The Relation of Law to Social Process: Trends in Theories About Law

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From an anthropological perspective, authoritative decisions are inextricable components of social process: such decisions are made in response to claims about particular interactions or events in social process; they are affected by a wide variety of interdependent variables in the context of interaction; they project a future distribution of values among participants in social process; and they have varied impacts through time upon a succeeding flow of events or value distributions. When considered in interaction with naked power decisions and choices within the civic domain, it is, furthermore, the aggregate flow of authoritative decisions in a community which shapes a comprehensive public order, in the sense of major value distributions, of that community. Even a theory about law which conceives law in terms of rules, or is primarily concerned about its transempirical assumptions, must, when it seeks to apply its rules, or transempirical assumptions, to interrelations between people, make some empirical reference, however implicit or vague, to this "big, blooming, buzzing, confusion" which is the larger context.
The comprehensiveness and precision with which a theory about law makes reference to the larger context of social process must, hence, affect the quality with which both observers and others can perform the indispensable tasks of inquiry about authoritative decisions. The explicitness with which problems are formulated in terms of social process events, comparable through time and across community boundaries, has important consequences for the performance of each of the various specific intellectual tasks. The clarity with which basic community policies are postulated in terms of an empirical distribution of values affects the economy and effectiveness with which appropriate principles of content and procedure can be devised for relating these policies to particular instances. The sharpness and selectivity of the focus upon the particular events that precipitate claims to authoritative decision determine the relevance and the accuracy of appraisals of past trends in decision for their approximations to preferred community policies. The comprehensiveness and selectivity with which both the environmental and predispositional factors affecting decision are specified completely condition performance of the scientific task. Estimates of the costs and benefits both for the particular parties and aggregate community interest of options in decision are dependent, not upon mere extrapolations of the past, but upon the disciplined performance of each other task, within the framework of a comprehensive map of costs and benefits relevant to the particular decision. The devising of alternatives in authoritative decision better designed to secure preferred community policies is, similarly, dependent, not merely upon a knowledge of technical legal concepts and institutions, but upon a realistic map of the effective power and other social processes that condition authoritative decision.

Our inherited theories about law, the great historic emphases, differ immensely, however, in the explicitness, comprehensiveness, and particularity with which they make reference to the encompassing social process. Though “the idea that law is causally deter-

integral component of empirical social process. E. Havelock, The Liberal Temper in Greek Politics passim (1957).

3. The relevant history is sketched in J. Stone, Social Dimensions of Law and Justice (1966); L. Pospisil, Anthropology of Law ch. 5 (1971); N. Timasheff, An Introduction to the Sociology of Law ch. 3 (1939); G. Gurvitch, Sociology of Law 68-157 (1942); E. Schur, Law and Society: A Sociological View (1968); Riesman, Toward an Anthropological Science
mined by other social phenomena and in its turn causally determines them” has “been expressed since remote times,”4 one dominating tradition, deriving from ancient Western-European thinking and strongly reinforced by certain basic presuppositions of the transempirical and positivistic emphases, has been that law is regarded “as an absolute and autonomous entity, independent of space and time, not related in any particular way to the nature of the society, in which it exists.”5 It is only with the advent of modern social science, in its impacts upon the historical, sociological, and American realist emphases, that we begin to get an appropriate account taken of the inescapable interconnections of legal process and social process.6 Even the best of our contemporary theories about law do not, however, always offer or suggest recourse to either a comprehensive map of the interrelations of legal process and social process or the more detailed procedures necessary for the effective employment of this map in particular instances.7 Some of the inadequacies in our inherited theories would appear to derive both from the absence of a clear focus upon authoritative decision and from failure to distinguish and specify the various intellectual tasks of inquiry.8

4. N. Timasheff, supra note 3, at 44.
5. L. Pospisil, supra note 3, at 128; cf. J. Stone, supra note 3, at 7. A. Radcliffe-Brown, supra note 1, at 198 writes:
   If you examine the literature on jurisprudence you will find that legal institutions are
   studied for the most part in almost complete abstraction from the rest of the social
   system of which they are a part.

6. H. Yntema, American Legal Realism in Retrospect, 14 VAND. L. REV. 317 (1960); H.
   Cairns, Theory of Legal Science (1941).

7. Edwin Schur concludes that “[a]t its best then, and no matter how sociological in
   orientation, jurisprudence has not approximated a genuine sociology of law.” E. Schur, supra
   note 3, at 18. In a sober statement of some of the difficulties in formulating relevant theory,
   Willard Hurst writes:
   The greatest difficulties for legal history lie in relating the formal operations of
   law—passing statutes, deciding cases, making administrative orders or rules—to the
   life that flowed outside the legal forms. The basic organizing ideas of this legal order
   will not let us escape this effort.

