

THE THIRD PILLAR OF JURISPRUDENCE:  
SOCIAL LEGAL THEORY

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## INTRODUCTION

When contemporary legal theorists engage the question “What is law?” their analyses typically are framed in terms of a grand contest between legal positivism and natural law. In an encyclopedic entry on “The Nature of Law,” Andrei Marmor observes:

In the course of the last few centuries, two main rival philosophical traditions have emerged, providing different answers to [traditional] questions [regarding the nature of law]. The older one, dating back to late mediaeval Christian scholarship, is called the natural law tradition. Since the early 19th century, Natural Law theories have been fiercely challenged by the legal positivism tradition promulgated by such scholars as Jeremy Bentham and John Austin.<sup>1</sup>

A recent text entitled *The Nature of Law* covers only the debate between natural lawyers and legal positivists.<sup>2</sup>

These two hold pride of place in standard accounts of jurisprudence,<sup>3</sup> standing above an unruly jumble of other theoretical approaches.<sup>4</sup> A common arrangement in jurisprudence texts is to begin with natural law and legal positivism, in that order, followed by legal realism, and then a host of contemporary schools of thought.<sup>5</sup>

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1. Andrei Marmor, *The Nature of Law*, STAN. ENCYCLOPEDIA PHIL. (May 27, 2001), <http://plato.stanford.edu/entries/lawphil-nature> [<http://perma.cc/JAD8-TVWL>] (last updated Feb. 25, 2011). Although he acknowledges sociological approaches, Larry Solum likewise centers his analysis on natural law and the legal positivist school of thought. Larry Solum, *Legal Theory Lexicon 065: The Nature of Law*, LEGAL THEORY BLOG (May. 11, 2005), [http://lsolum.typepad.com/legal\\_theory\\_lexicon/2008/05/legal-theory-le.html](http://lsolum.typepad.com/legal_theory_lexicon/2008/05/legal-theory-le.html) [<http://perma.cc/UD83-89FM>] (last visited Apr. 11, 2015).

2. THE NATURE OF LAW: PHILOSOPHICAL ISSUES IN CONCEPTUAL JURISPRUDENCE AND LEGAL THEORY (Kenneth Einar Himma ed., 2011).

3. *Id.* at v.

4. See generally BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT (6th ed. 2012) (discussing various theories of jurisprudence as well as the debates surrounding those theories that are presented in influential primary texts).

5. See, e.g., ROBERT L. HAYMAN, JR. ET AL., JURISPRUDENCE CLASSICAL AND CONTEMPORARY: FROM NATURAL LAW TO POSTMODERNISM (2d ed. 2002); JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE (rev. ed. 1990); FREDERICK SCHAUER & WALTER SINNOTT-ARMSTRONG, THE PHILOSOPHY OF LAW: CLASSIC AND CONTEMPORARY READINGS WITH COMMENTARY (1996).

This ordering is chronological as well as thematic: natural law theory began in classical times;<sup>6</sup> legal positivism arose in the nineteenth century to challenge natural law;<sup>7</sup> legal realism arose in the 1920s and 1930s to debunk formalist views of law;<sup>8</sup> the Hart-Fuller debate of the late 1950s marked the reenergizing of legal positivism;<sup>9</sup> and in the 1970s, Dworkin challenged Hart's dominance,<sup>10</sup> law and economics examined law from an economic perspective,<sup>11</sup> and critical legal studies of the radical left attacked mainstream legal liberalism.<sup>12</sup> Now we have a hodge-podge of descendants or variations of these schools, with natural law and legal positivism enjoying prominence above all others.

A third major pillar of jurisprudence exists, I argue in this Article, and has existed for several centuries as a rival to natural law and legal positivism, though it goes mostly unrecognized today owing to the vagaries of labeling and intellectual fashion.<sup>13</sup> Despite lacking an acknowledged name and identity, several of the core propositions of this theoretical stream are now virtually taken for granted—a remarkable achievement for a theoretical perspective on law that remains all but invisible.

Contrary to what the title might suggest, it is not my contention that every existing legal theory can be squeezed into one of these three jurisprudential approaches; nor do I claim that this is the only way to categorize current theories about law.<sup>14</sup> My claims are more limited: this third theoretical stream constitutes a long-standing and coherent alternative to natural law and legal positivism and the theoretical discussion of law will benefit from recognizing it as

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6. MURPHY & COLEMAN, *supra* note 5, at 12.

7. *Id.* at 19.

8. HAYMAN, JR. ET AL., *supra* note 5, at 159-60.

9. MURPHY & COLEMAN, *supra* note 5, at 36-39.

10. *Id.* at 39-46.

11. J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 437-41 (1992).

12. MURPHY & COLEMAN, *supra* note 5, at 51-55.

13. An exception to this general treatment is RAYMOND WACKS, UNDERSTANDING JURISPRUDENCE (3d ed. 2012). Wacks allocates a chapter to "Law and Social Theory" and a chapter to "Historical and Anthropological Jurisprudence." My treatment differs in that I unite these schools within a single tradition, whereas he presents these as distinct approaches. A version of the tradition I am referring to was also recently mentioned in Hanoch Dagan & Roy Kreitner, *The Character of Legal Theory*, 96 CORNELL L. REV. 671, 675-77 (2011).

14. For a different three-part classification, see ROBIN WEST, NORMATIVE JURISPRUDENCE: AN INTRODUCTION (2011) (analyzing natural law, legal positivism, and critical legal studies).

such.<sup>15</sup> Recognition of this third branch of jurisprudence will create a framework that facilitates the incorporation of insights currently at the margins of discussions of the nature of law, including insights about legal institutions, legal functions, legal efficacy, legal change, legal practices, legal development, legal pluralism, legal culture, and more.<sup>16</sup> This jurisprudential tradition, labeled “social legal theory” for reasons that will become evident, is characterized by a consummately social view of the nature of law.<sup>17</sup>

### I. THREE NINETEENTH-CENTURY RIVALS

I will first attempt to loosen the grip of conventional assumptions by noting that legal theorists a century ago would have been surprised by Marmor’s identification of only *two* great jurisprudential rivals and also by the prominence he accords to natural law.<sup>18</sup> As Roscoe Pound wrote in 1911:

Until recently, it has been possible to divide jurists into three principle groups, according to their views of the nature of law and the standpoint from which the science of law should be approached. We may call these groups the Philosophical School [natural law], the Historical School, and the Analytical School.<sup>19</sup>

In the late nineteenth century, the historical school was equal in stature to legal positivism,<sup>20</sup> whereas natural law theory was mired in a lengthy state of quietude.<sup>21</sup> As legal historian J.M. Kelly put it:

If we scan the nineteenth century for any trace of the natural-law belief which had survived from the ancient world until well after the Reformation, being eclipsed only by the rational scientific spirit of the Enlightenment, we will find it difficult to locate anywhere outside the teaching of the institutional Catholic

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15. See *infra* Parts V-VI.

16. See *infra* Part IX.

17. See *infra* Part VI.

18. Marmor, *supra* note 1.

19. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591, 591 (1911).

20. See Roscoe Pound, Book Review, 35 HARV. L. REV. 774, 774 (1921); see also Melville M. Bigelow, *A Scientific School of Legal Thought*, 17 GREEN BAG 1, 1 (1905).

21. Bigelow, *supra* note 20, at 1.

Church, which never abandoned the Aristotelian-Thomistic tradition.<sup>22</sup>

This statement sweeps too broadly, for it ignores that natural law thought was taught in the standard school curriculum during this period,<sup>23</sup> but Kelly is right that jurists hardly write about natural law theory.<sup>24</sup>

Natural law was in such disfavor in philosophical circles by the end of the nineteenth century that it was occasionally suggested that there was no reason to mount scholarly arguments against it.<sup>25</sup> Renowned Oxford Professor James Bryce remarked in *Studies in History and Jurisprudence* that “we now seldom hear the term Law of Nature. It seems to have vanished from the sphere of politics as well as from positive law.”<sup>26</sup> For decades it remained dormant. An article in 1915 noted, “[n]ow and again we are told that a revival of the Law of Nature is in process or impending,” but continued, a “new movement of this character ... can scarcely be [seen].”<sup>27</sup> Lon Fuller lamented in 1940 that natural law was then widely perceived as “cobwebby illusion.”<sup>28</sup> He wrote:

I believe that there is much of great value for the present day in the writings of those thinkers who are classified, and generally dismissed, as belonging to the school of natural law, and I regard it as one of the most unfortunate effects of the positivistic trend still current that it has contributed to bring about the neglect of this important and fruitful body of literature.<sup>29</sup>

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22. KELLY, *supra* note 11, at 333.

23. See KNUD HAAKONSSON, NATURAL LAW AND MORAL PHILOSOPHY 310-41 (1996).

24. See Jeremy Waldron, *The Decline of Natural Right*, in THE CAMBRIDGE HISTORY OF PHILOSOPHY IN THE NINETEENTH CENTURY (1790-1870) 623, 626-27 (Allen W. Wood & Songsuk Hahn eds., 2012).

25. *Id.* Although natural rights thought is distinct from the natural law, the former grew out of the latter, and both declined for related reasons. *Id.* at 640.

26. JAMES BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE 604 (1901). Bryce identifies four schools—Metaphysical (natural law), Analytical, Historical, and Comparative—the latter two being interconnected. *Id.* at 607-37. Frederick Pollock also describes the latter two as intimately related, both grounded in Montesquieu and Maine. See Frederick Pollock, *The History of Comparative Jurisprudence*, 5 J. SOC'Y COMP. LEGIS. 74, 75-84 (1903).

27. A.W. Spencer, *The Revival of Natural Law*, 80 CENT. L.J. 346, 346 (1915).

28. LON L. FULLER, LAW IN QUEST OF ITSELF 104 (1940).

29. *Id.* at 101.

Historical jurisprudence was a formidable rival not just in eclipsing natural law for a time, but in mounting a powerful critique against natural law:<sup>30</sup> “All thinkers in the historicist tradition held that the doctrine of natural law had illegitimately universalized the values of eighteenth-century Europe as if they held for all epochs and cultures.”<sup>31</sup> Friedrich von Savigny, the nineteenth-century progenitor of historical jurisprudence, offered the historical perspective as an antidote to this natural law tendency: “The historical spirit, too, is the only protection against a species of self-delusion, which is ever and anon reviving in particular men, as well as in whole nations and ages; namely, the holding that which is peculiar to ourselves to be common to human nature in general.”<sup>32</sup> Henry Maine, another founding figure of historical jurisprudence, traced this challenge to the mid-eighteenth century: “[T]he book of Montesquieu, with all its defects, still proceeded on that Historical Method before which the Law of Nature has never maintained its footing for an instant.”<sup>33</sup>

The conventional jurisprudential narrative dismisses these details of intellectual history by pointing to subsequent developments: historical jurisprudence expired early in the twentieth century while natural law theory revived after mid-century.<sup>34</sup> “In the United States, historical jurisprudence is considered to be dead,” wrote legal historian and theorist Harold Berman.<sup>35</sup> A leading jurisprudence text proclaims, similarly, “historical jurisprudence has largely disappeared.”<sup>36</sup>

That view, I will show in this Article, although superficially correct, is wrong in substance. Although the label fell into disuse, the core theoretical propositions espoused by historical jurists, propositions that define the third stream of jurisprudence, carried on and spread.<sup>37</sup> These theoretical propositions did not originate with the Historical School and are not exclusive to it.

