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LEGAL THEORY AND SOCIAL THEORY

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Abstract

While social theory and legal theory were once closely intertwined, contemporary American sociology pays scant attention to recent developments in legal theory. But the problems that legal theory currently wrestles with are very similar to those with which sociology is now centrally concerned. This essay reviews major schools of thought in contemporary legal theory to introduce sociologists to some potentially useful literatures on the meaning of rationality; on critical theory; on the importance of gender, race, and class in understanding social institutions; on the interpretive turn; on the relationship between structure and agency; and on the revival of pragmatism.

"[S]ociology [is] the ghost of jurisprudence past."
Donald R. Kelley, *The Human Measure* (1990: 275)

INTRODUCTION

Annual Review articles customarily begin with a statement about the current salience of the field under review for the discipline of sociology. I cannot make any such claim. Legal theory (jurisprudence) is a field that is today largely unrecognized by sociologists, even sociologists of law. Why then devote an *Annual Review* paper to a field that is not prominently on the intellectual map of the discipline?

One answer is that sociology as a distinct discipline grew out of jurisprudence and maintained a close alliance with jurisprudence for most of the

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nineteenth century. Many early European social theorists studied law at university because sociology did not exist as an independent field of study. "Indeed," as historian James Q. Whitman has noted, "it is a striking fact that when modern social science finally appeared, it appeared not among theologians or philosophers, but among lawyers." (1991: 205). Understanding sociology's past requires understanding jurisprudence.

Another answer might be that legal theory has the potential to be important to contemporary sociology because legal theorists and social theorists have relevantly similar agendas these days. The main object of legal theory is legal doctrine, the set of concepts and categories that law students learn in law schools: constitutional provisions, statutory enactments, administrative regulations, precedents. But sociology is itself increasingly focused on cultural products as well: representations, mentalités, texts, and images. The ways in which legal theorists think about legal doctrine may be of more than passing interest to sociologists who are thinking through cultural formations.

But there is something even deeper about the contemporary connection between legal theory and social theory. Both try to reconcile the same tensions—between the written word and social practices, between structure and agency, between the normative and the descriptive, between formal elegance and descriptive adequacy. Just as the nineteenth century social theorists turned to law to see how society was organized, late twentieth century social theorists may look to law to find fellow travellers who are also trying to understand the complexity of the social world.

That said, I should provide one note of caution to sociologists about to undertake extensive reading in jurisprudence. Legal theorists often find that the same questions sociologists ask need different sorts of answers. Legal theorists tend to go back and forth between descriptive and normative arguments more fluidly than most social theorists (though feminist social theorists are one notable exception to this). Many legal theorists also accept certain contingent features of legal systems as being more fixed than sociologists would be inclined to imagine, sometimes conveying the impression that courts are the only institutions in the universe or that American rules of civil procedure (for example) are as fixed as fortresses and as unremarkable as gravity. Nevertheless, as I hope to show in this essay, social theorists may well find that legal theory is quite relevant for answering pressing questions in contemporary sociology.

JURISPRUDENCE AND SOCIOLOGY: A BRIEF HISTORY

Marx, Durkheim, and Weber had strong and deep ties to the law; Marx and Weber received their university educations in law, and Weber spent seven years being miserable while practicing it. Durkheim wrote about law through-

out his career. He believed that law was the preeminent example of a social fact and that the evolution of societies could be traced through the relative elaboration of civil and criminal law (Durkheim 1964, Lukes & Scull 1983, Hunt 1978, Grace & Wilkinson 1978). Marx thought that class was most importantly defined through the legally constituted relationship of ownership of property and that law could best be understood as an ideological formation (Cain & Hunt 1978, Collins 1984). For Weber, the modern age was characterized primarily by the triumph of rational-legal authority in which social institutions were progressively conquered by norms modelled on formal legal procedure (Weber 1978, Kronman 1983, Tronto 1984).

What law represented for Weber, Marx, and Durkheim was not just a set of institutions and professions (though these were important in their own right), but it was also a system of ideas: rational legality, ideology, doctrine. Law was important because it provided an intellectual framework within which bureaucrats, capitalists, and common people thought about and acted in the social world.

The idea that law was an important subject of academic study was common in nineteenth century Europe. The term "jurisprudence," both then and now, has at least two distinct meanings that are often intertwined: (i) the body of scholarship that theorizes about law (legal theory), and (ii) the set of rules, principles, and official pronouncements that constitute "the law" as a substantive field (legal doctrine). Nineteenth century social theory drew freely from both because jurisprudential writing at the time took for granted that legal doctrine should be the main object of legal theory. Legal scholars like Montesquieu (1748), Maine (1864), Savigny (1829), and Gierke (1913) traced broad patterns in the history of legal doctrine to illuminate equally broad conceptual categories of legal theory. Marx, Weber, and Durkheim also examined the historical development of law, believing that social theory should comprehend legal forms (Kelley 1990).