Hurst, Legal Elements in American History, in Law in American History 14 (D. Fleming &
B. Bailyn eds. 1971) (Vol. 5 of the Perspectives in American History series).

8. For specifications of some of the requirements of appropriate theory, see Jones,
It has already been observed that the "natural law" frame of reference, grounding authority in transembrirical sources, exhibits a minimum of concern for the formulation of comprehensive theory designed to facilitate inquiry about the interrelations of authorita­tive decision and its context of social process. It is this frame which is "the most elaborated form" of the conception that law is largely independent of time, place, and other circumstance and which has "left little room for conceiving of law as a dynamic phenomenon and prevented legal scholars from theorizing about legal change." When the primary concern of a theory is identifying or formulating general principles of a universal character for purposes of appraisal only, it can hardly be expected that such a theory will find need to engage in detailed inquiry about the events that precipitate claims to decision, the modalities of claim within decision process, the environmental and predispositional factors that affect decision, or the impacts of decision upon continuing social process. Yet it should be remembered that many of the great historic expositors of the natural law frame have made, as we have seen before with respect to constitutive process, profound and searching criticism of the most minute details of legal process in terms of values that can be given empirical reference, and that no proponent of this frame who would communicate can entirely escape reference to effective decision and its empirical context. Indeed, one distinguished contemporary proponent of the natural law frame, Professor Lon Fuller, insists that it "is only the rediscovery of a point of view which has always been taken for granted in natural-law speculation" for moderns to hold that "law is an integral part of the whole civilization of a society, and that fruitful work in the law presupposes a familiarity

11. It has often been observed that the proponents of natural law are more concerned with appraisal than with other intellectual tasks. See E. Patterson, Jurisprudence 332 (1953); W. Friedmann, Legal Theory 95 (5th ed. 1967). Note the emphases in H. Rommen, The Natural Law (T. Hanly transl. 1947); Selznick, Sociology and Natural Law, 6 Natural L.F. 84 (1961); Strauss, Natural Law, 11 Int'l Encyc. Soc. Sci. 80 (1968); Natural Law and Modern Society (J. Conley ed. 1963).
with the other social sciences, such as psychology, economics, and sociology." \[13\] What Professor Fuller does not adequately emphasize is that how law is conceived and how society is conceived, and what are regarded as the relevant intellectual tasks of inquiry, make a tremendous difference to the consequentiality of inquiry about the interrelations of legal process and social process. \[14\]

One distinguishing characteristic of the historical frame of reference, in an emphasis dating back at least to Montesquieu, has of course been its insistence that legal process cannot be realistically studied in isolation from its larger context of social process. \[15\] \"The central thesis of the *Lettres Persanes* and of *L'Esprit des Lois*,\" as Stone writes, \[16\] \"that human laws and justice are the resultant of numerous factors such as the local manners and customs and physical environment, implied that human laws as social phenomena could be understood only by postulating the operation of cause and effect in the social field.\" For Montesquieu, as many have observed, law was an integral, organic component of a community's total culture, \[17\] and the theory and procedures for inquiry that he recommended approach contemporary standards in emphasis upon comprehensiveness and contextuality. \[18\] Because of their complete, \"inseparable\" merger of law into community process, with failure to identify authoritative decision even for purposes of observation, their inability to distinguish and clarify conceptions of authority and control, and their basic insistence that in any community the factor predominantly determining law is a \"popular consciousness\" or \"geist\" unique to that community, Savigny and his followers

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14. In his famous article, *American Legal Realism*, 82 U. Pa. L. Rev. 429, 448, 452 (1934), Professor Fuller reviews the debate as to which of \"law\" and \"society\" has the predominant impact upon the other and concludes that they are \"polar categories.\"
   
   In a more recent book, Fuller concludes that: \"Perhaps in time legal philosophers will cease to be preoccupied with building \'conceptual models\' to represent legal phenomena, will give up their endless debates about definitions, and will turn instead to the analysis of the social processes that constitute the reality of law.\" L. FULLER, THE MORALITY OF LAW 242 (rev. ed. 1969).
cannot be regarded, despite the inspiration they offer, as having made important contribution to the development of systematic theory and procedure for inquiry about the interrelations of law and society. The emphasis of Maine was more upon origins and stages of development than upon impacts, and subsequent scholarship has not always dealt kindly with his findings about origins and stages, but the model Maine exhibited for the meticulous, and richly detailed, relating of legal concepts and practices to a host of factors in community context has had an enormous subsequent influence and is of abiding value. More modern proponents of the historical frame, such as Sir Paul Vinogradoff, eloquently if somewhat cautiously, restate its basic postulate. Thus,

a remarkable feature in the formation of social and legal doctrines is the fact that the principal schools of thought arise and displace one another under the influence of actual changes in world politics, as though the material struggle for power or property was reflected in the consciousness of thinkers and contributed substantially to produce change in the orientation of thought.

