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SOCIAL THEORY AND LEGAL THEORY: CONTEMPORARY INTERACTIONS

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ABSTRACT

This essay identifies points of comparison between legal theory and social theory, and possibilities for research communication between them. The current range of both fields is such that each must be seen as a compendium of very diverse intellectual projects. So, the essay explores particular contemporary themes around which the interests of juristic scholars and social theorists are converging, albeit that their theoretical aims often differ. Contrasting and complementary juristic and social theoretical perspectives are considered in relation to the following: the future of legal individualism; the identity of law as a social phenomenon; the relations of law and power; the contribution of law to societal integration; and the changing relation of law and the state. The essay argues that these five themes reveal major intellectual challenges for both legal theory and social theory, and productive future areas for inquiry.

INTRODUCTION

It has been claimed that ‘legal theory is merely a subset of a wider activity known as social theory’ (Van Zandt 1989, p. 34). Certainly, insofar as law is a social phenomenon, inquiry about its nature is an exploration of an aspect of the social, and so surely a topic for social theory; when law is studied theoretically using the methods and theories of social science, the enterprise is often called socio-legal theory or seen as the theoretical aspects of sociology of law or ‘law and society’ studies. But legal theory, as such, is often *not* characterized in this way.

For lawyers and legal philosophers, legal theory is mainly a matter of understanding the nature of law in its conceptual structures and modes of reasoning or evaluation, rather than in the contingent patterns of social action, social relations and social institutions that social scientists study. Contemporary legal philosophy is often geared to issues of philosophical interest that do not necessarily prioritize lawyers' practical concerns (Gardner 2001, p. 203; Leiter 2004, p. 178). But legal scholars' theoretical inquiries are often directly related to those concerns. In the Anglophone world these inquiries are typically called jurisprudence or juristic theory. Legal theory as *juristic theory* (which will be the central legal focus of this essay) is usually concerned to systematize law, critique its workings and reveal its failings and potential, so as to make it operate in more valuable ways. Juristic theory relies on legal philosophy but, at its best, also shows a sensitivity to empirical socio-legal inquiries. A century-long engagement of juristic theory with sociological perspectives is encompassed in the familiar, still evolving tradition of sociological jurisprudence (Cotterrell 2018), initiated in the common law world by Roscoe Pound early in the 20th century, and arising in continental Europe at much the same time, especially in the so-called 'free law' movement, focused on the need to incorporate social analysis in judicial decision-making.

Social theory as a category also has its complexities. What distinguishes it from social philosophy, or from juristic speculations about the social? Is social theory specifically *sociological* theory – the theoretical components of the discipline of sociology? Today, its core remains in sociological methods and traditions, but it is usually treated as extending further (e.g. Elliott & Turner 2001), so that some philosophers and literary and psychoanalytic theorists are viewed as contributing insights to it. Nevertheless, social theory is best seen as having important sociological characteristics even if its interests and methods extend beyond those of sociology as an academic discipline. Above all, social theory needs to be *empirically* oriented, focused on the nature of *social* phenomena, and attuned to *variation and diversity* in these phenomena across time and place. Insofar as intellectual projects adopt such a perspective they relate to social theory, whatever disciplinary allegiances, if any, they claim.

This essay explores some points of contact between legal theory and social theory. Because each of these vast fields is diverse and it is hard to generalize across them, the approach here focuses on a few clusters of issues – issues that, although understood or studied in different ways by legal scholars and social scientists, seem of obvious contemporary significance for both. Justice can rarely be done to theories except by treating them as self-contained systems

of thought rather than compendiums of insights on discrete issues. Nevertheless, comparisons across a selection of themes can be worthwhile, if only to show that divides between lawyers' and social scientists' concerns may not always be as great as is often assumed.

Interconnections between legal and social theory have certainly been complex and shifting. It has often been noted that early forms of social theory emerged directly out of juristic thought, gradually separating themselves from it, and this process extended over centuries (e.g. Kelley 1990). Nicholas Timasheff's (1974[1939], p. 45) memorable claim that sociology 'was born in the state of hostility to law' related specifically to Auguste Comte's early nineteenth century utopian idea that a positivist sociology might entirely replace law's normative methods with scientific administration. For different reasons, Karl Marx foresaw a comparable development. But it should be emphasized that other influential classic social theory grew *alongside* and in the shadow of juristic ideas. Both Emile Durkheim and Max Weber saw the study of legal ideas as integral to their social theory, a matter that modern sociology has sometime under-emphasized. Durkheim made great efforts to enlist the interest of legal scholars early in his project of building sociology, and a few became his valued collaborators (Cotterrell 1999). In a long historical view, it has even been claimed that 'law formed the conceptual archetype and even substratum of sociological thought, and furnished most of its vocabulary' (Kelley 1990, p. 275), an assertion that has been meticulously supported at least in Weber's case (Turner & Factor 1994).

