The Nature of Legal Sociology

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Introduction.

Centuries, whether in cricket or chronology, are arbitrary divisions, but we are conditioned by conventions, and I find it convenient to describe the nineteenth century as giving birth to sociological jurisprudence and the twentieth century to legal sociology. A case can be made out for regarding 1900 as a turning point in the graph of legal study in the common law world. A few years earlier Holmes had expressed the conclusions of his reflections on legal education in addresses to his own Law School at Cambridge and to the rival Law School at Boston, which had been established some years earlier as a protest against Harvard's adoption of the case method. A few years later, Roscoe Pound was to begin the addresses and articles which less dramatically, but with no less importance than the case method, were to transform the character of American legal education. To Harvard, Holmes had said "An ideal system of law should draw its postulates, and its legislative justification from science. As it is now, we rely upon tradition, or vague sentiment, or the fact that we never thought of any other way of doing things, as our only warrant for rules which we enforce with as much confidence as if they embodied revealed wisdom. Who here can give reasons of any different kind for believing that half the criminal law does not do more harm than good? . . . The Italians have begun to work upon the notion that the foundations of the law ought to be scientific, and if our civilisation does not collapse, I feel sure that the regiment or division that follows us will carry that flag." To the Boston Law School he said: "The training of lawyers is a training in logic . . . The logical method and form flatter that longing for certainty and repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man . . . For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."

The first 2,500 years of European Legal Science.

The phenomena which constitute the denotations of the word "law," e.g., the rules enacted by parliaments, must be distinguished from the science of law in the sense of the discipline which studies those phenomena. This distinction is not easily maintained in the common law world where judges are legislators, giving much space in their judgments to their reason for legislating, but it is vital. Professor Stone has said: "The summons sometimes heard for 'law' to become a social science . . . is misconceived since even if the study of law in
society should become a social science, that is certainly not the same thing as 'law' becoming a social science. Law would only provide its subject matter." The distinction he makes is the one I make between two meanings of the word "law," for that word belongs to a family of words which are used both for denoting a science and the data of the science: other words are psychology, chemistry, history, economics and philosophy.

Calling "philosophy" a science is intended to draw attention to the fact that the word "science" is used both to refer to any organised knowledge, and also to signify that a discipline employs the methods of the natural sciences. Julian Huxley has blamed the Americans for using social science to include disciplines like history, but the restriction of the use of the word "science" to the natural sciences appears to be rare except among those who attended schools with special "science" sections for the teaching of physics and chemistry. Both law and the study of law have long been called "sciences" because legal and jurisprudential discourse places greater emphasis on reasoning than does ordinary discourse. Those, however, who are anxious to promote what they often call an empirical science of law would deny to much of sociological jurisprudence the name of "science," employing that word only for the enterprise of seeking for specific correlations between precisely defined concepts.

The oldest of legal studies is that first pursued in Greece before the modern illusory separation of philosophy into legal, moral, political and social philosophy appeared: it was the search for the character of an ideal system of law, for the criterion by which the just law could be distinguished from the unjust. Boom has followed depression in "die ewige Widerkehr des Naturrechts," but each new upsurge of "natural law" has provided a number of different theories. To-day the rival theories also compete for the name, neo-Thomists denying to neo-Kantians the right to be called believers in natural law. It is, of course, not necessary to believe in the reality of justice, for one to be an adherent of natural law, for even the logical positivists are prepared to do that. They, however, reduce justice to sentiment or feeling, whereas "natural lawyers" insist on the rationality of the concept. The natural lawyer need not, however, be opposed to the sociologist. The Platonist sees natural law as that which conforms to the nature of man: why may not the nature of man be determined by Aristotelian observation? What has to be avoided is the simplified belief as to man's nature which is founded on and does not transcend one's tribal conventions. Margaret Mead has shown how plastic is man's nature, and women's also—but the social institutions she would like to see created are those which would satisfy and realise the manifold potentialities of humanity: not so far a cry from that open society an open mind can discern as a Platonic ideal.