The "ideological types" offered by Vinogradoff as a theory for inquiry do not appear, however, to afford high promise of future enlightenment. The confusions of Savigny and his followers are compounded in the American proponent, J. C. Carter; it may be recalled that he regarded law as "the product of the automatic action of society," "self-created and self-existing," and impervious to change by direct legislative action, not conforming to established custom. It would appear of little consequence that he adds: "Life is an ever unfolding spectacle of new transactions and phases of conduct, which will forever demand the work of study and classification."

The dominant preoccupation of the positivistic or analytical frame of reference with the systematic classification and ordering of technical rules emanating from established officials has largely pre-

19. L. POSPISIL, supra note 3, at 139, 143; W. FRIEDMANN, supra note 11, at 209, 214; J. STONE, supra note 3, at 101; E. PATTERTON, supra note 11, at 410; Wilhelm, SAVIGNY, 14 INT'L ENCYC. SOC. SCI. 21 (1968); Riesman, supra note 3, at 124; Redfield, Maine's Ancient Law in the Light of Primitive Societies, 3 W. POL. SCI. Q. 574 (1950); Hoebel, Maine, 9 INT'L ENCYC. SOC. SCI. 530 (1968).
22. Id. at 128.
cluded proponents of this frame from any consequential concern with social process context. In their efforts to reject and escape the theological and metaphysical elements in earlier theories, they have concentrated more upon the syntactic interconnections of such rules than upon the semantic dimensions of the interactions in which rules are employed. 23 Without a consistent focus upon operations, as well as perspectives, without the clear relation of authority and control in a conception of decision, and without an explicit notion of constitutive process, proponents of this frame could hardly be expected to exhibit great interest in the exploration of the reciprocal impacts of law and comprehensive social process. 24 Thus, the most important link which Austin sought to establish with empirical social process, in an effort to escape syntactic circularity, was, it may be recalled, in his location of "sovereignty," or highest authority, in a determinate person or body of persons to whom habitual obedience was paid. 25 Yet the description of even this modest link was left highly cryptic and ambiguous, and Austin's search for "the necessary notions and distinctions common to all systems of law" was scarcely the most constructive model for inquiry about the interrelations of legal process and social process to bequeath to posterity. 26 It is largely posthumous flattery, however, unintended, for Kelsen to find "sociological elements" in "Austin's analytical jurisprudence." 27

For Kelsen, the problem of locating authoritative decision in more comprehensive social process is a problem of "general sociology" or "sociological jurisprudence," not of the "pure" theory of law. 28 Sociology may concern itself with "natural reality," such as

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23. W. Friedmann, supra note 11, at 276; E. Bodenheimer, supra note 15, at 89; E. Patterson, supra note 11, at 82. It is interesting that Patterson, though describing at great length the interests of legal scholars in various social sciences, makes no attempt at synthesis. See E. Patterson, supra note 11, at 50 et seq.
He claimed to be constructing a science, comparable to the physical sciences. The attempt was obviously chimerical if we are to take it seriously. . . . If he had little psychology, he had not even a conception of "sociology."
27. H. Kelsen, supra note 5, at 171.
“the motives or intentions of law making authorities” or “the wishes or interests of individuals with respect to the formation of the law to which they are subject”; except, however, “in so far as these motives and intentions, these wishes and interests are manifested in the material produced by the lawmaking process” they are not appropriate subject matter for “normative jurisprudence.”29 The “general theory of law,” as conceived by Kelsen, “is directed at a structural analysis of positive law rather than at a psychological or economic explanation of its conditions, or a moral or political evaluation of its ends.”30 Thus, in his theory, quite explicitly and consistently, “norms” do not have the content of anybody’s actual perspectives but are rather regarded as transcendental forms or hypothetical judgments;31 authority is defined in terms of such norms, and not of facts;32 the “efficacy” stipulated for norms is related to whole systems, and is assumed;33 the basic “grundnorm,” substituted for Austin’s sovereign, is not located in empirical processes of effective power, but is rather presupposed;34 and even the “state” is dissolved in its empirical reference to interactions and made identical with an equally disembodied “law.”35 One can only conclude that Kelsen, in his effort to cleanse jurisprudence of metaphysical elements and value judgments, has also cleansed it of any helpful reference to what he describes as “natural reality.”36

Though Hart aspires to “be of use to those whose chief interests are in moral or political philosophy, or in sociology, rather than in law,”37 his theory is in fact only modestly less “pure” of social process context than that of Kelsen. He distinguishes between “the analysis (or study of the meaning) of legal concepts” and “historical inquiries into the causes or origins of laws,” “sociological inquiries

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Kelsen has laid out a sharp line of distinction between juristic and sociological method, and his “pure theory” of law is as exclusive of anything but the norms proceeding from the organs of a politically organized society as was Austin’s analytical jurisprudence.