It is no wonder that European social theory had its origins in legal scholarship. The nineteenth century continental social theorists were writing in a time that was enthusiastic about general codes. Reading the French Civil Code of 1804 or the German Civil Code of 1900, one can see that legal doctrine is like a rough draft of social theory, comprising concepts, categories, rules and procedures for managing the vast array of human conduct in an orderly and systematic way. A comprehensive system of contract law reads like general social theory, for example. It specifies types of social actors, the ways they may interact with each other, what they may expect, what they may do when expectations are violated. Legal rules are the general principles for understanding and managing such interactions. The social theory that arose from familiarity with legal doctrine also engaged in systematic examination of social life, specifying the same sorts of things that nineteenth century legal codes did in a systematic and comprehensive way.

American sociology, however, never had such strong formal ties to jurisprudence. Concern with law as an intellectual enterprise, so prominently featured in continental social theory, gave way in the new American urban sociology to the empirical study of deviance, criminality, and social control. Not that these things weren't important; they were crucial in understanding the problem of social order that had become central to American sociology. But once the historical study of law was transformed into the contemporary empirical study of criminal behavior, doctrinal ideas and legal ideals became less prominent in social theory.

Within American legal scholarship, however, the new empirical sociology was influential. Oliver Wendell Holmes explicitly distanced himself from Continental abstract theorizing by urging his colleagues to focus on "our friend the bad man" for "we shall find that he does not care two straws for axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact" (Holmes 1920:172–73). Harvard Law School Dean Roscoe Pound launched a movement in sociological jurisprudence that concentrated on the relation between law and social interests, seeing the developing social sciences as crucial in the understanding of legal forms (Pound 1911–1912). The laissez-faire attitude of sociological jurisprudence eventually gave way to the New Deal theorizing of the Legal Realists, for whom theory took as its object the way law worked in practice, breaking down the intellectual walls between law, politics, society, and culture. While mainstream American legal thought had previously emphasized the pure logic of abstract legal concepts through legal formalism, the Realists and their precursors were at pains to demonstrate that law was a human product contingent on time and place (Hunt 1978, Harris 1980).

European social theory had an influence on the Legal Realists, but not through the mediation of American sociologists. Instead, Columbia law professor Karl Llewellyn, who discovered Weber's writings on a trip to Germany in 1927 (Ansaldi 1992), provided one link (Llewellyn 1930, 1962). Weber had noted that "order will be called ... law if it is externally guaranteed by the probability that physical or psychological coercion will be applied by a staff of people in order to bring about compliance or avenge violation" (1978: 34), and a similar view of law echoes eerily through the American Legal Realist movement (Rumble 1968, Frank 1930, 1949, Cohen 1935). Llewellyn's lectures to the entering class of the Columbia Law School in 1930 borrowed Weber's emphasis on the importance of legal professionals in defining the law: "What [legal] officials do about law is, to my mind, the law itself" (1930: 3). This emphasis remains in socio-legal scholarship to this day.

In the meantime, back in American sociology, European social thought reappeared through a different line of transmission. Through Parsons' *The Structure of Social Action* and later through strategic translations of the works

of Durkheim, Weber, Marx, and Simmel, American sociologists adopted the newly defined classics, but without the background to see just how these ideas resonated in European jurisprudence. Sociology appeared as a free-standing field with law as one possible subject; law was not seen as an intellectual tradition that had contributed in important ways to the development of social theory in the first place.

Numerous attempts in this century to provide a theoretically ambitious general social theory based in jurisprudence have been largely ignored by the discipline (Ehrlich 1913, Timasheff 1939, Hall 1963, Gurvitch 1973, Aubert 1969). More successful were attempts to link the sociology of law more directly to the classic writers: Durkheim's legacy was kept alive and extended in different ways by Schwartz & Miller (1964), Black (1989), and Evan (1990); Philip Selznick's discussion of the pervasiveness of norms of legality (1968) followed strong themes in Weber; Pashukanis (1929), Balbus (1977), Chambliss & Seidman (1982), and Thompson (1975) followed Marx. A group of scholars working in the 1960s and interested in combining social science and legal scholarship laid the foundation for what became the law and society movement, in which empiricism became the rallying cry (Friedman 1986). Demonstrating that "law in action" was different from "law on the books," early law and society scholars rejected normative jurisprudence and the doctrinal scholarship prevalent in law schools at the time, further estranging sociology of law from legal theory.

From the 1970s on, however, theoretical ferment in law and in social science brought the agendas of jurisprudence and general social theory closer together again. Theorists like Coleman (1990), Bourdieu (1987), Foucault (1977), and Luhmann (1985, 1988–1989) explicitly turned their attention to legal forms. Sociolegal scholars like Lempert & Sanders (1986), Post (1988, 1989), Simon (1993), and members of the Amherst Seminar on Legal Process and Legal Ideology (Silbey 1985, Sarat & Felstiner 1986, Yngvesson 1989, Merry 1990) embraced social theory in the course of studying law. Recently, the *Northwestern Law Review* published a symposium issue on Law and Social Theory in which notable social theorists and legal scholars explored the connection (1988–1989, with overviews by Mertz 1988–1989, van Zandt 1988–1989 and Calhoun 1988–1989). Social theory is having an increasing effect in law review articles, and legal theory is increasingly seeping into sociological writing, particularly in law and rationality studies and feminist theory.