A long-established tradition has associated the study of law not with the search of Greek philosophers for the ideal or essential character of law, but with the elaboration by Roman jurists of particular rules of law. It is for the scholar, and not for me, to say whether Buckland is right in his view that references in the texts of Roman law to natural law are but ornaments of discourse. The prevailing view still is that the Romans founded the jurisprudence of the world, to use Asquith's phrase, on a basis of juristic empiricism. For their
early development by analogy they were willing to employ fiction, saying that other trees were to be regarded as the vine trees of the Twelve Tables, other instruments of harm as their javelin. But later they were to abandon the language of fiction and to create new rules from the principles they discerned behind existing rules. This is the method some regard as that of the common law. The legal philosophy it represents, says Pound, is the idealisation of the social status quo, all situations are to be measured by an idealised form of the social order of the time and place. Principles remain the same, says Lord Mansfield, but they are applied to changing circumstances and needs: and the creation of new rules and the application of new and old rules is thought of as a logical process. Even Holmes, as we have seen, thought in 1895 of the lawyer of his day as the man of logic. But the fuller understanding of logic, which he developed led him to see traditional methods as pseudo-logical. From the Supreme Court Bench he was to proclaim that "general proportions do not decide concrete cases," and to ask his colleagues whether the inarticulate premisses required to support the logic of their judgments were really derived from the constitution they purported to expound, or from Herbert Spencer's Social Statics. Lord Atkin was to claim for the common law a "charter of freedom" comprising even greater powers of expansion in relation to social needs than those exercised by Lord Mansfield.

The theory that law is responsive to the felt needs of the time, and must be adequate to changing social needs and requirements, may be traced back at least as far as Aristotle, but for a sustained and pervasive treatment of this theory of the social and historical character of law we must turn to the beginning of the nineteenth century. Reacting against different versions of a priori rationalism in law, Savigny in Germany and Bentham in England were pioneers of social science, founders of a historical school of jurisprudence and of a utilitarian philosophy of government. Their influence was by no means confined to the legal profession. Dicey was to see the transformation of Britain in the nineteenth century as largely the work of Bentham, but the writings of Bentham are almost entirely unknown to the legal profession. Professor Jolowicz asked in the title of his bi-centennial lecture "Was Bentham a lawyer?" Savigny was nothing but a lawyer, but his influence too transcended law. As Ashley said "From the lawyers the historical method passed to the economists," and the present pedagogical naming of disciplines as Political and Economic Institutions stems from Savigny's insistence that law is an institution of society, functioning best when allowed to develop as a natural growth, instead of being imposed on society by legislative plan. Bentham, on the other hand, saw legislation as the only practical means of ending the vested interests which obstructed the satisfaction of society's real needs.

The Sociological Jurisprudence of the Nineteenth Century.

Sociology as a word is the creature of the nineteenth century. The work of its inventor, Auguste Comte, and of his successors has had considerable influence on legal theory: and in legal education the continued retention of economics within the faculties of law of French universities is due in some measure to the sociological interpretation
of law which culminated in the doctrine of social solidarity of Duguit. But, as we have seen, recognition of law as one of the institutions of society, having as its origin social needs and forces, and as its function social control, is much older. It is in the nineteenth century that this became a dominant attitude, even in England. The literature which appears to have been most influential for the common law world has been German; for the nineteenth century saw German universities rise to a position of supremacy, and in so doing transform all universities into centres of research and science. From Savigny onwards the understanding of human activity was seen to lie in the necessity for historic continuity and for social integration. Mommsen taught that Roman law could not be understood if Roman legal history were ignored, and Roman legal history could not be understood except against the background of the political, economic and social institutions of Rome. Moreover, what was true of Rome was true of all legal history, as Maitland was to emphasise again and again in his description of English legal history. An equally important part of the teaching of Mommsen and Maitland was the correlative to what I have just stated: life as well as law is a seamless web. Political and economic events cannot be fully understood without an awareness of the nature of the legal constitution of the society in which they occur.

