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IS LAW REALLY A SOCIAL SCIENCE? A VIEW FROM COMPARATIVE LAW

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THE question to be pursued in this article has the merit of simplicity even if the response to it proves somewhat complex. The question is this: is law truly a social science? This may seem an odd question to many in the common law world since it is not uncommon, at least in England, for law schools to find themselves located in faculties of social science. Moreover there are a number of individuals, perhaps a considerable number in common law departments and faculties throughout the world, whose research and scholarship undoubtedly qualifies as social science research. So, before one can even begin to reflect upon the question to be pursued in this paper, a preliminary question must first be asked. Why should one wish even to pose the question?

This question will be considered by way of introduction and it will be followed by a section setting out the arguments as to why law might be regarded as not being a social science. Counter arguments will be discussed in further sections, but one particular difficulty will then be highlighted. Law, like traditionalist theology, is a discipline that is governed by the authority paradigm and it is this paradigm that restricts it in its capacity to make an epistemological contribution to social science thinking. However not all jurists are, or at least ought to be, trapped within this paradigm. Comparative legal studies, for example, have to be interdisciplinary and have to operate outside of the authority paradigm if they are to be taken seriously. Moreover such studies can generate, so it will be argued in this article, new ideas with regard to methodology and epistemology. So, by way of conclusion, it will be suggested that the answer to the question of whether law is a social science is an ambiguous one.

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I. Introduction: Why the Question?

The primary reason why the question has been posed is to be found in a relatively recent book published in France under the editorship of Jean-Michel Berthelot and entitled *Épistémologie des sciences sociales*.[1] Now it is clear that what constitutes a social science in France is somewhat different from the position in the United Kingdom, for the English do not tend to treat disciplines such as history and philosophy as social science subjects; they are usually regarded as falling within the humanities. This distinction is of course of great importance and raises of itself fundamental discipline issues.[2] Nevertheless the point to be stressed for the purposes of this present article is that it is still striking that Berthelot has no chapter on law.[3] This exclusion is due neither to oversight nor to the lack of anyone in France capable of writing a sophisticated entry on legal epistemology, for there is a short work by a French law professor that, adapted, might have made an excellent contribution to the Berthelot book.[4] The exclusion results from a deliberate decision taken by Professor Berthelot not to include law.

To do justice to Berthelot, he did not, it seems, arrive at his decision without considerable reflection nor in fact does he actually state that law is not a social science.[5] Indeed he indicates that had more space been available he might well have invited a contribution on law.[6] What he does do, however, is to advance a theoretical argument in which he asserts that law (together with political science) is different from the other social sciences in that "the legal and political sciences are made up in the main of normative judgments and their foundations". This, he says, makes them different in terms of their perspective. The disciplines that Berthelot includes in his book are all "drawn towards problematising the forms of interaction between

[1] Presses Universitaires de France, 2001 (hereinafter cited as *Épistémologie*). A review of this book by Wanda Capeller, who also gives consideration to the question of whether or not law is a social science, can be found in [2003] *Droit et Société* 215. This review is followed by a short response from Jean-Michel Berthelot at 227. The death of Professor Berthelot was reported in *Le Monde* 14 February 2006. Reference should also be made to W.T. Murphy, *The Oldest Social Science? Configurations of Law and Modernity* (Oxford 1997). Professor Murphy is equally sceptical about the claim that law is a social science.

[2] It has to be pointed out of course that what constitutes a social science is of itself a highly difficult and debated issue, as is the question of the distinction between the social sciences and human sciences (humanities). Indeed, there is the whole issue of whether or not "social science" (and equally "human science") constitutes a discipline in itself or is simply an amalgam of individual disciplines: see *e.g.* A Renaut, "Humanisme et Sciences Humaines", in S Mesure and P Savidan (eds.), *Le Dictionnaire des Sciences Humaines* (Paris 2006), 584. Although this present article will not investigate directly these issues and debates (if only because of space constraint), it is nowhere being suggested that these questions and debates are irrelevant to the issues that are discussed.

[3] See Capeller, above note 1, p.224ff.

[4] See *e.g.* C. Atias, *Épistémologie du Droit* (Paris 1994).

[5] See also Berthelot [2003] *Droit et Société*, pp.227–228.

[6] Berthelot, *Épistémologie*, pp.11–12.

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'*actants*', whatever name one gives them (agents, actors, speakers, social forces, or indeed institutions)''. Law and politics, in contrast, ''seek to explain the factors which determine a normative universe and to understand the reasons which the actors have to adhere to it.'' These 'textual sciences', as he calls them, no doubt make many references to the social sciences in general, but, he asserts, either ''they define themselves through a specific object, approached in an interdisciplinary fashion or they make use of a hermeneutical and textual programme which is not their own.''[7] The focal point for the social sciences that are included in his collection is, in brief, *interaction*[8] and it is this notion of interaction that permits one to construct a conceptual apparatus that, says Berthelot, will lead to a schematisation capable of transcending, at least to some extent, the individual social sciences in order to act as a basis for a more general epistemological discussion.[9] In other words Berthelot is excluding law on epistemological grounds.[10]

Is he right to do this? This of course is just another way of asking, at the epistemological level, whether or not law is a social science. Yet it might be worth reflecting at the outset not just upon Berthelot's reasoning but also upon law as a discipline. If one looks at textbooks on, say, sociology one is struck by the fact that much of what counts as knowledge is, to a greater or lesser extent, about methodology.[11] In saying this, one is not in any way implying anything pejorative about this (or any other) social science. Indeed, it is one of the objectives of the present article to establish method as a serious and central part of knowledge.[12] What one is saying is that the different schools of

[7] *Ibid.*, p.12.
[8] *Ibid.*
[9] *Ibid.*, p.13.
[10] Professor Murphy makes a similar point. He says that ''to claim that law is a social science is to conflate distinctive epistemic styles, and to overlook the crucial difference which ''positivity'' makes to the character of the knowledge of society…. Between these two modes or epistemic styles, the gulf is immense…'': Murphy, above note 1, at p.152. However Murphy is taking a rather different approach to the problem than Berthelot. He focuses on the relationship between the common law tradition and the modern social sciences and as a result sees the epistemic problem as ''the Congruences [*sic*], Harmonies, and Concordances of the common law tradition'' in contrast to ''the production of performance indicators and the diagnosis of social problems'' (p 152). This is an interesting and perhaps important point, but it may be that in terms of methodology the gulf between the two ''epistemic styles'' is not as great as Murphy claims. Central to Murphy's thesis is his assertion that ''it is the enterprise of statistics, rather than economic theory, which has changed the world to which those involved in public affairs are orientated'' (p 153). To premise the distinction between law and social science just on this statistics point is, as the totality of Berthelot's work surely indicates, too restrictive; moreover it is, perhaps, taking a too restrictive view of social science knowledge. As one French commentator puts it, as indispensable as statistics may be to the sociologist, they ''cannot however be a substitute for sociological reasoning: mathematics do not have explanatory or comprehension power'': O. Martin, ''Mathématiques, Méthodes Quantitatives et Sciences Humaines'', in Mesure and Savidan (eds.), *Le Dictionnaire des Sciences Humaines*, 750, 751. With respect, Professor Murphy's epistemological thesis is possibly too naive.
[11] See *e.g.* J.-P. Delas and B. Milly, *Histoire des pensées sociologiques* (2nd ed., Paris 2005).
[12] See also G. Samuel, ''Taking Method Seriously'' (2007) 2 Journal of Comparative Law 94 and 210.

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sociology, knowledge of which is a central part of the discipline, are characterised by differences of what might be called method. However "method" here means more than just forms of reasoning such as induction and deduction or analogy and types of argumentation. It is, also, more than statistical method.[13] The term is employed to embrace what Berthelot calls schemes of intelligibility and what Thomas Kuhn called paradigms.[14] In other words, method merges with epistemology, this latter "discipline" itself raising a variety of questions about differing approaches.[15]

There is another reason for posing the question about whether or not law is a social science. In an essay devoted to the American jurist and comparative lawyer John Henry Wigmore, Annelise Riles makes the point that this jurist "made his scholarly name as an expert in the field of evidence, and his serious and still-popular treatise is a standard performance in that formalist genre".[16] Yet, she says, when it came to comparative law his work was seen as displaying a "dogged amateurism".[17] Now Riles uses this essay to make the point that amateurism is in fact a "defining methodological trait" not just of Wigmore's work, but of twentieth century comparative law in general.[18] "A consideration of Wigmore's life and scholarship", she concludes, "suggests that if amateurism is defined as a failure to analyse, then comparative law is inherently amateuristic." And, she adds, it "cannot be otherwise as long as our discipline remains comparative *law* that is, a discipline grounded in the culture of legal formalism, rather than comparative politics, literature, aesthetics or anthropology."[19] The second reason why the question of whether or not law is a social science thus becomes important in as much as it impacts directly on comparative law. If the comparatist cannot claim to be a social scientist it would seem that he or she would be ill-equipped to handle those disciplines other than formal law listed by Riles.

Pierre Legrand, equally, has asserted that the essence of comparative legal studies is its interdisciplinarity,[20] but his analysis

[13] *Cf*. Murphy, above note 1, p.155.
[14] T. Kuhn, *The Structure of Scientific Revolutions* (2nd ed., Chicago 1970). It is not being suggested here that schemes of intelligibility and paradigms are different ways of describing the same phenomenon or methods. As this article will hopefully indicate, schemes and paradigms are not to be confused one with the other.
[15] This merging of method and epistemology is evident in a work devoted to the method of undertaking a literature review: see C. Hart, *Doing a Literature Review* (London 1998).
[16] A. Riles, "Encountering Amateurism: John Henry Wigmore and the Uses of American Formalism", in A. Riles (ed.), *Rethinking the Masters of Comparative Law* (Oxford 2001), 94 at p.97.
[17] *Ibid.*, p.98.
[18] *Ibid.*, p.94.
[19] *Ibid.*, p.125.
[20] P. Legrand, *Le Droit Comparé* (Paris 1999), pp.27–32.