29. H. KELSEN, supra note 5, at xiii.
30. Id. at xiv, 162.
31. See Lasswell & McDougal, supra note 25.
32. H. KELSEN, supra note 5, at 111.
33. Id. at 42, 119.
34. Id. at 115-16.
35. Id. at 182-83, 188.
36. W. FRIEDMANN, supra note 11, at 277-78.
into the relation of law and other social phenomena,” and “criticism or appraisal of law whether in terms of morals, social aims, ‘functions,’ or otherwise,” and he makes clear that his own primary interest is in “analysis.”38 His central focus is placed upon “rules,” rather than upon authoritative decision, because without “the notion of a rule” there “would be nothing to distinguish” authoritative from non-authoritative decisions, though he nowhere explains why the empirical expectations of community members might not suffice to make this distinction.39 His “concept of law” is achieved, as noted earlier, by a “union” or “combination” of “primary” and “secondary” rules;40 yet he leaves quite mysterious who combines what with what and how. The distinction he makes between rules with a “core of settled meaning” and rules of “open texture” scarcely begins to indicate the difficulties confronting an interpreter who must ascribe an empirical reference to such rules in particular instances.41 The most important of his “secondary rules,” the “rules of recognition” employed to establish the authority of “primary rules” of behavior, Hart asserts to be matters of “fact” or practice, not of postulation;42 yet, as we have already emphasized, he offers little specification of constitutive practices.43 In lieu of comprehensive inquiry about factors affecting decision and the impacts of decision, Hart, like Kelsen, stipulates the “efficacy” of an entire system of rules44 and indulges the assumption that rules are generally obeyed.45 It may be that, as Hart suggests, “an examination of the standard uses of relevant expressions and the way in which these depend on a social context” may yield important information for “descriptive sociology”:46 some may, however, be forgiven if they prefer a less restricted, more comprehensive, and more direct view of the interrelations of legal and social process.47

39. H. Hart, supra note 37, at 78, 133.
40. Id. at 77.
41. Id. at 144; Hart, supra note 38, at 607.
42. H. Hart, supra note 37, at 107.
43. See Lasswell & McDougal, supra note 12, at 13.
44. H. Hart, supra note 37, at 100.
45. Id. at 114.
46. Id. at vii.
47. Hughes, Professor Hart’s Concept of Law, 25 Mod. L. Rev. 319 (1962).
It has been the principal mission of the sociological frame of reference to bring the theory and procedures of modern science to bear upon inquiry about legal process in its larger context of causes and consequences. Though the general frame has been affected, or afflicted, by changing theories and conceptions in sociology and the other social sciences, by alleged distinctions between the "sociology of law" and "sociological jurisprudence" more recondite than serviceable, and by various affiliations with, or dependences upon, prior metaphysical, historical, or positivistic theories, there would appear to be a slow movement toward the formulation of appropriate theory about law and social process, and their interrelation, and toward the invention of more effective procedures for relevant inquiry. Thus, the formulations of Ehrlich, commonly regarded as a pioneer in this frame, are certainly sufficiently comprehensive in their reach: in his theory, law is made an integral, almost indistinguishable, part of a larger social process and he insists, that "the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself." This comprehensiveness in reach is not, however, complemented by an appropriate selectivity in focus and specified procedures for inquiry. His basic conceptions remain diffuse, without the necessary detailed empirical indices. For him, official decisions are propelled by " elemental forces against which the will of man cannot prevail" and decisions can be made effective only when they are in conformity with the "living law," which "dominates life itself even though it has not been posited in legal propositions." "The center of gravity," he repeats, "everywhere lies in the order which the associations create for themselves, and life in the state and society depends more upon the order of the associations than upon the order which proceeds from the state and from society." Authority and control, authoritative decision, and constitutive process are never, in his theory, made clearly

49. Lasswell & McDougal, supra note 25.
51. E. Ehrlich, supra note 50, at 154.
52. Id. at 493.
53. Id. at 119.
distinguishable components of the encompassing, overwhelming social process. One can only concur in the sober appraisal of Pound that Ehrlich, despite the magnificence of his design, "had only the beginnings of a technique of ascertaining customs of popular action and getting at the relations of these customs to the law in the books and the judicial and administrative processes in action."  

Weber obviously had a vision of a comprehensive social process and of authoritative decision as a component of such process, but he was content to offer a number of disparate methodological suggestions, without attempting an overall systematization in terms of values and institutions or their equivalents. He did greatly emphasize the importance both of contextuality and of selectivity. Contextuality he sought in the notion of social process as interaction. Thus, he writes:

In general, for sociology, such concepts as "state," "association," "feudalism," and the like, designate certain categories of human interaction. Hence it is the task of sociology to reduce these concepts to "understandable" action, that is, without exception, to the actions of participating individual men.  

