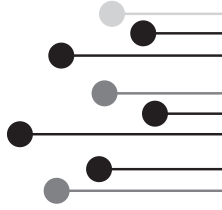


Fundamentals of Law and Society



Introduction

This chapter will provide to students the broad contours of the field of the sociology of law. What will be emphasized is understanding law and the legal system with reference to the social system within which it is situated. As we saw in Chapter 1, evidence of legal systems stretches back to approximately 3500 B.C., and it was important to spend some time tracing out this history into the modern era. For the most part, from here forward, we will be interested in modern law, and specifically, in modern western law since 1800. This decision has been made to reduce the complexity of our topic, especially insofar as a distinctly sociological perspective did not come on the scene until approximately 1880, with the institutionalization of sociology in America. Modern law, that is, law codified into statutes and backed by a constabulary force, means that social development must have reached the stage of written language situated within a well-established political system (the state).

Indeed, modern law is shot through with political posturings and negotiation over collective understandings of the relation between the individual and society. At heart, law and politics struggle with this basic dichotomy, that is, balancing the interests of individuals against the group (whether at the level of the neighborhood, the organization, the community, the city, the state, or the nation). Before summarizing the key contributions to law from the perspective of philosophy, jurisprudence, and later the sociological perspective, we will first discuss some of the key distinctions and legal principles found within law.

Substantive and Procedural Law

To avoid arbitrariness, modern law is concerned with being as explicit as possible concerning the rules for doing law. This means that a very large subfield within law itself is procedural law, namely, the rules, regulations, and requirements concerning the carrying-out of the legal process in particular realms of practice.¹ A leading idea of procedural law is that it should act as a guide to citizen action through the promulgation of clear, abstract rules that are set forth authoritatively (as embodied in codes or statutes) in advance of actual application (Sunstein, 2006). Without a strict adherence to a set of rules committed

to in advance, no legal system could maintain its claim to legitimacy, for it would be subject to the whims of lawmakers or judges in any given instance. The ideal outcome of procedural law is procedural fairness, whereby all citizens are treated the same given a similar set of legal circumstances. Lon Fuller (1977) has identified the eight ideal characteristics of a legal system legitimated on the basis of procedural fairness, which are as follows:

- Laws are general, not ad hoc;
- They are publicized;
- They are prospective, not retrospective (i.e., a person is subject to the law only if it is already on the books);
- They are clear;
- They are logical;
- They are capable of obedience in practice (i.e., laws should not be passed that are difficult to follow);
- They are stable and not subject to frequent change; and
- They are administered in a way that is consistent with the substantive law as enacted (Coughlin, 2011, p. 191).

Whereas procedural law refers to the commitment to a set of guidelines established in advance of any application of law, substantive law refers to the actual statement of activities and events that are subject to the law, as well as the specification of a range of punishments (if applicable) for their violation. There is a tremendous variety of categories of law practice, including family law, entertainment law, torts (civil harm), contracts, criminal law, property law, international law, aviation law, and fashion law, to name just a few. In each of these areas, law must specify the acts, actors, and institutional settings within which legal accountability (that is, justiciability) obtains. This means that rather than the universalism of procedural law, substantive law deals with the empirical realities that exist within the area under question so that the rule of law can be applied as required. Interestingly, over time, there has been more of an emphasis placed upon substantive law regarding issues of equity, to the extent that law can be used as a tool to correct inequities or imbalances in areas such as housing, education, and work. Concerns of equity are substantive to the extent that law must be couched not at an abstract or general level—as in the case of procedural or formal law—but consider the pertinent factors associated with the production of inequality among real, flesh-and-blood human beings.

An example of substantive law in the realm of equity is the Pay Equity Act of Ontario, Canada. In 1988, the Ontario government enacted the Pay Equity Act (PEA) in response to statistics that showed that women were

paid approximately 70 cents for every dollar men were paid for the same or similar work. The PEA was based not on complaints filed by women for perceived work discrimination but was proactive to the extent that all businesses with at least 10 employees were mandated to develop a plan describing how they would change conditions at work to meet the goals of the legislation.

Twenty years after its implementation, Singh and Peng (2010) analyzed to what extent PEA was achieving greater pay equity for women in Ontario. The data indicate that gains have been uneven, as the greatest benefits of the law have been for female employees in the public sector as well as in larger private organizations. Many smaller, private companies may still be engaging in a pattern of discrimination related to evaluating women's work, and these long-held, informal practices—part and parcel of the organizational culture—would need to be more systematically targeted for training. Of course, extra training is expensive, hence Singh and Peng (2010) recommend more funding so that the law could be implemented more evenly and systematically. In any event, substantive law, whether equity or based on some other focal concern, always requires a closer examination of the characteristics of persons, places, and activities so that legal interventions “hit the mark,” as it were.