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develops this point in a particularly pertinent way. Legrand argues that interdisciplinarity is vital because the comparison of formal legal rules is a meaningless exercise; what matters are the cognitive structures – the legal mentality – that lie beneath this surface.[21] And in order to discover these structures, or legal mentality, the comparatist must adopt a hermeneutical method instead of relying either on a causal analysis or on functionalism.[22] This methodological point should not pass unnoticed because it offers a direct link with the work of Jean-Michel Berthelot. One of Berthelot's major contributions to social science epistemology is his enumeration of six schemes of intelligibility which, according to the philosopher of science Gilles-Gaston Granger, offers real epistemological insights into all the human sciences.[23] What Pierre Legrand is indicating is that the comparatist must be *au fait* with social science epistemology, with works like *Épistémologie des sciences sociales*. Now this is not to imply that merely being familiar with social science methodology and epistemology is enough to turn comparative law into a social science. Yet if the comparatist is able to make an independent contribution to this methodology and epistemology it at least would offer a platform from which the jurist could begin to take issue with Berthelot's exclusion of law from the epistemological investigation. Can such an independent contribution be made? One possibility is to argue that many of the methods now employed by social scientists were formulated by jurists. This is an argument that will be pursued in the present article (an argument that will involve a defence of Donald Kelley's thesis). A second possibility is to move from the diachronic to the synchronic and argue that legal thought is still capable of making an independent contribution. This is an argument that (for reasons of space) will be pursued in a future paper.

II. Arguments against Law as a Social Science

Berthelot's central reason for excluding law from his social science epistemological investigation is that it is a discipline that is preoccupied with normative judgments and not with human interaction and behaviour as such. The object is a body of norms and not humans as an interacting social reality.[24] If one looks at the make up of most law programmes in Europe it would seem that Berthelot has a point. Law degrees in both civilian and common law faculties consist largely of learning what the law is; the emphasis is on learning rules

[21] *Ibid.*, p.28.
[22] *Ibid.*, p.31.
[23] G.-G. Granger, *La Science et les Sciences* (2nd ed., Paris 1995), pp.90–92.
[24] Berthelot. *Épistémologie*, p.12.

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and these rules in turn have been described as the ontological and epistemological basis of legal knowledge.[25] As for the law professors themselves, their role, at least traditionally, has been to produce textbooks. These of course are guides to what the law is, but in addition they are supposed to be more than mere guides, "for they seek not only to arrange the cases systematically but to extract from them the general principles of the law and to show how those principles may be developed."[26] When taken together with law articles this *doctrine* plays a fundamental role in the formation of a legal system.[27] Perhaps the Research Assessment Exercise has, in the United Kingdom at least, changed expectations to some extent,[28] but it is still difficult to imagine that this organising role of the legal academic has fundamentally changed. Thus the United Kingdom judges certainly see the academic endeavour as being the search for principle[29] and in France "doctrine has as its mission to comment on positive law: therefore it comprehends only the professionals of law and only to the extent where they undertake this task of commentary".[30]

The writing of textbooks is, accordingly, regarded as being scientific since the academic is engaged in an exercise of reductionism.[31] This latter term has been described by one French philosopher specialising in theories of knowledge as "the epistemological strategy consisting of putting into action the concepts and methods destined to unify an area of knowledge which has had to fragment and diversify in order to understand its objects".[32] Common lawyers may not go as far as civilians in the quest for symmetry, structure and rationality in the organisation of legal knowledge,[33] but a considerable proportion of the academic literature in the common law world displays these tendencies.[34] Indeed, it has been argued that one reason why codification of English law never happened was because of the rise of the law faculties in England and Wales which resulted in an

[25] See *e.g.* P. Orianne, *Apprendre le Droit* (Brussels 1990), pp.153–155; F. Cownie, *Legal Academics: Cutlure and Identities* (Oxford 2004), p.35. The position is now more complicated in the common law world as two French jurists note: P. Jestaz and C. Jamin, *La Doctrine* (Paris 2004), pp.265–269. Professor Cownie's book provides a good up-to-date overview of legal education in the UK. As for the epistemological assumption that legal knowledge consists of rules and (or) norms: see *e.g.* J.-L. Bergel, *Méthodologie Juridique* (Paris 2001), p.30.

[26] H.F. Jolowicz, *Lectures on Jurisprudence* (London 1963), p.314.

[27] *Ibid.*, p.315.

[28] Cownie, above note 25, pp.135–141, 200.

[29] Robert Goff, *The Search for Principle*, reprinted in W. Swadling and G. Jones (eds.), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford 1999), 313.

[30] Jestaz and Jamin, above note 25, p.171.

[31] *Ibid.*, pp.228–232.

[32] J.-M. Besnier, *Les Théories de la Connaissance* (Paris 1996), p.102.

[33] P Legrand, "Are Civilians Educable?" (1998) 18 Legal Studies 216.

[34] For a useful insight into the nineteenth century foundations of this rationalisation of English law, see N. Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford 2004).

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epistemological reorientation towards the rule model of law.[35] As far as the civil law is concerned, then, one of the arguments against law being regarded as a social science might be said to be grounded in its quest for natural science status.[36]

Now the problem facing law in the quest for this status is that the theories produced by academic lawyers cannot be falsified, this falsification method being one of the key tests, according to Karl Popper, for qualifying a theory as scientific.[37] The only alternative epistemological test is to associate law with the non-empirical science of mathematics where the test is one of coherence rather than correspondence.[38] The search for coherence in law has of course been such a dominant part of continental legal doctrine – it was one of the major preoccupations of legal scholars from the Humanists to the Pandectists[39] – that it might be the theme that sums up the whole of civilian legal history. Civilian legal thought has been the movement from an *ars judicandi* to a *mos geometricus*; that is to say a movement from judging to inference, the latter requiring, if the syllogism is to be viable, an ever more perfected rational organisation of law.[40] And even if civilian doctrine has moved on from this logical formalism – which it undoubtedly has – one legacy of this continental legal history is the association of law with scientific rationality. Whereas the Glossators and the Post-Glossators considered that the authority of law was to be found in the existence of the Roman texts themselves, which in turn were ultimately linked to the authority of God, the effect of the humanist revolution was to create an epistemological shift. The authority of law gradually became embedded in its scientific rationality with the result that one form of authority became replaced by another.[41] As far as the medieval jurists were concerned the texts themselves were authoritative just like the Bible or the *Qur'an* and the validity of the knowledge contained in these texts arises from their consensual acceptance as being the Word of God.[42] But for the jurists

[35] S. Hedley, "How has the Common Law Survived the Twentieth Century?" (1999) 50 Northern Ireland Legal Quarterly 283.

[36] Jestaz and Jamin, above note 25, pp.141–146. One should note that Murphy's book (above note 1) is concerned almost exclusively with the common law and does not really embrace the history of civilian legal thought.

[37] See generally K. Popper, *The Logic of Scientific Discovery* (London 1959; reprinted 2002).

[38] L. Soler, *Introduction à l'Épistémologie* (Paris 2000), pp.43–45.

[39] See P. Dubouchet, *Sémiotique Juridique: Introduction à une Science du Droit* (Paris 1990); F Wieacker, *A History of Private Law in Europe* (trans. T Weir, Oxford 1995); O. Jouanjan, *Une Histoire de la Pensée Juridique en Allemagne* (Paris 2005).

[40] Jouanjan, *Pensée Juridique en Allemagne*.

[41] P. Stein, *Roman Law in European History* (Cambridge 1999), pp.79–82.

[42] W. Ullmann, *The Growth of Papal Government in the Middle Ages* (2nd ed., London 1962), pp.359–366. "Not the least significant feature of the medieval period", writes Ullmann, "is the great reliance placed upon authority: authority – *auctoritas* – either in the shape of custom or tradition, or preferably in that of documentary evidence. The value of an *auctoritas* increased proportionately with its age: the older the *auctoritas* the more weight and greater standing it had" (pp.359–360).

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who succeeded the medieval doctors one part of the authority was to be found in the "scientific" or systematic coherence of law because this rationality provided not just the deductively valid solutions but, in doing this and thus freeing judging from subjective bias, the very authority that gave law its validity.[43] Another dimension of law's authority was of course provided by the political (constitutional) validity of the source of the texts considered legal.[44]

In seeking therefore the status of a science law might be said to have become so preoccupied with its own internal organisation that, as a knowledge discipline, it has completely isolated itself from social reality.[45] By this is meant not that law fails to take account of social fact; it certainly does take account of fact and how it does this is an aspect that needs particular attention.[46] What is meant is that law as a body of knowledge has nothing to contribute, epistemologically speaking, to our knowledge of the world as an empirical phenomenon. Law does not, in other words, take as its object social reality – or at least an aspect of social reality – so as to produce a model that increases our knowledge of this reality. Law has as its object only itself.[47] It is in this sense a narcissistic science that is of little interest intellectually speaking to those outside of the discipline, save perhaps to those social scientists interested in studying the corps of lawyers as a social phenomenon itself.[48]

One might object to this assertion in saying that law does in fact have as its object an important social phenomenon, namely justice or, failing that, norms as a social "fact". Legal rules, concepts and institutions exist, it might be argued, to give expression to justice. However one difficulty here is that if justice is itself to be defined by law, then one is back to the problem of law as its own object. Alternatively if justice is a phenomenon that exists independently of law one will need to turn to other social science disciplines – for example to economics, moral philosophy, political theory or whatever – in order to give substance and definition to the phenomenon.[49] And in doing this one comes up against Berthelot's observation that law either defines itself "through a specific object, approached in an

[43] Wieacker, above note 39, pp.199–204, 213–215; Jestaz and Jamin, above note 25, pp.141–157. Murphy claims that with regard to the common law it is the medieval *auctoritas* that is still the guiding paradigm: Murphy, above note 1, pp.93–101.

[44] In the Roman sources what pleased the ruler (emperor, prince or king) had force of law: D.1.4.1.pr. However this text famously goes on to locate the ultimate source of sovereign power in the *populus* who had transferred this authority to the emperor via the *Lex regia*.

[45] Indeed the epistemological "purification" of law was one of the objectives of a section of the German Historical School: see generally Jouanjan, above note 39.

[46] C. Atias, *Épistémologie Juridique* (Paris 1985), pp.129–132.

[47] *Ibid.*, pp.31–36.

[48] For another view of the irrelevance of law see Murphy, above note 1, p.175.

[49] The definition of justice provided by the Roman texts, namely *suum cuique tribuendi* (Ulpian D.1.1.10.pr), begs more questions than it answers.

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interdisciplinary fashion'' or it makes ''use of a hermeneutical and textual programme which is not [its] own.''[50] Norms as a social phenomenon acting as the object of a ''legal science'' is equally problematic in that what constitutes the ultimate source of such norms is a concept that is either metaphysical[51] – for example Kelsen's *Grundnorm*[52] – or seemingly empirical, for example Hart's rule of recognition[53] or some other social source.[54] In other words, law is either creating its own epistemological validity or is relying upon a sociological phenomenon that cannot itself be explained by legal knowledge. Accordingly Berthelot's rejection of law as a social science capable of contributing to an epistemology of social sciences does seem, at first sight, difficult to refute.