But the overlap of potential mutual interest is even larger than this. In this essay I track some of the connections, outlining the major lines of work in contemporary legal theory: law and rationality studies, critical jurisprudence, the literary turn, discursive structuralisms and pragmatism. My discussion proceeds roughly chronologically, both across sections and within sections.

LAW AND RATIONALITY STUDIES

"Law and rationality" includes various schools of law and economics as well as the new public choice theories. They share a focus on individual choice and human rationality as the building blocks of social theory. Launched in the early 1960s, this field has since become crucially important in American law, and during the Reagan years many prominent theoreticians in the law and economics movement were appointed to the federal bench.

The growth of law and economics has paralleled the growth in legally informed rational choice theories in sociology, particularly those of Coleman, Elster, and Buchanan & Tullock. Coleman's *The Foundations of Social Theory* (1990) envisions social action as a system of rational decisions that both operate within an institutional framework and form the institutional framework itself. Coleman analyzes the way social context is derived from and influences the aggregation of individual decisions, through the legal ideas of sovereignty, rights, authority systems, and juristic persons. Elster uses his work on the limitations of a strict rationality model to analyze questions about constitutionalism and institutional design (1988), seeing constitutional drafting processes as a "gigantic natural experiment" for analysis of "bargaining, threats and warnings" (1991:447). Buchanan & Tullock (1962) applied public choice theory to the law. These approaches have a strong affinity with law and rationality studies, which divide into several schools.

The Chicago School

When Coase first published *The Problem of Social Cost* (1960), the field of law and economics was barely a blip on the intellectual map. Coase argued that in a world with no transaction costs, the initial assignment of property rights was irrelevant to the final distribution of property. And despite the fact that this looks like an argument that law makes no difference, the article is widely credited with launching the field, particularly the version associated with the University of Chicago and the *Journal of Legal Studies.*

The Chicago school of law and economics evaluates legal rules on the basis of their abilities to promote the efficient use of scarce resources and, in some versions, to produce the greatest amount of wealth in the society as a whole (Posner 1992). Legal rules should, and common law rules largely do, mirror what would happen if an error-free market could determine the outcomes, according to Chicago school theorists. Their approach is relentlessly individualistic, using Gary Becker's particular version of microeconomics for most of the theoretical framework (Becker 1976). It is also very court-centered, focusing on legal doctrine as it has been elaborated by judges as the main object of study. Most of the time, the concrete results of the Chicago school writers are consistent with a libertarian conservativism and, not surprisingly,

the approach has generated a large critical literature (Leff 1974, Scheppele 1988), attacking it for being insufficiently sensitive to the variety of values in the law.

The Yale School

Guido Calabresi's book *The Cost of Accidents* (1970) launched the Yale school much the same way that Coase launched the Chicago school. Generally, a group of writers clustered around the Yale Law School and around the *Journal of Law, Economics and Organization* has been concerned with questions of institutional design (Williamson 1975), choices of legal rules (Calabresi & Melamed 1972), and ethical issues in institutional arrangements (Coleman 1988), rather than with working out ideal results from free-market assumptions. The approach tends to be quite institutional and realistic, focusing in particular on the relationship between the administrative state and economic formations. In contrast with the Chicago School, which views government largely as a pathology interfering with well-functioning markets, the Yale School sees public institutions as one organizational form among many which might handle a particular social problem. Rose-Ackerman, for example, argues for a reformist theory of the administrative state that starts from welfare economics rather than from microeconomics (1988). Such an approach generates a concern for social effects as well as individual effects.

The Legal Incentives School

Economists in this group focus on the effects of legal rules on the incentives of individuals who are engaging in rational action. As evidenced in the work of Shavell on tort law (1987), Mnookin & Kornhauser (1979) on bargaining in divorce cases, and in the Polinsky (1989) and Cooter & Ulen (1987) textbooks, scholars in this group use rational choice models to derive the expected effects of alternative legal rules, and then use welfare economics to assess which of competing legal rules produces the most desirable results. Applying the methods of public policy analysis to the study of legal rules, economists of this sort take law to be one of many sources of incentives, constraints, and opportunities.

The Public Choice School

Starting with Buchanan & Tullock (1962), public choice theory examines the collective consequences of individual choice. In legal circles, this traditionally meant thinking about the ways in which individual rationality produced collectively irrational results. But public choice has entered the theoretical fray in law schools most recently with the increasing concern about the rationality of the legislative process and its impact on statutory drafting and interpretation (Farber & Frickey 1991), the rationality of administrative agency decisions

(Eskridge & Ferejohn 1992), and the rationality of judicial review (Ferejohn & Weingast 1992). Critics have complained that these theories fail to take into account important differences across institutions (Rubin 1991), but the ability to use a theory that applies to all institutions regardless of difference is one of the main strengths, proponents claim.

Law and rationality studies have had an enormous impact on law. Many practioners of this line of scholarship are now federal judges, applying their theories in the course of their judicial decisions. Virtually every major law school has an economist on the faculty to teach economics to law students. And law and rationality studies have had an important influence in rational choice theories in sociology, where law is now more prominently featured as an institutional constraint. In this area, at least, law and sociology are on quite good terms with each other.