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30. See CHARLES GROVES HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* 69-71 (1930).

31. FREDERICK CHARLES BEISER, *THE GERMAN HISTORICIST TRADITION* 13 (2011).

32. FRIEDRICH CARL VON SAVIGNY, *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* 134 (Abraham Hayward trans., Littlewood & Co. 1831).

33. HENRY SUMMER MAINE, *ANCIENT LAW* 91 (John Murray ed., 1920).

34. See MURPHY & COLEMAN, *supra* note 5, at 36-37.

35. Harold J. Berman, *The Historical Foundations of Law*, 54 *EMORY L.J.* 13, 18 (2005).

36. BIX, *supra* note 4, at 276.

37. See *infra* Part IV.

## II. LAW AS A SOCIAL INSTITUTION

Montesquieu's *The Spirit of the Laws*, published in 1748 to wide acclaim, contains this fecund passage:

Laws must relate to the nature and the principle of the government that is established or that one wants to establish, whether those laws form it as do political laws, or maintain it, as do civil laws.

They should be related to the *physical aspect* of the country; to the climate, be it freezing, torrid, or temperate; to the properties of the terrain, its location and extent; to the way of life of the peoples, be they plowmen, hunters, or herdsmen; they should relate to the degree of liberty that the constitution can sustain, to the religion of the inhabitants, their inclinations, their wealth, their number, their commerce, their mores and their manners; finally, the laws are related to one another, to their origin, to the purpose of the legislator, and to the order of things on which they are established. They must be considered from all these points of view.<sup>38</sup>

“Law should be so appropriate to the people for whom they are made,” he advised, “that it is very unlikely that the laws of one nation can suit another.”<sup>39</sup>

Montesquieu set forth a descriptive and prescriptive account of law as a social institution that fits its surrounding milieu, and ought to match if the legal system and society are to function well. Law is a social institution shaped by society and, in turn, shaping society. Law is the product of and reflects the polity, religion, trade, manners, moral views, customs, temperature, geography, and everything else about and within a society, seen holistically. Sociologist Emile Durkheim wrote that Montesquieu “saw quite clearly that all these elements form a whole and that if taken separately, without

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38. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 8-9 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748).

39. *Id.* at 8.

reference to the others, they cannot be understood.”<sup>40</sup> Montesquieu highlighted “the interrelatedness of social phenomena.”<sup>41</sup>

In addition to his portrayal of law as a social institution, he set an influential example by assuming a naturalistic-scientific perspective on law, in contrast to current modes of philosophical or religious speculation or idealization.<sup>42</sup> He criticized Hobbes’s state of nature and social contract theories as unwarranted and unnecessary myths: human societies require no explanation.<sup>43</sup> By nature, we are social-sexual beings who live in communities.<sup>44</sup> Law is best apprehended via scientific methods, gathering a large body of information on historical and current societies, engaging in close observation of facts, applying inductive and deductive reasoning, observing connections and patterns, constructing ideal types, and formulating general propositions about social-legal arrangements.<sup>45</sup> Durkheim credited Montesquieu as the theorist who “first laid down the fundamental principles of social science,”<sup>46</sup> and “instituted a new field of study, which we now call comparative law.”<sup>47</sup>

Writing in the heyday of Enlightenment natural law thought, Montesquieu expressed a pluralistic vision that domesticated natural law (in a manner of speaking): although reason is universal, legal provisions cannot be uniform, he held, because what reason requires of law varies owing to differences in surrounding context. It follows from Montesquieu’s position that societies with different political-economic-cultural-ecological complexes will have different conditions and ends, and consequently, the law will be different in structure and content.<sup>48</sup> David Hume, a philosopher-contemporary who shared a naturalistic perspective, reinforced this seminal insight:

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40. EMILE DURKHEIM, *MONTESQUIEU AND ROUSSEAU: FORERUNNERS OF SOCIOLOGY* 56 (1960).

41. *Id.* at 57.

42. *Id.* at 56-57.

43. MONTESQUIEU, *supra* note 38, at 6-7; *see also* Michael Zuckert, *Natural Law, Natural Rights, and Classical Liberalism: On Montesquieu’s Critique of Hobbes*, 18 *SOC. PHIL. & POL’Y* 227, 228 (2001).

44. MONTESQUIEU, *supra* note 38, at 6-7.

45. Isaiah Berlin, *Montesquieu*, in *AGAINST THE CURRENT* 130, 138-39 (Henry Hardy ed., 2001).

46. DURKHEIM, *supra* note 40, at 61.

47. *Id.* at 51.

48. *See* Berlin, *supra* note 45, at 158.



In general, we may observe, that all questions of property are subordinate to the authority of civil laws, which extend, restrain, modify, and alter the rules of natural justice, according to the particular *convenience* of each society. The laws have, or ought to have, a constant reference to the constitution of government, the manners, the climate, the religion, the commerce, the situation of each society. A late author of genius [Montesquieu], as well as learning, has prosecuted this subject at large, and has established, from these principles, a system of political knowledge, which abounds in ingenious and brilliant thoughts, and is not wanting in solidity.<sup>49</sup>

Starting with the basic characteristics of human nature (social beings, self-interested, limited benevolence to fellows) under conditions of scarcity, Hume elaborated his own account of law as a variable institutional arrangement that functions to benefit society.<sup>50</sup>

Montesquieu's perspective counters not only the universalism of natural law theory, but also subtly pushes back against legal positivism. By locating the efficient causes of law in social forces, he displaces the *will* of the lawgiver as the primary source of law.<sup>51</sup> Philosopher Isaiah Berlin conveyed this thrust in an essay on Montesquieu:

His whole aim is to show that laws are not born in the void, that they are not the result of positive commands either of God or priest or king; that they are, like everything else in society, the expression of the changing moral habits, beliefs, general attitudes of a particular society, at a particular time, on a particular portion of the earth's surface, played upon by the physical and spiritual influences to which their place and period expose human beings.<sup>52</sup>

He emphasized that law develops organically in connection with the needs of a changing society.<sup>53</sup>

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49. DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS 93 (Tom L. Beauchamp ed., 1998).

50. *Id.* at 83-103, 170-75.

51. DURKHEIM, *supra* note 40, at 40-44.

52. Berlin, *supra* note 45, at 153-54.

53. *Id.* at 156-57.

Trained in law and having sat for a decade as a provincial magistrate, Montesquieu understood law firsthand.<sup>54</sup> He cautioned that legislative enactments that clash with prevailing moral and social norms may well fail and may require tyrannical force to be effective.<sup>55</sup> Judith Shklar wrote, on Montesquieu,

The lesson for legislators is that they must understand law first of all as part of the social whole which they rule, as well as an instrument of deliberate government. The spirit of the laws is thus a mixture of intentional human designs and of the deep circumstances which condition all rules of a society.<sup>56</sup>

His view of law and society has been criticized as overly deterministic and conservative—a charge regularly leveled at holistic theories of law and society—but, as Berlin noted, it also has been enlisted “by social reformers and radicals as so many demands that the law shall constantly respond to changing social needs and not be tied to some obsolete principle valid only for some epoch dead and gone.”<sup>57</sup>

### III. SOCIAL THEORY OF LAW AT THE CENTER OF HISTORICAL JURISPRUDENCE

When historical jurisprudence emerged early in the nineteenth century, Montesquieu’s insight stood at its core. Peter Stein, a rare contemporary scholar who situates his work within historical jurisprudence, makes this plain: “Nineteenth-century historical jurisprudence was founded on the connection between law and social and economic circumstances.”<sup>58</sup> Harold Berman presents the same thrust:

[H]istoricists emphasize the source of the law that “is” and the law that “ought to be” in the customs and traditions of the given

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54. See JUDITH N. SHKLAR, *MONTESQUIEU* 1-5 (1987).

55. See MONTESQUIEU, *supra* note 38, at 308-33; see also Berlin, *supra* note 45, at 155. Montesquieu held to a strict view that judges interpreted the laws as written, and thus did not extend the influence of social forces to the realm of judicial interpretation. Berlin, *supra* note 45, at 154.

56. SHKLAR, *supra* note 54, at 69.

57. Berlin, *supra* note 45, at 156.

58. Peter Stein, *The Tasks of Historical Jurisprudence*, in *THE LEGAL MIND: ESSAYS FOR TONY HONORÉ* 293, 304 (Neil MacCormick & Peter Birks eds., 1986).

society—including both the previous decisions of its courts and the scholarly writings of its jurists—contending that both the meaning of legal rules and the meaning of justice are to be found in the character, the culture, and the historical values of the society.<sup>59</sup>

Friedrich von Savigny's *Of the Vocation of Our Age for Legislation and Jurisprudence*, published in 1814 to challenge the enactment of a Civil Code for Germany, is the inaugural piece of historical jurisprudence. Savigny criticized the natural law “conviction that there is a practical law of nature or reason, an ideal legislation for all times and all circumstances,”<sup>60</sup> and he criticized the legal positivist proposition that “all law, in its concrete form, is founded upon the express enactments of the supreme power.”<sup>61</sup> Against these positions, he argued, law is the unplanned product of forces within society:

In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view.<sup>62</sup>

The source or “seat” of the law, he held, is the “common consciousness of the people.”<sup>63</sup> Law is “first developed by [the] custom[s] and popular faith” of the people,<sup>64</sup> then jurists work these into legal doctrine; law is produced “everywhere, therefore, by internal, silently-operating powers, not by the arbitrary will of a law-giver.”<sup>65</sup> Savigny credited Montesquieu with establishing that law is tied to the unique circumstances of the people, and therefore diversity of law among communities is to be expected.<sup>66</sup>

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59. Berman, *supra* note 35, at 13-14.

60. SAVIGNY, *supra* note 32, at 23.

61. *Id.*

62. *Id.* at 24.

63. *Id.* at 28, 24.

64. *Id.* at 28, 30.

65. *Id.* at 30.

66. *Id.* at 57-58.