One further thing should be noted. The stiff formalism of procedural law was set up in such a way that those who come before the law (whether in civil or criminal court) are assured that they will be treated the same as anyone else given a similar set of legal circumstances. This is how the legal system seeks to attain fairness, namely, by the assurance that well-established procedures are in place by which the due process rights of defendants, plaintiffs, and others involved in the legal process are guaranteed. Yet studies clearly show that persons are less satisfied with procedural outcomes as the formality of the venue increases. This means that, if available, more informal systems for resolving conflict (such as alternative dispute resolution) are preferred over highly formal trial settings. The following four factors are strongly associated with legal participants' perception of procedural fairness:

- Opportunities for participation (or voice);
- The neutrality of the forum;
- The trustworthiness of the authorities; and
- The degree to which legal participants feel they were treated with dignity and respect (Tyler, 2004, p. 445).

As we will see in later chapters on specific types of law (civil, criminal, and administrative), there are mechanisms in place that attempt to steer persons away from trials, primarily because they are expensive and time-consuming, but also because of the higher degree of fairness imputed to less formal venues.

Private and Public Law

The distinction between private and public law varies by degree and within national traditions. For example, the distinction between private and public law is much more established and consequential in France than in most of the western world (Freedland and Auby, 2006). Within most common law jurisdictions, public law is basically synonymous with government, including the constitutional separation of powers, criminal law, administrative law, and welfare law. Private law, on the other hand, deals with civil law, that is, the behavior of and interaction between private citizens regarding torts, contracts, and property (Rosenfeld, 2013).

The split between public and private in western law goes back to the Code of Justinian in ancient Rome, authored by the Roman statesman Ulpian. To hold individual passions in check, there must be established a sacred order or body that transcends and stands over the people. This is the common set of rules established in the *res publica*, that is, the system of authoritative proclamations embodied in the state. This publicly held and visible authority was the way forward to escape the ancient law of natural right, whereby might makes right. This is the same basic argument that Hobbes made years later in noting the establishment of the state, which he referred to as the Leviathan.

Yet as Supiot (2013) has argued, this idea of the dominance of *res publica*, by which the private interests of citizens are tamed under the auspices of a broader public law, has been eroded since the Enlightenment. Because the idea of *res publica* was grounded in a spiritual or mystical notion of a public system of rules that authoritatively stands over society, by the time of the rise of Canon or ecclesiastical law the spiritual dimension backing the founding of the state was thrown into question. The Enlightenment embodies a worldly orientation toward the understanding of the human condition and seeks to jettison ideas or systems of belief that lack empirical reference points or validation. In modernity, there are no longer *self-evident truths*; rather, these must be worked out and continually shored up by real human beings attempting to achieve the good life collectively. Under *res publica* individual interests were subordinated to the public good. However, with growing state skepticism there has been an instrumentalization of law, whereby the state is now in the business of maximizing citizens' individual utilities (Supiot, 2013, p. 133). There has been an inversion of sorts, according to Supiot, in that across western society especially, the private continues to triumph over the public, in the realm of law and elsewhere.

Common Law

Founded in 12th-century England, British criminal justice was monarchical and authoritarian as the king was considered the fountain of justice. For

Puritan leaders in the American colonies, however, rather than the king the ultimate source of justice was God. With the American Revolution and the creation of the U.S. Constitution, which represented the breaking free from English rule and its royal theory of justice, the U.S. legal system nevertheless maintained a major feature of English law, and this was the common law (Chriss, 2013; Friedman, 1994).

There are five basic features of common law worth noting. First, under the doctrine of the *supremacy of law*, no one is above the law, not even the king. This principle is embodied in John Adams's famous pronouncement from the Massachusetts Constitution of 1780 that "We are a nation of laws not men" (Versteeg and Ginsburg, 2017). Second, common law is based on *precedent*, that is, on past court decisions. This is the doctrine of *stare decisis*, meaning *stand by the decided matter*. Under common law, there is a slow and inexorable accumulation of cases that have been decided and that provide guidance for current and future legal cases.

There are five broad justifications for a reliance on legal precedent (Garner et al., 2016). First, *learning* from the past is crucial in all areas of life but especially regarding the development and operation of a legal system. The legal decisions of past cases allow judges to build on the wisdom of others. Second, cases are decided individually over time, and as judges revisit cases with elements similar to the present case under consideration, such a legal system allows for fine-tuning, refinement, and *constant improvement*, however slow or incremental it might be. Third, the doctrine of precedent creates *efficiency* to the extent that new cases do not need to be constructed anew but can take common elements from past cases so that rules already at hand can guide decisions and actions of court actors. Reliance on precedence means that judges need not reinvent the wheel with each new case. Fourth, reliance on precedence in guiding judges and juries as triers of fact (with the eventual goal of rendering a verdict) promotes *respect* for the judiciary and the legal system as a neutral source of legal decisions. Going back to already decided cases for guidance on how to proceed concerning current cases reduces reliance on the whim or caprice of triers of fact. Fifth, respect for precedence provides *fair notice* and predictability to those interested in pursuing legal remedies for cases at hand. For example, anyone who approaches legal counsel articulating a desire to seek legal remedies will rely on those legal professionals to examine the case law covering the substantive area of concern (whether contracts, divorce, property or employment disputes, and so forth). After reviewing case records, a competent lawyer will advise the client as to whether his or her claim is justiciable (that is, amenable to legal remedy) and, if the cases proceeds, the odds of prevailing in court.