CRITICAL JURISPRUDENCE

Politically and methodologically the opposite of law and rationality studies, critical jurisprudence is also flourishing in law schools. Critical jurisprudence comes from the academic left, parallelling the growth of cultural studies (Grossberg et al 1992) and producing an enormous range of writings on law and oppression and on ways of making legal institutions more democratically responsive. Critical jurisprudence embraces a far-flung and large range of scholars who identify themselves as being engaged in critical legal studies, feminist theory, and/or critical race theory. Many critical theorists identify with more than one of these labels, and much exciting intellectual activity these days is happening at the boundaries (Menkel-Meadow 1988, Harris 1990, Rhode 1990, Crenshaw 1989, Torres 1988, Trubek 1984, Johnson 1991).

Critical Legal Studies (CLS)

Starting as a social movement within American law schools in the late 1970s, the group called "The Conference on Critical Legal Studies" created an intellectual home for radical law teachers and by one count in 1989 claimed over 700 articles (Hutchinson 1989). Critical legal studies (CLS) is "influenced by a variety of currents in contemporary radical social theory, but [CLS] does not reflect any agreed upon set of political tenets or methodological approaches" (Kennedy & Klare 1984: 461). Nonetheless, certain critical themes emerge that capture the spirit of much CLS writing.

ATTACK ON LIBERAL LEGALISM Many CLS writers believe that liberal legal theory, with its conceptions of rights, neutrality, and procedural justice, is an ideological cover for decisions governed by power and the maintenance of inequality (Unger 1986). By speaking in abstract terms, liberal legalism dis-

guises its own fictions: that rules can decide concrete cases, that legal subjects are autonomous individuals, that intentions are sufficient to explain social action (Kelman 1987). Liberal legalism is exposed in CLS writings as a justification machine that serves primarily to reproduce social inequality. (But at least one critic complains that the liberalism CLS attacks is not a version most liberals are defending—Herzog 1987).

THE INDETERMINACY THESIS When judges decide cases, they claim that their results are compelled by the law. But actually, CLS writers argue, law consists of a whole variety of contradictions and inconsistencies, allowing decisions to go either way. Law is logically indeterminate and fails to compel a particular result (Singer 1986). Therefore, judicial decisions cannot be the self-contained models of reasoning that they pretend to be. Instead, they must rest on grounds outside of formal legal doctrine, grounds which are inevitably political (Kennedy 1979, Dalton 1985, Tushnet 1983, Klare 1978).

THE RELATIVE AUTONOMY OF LAW Having unmasked (or "trashed") liberal legal theory and shown that cases cannot be compelled by doctrine, CLS writers argue that law is inevitably tied to politics. Borrowing heavily from both Marx and Weber, critical legal scholars have elaborated a view that law is "relatively autonomous," meaning that although law uses a special form of argumentation that makes it distinct from ordinary politics, it always serves political interests and purposes (Kairys 1990, Gordon 1984). The framework of relative autonomy helps to explain why law may appear to be a self-contained logical system—it does develop according to its own internal rules of operation—but also why law must always be tied to the political.

LEGAL CONSCIOUSNESS Law operates by producing in those subject to it or trained in its use a specific legal consciousness. CLS writers have analyzed both the way in which law sets the terms within which the world is seen and the efforts of those dominated by such visions to escape from these ideologies (Kennedy 1980, Klare 1978).

These themes combine to form a basis for a critical legal practice, devoted to assisting the oppressed and to challenging power, particularly when it masquerades as inevitability. CLS scholars unmask the apparent neutrality of legal premises and show precisely how legal ideas and ideals are constantly being reconstructed to hide their own agendas. And CLS scholars often show the subaltern, subordinated discourses present alongside the authorized ones.

Feminist Jurisprudence

Feminist jurisprudence is centrally concerned with the influence of gender and gendered conceptions of the world on law and vice versa. Since law is a crucial

site in which the fight for women's equality has been carried out, feminist jurisprudence has been important in the development of general feminist theory outside of law. Recent collections reveal the impressive vibrancy of feminist jurisprudence (Bartlett & Kennedy 1991, Weisberg 1993, Frug 1992a, Goldstein, 1992).

Most feminists share the view that society is patriarchal, organized and dominated by men, and therefore not necessarily hospitable to women. This dominance can be seen in the way in which gender (the social meaning given to biological sex differences) is employed to mark hierarchy. The role of gender is particularly crucial in law since law regulates all other institutions in a society. Starting from important analyses of areas of the law that were most obviously about women—abortion (Ginsburg 1985, Law 1984, Siegel 1992), rape (Estrich 1987, Olsen 1984), domestic violence (Mahoney 1991), pregnancy (Williams 1984–5), sexual harassment (MacKinnon 1979), employment discrimination (Schultz 1990), work and family issues (Olsen 1983), divorce (Fineman 1991), sexual orientation (Robson 1992), child custody (Fineman 1988), and pornography (Dworkin 1981)—feminist legal theory is now seeing the ways in which law is gendered all the way down, from topics not traditionally thought of as presenting feminist issues, like contracts and torts (Dalton 1985, Bender 1993), to legal education (Menkel-Meadow 1988), to legal methodology (Bartlett 1990), to legal practice (L White 1990, Davis 1991, Scheppele 1992). Feminist legal theory is not only about women; feminist legal theory is now a general theoretical approach to law.