Owing to the multifarious connections between law and society, Savigny insisted, it is folly to think that one could produce a new Code that severs “all historical associations” and begins “an entirely new life.”<sup>67</sup> This is delusive not only because existing law grows out of what came before but also because the thinking of jurists is permeated by preexisting ways. Savigny wrote:

For it is impossible to annihilate the impressions and modes of thought of the jurists now living,—impossible to change completely the nature of existing legal relations; and on this twofold impossibility rests the indissoluble organic connection of generations and ages; between which, development only, not absolute end and absolute beginning, is conceivable.<sup>68</sup>

This is not a rigidly conservative view. To the contrary, change has a vital place within the historical perspective; it reminds us, however, of “the element of continuity from past to future in the development of the culture of a society, including its legal culture.”<sup>69</sup> Society is constantly moving, and law with it. Savigny wrote:

But this organic connection of law with the being and character of the people, is also manifested in the progress of the times; and here, again, it may be compared with language. For law, as for language, there is no moment of absolute cessation; it is subject to the same movement and development as every other popular tendency .... Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its nationality.<sup>70</sup>

Savigny’s theory of law has two central planks: law is the product of society and law is constantly evolving in connection with changes in society. Law, therefore, bears the indelible imprint of the history of a society.<sup>71</sup>

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67. *Id.* at 132.

68. *Id.*

69. Berman, *supra* note 35, at 18-19.

70. SAVIGNY, *supra* note 32, at 27.

71. This account, focusing on the connection between law and society, leaves out other aspects of Savigny’s thought, in particular his assertion that legal concepts could be reduced to a logical or geometrical system. *See id.* at 38-41.

Henry Maine, the second great figure of historical jurisprudence, writing in the second half of the nineteenth century, also explicitly acknowledged Montesquieu's influence (though not Savigny's).<sup>72</sup> Maine criticized both natural law and legal positivism for being excessively abstract and for lacking historical awareness in their speculations about law.<sup>73</sup> He presented his work as scientific in orientation, a theory of law grounded in evidence.

Maine focused on the organization of society and how this is manifested in law. Primitive society, he observed, revolves around families, which aggregate to form clans and tribes, which in turn aggregate at higher levels of organization, all linked through a common lineage; legal arrangements are determined by status relations within the group.<sup>74</sup> In contrast, modern society revolves around individuals with legal relations determined through voluntary agreement. Hence his famous antithesis:

The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The individual is steadily substituted for the Family, as the unit of which civil laws take account. The advance has been accomplished at varying rates of celerity .... But, whatever its pace, the change has not been subject to reaction or recoil .... Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of individuals .... [W]e may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*.<sup>75</sup>

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72. See MAINE, *supra* note 33, at 133-34.

73. See *id.* at 79-83, 123-29; see also PETER STEIN, LEGAL EVOLUTION: THE STORY OF AN IDEA 89-90 (1980); PAUL VINOGRADOFF, THE TEACHING OF SIR HENRY MAINE 4-6 (1904). For an excellent study of Maine's criticism of these schools, see Stephen G. Utz, *Maine's Ancient Law and Legal Theory*, 16 CONN. L. REV. 821 (1984).

74. See MAINE, *supra* note 33, at 131-37.

75. *Id.* at 163-65.

Maine's formulation expresses the inextricable connection between law and society: the evolution of one is the evolution of the other, aspects of one and the same process.

The challenge for modern legal systems, Maine wrote, is that social mores change more swiftly than law, constantly generating a gap between them. "Law is stable; the societies we are speaking of are progressive. The greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed."<sup>76</sup> Three mechanisms are used to close this gap, listed in their historical order of appearance: "Legal Fictions, Equity, and Legislation."<sup>77</sup> The first two were utilized mostly undercover by judges, the third openly by legislators.<sup>78</sup>

Maine's discussion of legal fictions, penned in 1861, is precociously realistic. He observed that legal fictions are a device that "conceals, or affects to conceal, the fact that a rule of law has undergone alteration its letter remaining unchanged, its operation being modified."<sup>79</sup> Maine says "*affects to conceal*" because lawyers and judges are cognizant that the law has been changed—the fiction is a *knowing* pretense. "We in England are well accustomed to the extension, modification, and improvement of law by a machinery which, in theory, is incapable of altering one jot or one line of existing jurisprudence. The process by which this virtual legislation is effected is not so much insensible as unacknowledged."<sup>80</sup> This elaborate pretense allows the law to maintain its facade of stability while judges make adjustments to legal doctrine beneath the surface to keep pace with society.

Rudolph von Jhering, a German contemporary of Maine, cast aside Savigny's mystical "common consciousness" and his emphasis on custom as the underlying source of law.<sup>81</sup> Jhering instead described legal development in terms of battles between competing individuals and groups enlisting legal support to pursue their

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76. *Id.* at 29.

77. *Id.*

78. *See id.* at 32-34.

79. *Id.* at 30-31.

80. *Id.* at 35.

81. "It has been said of Ihering that he was at once the fulfilment [sic] and the end of the historical school." CARL JOACHIM FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* 154 (2d ed. 1963).

purposes and interests. Law is created and used instrumentally. Jhering wrote:

In the course of time, the interests of thousands of individuals, and of whole classes, have become bound up with the existing principles of law in such a manner that these cannot be done away with, without doing the greatest injury to the former .... Hence every such attempt, in natural obedience to the law of self-preservation, calls forth the most violent opposition of the imperiled interests, and with it a struggle in which, as in every struggle, the issue is decided not by the weight of reason, but by the relative strength of opposing forces.<sup>82</sup>

Jhering optimistically opined that individual egoism (infused with ethical notions) and social purposes combine in this process to give rise to a legal order that benefits individuals and society overall.

A major legal figure in his day, though seldom mentioned by jurisprudence scholars today, Jhering's seminal contribution was to articulate a thoroughly instrumental view of law that reflected the new perceptions of the age, which would take over (independent of Jhering) in the course of the twentieth century.<sup>83</sup> He identified instrumental resort to law as a crucial moving force behind the constant evolution of law along with society. He too followed in the footsteps of Montesquieu, as recognized in the exuberant opening line of a review of his book, *The Struggle for Law*: "This is the title of the most brilliant, original, and significant book on the genesis and development of law since Montesquieu."<sup>84</sup>

Jhering rejected social contract theories as fictional, offering instead a bracing account of law as organized force: "Whoever will trace the legal fabric of a people to its ultimate origins will reach innumerable cases where the force of the stronger has laid down the law for the weaker."<sup>85</sup> Hume said the same, remarking: "Almost all the governments which exist at present, or of which there remains any record in story, have been founded originally either on usurpa-

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82. RUDOLPH VON JHERING, *THE STRUGGLE FOR LAW* 10-11 (John J. Lalor trans., Hyperion Press, Inc. 1979) (1915).

83. See BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* (2006).

84. *The Struggle for Law*, 20 ALB. L.J. 444, 444 (1879) (book review).

85. RUDOLPH VON IHERING, *LAW AS A MEANS TO AN END* 185 (Isaac Husik trans., 1914).

tion or conquest or both, without any pretense of a fair consent or voluntary subjection of the people.”<sup>86</sup> “Force produces law immediately out of itself,” Jhering contended, “and as a measure of itself, *law evolving as the politics of force*. It does not therefore abdicate to give the place to law, but whilst retaining its place it adds to itself law as an accessory element belonging to it, and becomes *legal force*.”<sup>87</sup> Over time, law in many places evolves from an instrument of the powerful to also impose limitations on the powerful, gaining legitimacy in the process, though this does not occur to the same degree everywhere, and even with this transformation force remains integral to law.

Each of these nineteenth-century giants of historical jurisprudence held to Montesquieu’s holistic vision of law within society, adding their own layer and wrinkle. Savigny promoted the organic law-society image, situating society as the fount of law, and pointing to the thinking of jurists as the key tether between collective consciousness and law. Maine portrayed legal evolution and social evolution as two sides of the same process, and explained how, alongside legislation, judges change law to keep up with society. Jhering discarded the image of law as an immanent ordering, replacing it with law as an instrument that individuals and social groups shape and utilize to advance their interests.

At its height in the final quarter of the nineteenth century, historical jurisprudence had cast natural law theory as prescientific and made legal positivism appear narrow in light of the blooming variety of past and present legal systems around the world.

#### IV. THE CONTINUITY OF SOCIOLOGICAL JURISPRUDENCE

The Historical School faded from the jurisprudential scene around the turn of the twentieth century. Why it suffered this fate is a matter of debate—a confluence of factors contributed. No systematic theory was articulated by its founders. Maine’s immediate

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86. DAVID HUME, *Of the Original Contract*, in DAVID HUME’S POLITICAL ESSAYS 43, 47 (Charles W. Hendel ed., 1953). A number of contemporary anthropologists and political scientists have also expressed versions of this view. See, e.g., Charles Tilly, *War Making and State Making as Organized Crime*, in BRINGING THE STATE BACK IN 169 (Peter Evans et al. eds., 1985).

87. IHERING, *supra* note 85, at 187.



jurisprudential successors, Frederick Pollock and Paul Vinogradoff, failed to move it along.<sup>88</sup> Jhering's criticisms discredited Savigny. Historical jurisprudence was a part of the general historicist tradition in Germany, which declined in this period, suggesting that broader intellectual factors played a role.<sup>89</sup> Several legal theorists and historians argue that historical jurisprudence was done in by its association with evolutionary theory, which fell out of favor after the nineteenth century when faith in inevitable human progress was dashed by incessant social strife and the Great War.<sup>90</sup> The turn of the century, moreover, witnessed rapid and sweeping social change, making a seemingly backward-looking jurisprudential school appear less relevant and attractive;<sup>91</sup> the explosion of new, hotly contested economic, labor, and social welfare legislation and the growth of the administrative state made talk about customs and organic growth seem outdated.<sup>92</sup>

Why historical jurisprudence apparently expired, although interesting to contemplate, distracts from the more consequential point that the core theoretical views of law and society it advanced continued to thrive. Austrian jurist Eugen Ehrlich vigorously promoted the selfsame cluster of positions in his 1913 text, *Fundamental*

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88. Neil Duxbury suggests that historical jurisprudence, which he labels "comparative jurisprudence," did not carry on within English jurisprudence because it lacked a distinctive jurisprudential agenda. NEIL DUXBURY, *FREDERICK POLLOCK AND THE ENGLISH JURISTIC TRADITION* 90-91 (2004). "These men [Maine, Vinogradoff, Pollock] may well have been Oxford professors of jurisprudence, but their reflections on the subject were insufficiently well structured and focused to ensure that their own jurisprudential achievements would have lasting appeal." *Id.* at 91.

89. See FREDERICK C. BEISER, *THE GERMAN HISTORICIST TRADITION* (2011).

90. Calvin Woodward argues that historical jurisprudence collapsed in Anglo-America owing to a combination of three factors: (1) the rejection of evolutionary ideas; (2) the rejection of German ideas after World War I; and (3) the rejection of laissez-faire thought (with which Maine was associated) with the rise of the social welfare state. See Calvin Woodward, *A Wake (or Awakening?) for Historical Jurisprudence*, in *THE VICTORIAN ACHIEVEMENT OF SIR HENRY MAINE: A CENTENNIAL REAPPRAISAL* 217, 220-28 (Alan Diamond ed., 1991); see also Stein, *supra* note 58, at 296. Donald Elliot speculates that the absence of evolutionary theory from jurisprudence between 1920 and 1970 was probably due to the backlash against Social Darwinism. E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 *COLUM. L. REV.* 38, 59-60 (1985).