A third feature of common law is in keeping with the spirit of popular justice, which triumphed over royal justice of the old kingship model of governance. This feature of common law is that a person charged with wrongdoing in a criminal or civil case must be tried by a *jury* of his or her peers (W. Chriss, 2011). Choosing jurors from a pool of eligible citizens to try cases acts as a hedge against government overreach and abuse. The idea

is that if a government were able to enforce its own laws without appealing to citizens, government would be absolute and there could be no checks on its powers. Perhaps jurisprudence scholar Lysander Spooner (1971 [1852], p. 15) put it best when he wrote more than 150 years ago that trial by jury

... forbids the government to execute any of its laws, by punishing violators, in any case whatsoever, without first getting the consent of “the country,” or the people, through a jury. In this way, the people, at all times, hold their liberties in their own hands, and never surrender them, even for a moment, into the hands of the government.

A fourth feature of common law is the *adversarial* nature of legal cases. Criminal court cases are particularly amenable (in spirit) to being described as an adversarial system in which one side, the plaintiff (here, the state) seeks a conviction against a criminal defendant, while the other side (the defense) seeks an acquittal. This is a clash of two potentially diametrically opposed stories about what actually happened and the criminal defendant’s role in the commissioning of the offense. In this pitched battle between opposing versions of reality, presumably the truth will emerge, guided by procedural law, and justice will be served. Contrary to this ideal of trials as adversarial systems, critics such as Herbert Packer (1968) argue that the criminal law first and foremost seeks to dispose of cases efficiently. This means that the processing of crime cases is more like an *assembly line* where all members of the legal system—judges, defense attorneys, and prosecuting attorneys—develop close working relationships as well as an understanding of *going rates* for crimes. These are developed prior to any actual litigation and help reduce reliance on trials in favor of plea bargaining, all of which diminish the adversarial nature of the system (but see, e.g., Ferrandino (2014) whose research finds that Packer’s assembly line critique is somewhat overstated).

A fifth feature of common law, alluded to above, is the importance placed on *procedural law*. Judges act as referees overseeing every facet of court operation, and they are experts in the procedural law undergirding and guiding the activities of key personnel in the courtroom. To guard against decisions of their courts being overturned on appeal—one of the worst possible outcomes for any sitting judge—judges focus on maintaining proper procedures at every step of the trial process, from opening arguments to jury instructions.

Trifles

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In early English history, it was commonplace for those embroiled in disputes with their family, neighbors, or merchants (the latter usually in the context of a disagreement over some purchase or trade) to seek to settle their

differences face-to-face and informally, that is, without having to take the dispute to court. After the establishment of the Magna Carta in 1215—the so-called Great Charter of the Liberties—persons were more apt than before to seek access to the royal court or to the king directly to air such grievances. By the end of the 15th century, however, the King's Select Council—the place you would go to petition to have your grievance heard—felt so besieged by often trivial complaints being brought before them that a determination was made that the law should not concern itself with trifles, which is now known as the legal principle *de minimis non curat lex*. For example, if you lost \$1.50 in a vending machine and tried to take the vending machine manufacturer to court to recoup your loss, summary judgment would be for the defendant (the manufacturer) under the *de minimis* doctrine.

The establishment of the principle that the courts should concern themselves only with claims of significant damage or loss—usually civil complaints (or torts)—over time led to the development of specialized courts, which would hear cases for claims of losses not to exceed a certain dollar amount. These small claims courts hear civil cases for claims not to exceed an established amount set by the state. For example, small claims courts in Rhode Island can hear cases of up to \$2,500 in value, whereas Ohio's upper limit is \$6,000 while North Dakota's is \$15,000.² There is technically no lower limit, but because of filing costs—\$25 and up per day—and attorney fees, it is simply not economically feasible to utilize small claims courts to recoup small losses.

Jeff Nemerofsky (2002) has summarized the history of litigation in which the *de minimis* doctrine has been applied, and a few of those cases will be highlighted. In *Deutsch v. United States*, an inmate at the federal corrections facility in Minersville, Pennsylvania, filed suit alleging that a corrections officer stole pens from his cell and sought to recover \$4.20, the value of the pens. The district court ruled that the complaint was a trifle and not worthy of adjudication. In *Altman v. Hurst*, the chief of the Hickory Hills, Illinois, police department reassigned Sergeant Altman to foot patrol—Altman was alleged to have urged a fellow officer to appeal a suspension from the force—and caused him to miss his annually scheduled vacation in April. The court ruled that Altman did not have a right to a hearing because the inconvenience of having to reschedule his vacation was *de minimis*. In *Raymon v. Alvord Independent School District*, high school student Roberta Raymon received a three-point deduction on her algebra grade as a penalty for an unexcused absence, dropping her overall GPA from 95.478 to 95.413. The family sued the school district claiming violation of their daughter's rights under the Fifth and 14th Amendments. The court of appeals dismissed the case, claiming the drop of .065 in GPA was trifling.

