

CLASSICAL SOCIOLOGY AND THE LAW

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I

Sociology has always been closely concerned with the study of the law—indeed, it could almost be said to have emerged out of it. Of the four eighteenth-century writers who belong on any list of the ancestors of sociology—Montesquieu, Adam Smith, Vico and Herder—three were directly involved in the practice or teaching of the law. Montesquieu was himself a lawyer (the President of the Bordeaux *parlement*); Smith lectured on jurisprudence as part of his duties as Professor of Moral Philosophy in Glasgow; and Vico aspired (unsuccessfully) to the Chair of Civil Law at the University of Naples. Only Herder had no such institutional links with the law, and, even here, commentators have emphasized the importance of writers on jurisprudence for the development of his thought.¹

Such connections were not just a matter of coincidence or of institutional factors; in their different ways all these authors understood themselves as standing in the intellectual tradition of natural law. Their heightened awareness of the differences between societies notwithstanding, they took their task to be the discovery of an underlying rational order beneath the diversity of social life. Montesquieu expresses the point unequivocally at the outset of his *Spirit of the Laws*:

Law in general is human reason inasmuch as it governs all the inhabitants of the earth: the political and civil laws of each nation ought to be only the particular cases in which human reason is applied. (Bk I, Chap 3)

Yet, in their search for the unchanging and universal element in law, Montesquieu and his successors were led to move beyond the traditional perspective of the natural law theorist. What was novel in their approach was that they saw the problem not in terms of individual laws but of systems. Laws which, taken singly, might appear to be arbitrary—and which differed radically as between one society and another—could be shown to have a rationale when considered as part of an institutional fabric adapted to social circumstances. The diversity of societies made the diversity of laws both inevitable and desirable. As Montesquieu goes on to say:

Laws should be adapted in such a manner to the people for whom they are framed that it would be a great chance if those of one nation suit another. (Bk I, Chap 3)

The laws, thus, were seen to form part of a social system, interrelated and organically unified.

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¹ Principally Thomasius. See Barnard, *Herder's Social and Political Thought* (Oxford, 1965), Chapter 1.

The theorists of the eighteenth century explored this new vision while maintaining the traditional belief in law as the embodiment of universal principles. Nevertheless, the balance between the two views was inevitably precarious; the classical age of sociology, with its consciously scientific approach to the study of society, brought the two into open conflict. Thinkers like Marx, Durkheim and Weber were sceptical of any commitment to the existence of a transcendent order of values. Indeed, to the extent that legal systems appeared to incorporate such a belief, then that belief itself would be a central part of what the sociology of law had to explain.

It is possible to identify several general areas of agreement between Marx, Weber and Durkheim in their approach to the law. Their scientific orientation—although each has a significantly different conception of what, in the end, that amounts to—leads them all to reject the existence of a timeless ideal of justice. Attention is displaced from the normative question: when and why *ought* men to obey the law? to the positive one: when and why *will* they obey it? They agree, too, in taking up the eighteenth-century idea that social phenomena are systematic in character and that individual elements can only be understood in the context of the wider operation of society.

Finally, one may note two consequences from these basic commitments which were accepted by them all. The first is that it is possible that the sociologist's analysis of legal systems will go beyond (and, perhaps, even directly contradict) the account which would be given by the participants themselves. Marx's unmasking of the 'necessary illusions' of ideology is perhaps the classic example, but it is also an important element in Weber and Durkheim's thinking. As Durkheim writes:

We have to get through to the realities and discover beneath the letter of the myths the spirit it expresses. (*Durkheim on Law*, 182)

The second consequence is their attitude to change in legal systems. The systematic character of social life implies that major changes in one area are never accidental or isolated from changes in other areas of society. Thus changes in the law act as indices of social change more broadly.

But, important as these agreements are, they obtain only on the most general level. When one examines the individual authors more closely it becomes apparent that their understanding of the law is in each case intimately dependent upon their particular sociological doctrines and concerns. Thus, for Weber, the evolution of law is to be interpreted as part of a general process of rationalization; for Marx the law's claims to embody universal justice play a role within a system of ideology; while, for Durkheim, it is the law as expression of the *conscience collective* which is of central importance.

This complicates considerably comparison between the three authors. It makes it extremely difficult to determine how far their views are directly in contradiction with one another and how far their divergences merely reflect different emphases and concerns. It creates a dilemma, too, for writers whose task it is to deal with Marx, Durkheim and Weber as legal theorists. Should they be treated primarily as

participants in a continuing tradition of the sociology of law? Or should the emphasis be on placing the author's legal thought in the framework of his wider social theory? As it turns out, the three books under consideration—Hugh Collins's *Marxism and Law*,² Anthony Kronman's *Max Weber*,³ and the selections from Durkheim edited by Steven Lukes and Andrew Scull⁴—illustrate not only how great are the differences between the ideas of their three subjects, but also how different can be the methods used to approach them. Of the three it is Lukes and Scull who, in their introduction, do most to give the reader a broader perspective on the sociology of law—at the price, inevitably, of some compression of the treatment of Durkheim himself. Both Collins and Kronman, in contrast, clearly take the second option and give an account of their author's legal thought which stresses its place in his overall vision of society. But they do so, as will become apparent, in very different ways.

II

In Collins's case this choice of strategy is probably an inevitable consequence of his initial decision to concentrate on the Marxism of Karl Marx himself. Marx's views on the law and its development almost always appear in the context of his remarks—in themselves fragmentary—on ideology. Thus it is as a part of the theory of ideology that Marx's account of the law stands or falls and Collins's book is primarily an assessment of that theory with illustrations drawn from the law.