His most general aspiration he stated as:

The type of social science in which we are interested is an empirical science of concrete reality (Wirklichkeitswissenschaft). Our aim is the understanding of the characteristic uniqueness of the reality in which we move. We wish to understand on the one hand the relationships and the cultural significance of individual events in their contemporary manifestations and on the other the causes of their being historically so and not otherwise.

Selectivity Weber sought by recommending that scholars focus upon segments of activity in terms of their value significance. He emphasized repeatedly:

54. R. Pound, supra note 48, at 335.
It has been pointed out that, in formulating his classification of the four types of action, Weber neglected to develop the analysis of the structure of a social system which is a logically necessary prerequisite of such a classification.
57. E. Shils & H. Finch, supra note 55, at 72.
The concept of culture is a value-concept. Empirical reality becomes "culture" to us because and insofar as we relate it to value ideas. It includes those segments and only those segments of reality which have become significant to us because of this value-relevance. Only a small portion of existing concrete reality is colored by our value-conditioned interest and it alone is significant to us. It is significant because it reveals relationships which are important to us due to their connection with our values.58

For economic inquiry about different segments of activity, or institutional practices, Weber invented his famous conception of "ideal types" but it does not appear that he ever organized the various "ideal types" with which he worked in terms of a comprehensive set of value categories. It has already been indicated that the conceptions of authority and control offered by Weber were sufficiently empirical in their reference to facilitate policy-relevant inquiry.59 The influence that Weber's recommendations and example have had on a world-wide basis in promoting inquiry by both social scientists and legal scholars is a matter of common knowledge.

It is the accolade of some that Pound's contributions to inquiry about the interrelations of legal process and social process are the most important an American scholar has yet produced.60 Certainly Pound's aspiration was no less comprehensive than that of Weber. "We study law," he wrote, "in all of its senses as a much specialized phase of what in a larger view is a science of society."61 His purpose was to approach law from "the side of the ideal element" and he began "with the ideas of civilization, of social control as the means of maintaining civilization, and of law as an agency, or in one sense of the term, a phase of social control."62 Yet the theories and procedures for inquiry Pound recommends are infected with many imprecisions and ambiguities which handicap this grand aspiration. His key concept of "social control" is, as we have previously noted, left quite diffuse in many forms and agencies.63 The most we get about the interaction of law and other forms of social control is that "all other agencies of social control are held to exercise disciplinary au-

58. Id. at 76.
59. Lasswell & McDougal, supra note 25.
60. E. PATIERSON, supra note 11, at 509.
61. R. POUND, SOCIAL CONTROL THROUGH LAW 7 (1942).
62. Id. at 16.
63. Lasswell & McDougal, supra note 25.
thority subject to the law and within bounds fixed by law”^{64} and that there is “movement for teamwork with the other social sciences” for “the study of law as a part of a whole process of social control.”^{65} The closest Pound comes to offering a theoretical structure adequate to facilitate inquiry about the interrelations of authoritative decision and other features of social process is in his celebrated theory of “interests.” He defines “interests,” building both upon Von Jhering and William James as “claims or wants or desires (or, I like to say, expectations) which men assert de facto, about which the law must do something if organized societies are to endure”^{66} he subdivides interests into the three main classes of “individual interests” (“involved immediately in the individual life and asserted in title of that life”), “public interests” (“involved in life in a politically organized society and asserted in title of that organization”), and “social interests” (“involved in social life in civilized society and asserted in title of that life”);^{67} and he suggests further elaborate subdivision and particular specification for each major class of interests. With explicit and appropriate relation to major values and institutional practices of each particular interest, Pound’s theory might be refashioned into a comprehensive and homogeneous framework for facilitating performance of all relevant intellectual tasks. In Pound’s presentation, however, key concepts are accorded a floating and unstable reference, quite without system or homogeneity, to the social process events that precipitate claims to authoritative decision, the detailed modalities by which claims are made, the responses of authoritative decision in granting or denying such claims, and alleged criteria for the appraisal of decision;^{68} one is never certain, furthermore, whether particular recommended concepts are being offered or applied for the purpose of describing decisions, accounting for decisions, or appraising deci-

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64. R. Pound, supra note 61, at 24.
65. Id. at 124.
67. R. Pound, supra note 61, at 69.