The legal principle of trifles reflects the folk wisdom of “live and let live,” namely, that we all naturally suffer the small aches, pains, and nuisances of life, and most of the time we shrug them off and get on with the business of living. In other words, no one has a right to not experience the small and nagging pains of life, and the court is not the place to seek relief from them

(Donohoe, 2013). However, what about a case in which many persons are mildly discomfited but when considering any single of these cases, all would be judged to be trifles and would not win at trial? The way to get around this is to file a class action lawsuit, whereby many persons combine their admittedly meager individual grievances into a large and robust complaint involving a potentially large class of litigants. This trend of combining meager claims that would otherwise be dismissed as trifles individually into class action claims has been growing since the 1960s.

Class action's heyday was the civil rights era, when such litigation was used to tackle large social problems such as inequality, discrimination, and unequal access to housing and education. Today, however, ". . . we too often resort to class actions to cumulate petty grievances into negligible settlements for class members who don't even know they've been injured" (Sasso, 2005, p. 16). In this age of online interconnectivity through social media platforms, the practice of alerting sometimes unsuspecting citizens to the prospects of joining class action lawsuits will continue to expand, with lawyers standing to benefit as they typically take a percentage of the profits from any final award settlement.

Jurisprudence

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A standard response to the question "What is jurisprudence?" is that it is the study or the philosophy of law. Jurisprudence is usually taken up by those trained in law, and many law schools offer courses in jurisprudence in the second or third year of study. One of the basic orientations within jurisprudence is the attempt to make explicit the procedures by which judges (or other triers of fact, such as jurists) interpret cases. Hence, in its purest form jurisprudence represents the quest to specify the tacit operating principles that make the practice of law possible. Jurisprudence could also be construed as the science of law and legal systems, to the extent that it is possible to ferret out such operating principles of legal practice utilizing standard scientific methods (Kelsen, 1967).

Because law is so vast, the substantive aspects of law, which jurisprudence could focus on, are potentially vast as well. However, when jurisprudence is taught in law school these four aspects of law and legal systems tend to be emphasized:

- The definition of law, legal systems, and rules;
- The nature of liberty and the limits of legal interference (as we saw in the work of Mill);
- Punishment, including its nature and justification; and
- The nature of legal reasoning, especially in the areas of justice and dispute settlement (Tur, 1978, p. 151).

By its nature, then, the study of jurisprudence suspends the assumption of law as a tightly bound, well-established system of principles by which legal actors are led to proper decisions or interpretations. If this is all there was to the practice of law, there would be no need to fill in the gaps that exist between the explicit aspects of law (as codified in statutes) and the actual work legal practitioners do. In this sense, jurisprudence is akin to the sociology of law: They are both projects of metatheorizing (Ritzer, 1991). Metatheory is *theorizing* or *talking about* theory, and in this case, the metatheoretical approach would be to analyze the tacit theory of law that particular practitioners hold. The difference between the sociology of law and jurisprudence is, of course, the primary fields of training of the practitioners of each. For the most part, jurisprudence scholars are trained in law or the philosophy of law as a specialty, while sociology of law scholars are typically trained in sociology (although they may also have some legal training). Additionally, some persons initially trained in law migrate out into sociology and combine the projects of jurisprudence and the sociology of law. This is what legal scholar Roscoe Pound did in founding the approach known as sociological jurisprudence. (We will return to Pound later in the chapter.)

Indeed, today a variety of perspectives on law and the legal system have come together to form a broad agenda referred to as *law and society*. Very briefly, the law and society approach seeks to understand which social, cultural, economic, political, and psychological factors are associated with the development of certain types of law and legal systems in societies at particular times. It is a well-established intellectual movement that seeks to explain and/or describe legal phenomena in social terms (Friedman, 1986).

This law and society movement encompasses a very broad and diverse group of thinkers representing such fields as history, sociology, jurisprudence, philosophy, political science, anthropology, psychology, medicine, linguistics, communications, and business. Because of the ascendancy of this multidisciplinary law and society project, it is sometimes difficult to identify a purely sociological approach to issues of law, just as it is difficult to do so with any of the other disciplines mentioned above. Nevertheless, below I discuss thinkers from three key perspectives or time frames who have contributed important insights to the study of law and society. The first group to be discussed consists of three early sociolegal theorists. In the next chapter, I will discuss key classical and contemporary sociologists whose writings continue to inform discussion and debate in law and society to this day.

Sociolegal Thinkers

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Henry Sumner Maine

Sir Henry James Sumner Maine was born in 1822 in India and educated at Christ's Hospital and Pembroke College in Cambridge. In 1847,

he became professor of law at Cambridge University, and a few years later passed the English bar exam allowing him to practice law. He spent much of his time in public service (for example, he spent seven years as a legal member of council in India). Near the end of his life and in failing health, he left for Cannes, France, to work on international law and to devise a system of arbitration. He died there in 1888, the cause of death listed as apoplexy.

