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Law in Social Theory and Social Theory in the Study of Law

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What can social theory contribute to legal studies? And what place does law have as a concern of social theory? Three or four decades ago, when the field of "law and society" or sociolegal studies was first becoming a lively, popular focus for research, defining the relations of law and social theory meant mainly locating law's place in the theoretical traditions of the academic discipline of sociology, and asking what those traditions might offer the study of law. Now, however, social theory can no longer be considered the preserve of any particular academic discipline. It has to be defined in terms of its objectives rather than particular traditions that have shaped it.

LAW IN CLASSIC SOCIAL THEORY

Social theory is systematic, historically informed, and empirically oriented theory seeking to explain the nature of "the social." And the social can be taken to mean the general range of recurring forms or patterned features of interactions and relationships between people. The social is the ongoing life of human beings lived alongside and in relation to others; the compendium of institutions, patterns of interaction, networks, systems, and structures of collective life resulting from human coexistence. So it is the collective life of human groups and populations, but also the life of individuals in so far as this is shaped by their relation to those populations or groups. The social is a realm of solidarity, identity, and cooperation, but also of power, conflict, alienation, and isolation; of stable expectations, structures, systems, custom, trust, and confidence, but also of unpredictable action, unforeseen change, violence, disruption, and discontinuity.

Described in these expansive terms, the social seems bewilderingly general as an object or field of study. Debates about its nature and significance are fundamental today in assessing the significance of social theory itself. And the essence of the social has been seen in social theory in radically different ways. For example, in Max

Weber's (1978) work it appears as a limited number of distinct types of social action combined in innumerable ways to give rise to what we recognize as "capitalism," "bureaucracy," "domination," and all the other seemingly solid structures of the social world. Sometimes the social has been seen in terms of an evolution of human relations – for example in Marcel Mauss's (1990) famous analysis of the significance of gift relationships. Its essence has also been found in different types of cohesion of human populations (Durkheim, 1984) or sociality or bonding between the members of social groups (Gurvitch, 1947). Sometimes it has been understood as categories or institutional forms in terms of which individuals interrelate – for example, in Georg Simmel's (1971) analyses of "the stranger," "the metropolis," "fashion," "conflict," "exchange," and other phenomena.

The object that has served – implicitly or explicitly – as the primary focus for most social theory is "society," conceived as a unified totality in some sense, so that the study of how that totality exists could be distinct from, though related to, the study of politics, law, the economy or other more specific kinds of social action or experience. Society in this sense is "the sum of the bonds and relations between individuals and events – economic, moral, political – within a more or less bounded territory governed by its own laws" (Rose, 1996: 328). Even where social theory has not treated society directly as its object, its characterizations of the social assume that social phenomena cohere in some significant way: that social life forms a fabric of some kind; that it has continuity and scale and that particular exemplifications of the social relate to larger patterns, even if their exact limits or boundaries may be variable or hard to specify. The social includes class, race, gender, or specifically economic relations, for example, but social theory assumes it must treat all of these as components or examples of more general patterns or features of human interaction, and that its consistent focus must be on that generality. The social is always assumed to be in some sense intelligible as a unity.

In the classic social theory of the late nineteenth and early twentieth century, "society" was mainly typified by the politically organized and territorially bounded society of the modern Western nation-state. Given this position, it is not surprising that a strong sensitivity to law is found in the most ambitious and influential contributions to this theory – the work of Emile Durkheim, Weber, and Karl Marx. The reach of society could be seen as paralleling the jurisdictional reach of nation-state legal systems. As social theory examined the general social relations and structures comprising society, it encountered modern law as a society-wide system of definition and regulation of these relations and structures. In a sense, law and social theory competed in characterizing modern society, but law could be treated in social theory as exemplifying certain structures and patterns fundamental to this society.

So, for Durkheim, the substance of modern law (particularly contract, commercial, property, and criminal law) and its processes expressed the particular characteristics of modern social solidarity, by which he meant the manner in which modern society was integrated and given a sense of unity despite its increasing complexity, changeability, and diversity. A study of the development of law across the centuries could show how the structures of solidarity allowing modern society to cohere had gradually formed (Durkheim, 1984). His conclusion was that the only value system that could integrate modern societies – and so must be the moral foundation of all modern law – would be one requiring universal respect for the autonomy and human dignity of every individual citizen (Durkheim, 1975; Cotterrell, 1999: 103–47).

In a completely different way and using different methods, Weber also securely linked the study of law with the study of the social in its modern forms. Modern law exemplified a kind of rationality mirroring and running parallel with the rationalization of other aspects of life in the West. While formal legal rationality was a distinctive mode of thought and practice, it could be seen as part of a far wider rationalization of the modern world. The study of legal rationality's development and its interrelations with other varieties of rationality (especially in economic action, administration, and politics) could provide major insights into the nature of the social in the unique forms it had taken in the West (Weber, 1978: pt. 2, ch. 8).

Marx, seeking to analyze the nature and destiny of capitalism, saw law as in one sense superstructural, a support rather than an engine of capitalism's trajectory as a mode of production and as the overall structure of the social in the modern West. But he emphasized law's role in defining social relations, repressing class unrest, and helping to constitute the ways of thinking – above all in terms of property and contract – that serve as fundamental ideological supports of capitalist social relations (Cain and Hunt, 1979). Thus, like Durkheim and Weber, Marx saw a need to take account of the development of law to identify the way it produced particular ideas, ways of reasoning, or forms of practice at certain stages in history. So each of these writers saw law as essential in transforming the social – establishing foundations of modern society – however differently they might characterize this modernity in their work.