Links between legal theory and social theory loosened as modern sociology made rigorous empirical research central to its disciplinary identity, while legal scholarship remained largely wedded to conceptual and normative analyses. In the 1990s it could be said that jurisprudence 'is a field… today largely unrecognized by sociologists' (Scheppele 1994, p. 383). But more recently, as social theory has recovered some of its open transdisciplinary orientation and legal theory has sought ways to understand the changing challenges for law in contemporary society, new possibilities for interaction – even mutual learning – between legal and social theory may exist. Legal theory and social theory are both concerned with large structures of social life, with social institutions and the generality and diversity of social relations. To some degree they inevitably compete, using different methods to generalize about, and intellectually organize, the social world. In what follows a series of themes is used to provide a basis for comparisons.

LEGAL INDIVIDUALISM

How far should the individual be seen as central in social and legal analysis? This question is a useful starting point because much modern legal thought organizes its analyses around assumed characteristics of the individual as a reasoning being, accepting personal responsibilities and liabilities, making choices and asserting rights.[1] In recent social theory this outlook is also adopted in the work of James Coleman (1990). Individuals, pursuing their interests and controlling resources in doing so, are for Coleman the basic units for social analysis. Through individuals' mutual exchanges and unilateral transfers, they build social relations that can persist over time. But 'individuals do not act independently, goals are not independently arrived at, and interests are not wholly selfish' (Coleman 1990, p. 301). So, co-operation and the creation of social institutions and structures follow. Law frames individuals' interactions and what results from them. Authority is conferred when individuals transfer control over their actions to others. Coleman's interest in organizational structures leads to much emphasis on *corporate* actors, the overwhelming dominance of which in contemporary life is a 'massive social change' creating 'a new social world' (Coleman 1992, p. 279). Crucially, such actors 'merit existence only insofar as they further the ends of natural persons' (Marsden 2005, p. 16) and need control to ensure this. Despite the pervasiveness of corporations and massive organizational structures, the individual remains the bedrock of the social. Corporations must be made accountable to individuals they affect. Law serves individualism.

This stance, at odds with other social theory that displaces the individual from such a central place in analysis, partly corresponds with modern legal thought. Individual responsibility remains the central case in law, especially when intention or motive must be examined. Rational choice decisions, usually presuming ultimately human motivation, are a postulate of much economic analysis of law, which has been immensely influential in juristic thought. But legal theory avoids many complications of assessing individual human beings by using the concept of legal person which constructs actors in law in abstract terms (even if individuals are often the carriers of this abstract legal personality). As in pre-modern times, so today, the person in law is in not limited to the individual. So legal theory has been able to retain a typical

[1] For a classic social theoretical perspective on pre-modern legal conceptions of liability see Fauconnet 2010[1928].

liberal focus on the human individual as central to law's concerns but not be confined conceptually by this. At one time the nature of corporate personality (as in the limited liability business corporation) was a major issue for legal theorists (Hallis 1978[1930]). Did the corporation really have a personality recognized by law? Or was this only a fiction to refer to an association of individuals? Today these issues are no longer pressing. Corporate personality is a pervasive feature of legal life, just as Coleman rightly sees corporate actors as pervading social life.

The concept of rights, crucially important for Coleman as a legal expression of individual autonomy, became an object of attack in critical legal studies, partly insofar as it symbolized the separation of individuals from each other (like legal fences built around them), and so from any strong sense of community (e.g. Gabel 1984). But this CLS stance soon ran into opposition. Critical race theorists insisted that rights had to remain important in legal and social life, at least for their occasional practical utility despite their frequent frustration in practice (e.g. Williams 1991). If legal individualism deterred wider legal concerns for solidarity and community, it at least gave some chance for minority groups to assert claims on an equivalent basis to the majority, relying on the promise (even if frequently broken) of equality before the law – the rights of individuals seen as formally equal persons.

From a contrasting ideological standpoint, neo-liberal thought – seen in the United States and beyond as influential in many areas of juristic analysis (Grewal & Purdy 2014) – also emphasizes legal individualism, though for crucially different reasons. If liberal law might see the individual as the ultimate *moral component of society*, neo-liberal law stresses 'stable and well-protected property rights, enforcement of private contracts' and 'a particular ideal of entrepreneurial liberty, *not visions of society*' (Blalock 2014, p. 84, emphasis added). Entrepreneurs will often be corporate actors, but the underlying model is still the autonomous self-focused individual. Law, in this juristic vision, holds the ring in individuals' chosen transactional activities.

Much social theory does not, however, privilege the position of the individual in the social. Niklas Luhmann's systems theory initially puzzled many legal theorists partly by insisting that all social analysis must be of systems of communication and 'not individuals, social groups…' (King & Schütz 1994, pp. 262-3). Law is one kind of social communication system revolving self-referentially, in all its normative discursive analyses, solely around the dichotomous issue

of whether a set of circumstances is ‘legal’ or ‘illegal’. Law’s discourse continues whatever individuals do; its normative pronouncements exist whether or not people follow them. Legal discourse judges whatever circumstances it interprets entirely in its own terms. In Luhmann’s austere vision, it declares normative positions that may be observed (or ignored) by other social systems (e.g. of economy, polity or science). But all social analysis is in terms of the operations of systems, not individual motivations.

