White Meeusen, 290). This skeptical perspective toward legal rules is typically traced back to legal realism. It should be noted, however, that although today the legal realists are commonly portrayed as radical skeptics of judging, this distorts their position (Tamanaha 2010, 93–98). They recognized, as Walter Wheeler Cook observed, that "[o]ur legal rules and principles will give us the answer to the vast bulk of human transactions" (Cook 1943, 421). They were not external critics, moreover, but jurists committed to the improvement of law and judging, many with distinguished legal careers, including several who served as federal judges for decades (Rostow 1961; Tamanaha 2010, 94). With these corrections in mind, it is true that certain legal realists emphasized gaps and flexibility of legal rules and subconscious influences on judging.

For these reasons, it makes sense that legal realism serves as the genealogical and inspirational touchstone for law and society scholars. The legal realists, in their polemical coming-out blast, struck a radical pose and expressed skepticism about legal rules that Pound rejected as excessive, but later progressive law and society and critical scholars would find appealing; and Pound advocated applying social science to law but he did not do it himself, while a few legal realists actually engaged in pioneering social scientific studies of law.

SOCIOLOGICAL JURISPRUDENCE AND CONTEMPORARY JURISPRUDENCE

Just as legal realism superseded sociological jurisprudence in law and society studies, the same occurred in jurisprudence. The standard jurisprudential narrative constructs a line of descent that runs from Holmes to Pound and Cardozo, culminating in legal realism, which lays the groundwork for modern theories of law, from law and economics, to critical legal studies, to critical feminism and critical race theory (see Bix 2015). The apparent skepticism of legal realism was a forerunner to modern critical theory, while its emphasis on social science helped pave the way for law and economics, thereby earning the bulk of contemporary theoretical attention, leaving little contemporary relevance for sociological jurisprudence.

Cotterrell emphasizes a different explanation for the neglect of sociological jurisprudence: jurisprudence has become exceedingly narrow and abstract in recent decades as it increasingly came to be taken over by the philosophy of law. Through the first half of the twentieth century jurisprudence was broadly conceived as accounts of law produced by theoretically inclined jurists. "Jurisprudence consists of the general theories of, or about, law" (Patterson 1953, 2). Pound identified the dominant jurisprudential schools at the turn of the century as historical jurisprudence and analytical

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jurisprudence, with natural law theory in decline, and sociological jurisprudence ascendant. Through the mid-twentieth century it was common for jurisprudence texts to range broadly across all these topics. (see, for example, Patterson 1953). However, since Hart revived the analytical philosophy of law with the publication of *The Concept of Law* (1961), Cotterrell tells us, jurisprudence has gradually been transformed into "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" (Cotterrell 2018, 5). The "philosophical professionalization of jurisprudence" has made it less beneficial for jurists, while also marginalizing historical jurisprudence, sociological jurisprudence, and other theoretical perspectives, impoverishing jurisprudence as a result (8, 44–57).

Contemporary legal philosophy is highly abstract. In their search for universal, essential, and necessary features of law, legal philosophers detach law from social context and history, and distance themselves from sociology, building their theories on a priori intuitions, self-evident truisms, conceptual analysis, thought experiments, and the like (for a critique, see Tamanaha 2017, chap. 3). Joseph Raz explained, "Since a legal theory must be true of all legal systems the identifying features by which it characterizes them must of necessity be very general and abstract. It must disregard those functions which some legal systems fulfil in some societies because of the special social, economic, or cultural conditions of those societies" (Raz 2009, 104). Only philosophy can tell us what law is, according to Scott Shapiro:

> Social science cannot tell us what the law is because it studies *human* society. Its deliverances have no relevance for the legal philosopher because it is a truism that nonhumans could have law. Science fiction, for example, is replete with stories involving alien civilizations with some form of legal system. . . . Social scientific theories are limited in this respect, being able to study only human groups, and hence cannot provide an account of all possible instances of law. (Shapiro 2011, 406–07, n16)

When denying that coercion is a necessary feature of law, legal philosopher Leslie Green resorts to presumably self-evident assertions about societies of angels, for example: "We all know that even a 'society of angels' would need rules, if only to help them coordinate their altruistic activities" (Green 2016, 165–66).[8] Talk about aliens and angels is as far away from empiricism as one could get.