These brief comments may be enough to illustrate two points: that the concept of "modernity" has often, in practice, been inseparable from that of "society" in the vision of social theory, and that law was often treated in classic social theory as, in some way, a crucial marker, component, or agent of the coming into being of the modern world. More recent social theorists have often treated the emergence of a certain kind of legal system as crucial in this sense. Talcott Parsons, for example, saw the emergence of a "general legal system" – cutting across all traditional special statuses and providing a universal system of rights and obligations – as "the most important single hallmark of modern society" (Parsons, 1964: 353). But we shall see later that the concepts of "modernity" and "society," so central to social theory, are at the heart of debates surrounding it as an enterprise today.

Leaving aside these debates for the moment, what has social theory in its classic or traditional forms been able to offer legal studies? If social theory is abstract and broad in scope, law as a practice, and often as a field of study, has been said, by contrast, to be wedded to the "method of detail" (Twining, 1974), focused on particularity and immediate problem solving. Social theory in general has claimed that philosophical analyses, reflections on specific historical experience, and systematic empirical observations of social conditions can be combined to explain the nature of society. Social theorists' considerations of law are colored by this amalgam of philosophical, historical, and observational orientations. As a byproduct of its general concerns, social theory has often assessed law's capacities, limits, conditions of existence, and sources of authority and power. Its attraction for some legal scholars has been that its perspectives on law have been much wider than those the legal specialist alone could usually be expected to command. So social theory has been called on in sociolegal studies to escape the limits of law's method of detail as well as to counter narrow social scientific empiricism. The promise has always been to broaden social perspectives on law. The corresponding risk has always been that the broad perspective loses the richness and specificity of particular experiences or

practices of the legal. The method of detail may need supplementing but has its value nonetheless.

Despite these claims for social theory's usefulness to legal studies and the prominent presence of law in the classics of social theory, the link between legal studies and social theory has usually been tenuous. That various changes in both law and social theory are bringing about a greater mutual dependence will be a main argument in later sections of this chapter. Nevertheless, until quite recently, the relationship could be characterized as predominantly one of disinterest or token acknowledgment.

Despite the example set by the classic writers, social theorists have often doubted whether law is important enough or sufficiently identifiable as a specific social phenomenon to deserve special consideration in any theory of the social. Could most of what needs to be analyzed be treated in terms of concepts such as administrative action, state coercion, social norms, social control, ideology, reciprocity, conformity and deviance, bureaucratic norms, or custom? Law, as such, might not need theorizing: that could be left to jurists for their own purposes. The term "law" would remain for the social theorist only a commonsense label that might usefully designate clusters of phenomena to be explained theoretically without essential reference to it. In any event, law's identity and significance vary considerably between different societies. And general conceptions or definitions of law are dominated by juristic perceptions which most social theorists have not sought to upset.

For example, social theorists have rarely adopted the radical reformulations of the concept of law associated with what is now called social scientific legal pluralism (see e.g., Merry, 1988). Legal pluralism in this sense explicitly denies that juristic conceptions of law are universally adequate and adopts some wider conception of law that can embrace, for various analytical purposes, phenomena the lawyer would not recognize as legal – for example, private or "unofficial" norm systems of various kinds. Among major social theorists only Georges Gurvitch stands out as having radically rejected juristic conceptions of law in favor of an intricate, fully elaborated theory of legal pluralism integrated into his broader social theory. Significantly Gurvitch reached this position on the basis of his early sociolegal and philosophical inquiries (Gurvitch, 1935, 1947), rather than as a by-product of his later general sociological theory.

Indeed, in contrast to social theorists, it is those social scientists who see law as central to their research careers, and tend to refer to themselves as "law and society" or sociolegal scholars, who have most often embraced legal pluralist perspectives. But many sociolegal scholars have been content to follow social theory's general lead, paying homage to the broad insights about law to be found in classic social theory but otherwise mainly using "law" as a pragmatic umbrella term for clusters of social phenomena analyzed in terms of concepts familiar in their parent social science disciplines.

Just as social theory has tended to avoid law while considering its social manifestations, so lawyers and legal scholars have mainly avoided social theory. And certainly, from a juristic standpoint the usefulness of a theory of the social may not seem obvious: the social might be viewed as what law itself creates as its own jurisdiction, the structure of the social being simply the regulatory structure that law provides. In this sense the social is the taken for granted locus and environment of legal practice. And, undoubtedly, from a juristic viewpoint, law seems endlessly resourceful in defining and adjusting its reach and the nature of the relations it regulates. The social is what law treats as such.

Law and Contemporary Social Change

What is happening to change this typical relationship of disinterest? The relevant changes that have occurred in the situation of law and legal studies on the one hand, and of social theory on the other, have often been associated with the idea of the passing of modernity and its replacement with the "postmodern." "Post" implies that the new can only be understood as related to and, in some sense, a supplement or reaction to, what preceded it, but also that modernity's features can now be identified with finality, so that what follows is distinct from them.