91. See Berman, *supra* note 35, at 17-19.

92. See Brian Z. Tamanaha, *The Unrecognized Triumph of Historical Jurisprudence*, 91 *TEX. L. REV.* 615 (2013) (reviewing DAVID M. RABBAN, *LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY* (2013)).

*Principles of the Sociology of Law*.<sup>93</sup> Identifying with Montesquieu, Ehrlich asserted, “[a]s law is essentially a form of social life, it cannot be explained scientifically otherwise than by the workings of social forces.”<sup>94</sup> Ehrlich also credits Savigny, writing,

In forming an estimate of the doctrines of Savigny and Puchta, one must bear in mind that it was they who first introduced the idea of development into the theory of the sources of law and clearly saw the relation between the development of law and the history of a people as a whole.<sup>95</sup>

A prominent theme in Ehrlich’s work was law’s vibrant interaction with social forces, subject to ceaseless change.<sup>96</sup> It notes that “[t]he center of gravity of legal development therefore from time immemorial has not lain in the activity of the state but in society itself, and must be sought there at the present time.”<sup>97</sup> Society is constantly transforming and law with it. “The reason why the law is in a perpetual state of flux is that men, whose relations the law is designed to regulate, are continually posing new problems for it to solve.”<sup>98</sup> New legislation alters the law in an overt fashion, but legal change is more extensively accomplished through judicial interpretations using subtle distinctions and fictions that “put a new picture into the old frame.”<sup>99</sup> “Transformations of this sort, pregnant with immeasurable consequences, are likely to be at work every moment in affecting legal and social judgments concerning legal relations; yet it might not be necessary on that account to change a single line of the written law.”<sup>100</sup> The agents on the front lines of

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93. EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (Walter Moll trans., 1936).

94. Eugen Ehrlich, *Montesquieu and Sociological Jurisprudence*, 29 HARV. L. REV. 582, 584 (1916).

95. EHRLICH, *supra* note 93, at 443.

96. *See generally* Brian Z. Tamanaha, *A Vision of Social-Legal Change: Rescuing Ehrlich from “Living Law,”* 36 LAW & SOC. INQUIRY 297 (2011).

97. EHRLICH, *supra* note 93, at 390.

98. *Id.* at 399.

99. *Id.* at 397; *see also id.* at 436-71.

100. Eugen Ehrlich, *Judicial Freedom of Decision: Its Principles and Objects*, in *SCIENCE OF LEGAL METHOD: SELECT ESSAYS BY VARIOUS AUTHORS* 57 (Ernest Bruncken & Layton B. Register trans., 1917); *see also* BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 1-30 (1928).

legal change, in Ehrlich's view, are the multitude of lawyers who modify legal forms or draw up legal documents or construct new legal arguments in order to meet novel social and economic demands.<sup>101</sup> Law is never in repose. "The great never-ending task of juristic science," Ehrlich wrote, "is to resolve the conflict between the changing demands of life and the words of the established law."<sup>102</sup> Ehrlich brought home the lesson that it is a mistake, commonly committed by jurists, to view law in isolation: "[t]he problem is not simply to know what a rule means, but how it lives and works, how it adapts itself to the different relations of life, how it is being circumvented and how it succeeds in frustrating circumvention."<sup>103</sup>

Another prominent theme in *Fundamental Principles* was Ehrlich's argument that social life is filled with multiple norm-governed orders tied to social associations, which exist independently of the state. This "living law," as he famously called it, interacts with the official law of the state, is often more efficacious than state law, is a source of state law norms, and can give rise to a plurality of coexisting legal and quasi-legal orders.<sup>104</sup> To apprehend the operation and effect of state law, one must attend to the multiple normative orders that saturate social arenas.

Ehrlich was neglected by continental jurists, but he found a receptive audience in the United States. Oliver Wendell Holmes, Roscoe Pound, and Karl Llewellyn were effusive about the book. In correspondence with Frederick Pollock, Holmes called *Fundamental Principles* "the best book on legal subjects by any living continental jurist."<sup>105</sup> Pound declared in 1915 that "I think it is the best thing that has been written recently."<sup>106</sup> He praised Ehrlich for showing:

[T]hat it is not enough to be conscious that the law is living and growing, we must rather be conscious that it is a part of human

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101. EHRlich, *supra* note 93, at 341-45, 433.

102. *Id.* at 402.

103. Ehrlich, *supra* note 100, at 78.

104. See generally LIVING LAW: RECONSIDERING EUGEN EHRlich (Marc Hertogh ed., 2009).

105. Stefan Vogl, *Eugen Ehrlich's Linking of Sociology and Jurisprudence and the Reception of His Work in Japan*, in LIVING LAW: RECONSIDERING EUGEN EHRlich, *supra* note 104, at 95-96 (quoting Letter from Oliver Wendell Holmes to Frederick Pollock (Dec. 29, 1919), in 2 HOLMES-POLLOCK LETTERS 34 (Mark DeWolfe Howe ed., 1941)).

106. N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 110 (1997) (quoting Letter from Roscoe Pound to Oliver Wendell Holmes (July 22, 1915), in *The Roscoe Pound Papers* (on file with the Harvard Law School Library)).

life. It is not merely that it should look upon nothing human as foreign to it, in a sense everything human is a part of it.<sup>107</sup>

Llewellyn confessed that when he found Ehrlich, he was “somewhat crushed in spirit, because [Ehrlich] had seen so much.”<sup>108</sup>

The conventional jurisprudential narrative has historical jurisprudence dying and being supplanted by sociological jurisprudence.<sup>109</sup> This is incorrect. They are strains of the same jurisprudential tradition;<sup>110</sup> rather than expiring, as many have repeated, the former seamlessly morphed into the latter.<sup>111</sup> Paul Vinogradoff's *Introduction to Historical Jurisprudence*, published in 1920, ranges across history, psychology, sociology, economics, and political theory as they bear on social-legal development. Roscoe Pound witnessed this transformation: “At first this wider historical jurisprudence was thought of as a comparative ethnological jurisprudence. But it was not long in assuming the name and something of the character of a sociological jurisprudence.”<sup>112</sup> A French legal philosopher at the time also perceived their core identity: “Like the historical school, [the sociological school] considers law in its evolution, in its successive changes, and connects these changes with those which are experienced by society itself.”<sup>113</sup> Philosopher Michael Oakeshott likewise remarked, “[b]oth these interpretations [economic and “sociological theories of the nature of law”] share, in part, the presuppositions

107. *Id.* at 108-09 (quoting Letter from Roscoe Pound to Oliver Wendell Holmes (July 22, 1915), in *The Roscoe Pound Papers* (on file with the Harvard Law School Library)).

108. *Id.* at 291 (quoting Karl Llewellyn, *Appendix on Allocation of Responsibility* [for THE CHEYENNE WAY], in *The Karl Llewellyn Papers* (on file with the University of Chicago Law School Library)).

109. *See, e.g., supra* notes 35-36 and accompanying text.

110. It is important to emphasize that beyond the social theory of law that is the focus of this Article, the historical jurists and sociological jurists differed in several respects. They were of different generations, and the former tended to be more conservative, favoring slower more organic legal change, whereas the latter tended to advocate rapid change through legislation. *See* Berman, *supra* note 35, at 18-19.

111. For a fuller elaboration of this argument, see Tamanaha, *supra* note 92, at 628-29.

112. Pound, *supra* note 19, at 614. Although he is describing the German wing, Pound noted that a similar expansion had occurred in the English branch. *Id.* at 614-15 n.79.

113. Joseph Charmont, *Recent Phases of French Legal Philosophy*, in *MODERN FRENCH LEGAL PHILOSOPHY* 65 (Arthur W. Spencer ed., Franklin W. Scott & Joseph P. Chamberlain trans., 1916). Charmont observes that the sociological school also took from utilitarianism the notion that institutions are a “means of satisfying social interests.” *Id.* What all these schools share is opposition to natural law theory. *Id.* at 69-70.

which determine the character of historical jurisprudence, and therefore cannot be distinguished from it absolutely.”<sup>114</sup>

The connection between historical and sociological theories of law extends back to Montesquieu. He saw law as the product of the history of a society, and he combined history and sociology in his methodology. As Carl Becker described it, Montesquieu surveyed “the ideas, customs, and institutions of all peoples at all times and in all places, to put them side by side”;<sup>115</sup> he plumbed historical knowledge to construct ideal types of basic social arrangements, then analyzed what he found in sociological terms.<sup>116</sup> Isaiah Berlin noted that Montesquieu’s account of law as the product of society “is the foundation of the great German School of historical jurisprudence” and “various modern sociological theories of law.”<sup>117</sup>

#### V. SOCIAL THEORY OF LAW WITHIN LEGAL REALISM AND CONTEMPORARY LEGAL THOUGHT

The theoretical ideas about law championed by historical jurisprudence not only carried on in sociological jurisprudence, they continued to spread, ultimately to become widely and deeply entrenched. *The Common Law*, by Oliver Wendell Holmes, exudes this same perspective:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries.<sup>118</sup>

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114. MICHAEL OAKESHOTT, *THE CONCEPT OF A PHILOSOPHICAL JURISPRUDENCE: ESSAYS AND REVIEWS*, 1926-1951, at 151 (2007).

115. CARL L. BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS* 100 (1932).

116. See JOHN ALAN BAUM, *MONTESQUIEU AND SOCIAL THEORY* 97-119 (1979); ERNST CASSIRER, *THE PHILOSOPHY OF THE ENLIGHTENMENT* 209-16 (Fritz C.A. Koelin & James P. Pettegrove trans., 1951).

117. Berlin, *supra* note 45, at 154.

118. O. W. HOLMES, JR., *THE COMMON LAW* 1 (1881).

More than a decade earlier Jhering had made a similar observation:

Let us break the charm, the illusion which holds us captive. All this cult of logic that would fain turn jurisprudence into legal mathematics is an error and arises from misunderstanding law. Life does not exist for the sake of concepts, but concepts for the sake of life. It is not logic that is entitled to exist, but what is claimed by life, by social intercourse, by the sense of justice—whether it be logically necessary or logically impossible.<sup>119</sup>

Holmes, much like Jhering, described the process of legal recognition as a struggle between competing individual and social interests (though Jhering has a more optimistic spin). Holmes wrote:

This tacit assumption of the solidarity of the interests of society is very common, but seems to us to be false.... [I]n the last resort a man rightly prefers his own interest to that of his neighbors. And this is as true in legislation as in any other form of corporate action.... [W]hatever body may possess the supreme power for the moment is certain to have interests inconsistent with others which have competed unsuccessfully. The more powerful interests must be more or less reflected in legislation; which, like every other device of man or beast, must tend in the long run to aid the survival of the fittest.<sup>120</sup>

Legislation “is necessarily made a means by which a body, having the power, put[s] burdens which are disagreeable to them on the shoulders of somebody else.”<sup>121</sup> Holmes wrote that “it is no sufficient condemnation of legislation that it favors one class at the expense of another; for much or all legislation does that; and none the less when the *bona fide* object is the greatest good of the greatest number.”<sup>122</sup>

More than any other American jurist, Pound is identified with sociological jurisprudence, owing to *The Scope and Purpose of*

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119. PAUL VINOGRADOFF, INTRODUCTION TO HISTORICAL JURISPRUDENCE 142 n.1 (1920) (quoting RUDOLPH VON IHERING, *GEIST DES ROMISCHEN RECHTS*, III, at 302 (1866)).