Cotterrell accepts that legal philosophers may generate insights via philosophical methodologies and objectives. His concern is to free jurisprudence from legal philosophy in a way that renders jurisprudence amenable to sociological jurisprudence and beneficial for jurists.

The preceding threads in this essay suggest that three factors contributed to the virtual disappearance of sociological jurisprudence from jurisprudence. Once the view that law is a social institution with social ends and consequences became taken for granted, a jurisprudential school dedicated to this view no longer seemed necessary. Legal realism superseded sociological jurisprudence because its skeptical-critical

8. I, for one, do not know that societies of angels would have rules, or anything else about angels.

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observations about legal doctrine and judging comported with modern critical approaches to law while its emphasis on social science aligned with law and economics. And the growth of abstract legal philosophy within jurisprudence marginalized empirically oriented jurisprudence.

A revival of sociological jurisprudence is necessary, according to Cotterrell, to fill a vital lacuna. The many challenges and crises in contemporary societies that jurists are called upon to grapple with—particularly in connection with the proliferation of public and private forms of law and regulation wrought by globalization—require a normatively oriented jurisprudence dealing with concrete situations in particular societies and legal arenas. Other jurisprudential approaches with normative orientations exist, like John Finnis's natural law theory, Ronald Dworkin's law as integrity, or Robin West's progressive jurisprudence, but they are constructed in theoretical terms (Finnis 1980; Dworkin 1988; West 2011). Only sociological jurisprudence has a normative commitment in support of jurists that incorporates social science as integral to the identification and advancement of law as an ethical idea and pursuit.

Earlier I conveyed similarities between Pound's and Cotterrell's sociological jurisprudence in their normative commitment to advancing law and their belief that social science can supply knowledge about values. Here I elaborate a few additional aspects of Cotterrell's position. The normative nature of law derives from its fundamental role in society of achieving justice, order, and social purposes; the values and purposes law serves are taken from the particular culture in which it exists, assisted by social scientific identification of fundamental values (Cotterrell 2018, 38–42). Cotterrell's vision resembles Dworkin's view of law reflecting the moral and political principles of the community, except the latter is hierarchical and derived philosophically, while the former is pluralistic and devised sociologically. "Attention to purpose involves not a philosophical effort rigorously to expound social values," Cotterrell elaborates, "but a *sociological* attempt to identify patterns of experience in the jurist's sociohistorical environment, so that the idea of law can be advanced in *that* context, in relation to *those* aspirations and expectations. It demands sensitivity to the ways that values of order and justice are understood and experienced in a given society at a particular time" (41). Cotterrell also shares with Dworkin the view that jurisprudence as a theoretical enterprise operates in relation to (is an aspect of) particular juristic traditions.

The pivotal moves in his position involve stipulating a definition and assigning a role to jurists, then tying jurisprudence thereto. "Jurists" are scholars of law—including academics and practicing lawyers who pursue knowledge about law—and their specific role "is that of maintaining the idea of law as a special kind of practice and enabling that idea to flourish. One might say that the jurist's role, on this understanding, is to safeguard and promote law's general *well-being*" (32). The commitment to enhance law's well-being extends to all aspects: "clarity, coherence, fairness, consistency, reputation, accessibility, enforcement, and effectiveness," and more (33). Jurisprudence supports jurists in carrying out their role: "jurisprudence is properly seen as an important body of thought that aims at exploring, aiding, and developing the *prudentia* of jurists" (45). Not an academic field or discipline, in Cotterrell's conception, jurisprudence is "a patchwork of insights related to the idea (and ideal) of law as a practice of regulation to serve social needs and social values, as these are recognized in particular times and places" (45).

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This is how Cotterrell construes *jurisprudence*, it must be emphasized, not just sociological jurisprudence. "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" (13). The entirety of jurisprudence should be committed to advancing law's well-being informed by sociological awareness, he asserts;[9] when this commitment is fully embraced, "the term 'sociological jurisprudence' would become redundant" (13n16). In response to legal philosophy trying to encompass jurisprudence in its entirety, it appears that Cotterrell turns the tables to have sociological jurisprudence swallow jurisprudence whole (leaving legal philosophy outside undigested).