III. Methodological Possibilities

If law itself, that is to say law as a system of propositions, seems unpromising as the basis for candidature to the category of social science, could the methods associated with the discipline prove of greater interest? Here the history of legal thought is more ambiguous since it could well be said that the methods used by the generations of jurists from Roman to modern times have of themselves had an important impact on social science thinking.[55] No doubt it could be argued that these methods have in truth been fashioned outside the discipline of law and thus, following Berthelot, they are simply further evidence of lawyers approaching their own texts through recourse to other disciplines. Yet if one looks at the history of the civil law as a history of changing methods it is possible to discern a number of factors that ought to be of interest to social science epistemology.

[50] Berthelot, *Épistémologie*, p.12.

[51] Atias, *Épistémologie Juridique*, above note 46, p.33.

[52] On which see M. Troper, *La Philosophie du droit* (Paris 2003), pp.47–50. Troper describes the *Grundnorm* as ''une décision épistémologique'' (p 49).

[53] H.L.A. Hart, *The Concept of Law* (2nd ed., Oxford 1994), pp.94–95, 100–110.

[54] On this point see J.W. Jones, *Historical Introduction to the Theory of Law* (Oxford 1940), pp.222–223. Interestingly Jones says here that the ''science of law may be a social science – it may even be, in the words of Saleilles, the social science *par excellence* – but it is not the whole of sociology'' (p 222). On the *Grundnorm* see Jones, pp.226–227; and on the metaphysical aspects of Kelsen's pure theory see pp.211–212, 232–233.

[55] This was no doubt true of Roman law: see J. Ellul, *Histoire des Institutions: 3 - Le Moyen Age* (9th ed., Paris 1982), pp.26–28. Note in particular Ellul's comment: ''Le droit devient une sorte de réalité imposée au donné social, le mettant en forme, et finissant en somme par devenir plus « vrai » que les faits'' (p 27). It was certainly true of medieval jurisprudence: see generally W. Ullmann, *Law and Politics in the Middle Ages* (London 1975). And it is true of the humanists as well: see *e.g.* D.R. Kelley, *The Beginning of Ideology: Consciousness and Society in the French Reformation* (Cambridge 1981). Murphy, however, is sceptical since he sees an epistemological break between legal thought and modern social science thinking, the latter being based on statistical thinking. See Murphy, above note 1. However Murphy is focusing on the common law rather than the civil law and possibly puts far too much emphasis on the epistemological importance of statistics. They are by no means irrelevant to epistemology in the social sciences (and he thus makes a good point), but they are not definitive of contemporary methodology if Berthelot and others are to be believed.

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Indeed one might start with Berthelot's collection itself. Despite the absence of a chapter devoted to law, one might note that in the contribution from an historian there is right at the start a reference to Donald Kelley.[56] There is no doubt about Kelley's credentials as an historian, but he is equally a jurist best known for his work on the French humanists. In particular he has argued that these sixteenth-century academics were not just jurists; they were the founders of modern historical research methods and thus hold an important position in the epistemology of history.[57]

Indeed Kelley, as jurist, is important for his view that law is not just a social science but one that is central to social thought in general. "If the book of nature is 'written in the language of mathematics' (as Galileo thought)", he writes, "the book of human nature in its social forms has been written, in the most practical contexts, in the language of the law."[58] Whether Berthelot was aware that Kelley seems to be advancing a thesis about the place of law in social science epistemology somewhat at odds with his own argument is an interesting question. Had Kelley been invited to contribute a chapter to *Épistémologie des sciences sociales* the American academic would no doubt have re-quoted Walter Ullmann's remark that "medieval jurisprudence was forced to elucidate some basic principles about society, and was thus led to consider topics which, under modern conditions, would be dealt with, not by lawyers, but by the sociologist."[59] Jurists, it would seem, once did the work of sociologists; not only did they fashion the modern research methods but they equally provided a *grille de lecture* for understanding early modern European society.[60]

It might at this point be useful to turn to Berthelot's own major contribution to social science methodology and epistemology. For it is this social theorist who has to date provided one of the most coherent accounts of the methodological schemes of intelligibility through which social scientists analyse the object of their investigations, namely society and social fact. According to Berthelot the question to ask is this: "what are the ontological and epistemological principles presupposed by the various existing research programmes?"[61] His response to this question is to assert that if one studies the main

[56] J. Revel, "Les Sciences Historiques.", in Berthelot, *Épistémologie*, 21 at p.25.
[57] D. Kelley, *Foundations of Modern Historical Scholarship* (New York1970).
[58] D. Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (Cambridge, Mass. 1990), p.12. However note Murphy's specific dissent from this comment by Kelley: Murphy, above note 1, pp.3–4.
[59] W. Ullmann, *The Medieval Idea of Law as Represented by Lucas de Penna* (London 1946), p.163; quoted in Kelley, *The Human Measure*, at p.12.
[60] See *e.g.* Ellul, above note 55.
[61] Berthelot, *Épistémologie*, pp.483–484.

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sociological schools six different *principes* – or, as another sociologist puts it, *grilles de lecture*[62] – can be *dégagés*. They are:

> the *causal* scheme (if *x*, then *y* or $y = f(x)$); the *functional* scheme (S→X→S, where one phenomenon X is analysed from the position of its function – X→S – in a given system); the *structural* scheme (where X results from a system founded, like language, on disjunctive rules, A or not A); the *hermeneutical* scheme (where X is the symptom, the expression of an underlying signification to be discovered through interpretation); the *actional* scheme (where X is the outcome, within a given space, of intentional actions); finally, the *dialectical* scheme (where X is the necessary outcome of the development of internal contradictions within a system).[63]

These schemes are, of course, in need of much elaboration and explanation if their epistemological and methodological importance is to be fully appreciated.[64] But for present purposes it will hopefully suffice if they are developed only in a limited way in relation to law. The point here is not so much to examine the schemes themselves, as important as they are;[65] what needs to be stressed is the relationship between these methodological and epistemological *grilles de lecture* and the claim that law is (or is not) a social science.

It should be immediately evident that these schemes of intelligibility have a direct relevance for law in that they encapsulate all the various methods used in legal reasoning and analysis. Tort lawyers spend much time applying causal and *actanciel* methods in the analysis of case law problems – the classic "actional" approach being an analysis utilising the "reasonable man" or "le bon père de famille" – just as those writing judgments may make use of functional methods (for example policy reasoning or the application of the mischief rule in statutory interpretation) in place of a hermeneutical analysis (what did the legislator mean or what was the will of the legislator or testator?).[66] The dialectical scheme finds expression not just in the legal maxim *audi alteram partem* but equally in a whole range of conceptual and category dichotomies such as the distinctions between public and private law, real and personal rights, corporeal and incorporeal property and so on.[67] At the level of legal theory structuralism,

[62] C. Giraud, *Histoire de la Sociologie* (2nd ed., Paris 2000), pp.86–123.
[63] Berthelot, *Épistémologie*, p.484.
[64] For a more developed treatment see G. Samuel, *Epistemology and Method in Law* (Aldershot 2003), pp.295–334.
[65] G Samuel, Taking Method Seriously, above note 12.
[66] For an "actional" approach to remoteness of damage see *Overseas Tankship (UK) Ltd* v. *Morts Dock* and *Engineering Co Ltd* (*The Wagon Mound (No 1)*) [1961] A.C. 388 where the Privy Council adopted the test of foreseeability of the reasonable man in place of an objective causal analysis (directness test). As for statutory interpretation and methodology, one might profitably look at *Birmingham CC* v. *Oakley* [2001] 1 A.C. 617, where different schemes of intelligibility seem very much in evidence.
[67] J.-L. Bergel, *Théorie Générale du Droit* (4th ed., Paris 2003), n° 253.

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intermixed with hermeneutics, finds one of its most perfect developments in nineteenth-century German legal thinking, as a new work by a French jurist so clearly reminds us.[68] But this "transcendental nonsense" was to be displaced in American legal theory by an appeal to "the functional approach".[69] In the civil law world, however, a structural analysis remains (in some quarters at least) very much in vogue.[70] The history of theory and method in law could, in other words, be explained by reference to Berthelot's schemes.

This would not have surprised Berthelot of course, for, as we have seen, he asserted that lawyers make use of social science methods. Yet what might be more of a surprise is the argument that, diachronically speaking, it is not always a question of lawyers adopting and adapting schemes from disciplines outside law. It is a question, as Kelley asserts, of the history of methods and the history of law often marching very much hand-in-hand. Where but in the *Digest* does one find a rich source of "social science" methodology from the ancient world? Admittedly with respect to the natural sciences the position is more complex in that it is in Greek philosophy and mathematics – in particular in the writings of Aristotle – that one looks for the foundations of the scientific mind.[71] But what is of fundamental importance with respect to the social sciences are the institutional concepts to be found in the work of the Roman jurists. Notions such as *obligatio* and *dominium* were not just important ideas in themselves; when combined with the institutions of *persona*, *res* and *actiones* they created a structural system in which individual owners and contractors were integrated into a social whole itself given expression by concepts such as the *respublica*, *fiscus* and *ius publicum*. This whole was genuinely a system in that it was capable, as has been illustrated elsewhere,[72] of creating its own elements which then became integrated into the social system as realities. Thus the moment a *universitas* became capable of bringing an *actio* in its own name, it effectively became a *persona*; equally as soon as an *actio in rem* was available in respect of a *ius* this latter became a form of intangible property (*res incorporalis*).[73] One is not talking here merely of relatively passive systems capable of creating other conceptual elements such as intellectual property and corporate legal persons. Such structural thinking was integrated into legal reasoning itself.

[68] Jouanjan, above note 39.
[69] F. Cohen, "Transcendental Nonsense and the Functional Approach" (1935) 35 Columbia Law Review 809.
[70] Orianne, above note 25, pp.271–286.
[71] Granger, above note 23, pp.21–22.
[72] See Samuel, *Epistemology and Method in Law*, above note 64.
[73] G Samuel, *The Foundations of Legal Reasoning* (Antwerp 1994), pp.171–190.