120. Oliver Wendell Holmes, Jr., *The Gas-Stoker's Strike*, 7 AM. L. REV. 582, 583 (1873).

121. *Id.*

122. *Id.* at 584.

*Sociological Jurisprudence*, his two-part elaboration and advocacy article in the *Harvard Law Review*.<sup>123</sup> Pound presented law in thoroughly functionalist terms:

I am content to think of law as a social institution to satisfy social wants—the claims and demands and expectations involved in the existence of civilized society—by giving effect to as much as we may with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society.<sup>124</sup>

Observing law over the arc of history, Pound saw “a continually more efficacious social engineering.”<sup>125</sup>

Legal philosopher Morris Cohen, the father of legal realist Felix Cohen, wrote in 1915 that judges are constantly modifying the law—common law, statutes, and the Constitution—through creative interpretation that amounts to judicial legislation.<sup>126</sup> “These changes,” Cohen noted, “have been necessitated by the changed conditions of industrial and commercial life and the courts have consciously or unconsciously changed the law accordingly.”<sup>127</sup> Cohen was critical of “two contradictory absolutistic conceptions of what is law. One is that the law is the will of the sovereign and the other that law is eternal reason or immutable justice.”<sup>128</sup> Although both notions are informative when softened and not framed as opposites, in practice law must be apprehended and evaluated as an instrument to achieve social ends. “The issue,” Cohen wrote, “is not between a fixed law on the one hand, and social theories on the other, but between social theories unconsciously assumed and social theories carefully examined and scientifically studied.”<sup>129</sup>

The legal realists also had a thoroughly social view of law. On his list of legal realist propositions, Karl Llewellyn declared: “(1) The

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123. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pts. 1 & 2), 24 HARV. L. REV. 591 (1911), 25 HARV. L. REV. 140 (1912).

124. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 47 (rev. ed. 1954).

125. *Id.*

126. See Morris R. Cohen, *The Process of Judicial Legislation*, 48 AM. L. REV. 161 (1914).

127. Morris R. Cohen, *Legal Theories and Social Science*, 25 INT'L J. ETHICS 469, 476 (1915); see Cohen, *supra* note 126, at 169.

128. Cohen, *supra* note 127, at 482.

129. *Id.* at 485.

conception of law in flux, of moving law, and of judicial creation of law. (2) The conception of law as a means to social ends and not as an end in itself; ... [and] (3) The conception of society in flux, and in flux typically faster than law.”<sup>130</sup> Llewellyn named Ehrlich as an early exemplar of realist jurisprudence.<sup>131</sup> Both gave primacy to judges as a vehicle through which law is altered to keep up with social changes. Similar to Ehrlich, he wrote:

It is society and not the courts which gives rise to, which shapes in the first instance the emerging institution; which kicks the courts into action. It is only from observation of society that the courts can pick their notions of what needs the new institution serves, what needs it baffles.... In any event, if the needs press and recur, sooner or later recognition of them will work into the law. Either they will induce the courts to break through and depart from earlier molds, or the bar will find some way to put new wine in old bottles and to induce in the bottles that elasticity and change of shape which, in the long run marks all social institutions.<sup>132</sup>

These ideas are now associated with legal realism. Sociological and historical jurisprudence articulated them decades earlier.<sup>133</sup>

Judge Benjamin Cardozo likewise emphasized that law is continually engaging with social developments, writing that law’s constant task is to manage “permanence with flux, stability with progress.”<sup>134</sup> Cardozo wrote:

We live in a world of change. If a body of law were in existence adequate for the civilization of today, it could not meet the demands of the civilization of tomorrow. Society is inconstant. So long as it is inconstant, and to the extent of such inconstancy,

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130. Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236 (1931).

131. See Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 454 (1930).

132. K. N. LLEWELLYN, *THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY* 55 (1930).

133. See Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 758-59 (2009).

134. CARDOZO, *supra* note 100, at 6.



there can be no constancy in law. The kinetic forces are too strong for us.<sup>135</sup>

A great deal of legal change, Cardozo insisted, necessarily and legitimately is accomplished by judges.<sup>136</sup> When business customs change such

that a rule of law which corresponded to previously existing norms or standards of behavior, corresponds no longer to the present norms or standards ... then those same forces or tendencies of development that brought the law into adaptation to the old norms and standards are effective, without legislation, but by the inherent energies of the judicial process, to restore the equilibrium.<sup>137</sup>

The same is true of social mores. “The moral code of each generation, this amalgam of custom and philosophy and many an intermediate grade of conduct and belief, supplies a norm or standard of behavior which struggles to make itself articulate in law.”<sup>138</sup> The “pressure of society on the individual mind,” he observed, “is ever at work in the making of the law declared by courts.”<sup>139</sup>

Common to all these depictions of law is an implicit understanding of the social nature of law.<sup>140</sup> “What is certain,” Cardozo proclaimed in 1928, “is that the gaps in the [legal] system will be filled, and filled with ever-growing consciousness of the implications of the process, by a balancing of social interests, an estimate of social values, a reading of the social mind.”<sup>141</sup>

An elaborate modern rendering of ideal-type law-society clusters was presented in *Law in Modern Society* by Roberto Unger, a leading philosopher of critical legal studies. “A society’s law constitutes the chief bond between its culture and its organization; it is the

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135. *Id.* at 10-11.

136. *Id.* at 7-8.

137. *Id.* at 14-15.

138. *Id.* at 17.

139. *Id.*

140. Not all theorists who saw law in social terms extended this insight to judicial decision making. Montesquieu in particular described judging as if the judge was strictly interpreting the law. See SHKLAR, *supra* note 54, at 88.

141. CARDOZO, *supra* note 100, at 77.

external manifestation of the embeddedness of the former in the latter.”<sup>142</sup>

Each of the forms of social life discussed in this book—tribal, aristocratic, and liberal society, or the postliberal, the traditionalistic, and the revolutionary socialist variant of modernity—is a meaningful whole of the most comprehensive kind. Each embodies an entire mode of human existence. And for each the law plays a crucial role in revealing and determining the relationship of belief to organization.<sup>143</sup>

Two decades later, Unger would back away from this ideal-type presentation.<sup>144</sup> The rapid transformation brought on by late-twentieth-century economic globalization made it obsolete. And Unger eschewed the conservative connotation that attaches to the notion of society and law as coherent wholes, preferring instead to emphasize the mutability of legal-social arrangements.<sup>145</sup> But his vision of law as a social institution produced by, and engulfed in, social forces remained. “[T]he law is the product of real collective conflict,” wrote Unger, “carried on over a long time, among many different wills and imaginations, interests and visions.”<sup>146</sup>

Many legal theorists today would assent to this statement, which harkens back to Jhering and Holmes. A range of contemporary theoretical approaches implicitly presume that law is an instrument to achieve individual and social purposes infused with, and buffeted by, social forces.<sup>147</sup> Law and economics theory posits law as a means

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142. ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* 250 (1976).

143. *Id.* at 252.

144. See ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 2-6 (1996) (“The failure to imagine transformative possibility that has come to vitiate the dominant practice of social and historical study infects normative political philosophy as well as the shared language of practical politics.”).

145. See *id.* at 126-28 (“The idea of law as the expression of a unique form of life drastically exaggerates the unity and continuity, and understates the made-up character, of the cultures manifest in law.”).

146. *Id.* at 65.

147. See TAMANAHA, *supra* note 83, at 118-32 (describing the legal theories of economic analysis of the law, critical legal studies, the law and society movement, legal pragmatism, and the formal version of the rule of law, and the fact that each builds upon the view that law is a means to an end).

to maximize wealth.<sup>148</sup> Critical theorists argue that beneath a facade of neutrality, law fundamentally serves and enforces social hierarchies of power, whether economic, gender-based, or racial. Legal pragmatism connotes “a rejection of the idea that law is something grounded in permanent principles and realized in logical manipulation of those principles, and the determination to use law as an instrument for social ends.”<sup>149</sup>

What complicates the jurisprudential picture is that many modern legal theorists accept the core legal positivist insight that law is whatever legal officials validly declare,<sup>150</sup> *as well as* the core insights of historical and sociological jurisprudence about the social nature of law and the instrumental use of law.<sup>151</sup> Accordingly, it can be said of legal realism, law and economics, critical legal studies, and others, that they partake of *both* jurisprudential traditions—each highlighting a key aspect of law in its own way that resonates with jurists.

Major elements of the social theory of law, as this chronicle shows, are nigh taken for granted within the legal culture today. Donald Elliott observed twenty years ago that the notion that law evolves in connection with society is “deeply ingrained,” though its original theoretical provenance has been forgotten.<sup>152</sup> “We speak of the law ‘adapting’ to its social, cultural, and technological environment without the slightest awareness of the jurisprudential tradition we are invoking.”<sup>153</sup> Along the same lines, legal historian Robert Gordon recently remarked that evolutionary functionalist “theory and its accompanying narrative [has] dominated Western thinking about the relation between law and social change for the last two centuries, although in strictly legal writing the theory is usually inexplicit: it lurks as a set of background assumptions rather than being explicitly set forth and argued for.”<sup>154</sup>

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148. *Id.* at 118-20.

149. RICHARD A. POSNER, *OVERCOMING LAW* 405 (1995).

150. See Berman, *supra* note 35, at 13.

151. See *supra* note 147.

152. Elliott, *supra* note 90, at 38.

153. *Id.*

154. Robert W. Gordon, “Critical Legal Histories Revisited”: A Response, 37 *LAW & SOC. INQUIRY* 200, 202 (2012).

## VI. SOCIAL LEGAL THEORY

Thus far, I have presented an alternative intellectual history to counter the conventional jurisprudential narrative. Henceforth I will refer to the third branch of jurisprudence as “social legal theory.” Another fitting label would be “social historical legal theory,” with a nod to both theoretical strains that embody it, but I prefer “social legal theory” for concision and because variations of it already circulate.<sup>155</sup>

Let me now offer a few clarifications. A social “perspective” or “orientation” toward law, or widely held “background assumptions” about the social nature of law, do not amount to a *theory of law*. A theory of law consists of explicitly formulated propositions about what law is and what law does. Several of the theorists mentioned above offered a theory of law in this sense, at least to some extent, but not all did.