Whether Cotterrell's revival of sociological jurisprudence will succeed remains to be seen. Others have recently argued that social science can contribute to value-laden aspects of law (see Fischman 2013). The original reaction to Pound's sociological jurisprudence, however, does not bode well. Though much of his program enjoyed broad support, his theory of social interests went nowhere (for critiques, see Wacks 2012, 165). To identify social interests, he examined the common law and legislation to discern what secured legal recognition. (He did not use social science for this investigation.) The interests he identified are general and vague: security within the family, security of religion, stable government and political rights, prevailing morals, conserving social resources, making social and economic progress, promoting individual lives and opportunities (Pound 1943b, 21–39). Jurists objected to Pound's scheme that fundamental conflicts exist over which interests deserve recognition, how they are to be realized, weighted, or balanced, and which should prevail when they clash (see Kennedy 1924).

Social sciences are unable to say what should obtain legal recognition in societies riven with conflict over desirable values and ends because science does not answer normative questions. This criticism was directed at Pound and Dewey at the time: "The difference between us [adherents of natural law] and Mr. Dewey is that we can defend Mr. Dewey's goals, we can argue for democracy and human ends, and Mr. Dewey cannot. All he can do is say he is for them. He cannot say why, because he can appeal only to science" (Robert Hutchens, quoted in Johnston 2011, 13). Llewellyn cautioned that "nothing could more endanger either one's own thinking or the reputation of a discipline than the putting forward of such hunches [about values] as if they were statements of scientific truth. Science does not teach us where to go" (Llewellyn 1931b, 101).

Cotterrell's views of science and values are more sophisticated and nuanced than Pound's.[10] He does not believe sociology can directly answer value questions, as Pound apparently believed. Rather, Cotterrell believes sociology can identify the values people hold as well as their consequences, explain why value debates and choices matter in given social contexts, guide the implementation of those choices, reveal their likely consequences, show how they can benefit society, and identify moral principles necessary to stable relations within given societies. He also believes sociology can help fill in value-laden notions like reasonableness and fairness, working in conjunction with

9. For an informative discussion of Cotterrell's treatment of values see Priban 2018.
10. Thanks to Cotterrell for his clarification of these points in personal correspondence.

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juristic notions to help produce decisions in particular contexts. But Cotterrell does not believe that sociology can make ultimate value choices for jurists.

This places a great deal of faith in the capacity of sociology. Sociology arguably can identify prevailing social values in a homogenous society—though contrasting selections, formulations, and interpretations of existing values will exist—and in heterogeneous societies the task is much harder because the candidate pool of circulating values is multiplied. Perhaps sociology can identify the social consequences of prevailing values and their legal recognition—though establishing the causal consequences of values is highly problematic owing to social complexity and the inevitable presence of multiple intertwined factors that render it exceedingly difficult to isolate the effects of given values, if it can be done at all. Presumably these are empirical questions susceptible to sociological determination, although the challenges they present are formidable. But there are many hurdles confronting Cotterrell's sociological jurisprudence. To name a few: theoretical and methodological disagreement permeates sociology; doubts about reliability of findings are common and multiple studies are necessary to confirm results; depending on research design and the questions framed, studies may produce disparate findings; studies of values, which are inchoate, require great sophistication and substantial funding. Put concisely, a given value must be correctly identified and formulated, the impact of that value on actual behavior of people within society must be accurately specified and measured, and the causal consequences of the value-oriented behavior must be identified, traced, and measured. Sociological jurisprudence is unlikely to get off the ground if its fate depends on reliable empirical studies of this degree of difficulty tied to values.

Once the social theory of law became standard and the empirical study of law was generally recognized as useful, the feature that makes sociological jurisprudence most distinctive—its application of social science to illuminate and inform law's normative dimensions—is also the source of its most profound challenges. Sociological jurisprudence, in Cotterrell's telling, is normative in its commitment to enhancing law's well-being, and in drawing on empiricism to provide various insights into values. Many contemporary societies are sharply divided over value questions, however, and skepticism already exists about the capacity of social sciences to produce objective findings on facts, all the worse for fraught questions relating to values.