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This structural thinking manifests itself in legal reasoning in a number of ways. First it is to be found in the way the reasoning of the Roman jurists is often centred on the question of whether or not an *actio* is available and against whom; this institution, in other words, regularly acts as a vehicle for discussing more substantive issues such as blame, cause and (or) risk.[74] Secondly, although the jurists seem often to be discussing problems at the level of fact, these facts are usually organised in terms of concepts that might appear descriptive but are actually more schematic in their structure. For example, the jurist Paul tells us that it is not just the owner of stolen property who has the *actio furti* but anyone who has an "interest" in the thing, such as a hirer.[75] What is being constructed here is a model based upon the institutions of *persona* and *res* in which the person who is entitled to the action is delineated either by the legal (institutional) relationship of ownership (*dominium*) or by the existence of an *interest*.[76] This notion of an interest is of course one that was much later to become a key concept in economic theory,[77] but the idea that the social science model of "individuals" endowed with an economic "interests" is a creation of the discipline of economics is, historically speaking, not true. Economists may talk of how the notion of an interest allows one to evaluate society and its individuals in terms of economic relations and function,[78] yet it is not the lawyers who have appropriated the term from economists. Rather it is economists making use of a model of social reality fashioned by Roman jurists.

A third way in which structural thinking manifests itself in Roman legal reasoning is through categories. These categories were partly rooted in what the Romans perceived as social reality, but, and this is the point to be stressed, only partly. As Ulpian says of the law of contracts, *natura enim rerum conditum, ut plura sint negotia quam vocabula*.[79] That there are more transactions in the real world than are capable of being represented in the established categories of contracts, suggests clearly that one is dealing with a rationalised model rather than working directly on the facts. Indeed, as another jurist points out, facts, unlike the laws, are not something capable of being grasped by the mind, for law is definite while facts are not.[80] Accordingly the reasoning of the Roman lawyers is one of negotiating an adequate correspondence between a reasoning model – consisting of institu-

[74] One famous example is D.9.2.52.2.
[75] D.47.2.86.
[76] A variation on the interrelation of legal institutions and relations is to be found in D.47.2.60: here the *actio furti* interrelates with interest and contract.
[77] A. Leroux and A. Marciano, *La Philosophie Économique* (Paris 1998), pp.15–18.
[78] *Ibid.*, pp.17–18.
[79] D.19.5.4.
[80] D.22.6.2.

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tions (*personae*, *res* and *actiones*), institutional relations (*obligationes*, *dominium*, *possessio* and so on) and empirical concepts (interests, damage, fault, fraud and the like) – that insinuates itself within the facts and the actual facts themselves. Are these texts to be found in the *Digest* really just about normative judgments? Surely they are as much about "human interaction and behaviour" as any other social science? At all events these texts certainly invite one to reflect upon a fundamental epistemological challenge that is to be found in all of the social sciences. What is the relationship between the knowing *intellectus* and the *res* that forms the object of knowledge?

As for the schemes of intelligibility themselves, they equally are to be found in the reasoning of the Roman jurists. A causal analysis of facts operates both as a constituent of liability in cases of, in particular, wrongful damage[81] and, in combination with a hermeneutical approach, as a means of interpreting legal texts. An example of this latter kind of reasoning is evident in the discussion concerning the interpretation of the aedilicean edict imposing a duty upon sellers of slaves to disclose any disease or other defect. What becomes clear in the discussion of particular cases is that the jurists distinguish between symptoms and disease; and thus in answer to the question whether a bed-wetting slave is diseased the jurist replies that it depends. If the problem arose because, say, the slave was drunk or too lazy to get up that is not a disease; if the defect was caused by a problem with the bladder then this would amount to a disease and the buyer would be entitled to rescind the sale.[82] A similar causal analysis is applied to other symptom problems.[83] A functional dimension can also provide a logical premise in that if every defect is considered a disease – for example missing teeth – it would give rise to a situation where whole classes of people, for instance the elderly, would have to be considered diseased.[84] Structuralism is particularly evident in the Institutes: Gaius constructs his work with constant reference to genus and species[85] and points out the error of confusing the two levels.[86] Hermeneutics even attracts its own chapter in the *Digest*: what do words *signify*?[87] A dialectical analysis may also be adopted in respect of factual situations to aid, for example, the interpretation of a word. Thus in an attempt to define accurately a "fugitive" one Roman jurist asserts that a distinction must be made between a "fugitive" and a "wanderer",

[81] See *e.g.* D.9.2.11.pr.
[82] D.21.1.14.4.
[83] See *e.g.* D.21.1.13.4.
[84] D.21.1.11.
[85] See *e.g* G.3.89.
[86] See *e.g.* G.4.1.
[87] D.50.16.

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the latter indulging merely in aimless roaming about and time-wasting.[88] A statement (*dictum*) must equally be distinguished from a *promissio*,[89] just as a specific assertion must be differentiated from failing to speak.[90] Making sense of both *les mots et les choses* is often aided, in other words, by simple oppositions.

The identification of these schemes in the Roman texts may seem, today, obvious if not trite; but the point to be made here is that the Roman jurists were just as involved in *un engagement ontologique* as any modern social scientist, and long before theorists used such terms to describe the epistemological complexities of contemporary social science.[91] But the jurists did more than just engage with the facts of society. As Kelley observes, the "distinctive language of sociology was created through a sort of distillation from social and legal conventions at hand – beginning with the obvious designations of personality, property, action, inheritance, custom, contract, domination, sacred and civil law, public and private law, law-making and law-finding, codification and administration, and other commonplaces of the old Gaian system."[92] Kelley might well have added that the distinctive methodology of the social sciences (that is schemes of intelligibility) is equally just as much a distillation from the legal methods that were at hand in the *Digest* and the *Institutes*. Of course modern French and German legal theory, with its emphasis on texts, norms and on axiomatic structures, might seem kilometres from *un engagement ontologique*, which of course it is. Yet had Berthelot looked beyond modern legal theory – had he appreciated that "sociology was … the ghost of jurisprudence past"[93] – he might have realised that the real methodological and epistemological challenge for jurists is in the diversity of legal activity[94] and in the very place where social fact and legal knowledge meet, namely in the deciding of cases.[95]

IV. Paradigms

However, the challenge of social science epistemology does not begin and end with schemes of intelligibility, as Berthelot's own rich writing makes clear.[96] The schemes usually combine so as to give expression to a governing paradigm, the term itself being used by Berthelot –

[88] D.21.1.17.14.
[89] D.21.1.19.2.
[90] D.21.1.52.
[91] *Cf.* Berthelot, *Épistémologie*, p.517.
[92] Kelley, *The Human Measure*, above note 58, p.275.
[93] *Ibid.*
[94] A point emphasised by Atias, above note 4, pp.23–28. This little book would have made an excellent chapter in Berthelot's *Épistémologie*.
[95] Atias, above note 4, at p.119.
[96] See in particular one of his own chapters in Berthelot, *Épistémologie*, pp.457–519: "Programmes, Paradigmes, Disciplines: Pluralité et Unité des Sciences Sociales".

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although he actually abandons the expression[97] – to mean "an ill designated class weakly formulated but nevertheless powerfully significant in its attitudes and behaviours".[98] In fact the term, usually attributed to Thomas Kuhn,[99] is notoriously difficult to define and is often summed up as a "vision of the world", a "way of seeing"[100] or a "*cadre de pensée*".[101]

In the social sciences one possible use of the term "paradigm" is to give expression to a number of fundamental epistemological dichotomies such as the ones between holism and individualism, order and chaos and nature and culture. Take first of all the opposition between a whole and its parts whose paradigmatic and epistemological status is often traced back to the nominalist revolution associated (possibly incorrectly) with William of Ockham.[102] Does society exist as an ontological reality – as a "thing" – or are there only individuals? The question is fundamental both in the natural and social sciences because the difference of levels reveals differences of information. For example statistical modelling might well reveal that there is a greater preponderance of disease x in communities situated near factories y. This is clearly valuable information, but operating at this holistic level there is a great danger that one might conclude that y is the cause of x, a dangerous assumption. An analogous problem arises in the social sciences: statistics may well reveal that it is the children of middle class families who dominate the higher education institutions but such a correlation does not explain the causes of this phenomenon. In order to search out such an explanation it is necessary to adopt a different methodological paradigm; the social scientist must think in terms of the individual and examine the causes in relation to individuals within families.[103] One has to move, in other words, from structural models (statistics) to causal and actional schemes. The dichotomy has political implications as well since social theorists such as Marx – who saw society in terms of class – are likely to generate a different kind of political hypothesis than theorists such as Weber who saw society in terms of individuals.[104] In short, so important is this paradigm dichotomy between holism and individualism that it has attracted a chapter to itself in Berthelot's *Épistémology des sciences sociales*.[105]

[97] Berthelot, *Épistémologie*, p.468.
[98] *Ibid.,* p.457. But *cf.* p.469.
[99] T. Kuhn, *The Structure of Scientific Revolutions* (2nd ed., Chicago 1970).
[100] J. Pheby, *Methodology and Economics: A Critical Introduction* (London 1988), p.37.
[101] Berthelot, *Épistémologie*, p.468.
[102] See now B. Tierney, *The Idea of Natural Rights* (Atlanta 1997).
[103] See generally R. Boudon and R. Fillieule, *Les Méthodes en Sociologie* (12th ed., Paris 2002), pp.41–90.
[104] S. Gordon, *The History and Philosophy of Social Science* (London 1991), pp.479–480.
[105] B. Valade, "De l'Explication dans les Sciences Sociales: Holisme et Individualisme", in Berthelot, *Épistémologie*, at p.357ff.

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Yet as Yan Thomas reminds us, the debate has its roots in Roman law.[106] In a text that must have fascinated the medieval doctors a Roman jurist describes a case that was put to him concerning the appointment of judges for a hearing. As some judges had been excused and others appointed in their place the question arose as to whether this replacement process meant that a different court had been constituted.[107] The jurist responds that even if all of the judges had been replaced it would still be the same court and he justifies this by reference to other examples where a thing remains the same although the parts change. An army legion and a community are always the same despite the turnover of personnel. However the most striking example is that of the boat whose every plank is gradually replaced over the years; the boat, says the jurist, is the same boat even if every single plank has been replaced.[108] Now at the level of legal reasoning this dichotomy between a whole and its parts is of fundamental importance because the institutional system, based upon relations between persons (*personae*) and things (*res*), continually has to move from the group to the individual.