Maine's greatest achievement was the publication in 1861 of his book *Ancient Law*. As he was writing at the time of the ascendancy of evolutionary theory as the cutting edge in scientific explanation, it is no surprise that Maine takes a largely evolutionary approach to his subject matter. Maine (1960 [1861]) wanted to understand how simple decrees, given by persons of power in ancient society, slowly transitioned into the situation whereby, at later stages of societal development, mere decrees become coupled with more complex systems of rules designating how these decrees or commands would impact certain classes of persons, and what the prescribed punishments would or should be for such disobedience. Indeed, Maine was influenced by Jeremy Bentham's earlier attempt to develop a modern system of jurisprudence that systematically connected all these elements—commands of lawgivers, obligations imposed on citizens, the circumstances under which the law takes note of citizen actions, sanctions for disobedience, the nature of punishments, and procedures for the gathering of evidence in guilt-finding—because it was Bentham more than any other observer before Maine who gave an account of how this transition occurred.³

The evolutionary transition, according to Maine, is from ancient Customary Law to the early attempts at codification of law, that is, with the authoritative promulgation of codes (such as those of Hammurabi or the Twelve Tables of Rome) that seek not only to put the customs of the people into writing but also to validate the system of ruling. Although those in power are in a position to dominate the practice and interpretation of law once the code stage has been reached, it is also the case that with the progression of human society there is a growing concern with equity, specifically in terms of addressing the great power disparities between the rulers and the ruled. By the time of the promulgation of codes, legal systems display movement toward an (admittedly) incipient notion of universalism whereby all persons are subject to the dictates of law. The creators and administrators of law—the lawgivers—must on some level give the appearance that they, too, will be accountable to the masses. In this way, traditional forms of legitimation—such as the divine right of kings—are eroded in favor of a more rational, or certainly more contested, process for establishing mechanisms for the enforcement of codes. Maine referred to this as the evolution from status (birthright or who you are) to contract (what you do).

As societies advance to the stage of written language and the production of codes for ordering social life, what functions must law fulfill to maintain this forward or progressive development? Maine argues that three main agencies of legal change tend to appear in the following chronological order. First is the practice of *legal fiction*, which refers to any assumption that conceals

the fact that an element of law has undergone change. Fictions are congenial to the development of early legal systems because they satisfy the desire for improvement while not offending traditions and old superstitions, which are often hostile to change. While legal fictions produce incremental change, which occurs largely behind the backs of citizens, they are invaluable for overcoming the rigidities of law (Chriss, 2008). For example, judicial interpretation of law is frequently a kind of legal fiction given that it allows the court to amend the written law while claiming to remain faithful to its spirit. The most important legal fiction, however, flows from the need to resolve cases even in times of great ambiguity. The decisions of the court—for example, guilty or not guilty—are akin to an off/on switch, which is a handy way of simplifying the world and allowing for the neat and tidy disposition of cases. The fiction is that there is a one-to-one correspondence between legal truths—verdicts or other legal findings—and ontological truths. The reality is that there are often slippages between what really happened (ontological truth) and findings of court proceedings (legal truth).

The next mechanism of legal change to appear is *equity*. As Maine notes, equity claims are more likely to be advanced by the masses or common folk than any other strata of society. Equity seeks to fulfill the emancipatory potential of law, and over time it trumps many other aspects of enacted law. As this happens, law becomes less *legal* and more *political* as citizens seek fair treatment and equal protection under the law regardless of status. Indeed, equity is a crucial element in the progression from status to contract. Legal and social change is now more likely to occur through the politically based legislature rather than the professionally controlled judiciary. In a clever passage, Maine stated that the evolution of law begins in the anarchy of no-law (custom) and ends in the chaos of too much law.

The last mechanism of sociolegal change, *legislation*, is impelled into prominence through the increasing role of equity in law. Eventually, legislation becomes a major impetus for social change, embodied in such sentiments as “There ought to be a law!” Legislation grows by way of grassroots populism but also through the politicization of law as moral entrepreneurs seek to frame issues of concern to wider audiences, including legislators, media pundits, and any others potentially sympathetic to their message (Altman & Bamartt, 1993). With legal fictions, equity, and legislation, law loses its quality of spontaneous development typical of ancient law based in custom, and instead becomes a leading mechanism of planned change. Although Maine enlarged our understanding of the history of property, contracts, and criminal law, his theory of the evolution, from ancient to modern law by way of the sociolegal changes instigated by legal fictions, equity, and legislation, is his enduring contribution.

Roscoe Pound

Born in Lincoln, Nebraska, in 1870, Roscoe Pound became one of the most honored and respected American jurists of the early- to mid-20th

century. After completing his studies at University of Nebraska—in law, philosophy, political science, and botany—he passed the bar examination in 1890 and started practicing law. Interestingly enough, Pound was also director of the Botany Survey of Nebraska from 1892 to 1903. About a decade after passing the bar, Pound started his career as a law school professor and administrator, first at the law school of the University of Nebraska in 1899 where he eventually worked his way up to dean in 1903. After short stints as professor of law at Northwestern University and the University of Chicago between 1907 and 1910, Pound became Story Professor of Law at Harvard University in 1910. By this time, Pound had launched a successful publishing career, and by 1916 had attained the position of dean at Harvard Law, which he kept until 1936. After retiring from Harvard in 1947, Pound continued to stay busy with his writing, consulting, and law activities until his death, at the age of 93, in 1964.⁴ For example, in 1946, at the age of 75, Pound left for China at the invitation of Chairman Chiang Kai-shek to help reorganize the judicial system there.