Savigny’s doctrine that law is the product of the silent anonymous forces of nature arose interest in the study of primitive societies whose simpler character enabled those forces to be seen more clearly. Social coherence and stability, it was seen, could be achieved without the institutions of legislatures or courts, but the society was not regarded as lawless. Customary modes of social organisation, biting deep into individual consciousness through educational methods more effective than those of to-day, provided an authoritative structure which was studied by lawyers, among whom Sir Henry Maine was eminent. Customary law supported, and was supported by, the moral, economic and religious life of the community, and the historical jurist saw law as a way of life and not a form of words. Human behaviour lends itself to a scientific study very different from the logical analysis of words, and Maine’s writings can be properly termed scientific. But lawyers who have followed Maine have been content mainly with historical explanations of particular laws by reference to general social factors. Modern supporters of a customary basis for law sometimes do no more than indicate an ideological dislike of legislation. The mantle of Maine is worn by the anthropologists, Malinowski and Mead, who have supported their theories by their own observations in the field, and have demonstrated the flexibility of human institutions. While they have shown the folly of changing one type of customary behaviour without regard for the interactions of the entire complex of customs, they have shown the wisdom of striving for integrated institutions for the advancement of the entire spiritual and material welfare of man.

The legal etiology of the nineteenth century was not, of course, confined to the study of primitive societies. The most influential writer on the subject, whose work is regarded by his followers as marking out a chronological separation between pre-scientific and scientific writings, more complete than the geographical boundary of the Iron Curtain in whose forging he was instrumental, was Karl
Marx. He proffered explanations not merely of the basis of law in primitive societies, but also of its basis in the capitalist society of his day, and predicted future developments. This is not the place to give an account of the Marxian theory of the interactions between the substructure of the forces of production and the ideological superstructure which includes law: but one need not be a McCarthy to maintain that the conclusions have not been obtained by any rigidly scientific method. Nor need one be a Marxist to say that similar facile generalisation is to be found in the work of English jurists, like Dicey, who have sought for the causes of legal changes in modern societies. Dicey saw "public opinion" as the decisive factor in legal development: there is much of value in his book, but I sometimes wonder whether his thesis is more enlightening than putting forward the vote of a majority as the cause of the passing of an Act of Parliament.

Before Savigny wrote his denial of the vocation of his age for a code of laws, he had been an orthodox teacher of Roman Law, who had expounded also the reception of Roman Law by the Europe of the Middle Ages. Ihering, who has sometimes been regarded as the founder of sociological jurisprudence, also began his academic work as a teacher and writer on Roman Law. But then there came to him a revelation. He realised the absurdity of the manipulation of concepts derived from verbal formulae. Law, he proclaimed, was the instrument of society for the realisation of social purposes. It existed to satisfy as far as possible the varying interests of mankind, and the correct solution of a legal problem where interests conflicted was the maximisation of the satisfaction of those interests. Benthamism was adopted with some significant differences. In the first place, Ihering's was a social utilitarianism admitting of the interests of society as well as of the interests of individuals; and perhaps more importantly it was a doctrine to be used by judges in the decision of cases, and not merely by legislatures in the enactment of statutes. The judge was to look beyond the particular claims of the parties before him to the actual interests involved, and to look beyond the particular rules of code or statute for the source of a new rule for the decision of a new case to social welfare itself. This doctrine was influential in developing schools of lawyers who taught and consequently judges who practised freie Rechtsfindung, libre recherche scientifique, refusing to act solely on analogy from the past.

In the United States the rejection of mechanical jurisprudence was urged on the American Bar in a series of addresses by Roscoe Pound, who also used the name sociological jurisprudence to cover a number of other attitudes to law. Savigny had seen social needs as an efficient cause of legal rules: Ihering had seen social purposes as final causes. Pound stressed the need for considering not only law in books but also law in action. How are these paper rules translated into decisions by judges, police and other administrators, and what is the impact of rules of law on the lives of men and women, on their ideals of conduct and their actual behaviour?

American Realism in the Twentieth Century.

The "vicious rationalism" of Blackstone, as a modern critic has characterised it, led him, even at one of the most creative periods of
the English common law, to portray the judicial process as a government of laws and not of men, a logical application of existing rules. Bentham’s career, which laid the foundations of the welfare state, began with an exposition of the fictional character of the declaratory theory of law. But Bentham retained the ideal of a government of laws, and had no use for judicial legislation: his ideal State was one in which judges mathematically, if not mechanically, applied codified rules of law. The nineteenth century was in one sense a century of codification: the constitution of the United States was the forerunner of many written constitutions and the Code Napoleon the prototype of many codes. The American jurists of the twentieth century approached the study of the judicial process armed with the teaching of Mr. Justice Holmes from the Supreme Court Bench about the administration of a constitution, and the teaching of Dean Pound about continental experience of codes. They, like Bentham, saw the judicial process as one of legislation, but, unlike him, they were convinced of the necessity of judicial legislation, and concerned to make it an instrument of social policy.