Although not theories in themselves, widely held background assumptions lie at the heart of all theories about law. Legal positivism embodies the commonsense recognition that law is whatever legal officials enforce as law regardless of whether it is bad in content or consequence.<sup>156</sup> Natural law theory is built on common beliefs that law is (or should be) just, and that morality is objective (in some sense).<sup>157</sup> Social legal theory is grounded on the widespread perception that law is a social institution, with social influences and consequences, that is used instrumentally.<sup>158</sup>

The connection between background beliefs and theories is large because theories themselves are social products inextricably linked to existing social views, practices, and circumstances. Pound observed:

For jurists and philosophers do not make these theories as simple matters of logic by inexorable development of philosophical

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155. Law and society scholars frequently use the labels “socio-legal” or “sociolegal.”

156. See Berman, *supra* note 35, at 13.

157. See Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44, 46-47 (1941) (describing natural law theory as deriving its doctrine from the assumption that what is just can be objectively determined by human reason or the will of God).

158. See *supra* Part IV.

fundamentals. Having something to explain or to expound, they endeavor to understand it and to state it rationally and in so doing work out a theory of what it is. The theory necessarily reflects the institution which it was devised to rationalize, even though stated universally.<sup>159</sup>

Theories of law wax and wane and have shifting emphases subject to developments at the time and place of their formulation. This includes broad influences like a period of social turmoil or rapid social change, as well as more immediate influences within intellectual settings in which legal theories are developed, such as academic specialization, institutional support, and current scholarly norms or fads.

It is critical to see that a jurist (or citizen) can adhere to *all three* sets of background beliefs simultaneously without contradiction or inconsistency—she can believe that legal rules are legally valid even when immoral, that law should be just and some moral norms are objectively right, and that law is a social institution utilized to achieve ends. Indeed this combination of beliefs is probably common. Only when these beliefs are framed at higher levels of abstraction and counter-posed as opposing theoretical positions with defining elements do incompatibilities arise.

The failure to mark the distinction between theories of law and background assumptions has been a fertile source of confusion. Using adherence to the assumption underlying legal positivism as his criterion for inclusion, for example, Lon Fuller categorized Oliver Wendell Holmes, Jr., the legal realists, and sociologists of law (including Ehrlich) as legal positivists, even though they did not explicitly align themselves with legal positivism.<sup>160</sup> Theorists still debate whether Holmes was a legal positivist,<sup>161</sup> and whether the legal realists can be seen as legal positivists.<sup>162</sup> Assertions like these are prone to commit the basic error of thinking that a jurist who

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159. POUND, *supra* note 124, at 30.

160. See FULLER, *supra* note 28, at 45-59.

161. See FREDERIC R. KELLOGG, OLIVER WENDELL HOLMES, JR., LEGAL THEORY, AND JUDICIAL RESTRAINT (2007) (challenging the notion that Holmes was a legal positivist).

162. See, e.g., Danny Priel, *Were the Legal Realists Legal Positivists?*, 27 LAW & PHIL. 309 (2008); Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054 (1995) (describing the evolution of legal positivism in the United States, and comparing it to legal realism).

holds the background assumption contained within a theory also, therefore, subscribes to the higher-level theory. This promotes confusion, as just explained, because a jurist can accept one or more background assumptions without necessarily committing to the theory which centers on those assumptions.

To preempt this misunderstanding, I should clarify that I do not claim that all legal realists or contemporary legal scholars who implicitly hold evolutionary-functionalist-social views of law count as social legal theorists. My objective, rather, was to trace out ideas about the social nature of law that were central to historical and sociological jurisprudence, and to show how widespread these ideas have become independent of the theories that initially promoted them.<sup>163</sup>

The current situation is precisely that law is widely seen in social terms, but with no recognized jurisprudential tradition to match.<sup>164</sup> Background beliefs about law do not require an accompanying theory to thrive, obviously, yet this theoretical vacuum leaves us to carry on without the benefit of advances in understanding that well formulated theories potentially bring.

Another essential clarification is that social legal theories are a *branch* of jurisprudence. Multiple contrasting social theories of law exist, not just those I mentioned earlier, from theorists as diverse as Max Weber, Niklas Luhmann, and Julius Stone,<sup>165</sup> and among contemporary jurisprudents such as William Twining, Roger Cotterrell, Lawrence Friedman, and David Trubek.<sup>166</sup> Social legal theories proffer concepts of law, theories about the origins of law and

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163. See *supra* Parts II-IV (discussing how the principles of historical jurisprudence were integrated into sociological jurisprudence, which in turn became engrained in jurisprudence theories); see also *supra* notes 152-54 and accompanying text.

164. See *supra* note 154 and accompanying text.

165. See MAX RHEINSTEIN, MAX WEBER ON LAW IN ECONOMY AND SOCIETY (Max Rheinstein ed., Edward Sihls & Max Rheinstein trans., 1954); JULIUS STONE, THE PROVINCE AND FUNCTION OF LAW: LAW AS LOGIC, JUSTICE, AND SOCIAL CONTROL (1950); Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 CARDOZO L. REV. 1419, 1425 (1992) ("The legal system itself is an inseparable part of the societal system.").

166. See generally ROGER COTTERRELL, THE POLITICS OF JURISPRUDENCE (Univ. of Pa. Press 1989); LAWRENCE M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE (1975); WILLIAM TWINNING, GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE (2009); David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1, 1-2 (1972).

functions of law, theories about the institutional nature of law, theories about the social forces that shape law, and much more.<sup>167</sup> Because social legal theorists disagree among themselves on fundamental points, it is not possible to present a detailed list of shared theoretical propositions.

The broad range and sheer diversity of social theories of law has contributed to obscuring that they fall within a single jurisprudential branch. The functionalist assumptions within Montesquieu,<sup>168</sup> for example, are different from the cultural explanations of Savigny,<sup>169</sup> which are yet again different from the instrumental explanation of Jhering.<sup>170</sup> Sociological jurists, in their political views, tended to be critical of historical jurists for their antipathy to radical legislative reform.<sup>171</sup> This diversity might be invoked as an argument against squeezing them under a single jurisprudential umbrella, especially considering that certain theorists, most prominently Maine and Weber, are major figures outside jurisprudence in fields like sociology, anthropology, and political science<sup>172</sup> (although it bears mention that Weber was trained in law, worked for several years as a lawyer, and initially taught law).<sup>173</sup>

Natural law theory, however, is in the same condition. Radically diverse approaches coexist within the natural law tradition, including the Catholic branch represented by St. Thomas Aquinas and John Finnis, Lon Fuller's proceduralism, Michael Moore's metaphysical realism, and Ronald Dworkin's unique law as integrity, to

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167. See generally BRIAN Z. TAMANAHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* 1-3 (2001) (testing, exploring, and elaborating on the thesis that "*law is a mirror of society, which functions to maintain social order*").

168. See *supra* notes 38-57 and accompanying text.

169. See *supra* notes 30-71 and accompanying text.

170. See UNGER, *supra* note 144, at 123-28; *supra* notes 81-87.

171. See *supra* notes 55-56 and accompanying text.

172. See, e.g., Charles F. Keyes, *Weber and Anthropology*, 31 ANN. REV. ANTHROPOLOGY 233, 233 (analyzing Weber's effect on English-speaking anthropologists, as opposed to his often analyzed influence in political science and sociology); Henry Orenstein, *The Ethnological Theories of Henry Sumner Maine*, 70 AM. ANTHROPOLOGIST 264, 264 (synthesizing Maine's social, political, and legal theories in order to understand his influence on modern anthropology). Some of the most interesting current theorizing about law as a social institution is coming out of evolutionary thought taking place in political science and anthropology. See, e.g., FRANCIS FUKUYAMA, *THE ORIGINS OF POLITICAL ORDER* (2011) (analyzing the origins of law and the social forces that have brought them to their contemporary state).

173. See STEPHEN P. TURNER & REGIS A. FACTOR, *MAX WEBER, THE LAWYER AS SOCIAL THINKER* 2-7 (1994).

mention a few natural law theories that have little in common.<sup>174</sup> Along with jurisprudential strains worked out in law departments, natural law theory is developed in philosophy, political theory, and theology departments.<sup>175</sup>

Legal positivism is likewise internally riven by disputes among competing positivist theories—a gulf separates Hartian and Kelsenian positivists<sup>176</sup>—although the range of disagreement among positivists is narrower. The more limited diversity within legal positivism is perhaps explained by the fact that only legal theorists (and not even most of them) appear to be interested in the questions that occupy analytical jurisprudents; in contrast, natural law and social legal theory entertain issues taken up by an assortment of theorists from other disciplines.<sup>177</sup>

Like the other two major traditional branches of jurisprudence, there is no single or dominant social legal theory. The common thread that unites this jurisprudential tradition can be pared down to two propositions: law is social in nature and is best understood through an empirically-focused lens.

## VII. THREE CONTRASTING-COMPLEMENTARY ANGLES ON LAW

This last observation raises another sense in which these three jurisprudential streams represent genuine theoretical alternatives. Natural law takes a *normative* angle on law.<sup>178</sup> Legal positivism takes a *conceptual or analytical* angle on law.<sup>179</sup> Social legal theory

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174. An overview of this diversity is provided in Jonathan Crowe, *Natural Law Beyond Finnis*, 2 JURISPRUDENCE 293, 294 (2011) (discussing the natural law theories of Aquinas and Finnis, Fuller, Moore, and Dworkin while clarifying “the relationship between the core claims of the new natural outlook and the more specific views of individual authors”). For a discussion of a range of existing theories, and advocating the addition of progressive natural versions, see WEST, *supra* note 14, at 12-59.

175. See Crowe, *supra* note 174, at 297 (“[C]ontemporary natural law scholarship has become splintered between distinct academic fields.”).

176. See H.L.A. Hart, *Kelsen Visited*, 10 UCLA L. REV. 709 (1963) (critiquing Kelsen’s work and delineating between their respective positions).

177. See *supra* notes 172, 175 and accompanying text.

178. See Kelsen, *supra* note 157, at 46-48 (stating that most individuals in a society agree on morals and values, and the doctrine of natural law is derived from that idea).

179. See Sebok, *supra* note 162, at 2070-71 (stating that Pound’s criticism of analytical jurisprudence targeted two of three central elements of positivism).



takes an *empirically* oriented angle on law.<sup>180</sup> To put it another way: natural law is grounded in moral philosophy, legal positivism in analytical philosophy, and social legal theory in science. I invoke “science” expansively to encompass history, economics, sociology, anthropology, psychology, political science—any approach with an empirical focus grounded in observation, evidence, verification, falsification, induction, deduction, data gathering, and other such methods. The term “angle” denotes that, although each stream has its own distinctive center, they are not mutually exclusive compartments. When not pushed to antagonistic extremes, these three orientations balance one another, which prompted Morris Cohen to declare (too brashly), “[n]o great individual jurist ever belonged exclusively to the analytic, historical, or philosophical school.”<sup>181</sup> All three have normative implications; all three engage in conceptual analysis; all three accept that law is a social institution.