Although in his later years he was somewhat antagonistic toward it, for most of his career Pound was an advocate of legal realism, a legal perspective whose beginnings are attributed to Oliver Wendell Holmes, Jr. *Legal realism* is a jurisprudential philosophy that attempts to contextualize the practice of law. Its proponents argue that, rather than jurisprudence being a detached and self-sufficient science of law of and for itself, law is instead shot through with multiple influences—biological, cultural, historical, sociological, psychological, and economic—that must be systematically considered in order truly to understand it (Pound, 1945, p. 334). A key passage from Holmes's *The Common Law*, published in 1881, highlights the idea that law is based less on formal logic and more on human experience:

The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

And further, Holmes (2009 [1881], p. 1) argues that the law embodies the story of a nation's development through the ages, and that "it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." Pound's interpretation of Holmes was that law ought to strive toward becoming a true social science, whereby its operations and procedures could be known with exactness and certitude. Pound felt that citizens and legal officials had only a vague and ill-defined sense of how law worked. Police officers, judges, and prosecutors were certainly empowered to carry out the dictates of law, but understanding and explaining how and why the law worked within certain cultural or social settings lagged behind its actual implementation.

In early stages of human development, wherever law arose it did so as a more or less unproblematic, background aspect of the daily lives of the people. Also, in early homogeneous society there existed tacit agreements about the dictates and commands the ruling class made on behalf of the people. As Pound (1907a, p. 608) noted, “Hence legal theory and doctrine reached a degree of fixity before the conditions with which law must deal to-day had come into existence.” Law survived on the power of legal fiction for centuries, as an unquestioned source of truth and power, the origins of which were buried in antiquity and rarely made an object of systematic inquiry by the people. Over time, however, with the growing complexity of society and the promulgation of more laws—and more types of law—to deal with new conditions, law began touching citizens in more intimate ways, whether within the context of families, relationships, work, schooling, or the rights and responsibilities implied in citizenship itself. This new paradigm of law, according to Pound, would be something akin to social engineering. Pound bemoaned the fact that there were no laboratories dedicated to legal science, and that for the most part law professors were not including in their training firm data explaining how the law works and why. Although earlier jurisprudence scholars, such as Coke and Blackstone, had made passing recommendations toward this goal, for the most part all that transpired were attempts at legal classification and occasional studies making rudimentary comparisons between like cases and the social circumstances within which such cases arose.

Building upon Holmes and going beyond him, then, Pound turned legal realism into *sociological jurisprudence*. Pound (1907a, p. 612) stated, for example, that it is the duty of law professors to “. . . investigate the sociological foundations, not of law alone, but of the common law and of the special topics in which they give instruction.” Legal justice was founded on the law of individual freedom of will just so long as those actions do no harm to others (e.g., Mill). But common law—which ideally represents the collective will of the people—is slowly moving from a technical and individualistic notion of legal justice to a new notion of social justice based upon equity or fairness.⁵ Pound claims that this newer legal standard or paradigm of social justice has been made possible through the work of sociologists who, following Comte and the positivists, have argued for greater precision and data regarding all manner of social phenomena in order to understand to what extent social satisfactions are being attained, but also under what conditions they are being thwarted.

Pound (1911a, 1911b, 1912) argued that sociological jurisprudence represented a new paradigm of law situated alongside three other traditional paradigms. The three older or traditional schools of jurisprudence were the analytical, the historical, and the philosophical (for a summary of these along with sociological jurisprudence, see Table 2.1).

Analytical jurisprudence was one of the earliest perspectives on law, as it dealt with newly established systems of law embodied in codes. From this perspective as well, law is made, specifically originating from the commands

Table 2.1 Four Schools of Jurisprudence

Schools of Jurisprudence				
	Analytical	Historical	Philosophical	Sociological
<i>Considers:</i>	Developed systems only	The past rather than the present	The ideal future of law	The workings of the law rather than its abstract content
<i>Sees law as:</i>	Something made consciously by legal actors	Something that is not made consciously (lawfinding)	Founded, but stated definitively in certain prescribed forms	A social institution, which can be improved through planned design
<i>Lays stress upon:</i>	The force and constraint behind legal rules (state power)	The social pressures behind legal rules (public sentiment)	The ethical and moral bases of rules, rather than the sanctions lying behind them	The social purposes, which law subserves, rather than the sanctions lying behind them
<i>Typical law:</i>	Statutes	Customs	No necessary preference for any particular form of law	Guides to results, which are socially just; form less important
<i>Philosophical view:</i>	Utilitarian, specifically legal positivism's separation between law and morality	Hegelian (dialectical and ideational)	Diverse views, amounting to a group of philosophical schools	Three main schools or paradigms: the positivist, the evaluative, and the interpretive

and decrees of lawgivers. This also means that the law is viewed chiefly as the system of constraints—that is, negative sanctions or punishments—lying behind legal rules. The earliest philosophical views were tied up with the notion that good deeds should be rewarded while bad deeds should be punished (the utilitarian maxim of the pleasure-pain complex). The most ancient goal of punishment is and was vengeance or retribution, embodied in the idea that evil deeds harm the entire collectivity—the condition of mechanical solidarity according to Durkheim—and that those who bring harm to others *deserve* to be punished (that is, just desert).