The “realists” represented the traditional description of the judicial process as being the logical application to the facts of a particular case of rules already created for the judge. They denied the accuracy of this description. They pointed out that judges made laws, and that between the conception of a rule and the deed of decision intervened far more than logical subsumption. The student who wanted to understand law, the counsel who wished to advise a client, had to do far more than learn rules. Holmes in his Harvard address had spoken of law as being not the revelation of transcendent reason, but simple prediction: Prediction is, of course, often regarded as the criterion of science, and a link between science and law was forged. Bingham, in his 1912 article, which is regarded as the first manifesto of realism, said “The lawyer, as does the scientist, studies sequences of external phenomena and he studies them with a similar purpose—to determine their causes and effects and to acquire an ability to forecast sequences of the same sort. While not excluding other sequences, the phenomena with which he was principally concerned, and to which realists principally gave their attention, was that of litigation. The actual concrete facts on which the action is or might be based and defended are external and generally non-legal phenomena. When the suit is initiated, however, the string of legal consequences commences and continues until it is formally disposed of... Such strings... of causal external facts and legal external consequences constitute the laboratory nature of the lawyer and jurist.” The possibility of considering other behaviour than judicial is, however, retained even in Llewellyn’s flower plucked from the Bramble Bush that law is official behaviour.

This approach to law sought to explain decisions in terms of scientific laws rather than of the juristic norms expressed in decisions. The realists did not always criticise judicial decisions: Llewellyn thought it a commonplace “that the commonsense of judges in dealing with the facts far outruns their powers of reflecting in opinions either what they have done or why they did it.” But the hope was expressed that judicial methods might be improved. There is criticism of “professional conservatism which prefers subsumption under poorly
defined concepts”; there is the injunction that “legal concepts must be sharpened if law is to become scientific.” The jurist himself had to adopt a new technique. One of the realist assumptions, or discoveries, was that the personality of the judge was an important factor in judicial decisions. It did not, of course, need a new scientific investigation of judicial behaviour to discover, reversing the judgment of Plato, that since judges are not philosophers we are bound to have a government of men and not of laws. The practising lawyer and the politician are aware of this common place: the President Roosevelt of 1908 is quoted as saying “The chief law-makers in our country may be, and often are, the judges, because they are the final seat of authority . . . The decisions of the courts on economic and social questions depend upon their economic and social philosophy.” But the realist doctrine did bring about the full examination of the careers and opinions of particular judges which is so marked a feature of American legal writing. Judicial statistics were examined to show that “justice is a personal thing, reflecting the temperament, the personality, the education, environment, and personal traits of the magistrates—that the process of judicial decision is determined to a considerable extent by the judges’ views of fair play, public policy and their general consensus as to what is right and just.” Here is an example of such surveying. “In 1916 (in the City Magistrates’ Courts of New York) 17,075 were charged before the magistrates with intoxication. Of these, 92% were convicted. But the examination of the record of individual judges showed that one judge discharged 79% of this class of cases. In cases for disorderly conduct one judge heard 566 cases and discharged one person, whereas another judge discharged . . . 54%.”

Protests have been made against this “digestive jurisprudence” as it has been termed. Certainly some of the realists were unaware of the difficulties of their task, and were as rash in their generalisations as the commonsense intuitionists they criticised. But the moderate realists had no illusions. “The problem is to predict,” says Moore, “the judicial behaviour of a particular judge at a particular time in an uncontrolled environment. If the judicial behaviour of every judge in the past had been correlated with every significant element in the situation, including his behaviour, and had the procedure netted very precise applicable laws, yet a prediction as probable as that of the physicist . . . could not be possible . . . The lawyer’s colleagues in the other sciences of human behaviour have attempted to correlate behaviour with ‘racial’ traits, structure, physiological processes, psychological adjustment, ‘personality,’ intelligence and co-existent culture. The lawyer’s singlemindedness (his belief that judicial behaviour is correlated solely with the facts of the case) has saved us thus far from a racial jurisprudence, a neurotic jurisprudence, etc., but it has, unfortunately, deprived him of worthwhile scientific experience. It is proposed he begin acquiring that experience.”