For example the institutional system envisages a society in which individual persons own individual things. But what amounts to an individual "thing"? The response of a Roman jurist to this question is that there are three kinds (*genera*) of things: there are things that have a single spirit such as a stone, slave or beam of wood; there are things that are made up (*quod ex contingentibus*) of other "cohering" (*inter se cohaerentibus constat*) things, such as a ship or a house; and there are things made up of individual entities (*quod ex distantibus constat*) like a people (*populus*), legion or flock.[109] All this is set out by the jurist because it has real practical consequences given the existence of property concepts in the institutional system. With respect to usucapion – the acquiring of ownership of a thing through long possession in good faith – the first kind of thing presents no problem, but, of course, the other two do. What if one possesses tiles or bricks that later become incorporated in someone else's building?[110] What if one possesses a plot of land on which there is a lost gold ring: does one also possess the ring?[111] Then there is the problem of the flock. According to one jurist although a flock does exist in nature (*natura*) as a thing[112] one cannot obtain ownership of it through usucapion in

[106] Y. Thomas, "L'Extrême et l'Ordinaire: Remarques sur le Cas Médiéval de la Communauté Disparue", in J.-C. Passeron and J. Revel (eds.), *Penser par Cas* (Paris 2005), 45 at p.55.
[107] D.5.1.76.
[108] See also D.46.3.98.8; D.44.2.7.pr.
[109] D.41.3.30pr.
[110] D.41.3.30.1.
[111] *Ibid.*
[112] And see D.30.1.22.

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the same way as with individual things; it is the individual animals that are possessed and not the flock.[113] Analogous problems arise with respect to *res judicata*. If one has unsuccessfully claimed for a ship can one subsequently claim for all its planks?[114] Or if one has claimed for a flock and failed can one then claim for several individual head of cattle?[115]

It is not of course being asserted here that the Romans were indulging in some kind of social science epistemological reflection. What they were doing, however, was to engage with social fact and it is in the context of this very engagement that the elements that make up epistemological debate start to reveal themselves. This is true with respect to the other paradigm dichotomies as well. We have already seen that the Romans began to be aware of a difference between order and chaos with respect to the distinction between mistakes of fact and mistakes of law; the law can and should be definite while fact can baffle the wisest of people.[116] It is not unreasonable, then, to assume that the Roman notion of *ratio iuris* – the term is to be found in the *Digest*[117] – amounted to a rationalised social order even if certainty was to be preferred on occasions over this rationality.[118] What is not rational ought not to be extended by analogy.[119] Moreover the force of law, be it in respect of custom or statute, is justified by reference to a kind of social contract acceptance within the *populus*. *Nam quid interest suffragio populus voluntatem suam declaret an rebus ipsis et factis*?[120] The will of the people declares itself not just through voting but equally by their actions.

This kind of reflection provokes the next paradigm question, if only because it is of course debatable whether these ideas about the *populus* have any basis in social reality. What Berthelot calls *le pôle naturaliste* is "that which considers that social phenomena are an extension of natural phenomena and not requiring specific explanation". It is, as he says, sufficient "for analysis to determine the mechanisms on which they depend".[121] Is law the product of nature or culture? One can thus oppose to this naturalist paradigm that of culture. As for this latter paradigm, "they are the cultural norms and values of the group or of the society which, through the mediation of socialisation, enculturation or inculcation, define the sense of behaviour or, according to certain definitions, practices".[122] Are ideas

[113] D.41.3.30.2.
[114] D.44.2.7pr.
[115] D.44.2.21.1.
[116] D.22.6.2.
[117] See *e.g.* D.1.3.14.
[118] See *e.g.* D.1.3.20.
[119] D.1.3.39.
[120] D.1.3.32.1.
[121] Berthelot, *Épistémologie*, at p.498.
[122] *Ibid.*, at p.247.

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of social contract, legal rationality (*ratio iuris*), legal knowledge (*scientia iuris*)[123] and the transfer of sovereignty (*Lex regia*) cultural or natural phenomena? It might be tempting to say that this paradigm debate takes one beyond the Roman texts themselves in that any opposition between Roman society as culture and Roman law as *naturalis ratio* is not obviously to be found in the texts. Yet in developing an institutional 'system' around *persona*, *res* and *actio* the question arises as to whether this system has transcended Roman law. Is it not a system capable of applying to any body of rules irrespective of time and culture? Indeed is it not the system upon which the whole of the modern civilian private law tradition is based?

While not denying the importance of the link between culture and law, Alan Watson makes the point that Justinian's *Institutes* – which reproduces the Gaian plan[124] – "was the basic text for beginning law students throughout Europe for hundreds of years, and gave them their concepts and structures."[125] And without this introductory book – this "nutshell" as he calls it – the subsequent reception of Roman law into modern Europe would have been "a great deal more difficult and would have been very different".[126] Watson subsequently concludes by expressing a certain scepticism with respect to the link between law and culture. In what sense, he asks does Gaius' *Institutes*, reflect Roman pagan, and (via Justinian) later Christian, society? Indeed he goes on to issue a challenge. Can anyone produce "one scrap of evidence that the *Institutes* is in any way indicative of the specific religious, political, economic or social conditions of early Byzantium"?[127] And he concludes that had the *Institutes* reflected Byzantine society, "it would have been influential in the west only with difficulty."[128] The implication here is that in order to understand legal concepts and law's systemic rationality one does not need to study legal culture as such; one needs to study the Gaian system and its elements in a synchronic fashion in order to understand its scientific or natural *essence*, as indeed the German jurists were to do with an extraordinary vigour.[129]

This view has not gone unchallenged. Arguing from the position of the cultural paradigm, Pierre Legrand is scathing in his criticism of the idea that law can be transplanted from one culture to another or can be studied in terms of similarity between rules from different

[123] D.1.2.2.35.
[124] J.1.2.12.
[125] A Watson, "The Importance of 'Nutshells'" (1994) 42 American Journal of Comparative Law 1, 10.
[126] *Ibid.*, p.18.
[127] *Ibid.*, p.21.
[128] *Ibid.*
[129] On which see Jouanjan, above note 39.

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cultures.[130] Such thinking is "the result of a particularly crude apprehension of what law is and of what a rule is".[131] As far as this comparatist is concerned rules are the product of a particular culture and as a result cannot be studied simply in terms of a bare propositional statement. "There is", he says, "more to ruleness than a series of inscribed words which is to say that a rule is not identical to the inscribed words".[132] Rules as words are simply the "surface" of the law and as such one needs to adopt a deep hermeneutical approach in order to get below this surface – this layer of words as signifiers – to discover the *mentalité* in which positive law is anchored.[133] Legrand defines this mentality as the cognitive structures that underpin the rules and the job of the comparatist is to reveal them "*à travers une «comparaison à étages»*."[134] One can switch the point of view in saying that any "manifestation of posited law thus exists as the unknowing articulator or vector of a cultural sensibility which, while it is actually inscribed in the textual fragments themselves, requires the comparatist's ampliative acts of interpretation to come to light."[135] The job of the comparatist is, then, not one of disembodying aspects of law from its cultural embeddedness – it is not a matter of detaching from say the *Institutes* a system-as-entity – because "the specificity of legal discourse lies precisely in its *embeddedness*".[136] This "venture into cultural hermeneutics"[137] represents a shift not just at the level of schemes of intelligibility – away from structuralism and from causality as logical necessity – but equally at the level of the paradigm because transmissions between cultures do not take place via "some transcendent, supra-individual entity".[138] It is not a question of *essence* existing as some kind of detached *res*.

Now it has to be stressed at once that the point of raising this paradigm debate is not to enter into the debate itself. The point is to show how the paradigm debate itself is the result of nothing less than an engagement with the facts of social reality. Whether one agrees with Watson or not – or equally whether one agrees with Legrand or not – is hardly the matter in issue here. What matters is that both jurists are engaged in an exercise that has as its object not just texts but the "*interactions entre actants*".[139] This is particularly evident in the work

[130] See *e.g.* P. Legrand, "The Impossibility of 'Legal Transplants'" (1997) 4 Maastricht Journal of European and Comparative Law 111.
[131] *Ibid.*, at p.113.
[132] *Ibid.*, at p.115.
[133] Legrand, *Le Droit Comparé*, above note 20, p.28.
[134] *Ibid.*
[135] P Legrand, Comparative Legal Studies and the Matter of Authenticity (2006) 1 Journal of Comparative Law 365, 371.
[136] *Ibid.*, p.372 emphasis in the original.
[137] *Ibid.*, p.378.
[138] *Ibid.*, p.386.
[139] Cf Berthelot, *Épistémologie*, at p.12.

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of Professor Legrand whose reflections on comparative legal studies are specifically aimed at providing a deep hermeneutical alternative to a comparative law "which [just] engages in the juxtaposition of substantive and adjectival posited law".[140] Yet even Professor Watson's thesis is capable of being envisaged as much more than *une science du texte* exercise trapped within *un univers normatif*.[141] As Kelley points out, the Gaian system "entailed not only moral priorities and a means of ordering reality but also a characteristic mode of perceiving, of construing, and potentially of controlling the social field."[142] It is a system that can be seen at one and the same time as an entity that is trans-cultural (for those who subscribe to the nature paradigm) and as an epistemological structure that integrates itself within the facts of social reality.[143] This integration becomes in itself an epistemological framework for understanding *les interactions entre actants* – and indeed for understanding the relations between *actants* and things. The "categories of person-thing-action constitute, first implicitly and later explicitly, what might be regarded as the metaphysical (or metanomical) foundations of Roman social thought" and, given the later developments, "they may also be regarded as a system rivalling the naturalistic construction of Aristotelianism, as another version of the many-faceted contrast between Physis and Nomos – of primary and secondary nature."[144] In short the epistemological implications of the Gaian system for the social sciences cannot be underestimated.

V. The Authority Paradigm

It might at this stage be tempting, then, to conclude that Professor Berthelot made an error of judgment in excluding law from his epistemological investigation of the social sciences. When approached diachronically the discipline of law has its own distinct contribution to make to social science epistemology. However this diachronic dimension is not a paradigm or orientation[145] that represents the approach of most lawyers, even with respect to those working in law faculties. Most jurists – in Europe as a whole at least – adopt a synchronic approach to their discipline and such an approach is

[140] Legrand, above note 135, p.393.
[141] Cf Berthelot, *Épistémologie*, at p.12.
[142] Kelley, *The Human Measure*, above note 58, p.49.
[143] See further Samuel, *Epistemology and Method in Law*, above note 64.
[144] Kelley, *The Human Measure*, above note 58, p.49.
[145] The dichotomy between a diachronic and synchronic approach can be regarded as a paradigm question given the relative imprecision of the term "paradigm". It is certainly an "epistemological approach": see R. Blanché, *L'Épistémologie* (3rd ed., Paris 1983), pp.33–39. But it might be better to regard it as operating at a level even higher than a paradigm in that it is less a way of seeing the world and more an approach to knowledge itself.