Pound made this ancient starting point of law and punishment clear in a study of the criminal justice system of Cleveland, Ohio, that he conducted with co-investigators in 1920. This was published in book form two years later, and Pound wrote the concluding chapter titled “Criminal Justice in the American City—A Summary.” Pound (1922) noted that the earliest tendency of human beings was to interpret the world in simple dualisms, such

as pleasure and pain or good and evil. Beginning even in early savagery and barbarism, members of the human race discovered value-added mechanisms or ideas by which persons in their immediate presence could be held to new standards of conduct, that is, the *ought* of morality. These earliest folkways, mores, or laws were attributed to the gods, and with this there was a new sense of the importance of maintaining good standing with them. The primitive instinct is to hurt somebody who hurts you, yet in early law, the agent of the pain need not even be a fellow human being. Influenced by the early legal realism of Holmes (2009 [1881]), Pound noted that in early Mosaic law if an ox gored a man, the ox would be put to death. Likewise, in early Athens, if a falling tree branch killed a man, the tree would be chopped down and burned. In ancient Rome, if a horse drawing a cart bolted and sent the cart careening into a crowd of bystanders some of whom were injured or killed, the horse would be killed, and the cart would be chopped into scrap wood.

By our birthright, then, the general assumption was that there is good and there is evil and that the power vested in the ruling class—this class of persons assumed to be great in their own right—should direct the energies of the collectivity toward the smiting of those who do harm. Even by the time of the 18th century Classical School of Criminology headed by Beccaria and Bentham, among others, the assumption was made that pleasure and pain are the driving forces of all sentient life, and that the professionalization and upgrading of the criminal justice system would involve calculating how much pain to deliver to criminals—or threaten to deliver to would-be criminals—to keep them from doing evil. Hence, deterrence emerged as the second goal of punishment, but of course based on the tacit assumption of the pleasure-pain nexus of retribution.

The earlier schools of jurisprudence, specifically the analytical, the historical, and to some extent the philosophical, all saw law as chiefly a system of authoritative directives (statutes in the case of the analytical school, customs in the case of the historical school) backed by sanctions. In other words, to maintain order, the state must *hurt* those who run afoul of the law. The way we got around the endless cycle of tit-for-tat escalations of violence (for example, in blood feuds or other forms of vigilantism) was to take the means of dispensing violence away from the people and place them into the hands of a professional class of state functionaries. But by the time of Pound, with his sociological jurisprudence and an incipient notion of social justice developed by Lester Ward, there was an attempt to completely reconfigure the goals of justice. With sociological jurisprudence, nothing is taken for granted, and everything is put on the table. The work of law is seen as social engineering, and the sociologist should be utilized to study what law is doing with an eye toward improving it. For example, rather than seeing law chiefly as authoritative proclamations backed by the coercive power of the state, even more crucial are the social purposes law (ideally) serves (again, see Table 2.1). There is a need, then, to study the language of the law (embodied in statutes and code books), observe the actions of key functionaries of the legal system (judges, prosecutors, police, and custodial staff), and measure gaps

between law *on the books* and law *in practice* (Pound, 1910). Pound's ideas concerning sociological jurisprudence and legal realism were later taken up, criticized, and modified in interesting ways by Karl Llewellyn, the final sociological scholar to be discussed.

Karl Llewellyn

Karl Llewellyn was born on May 22, 1893, in Seattle, Washington, and moved with his family to Brooklyn, New York, shortly thereafter. Showing little interest in his studies in the public school system of Brooklyn, at age 16, Llewellyn left for Mecklenburg, Germany, to live with relatives of a family friend. Already fluent in German, Llewellyn thrived in the new environment and completed high school there.

He returned to the United States in 1911 and enrolled at Yale College, but after three years there, he left to seek greater intellectual challenges at the Sorbonne in Paris, where he studied law, Latin, and French. Yet his interests were elsewhere, for he made his way back to Germany to enlist in the 78th Prussian Infantry. He was wounded in a skirmish near Ypres, Belgium, and spent several months convalescing in a military hospital in Nürtingen, Germany. At the end of 1915, he was back in the United States, once again enrolling at Yale. At Yale, Llewellyn became interested in the work of early American sociologist William Graham Sumner, who in 1906 published a large book rich with anthropological details about the customs (Sumner called them folkways) of primitive societies and how they become institutionalized into mores and sometimes law with continuing social development (Twining, 1973). What Llewellyn learned from this encounter with Sumner (1906) is that law as a social institution evolves largely out of the customary ways of life of a people. Llewellyn (2008 [1962]) viewed law as being shot through with custom, and in agreement with Holmes and Pound before him, he believed that jurisprudence should focus on the empirical social world rather than getting caught up in sterile debates about legal precepts or rules. This line of legal realism from Holmes to Pound and Llewellyn emphasized then, to varying degrees, the importance of extralegal factors (folkways, customs, mores, socialization, personality, culture, and the nature of social institutions) in the study of law and legal systems. As Mehrotra (2001, p. 743) has noted, in the hands of Llewellyn legal realism was a jurisprudence that aspired “to throw off the formalistic, conceptual view of legal reasoning in favor of a more empirical, sociological approach to law.”