KEEPING JURISPRUDENCE OPEN

A final concern with Cotterrell's sociological jurisprudence is his argument that jurisprudence in general is normatively committed to serving law's well-being. Pound shared this personal commitment and presented sociological jurisprudence in normative terms in service of law. Perhaps it makes sense to see this normative commitment as integral to sociological jurisprudence, since it originated within a social-historical context that included this orientation; though a contrary argument can be made that sociological jurisprudence need not be wedded to Pound's particular orientation—emphasizing instead that it consists of a social theory of law grounded on empirical insights (see Tamanaha 2017). But even Pound did not delimit jurisprudence exclusively in terms of serving jurists and the well-being of law.

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Jurisprudence is a broad tent of theoretical approaches to law not tethered to specifically juristic concerns. It is insufficient to simply stipulate or define "jurists" and "jurisprudence" in normatively oriented terms. These normative commitments may be laudable, attractive to jurists and jurisprudents who hold these views, but compelling justifications are required for each, which Cotterrell fails to provide.[11] As a lawyer I took an oath to uphold the law, which arguably came with a normative obligation to advance the well-being of law. But why must jurisprudence serve the jurist in fulfilling this role? As a scholar, my commitment is to contribute to knowledge about law, which does not require me to enhance law's well-being.

Jurisprudence has long consisted of theories about law of any stripe whatsoever, changing in composition over time as surrounding circumstances and theoretical perspectives change. Cotterrell wants to seize jurisprudence back from legal philosophers, but replaces their narrow construal of the subject as philosophy with his own restrictive view in the service of jurists. Leaving jurisprudence open is inadequate, he contends, for "something must hold all this together" (Cotterrell 2018, 55). But jurisprudence has long comprised various theoretical perspectives on law without any specific glue binding it together, and his preferred focus is highly problematic.

What his normative commitment excludes are general theoretical approaches to understanding law that are descriptive in orientation wholly detached from juristic concerns. Consider *The Concept of Law*, which Hart presented as "concerned with the clarification of the general framework of legal thought, rather than with criticism of law or legal policy" (Hart 1961, v). It was general, descriptive, and analytical, a contribution to philosophical knowledge about law, with no necessary connection to enhancing law's well-being in the United Kingdom or anywhere else. Notoriously, Hart asserted that it "may also be regarded as an essay in descriptive sociology" (Hart 1961, v), a statement roundly criticized for the apparent lack of sociology in the text. As it turns out, though, Hart's concept of law as primary and secondary rules has been enlisted by legal sociologists and anthropologists to identify law in contexts of legal pluralism (see Galanter 1981, 18), vindicating his expressed hope that his analysis might be useful in sociology (Hart 1961, v). Or consider my recent book, *A Realistic Theory of Law* (2017), which draws on history, anthropology, sociology, political science, and other social sciences to construct a view of law as a complex of institutions that have evolved over time in different social settings interconnected within their surrounding culture, economy, polity, technology, ecology, and the rest of the environment (including other interacting societies). My objective was to articulate a general, descriptive, social-historical account of law, with no normative commitment toward law and no obvious use for jurists beyond helping them understand law.

By Cotterrell's criteria, since neither text aims to support jurists in advancing law's well-being within particular systems, they are not works in jurisprudence, though he grants that they have value outside of jurisprudence in legal philosophy and social legal theory, respectively. The suggestion that Hart's classic book is not a part of jurisprudence, however, is a complete nonstarter given its unquestioned central place. Cotterrell's idiosyncratic construal of jurisprudence as a normatively committed,

11. For an informative discussion of Cotterrell's position on legal values, see Priban 2018.

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empirically informed theory in the service of jurists is highly unlikely to succeed because few jurisprudents see it this way.

Jurisprudence is enriched by being open to a variety of theoretical frameworks, orientations, disciplinary backgrounds, methodological techniques, and everything else brought to bear in the theoretical study of law. Jurisprudence involves theories of law. Hearkening to the standard view a century ago, articulated by Pound above, I have argued that three branches of jurisprudence have long existed: natural law, analytical, and social-historical (Tamanaha 2017). This breakdown is neither all-encompassing nor final. All comers with theoretical views of law should be welcome to jurisprudence, proving their worth through interest generated by their insights. Arguments that impose boundaries on what qualifies as jurisprudence are not only unduly restricting, they are doomed to failure. What jurisprudence consists of is a product of what scholars engaged in jurisprudence see fit to undertake. Sociological jurisprudence will secure a place within jurisprudence as long as legal theorists, social scientists, lawyers, and others find it illuminating or useful.

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