So what does this approach include? Feminists disagree too much to have a common set of answers; what they share is a common framework within which feminist debates occur, emphasizing equality and difference, relations of power, complexities of social position, and subjectivity. They also share a concern with the common question: How can women's situation best be bettered?

EQUALITY VS DIFFERENCE On this question, feminists divide between those who favor treating women equally (in other words, just like men) (Ginsburg 1985) and those who favor treating women differently from men, in order to ensure equality in results (Littleton 1987, Minow 1990). Breaking new ground, "equality feminists" first achieved a series of legal victories in the areas of employment discrimination. This ultimately proved unsatisfying, however, when other barriers, like women's unique reproductive capacities, could not be handled within a strict equality framework. If women had to be treated just like men, then how could they be given maternity leave or pregnancy benefits? "Difference feminists" then argued that formal similarity of treatment would never be enough, because women and men are relevantly different. Such differences needed to be taken into account in fixing legal rules, "difference

feminists" argued, or these rules would simply reproduce inequality. Equality could be achieved through differential treatment.

DOMINATION AND SUBORDINATION Into this debate over equality and difference came another argument: perhaps what mattered was not the formal relation of comparison between men and women, but rather their power relative to each other. Men dominated; women were subordinated. From this, argued Catherine MacKinnon, one could attack the means through which men's domination is achieved: control over sex (MacKinnon 1989). In domination theory, the task of feminism is to end the subordination of women, not simply to make men and women "equal" in some abstract sense (Scales 1986, Colker 1986). Everyone could be equal and oppressed: the task of dominance feminism was to end the oppression.

ESSENTIALISM VS ANTIESSENTIALISM But while difference and domination were becoming the central analytical tools of contemporary legal feminism, other differences and relations of domination among women themselves began to become apparent. Both dominance and difference theorists were often accused of being essentialist—that is, of defending an idea of woman's "essence" that was the same for all women. Though few feminists overtly defend essentialism, something like essentialism was presumed in early feminist theory as a way of sharpening the primary contrast between men and women. Antiessentialist theory celebrates difference among women and refuses to see "woman" as a unitary social category. This has clearly become the more dominant view in recent years within feminist legal theory, as feminists have examined questions of race, ethnicity, and sexual orientation (Harris 1990, Robson 1992, Matsuda 1989a, Crenshaw 1989, Spellman 1988).

SUBJECTIVITY AND RELATIONALITY Feminist legal theorists are also now exploring different models of thinking about legal subjects (i) as requiring connections with others rather than seeking separation through claims of autonomy (West 1988, Minow 1990, Nedelsky 1989), (ii) as defined by their subjectivity rather than by objectivist conceptions (Matuda 1989b, Williams 1991), and (iii) as finding that the experience of subordination (Menkel-Meadow 1988) or the sense of an embodied self (West 1988) leads to special insight. These feminists are turning what were once thought to be liabilities of women into sources of strength and illumination, and in so doing, they are reconfiguring the subject of law.

Critical Race Theory

Like feminist legal theory and often closely aligned with it, critical race theory is centrally concerned with questions of oppression, difference, and equality.

Critical race theory had its official beginning in 1989 when a group of scholars of color held a conference in Madison, Wisconsin. Many of these scholars had been previously involved with critical legal studies or with feminist jurisprudence, and the 1989 conference ratified what had already been the case for some time: Critical race theory was a major presence in American legal theory.

Critical race theorists are a diverse group, speaking about many different areas of law in many different voices. Some central themes can be found, however, themes highlighted below in the words of critical race theorists.

"LOOKING TO THE BOTTOM" (Matsuda 1989a): Critical race theorists generally start from the observation that to be a person of color in America is to be oppressed, to have one's subjectivity colonized by others who either silence the opposition of persons of color or speak in their name. Being oppressed creates fundamental disadvantages for those who are so treated. Critical race theory must start from the bottom, by focusing on the experiences and situations of oppressed people of color, giving voice to the concrete experiences of subalterns (Matsuda 1989a, Peller 1990, Johnson 1991).

"WE SEE A DIFFERENT WORLD..." (Lawrence 1990): Because they share experiences of oppression, people of color see the world differently from those who have not had such experiences. With different vision and different voice, scholars of color can bring to legal analysis perspectives that were previously excluded (Lopez 1987, Bell 1987, 1992, Williams 1991).

"A PLEA FOR NARRATIVE" (Delgado 1989) To bring these excluded perspectives to the law, some critical race scholars tell stories about their experiences or the experiences of other people of color to make their presence real in legal scholarship (Bell 1987, 1992, Williams 1991, Scales-Trent 1990, Matsuda 1989b). Overcoming the abstraction of conventional legal analysis and the sanitized versions of facts presented in court decisions, the highly personal stories in these articles break through alleged neutralities.