It should be added that Pound himself recognized that his categories were not comprehensive and homogeneous. See R. Pound, supra note 61, at 69-70.
sions.\textsuperscript{69} Similar imprecisions and ambiguities in Pound's conceptions of authority and control, decision, and constitutive process have already been indicated. One interested in comprehensive policy-oriented inquiry can applaud the general direction of Pound's recommendations, but not the details of his road map.\textsuperscript{70}

The principal contribution of the American realists, in indispensable supplement to the aspiration of the sociological frame, to theory for inquiry about the interrelations of law and social process has been in making authoritative decision the central focus of attention. The definition of law as "a function of judicial decisions," as Felix Cohen noted, "is of tremendous value in the development of legal science, since it enables us to dispel the supernatural mists that envelop the legal order and to deal with the elements of the legal order in objective, scientific terms."\textsuperscript{71} When authoritative decisions are made the central phenomena subjected to inquiry, it becomes possible to be both comprehensive and selective in reference to the potentially significant features of the larger, encompassing social process: the events which precipitate claims to authoritative decision may be categorized in ways convenient for comparisons through time and across boundaries, the environmental and predispositional factors affecting decision may be examined in terms of their potential significance, decisions may be observed in any desired degree of intensity as distributions of values among claimants, and the value consequences of decisions both for the claimants and others, including the larger community, may be assessed.\textsuperscript{72} Building upon this insight, various early proponents of the realist frame made an insistent demand for the reorganization of inquiry about law in terms of factual categories, as contrasted with complementary tech-

\textsuperscript{69} Thus, E. Patterson, supra note 11, at 509 and W. Friedmann, supra note 11, at 336, appear to regard Pound's categories as serving primarily the task of evaluation.

\textsuperscript{70} The principal purpose of Timasheff's important book, The Sociology of Law (1939), was to locate "legal order" within "social order" and to sketch their broad potential interrelations. This he achieves in high degree with eminently workable empirical references for authority and control and constitutive process. He does not, however, complement this achievement by providing theory and procedures for performing the relevant intellectual tasks with respect to a community's aggregate flow of public order decisions. Cf. F. Cohen, The Legal Conscience 192 (L. Cohen ed. 1960).

\textsuperscript{71} Id. at 79.

\textsuperscript{72} The importance of making decision the central focus of attention is developed in R. Snyder, H. Bruck & B. Sapin, Foreign Policy Decision-Making (1963).
nical legal concepts, both comprehensive and precise.73 Thus, Cook, in a pioneering article, argues that “a scientific approach to the study of law will demand observation and study of the actual structure and functioning of modern social, economic and political life,”74 and Llewellyn called for “a comparison of facts with facts, and not of words with words”75 and “grouping cases and legal situations into narrower categories than has been the practice in the past.”76 Most pointedly, Oliphant wrote:

Law teachers should have and law students should get either before or after they come to the law school a comprehensive knowledge of the whole social structure. This should not consist of theories as to domestic, economic and political life nor of unrelated description of disjoined social phenomena. The whole life which law affects should be viewed comprehensively as an interrelation of processes. This understanding cannot be got today by a hit and miss apprenticeship in life any more than living in our bodies can teach us its structure and functioning. Systematized study, deliberately focused toward getting an adequate knowledge of the entire social structure as a functioning and changing but coherent mechanism, is a basic prerequisite.77

One consequence of this emphasis by the realists was the production of a large number of new casebooks, emphasizing both a “factual” organization and the introduction of vast quantities of materials which would previously have been regarded as “non-legal,”78 and

73. A particularly perceptive and eloquent statement of the basic tenets of American legal realism is Yntema, American Legal Realism in Retrospect, 14 VAND. L. REV. 317, 322 (1970). He writes:

It would not be inappropriate to consider the movement an offspring of sociological jurisprudence that purported, in closer conformity with contemporaneous relativistic theories developed in other fields of science and philosophy, to represent more truly the trend of the time to understand the law by objective investigation of legal phenomena, not merely in themselves but in relation to their social context, as the necessary basis of reform.

See W. Rumble, Jr., American Legal Realism (1968); E. Patterson, supra note 11, at 537; W. Friedmann, supra note 11, at 295.


75. K. Llewellyn, supra note 68, at 19.

76. Id. at 56. In The Normative, The Legal and The Law Jobs: The Problem of Juristic Method, 49 YALE L.J. 1355 (1940) and, with E.A. Hoebel, in The Cheyenne Way (1941), Llewellyn made constructive development of the notion of “claim” and distinguished claim from both group interaction and community response.


78. Illustrative volumes might include K. Llewellyn, Cases and Materials on Sales (1930); W. Douglas & C. Shanks, Cases and Materials on the Law of Business Units (3 Vol. 1931); L. Green, Cases on Torts; H. Havighurst, Cases on Contracts (1934); A. Jacobs, Cases on Domestic Relations (2d ed. 1939); R. Powell, Cases on Trusts and Estates (1932).
widespread efforts toward reform of law school curricula, some of which have continuing reverberations. This emphasis may have contributed also to the deepening and enrichment of legal scholarship more generally, both in law reviews and in treatises, which has occurred within the United States in recent decades. Whatever the realists' other successes or failures, however, they have yet to develop or borrow the comprehensive overarching theory, which they demanded, for describing, in any necessary particularity, the larger social process encompassing authoritative decision. The theory with which they have worked has been largely that of "institutional" analysis. Though quite aware of the importance of values, and indeed strongly value oriented, they have never developed a comprehensive set of value categories for cross-cutting institutional practices; in the absence of such value categories they have not had adequate intellectual tools for observing the equivalence or non-equivalence of different institutional practices through time or across boundaries. Perhaps it should be added that one of the most