In England, of course, a beginning has not been made. But the case of Fender v. Mildmay aroused some interest. The problem for the courts was whether a promise to marry was binding when made by a married man in the interval between obtaining a decree nisi for divorce, and having the decree made absolute. The case went to the House of Lords. It was noted that during this peregrination all
judges who were either Roman Catholic or Anglo-Catholic said the promise was not binding, while non-conformists and low-churchmen held it to be binding.

The behaviour of juries has also been considered. Here is an extract from Jerome Frank, whose extremist "Law and the Modern Mind" is the best-known realist work in England. "In the lower court, the formal law in a jury trial consists mostly of ineffective rigmaroles, incantations, or semi-magical rituals which the judge utters to the jury's uncomprehending ears. When a jury case is appealed . . . the upper court's opinion . . . is merely a step in the process of sending a case back for a second trial before a newly-summoned jury in whose presence the judge . . . will utter a revised abracadabra which will be as little understood by the second jury as the so-called erroneous instructions were understood by the first jury." There is no evidence produced to sustain this belief, but it is an interesting and plausible hypothesis.

Jerome Frank is now a judge, and the second of the realist propositions I wish to describe is that concerned with the evidence on which judges should act. It must be remembered that judicial activity in the United States includes the determination of the constitutionality of statutes, and that the terms of the Bill of Rights of the United States contain such general terms as "due process," "freedom of contract," "equality of laws," whose application demands the intervention of judicial definition. The court has to consider what social policies are stricken by those wide phrases, and what the social consequences are of holding statutes unconstitutional. The realists have not merely pointed to these realities of the courts' function: they have also examined the question of how the court is to determine the social consequences or desirability of judicial decision. The "traditional" method of judicial notice has been criticised. Patterson has said "The judge assumes that, because he has lived in society, he can judge, from his previous experience and without further investigation or experimentation, what will be the social consequences of his decision. This 'casual observation' method is a stubborn hindrance to scientific procedure in judicial decision." The Brandeis Brief has been one method of bringing relevant material to the attention of the court, but it has been objected that counsel's statements are not as reliable as tested testimony. Suggestions have been made that a court should be aided by a panel of experts, and Cardozo J. has thought that one of the functions of a Ministry of Justice might be to organise a commission of scholars to supply the court with requisite evidence.

It remains, of course, to be said that realists do not limit the political character of judicial decisions to those concerned with constitutionality of statutes.

Quantitative Science.

Students of any of the social sciences are well aware of the energy which has gone into the debates over methods and objects. One group of scholars criticises the unscientific character of the procedure of others, another discusses the limitations of the use of scientific method in the study of human behaviour: and there are not found wanting those who consider what constitutes scientific method and
whether it is applicable to social material at all. Controversy over method is perhaps the most distinctive feature of the disciplines called social science. It is found not least among those who advocate and decry the use of scientific method in law. I have already participated to some extent in our dissensions by using separate phrases like sociological jurisprudence and legal sociology. Timasheff has pointed out that much legal writing which talks of the relation between law and society does not concern itself with causal functional studies of how legal norms arise. Only to such studies would he apply the name of legal sociology; literature which is merely concerned with discussing the social character of legal rules he would call sociological jurisprudence. The distinction which I have made is essentially this, though I have extended the categories of sociological jurisprudence and legal sociology. Legal sociology involves the application of scientific method to the problems it handles.

Once again I refer to the addresses of Holmes. In those, we have seen, he pointed out how the Italians were applying science to law. His reference was to the school of positivist criminology whose best known adherent in Britain is probably Lombroso. Though criminology in its origins was the work of jurists, it has since been the subject of study also by psychologists and general sociologists.

It is desirable to point out that criminology includes the study of social phenomena unrelated to a positive system of criminal law, as well, of course, as the treatment of offenders against criminal laws and other matters connected with criminal law. I should further state that within the field of criminology itself there are to be found the usual accusations about the unscientific character of other writers' work. Some of the most vigorous supporters of the possibility of scientific criminology, and critics of the scientific value of existing criminology, have been jurists. Let me also say that some of the most valuable work in the field of criminology has been carried out by scholars who were not lawyers. The Cadogan Report on Corporal Punishment and the Gowers Report on Capital Punishment were the fruit of co-operation between scholars of all kinds together with administrators.