Llewellyn believed that although Pound called his perspective “sociological jurisprudence,” it never achieved a truly sociological perspective on jurisprudence. Granted, even though Pound's (1910) distinction between *law on books* and *law in practice* was useful, for the most part he was stuck in other schools of jurisprudence—specifically the analytical or the philosophical—and never truly practiced a sociological jurisprudence even as he named it. The closest Pound came to fulfilling a true, sociological *law in action* was his study of the criminal justice system in Cleveland (discussed

above). Llewellyn believed a fully formed legal realism should study the behavior of legal practitioners, including their practices, habits, and techniques of action (Chriss, 2008).

A prime example of the importance he placed on the empirical social world was Llewellyn's ethnographic study of the laws and customs of the Cheyenne Indians. Published in 1941, *The Cheyenne Way* still stands as one of the best legal ethnographies ever conducted. Teaming up with anthropologist E. Adamson Hoebel on the book, Llewellyn talked with many members of the Cheyenne tribe to understand how they settled various *trouble-cases*, be they homicide, theft, adultery, or what have you. The researchers discovered that the Cheyenne had developed a rather sophisticated approach to dealing with dispute resolution, punishment, and social control. It seems that from a very young age Llewellyn was always studying the empirical social world, and at one point, he suggested that he was a "half lawyer, half sociologist" to the extent that for decades he had used informal ethnographic methods before realizing they were central to the work of cultural anthropologists and the more empirically oriented sociologists (Mehrotra, 2001, p. 745).

To move to a more empirical jurisprudence, Llewellyn chose to emphasize the institutional basis of law, asking such questions as "How is law held together as a going concern?" and "What are the 'jobs' that are vital to this institution?" To get to the empirical level, Llewellyn suggested that one must study the *craft* of law, that is, the actual types of work people do within the legal institution. Indeed, studying a craft leads to studying persons at concrete work. Here, law in practice is elevated to primacy over law on the books, the latter being the area that had preoccupied jurisprudence scholars for centuries. Llewellyn noted, for example, that no rule of law ever applied itself: You need real, flesh-and-blood human beings to do the work of law. Hence, the ultimatum of an advanced sociological jurisprudence, going beyond Pound, would be to study actual persons working in a craft (judges, prosecutors, bailiffs, police officers, etc.) within an institutional setting (Chriss, 2008). As James Herget (1990, pp. 176-177) has pointed out in his history of American jurisprudence, the ethnographic work evident in *Cheyenne Way* represents a continual unfolding of the particular type of legal realism Llewellyn had been espousing since 1930, the year he published a book and a law review essay that concluded that "what these [government] officials do about disputes is, to my mind, the law itself."⁶

Finally, it should be noted that for many sociologists and social scientists in general who were sympathetic to Llewellyn's attempt to bring sociological concepts and methodologies to bear on the study of law, they also realized that Llewellyn was becoming more mechanistic and behavioristic in attempting to deal with those aspects of law that could be brought into the orbit of predictability and stability according to his understanding of the sociological perspective. This was illustrated when Llewellyn (1930b, p. 464) stated that:

. . . the trend of the most fruitful thinking about law has run steadily toward regarding law as an engine (a heterogeneous

multitude of engines) having purposes, not values in itself; and that the clearer visualization of the problems involved moves toward ever-decreasing emphasis on words, and ever-increasing emphasis on observable behavior (in which any demonstrably probable attitudes and thought-patterns should be included).

This represents a sort of functionalism, which was derived from British and French cultural anthropology, and in some ways, it is consistent with the sociological functionalism of Emile Durkheim, whose ideas will be explored in the next chapter.

Notes

1. Weber often refers to procedural law as formal law. This will be returned to in the discussion of Weber in Chapter 3.
2. For a complete list of small claims court limits by state, see <https://www.nolo.com/legal-encyclopedia/small-claims-suits-how-much-30031.html>.
3. On evidence, see Bentham's five-volume *Rationale of Judicial Evidence*, published in 1827. For a discussion of Bentham's ambitious effort to construct a new jurisprudence for English criminal law, based on his *Of the Limits of the Penal Branch of Jurisprudence* (written before 1782 but largely unpublished), see Schofield (2013) and Tusseau (2014).
4. Most of the biographical information on Pound was gathered from the Roscoe Pound Papers, American Legal Manuscripts, Harvard Law School Library, available at http://cisupa.proquest.com/ksc_assets/catalog/101692.pdf. See also McManaman (1958).
5. Pound's use of social justice here was borrowed most directly from the early American sociologist Lester F. Ward. Ward (1903, 1906) noted that human development has moved from the archaic era of natural justice to a middle era of civil, political, or legal justice, to a dawning era of social justice. Although little can be done about natural inequalities, under the reign of early law civil and political inequalities were largely removed (primarily to defeat the tacit *might makes right* principle of natural right). For more on Ward's early version of social justice, see Chapter 1.
6. The book Herget refers to here is Llewellyn's (1930a) *The Bramble Bush*. The article is from the *Columbia Law Review* and titled "A Realistic Jurisprudence—The Next Step" (Llewellyn, 1930b). In sum, Llewellyn argues that law, from its most archaic form to the present day, is simply the business of dealing with disputes.