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supported by the weight of legal theory.[146] Historical jurisprudence, in the common law world, enjoys little emphasis in today's jurisprudence textbooks[147] and few graduates will leave their law faculties with a knowledge of the contributions made to their discipline by for example Gaius, Ulpian, Bartolus, Cujas, Domat, Pothier and (or) Savigny.[148] Students tend to learn what the law is rather than how law has been constructed as a discipline. In many ways one should not be surprised by this. As has been mentioned earlier, law's quest for scientific status has resulted in the emphasis being put on coherence and this has encouraged what Robert Blanché terms (for the natural sciences) *une analyse directe*, that is to say a static or synchronic view of a science's contemporary structure.[149]

In the common law world it is probably true to say that this emphasis on law as science is treated with much scepticism and the great majority of jurists working in Anglo-American law faculties would no doubt prefer to see their discipline associated with the social sciences.[150] Nevertheless the influence of civilian thinking on legal theory ought not to be underestimated[151] and with the growth of law as an academic subject in England and Wales from the end of the nineteenth century the law-as-rules model increasingly has come to dominate common law thinking.[152] Indeed, for Richard Susskind, "one fundamental assumption… should be articulated: that *rules* do and should play a central role in legal science, legal knowledge representation, and in legal reasoning." For "[o]verwhelming authority for this proposition can be found in legal theory, and even a philosopher such as Dworkin, who has questioned the sufficiency of rules for legal decision-making, does nevertheless himself seem to presuppose a predominant place for them, as MacCormick has shown."[153] The result of this theorising is that students spend much of their time examining legal texts and trying to make sense of them using what might be termed shallow hermeneutical[154] and (or) structural

[146] See in particular Ronald Dworkin's comment about the irrelevance of history to legal theory: R. Dworkin, *Law's Empire* (London 1986), p.14.

[147] P. Stein, "The Tasks of Historical Jurisprudence", in N. MacCormick and P. Birks (eds.), *The Legal Mind: Essays for Tony Honoré* (Oxford 1986), 293.

[148] Knowledge of these jurists will no doubt vary from system to system and so it would be misleading to say that every law graduate will be ignorant of the civil law's rich historical tradition. However, this said, because the law degree plays an essential role in the qualification of practitioners in the civilian tradition this inevitably means that the law curriculum is dominated by what might be called the foundational doctrinal subjects.

[149] Blanché, above note 145, p.34.

[150] See generally Cownie, above note 25. See also K. Gray and S. Gray, "The Rhetoric of Reality", in J. Getzler (ed.), *Rationalizing Property, Equity and Trusts* (London 2003), 204.

[151] See generally P. Stein, *Legal Evolution: The Story of an Idea* (Cambridge 1980).

[152] See Hedley, above note 35. And see also Gray and Gray, above note 150.

[153] R. Susskind, *Expert Systems in Law* (Oxford 1987), pp.78–79.

[154] The term "shallow" is used here to differentiate this kind of interpretative approach from the one advocated by Professor Legrand in respect of comparative legal studies: see Legrand, above note 135. See also Murphy, above note 1, p.94.

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methods.[155] One is not inviting the contemporary law student to examine a statute or a judgment as a signifier for a deep cultural mentality; what the student is invited primarily to do is to read a legal text in such a way that she will know what the law "is" and be able to apply it to relevant factual situations. Of course this "is" aspect, and the methodology that now accompanies it, is no doubt more critical in its orientation in the common law faculties than in the High Court.[156] As Christopher McCrudden has recently observed, referring to Fiona Cownie's work, "We're all socio-legal now",[157] an expression that recalls William Twining's comment that "we are all Realists now".[158] What these expressions indicate is that rules and concepts – the law – is now studied, in many common law jurisdictions, in their (its) social, political and (or) economic context and even the foundational subjects may well be approached, if not from a "law and…" perspective, then at least in a context that emphasises law's functional role.[159] The emphasis in the common law faculties is now more on functionalism than conceptualism (structuralism), although, as we shall see, the late Professor Birks attempted to reverse this trend.[160]

Yet it has to be asked to what extent this social functionalist emphasis has effected a shift of paradigm. Certainly it has encouraged a more social science orientated enquiring approach towards legal rules and concepts and this shift away from formalism has impacted upon the judiciary as well.[161] Indeed some English judges are even prepared to pay lip service to, for example, the law and economics school.[162] But what it has not done is to encourage a more sophisticated attitude towards methodology and epistemology.

Imagine three students from the same town and acquainted with each other leave for university, one to study sociology, one to study cinema and the third to read law. Towards the end of their courses, which they have pursued very diligently, they meet to discuss the

[155] Orianne, above note 25, pp.271–286.
[156] *Cf.* Vinelott J in *Derby* and *Co* v *Weldon (No.5)* [1989] 1 W.L.R. 1244, 1250.
[157] C. McCrudden, "Legal Research and the Social Sciences" (2006) 122 L.Q.R. 632, 645 referring to Cownie, above note 25. Professor Cownie's rich and interesting work on academic lawyers can certainly be described as social science research, and important social science work; but she would probably be the first to say that her book is not about to be adopted as a standard text in any of the foundational subjects required by the professions.
[158] W. Twining, *Karl Llewellyn and the Realist Movement* (London 1973), p.382. The actual quote is: "Realism is dead; we are all realists now".
[159] Cownie, above note 25, pp.197–199.
[160] Peter Birks' work is discussed critically by the present author in "Can Gaius Really be Compared to Darwin?" (2000) 49 I.C.L.Q. 297 and in "English Private Law: Old and New Thinking in the Taxonomy Debate" (2004) 24 O.J.L.S. 335.
[161] In *Watts* v. *Aldington* (1993) Steyn L.J. said, "In a less formalistic age it is now clear that the question… is a policy issue" in that more than one "solution is logically defensible" and "good sense, fairness and respect for the reasonable expectations of contracting parties suggests that the best solution" is one which "at least has the merit of promoting more sensible results than any other solution" (quoted in *Jameson* v. *CEGB* [1997] 3 W.L.R. 151, 161).
[162] See G. Samuel, *Cases and Materials on Torts* (Exeter 2006), pp.57–59.

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content of what they have studied. The sociology student will certainly be able to distinguish functionalism from structuralism, holism from methodological individualism and, probably, a causal approach from a hermeneutical one. These methods are associated with the very construction of the subject.[163] The film studies student might be a little less aware of all these different schemes of intelligibility and paradigms as they relate to social fact, but will be very knowledgeable about the various methods and techniques individual film-makers have contributed to cinema since its inception. She will be able to discuss the individual methodological techniques and styles made by, say, John Ford, Alfred Hitchcock, Douglas Sirk and Alain Resnais. Moreover the film studies student will be well-trained in critical theory and will almost certainly be able to distinguish a structuralist analysis from a hermeneutical one[164] and may well be aware of the importance of dialectics in cinema.[165] What will the law student know of the methodology of her discipline? She will, perhaps, be able to distinguish between deduction and induction and may well be able to discuss the various approaches towards statutory interpretation. If she has studied legal theory she will also be aware of the important contribution made by a number of the more recent jurists about the formal sources of legal rules. Indeed, she may well be aware of Dworkin's chain novel analogy with respect to legal reasoning.[166] But the chances are she will know almost nothing about methodology outside of the authority paradigm and little about schemes of intelligibility despite their relevance to law.[167]

In terms of a governing paradigm, the law graduate, in short, will be analogous to some narrowly educated theology graduate.[168] Indeed the kind of methodological movements to be found in the history of the civil law can mirror to some extent those found in religious disputes. Take for example the idea of "fundamentalism". According to Karen Armstrong, the American Protestant "fundamentalists wanted to go back to basics and reemphasize the 'fundamentals' of the Christian tradition, which they identified with a literal interpretation of Scripture and the acceptance of certain core doctrines."[169] One cause of this back-to-basic movement had been the various attempts in nineteenth-century America to marry theology with science. However, as Armstrong notes, once "theology tried to turn itself into science, it

[163] See J.–M. Berthelot, *La Construction de la Sociologie* (6th ed, Paris 2005).
[164] See *e.g.* M. Wallington, "Pasolini: Structuralism and Semiology", 1969(3) Cinema 5; W. Wright, *Sixguns and Society: A Structural Study of the Western* (Berkeley 1975).
[165] J. Kitses, *Horizons West* (London 1969), p.11.
[166] Dworkin, *Law's Empire*, above note 146, pp.228–232.
[167] On this last point see Samuel, *Epistemology and Method in Law*, above note 64, pp.295–334.
[168] Jestaz and Jamin, above note 25, p.167.
[169] K. Armstrong, *The Battle for God: Fundamentalism in Judaism, Christianity and Islam* (London 2004), p.x.

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could only produce a caricature of rational discourse, because these truths are not amenable to scientific demonstration.''[170] Thus ''systematic theology'' did not look for meaning beyond the words of the Bible; instead it attempted to produce a closed and coherent system from which all Biblical truths could be inferred by the use of reason brought to bear on words that had an absolute authority.[171] Indeed earlier in the century one theologian had used these scientific methods – particularly mathematics – to ''prove'' that the Second Coming of Christ would occur in 1843.[172] The attempt to marry law and science, particularly in nineteenth-century Germany, in many ways echoes this religious methodology. Some German Roman lawyers brought the same scientific method to bear on the Roman law texts and induced out of them that the legal system is conceptually perfect, without any gaps whatsoever, just ''like the order of nature''.[173] Law was a system, analogous to mathematics, consisting of axioms from which all other norms, together with the solutions to case law problems, could be logically deduced. Hermeneutics had given way to conceptual causality.[174]

Admittedly it was not some sort of legal ''fundamentalism'' as such that was to provoke the reaction to this *Begriffsjurisprudenz*. It was, in the common law world at any rate, a shift to functionalism preached by the American Realists.[175] However Realism has provoked, in its turn, something of a return-to-science movement, at least by the late Peter Birks and his followers. This movement is one where the importance of ''scientific'' legal classification is being reemphasised accompanied by a reassertion of deductive methodology.[176] And even outside this movement, a shallow hermeneutical (and structural) approach – dominated, as McCrudden says, by ''terms such as coherence, fit and analogy''[177] – remains the traditional methodological technique in doctrinal legal scholarship,[178] especially in the civil law world.[179]

The paradigm that dominates this methodology is perhaps revealed once again by the epistemological orientation of theology. ''Human

[170] *Ibid.*, p.141.
[171] *Ibid.*, pp.141–142.
[172] *Ibid.*, pp.90–91.
[173] Jouanjan, *Une histoire de la pensée juridique en Allemagne*, above note 39, pp.224–225.
[174] *Ibid.*, p.229.
[175] Cohen, Transcendental Nonsense, above note 69.
[176] See e.g. P Birks, ''Equity in the Modern Law: An Exercise in Taxonomy'' (1996) 26 University of Western Australia Law Review 1, at pp.4–6.
[177] McCrudden, above note 157, p.634.
[178] *Ibid.*
[179] Professors Jestaz and Jamin note that in France one of the characteristics of legal doctrine is its divorce from the human sciences; it is a question of *la dogmatique*: Jestaz and Jamin, above note 25, pp.172–174.