A century ago this tripartite division was well known. “Jurisprudence, in its specific sense as the theory or philosophy of law,” wrote John Salmond, “is divisible into three branches, which may be distinguished as analytical, historical, and ethical.”<sup>182</sup> Salmond noted that most jurisprudence texts dealt primarily with one or another, but insisted that “[t]hese three aspects of the law ... are so involved with each other that the isolated treatment of any one of them is necessarily inadequate.”<sup>183</sup> In the mid-twentieth century, Julius Stone divided jurisprudence into three main branches: “Analytical Jurisprudence,” “Sociological (or Functional) Jurisprudence,” and “Theories of Justice (or Critical or Censorial or Ethical) Jurisprudence.”<sup>184</sup>

Legal philosopher Hans Kelsen presented the same triangulation. “The limits of this subject [analytical jurisprudence] and its cognition must be clearly fixed in two directions: the specific science of law, the discipline usually called jurisprudence, must be distinguished from the philosophy of justice, on the one hand, and from

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180. See *supra* notes 38-47 and accompanying text.

181. MORRIS R. COHEN, *LAW AND THE SOCIAL ORDER: ESSAYS IN LEGAL PHILOSOPHY* 347 (1933).

182. JOHN SALMOND, *JURISPRUDENCE* 4 (7th ed. 1924).

183. *Id.* at 5.

184. JULIUS STONE, *THE PROVINCE AND FUNCTION OF LAW* 31-32 (1950).

sociology, or cognition of social reality, on the other.”<sup>185</sup> In Kelsen’s breakdown, analytical jurisprudence focuses on law as a normative system with its own criteria of validity;<sup>186</sup> natural law is about principles of justice or morality;<sup>187</sup> sociological jurisprudence, which he associated with the “American legal realists,”<sup>188</sup> looks at what law actually does.<sup>189</sup> Kelsen was antagonistic to natural law theory,<sup>190</sup> but he was not entirely hostile to sociological jurisprudence though it had no place in his theory of law.

The pure theory of law by no means denies the validity of such sociological jurisprudence, but it declines to see in it, as many of its exponents do, the only science of law. Sociological jurisprudence stands side by side with normative [analytical] jurisprudence, and neither can replace the other because each deals with completely different problems.<sup>191</sup>

Absent social legal theory, the third branch argued for in this piece, theoretical discussions about the nature of law are missing an essential alternative perspective.<sup>192</sup> Natural lawyers and legal positivists take angles on law that limit their ability to plumb the full range of theoretical insights that can be derived from placing the social nature of law at the center of the inquiry.<sup>193</sup>

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185. Kelsen, *supra* note 157, at 44.

186. *Id.* at 50-52.

187. *Id.* at 46-47.

188. *Id.* at 52 n.2.

189. *Id.* at 52.

190. *Id.* at 45-49.

191. *Id.* at 52. Although he identified his theory with analytical jurisprudence, Kelsen uses the term “normative jurisprudence” to label his “pure theory of law” because his theory focuses on law as a system of norms. As Hart observed, this choice of labels was a source of confusion. Hart, *supra* note 176, at 712-13.

192. Oakeshott argued that each of these positions was incomplete in different respects, and he hoped that they could be superseded by a more comprehensive theory of law. He specifically faulted analytical jurisprudence for its overly abstract bent: “It is clear, I think, that a philosophical enquiry into the nature of law would very soon apprehend the incompleteness of the explanation of the nature of law offered in an analytical jurisprudence and would make the best of its way to something less abstract.” OAKESHOTT, *supra* note 114, at 173-74.

193. Harold Berman argues that each branch “has isolated a single important dimension of law, and it is both possible and important to bring the several dimensions together into a common focus. Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CALIF. L. REV. 779, 779 (1988).

Analytical jurisprudence and natural law have large blind spots owing to their lack of attention to social context and their failure to attend to the historical dimension of law.<sup>194</sup> For example, analytical jurists can tell us about the elements of the rule of law, but they say nothing about how the rule of law develops within a society. They also typically exclude from their purview the myriad ways in which “pressures in society” infuse legislation and judge-made law, and they do not examine legal consequences.<sup>195</sup> Many jurists, furthermore, have noted that the enduring challenge law faces is to reconcile legal stability with social change, which analytical jurisprudence and natural law do not address. “[S]ocial necessities and social opinion are always more or less in advance of Law,” Maine observed.<sup>196</sup> “We may come indefinitely near to the closing of the gap between them, but it has a perpetual tendency to reopen.”<sup>197</sup> As Morris Cohen put the dilemma, “It would thus seem that life demands of law two seemingly contradictory qualities, certainty or fixity and flexibility; the former is needed that human enterprise be not paralyzed by doubt and uncertainty, and the latter that it be not strangled by the hand of the dead past.”<sup>198</sup> Owing to its ongoing flow within fixity, law is constantly being made anew inside and on top of the old and existing—the old sometimes serving as a sturdy foundation or a recalcitrant drag. “A system of law at any time,” Holmes wrote, “is the resultant of present notions of what is wise and right on the one hand, and, on the other, of rules handed down from earlier states of society and embodying needs and notions which more or less have passed away.”<sup>199</sup>

Natural law and analytical jurisprudence say little about these prominent features of law. The former is silent because universal natural principles are timeless and unchanging. The latter neglects

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194. See *supra* note 73 and accompanying text.

195. See Edwin W. Patterson, *Hans Kelsen and His Pure Theory of Law*, 40 CALIF. L. REV. 5, 7 (1952) (these comments are directed at Kelsen but apply to analytical jurists generally).

196. MAINE, *supra* note 33, at 23.

197. *Id.*

198. COHEN, *supra* note 181, at 261. Cohen’s writings on judicial changes in the law are reminiscent of Maine’s analysis of legal fictions. See Cohen, *supra* note 126; see also Cohen, *supra* note 127.

199. COHEN, *supra* note 181, at 208 (quoting OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 156 (1921)).

them because social forces are outside the positivist focus on legally recognized mechanisms of legal change (internal rules of recognition and change), and social influences and consequences are too messy and empirically sensitive and variable to be amenable to analytical treatment. The two main acknowledged traditions in contemporary jurisprudence, consequently, are not interested in and are incapable of addressing the dynamic engagement of law *in* society.

In his account of the task of legal positivism, Marmor recognizes that law must be understood as one among other social institutions:

Law is not the only normative domain in our culture; morality, religion, social conventions, etiquette, and so on, also guide human conduct in many ways which are similar to law. Therefore, part of what is involved in the understanding of the nature of law consists in an explanation of how law differs from these similar normative domains, how it interacts with them, and whether its intelligibility depends on such other normative orders, like morality or social conventions.<sup>200</sup>

This seems to suggest that legal positivism extends out to the arena of social legal theory, but typically it aims at isolating and distinguishing the legal system; whereas, looking in the opposite direction, social legal theorists pay close attention to law's connections to the surrounding social domain.

Interestingly, social legal theory can incorporate natural law and legal positivist theories themselves within its own framework. On the opening page of his classic work, *The Concept of Law*, Hart writes, “[n]otwithstanding its concern with analysis the book may also be regarded as an essay in descriptive sociology.”<sup>201</sup> Although legal philosophers have downplayed this assertion ever since, social legal theories take it seriously, producing sociologically oriented accounts of legal positivist notions like the social sources thesis, the separation thesis, primary and secondary rules, the internal view, and legal validity.<sup>202</sup> Natural law theory itself can be examined as a social-legal phenomenon—as a set of beliefs about law that are

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200. Marmor, *supra* note 1.

201. H.L.A. HART, *THE CONCEPT OF LAW*, at v (1961).

202. This application, for example, reveals that the separation thesis of legal positivism should be extended beyond morality to include functionality as well. See Brian Z. Tamanaha, *Socio-Legal Positivism and a General Jurisprudence*, 21 OXFORD J. LEGAL STUD. 1 (2001).

acted upon in ways that affect the world.<sup>203</sup> As Max Weber observed, natural law is “sociologically relevant only when practical legal life is materially affected by the conviction of the particular ‘legitimacy’ of certain legal maxims, and of the directly binding force of certain principles which are not to be disrupted by any concessions to positive law imposed by mere power.”<sup>204</sup> John Finnis took pains to distinguish natural law principles, which he claimed exist outside of history, from natural law discourse, which has a long history with actual social consequences, good and bad.<sup>205</sup> Natural law theory occupies itself with the former, while social legal theory takes up the latter. Legal positivism and natural law are thus reframed through the social legal theory lens.

#### VIII. “BUT IT’S NOT *PHILOSOPHY* OF LAW”

The empirical-scientific bent of social legal theory prompts an objection to my argument. Natural law and legal positivism are entitled to their elevated status as theoretical approaches to the nature of law, it might be said, because only they are *philosophical*. Legal positivists have been especially prone to express this position, as in this passage by Joseph Raz:

Since a legal theory must be true of all legal systems the identifying features by which it characterizes them must of necessity be very general and abstract. It must disregard those functions which some legal systems fulfill in some societies because of the special social, economic, or cultural conditions of those societies. It must fasten only on those features of legal systems which they must possess regardless of the special circumstances of the societies in which they are in force. This is the difference between legal philosophy and sociology of law. The latter is concerned with the contingent and with the particular, the former with the necessary and the universal. Sociology of law provides a wealth

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203. For a recent example of this perspective on human rights, see LAWRENCE FRIEDMAN, *THE HUMAN RIGHTS CULTURE: A STUDY IN HISTORY AND CONTEXT* (2011). Another example is George Herbert Mead, *Natural Rights and the Theory of the Political Institution*, 12 J. PHIL. PSYCHOL. & SCI. METHODS 142 (1915).

204. MAX WEBER, *ECONOMY AND SOCIETY* 866 (Guenther Roth & Claus Wittich eds., 1978). For a systematic presentation of natural law as a social phenomenon, see TAMANAHA, *supra* note 167, at 133-205.

205. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 24-25 (2d ed. 2011).

of detailed information and analysis of the functions of law in some particular societies. Legal philosophy has to be content with those few features which all legal systems necessarily possess.<sup>206</sup>

Other leading legal positivists have echoed this stance. Scott Shapiro declares:

Social sciences cannot tell us what the law is because it studies *human* society. Its deliverances have no relevance for the legal philosopher because it is a truism that nonhumans could have law. Science fiction, for example, is replete with stories involving alien civilizations with some form of legal system.... Social scientific theories are limited in this respect, being able to study only human groups, and hence cannot provide an account about all possible instances of law.<sup>207</sup>

Ponder the oddity of a legal philosopher declaring that social-scientific theories, because they are limited to human societies, are irrelevant to legal philosophy. Earlier generations of philosophers were not so dismissive. Salmond, an analytical jurisprudent, considered analytical, historical, and ethical jurisprudence to be informative “branches” within the “philosophy of law.”<sup>208</sup> Oakeshott described historical and sociological jurisprudence as full-fledged versions of “philosophical jurisprudence,” alongside analytical jurisprudence and natural law. He recognized that they undertook the same basic task, albeit from different perspectives, writing:

Neither analytical jurisprudence nor historical jurisprudence accept law in the character in which it first appears to them; both are attempts to expound the nature of law by relating law as it first appears to some general principle and in this way transforming and making fuller our view of the nature of law.<sup>209</sup>

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206. JOSEPH RAZ, *THE AUTHORITY OF LAW* 104-05 (2d ed. 2009).