According to Jean-François Lyotard's celebrated dictum, the most profound exemplification of postmodernity is a loss of faith in "grand narratives" (Lyotard, 1984: 37) in a fluid, rapidly changing, intensely self-questioning and uncertain (Western) world: the coming of "a new age of radical rootlessness and doubt" (Douzinas and Warrington, 1991: 9). This applies not only to comprehensive systems of thought such as Marxism and the great religions, but to general theories of "society" as a stable, integrated totality, to political ideologies of all kinds, and to the very idea of "science" as the progressive unveiling of truth. All are said to flounder on the rocks of patent social contingency and indeterminacy.

The result is a new privileging of "local knowledge" (Geertz, 1983) and a perception of the failure or pointlessness of all attempts to generalize broadly about social change or social phenomena. The tendency in such circumstances might be to abandon social theory altogether. A new focus on the local and the specific, on the instability of social structures and institutions, and the exhilarating or frightening rootlessness of individual lives casts doubt on the usefulness of treating "society" as an object sufficiently solid to theorize (Rose, 1996; Bauman, 1992: 190). The dialectic of order/change and structure/agency in traditional sociological analyses of society does not seem to capture the sense of radical fluidity which postmodern thought associates with contemporary human coexistence in the most highly developed nations of the world.

The idea that it is no longer useful to theorize society has sometimes led into more general but very opaque claims about "the death of the social" (Baudrillard, 1983: 2). The doomsday scenario here is that social theory loses its integrity having lost its object. It is replaced with a host of competing discourses – especially literary, feminist, psychoanalytic, economic, and cultural theory – that focus on human relations no longer considered in terms of any explicit overall conception of the social.

More concrete ideas bearing directly on the destiny of law can also be mentioned. The social is sometimes claimed to be disappearing as a specific primary field of government intervention, and enterprises organized around it (such as social work, social welfare, sociology, and socialism) are losing prestige (Simon, 1999: 144–7). A further claim is that the social as a field distinct from the political is atrophying. On one view, the social has become merely a population mass, silent and inert, no longer the active source of political energies but merely a passive recipient of governmental actions (Baudrillard, 1983: 19–25). A consequence would seem to be that legal interventions can hardly look for effective legitimation or direction from this source.

On another view, an individualization of lifestyles puts in issue the stability of many social institutions (e.g., traditional family, employment, and gender relations)

but creates unprecedented opportunities for a radical remaking of the social through the spontaneous choices of individuals in relation to their own lives (Beck and Beck-Gernsheim, 2002; see also Beck, Giddens, and Lash, 1994). Thus politics is potentially transformed, its focus shifted toward the local and the personal but also, very importantly, toward the global (as in many environmental, security, and health concerns widely shared across national boundaries). Meanwhile, politics in nation-states becomes increasingly moribund in the traditional public sphere. Indeed, in a revitalized politics, lines between public and private, and national and global, might eventually become meaningless (Beck, 1992: ch. 8, 2000: ch. 2). The primary implication for legal studies would seem to be that the horizon and appropriate methods of regulation are changing in very fundamental ways.

The importance of this recent theorizing is certainly not to undermine the social as a category. Indeed, many theorists – including some, such as Jean Baudrillard, who have dramatically declared the social's demise – continue to refer to "society" without apparent embarrassment (Smart, 1993: 55–6). For legal studies, the importance of these writings is to show that the nature of the social cannot be assumed as unproblematic. Law may define the social as it regulates it, but it does so under conditions that the social itself provides. Law presupposes a conception of the social that defines not only its technical jurisdiction, but also the arena in which its interventions require rational integration, and the general source of its legitimation and cultural meanings. It follows that, as the identity, coherence, and shape of the social are questioned, assumptions about the nature and efficacy of law are also put in issue.

In contemporary social theory, Michel Foucault's work provides one of the most important vehicles for reconsidering the nature and scope of law in terms of fundamental long-term changes in the character of the social. It raises the question of whether law has failed to keep step with these changes and become marginalized as a result, increasingly giving way to other kinds of regulation and control. Foucault's works describe processes by which new kinds of knowledge and power have arisen, reinforcing each other to create what he calls disciplinary society (Foucault, 1977: 216). The prison, the asylum, the school, the medical clinic, and other particular institutional sites, have been primary foci for the gradual emergence of constellations of knowledge/power in which technical norms, expertise, training, and surveillance combine to regulate populations and define the place of individuals as autonomous, responsible subjects.

In lectures towards the end of his career, Foucault elaborated general implications for law of his earlier studies. He sharply contrasts the majesty of law with the "art of government" focused on administering social life (Foucault, 1991: 92). Law is, in his view, the expression of sovereign power: what is most important about it is that it demands obedience and requires that all affronts to the sovereignty it embodies be punished. The essence of law is, therefore, coercion. Foucault contrasts, with law's "occasional or discontinuous interventions in society," something he sees as very different: "a type of power that is disciplinary and continuously regulative and which pervasively, intimately and integrally inhabits society" (Fitzpatrick, 1992: 151). This is an autonomous, expert form of governing, focused specifically on regulating economy and population and relying on "multiform tactics" and a range of techniques, expertise, and information united only by a need for "wisdom and diligence" (Foucault, 1991: 95, 96).

Foucault calls this pervasive regulatory activity "governmentality" rather than government, to emphasize that it goes beyond and uses a far wider range of

techniques than government in the usual political sense, and its sites of operation are not restricted to what is usually thought of as the public sphere but relate to all aspects of life. Nevertheless, the rise of governmentality marks a stage in the development of the state, from the "state of justice" and law, through the "administrative state" of regulation and discipline organized territorially, to the "governmental state" which aims at guaranteeing security and is "essentially defined no longer [exclusively] in terms of its territoriality... its surface area, but in terms of the mass of its population with its volume and density..." (Foucault, 1991: 104).