79. One of the most constructive and influential calls for reclassification of "the subject matter of legal education" was Faculty of Law, Columbia University, SUMMARY OF STUDIES IN LEGAL EDUCATION (H. Oliphant ed. 1928). The impact of this study is noted in Currie, The Materials of Law Study, 3 J. LEGAL ED. 331, 335 (1951).

The continuing reverberations of these early efforts at reform may be observed in Roundtable on Curricular Reform, 20 J. LEGAL ED. 387 (1968), presenting papers delivered at the 1968 annual meeting of the Association of American Law Schools.

More recent stirrings abroad are indicated in THE DIVISION AND CLASSIFICATION OF THE LAW (J. Jolowicz ed. 1970). Mr. Jolowicz argues that "a system of classification whose purpose is to enable a review and reform of the law to be carried out must be factual, not conceptual in approach." He adds that ":[w]hat is needed is examination of the law as it operates in society, not examination of the law's internal logic or theoretical consistency." Id. at 3.

80. A comparison of the major books and reviews in 1930 and in 1970 should be enough to carry conviction. Auerbach observes that "[a]fter all, the realists did triumph and their teachings more than any other influence, are reflected in the curricula and methods of our law schools." Auerbach, supra note 8, at 96.

81. See Hamilton, Institution, ENCYC. SOC. SCI. 84 (1937); K. LLEWELLYN, supra note 68, at 352; Moore, Rational Basis of Legal Institutions, 23 COLUM. L. REV. 609 (1923).

The debt of the realists to Malinowski is often acknowledged. See Malinowski, Culture, 4 ENCYC. SOC. SCI. 621 (1937) and his Introduction to J. HOBEN, LAW AND ORDER IN POLYNESIA (1934).

82. One of the more interesting essays by the realists is the concluding chapter, entitled Some Principles of Political Dynamics, of T. ARNOLD'S, THE FOLKLORE OF CAPITALISM (1937). He writes:

In making these generalizations we are handicapped by the lack of a terminology. There are no adequate terms to describe the study of modern social institutions, either from the point of view of an anthropologist studying a primitive tribe, or from the point
influential founders of American legal realism, Judge Jerome Frank, was determinedly pessimistic about the potentialities of systematic inquiry about the interrelations of authoritative decision and its context. Every decision was unique and hopes of comparison and prediction were largely futile; the "social sciences" were mostly "social guesses." Thus, he wrote:

The basic trouble is that all the so-called "social sciences" are but phases of anthropology: Their attempted generalizations relate to the customs and group beliefs (in the mores, the folkways), matters, which especially in a changing modern society, are not readily predictable, because of the numerous elusive and accidental factors, including the fortuitous effects of forceful ("earth-quake") personalities. 83

The more significant search for viable theory about the larger social process that encompasses authoritative decision would appear to derive today, not from jurisprudential frames, but from various social science fields and from many different specific investigations of particular problems. 84 Contemporary investigations of society developed from the "mother matrix" of philosophy in seeking to describe the ever more complex situations to which preferential formulations are applied. In consequence of this descriptive focus, professional recognition was often given to social scientists who narrowed their vision to more and more minute problems and circumstances. As research accumulated and diversified, attention began to be directed once more to the ways in which each sector of society interacted with every other.

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83. J. FRANK, COURTS ON TRIAL 210 (1949).
In anthropology, for example, the "functionalist" movement stimulated comparative studies and simultaneously intensified the demand for comprehensive maps and versatile methods of exploring the role of law in society. Nevertheless, the theories employed in actual inquiry have not always approximated the double reference to values and institutions required for both inclusiveness and selectivity.

The important contributions of contemporary political scientists to both theory and procedures have already been noted in our discussions of authority and control and of constitutive process; yet political scientists have been so preoccupied with official institutions of power that they have been relatively slow to examine the counterparts of the community power process that occur within the boundaries of family, economic and other institutions. The sociologists, on the other hand, have devoted themselves to a significant extent to the sectors of society that have usually been neglected by other social scientists. Despite the wide-ranging theories and inquiries conducted by eminent colleagues who have contributed to power theory, sociologists have frequently failed to cope with problems of authority and control, including counterpart functions and structures, throughout society. Both political scientists and sociologists

85. Singer, The Concept of Culture, 3 Int'l Encyc. Soc. Sci. 527, 538 (1968) describes the emphasis of Malinowski "on culture as a functioning, active, efficient, well-organized unity, which must be analyzed into component institutions in relation to one another, in relation to the needs of the human organism, and in relation to the environment, man-made as well as natural."