The jurist who has perhaps striven most for the formulation of scientifically established quantitative correlations in the field of law has been Underhill Moore. His most elaborate research, which involved both experimentation and the mathematical manipulation of graphs and statistics, was concerned with traffic regulation.

The ultimate objects of that work may best be stated in his own words. "This study lies within the province of jurisprudence. It also lies within the field of behaviouristic psychology. It places the province within the field and, in doing so, fragments the province into disconnected pieces. The problems of jurisprudence become psychological problems to be attacked by the use of the propositions of a psychological theory of behaviour and by quantitative and experimental methods. Although analytical, natural-law, historical, sociological, and 'realistic' jurists, legislators, administrators, cultural anthropologists, sociologists and others have dealt with positive law and with whatever each classifies as law, they have not undertaken investigations, empirical, experimental and quantitative of the quantity and degree of conformity to a rule of positive law to the end that the propositions describing that quantity and degree of conformity
may be subsumed under a general theory of human behaviour . . .
(He alleges that certain pre-suppositions have been the cause of the
failure.) . . . In this state of affairs it has seemed worthwhile to
challenge each and all of the pre-suppositions, first, by hypothesising
that a proposition of law is an artifact and its administration behaviour
the effect of which may be described by the same laws as describe the
effect of any artifact or behaviour, for example, the ringing of a
telephone bell on the behaviour of the listener, and secondly, by a
combination of logical and empirical processes attempting to verify
hypotheses deduced from propositions of a general theory accounting
for human behaviour. This investigation is such a challenge."

The basic method of the experiment consisted in carefully observing
certain traffic conditions in what may be called unregulated cir-
cumstances and then observing the same area after the police authori-
ties had made some changes in those circumstances. The work took
four years and required the co-operation not only of the police authori-
ties, but also of psychologists and mathematicians and a large number
of observers working under the Yale University Institute of Human
Relations.

There were two different kinds of experiments: the first was con-
cerned with behaviour of motorists in parking cars in streets: the
second with behaviour of motorists in proceeding over cross-roads.
Only the first experiments are here described, since the first did not
prove satisfactory. A carefully marked portion of a street was kept
under observation, and the number of cars parked and the duration
of parking of each car during a definite period carefully observed.
Later, the observations were repeated after (a) "no parking" and
"limited parking" notices had been set up; (b) regulations had been
made forbidding parking for longer than specified periods, and the
police had summoned motorists who had infringed the regulations
(without notices having been put up). This was done for a number of
streets. The data obtained were then subjected to careful analysis:
various factors were thought of, such as "unsatisfied demand for
parking space," new figures obtained by manipulation of the raw
data, graphs drawn and mathematical formula eventually obtained.
They do not have the simplicity of the classic laws of physics. Here
is one: \( u = 12 - 1.4x - 1.01v \), where \( u \) is the difference between the
total parking minutes used in the unregulated and the regulated
distributions, \( x \) is a constructed factor derived from taking account of
unsatisfied demand for parking space, and \( v \) is the percentage ratio
between the total parking minutes used during the unregulated period
of observation and the total available during that period. This
formula, obtained from one study, was found, moreover, to be capable
of predicting relations between the data of another study. The
broad results of these studies were (i) that the effect of regulation
was to diminish the number of long duration parkings, the short period
parkings being unaffected, (ii) that there was little difference between
the effect of exhibition notices and prosecuting offenders.

Finally, the results of the experiments were compared with results
which might be expected by application of the learning theory of the
behaviouristic psychologists, Hull in his *Principles of Behaviour*, and
Muller and Dolland in *Social Learning and Imitation*. It was claimed
that the experiments were confirmatory of the theory.
Criticism of Underhill Moore's work has generally been along the line—parturient montes, nascetur ridiculus mus. It is true that much labour went into the experiments, particularly in an endeavour to see that the conclusions were scientifically warrantable. The classification of the results as trivial seems to me to be a value judgment, with which I do not agree. From the solid mountains of truth there has been detached a pebble which may be slung with mortal effect against the giant propositions of philistine common sense. Again and again neo-Austinians insist that laws without sanctions are ineffective, and that the institution of penalties will drastically alter conduct. I believe that fear is not the only effective means of influencing behaviour, but I also believe that the truth about man's behaviour is best discovered by disinterested observation and reflection.