Significantly, law's destiny is left vague. Perhaps ultimately it is for jurists and sociolegal scholars to sort this out. The state's stages of development are cumulative so that eventually legal, administrative, and governmental state forms coexist. Some writers see Foucault as claiming that law is progressively replaced by technical and disciplinary norms, and charge him with propounding a narrow view of law, apparently ignoring its current scope and character (Hunt, 1993: ch. 12). Others argue that Foucault well recognizes law's nature and scope in contemporary society (Ewald, 1990) and sees only its old regulatory supremacy as undermined. His claim, undoubtedly, is that law has been reduced from its grandly sovereign status to a position alongside numerous other regulatory techniques, no more than a "tactic" of government to be used or not used, as appropriate (Foucault, 1991: 95).

From another point of view, the key debate around Foucault and law is about law's *potential*. In the newly recognized complexity and indeterminacy of society, does action through and on law provide an important means of navigating the social and the numerous decentered locations of power that Foucault's work emphasizes (e.g., Munro, 2001), or is it increasingly a distraction as a focus for solving or campaigning on important social issues (Smart, 1989), being tied to forms of state action and political projects that are increasingly remote from many regions of the social?

The ambiguous implications of Foucault's work show that social theory's changing images of the social destabilize established ideas of law, pointing in different directions toward new conceptualizations. A broad, loosened conception of law might see it metamorphosing into diverse regulatory strategies, forms, and tactics attempting to mirror the fluidity, contingency, and indeterminacy of the social (Rose and Valverde, 1998). Law might seem an indefinite aspect of a range of tactics of governance operating in sites – for example, schools, religious practices, rural traditions, campaigns to protect local industries (Cooper, 1998) – often distanced from the direct operation of state agencies.

In this context, new unifying principles arise, focused, for example, on the control of risk, so that risk emerges as a major category for making sense of the normative implications of contingency (Beck, 1992). Perceptions or calculations of risk can then be seen to operate as signals to alert or set in motion regulatory processes and provide their focus (e.g., Ericson and Haggerty, 1997). Equally, they can be rallying points for political and legal action (Franklin, 1998).

By contrast, conceptions of law that in some way emphasize its autonomy or distinct identity rather than its tactical flexibility might see it as in crisis, overburdened with regulatory tasks for which it is unsuitable (Teubner, 1987). Or they might emphasize as somewhat remarkable the fact that, in such conditions of complexity, the legal system copes; that it pours out rules and decisions despite the ever-increasing diversity of social life and the rapidity of social change.

Autopoiesis theory, developed as a form of social theory by the sociologist Niklas Luhmann (1995), can be seen in this context as a particularly inventive way of conceptualizing how law copes with changes in the nature of the social without losing its special identity in the process, and becoming – as Foucault seems to suggest – just part of a continuum of regulatory "tactics." Autopoiesis theory seeks to explain how law retains a distinctive character and stability in complex societies, at the same time as it addresses an ever-increasing range of problems thrown up by the fluidity and complexity of the social. The theory also suggests why legal interventions often produce unforeseen and unintended social consequences and why law often seems persistently unresponsive to demands emerging from the social.

In Luhmann's formulation, law is cognitively open but normatively closed, in so far as it has become an autopoietic (self-observing, self-producing, and self-reproducing) system of communication (Luhmann, 1992). This means that, like other social systems of communication (such as the economy, the polity, and science) law is necessarily open to information from its environment but, no less necessarily, it reads this information only in its own discursive terms. Law processes information solely for the purposes of applying its unique normative coding of legal/illegal in terms of which all its decisions must be made. Similarly, other systems interpret legal rules and decisions in terms of their own system codings, for example the criteria of efficient/inefficient in the case of the economy.

As social theory, autopoiesis theory clearly pictures law in the way it so often appears to jurists – as a self-founding discourse unfazed by circularity in its reasoning and invocations of authority. It shows how law can operate in this way and explains sociologically why it does. The theory claims that the increasing complexity of the social gives rise, in an evolutionary process, to the gradual differentiation of society into a number of specialized systems of communication, of which law is one. The legal system is thus not defined in terms of rules and institutions – as, for example, in Talcott Parsons' earlier theory of social differentiation as a response to complexity (Parsons, 1977: 174–6) – but by its distinctive discourse of legality and illegality.

Hence law can pervade the spaces of the social. As discourse it can exist anywhere and everywhere and the thematization of issues as legal (Luhmann, 1981) can occur in contexts not restricted to the formal legal institutions of the nation-state. Thus autopoiesis theory can accommodate the idea of an emerging "global law without a state" (Teubner, 1997), or of law's presence in the private realms that social theorists have identified as contemporary sites of a new politics and of the transformation of the social.

Nevertheless, the theory suffers, as many critics have pointed out, from an almost impenetrable abstraction. Attempts to use it in empirical sociolegal research have had limited success although it has provided a striking way of emphasizing, for example, legal discourse's perceived deafness or incomprehension when sometimes faced in court with the discourses of social welfare in cases involving children (King and Piper, 1995). Despite being among the most sophisticated and rigorous recent contributions to social theory and having had its legal implications extensively elaborated (e.g., Teubner, 1993; Pribán and Nelken, 2001), autopoiesis theory stands some way apart from many of the themes this chapter has stressed. It has not extensively examined the changing character of the social in concrete terms in relation to law, and it has not indicated how contemporary legal change can be interpreted in the light of social theory. It leaves relatively unexplored the details of

the discursive character that it attributes to developed law. And the theory explains little about how autopoietic law will actually respond to what the social may throw up as regulatory problems. Its concern seems only to affirm that law will seek to address these matters always from its own point of view with its own discursive resources.