87. For representative samplings of current thought and inquiry, see Skolnick, The
have been engaged in filling the gaps in their respective fields.

Among the disciplines that cut across conventional lines of distinction and provide categories and procedures of great importance for the study of management of decision and choice are social psychology and social psychiatry. These disciplines are contributing to the investigation not merely of perspectives of authority but of all the interacting norms that occur in society.

Despite its reputation as the social science with an especially formidable interpenetration of explanatory theory and empirical inquiry, and of descriptive and preferential viewpoints, economics has been of little importance, until recently, in the study of legal process, or in the evolution of contextual maps for scrutinizing the whole of society. The changes that have occurred in recent years are traceable, in part, to the setbacks that occurred when professional economists tried to explain and to guide national and international programs of development. Although these programs were phrased as "economic," it became increasingly evident that power and other values and institutions were as deeply involved as "wealth." The urge to formulate policy alternatives with realism and precision has stimulated the adaptation of sophisticated economic analysis to issues of relevance to law and society.

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The potentialities of one popular type of theory are indicated in T. Parsons, SOCIETIES: EVOLUTIONARY AND COMPARATIVE PERSPECTIVE (1969); T. Parsons, THE SOCIAL SYSTEM (1951); M. Levy, THE STRUCTURE OF SOCIETY (1952).


The cumulative impact upon theory and procedures of the many relatively recent empirical studies by representatives from various disciplines of the interrelations of various isolated features of legal and social process is not yet clear. Unhappily, many of these studies have not had the benefit of appropriate guiding theory about either authoritative decision or social process, and many of them have been inspired by incomplete notions of the relevant intellectual tasks and of the interdependences of these tasks, including the dependence of even the scientific task upon the adequate performance of other tasks.

The reference to policy analysis draws attention to a movement that is bringing research in all social science fields in closer contact with the requirements of an approach to law that is "contextual," "problem oriented," and "multi-method." In an explicit "policy science" emphasis, specialists in all value-institution sectors have been busily involved in contemporary activities that break through many traditional barriers that tended to segregate intellectuals from one another and from active participants in the decision and choice processes of community-wide and of more delimited configurations in the world community as a whole, or of its subdivisions.

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91. Some of these studies are described in the references in note 87 supra. See also Symposium, Law and Social Change, 13 AM. BEHAVIORAL SCIENTIST 483 (S. Nagel ed. 1970). The course books by Friedmann and Macaulay and by Schwartz and Skolnick reproduce a number of representative studies, with abundant references. The journal LAW & SOCIETY REVIEW publishes an annual bibliography. See, e.g., 6 LAW & SOCIETY REV. 443 (1972).


93. This emphasis aspires toward the creation of a comprehensive conceptual map and an inclusive set of terms for thinking and talking about society, policy, and law that will facilitate performance of all relevant intellectual tasks. See H. LASSWELL, PREVIEW OF POLICY SCIENCES (1971); Policy Sciences, 12 INT'L ENCYC. SOC. SCI. 181 (1968); The Emerging Conception of the Policy Sciences, 1 POLICY SCIENCES 3 (1970); Lasswell & Holmberg, Toward a General Theory of Directed Value Accumulation and Institutional Development, in POLITICAL AND ADMINISTRATIVE DEVELOPMENT (R. Braibanti ed. 1969); THE POLICY SCIENCES (H. Lasswell & D. Lerner eds. 1951); Y. DROR, PUBLIC POLICYMAKING REEXAMINED (1968); COMMUNICATION SCIENCES AND LAW (L. Allen & M. Caldwell eds. 1965); W. Isard, GENERAL THEORY: SOCIAL, POLITICAL, ECONOMIC AND REGIONAL, WITH PARTICULAR REFERENCE TO DECISION-MAKING (1969).

Continuing ferment among legal scholars is suggested in LAW IN A CHANGING AMERICA (G. Hazard ed. 1968); W. FRIEDMANN, TRANSNATIONAL LAW IN A CHANGING SOCIETY (1972); J. HALL, COMPARATIVE LAW AND SOCIAL THEORY (1963); Miller, The Role of the University Law School
interplay between philosophical, historical, scientific, projective, and policy invention, evaluation and selection is becoming more intense and productive. The implications for jurisprudence are abundantly apparent; and, although it lies outside our present scope of inquiry, it is not too much to expect that jurisprudential developments may have reciprocal impacts in other areas of knowledge and action.

in the Evolutionary Scheme, 1971 U. ILL. L.F. 1; Reich, Toward the Humanistic Study of Law, 74 YALE L.J. 1402 (1965); Miller, On the Interdependence of Law and the Behavioral Sciences, 43 TEX. L. REV. 1094 (1965).