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beings, in nearly all cultures,'' says Karen Armstrong, ''have long engaged in a rather strange activity.'' And she continues:

> They have taken a literary text, given it special status and attempted to live according to its precepts. These texts are usually of considerable antiquity yet they are expected to throw light on situations that their authors could not have imagined. In times of crisis, people turn to their scriptures with renewed zest and, with much creative ingenuity, compel them to speak to their current predicament.[180]

Scriptural texts, in other words, become the unique and sole source of, if not all knowledge, then a considerable part of it. From the historical perspective, this observation by Armstrong certainly seems of some relevance with respect to the foundations of the Western legal tradition. The medieval Roman lawyers, as we have seen, regarded their texts in the same way as theologians regarded theirs.[181] Of course, today, lawyers are just as likely to abandon their texts (especially those protecting individual rights) in times of crisis and most do not regard such legal writing as the source of anything more than legal knowledge (that is to say they do not regard the texts as having anything more than a positivistic authority).[182] Nevertheless, within this narrow disciplinary limit, the legal text is given special status and it is these texts that are the primary source of all knowledge. In addition their authority – if not their styles, quality and function – is not open to question. And even legal philosophy has largely devoted itself to identifying, and thus implicitly supporting the authority of, the ''valid'' source of the normative propositions expressed in these documents.[183] In short what theology can contribute to legal epistemology is to help emphasise, by way of analogy, the extent to which law as a discipline is trapped within an authority paradigm, in turn seemingly making it an intellectually unattractive candidate when it comes to any serious investigation into social science epistemology.

VI. Escaping the Authority Paradigm

Professor McCrudden – drawing inspiration no doubt from Professor Cownie's book[184] – is of the view that this ''internal'' approach (as he and others term it) is breaking down to some extent and is merging

[180] K. Armstrong, Unholy strictures, *The Guardian*, August 11, 2005.
[181] Note also the actual importance of theological sources to the Western legal tradition: H. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass. 1983), pp.165–198.
[182] Atias makes this point more elegantly: see *Épistémologie Juridique*, above note 46, pp.35–36.
[183] For an overview see Jestaz and Jamin, above note 25. See also S. Toddington, ''The Emperor's New Skills: The Academy, The Profession and the Idea of Legal Education'', in P Birks (ed.), *Pressing Problems in the Law: Volume 2: What Are Law Schools For?* (Oxford 1996), 69.
[184] Cownie, above note 25.

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with an "external" approach, in particular socio-legal studies, critical legal studies and law and economics.[185] This may be true, but one wonders to what extent these external references are likely to provoke a significant epistemological shift within the discipline of law.[186] Berthelot, it may be recalled, at no point denies the importance of social sciences to law. "Sciences of the text have to make numerous references to the social sciences", as he says, "but either they define themselves in relation to a specific object, approached in a multi-disciplinary fashion, or they lay claim to a hermeneutic and textual programme which is not their own".[187] In short one might be expanding the authority paradigm but not escaping from it.

Can, how might, and should this escape happen? By these questions one is asking how lawyers might take their methodology (and thus epistemology) beyond the limits imposed by the authority paradigm, always assuming that going beyond these limits is desirable.[188] Now, as far as the practitioner is concerned, the necessity for such an escape is by no means evident. However for academic lawyers the position is different in that a number of them do, presumably, want to be taken seriously by their colleagues in other disciplines.[189] And, if this is the case, jurists will need to take method more seriously.[190] Yet even if a majority of academic lawyers are content to remain within the authority paradigm – to be traditionalist "theologians" rather than social scientists – there is one group that cannot. Comparative lawyers, if they are to say anything meaningful, must work within a spirit of enquiry rather than authority, for the exercise of comparison – if it is to do anything other than merely *dégage* some trans-national "science" (an exercise that often results in legal imperialism) – cannot be conducted in terms of authority.[191] Comparative legal studies is obliged, in other words, to be interdisciplinary[192] and this implies that comparatists must be social scientists and not "theologians".[193]

[185] McCrudden, above note 157, p.640.
[186] Note J.W. Jones' comment (writing in 1940) with respect to the law and economics school: "It is enough to say that, however far back we trace economic relations, we never get completely away from some compulsive system of rules which is difficult to describe otherwise than as law": *Historical Introduction to the Theory of Law*, above note 54, p.264.
[187] Berthelot, *Épistémologie*, at p.12.
[188] *Cf.* Birks, above note 176.
[189] McCrudden, above note 157, p.646.
[190] *Ibid.*
[191] P Legrand, How to Compare Now (1996) 16 Legal Studies 232; P Legrand, Comparer [1996–2] Revue Internationale de Droit Comparé 279.
[192] Legrand, *Le droit comparé*, above note 20, pp.27–32.
[193] Although in fairness to modern theological thinking a comparative approach is now seen as essential: see *e.g.* M. Burger and C. Calame (eds.), *Comparer les Comparatismes: Perspectives sur l'Histoire et les Sciences des Religions* (Lausanne 2006). By "theologian" in the context of this present article is meant one who never questions the authority of a holy text.

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If, then, escape is on the agenda, perhaps law schools should start by looking in much more diachronic depth at the construction of their discipline. The history of the civil law, as we have already mentioned, is largely a history of changing methods and a better appreciation of these methods and the changes that have occurred with respect to them would endow law students with a perspective that might allow them at one and the same time to appreciate the relationship between law as knowledge and as methodology and how changes in method can effect changes of substance.[194] As Robert Blanché has asserted with regard to the natural sciences, history "offers a good means of analysis in separating, by the date and by the circumstances of their appearance, the various elements which have contributed to form little by little the notions and principles of… science".[195] One is not talking here, as he goes on to say, of a history of events but the history of ideas which cannot be written in the same style, "for the links are not of the same nature in the two cases".[196] The ideas have to be "grasped, so to speak, from the inside" in a manner that is philosophic rather than descriptive.[197]

For example, the force of authority paradigm itself has not always been of the same epistemological nature. As far as the Glossators and Post-Glossators were concerned, the authority was primarily textual – although authority came to attach also to the celebrated jurists (or at least to their writings) – and thus their methods were orientated towards explaining the content of the texts, cross-referencing and ironing out the contradictions. Hermeneutics and dialectics were the two primary methods applied to this written source material.[198] The French humanists of the sixteenth century effected a complete revolution in that they brought quite different methods to bear on the Roman material; they developed what today we would regard as the modern historical methods.[199] They no longer saw the Justinianic compilation as a timeless authority but as a historical document whose contents had been fashioned at different time periods. In fact so different were some of their methods that several humanist jurists were dismissed as being philologists and grammarians rather than lawyers.[200] Yet this historical scholarship was equally to generate a

[194] A good overview of these changing methods from the 11th to the 20th centuries can be found in Jones, above note 54.
[195] Blanché, *Épistémologie*above note 145, p.36.
[196] *Ibid.*, p.38.
[197] *Ibid.*
[198] See on this methodology: W. Ullmann, *Law and Politics in the Middle Ages*, above note 55, p.87 and W Ullmann, *The Medieval Idea of Law as Represented by Lucas de Penna*, (above note 59), pp.112–113. See also M. Bellomo, *The Common Legal Past of Europe 1000–1800* (trans. LG Cochrane, Washington 1995), p.181.
[199] See generally Kelley, *Foundations of Modern Historical Scholarship*, above note 57.
[200] Jones, above note 54, pp.42–43.

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new kind of authority, that of the *essence* – that is to say the internal coherence – of law. As far as some of the humanists were concerned, the Roman materials had been corrupted by the intellectual vulgarity of the compilers, and subsequently by the medieval Roman lawyers, and what was needed was a method that would expose the systematic nature of law as understood (so the humanists believed) by the great classical Roman jurists.[201] Having been "exposed" – in effect constructed by the humanist jurists on the basis of the Gaian institutional plan[202] – this coherent model became, by the force of its rationality, a new authority.[203]

The methodological effect, in other words, was dramatic. The authority paradigm was no longer just a matter of textual authority; it was equally a scientific authority whose epistemological basis, borrowed from mathematics, was internal coherence.[204] Legal academics had been endowed with a new role and one that would prove infinite given the inherent ambiguity of language. Their job was to fashion an ever more coherent and closed structure of legal axioms so as to create a logic model from which solutions could be deduced with confidence and whose authority would be guaranteed by the authority of the syllogism.[205] Causality (*ratio iuris*) became the scheme of intelligibility that would endow hermeneutics (*interpretatio iuris*) with its "scientific" respectability.[206]

The authority of scientific rationality found, seemingly, its most perfect expression in codification.[207] Yet the moment a code came into force there was something of a shift back within the authority paradigm from rationality to textual authority. As Donald Kelley has observed with respect to the *Code civil*:

> [T]he imperial will would emanate mathematically, concentrically, and inexorably from its legislative source and reflect back on its national foundation. Few questioned the principle of *la volonté générale*. The main question was: How was this force to be expressed, explained, and applied? The crux of the matter was the age-old legal problem of 'interpretation,'… Corresponding to the thirteenth-century glossators was the so-called exegetic school (*école de l'exégèse*), which also took a narrow-minded construction of the text and tended to make a fetish of the 'intention' of

[201] J.-L. Thireau, *Introduction Historique au Droit* (Paris 2001), pp.223–226, 232–238.
[202] Kelley, *The Human Measure*, above note 58, p.196.
[203] H.F. Jolowicz, *Roman Foundations of Modern Law* (Oxford 1957), pp.61–81. Peter Birks, in more recent times, tried to import such an "authoritative" structure into the common law: see *e.g.* P. Birks, "Definition and Division: A Meditation on *Institutes* 3.13", in P. Birks (ed.), *The Classification of Obligations* (Oxford 1997), 1.
[204] Dubouchet, *Sémiotique juridique*, above note 39, pp.37–70.
[205] Jouanjan, above note 39, pp.222–230.
[206] Kelley, *The Human Measure*, above note 58, p.198.
[207] See eg D. Bureau, "Codification", in D. Alland and S. Rials (eds.), *Dictionnaire de la Culture Juridique*, Paris 2003, 225, 227.