"EXPLAIN THE SOURCE AND STRENGTH OF MINORITY CONVICTIONS THAT COURTS ... ARE CAPABLE OF BIAS" (Davis 1989: 1559): Some critical race theorists trace the ways in which law undermines people of color, despite official rhetoric to the contrary. Lawrence explains the extraordinary pervasiveness of unconcious racism and shows how it is ignored by courts (1987). Austin traces the material conditions of young women of color and shows how courts fail to recognize them (1989). Davis shows how African Americans interpret legal decisions as "microaggressions" whose cumulative effect is large (1989). Harris analyzes the way that whiteness has been treated as a property right, excluding people of color from making privileged claims (1993). Matsuda has

identified "accent discrimination" by showing how the comprehensibility of an accent depends on the hearer as much as the speaker, but courts have not heard this yet (1991).

"MULTIPLE CONSCIOUSNESS AS A JURISPRUDENTIAL METHOD" (Matsuda 1989a) People of color have an ambivalent relationship to law. Sometimes the law helps overcome discrimination, as when Williams reports that having a formal contract can limit the arbitrariness to which people of color are exposed (Williams 1991). But other times the law fails miserably. Matsuda counsels multiple consciousness, being able to think both inside and outside the law. Crenshaw also proposes a multiplicity of identifications in dealing with the combined effects of gender and race (1989). Such accumulated scholarship shows the profound and indelible mark of race in the law.

Critical race theory has come in for criticism (Kennedy 1989), but as a recent bibliography demonstrates, it is more than alive and well (Delgado & Stefancic 1993).

THE LITERARY TURN

Like many disciplines in the 1980s, law reeled from the invasion of literary theory. The new literary theory hit law hard because it challenged fundamental assumptions about the stability of legal doctrine. In the standard view, law was supposed to govern by constraining the future with words written in the past. But the new literary theory showed that all texts, including legal ones, were unstable in their meanings, either because writing always represses what it cannot control (Derrida 1976) or because meaning varies with the relevant "community of interpretation" (Fish 1980). Of course, these observations were broadly consistent with what critical legal studies, feminist, and critical race scholars were also writing about: that claims to objectivity and stability of the law were built on the power of law to suppress alternative viewpoints. The theoretical destabilization of texts and the debates that resulted can be discussed in the general categories of legal interpretation, postmodernism, and narrative jurisprudence.

Legal Interpretation

If, as literary theory demonstrated, texts were unstable, then how could they be shored up again to provide authoritative interpretations? Of course, critical legal scholars were saying that such a thing could not be done at all (Tushnet 1983, Levinson 1982). But other legal theorists tried to come up with ingenious ways to stabilize one of the embarrassing multiplicity of apparently "correct" interpretations any legal text could produce. Each of these efforts resulted in bringing in something from outside the text to accomplish this purpose, and

this is where law must be seen as caught in a larger web of cultural processes. Law could no longer be officially portrayed as a closed system of logic immune from social influences.

Much of the fight occurred over interpretation of American law's master text: the US Constitution. Reagan's Attorney General Edwin Meese argued that the only responsible way for a court to interpret the Constitution was by reference to the intentions of the framers (Meese 1988, but see Brest 1980). Supreme Court Justice William Brennan argued that a court must inevitably engage contemporary concerns: "We current justices read the Constitution in the only way that we can: as twentieth-century Americans" (Brennan 1988: 17). Into this debate plunged some substantial fraction of all jurisprudential writing published in the 1980s.

What resulted was a vast catalogue of different strategies of reading and understanding texts. In the 1950s, Wechsler had argued that courts should decide constitutional questions by reference to neutral principles that could be defended regardless of the particular dispute at hand (1959). And Black and Ely tried to argue that one need not look outside the text at all. Staking out "structuralist" positions (albeit different ones), they argued that the meaning of individual clauses in the Constitution could and should be derived either from the internal structure of the overall document or the sense that could be made of the vision of government and society that such a text contained (Black 1969, Ely 1980). Also trying to stay close to the text, Schauer noted that the plain language of constitutional provisions could convey meaning unproblematically to ordinary readers most of the time (1985).

But an assault on these strategies of reading was mounted by a set of authors who were concerned with specifying the social context under which language could be read like that. Fish argued that the idea of a single literal language and a recourse to the text alone only fools the interpreter, since the meaning of words is always supplied by context. While in some circumstances the context may be taken for granted enough to be unproblematic, it is always socially situated in a particular "community of interpretation" that ultimately judges the "reading" to be reasonable or not (1980). Fiss also located grounded readings in the larger community, in the invocation by a judge of public values (1982). Dworkin argued that the relevant context could be constructed by a judge who first developed a justifiable political theory and then read a legal text in light of that theory (1986). And Sunstein argued that one needs to situate texts in the context of the political process that gave rise to them to understand how they might be read (1990). Levinson provides a useful and humorous summary of this literature in his analysis of the "adultery clause of the Ten Commandments" (1985).