207. SCOTT J. SHAPIRO, *LEGALITY* 406-07 (2011). Ironically, just as legal philosophers declare the irrelevance of social science, we witness the opposite tendency of scientists denying the relevance of philosophy. See Austin L. Hughes, *The Folly of Scientism*, 37 *NEW ATLANTIS* 32 (2012), available at <http://perma.cc/Q5F6-JK6T>. On all sides, this has the feel of intellectual border patrolling and one-upmanship.

208. SALMOND, *supra* note 182, at 4.

209. OAKESHOTT, *supra* note 114, at 158.

In 1966, philosopher Martin Golding published *The Nature of Law: Readings in Legal Philosophy* using the same three-part division.<sup>210</sup>

No certain or agreed-upon criteria delimit what counts as “philosophy of law,” which has changed in scope and orientation over time. Raz and Shapiro apply unusually and unduly constrictive defining criteria that would exclude much that has been considered to be within legal philosophy in the past. In this Article, I have mentioned prominent philosophers—Hume, Berlin, Shklar, Oakeshott, and Cohen—who positively discuss theories of the social nature of law. Contemporary philosopher John Searle is engaged in constructing “a new branch of philosophy that might be called ‘The Philosophy of Society,’”<sup>211</sup> involving philosophical analysis of social institutions, with extensive discussions of law that overlap with subjects addressed by social legal theorists.

Raz’s and Shapiro’s exclusionary stance is premised on the assumption that the defining feature of legal philosophy is conceptual analysis that produces *universalistic, necessarily true* claims about the nature of law.<sup>212</sup> A like-minded, analytical jurist explains that their theory of law *must* “consist of propositions about the law which are *necessarily true*, as opposed to merely contingently, true,” because “only necessarily true propositions about law will be capable of explaining the nature of law.”<sup>213</sup> This self-imposed demand guarantees an abstract, stripped-down, sterile theory of law because little (if anything) is *necessarily* and *universally* true about any social institution.

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210. THE NATURE OF LAW: READINGS IN LEGAL PHILOSOPHY (Martin P. Golding ed., 1966). For his third branch, alongside natural law and legal positivism, Golding uses readings from legal realism and sociological jurisprudence, not historical jurisprudence. A recent text of the same name (different subtitle), in contrast, contains readings only from natural law and legal positivism. See THE NATURE OF LAW: PHILOSOPHICAL ISSUES IN CONCEPTUAL JURISPRUDENCE AND LEGAL THEORY, *supra* note 2.

211. See JOHN R. SEARLE, MAKING THE SOCIAL WORLD: THE STRUCTURE OF HUMAN CIVILIZATIONS 5 (2010); see also JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY (1995).

212. This assertion is criticized in Frederick Schauer, On the Nature of the Nature of Law (May 9, 2011) (discussion draft), available at <http://perma.cc/8MRL-VGUD>; see also Frederick Schauer, *The Social Construction of the Concept of Law: A Reply to Julie Dickson*, 25 OXFORD J. LEGAL STUD. 493 (2005).

213. JULIE DICKSON, EVALUATION AND LEGAL THEORY 18 (John Gardner ed., 2001) (emphasis added).

Their claimed detachment from social science, however, inescapably stumbles over the root reality that law is a *social* institution. It is for this reason that, beneath the elaborate philosophical trappings, theories of law that legal philosophers construct look much the same as theories of law that social legal theorists produce.<sup>214</sup> Take Shapiro's theory of law: "what makes the law, understood here as a legal institution, *the law* is that it is a self-certifying compulsory planning organization whose aim is to solve those moral problems that cannot be solved, or solved as well, through alternative forms of social ordering."<sup>215</sup> His theory of law consists of two elements: *form* (compulsory planning organization) and *function* (solving complex moral problems). Social theories of law typically are constructed using variations of the same two elements.

To see the similarity, compare Shapiro's theory of law with an influential sociological concept of law formulated by Max Weber: "The term 'guaranteed law' shall be understood to mean that there exists a 'coercive apparatus,' i.e., that there are one or more persons whose special test is to hold themselves ready to apply specially provided means of coercion (legal coercion) for the purpose of norm enforcement."<sup>216</sup> When devising his concept of law, Weber reformulated state law in abstract terms, paring away its nonessential features. Shapiro did the same, after setting up his analysis with philosophical talk of self-evident intuitions. Their respective concepts differ on the surface because they have different opinions about what is essential to law and how best to frame it, but each produces an abstraction of the *form* of state law (institutionalized coercion/organized compulsory system), and each posits law's core *function* (enforcing norms/norm-based planning).

Analytical jurists and social legal theorists produce similar-looking theories of law because they are working from the same material: socially constructed manifestations of law. They can be

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214. An extended demonstration of this similarity is in Brian Z. Tamanaha, *What is "General Jurisprudence"? A Critique of Universalistic Claims by Philosophical Concepts of Law*, 3 *TRANSNAT'L LEGAL THEORY* 287 (2012).

215. SHAPIRO, *supra* note 207, at 225.

216. MAX WEBER, *WEBER ON LAW IN ECONOMY AND SOCIETY* 13 (Max Rheinstein ed., 1954). Weber meant his formulation to be an ideal type, rather than a definition. For an overview, see Brian Z. Tamanaha, *Analytical Map of Social Scientific Approaches to the Concept of Law*, 15 *OXFORD J. LEGAL STUD.* 501 (1995).



compared against one another and judged superior or inferior, and their range of application is identical. There is no categorical distinction between the theories of law they construct.

For legal philosophers who remain unpersuaded, my argument that social legal theory is a third major jurisprudential tradition holds up even if the philosophy/not philosophy demarcation is granted. Jurisprudence is more capacious than legal *philosophy*.<sup>217</sup> The insistence that legal philosophy is a distinct subtype of jurisprudence does not deny that social legal theory is a coequal branch of jurisprudence.

### IX. WHY IT MATTERS

Legal theory discussions revolve around schools of thought defined by characteristic theses clashing with opposing schools espousing contrary theories (or subtheories), frequently presented in stock narratives: the legal realists debunked the formalists; critical legal studies attacked liberal legalism; textualists challenge pragmatists; originalists and living constitutionalists square off; natural lawyers and legal positivists have fought for several centuries.

Without an acknowledged name and identity, a theoretical perspective practically does not exist. Historical jurisprudence is all but forgotten; sociological jurisprudence is sometimes mentioned but rarely engaged; theoretical work on law and society is relegated to a nethermost region at the border of the social sciences, or stuck in the law and society movement, cabined off from jurisprudence.

A leading contemporary jurisprudence text by Brian Bix exemplifies this virtual erasure.<sup>218</sup> Bix travels expansively across the jurisprudential terrain, exploring many theoretical nooks and crannies and mounting sophisticated discussions of civic republicanism and game theory, among a multitude of other well-known and obscure theory topics; he even spends a chapter on law and literature.<sup>219</sup> He does not discuss sociological jurisprudence at all, however, mentioning the name once in connection with Pound.<sup>220</sup> He allocates

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217. See Roger Cotterrell, *Why Jurisprudence Is Not Legal Philosophy*, 5 JURISPRUDENCE 1, 41 (2014).

218. BIX, *supra* note 4.

219. *Id.*

220. *Id.* at 194.

page-length treatment to historical jurisprudence in the “Other Approaches” chapter, noting its demise.<sup>221</sup> Legal sociology and law and society are dispensed with in a short paragraph at the close of a chapter on “critical perspectives”:

The application of sociology to law, known variously as “socio-legal studies”, “law and society”, and “law in context”, has a long history of offering empirically grounded critiques of current laws and legal practices, and suggestions for change. While sociology aims to be descriptive and morally neutral, many of those who identify with this approach have “progressive” or radical views, and so these movements have often been thought of as more “critical” than scientific.<sup>222</sup>

No mention is made of Jhering or Ehrlich in the text. Savigny and Maine get a few quick words on the historical jurisprudence page.<sup>223</sup> Weber shows up in a handful of footnotes,<sup>224</sup> Unger in a single note.<sup>225</sup> Cicero gets greater coverage from Bix than all of them combined.<sup>226</sup> There is no discussion of the social nature of law or holistic views of law within society.

An astute and learned jurist, Bix is not to be faulted for his noncoverage, which accurately reflects the general disregard within jurisprudence of the social legal theorists canvassed in this Article. Jurisprudence proper leaves most of this out.<sup>227</sup> Among legal theorists who do think about these issues, the lion’s share of attention goes to legal realists—anointed authority figures in U.S. academic-legal culture—with little awareness of the rich theoretical veins that lie unseen and untapped beneath the realists’ understanding of law.

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221. *Id.* at 275-76.

222. *Id.* at 253.

223. *Id.* at 275.

224. *Id.* at 13, 37, 42, 71.

225. *Id.* at 254, 239.

226. *Id.* at 68.

227. Raymond Wacks, whose jurisprudence text includes chapters on historical and sociological jurisprudence, confides that a reviewer of the manuscript for the publisher “urged me to eliminate altogether” these chapters “because they were ‘mainly empirical’—and insufficiently intellectual.” WACKS, *supra* note 13, at 317. Although Wacks notes that a second reader wanted those very chapters expanded, the majority of jurisprudence texts reflect the views of the first reader.

Having no name means getting no recognition and no coverage. The label social legal theory gives an identity to a coherent theoretical perspective that was once prominent and lives on as implicit background assumptions, but is now neglected by legal theorists.

This is just a start. The parameters of this jurisprudential branch must be made concrete and filled in through the construction of theories that illuminate the social nature of law, building on predecessors like Ehrlich and Weber, as well as more recent contributors. With a name and identity, theorists with a social-legal orientation can locate their work within a shared tradition, perceiving and constructing common links with others, critically engaging in ways that prompt further insights and development within the tradition. A name and identity will also help sharpen the differences between natural law, legal positivism, and social legal theory as alternative theoretical standpoints, promising, perhaps, to advance beyond the well-worn debate between the former two. Work now excluded from jurisprudence—like theories of law and development or legal pluralism—will be drawn into jurisprudence by the social-legal focus.

Law *is* a social institution, after all. The poverty of contemporary jurisprudence is its marginalization of theories that center on and explore this fundamental insight about law.