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> the imperial redactors. The *exégètes* more or less avoided recourse to history but had an advantage over the medieval glossators: they had access to a record of the debates of the original editors [of the *Code civil*], assembled authoritatively in the analysis published by Jacques Maleville in 1805.[208]

Modern jurists continue therefore to be trapped within a paradigm whose foundational basis is two-fold. There is the authority of the text itself, an authority continually buttressed by appeals to democracy, certainty and (or) the "rule of law".[209] And there is the authority of coherence; law is a rational science in that it provides a model which is capable both of explaining law as an epistemological phenomenon and of predicting solutions to each and every legal problem.[210]

Certainly it would be completely misleading to claim that contemporary civil lawyers still equate law and legal method with mathematics. As Professor Bergel asserts, the reduction of law to a set of equations is a delusion. "It comes up against insurmountable method difficulties" and, he continues, "would anyway be contrary to the essential purpose of any legal system".[211] But what this two-fold authority paradigm does foster – and this indicates the great intellectual power of a paradigm – is an extraordinary restraining power at the level of schemes of intelligibility. Causal, functional, structural, hermeneutical, actional and dialectical approaches are indeed all employed by lawyers and jurists alike. Yet instead of providing a diversity of *grilles de lecture* through which *difference* can be explained with respect to legal texts, facts and theories regarding the legal system itself they are used, instead, as a means of subverting difference.[212] The authority paradigm combines logic, function, interpretation, individualism, system and dichotomy in such a way as to construct a methodological and epistemological model of law in which society – that is the society created by the Gaian model – is seemingly as predictable as the behaviour of comets or the planets.[213] And such a model has the great advantage that it is not open to testability. Its disadvantage is that it creates a closed model of

[208] D.R. Kelley, *Historians and the Law in Postrevolutionary France* (Princeton 1984), pp.43, 47.

[209] See eg Y. Gaudemet, "Légalité", in Alland and Rials (eds), *Dictionnaire de la Culture Juridique*, above note 207, 917.

[210] Common lawyers might not subscribe to the idea of law as a deductive model, but, as McCrudden observes, they still reason on the basis of reason and logic: McCrudden, above note 157, p.633.

[211] J.-L. Bergel, *Méthodologie Juridique* (Paris 2001), p.145.

[212] Professor Murphy makes the point that the common law is governed by what might be called the "medieval authority paradigm"; the "literature it [the common law] resembles, in other words, is medieval literature, not modern novels, chain or otherwise": Murphy, above note 1, p.95.

[213] Thus differences of reasoning between judges often results from differences in schemes of intelligibility or even paradigms: see on this point G. Samuel, *Foundations of Legal Reasoning* (Antwerp 1994) and *Epistemology and Method in Law*, above note 64. However these differences are masked by the structure and authority of the reported judgments.

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knowledge that isolates it from the other social sciences. This kind of law is, arguable, not social science.[214]

Conclusion: Is Law a Social Science?

Can one conclude, accordingly, that law is not a social science? Before responding directly to this question the point must be made, once again, that the question is aimed at the discipline of law and not at individuals working within the discipline. There is no suggestion whatsoever that law faculties lack genuine social scientists producing research that is unquestionably social science research.[215] Indeed there is much good research of this nature emerging from law schools, just as good social science research from outside law is having an impact within the discipline. In this sense, then, law faculties are making an important contribution to social science knowledge. The question is aimed at law as a discipline, that is to say law as it is perceived by those outside the subject, such as the late Professor Berthelot, and by those internal to law who talk in terms of a traditional "internal" approach to the subject.

To take a recent example, one might consider the vast scholarly effort in the United Kingdom devoted to restitution law since this effort has generated debates about classification and taxonomy in law in turn raising questions that can be regarded as epistemological.[216] This writing might well be of value to students and practitioners of law, and the point of referring to it here is not imply that it is valueless. But if this work were to be considered from Professor Berthelot's perspective two questions arise. What real social relevance does any of this scholarship actually have to an understanding of social knowledge? And what major contribution have the papers concerning legal coherence and taxonomy made to epistemology? It is arguable that had this restitution and taxonomy scholarship been brought to the attention of Professor Berthelot he would have been convinced of the correctness of his decision to exclude law from his project for the reasons he sets out in *Épistémologie des sciences sociales*. Even from the perspective of comparative law – an important perspective since the idea of a separate category of restitution within the law of obligations based on the principle of unjust enrichment is a civilian import[217] – the restitution scholarship, or some of it, can be regarded as amateurish. Can Gaius really be compared with Darwin as one

[214] See also (and generally) Murphy, above note 1.
[215] See *e.g.* Cownie, above note 25.
[216] For an overview see P. Birks, *Unjust Enrichment* (Oxford 2003).
[217] See generally J. Beatson and E. Schrage, *Cases, Materials and Texts on Unjustified Enrichment* (Oxford 2003).

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leading restitution lawyer was constantly suggesting?[218] In short, this type of scholarly pursuit, as valuable as it might be, is not *social science* scholarship and if, in turn, this restitution scholarship is to be regarded as typical high quality law research – the "paradigm" legal research – then it is difficult to escape from the conclusion that this type of law is not a social science. The research tells us nothing about society itself and is concerned only with the logical and hermeneutical implications of the unjust enrichment principle being regarded as an axiom whose authority cannot be questioned.

However the debate does not end here because there is one area seemingly "internal" to law as a discipline that cannot, if it is to have any credibility, be governed by the authority paradigm. The area in question is comparative law. This field of law studies cannot be governed by the authority paradigm because "comparative law", as the words themselves suggest, are governed by two questions. What is "comparison" and what is "law"? Neither of these questions can be adequately investigated or employed within the limits of the authority paradigm.

The comparison question requires the jurist first to consider the role of comparison as an epistemological tool in itself – an exercise that simply cannot be conducted within the framework of the traditional "internal" doctrinal methodology[219] – and secondly to reflect upon the objects of comparison. Again this second aspect of comparison cannot be tackled using only the reasoning tools of induction, deduction, analogy and coherence. What is required is an investigation of the ontological and (or) epistemological focal points of legal knowledge. Should one, for example, be comparing rules, norms, factual situations, values, institutions, categories, concepts, reasoning methods, systems structures, words, *les unités épistémologiques*[220] or what? And what are the paradigms within which these focal points are to be approached: is it a matter, say, of nature or culture or order of chaos? In addition there are other serious methodological issues that attach to the exercise of comparison. Should one presume similarity or difference? Should one take an insider or an outsider approach? Is the functional approach the primary method to be adopted or are there alternatives? And, indeed, what are these alternatives? These are extremely complex and controversial questions that are beginning to generate a sophisticated literature in comparative legal studies.[221] And whatever one thinks of

[218] On which see further G. Samuel, above note 160.

[219] See generally C. Vigour, *La Comparaison dans les Sciences Sociales : Pratiques et Méthodes* (Paris 2005).

[220] On which see Atias, *Épistémologie du droit*, above note 4, at pp.77–85.

[221] See *e.g.* the Legrand references cited above; and see generally P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge 2003); Riles (ed.), *Rethinking the Masters of Comparative Law*, above note 16.

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this literature, there is no doubting its independence from the authority paradigm.

Exactly the same can be said about the "law" aspect of comparative law. It might be tempting to think that comparatists will be confined to the parameters set by legal theorists, parameters often functioning within the authority paradigm.[222] But comparative lawyers are not preoccupied with fashioning a unified theory of law. Quite the opposite in fact, for they require "theories" of "laws" rather than a theory of law since the imposition of a unified theory normally amounts to legal imperialism.[223] The comparative lawyer who approaches the common law – or the legal systems of Africa or China – as a set of Kelsenian norms is likely to produce work not just of limited value to comparative legal studies but of a type that might actively mislead jurists.[224] No doubt some may think that these assertions are open to challenge, yet they are not raised here to provoke or to be defended (here) as such. They are raised simply to make the point that comparative law, when reflecting upon the nature of law, cannot do this from within the traditional authority paradigm.

Comparative legal studies, if it is to make a serious contribution to knowledge in general, must employ comparison as an epistemological tool and this epistemological dimension carries over, of course, into the "law" question as well. Comparative lawyers are thus engaged in a continual exercise that can be classed as epistemological and this is an exercise that cannot be categorised within dichotomies such as that between knowledge that is "internal" and "external" to law. Professor Berthelot's schemes of intelligibility are, for example, neither purely "external" to law (since judges and legal theorist employ different schemes) nor purely "internal". The comparative lawyer as epistemologist is viewing dichotomies such as the internal-external one from a different level than those operating as traditional doctrinal jurists or as social science scholars working within law faculties. In addition the comparative lawyer operates, or should operate, from the perspective of an enquiry paradigm. She is engaging with persons and things (and often actions) at one and the same time as legal constructs and as economic, political, social (including cultural) and psychological

[222] Much legal theory is concerned with the valid sources of legal rules and the isolation of the legal from the non legal. This is very much an exercise conducted within the authority paradigm, although of course certain jurisprudential orientations such as the Critical Legal Studies movement can legitimately claim to be working within an enquiry paradigm. Note the interesting observations with respect to the clash of these two paradigm approaches in Cownie, above note 25, pp.42–47.

[223] This point is developed in G. Samuel, "Droit Comparé et Théorie du Droit" [2006.57] Revue Interdisciplinaire d'Etudes Juridiques 1.

[224] P Legrand, "The Same and the Different", in Legrand and Munday (eds.), above note 221, 240 at p.304.

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constructs.[225] This is why the comparative legal studies deserves to qualify as a social science and this is why it is to be regretted that there is no contribution from a comparative lawyer in *Épistémologie des sciences sociales*.

In short, whether or not law is to be regarded as a social science is a paradigm question. Legal literature of the type that can be classed as having been produced from within the authority paradigm is not social science literature since it is not motivated by a spirit of enquiry into the nature of the social. Legal literature from outside the paradigm is more ambiguous, some, if not all, qualifying as social science scholarship.

[225] In what ways might the comparative lawyer make a contribution to social science epistemology? Limits on space dictate that this question cannot be pursued in the present article; it will be the subject of a future paper. However suffice it to say here that one way in which law as a discipline might contribute to social science epistemology is with regard to the schemes of intelligibility identified by Professor Berthelot. He identifies six such schemes, but it is arguable that this list is longer and that a seventh scheme based on "objects" or "commodification" is a possible *grille de lecture* of social fact (for example intellectual property and the notion that a person can "own" her ideas). If this is correct, it would be an example of how lawyers, working outside of the authority paradigm, could contribute to social science epistemology. As mentioned, this point will be developed in a future article.

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