In the meantime, other theorists were taking a more cultural view of the interpretation issue. Rather than trying to justify particular answers to particular

legal questions, interpretive theorists developed accounts of interpretive practice as an ongoing activity of legal and other social institutions. Starting from the stark proposition, "We inhabit a nomos—a normative world," Robert Cover examined the way in which any community contains within it multiple communities of normative meaning. Legal interpretation links general nomos with particular narrative, but in so doing judges flatten the normative diversity of the social world through exclusion of alternative perspectives (1983). Later, Cover showed how the interpretive acts of judges could be seen as acts of violence since they produced punishment, disruption, and violence in the world (Cover 1986, Sarat & Kearns 1991, 1992).

Other cultural theorists examined how legal representation and broader cultural images both constitute and resist each other. Geertz showed the interpretive fluidity around central legal conceptions in different cultures (1983). JB White explored the disjunctures that result when one system of thinking is translated into another (1990). Scheppele showed how the construction of facts is always an interpretive enterprise (1990). Humphreys shows how much of law could be seen as discourse (1986). The interpretive revolution ran all the way through legal scholarship.

Postmodern Legal Theory

Postmodernism can be described as a theoretical stance that attacks modernism. As an intellectual project, modernism creates order, systems, structures and plans through conceptual neatness and appeals to shared values. Postmodernism is, by modernist standards, messy. It separates images from the objects that such images claim to represent and in so doing denies the possibility of finding truth; it combines cultural shards, textual pieces, imaginaries. Postmodernism defies logic. It, perhaps fittingly, also defies common definition by those who claim to practice it (Schanck 1992).

In some legal postmodernist writing, modernism is equated with "the Enlightenment project" of liberalism, and so postmodernism becomes a critique of liberalism (Schlag 1990). Some postmodernist legal theorists emphasize the social transformation that has broken apart modernist orderings, creating a postmodern condition to which legal interpretation must respond (Balkin 1992). Others emphasize the impossibility of creating legitimate legal interpretations in the face of the now-demonstrated instability of texts (Hunt 1990). As it is used in legal theory these days, postmodernism tends to be a critical discourse. As a result, postmodern scholarship is allied with some aspects of critical legal studies (Peller 1985), feminism (Cornell 1991, Patterson 1992, Frug 1992b), and critical race theory (Thomas 1992), in addition to bringing in strong strands of sociological constructivism (Santos 1987, Eisenstein 1988). Even Derrida himself has turned his attention to the deconstruction of law (Derrida 1992).

Narrative Jurisprudence

Narrative jurisprudence understands legal discourse and the discourse of legal subjects as stories (Scheppele 1989). Recent social theory indicates that people interpret what happens to them narratively by fitting them into story structures (Bruner 1991, Carr 1990). Courts, too, makes sense of things as stories, since they hear cases as elaborations of particular events through story forms (Hastie & Pennington 1991).

Narrative jurisprudence has two distinct strands. In one, linked to some versions of feminism and critical race theory, narrative is the method through which oppressed groups and individuals make their experiences visible in law. "Outsider jurisprudence" (Matsuda 1989b) involves women and people of color telling stories of oppression, sometimes as parables (Bell 1992), sometimes as personal revelations (Williams 1991, Ashe 1989, Scales-Trent 1990), sometimes as a strategy of empowerment (Delgado 1989, Mahoney 1991), sometimes as guide to legal practice (L White 1990), sometimes to reform the law (Matsuda 1989b). These stories are consciousness-raising in the legal literature, making experiences visible that might otherwise not be known to a community that is predominantly white and male (Abrams 1991).

The other strand of narrative jurisprudence analyzes stories that have appeared in legal settings, sometimes to work out what makes some stories more believable than others (Bennett & Feldman 1981, Conley & O'Barr 1990, Scheppele 1992), sometimes to use them as a way of exploring the social context that makes these narratives compelling (Foucault 1975, Ginzburg 1983, Guha 1987, Davis 1987), sometimes to identify their standard forms (Sherwin 1988, Lopez 1984). Bringing methods from the humanities into the analysis of legal stories, narrative theorists try to move away from abstraction to the concrete experiences of particular individuals (Elkins 1985, West 1985).

Stories add in the vividness of detail and context what they may lose in representativeness. Some writers find this disturbing, claiming that the focus on the potentially idiosyncratic individual case obscures larger social patterns (Farber & Sherry 1993, Tushnet 1992).

DISCURSIVE STRUCTURALISMS

Social theorists have been making structuralisms more open to discursive influence through a new emphasis on the social construction of meaning. Where old structuralisms envisioned society as a set of rigid structures off which people bounced like tennis balls, the new discursive structuralisms see society as a dynamic interplay between meaningful action and more enduring social formations. Bourdieu, Giddens, Foucault, and (in one reading, at least) Luhmann have been influential in legal theory by providing a way to think about connections between legal knowledge and social structure.