Other social theory takes a less absolute, more oblique view of the individual. For example, Bruno Latour claims that actors participating in social life may be individuals but can also be non-human entities. For example, not only sailors but also winds and ocean currents may determine trade routes and, in Latour’s (2010) ethnographic study of France’s highest administrative court, the Conseil D’État, the court and its law exist not just in individuals and their practices, but in files, dossiers, technologies, and the organization of the court building. Individuals are partly displaced because law is ‘a network of people and of things’ (Levi & Valverde 2008, p. 806) acting on, limiting and enabling each other. One might think also of the actions of traffic lights, or the algorithms that control high frequency trading of investments. This suggests that a major issue for law is how far it can keep up with rapid technological change – something only weakly addressed in most current legal theory. And presumably, any natural phenomenon is an actor for Latour, or what he calls an ‘actant’ if ‘it has no figuration yet’ (2005, p. 71). Certainly, climate change and global pandemics should be reminders that legal and social theories underestimate nature as an active force at their peril.

Against Latour, it might be insisted that only *people* really act socially (Cotterrell 2011) even if, to paraphrase Marx, they do so not under conditions of their own choosing. But juristic thought has, from pre-modern times, been able to envisage non-human entities – animals, funds, corporate entities of all kinds, even sacred idols[2] – as actors of legal significance. To this extent Luhmann is right that legal discourse interprets social reality for itself, in its own ways.

[2] *Pramatha Nath Mullick* v *Pradyumna Kumar Mullick* (1925) LR 52 Ind. App. 245 (UK Privy Council).

LAW'S AUTONOMY AND IDENTITY

Another cluster of issues linking legal and social theory concerns the distinctiveness (or otherwise) of law as a social phenomenon. Remarkably, a basic question in much legal philosophy continues to be 'what is law?', a widespread (but never fulfilled) assumption being that some conclusive answer can be given independently of sociological inquiries. Legal philosophy is said to be concerned 'with the necessary and the universal'; sociology of law 'with the contingent and with the particular' (Raz 2009, p. 104)). So, law is thought to have a philosophical essence not dependent on social context. Most sociologists of law tend to treat such an approach as either misguided or irrelevant: law should be explored in its vast variety of forms, locations and effects rather than as some timeless essence. However, from the beginnings of modern sociology of law, a century ago (Ehrlich 2002[1936]), it was recognized that generalizations about law can and should be based on observation of concrete regulatory phenomena; one can work with serviceable models of 'the legal' for research purposes.

Conceptualizing the idea of law is not misguided for juristic purposes. Jurists need to be able to identify what will count as *legal* ideas for practical purposes, distinguishing them from the non-legal (such as social, technical or administrative regulation, and moral, political or other kinds of reasoning). And lawyers need to be able to assess the juristic significance of such forms of regulation as 'soft law', standards, rankings, and indicators which today have great importance, co-existing or often competing with law, even replacing it in some contexts (e.g. Nelken 2015; Di Robilant 2006). Most legal scholars – however close they see law's links in practice with other (political, economic, scientific, etc.) features of the social – assume some distinctive identity of law; they try to see it as a sufficiently coherent body of ideas and practices, however diverse its doctrinal fields may be. Indeed, especially in some European nations, the idea of a pure 'legal science', developed solely by jurists in their self-contained professional world, is taken for granted; law's autonomy as a distinct intellectual universe goes largely unchallenged (Samuel 2009, pp. 440-2).

One reason why the influence of Luhmann's social theory has grown in legal theory, especially in European contexts, is that it clearly recognizes this kind of autonomy of the legal but theorizes it in much more sophisticated terms than does most legal theory. Law as a communication system or discourse is, for Luhmann, cognitively open but operationally (or normatively) closed (King & Schütz 1994, pp.302-5). In other words, it readily receives

information from any source, but understands this in its own ways to fulfil its own distinct function. This function is not to control or steer society, engage in or reflect politics, structure the economy, mirror scientific findings, or support morality; it is solely to reason in terms of what is 'legal' or 'illegal' and thereby provide normative judgments that can be observed by other social systems (economy, polity, science, etc.). These systems will read (or ignore) law's normative judgments using *their* own criteria, for example, economic efficiency or pursuit of policy goals.

As noted earlier, individuals are absent from this picture, but Luhmann's theory well mirrors the typical abstraction of legal thought and its frequent intellectual isolation, despite law's vital social significance. Luhmann's theory has often been called a social theoretical reworking of Hans Kelsen's legal philosophy (e.g. Bertilsson 2006, p.112). Both theories present law as a self-contained, self-reproducing discourse: Kelsen did so to try to protect law from politicization, while Luhmann wanted to emphasize law's inability directly to control other spheres of social life in ways that lawmakers often intend. But it has been mainly left to Luhmann's followers to explore how law can sometimes productively interact with other social systems in society, by developing *alongside* them, despite its normative closure (e.g. Febbrajo & Harste 2013).