Foundations of Legal Authority

Autopoiesis theory attempts to bypass one question that has long been a major focus for social theory: what is the source and foundation of law's authority, the legitimacy that enables it to demand respect and command obedience? For Luhmann, the issue of law's legitimacy has been replaced by that of function: the question is simply about efficiency – whether law can effectively fulfill its social task of producing decisions according to its own criteria of legality/illegality. But one might still want to ask how functional success is to be judged and recognized. In fact, much recent social theoretical writing wrestles with questions about law's "grounds," its ultimate bases of authority or legitimacy.

Durkheim's classic social theory assumed that law and morality are inseparable and that morality is law's "soul." Since he understood morality as the normative structure of society, his social theory makes the strong claim that law finds all its meaning, authority, and effectiveness ultimately in this moral structure. Without such a grounding it becomes mere force or empty words (Cotterrell, 1999). In a sense, Weber's social theory turned these Durkheimian claims upside down. Modern law, having lost its "metaphysical dignity" with the discrediting of natural law theories, is revealed, in his view, as no more than "the product or the technical means of a compromise of interests" (Weber, 1978: 874–5). Law requires no moral authority. Instead, its rules and procedures, in their abstract formality, can themselves become a means of *giving* authority, as in the political authority of the rule of law as a legitimation of government. Weber's work is thus one of the clearest sources of the familiar idea of legitimacy through legality or procedure (Cotterrell, 1995: ch. 7).

Interestingly, the broad problems, if not the substance, of both Durkheim's and Weber's opposing positions are strongly present in recent writing on law in social theory and in invocations of social theory in legal studies. Postmodern ideas about the collapse of grand narratives might suggest that the authority or validity of all large-scale structures of knowledge has been put in question. But it could be argued that some kind of Weberian legitimacy through legality remains the only possibility of stable authority in the postmodern social environment. Contemporary law – explicitly constructed, particular, local in scope, and ever-changing – might seem the quintessentially postmodern form of knowledge or doctrine: not in any sense a grand narrative, but the perfect pragmatic embodiment of contingency, impermanence, artificiality, transience, and disposability; its doctrine continually adapted, amended, cancelled, supplemented, or reinterpreted to address new problems.

Hence postmodern writing on law has often emphasized law's simultaneous moral emptiness and social power in a world that has lost faith in other discourses (Goodrich, 1990). And autopoiesis theory's unconcerned recognition that the very essence of legal discourse is circular reasoning has some affinities with claims informed by postmodern perspectives: for example, that law's self-founded authority

acts powerfully to disguise the incoherences of concepts such as "society" and "nation," even though legal thinking itself presupposes these concepts (Fitzpatrick, 2001).

Not unrelated to these lines of thought is a stress, in much recent sociolegal writing, on law's constitutive power (e.g., Brigham, 1996) – its ability actually to create the social (not just for immediate regulatory purposes but also in the wider consciousness of all who participate in social life) by shaping over time such general ideas as property, ownership, responsibility, contract, rights, fault, and guilt, as well as notions of interests, identity, and community. To be theoretically coherent, the idea of law as constitutive in this sense – with antecedents stretching back to Marx's views on law's ideological power – must ultimately either presuppose some notion of law as self-founding or recognize that law and the social are *mutually* constituting, that law gains its meaning and ultimate authority from the social at the same time as it shapes the social through its regulatory force. In other words, law is an aspect or field of social experience, not some mysteriously "external" force acting on it.

This last conclusion might reopen Durkheimian questions about the social bases of law's authority and imply that the social is more coherent, stable, and susceptible to theorization than many writings on postmodernity assume. This is what Jürgen Habermas's social theory claims. It presents an image of society as made up partly of systems (e.g., economic, political, and legal systems), such as Luhmann describes, and partly of what Habermas calls the "lifeworld." The lifeworld is the environment of everyday social experience in which customs, cultures, moral ideas, and popular understandings are formed and reproduced. The lifeworld provides experiential "background knowledge" (Habermas, 1996: 23) with the aid of which people interpret each other's conduct and communicative actions, and it is the source of solidarity and legitimations necessary to the maintenance of the various systems that make up society. Yet it is continually colonized, invaded, and transformed by these systems. So, for Habermas, the social exists in the interplay of system and lifeworld.

In contrast to all postmodern portrayals of contingency, indeterminacy, and moral vacuity as characteristics of contemporary life, Habermas pursues the Enlightenment project of the discovery of reason in law, society, and nature. He sees law not as self-grounding but as deriving its authority from reason – what he calls a communicative rationality, dependent for its adequate development on certain ideal conditions under which agreement between persons pursuing opposed or divergent interests becomes possible. Law, for Habermas, is the only medium that can link the lifeworld and the various systems of complex modern societies. Law, as a system itself, depends on the lifeworld for its authority and significance. The Durkheimian aspect of Habermas's thought is thus an insistence that law must be rooted in and express lifeworld sources of social solidarity. He sees law as having the main responsibility to coordinate contemporary societies, participating in both the instrumental rationality that pervades social systems and the consensus-oriented communicative rationality that the maintenance of lifeworld solidarity requires.