Practice Theory

Developed through the works of Bourdieu and Giddens, practice theory involves tracing the connections between the daily practice of social agents and the larger structures that those practices constitute, resist, and change. Bourdieu is centrally concerned with the reproduction of social structures through the meaningful activity of agents. From the standpoint of agents, social structures appear as a set of inevitabilities, the naturalized patterns of thinking and doing that constitute a "habitus." But agents create these structures over time by reproducing meaning with the imprint of power (Bourdieu 1977, Bourdieu & Wacquant 1992). In his analysis of the "juridical field," Bourdieu shows how legal concepts and categories form a habitus within which legal practitioners engage the social world and within which struggles over meaning and power are contained (Bourdieu 1987).

Giddens elaborates a view of the "duality of structure," envisioning social structures as both the precondition and result of social practices. Constraining and enabling human agency, social structures comprise generative rules and relationships that social actors use strategically to make their way in the world (Giddens 1979).

Practice theory is starting to catch on among legal theorists, sometimes within a critical legal studies framework and sometimes outside. Coombe (1989), Peller (1985), Boyle (1985), and Francis (1986) are working out applications of practice theory in areas as diverse as sexual violence and debt collection.

Genealogical Inquiries

According to Foucault, genealogies are "histories of the present" that reconstruct the past, showing how knowledge of the "real" and the "inevitable" changes over time. For Foucault, power is inextricably intertwined with knowledge, so that "discourses" (relatively autonomous fields of representation and belief) both shape struggles for power and compete among themselves for dominance in the social world. Law, for Foucault, is a historically situated set of discourses that produce conforming subjects (Foucault 1977, 1978, Hunt 1992).

Foucault's work has produced a growing literature in sociolegal studies that is simultaneously sympathetic and critical. Simon's work on the uses of parole (1993), Constable's book on the genealogy of the mixed jury (1994), and Garland's book on theories of punishment (1990) are particularly creative genealogies of legal practices.

The Amherst School

The Amherst Seminar on Legal Ideology and Legal Process has combined elements of practice theory with Foucauldian insights about the discursive

construction of legal consciousness (Silbey 1985, Bumiller 1988, Ewick & Silbey 1992). Members of this interdisciplinary seminar have concentrated on the way in which legal ideologies, the concepts and categories of legal thought, are often negotiated in the process of application (Mather & Yngvesson 1980–1981, Sarat & Felstiner 1986, Harrington 1985). They recognize that legal ideology is found not just in official legal settings like courtrooms, but it is also mobilized and constituted in nonlegal settings as well (Merry 1990, Yngvesson 1989, Brigham 1987). And they explore these processes doing ethnographies, collecting stories, and following the traces of legal discourse in everyday life as well as traces of everyday life in legal discourse.

Autopoesis

Niklas Luhmann at first glance looks like a structural functionalist with his emphasis on systems theory, but on closer reading some of the same discursive structuralist tendencies are apparent. In *A Sociological Theory of Law*, Luhmann describes law as the institution in society that deals with disappointed expectations, both normative and descriptive (Luhmann 1985). When violations occur in what one expects would be done or in what one believes should be done, law is the institution that remedies disappointed expectations by rewriting the world. Most of those who have been influenced by Luhmann focus on the way in which law is constituted as a relatively autonomous system in a differentiated society, emphasizing systemic aspects of law (Teubner 1988). But Luhmann may also be read to say that law is an institution that mediates between expectations and potential future states, between cultural formations and material circumstances.

LEGAL PRAGMATISM

Perhaps exhausted by all of this theorizing, legal scholarship has turned to pragmatism (Brint & Weaver 1991). Pragmatism eschews large conceptual schemes in favor of contextualized knowledge. It starts from the present "here and now," rather than from imagined neutral places and times. It goes somewhere that will make a difference, doing only what is necessary to solve practical problems at hand. It is antifoundationalist, believing that knowledge has only the organization we bring to it and that the search for first principles inevitably turns up nothing very useful. To the pragmatist, truth comprises those things we know that hang together with everything else we believe to be the case. Theory is not what is done on special occasions; theory is what each of us does all the time to make sense of things.

Law, to the pragmatist, is not a pure logical system, but a set of practices: situated, instrumental, sensitive to time and place (Grey 1989, Minow & Spellman 1989). Judges should decide cases without grand schemes, but with

sensitivity to the local context of each case (Farber 1988). Legal theorists should stop straining at abstractions and should examine history and culture to understand how law works. And many legal theorists have joined the pragmatist cause, creating alliances between pragmatism and feminism (Radin 1989), the left generally (Baker 1992), and most schools of legal thought. In fact, one commentator noted, "it seems only a slight exaggeration to suggest that a movement which five years ago included almost no one today appears to embrace virtually everyone" (Smith 1990: 409).

AND SOCIOLOGY?

This necessarily brief survey of a wide range of legal theorizing should convince sociologists that many of the same intellectual currents that preoccupy sociologists are also central to jurisprudence. But it should also say more. Social theory has its roots in legal theory, and the agendas of classical social theorists are tied up with jurisprudence. Contemporary social theory is struggling with many of the same issues as contemporary legal theory is, but now, with the differentiation of disciplines, each field is more likely to go it alone. If legal theorists and social theorists followed the developments in each other's disciplines more closely, we each might avoid some blind alleys that the other discipline has already discovered, and we might learn something in the juxtapositions that would otherwise go unnoticed.

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