The price paid for Luhmann's portrayal of legal discourse is surely the absence of human agency: issues about responsibility, values, and human aspirations for law disappear. The closest correlate of this in legal theory is contemporary legal positivism's separation of conceptual issues about law from moral judgments, or from other issues about law's social or political contexts. Other kinds of legal theory move in different directions. After legal realism established the importance of thinking of law in relation to politics and policy, the chief progeny of realism – economic analysis of law and critical legal studies – followed this. And once people are re-admitted to the picture, law looks very different from Luhmann's image.

Thus, against Luhmann, the sociologist Pierre Bourdieu sees law as a field of human action. The 'juridical field' is one social field among many. Like others it is populated by people (primarily legal professionals) who compete and jockey for position in it, but unite to present and defend the field in its external relations. Internally it may be disunited and conflictual but externally it tends to show a united front. What structures the field is especially the habitus (the commonly assumed ways of acting, thinking, experiencing the field, and relating to situations)

shared by members in it. Sometimes Bourdieu (1987, p. 831) talks of existing in the juridical field, like other fields, as knowing how to play a game. Law's autonomy is highly relative: law is close to politics and the state, and political and legal personnel and relationships overlap. Law's autonomy is not in modes of discourse but in its distinctive practices, which involve rules but are ultimately more important than rules and not necessarily confined by them.

An analogy in legal theory with this view exists in certain kinds of early legal realism, most notably the unjustly neglected theory of the Swedish jurist Vilhelm Lundstedt (1956) who sees law as a kind of social machinery. This 'legal machinery' consists (like Bourdieu's juridical field) less in rules than in practices and understandings but, for Lundstedt, these must engage citizens' psychological dispositions no less than those of legal professionals.

LAW AND POWER

Law's relation to power is often left vague in legal theory. Power hardly figures as a topic in mainstream contemporary legal philosophy except in the claim that the concept of law depends on the existence of rules *conferring powers* on citizens and officials (Hart 1994). H. L. A. Hart's influential legal theory entirely displaced the earlier notion that the exercise of sovereign power was modern law's essence (Austin 2005[1885], p. 177). The idea that law *reflects* power relations in society survives strongly in juristic theory only in critical legal studies and associated varieties of legal theory such as feminist legal theory and critical race theory; in them, power is a central concern and law is readily seen as its agent – as in the power of majorities over minorities, but also the empowerment that law might sometimes provide for minorities and women to claim rights to an equal place in society or get recognition for distinctive identities and life conditions.

The idea of sovereignty is still prominent – if much contested – in legal fields such as constitutional and international law (Bartelson 2006; Loughlin & Tierney 2018). But it has been argued that this idea in legal theory is no longer attached to any political theory of sovereignty that could sustain it (Herzog 2020). And power itself has not been much analyzed as a general concept in contemporary juristic thought. This is probably why Michel Foucault's social theory has much influenced critical legal thought: Foucault offers resources for analyzing not only the changing nature of power itself, but also its relation to law and to the

traditional linking of law to sovereignty. It has been said that Foucault was interested in law only 'to the point that it helps him propose his very particular understanding of power' (Wickham 2013, p.218); and that, because he aimed to rethink power in a way that marginalized the sovereign coercive power of the state, he 'expelled' law (which he associated with this sovereign power) from his theory (Hunt 1992).

Power in modern society is, for Foucault, primarily not this sovereign legal coercion. Its task is 'to qualify, measure, appraise, and hierarchize, rather than display itself in its murderous splendor' (Foucault 1990[1978], p.144). Modern power 'is not only preventative, it is also creative or…productive' (Tadros 1998, pp.77-8), the way in which everything gets done in society. This view can then be developed in one of two directions.

One is towards displacing attention from law, because the means of social government '*instead of being laws*, now come to be a range of multiform tactics' (Foucault 1991[1979], p. 95; my emphasis); these are administrative regulations and the many kinds of discipline imposed by social institutions, leading to socially mandated self-discipline. The modern form of power is 'bio-power' (1990[1978], p.140) pervading life in all its personal and social aspects, and perhaps, according to some followers of Foucault, now even extending beyond national jurisdictions (Hardt & Negri 2000, pp.23-4).

Another direction of analysis follows Foucault's seemingly inconsistent remark that modern '*law* operates more and more as a norm' (1990[1978], p. 144, my emphasis), a social mechanism; less as juridical sovereign power. Perhaps law itself now mainly exists to guide social and personal understandings about conduct. Bio-power, harnessed to law, is socially pervasive – empowering but, more importantly, also enveloping and confining individuals in the social. Such a vision of power working in innumerable ways through law's devices of influence and control corresponds with many aspects of the way lawyers today see it. But Foucault's influence has been regretted for blunting critiques of law's sheer violence: his claim of 'the omnipresence of power… eventually emasculated the moral critique' of law (Robin West, quoted in Blalock 2014, p.82). So, other social theorists like Bourdieu, rejecting Foucault, have kept a focus on law's link to politics and the state, how it 'consecrates the established order' (Bourdieu 1987, p.838) or is only 'disguised force' (Bertilsson 2006, p.110).