The Basic Problems of Legal Sociology.

It is obvious that there are a great many difficulties attendant on the pursuit by scientific means of so complex a problem as human behaviour in its legal aspects. There are, however, basic problems connected with doubts as to the very existence of legal sociology. These doubts may appear fantastic to the student of law who is confronted with the vast mass of literature to which the name sociology of law has been given. Out of a total of 1,169 in Hall's Readings in Jurisprudence, 500 pages are devoted to what he calls "Law and Social Science." The law student has no doubt about the existence of what may be terra incognita to other students: his doubts are whether to liken it, on account of the difficulties of exploration, to the Himalayas or the Sahara. Much of the literature on legal sociology is concerned with two questions: first, whether social science has any validity at all—to what extent scientific method is applicable to human behaviour at all; second, whether any special discipline of legal sociology exists—whether any valid distinction exists between legal sociology and general sociology. Since the first question is one common to all the social sciences I will presume that there is fairly general knowledge of the various arguments connected with it. I believe that the basic fallacy of the opponents of social science is that they have been hypnotised by the achievements in physics of a calculus of fluxions, of the solution of problems of motion, continuous movement, so that they can only conceive of measurement in terms of measurements along a line, and of analysis of that which in its nature has graphic qualities. I do not think that even physics is so limited: I maintain that objectivity, precision and verification by prediction are not so limited. Reality may be analysed into discrete particulars, capable both of public observation and of enumeration, yielding data, the full elucidation of whose qualities may be considerably assisted by mathematical investigation.

I have contended that the present academic divisions of legal, moral, political and social philosophy are unrealistic—that they are all concerned with the same topic of the right ordering of the lives of men whose physical nature comprises life in society. So, too, there are those who contend that there is no separate field of legal sociology, that there cannot be a sociology of law, of morals, of politics, of economics, of sport, and so on. It is well to clear the discussion first
of what may be a merely verbal difference. Those who say there is a sociology of law do not contend that it exists with peculiar methods and objectives, but that it has a separate existence in the way in which inorganic chemistry is independent of organic chemistry. But, of course, organic chemistry is not historically the application of general chemistry to organic material. In the historical formation of general chemistry work on organic material has contributed its part. Are there separate legal phenomena to which sociological methods can be applied?

At first sight the answer seems clear: there are law-men whose behaviour can be studied, and there are law-facts whose relations to human behaviour may be examined, these law-facts being the rules of law which exist in human societies. Thus, realist jurisprudence posits the existence of a branch of legal sociology, namely, the study of the behaviour of judges, a study which the hypotheses of the realists requires to be concerned with more than an examination of the relation between rules of law and judicial decisions. Again, the definitions of some authorities present the differentia of legal sociology in terms of legal rules. Timasheff says "Human behaviour in society, in so far as it is related to law, is the object of the new science called \textquoteleft sociology of law.' Causal investigation is its chief method." He would not limit it, as Kantorowicz would, to the relation between law and other specific institutions of society. Hall says "A sociology of law, when constructed, will be a theoretical social science consisting of generalisations regarding social phenomena insofar as they refer to the contents, purposes, applications and effect of legal rules." A notable exception from this categorisation of the modes of interaction between legal rules and other social phenomena is that of the causes or origins of legal rules. There are jurists who regard the etiology of legal rules as the first matter for consideration in a sociology of law.

But objections can be urged against these specifications. Can a worthwhile investigation of judicial behaviour be attempted until a general grounding has been laid in human behaviour generally? Is it sound to apply, for example, Freudian psychology to judicial behaviour in view of the doubtful scientific status of such psychology? The insight behind these objections is that at the present stage of human knowledge it is uneconomic to spend intellectual energy on the problem of judicial behaviour. I think the commonsense answer is that intellectual energy is not fungible—if the investigation of judicial behaviour is obstructed the saved energy will not be usefully directed elsewhere. There will be frustration, with its consequent social disorders; or an increase in the energy devoted to ordinary legal practice, with the social benefits which flow therefrom.