In his major work on legal theory (Habermas, 1996), he insists that law and morality are distinct, though both derive from the same ultimate founding principle of communicative rationality. The conditions for this rationality to flourish include certain specified basic rights that can only be secured through legal processes. These processes, in turn, both presuppose and must be designed to support democratic structures. Law and democracy are thus inseparably interwoven.

Habermas's ideas on law have been much discussed in sociolegal literature, perhaps mainly because they clearly affirm law's relation to reason and the possibil-

ity of law's rational justification in the face of postmodern doubts. But these ideas have significantly shifted location over time. From components of an empirically oriented social theory focused notably on conditions of legitimate government in capitalist societies (Habermas, 1975), they have turned into a more speculative legal philosophy. Interestingly, Habermas (1987: 249) has criticized Foucault's view of power as "utterly unsociological" but the same might be said of some of his own very abstract, general discussions of communicative rationality.

Perhaps the most thought-provoking feature of Habermas's recent work is the fact that law has come to assume a very central position in his picture of society. If law might seem in some images of postmodernity to be the epitome of contemporary valid knowledge, in Habermas's entirely different outlook it appears, potentially at least, to epitomize essential social processes of consensus formation through interpretive procedures that hold out possibilities for developing communicative rationality. Law's procedures are the devices by which rationally oriented communicative action becomes practically possible on a society-wide basis. From a certain standpoint, then, the significance of law for social theory is affirmed in the most unambiguous terms. Law is the foundation of central structures of social life; a set of processes and procedures on which society's very integrity depends.

Law Beyond Nation States

I suggested earlier that law had often been able to avoid entanglement with social theory because it could take the nature of the social for granted. Law constitutes in regulatory terms what it treats as the social but it has to *presuppose* an overall conception of the social in which its regulatory actions can make sense. For a long time Western legal thought was able to presuppose the political society of the modern nation-state as its overall conception of the social.

The growth of transnational regulation and regulatory aspirations (in human rights, commerce and finance, intellectual property, environmental protection, information technology, and many other areas) creates new incentives for legal studies to draw on the resources of social theory. This is because it potentially disturbs long-standing presuppositions about law's stable relation to the political society of the nation state. Social theory's efforts to understand the social as extending beyond the bounds of society in this sense, or as shaped by powerful transnational forces, are presently organized mainly around the portmanteau concept of globalization. But law does not figure prominently in theories of globalization, perhaps because it is usually seen as following rather than actively shaping the transnational extension of the social. Globalization is often described in terms of particular forms of this extension such as the harmonization of markets, the transformation of culture (understood, for example, as traditions, basic values, or beliefs), or the effects of new communication technologies. Law's role, even where seen as vital in these developments, is usually thought of as purely technical. Relatively few writers (cf. Teubner, 1997; Santos, 2002) see the need for theories of "global law" or legal transnationalization. Law in its traditional forms is widely assumed to be endlessly adaptable, capable of relating to the social wherever legal practice encounters it.

I think that some of the most important future relations of legal studies and social theory will, however, focus on the need to understand the changing character of law as it participates in developments currently associated with globalization. How far is

social theory, which so often assumed the political society of the nation state as the social, helpful as law increasingly relates to a social realm demarcated in other terms?

As has been seen, debates inspired by Foucault's work address the nature of contemporary regulation (with its intricate, if somewhat indeterminate, links to the law created by sovereign power) and the complexity of networks of power in the social. These debates have great relevance for attempts to understand the nature and social contexts of transnational regulation. It will surely be necessary to ask whether, at some point, transnational regulatory forms can presuppose, to use Foucault's terms, the "cutting off of the king's head" (cf. Foucault, 1979: 88–9) – in other words, the freeing of regulatory strategies from the coercive demands of national sovereign power. It will be necessary to consider how far transnational social spaces can be created in which dispersed but pervasive power can be used not merely to discipline individuals, but also to create possibilities for their autonomy – the dual aspects of this power analyzed in Foucault's work. In related ways, Ulrich Beck's writings (e.g., Beck, 1992, 2000) identify, in terms of individualization and risk, new regulatory problems but also new foci of liberating political action that can, as he stresses, relate as much to transnational as national arenas.

An engagement between legal studies and social theory beyond the nation state focus does not depend entirely on posing new sociolegal questions. It can also be a matter of presenting old ones in new contexts. Some of the most important old questions are about the way law secures authority through responsiveness to the experience or understandings of the population it regulates. Durkheim, always concerned with these issues, offered an important theory of democracy that has been largely unrecognized in sociolegal studies. He understood democracy, as an ideal practice, to be less a matter of popular representation than of sensitive, informed deliberation by means of which understandings, issues, and values rooted in widespread everyday social experience can be recognized and translated into effective regulation (Cotterrell, 1999: chs. 10 and 11).

Durkheim's concerns about the moral groundings of law have not become irrelevant. But they are much more difficult to address when the social can no longer easily be thought of simply as a unified national political society. It has become hard to assume or specify a basis of moral cohesion in such a society, given what social theory has taught about the diversity, fluidity, and contingency of the social. And the wider terrain of the social over which transnational regulation now operates might seem even more obviously culturally diverse, variable, fragmented, and indefinite in scope.