Debates about what exactly law means for Foucault partly mirror issues in contemporary legal theory. Law is almost always seen juristically in terms of hierarchies of authority: must these be understood as structures of sovereignty, or can they be organized in more fluid rule networks? (Ost & Van der Kerchove 2002). Is law slowly detaching itself from the tutelage of the sovereign state, as international legal institutions flourish and seem to acquire greater autonomy from individual states (Besson 2009)? Can overarching constitutional structures be constructed without being tied to any sovereign state? (e.g. Teubner 2012; Sweet 2009) And what happens to hierarchies of authority in new forms of transnational law that readily facilitate private socio-economic relations across state boundaries? (Cotterrell 2018, pp. 122-39). All of these are pressing juristic issues today.

The most disturbing effort to attach Foucault's idea of bio-power to law is found in the work of the political philosopher Giorgio Agamben. If bio-power extending through all aspects of human life were to be linked to law's coercive sovereign power (as in Agamben's work), this raises the question: where does law's regulatory power and reach stop? What degree of control of life is open to law? (Agamben 1998, p. 120). In totalitarian regimes no region of life is excluded from the reach of sovereign power, and if this power is not separated, as perhaps Foucault envisages, from bio-power, but rather *integrated* with it, there is no limit to the potential for sovereign power to control life – or indeed to deny life. For Agamben, the concentration camp is the paradigmatic location in which all value of life is denied, yet this non-life or, as he terms it, 'bare life', still remains governed by sovereign power. In the camp, human life is removed from all legal protection, yet is somehow still within the horizon of law.

The message of this for legal and social theory is that the horrors of wholly unrestrained bio-power exerted over human life by sovereign legal coercion (as in the Holocaust) are not a grotesque aberration to be consigned to history (see also Bauman 1989). In a 'state of exception', law acts dictatorially and exceptionally, with emergency powers, to preserve its overall regulatory hegemony (a use of law defended, for example, by the jurist Carl Schmitt in the Weimar Republic). But this state of exception can, Agamben (2005) suggests, become *normality* for some people in modern legal regimes that, with the vast intrusiveness of bio-power, can use minute forms of surveillance, control and oppression. Today, as he notes (1998, pp. 133-4), refugees can risk being seen legally merely as bare life; perhaps other categories can exist too, among the destitute, forgotten and reviled. In this radical extension of Foucault's thought, law's power to exclude people socially while including them in its jurisdiction, is

portrayed in a salutary way for both legal and social theory. For the former what is essential is to see that juridical attention today must extend to those people seemingly outside law's concern but whose bare life is still lived in its sight.

LAW AS AN INTEGRATIVE MECHANISM

If Agamben focuses on the excluded, much social theory asks, by contrast, how far society might be seen as an inclusive, integrated whole. Implicitly, this is a concern for legal theory too. The idea of unity in law, considered earlier, tends to presuppose a unified realm of social life, envisaged in terms of interconnections of legal relations represented in integrated patterns of legal doctrine. Juristic theory typically assumes that the social can be understood in terms of rationally ordered regulatory patterns. But some legal theory has seen conflict, not integration, as the organizing principle of social life. For example, Marxist theory of class conflict has informed both legal and social theory. Yet Marxism never made any fundamental impact on the mainstream of Western legal thought, and critical legal theory has rarely been content to see fundamental social divisions in the straightforward terms of economic class conflict (cf. Mutua 2008). Instead, it has organized itself around a variety of differentiations of the social – for example, by gender, race, ethnicity or sexual orientation – primarily when these differentiations have been represented in legal theory by scholars who themselves belong to the populations directly affected, and can share or empathize with their socio-legal experience.

Since the members or allies of the economically weakest classes have not often occupied positions from which they could powerfully shape legal scholarship, their voices have rarely been heard in legal theory. This is why Marxism, speaking to the interests of the dispossessed has rarely gained a firm foothold in Western juristic thought, whatever its impact in social theory. Critical legal theory is mainly a coalition of many minority perspectives, each with its own constituency, but the concerns of the poor are usually reflected in special legal fields (poverty law, welfare law, etc.), not in general movements in contemporary legal theory.

While social theorists have usually portrayed the social as complex in its differentiation, they have equally often presented law, in a long theoretical tradition, as a means of social integration. A central theme of Durkheim's classical sociology was that law is, by its nature, such a means; it symbolizes the possible forms of social solidarity and has the task of sustaining

them (Cotterrell 1999). In this perspective, law is an affair of values, closely linked to morality as a unifying social force. Durkheimian sociology has often been seen as mistaking law's aspirations for its social reality, drastically underplaying the phenomena of social power, as considered above. Yet the tendency to try to see law as a means of social integration is surely predictable whenever social theory is influenced by legal theory, given law's typical juristic presentation as a unity and as an ultimate, overall, coordinating and mediating regulatory structure of social life.