The major criticism of legal sociology has been directed against the definitions which introduce the factor of legal rules. Many jurists, as we have seen, have felt that legal rules are not fundamental characteristics of society and themselves require explanation in terms of other factors. Ehrlich has taught that "living law" is to be found in actual folk-ways and not in official rules. Criminologists have felt the need to get away from the actual classifications of criminal laws to more fruitful concepts to be derived more directly from social phenomena. Hall says "It is preferable to reserve the term \textquoteleft crimin
ology' for knowledge and study of certain social phenomena without regard to penal laws." The term "sociology of criminal law" is required to denote the subject of the relation between criminal laws and human behaviour. Again, since rules of law may relate to any aspect of social life, is there any limitation really involved in talking of human behaviour insofar as it is related to law? Yet if the factor of legal rules be omitted then Kelsen asserts, we are left with general sociology.

But this view that the only specific characterisation of legal sociology is legal rules is not universally accepted. Frankfurter accepts force as the basis of law, and finds a definition of a legal sociology in a sociology of power. "Law... is as broad and deep as those social desires which have behind them the coercive will of society—whether that expresses itself through penalties or prisons, through injunction or ill-will. To understand these desires, their origin, their intensity, the means of their satisfaction, the cost of consequences of the means—these are the business of the science of law." This is not the equivalent of the sociology of power, which some scholars of to-day advocate as a necessity for a science of politics; nevertheless, other jurists are loth to see the distinctive character of legal phenomena in the element of coercion. Cairns seeks for a science of the phenomena of disorder, while Timasheff, though accepting coercion as an element in the specific legal phenomenon, says that it must co-exist with the element of moral recognition. For myself, I should like to see a science created dealing with the social phenomenon of moral recognition. Professor Macbeath's Gifford lectures have contributed to a wider dissemination of the knowledge of the reality of moral behaviour as a phenomenon distinct from supernatural belief with its consequent religious practices, from economic organisation, and from mere habit. This is the reflection in sociology of the philosophical doctrine that the basis of law is right.

Reference to the concept of right evokes a further reference to the general problem of the limitations of scientific method in relation to human behaviour. That legal sociology must be wert-frei is a claim asserted by legal sociologists in similar manner to wert-frei claims in other sciences. It is an admission that scientific method cannot comprehend values. The value or justice of a law, it is said, is not for the legal sociologist: he may examine whether particular laws are good instruments for achieving postulated ends, but it is an instrumental goodness which is examined. I do not think that there are any special features of the juristic debate about the relation between a sociology and an axiology; legal sociology is neither tied to positivism nor idealism.

Conclusion: Law and the Social Sciences.

The existence of an independent social science of legal sociology does not entail as a consequence the thesis that legal systems are related to the social sciences only through the sociology of law. The logical analysis of legal reasoning initiated by Holmes has shown how propositions drawn from economics and politics are involved in legal discourse. Professor Stone has shown that the efficiency of legal rules can be criticised by means of general sociology. Legal rules are concerned with all aspects of life, and all the social sciences furnish
criteria by means of which aspects of a legal system can be judged. But it is not alone the jurist who needs an awareness of other social sciences. Laws are themselves social phenomena, worthy of the interest of the sociologist, and legal sociology a scientific enterprise containing lessons for all scientists. The law reports are not only records of legal argumentation, they are rich stores of human experiences, and experience containing reliable data for the economist and political scientist as well as for the historian who has since the days of Maitland made so much use of them as evidence of the past. In many parts of the world it is already realised that the vast problems which confront this complex organisation of perplexed humanity, so justly proud and confident of its understanding and control of physical nature, and so rightly humble and diffident about its understanding of human nature, can only be solved by co-operation among the students of all the disciplines which form man's cultural heritage. Of course, there is still too much dogmatism, too much myopic clinging to the particularism brought about by the fragmentation of knowledge. But I look to the future, and I say with Holmes that if our civilisation does not collapse, I feel pretty sure that the regiment or division that follows us will carry the flag of science, and that in the ranks there will be found, if not a band of brothers, at any rate men from all the social sciences, possessed of an esprit de corps which will ensure the preservation of human values.