Communitarian writings have explored what moral bonds are possible and necessary in complex modern societies but, despite efforts to ground their analyses in the traditions of social theory (Selznick, 1992), they tend to be vague about the extent of existing moral consensus in these societies (Bauman, 1993: 44–5) and risk lapsing into nostalgia for old forms of social solidarity or moralistic exhortations to recover values. Some alternative approaches have sought a presocial "ethics of alterity" as a basis of moral evaluation of the social (Bauman, 1989: ch. 7, 1993: 47–53) and, by extension, a means of morally evaluating contemporary law (e.g., Cornell, 1992).

A different way forward might be to accept the concept of community as a potentially useful replacement for or supplement to that of (national) society, and to accept the need for solidarity in communities as the moral justification for regulating them, but to see community as existing in radically different forms: in

instrumental relationships such as those that provide the basis of commerce; in affective relationships of friendship, love, or care; in relations based on shared beliefs or ultimate values; and in traditional relations based on shared environments or historical experiences. On such a view, the social is structured by the fluid, intricate interweaving of different types of community, whether this interweaving constitutes the society of the nation-state, or particular groups or patterns of human interaction in this society, or networks of interaction, interests, or concerns extending across nation-state borders. On this view, law is the regulation and expression of communities (Cotterrell, 1997).

Old questions about law's bases of authority or legitimacy remain very important as the social seems increasingly "globalized," unless a view such as Luhmann's is adopted, suggesting that law's successful functioning is all that matters. Even if function is everything, it is still necessary to ask what ultimate conditions can ensure that law's regulatory functions are fulfilled. Habermas writes (1996: 33) that coercive law "can preserve its socially integrating force only insofar as the addressees of legal norms can understand themselves, taken as a whole, as the rational *authors* of those norms" (emphasis in original). Whatever view is taken of his ideas about communicative rationality, this restatement of an old problem can be seen to have new urgency as law extends its reach beyond national frontiers, and national law-making is more generally seen as driven by transnational forces.

If democracy, as Habermas claims, can in some conditions provide a sense of popular authorship of law in the political societies of nation states, where is such a sense to be found in the social realms addressed by transnational regulation or by national law subject to transnational pressures? How is Durkheim's democratic deliberation about the social to be achieved transnationally to create regulation that promotes solidarity? Marxist writings in social theory have properly emphasized – sometimes in debate with Foucault (Poulantzas, 1978: 76–92) – law's sources in organized power and the nature of its coercive and persuasive force (Jessop, 1980). But questions about its moral authority remain. As the nature of the social changes, sociolegal research is challenged to consider these questions anew, perhaps long before they become dilemmas disrupting law's everyday practice of the "method of detail."

References

Baudrillard, J. (1983) *In the Shadow of the Silent Majorities or, The End of the Social and Other Essays*. New York: Semiotext(e).

Bauman, Z. (1989) *Modernity and the Holocaust*. Cambridge, UK: Polity.

Bauman, Z. (1992) *Intimations of Postmodernity*. London: Routledge.

Bauman, Z. (1993) *Postmodern Ethics*. Oxford: Blackwell.

Beck, U. (1992) *Risk Society: Towards a New Modernity*. London: Sage.

Beck, U. (2000) *What is Globalization?* Cambridge, UK: Polity.

Beck, U. and Beck-Gernsheim, E. (2002) *Individualization: Institutionalized Individualism and its Social and Political Consequences*. London: Sage.

Beck, U., Giddens, A., and Lash, S. (1994) *Reflexive Modernization: Politics, Tradition and Aesthetics in the Modern Social Order*. Stanford, CA: Stanford University Press.

Brigham, J. (1996) *The Constitution of Interests: Beyond the Politics of Rights*. New York: New York University Press.

Cain, M. and Hunt, A. (eds.) (1979) *Marx and Engels on Law*. New York: Academic Press.