Talcott Parsons and his followers identified law functionally as an integrative system in society, linking all other aspects of the social (Bredemeier 1962). Today, a sophisticated expression of this tendency in social theory is found in Jeffrey Alexander's magnum opus, *The Civil Sphere* (2006). Somewhat comparably with Parsons' concept of the societal community (Parsons (1977, pp. 182-214), Alexander's 'civil sphere' is an arena of solidarity, 'a sphere or subsystem of society that is analytically and, to various degrees, empirically separated from the spheres of political, economic, family, and religious life' (Alexander 2006, p. 53). It is the locus of general, society-wide solidarity, cutting across all local, particularized allegiances. For Alexander, it characterizes civil society, of which 'law can be very a highly significant boundary mechanism', giving or refusing 'legal membership in an overarching civil sphere' (2006, p. 153). Alexander considers in detail how this giving and refusing has been done in the United States, especially as regards civil rights. Law is one of several mechanisms for maintaining boundaries of the civil sphere, determining inclusion in or exclusion from it. Demands for entry come from sectional constituencies and particularistic interests, but to gain entry, sectional demands must be translated into generalized interests that can be integrated in the overall perspectives of the civil sphere. Law's task seems, in part, to be to build solidarity in the civil sphere. But history also shows it firmly excluding population groups from this solidarity. Either way, for Alexander, it is a key institutional support of the civil sphere.

Alexander's civil sphere is comparable in some respects with Jürgen Habermas' 'lifeworld'. Habermas (1986) originally saw law as facing in two directions: on the one hand, coordinating social systems such as economy, polity, science and technology; on the other, protecting the lifeworld – the realm of people's moral experience in everyday social interactions; the place where a general, overarching solidarity in society might be built. The lifeworld can be unified, Habermas argues, only by a communicative rationality in which all can participate.

In his later work (1996), he has insisted unambiguously that law's function is to serve the lifeworld, keeping open possibilities of rational interpersonal communication and so the hope of bridging citizens' diverse perspectives in complex, pluralistic, modern societies (see also Deflem 2013). In this picture, law is clearly an agent of social integration, operating through communication and facilitating rational communication. It gets its ultimate legitimacy (essentially its moral justification) from the lifeworld, for which it provides regulation (Deflem 2013, pp. 84, 85).

In Habermas' approach, not only are necessary links between law and morality affirmed but law is given special status as a focus of allegiance in modern pluralistic societies. Unifying societal values are hard to find in complex modern societies when the experience of different social groups can be so radically varied; maybe, then, law itself, in its most visible, overarching form as a constitution, can be the focus of common allegiance. So, Habermas (1996, p. 500) has promoted the idea of 'constitutional patriotism' – a shared belief in constitutionality – to characterize such a socially and politically unifying role of law.

A critical view might be that this, like so much earlier thinking on law's integrative functions, expresses aspirations more than realities. Despite legal theory's tendency to assume the unity of the legal (and perhaps the social), it has, in its most socially aware forms, had to recognize the differentiation, even fragmentation, of both the legal and the social. Feminist theory shows this movement clearly. Early liberal feminism held to the idea of equality as the value necessary to overcome gender discriminations; subsequently, radical feminism assumed difference and inequality as inbuilt in the 'male' character of existing legal thought; and cultural feminism argued the need for difference in gendered experience to be recognized constructively in law. Eventually, the legal scholar Kimberle Crenshaw (1989) propounded the idea of 'intersectionality' to emphasize the cross-cutting and mutual reinforcement of discriminations on grounds of gender, race and other characteristics.

With such complexities, 'simple' categories of 'women' or 'race' can come to seem too undifferentiated to recognize the varieties of experience (e.g. black or gay female, trans male) of particular population groups demanding an adequate presence in social and legal thought. Categorizing social diversity in ways that do not recognize its full complexity risks 'essentialism' – postulating unities (e.g. of women's experience, black experience) that may not exist. In this rapid evolution of theoretical positions, the end point could be to lose the very

categories of differentiation and discrimination (e.g. ‘woman’, ‘black’) on which critical legal theory had initially been based. Perhaps the only clear way forward is to reinstate the basic demand for *human equality* as the guiding value for law, and to stress the most general forms of social differentiation as key, pragmatic, initial targets for legal reform.

Social theory might benefit from the experience of critical legal theory in trying to confront social discriminations and inequalities, if only because practically-oriented juristic theory has always had to consider how theory can address case-by-case problems. While some forms of both social and legal theory present themselves as value-free, or unconcerned with moral evaluation, it is hard to address the complex differentiation of the social without examining the possibility of some unifying social values. Hence the relatively recent recovery of the old idea of a sociology of morality (e.g. Hitlin & Vaisey 2010), a field that Durkheim pioneered. He insisted that the only possible unifying moral basis for complex modern societies, and for law that served their need for solidarity, would be universal respect for every individual as equal in human worth (Cotterrell 1999, pp. 112-5). The basis of this value system lay, for Durkheim, not in philosophy but in sociology – in asking: what kind of general identification with others in a society remains possible for individuals in that society when they differ fundamentally in social experience and interests? It is often said that belief in human rights (embodying much of Durkheim’s value system of moral individualism) is now the only possible socially unifying ‘religion’ in Western societies (Cole 2012; Féron 2014).

Efforts to link legal and social theory in terms of values have also been made from the perspective of natural law thought which, in its classical forms, locates ultimate legal values in a natural order, a natural condition of human existence, or a universal human reason. Natural law thought has been thoroughly marginalized in most contemporary legal theory, dominated by positivism or by assumptions of the relativity of values. However, it has recently been claimed that natural law is an implicit necessary foundation of social theory, insofar as social theory assumes certain universal attributes of humanity that make possible comparison of social experience in different times and places (Chernilo 2013). The argument is that social theory, when it considers human subjectivity and values, works with ‘implicit notions of human nature’ inherited from natural law (2013, p. 15).

Whatever should be made of this argument, natural law has occasionally been invoked expressly, if controversially, in some modern social theory, notably by Philip Selznick (1961)

to argue for the immanence of values in social institutions including law. And Roscoe Pound (2002[1958], pp. 63-5), pioneering sociological jurisprudence, showed sympathy for natural law although he saw law's ultimate values as generalizable from positive law itself. Most legal or social theory, if it seeks law's values, is likely to do so not in natural law terms but by reflecting on historical legal experience. In any case, the effort to theorize law's place in integrating societies will surely remain a point of contact between legal and social theory.

LAW INSIDE AND BEYOND THE STATE

One final theme, suggesting common concerns of legal and social theory, is the frequent assumption, underlying both of these types of theory, that the widest locus for their analyses is 'society', in the specific sense of the politically organized society of the nation state (e.g. American society, French society). Society and law are typically assumed ultimately to exist under the political umbrella of the state. In sociology this assumption has been called methodological nationalism (e.g. Beck & Sznaider 2006). In legal theory it underlies the linked ideas that all law is created or authorized by the institutions of the state, and that the boundaries of law's jurisdiction are set by the state, typically on the basis of the its territorial claims or its claims to determine allegiance on the basis of citizenship.

In both social theory and legal theory, many developments now challenge methodological or jurisdictional nationalism – far too many to survey here. Theories of globalization, of world society or system (e.g. Luhmann 1982), of post-colonialism (Amelina, Boatcă, Bongaerts & Wiess 2020), and of de-centered transnational empire (Hardt & Negri 2000) are among those that have impacted on social theory. In legal theory, the impact of legal and regulatory developments beyond or across state boundaries is forcing change in juristic thinking. Thus, much literature now addresses the nature and growth of transnational law – that is, regulation governing cross-national social (especially economic) relations involving private actors. Much of this regulation derives from state law or international law, but increasingly its effects escape full legal supervision by state legal institutions and much of it now arises from private cross-national rule-making sources, for example in multi-national industries, dispute arbitration systems of transnationally active merchants, and standard-setting by internationally organized bodies to govern private or public initiatives (for example, forest management and

development, or advertising and accounting practices) that cross (or have no particular relation to) national borders.

Difficult issues arise for legal theory in such developments (Cotterrell 2018, pp. 103-39). One is where the boundary, if any, now lies between public and private. Another is the old question of what counts as 'law', as contrasted with other kinds of regulation (and how far this distinction still matters). Juristically the most important question of all may be: where does regulatory authority lie, and how are questions of legal authority to be managed when different legal or regulatory regimes overlap, compete, or exist in indeterminate relation with each other? From a social theoretical perspective many of these issues can be reframed as questions about how social relations, or 'society', can be and is being organized, stabilized and regulated beyond national society. So, the utility of the concept of society has often been challenged in recent literature (Bauman 2002) and proposals have sometimes been made to rethink the social in terms of communities not necessarily limited within national society (Djelic & Quack 2010).

Perhaps, here too, contemporary legal theory might provide insights for social theory because of lawyers' focus on the particularity of regulatory problems, and case-by-case processing of disputes. The problem of how different legal regimes can operate in the same social space has long been a focus of practical juristic analysis – especially in relation to federal legal systems; colonial and postcolonial systems (where state law may have to co-exist with indigenous customary law); and conditions, widespread globally, where systems of state law and religious law co-exist, each with autonomous sources of its authority.