Cooper, D. (1998) *Governing Out of Order: Space, Law and the Politics of Belonging*. London: Rivers Oram Press.
Cornell, D. (1992) *The Philosophy of the Limit*. New York: Routledge.
Cotterrell, R. (1995) *Law's Community: Legal Theory in Sociological Perspective*. Oxford: Oxford University Press.
Cotterrell, R. (1997) "A legal concept of community," *Canadian Journal of Law and Society* 12: 75–91.
Cotterrell, R. (1999) *Emile Durkheim: Law in a Moral Domain*. Stanford, CA: Stanford University Press.
Douzinas, C. and Warrington, R. (1991) *Postmodern Jurisprudence: The Law of Texts in the Texts of Law*. London: Routledge.
Durkheim, E. (1975) "Individualism and the intellectuals," in W. S. F. Pickering (ed.), *Durkheim on Religion: A Selection of Readings with Bibliographies*. London: Routledge & Kegan Paul, pp. 59–73.
Durkheim, E. (1984) *The Division of Labour in Society*. London: Macmillan.
Ericson, R. and Haggerty, K. (1997) *Policing the Risk Society*. Toronto: University of Toronto Press.
Ewald, F. (1990) "Norms, discipline, and the law," *Representations* 30: 138–61.
Fitzpatrick, P. (1992) *The Mythology of Modern Law*. London: Routledge.
Fitzpatrick, P. (2001) *Modernism and the Grounds of Law*. Cambridge, UK: Cambridge University Press.
Foucault, M. (1977) *Discipline and Punish: The Birth of the Prison*. New York: Pantheon.
Foucault, M. (1979) *The History of Sexuality*, vol. 1. London: Allen Lane.
Foucault, M. (1991) "Governmentality," in G. Burchell, C. Gordon, and P. Miller (eds.), *The Foucault Effect: Studies in Governmentality with Two Lectures by and an Interview with Michel Foucault*. London: Harvester Wheatsheaf, pp. 87–104.
Franklin, J. (1998) *The Politics of Risk Society*. Cambridge, UK: Polity.
Geertz, C. (1983) *Local Knowledge: Further Essays in Interpretive Anthropology*. New York: Basic Books.
Goodrich, P. (1990) *Languages of Law: From Logics of Memory to Nomadic Masks*. London: Weidenfeld and Nicolson.
Gurvitch, G. (1935) *L'expérience juridique et la philosophie pluraliste du droit*. [*Legal Experience and Pluralist Philosophy of Law*] Paris: Pedone.
Gurvitch, G. (1947) *Sociology of Law*. London: Routledge & Kegan Paul.
Habermas, J. (1975) *Legitimation Crisis*. Boston: Beacon Press.
Habermas, J. (1987) *The Philosophical Discourse of Modernity: Twelve Lectures*. Cambridge, UK: Polity.
Habermas, J. (1996) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Cambridge, UK: Polity.
Hunt, A. (1993) *Explorations in Law and Society: Toward a Constitutive Theory of Law*. New York: Routledge.
Jessop, B. (1980) "On recent Marxist theories of law, the state, and juridico-political ideology," *International Journal of the Sociology of Law* 8: 339–68.
King, M. and Piper, C. (1995) *How the Law Thinks About Children*, 2nd edn. Aldershot, UK: Gower.
Luhmann, N. (1981) "Communication about law in action systems," in K. Knorr-Cetina and A. Cicourel (eds.), *Advances in Social Theory and Methodology*. London: Routledge and Kegan Paul, pp. 234–56.
Luhmann, N. (1992) "Operational closure and structural coupling: The differentiation of the legal system," *Cardozo Law Review* 13: 1419–41.
Luhmann, N. (1995) *Social Systems*. Stanford, CA: Stanford University Press.
Lyotard, J.-F. (1984) *The Postmodern Condition: A Report on Knowledge*. Minneapolis: University of Minnesota Press.

Mauss, M. (1990) *The Gift: The Form and Reason for Exchange in Archaic Societies*. London: Routledge.
Merry, S. (1988) "Legal pluralism," *Law & Society Review* 22: 869–96.
Munro, V. (2001) "Legal feminism and Foucault: A critique of the expulsion of law," *Journal of Law and Society* 28: 546–67.
Parsons, T. (1964) "Evolutionary universals in society," *American Sociological Review* 29: 339–57.
Parsons, T. (1977) *The Evolution of Societies*. Englewood Cliffs, NJ: Prentice-Hall.
Poulantzas, N. (1978) *State, Power, Socialism*. London: New Left Books.
Pribán, J. and Nelken, D. (eds.) (2001) *Law's New Boundaries: The Consequences of Legal Autopoiesis*. Aldershot, UK: Ashgate.
Rose, N. (1996) "The death of the social? Re-figuring the territory of government," *Economy and Society* 25: 327–56.
Rose, N. and Valverde, M. (1998) "Governed by law?" *Social and Legal Studies* 7: 541–51.
Santos, B. de S. (2002) *Toward a New Legal Common Sense: Law, Globalization and Emancipation*, 2nd edn. London: Butterworth, 2002.
Selznick, P. (1992) *The Moral Commonwealth: Social Theory and the Promise of Community*. Berkeley: University of California Press.
Simmel, G. (1971) *On Individuality and Social Forms: Selected Writings*. Chicago: University of Chicago Press.
Simon, J. (1999) "Law after society," *Law and Social Inquiry* 24: 143–94.
Smart, B. (1993) *Postmodernity*. London: Routledge.
Smart, C. (1989) *Feminism and the Power of Law*. London: Routledge.
Teubner, G. (ed.) (1987) *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law*. Berlin: de Gruyter.
Teubner, G. (1993) *Law as an Autopoietic System*. Oxford: Blackwell.
Teubner, G. (ed.) (1997) *Global Law Without a State*. Aldershot, UK: Dartmouth.
Twining, W. (1974) "Law and social science: The method of detail," *New Society* June 27: 758–61.
Weber, M. (1978) *Economy and Society: An Outline of Interpretive Sociology*. Berkeley: University of California Press.

Further Reading

Cotterrell, R. (ed.) (2001) *Sociological Perspectives on Law. Volume 1: Classical Foundations. Volume 2: Contemporary Debates*. Aldershot, UK: Ashgate.
Febbrajo, A. and Teubner, G. (eds.) (1992) *State, Law, Economy as Autopoietic Systems*. Milan: Giuffrè.
Hunt, A. and Wickham, G. (1994) *Foucault and Law: Towards a Sociology of Law as Governance*. London: Pluto.
Rosenfeld, M. and Arato, A. (eds.) (1998) *Habermas on Law and Democracy: Critical Exchanges*. Berkeley: University of California Press.
Tie, W. (1999) *Legal Pluralism: Toward a Multicultural Conception of Law*. Aldershot, UK: Ashgate.
Wickham, G. and Pavlich, G. (eds.) (2001) *Rethinking Law, Society and Governance: Foucault's Bequest*. Oxford: Hart.