Theories of legal pluralism – analyzing how a plurality of legal or regulatory regimes can co-exist in the same social space (Merry 1988) – address such matters. As Western societies become increasingly multi-cultural in character, and different cultural groups preserve or extend aspirations for law that reflects their cultural distinctiveness, legal pluralism is becoming a significant theoretical interest for jurists who recognize that the idea of the modern Western state's monopoly of law is often no longer adequate for legal theory (e.g. Roughan & Halpin 2017). Juristic thought has long been concerned with the way in which conflicts between laws originating in different systems can be managed. The old legal field of conflict of laws, traditionally concerned with deciding which law should apply when laws of different state legal systems are invoked in the same case, is being re-theorized in efforts to build a new 'conflicts law' that might address a wider panorama of legal pluralism (e.g. Michaels 2020).

The effort to rethink legal concepts for transnational application continues apace. Global legal pluralism is now a familiar concept in legal theory (e.g. Berman 2012) and the idea of 'global administrative law' explores principles of administrative justice and procedure that could operate effectively beyond the context of states (Kingsbury 2009). The concept of 'societal constitutionalism' especially developed by the legal sociologist and lawyer Gunther Teubner (2012) draws on Luhmann's systems theory to envisage a plurality of social spheres, not necessarily limited within national boundaries, ordering themselves on the basis of constitutional structures that would encourage responsibility and accountability within and beyond these spheres.

The variety of these and other developments in theory is too extensive to explore further here. It is perhaps enough to say that a great ferment in legal and constitutional theory has been inspired by the increasing transnational and international reach of law. It is this legal development, above all, that gives new relevance to the tradition of a sociological jurisprudence, attuned to juristic values but actively receptive to new social scientific research exploring how the idea of 'society' is being transformed by the increasing pace and scope of development of transnational social relations, institutions and forces (Cotterrell 2018).

CONCLUSION

Given the variety of approaches in legal and social theory, this essay has attempted only to select certain clusters of issues that are currently important, but often in different ways and differently interpreted, in both legal theory and social theory. They may indicate the most pressing problems about contemporary law that unite these intellectual fields.

It is clear, however, that, if the broad characterization of varieties of theory postulated at the beginning of this essay is accepted as useful, ultimate objectives of legal and social theory are likely to diverge. As suggested earlier, juristic theory is committed to serving the idea of law as a potentially valuable social institution (a commitment that will very often involve critique of the failings of actually existing law). To that extent juristic theory cannot be a wholly disinterested study of law (Cotterrell 2018, pp. 32-57). But legal philosophy and social theory, as characterized in this essay, have no such *necessary* commitment. Critical evaluation of

existing law can certainly sometimes be a product of legal philosophy and social theory. However, in the case of both of these scholarly fields, their *essential* intellectual commitment tends to be seen only as to uncommitted, dispassionate examination of their subject-matter.

For contemporary legal philosophy this is usually the rigorous clarification of concepts; for social theory it is the purportedly objective description and analysis of the nature of social life. Of course, such stereotypes are easily challenged. In particular, as social theory has become less monopolized by the scientific disciplinary protocols of academic sociology its interests have sometimes come closer to those of juristic theory. In any case, it often provides ideas of juristic relevance. And in practice the roles of jurist and legal philosopher are readily interchangeable.

From the intersections of legal and social theory considered in this essay some conclusions can be drawn as to where the most important theoretical concerns about law for the immediate future may lie. The increasing prominence of the 'transnational' threatens to disrupt many traditional understandings about the nature of law and society. And the question of the place of the individual in social thought (often traditionally theorized in sociology in terms of structure-agency problems) remains to haunt socio-legal inquiry. The exclusion of the individual in a picture of the social in terms of systems (as in Luhmann's thought) might seem reminiscent of Max Weber's (1985[1930], pp. 181-2) idea of an 'iron cage' of impersonal regulation enclosing individuals; and Foucault's idea of bio-power suggests a confinement of personal life even in what appear to be conditions of freedom and empowerment. So, Coleman's social theoretical individualism has been criticized for under-emphasizing the constraints that social structures and forces impose on individual rational choice (Alexander 1992).

In juristic and socio-legal theory, a long tradition of thought is concerned with the 'distance' of individual citizens from state power and its legal expressions. At the birth of modern sociology of law, Eugen Ehrlich (2002[1936]) warned of the dangers of the remoteness of lawmakers from regulated citizens. Later legal sociologists empirically studied citizens' knowledge and opinions about law, and today this tradition is continued in sophisticated ways in studies of popular legal consciousness and of the legal cultures (attitudes to and experience of law) of citizens and legal professionals (e.g. Halliday 2019; Nelken 2007). In juristic theory Lon Fuller (1969) put particular emphasis on the moral and technical failures that result from

excessively remote, insensitive and ignorant lawmaking. All such issues can be collected as aspects of a problem of 'moral distance' between the regulators and regulated which plagues much of contemporary law (Cotterrell 2019). The problem is intensified as more of law's sources become transnational and so are potentially even further removed from many citizens' experience. It is hard to see how law can operate as an integrative mechanism in society without this problem of moral distance being addressed as central in theoretical studies of law. It is a problem that ultimately underlies many of the most important issues on the urgent current agenda of political inquiry – issues, for example, about populism, democracy, authoritarianism and liberty that go beyond the possible scope of this essay.

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