Collins's approach is analytical. Rather than trace the twists and turns of the development of Marx's thought, he sets out an intellectual structure by conducting debate between what he takes to be the leading versions of Marx's doctrine. This has undeniable advantages. The reader is presented with comprehensible (if not, in their initial form, particularly plausible) positions, expressed in modern, accessible language. Where technical terms become necessary they are well introduced and explained, and, with one notable exception, Collins steers clear of controversial textual interpretations.⁵

Collins is following a course broadly similar to that taken by G. A. Cohen in his important book *Karl Marx's Theory of History: a Defence*⁶ (a work to which Collins frequently refers) and a comparison with Cohen may illustrate where, in Collins's case, the weakness of the strategy lies.

As the title of his book makes clear, Cohen's intentions are frankly reconstructive. To the extent that his account can be said to select and simplify Marx's thought, it does so with the justification that it is aiming to present that

² *Marxism and Law* (Oxford, 1982), Marxist Introductions (OUP).

³ *Max Weber* (London, 1983), Jurists: Profiles in Legal Theory (Edward Arnold).

⁴ *Durkheim and the Law*, (Oxford, 1983), Law in Society Series (Martin Robertson).

⁵ The exception is the twelve pages on the distinction between the concepts of estrangement and alienation. Since Collins at no point indicates that these are simply two different renderings of a single word—*Entfremdung*—the reader may not realize how bizarre is the claim that 'Alienation and estrangement constitute different levels of analysis of the properties of capitalist society' (118).

⁶ Cohen, *Karl Marx's Theory of History: a Defence* (Oxford, 1978).

theory in its most defensible form. Collins, in contrast, is less unequivocal in his commitment to the validity of the theory. Having set out what he takes to be a basic alternative between 'crude materialist' and 'class instrumentalist' theories of ideology in Chapter Two, Collins states preliminary intentions which appear to be very similar to Cohen's:

Through progressive refinement I hope to present a sophisticated version of the class instrumentalist theory of law which is at once internally coherent, consistent with the principles of historical materialism, and a persuasive account of the form and content of laws. (*Marxism and Law*, 34)

But by the end of the crucial next chapter Collins has become considerably less sanguine. Having rejected a number of alternative versions of the theory of ideology, he says of the one with which he is left:

Although this defence of class reductionism with its emphasis upon the ideological hegemony of the dominant class is extremely common among Marxists, I find it ultimately unconvincing... (*Marxism and Law*, 74—5)

He then goes on to make a number of objections which, if accepted, certainly prove devastating for the theory. His conclusion is that, in order to be plausible at all, the Marxist theory of ideology must be construed in a manner so vague as to defy empirical testing or application. And yet, surprisingly, by the beginning of the next chapter, the earlier position appears to have been restored, for Collins now writes:

In the previous chapter my aim was to *defend* an interpretation of historical materialism which relied upon the base and superstructure configuration. (*Marxism and Law*, 77, my emphasis)

Thus a considerable tension exists between the central chapters of the book. The effect is that of a bridge with a span missing. Apart from causing confusion as to the course of the argument, it invites the question whether Collins has, in fact, introduced the best or most interesting form of Marx's theory. In several instances it seems that ideas at least as plausible (and with just as much basis in Marx's text) are to be found in directions which Collins does not explore as in those which he pursues but fails to find convincing. The initial opposition which he sets up between 'crude materialist' and 'instrumentalist' doctrines is a case in point.

Crude materialism, Collins argues, was the doctrine that ideologies 'corresponded to the general economic condition of a society, and expressed or reflected the relations of production' (23). Collins's central objection to the theory is that it rests on a set of unexamined and unjustified metaphors:

... terms such as 'determines', 'expresses' or 'arises' tend to restate the problem of how the base influences the superstructure rather than providing an adequate solution to it... Marxists who view law from a crude materialist perspective... have been content to make facile statements about the law expressing or reflecting the relations of production without conscientiously examining the process by which this occurs. (*Marxism and Law*, 24)

There is certainly some substance to this criticism. In his early works, and

particularly in *The German Ideology*, Marx does tend to write as if the claim he is making about ideology follows without further argument from a general commitment to philosophical materialism. It is clear, however, that the sociological claim that ideology reflects economic life is quite different from the epistemological one that mind in general reflects matter.⁷ Nevertheless, it is simply not true to say that Marx makes no effort to explore the basis of the metaphor. Even *The German Ideology* contains some suggestive elaborations and later Marxists have attempted to take things further. Nor has it been Marxists alone who have found this metaphor persuasive. The idea that the forms, structures and modes of thought of one area of social life can be found to be re-expressed in other areas—Hegelianism without Hegel, as Sir Ernst Gombrich has called it—has animated a whole tradition of cultural history.⁸ Of course, it may be that the idea is ultimately untenable, but it is hardly fair of Collins to equate it with 'crude materialism' or 'economism' (23). That would amount to interpreting the claim that ideology reflects the relations of production as equivalent to the much stronger claim that *all* ideology *only* reflects the relations of production—an extreme and unjustifiably unsympathetic interpretation which the original metaphor by no means entails.

Defenders of Marx might go on to quarrel with Collins's emphases in other areas, too: why, for instance, spend so much time wrestling with the distinction between base and superstructure (perhaps that would have been better left as a suggestive metaphor) but make no mention at all of the important distinction made by Marx in *Capital* between essence and appearance—between the underlying exploitative nature of economic relations and the way in which they present themselves as free and equitable to those who participate in them? But, in the end, it would be unfair to criticize Collins for not having written a different book rather than appreciating the considerable virtues of the one he has. The topics to which *Marxism and Law* directs its attention are of considerable interest and importance and they are given a lively, unpretentious discussion. If it does not, perhaps, achieve as much as it sets out to, *Marxism and Law* can nevertheless be recommended as a serious-minded and intelligent approach to a complex and controversial subject.

III

In contrast to Marx, whose overriding priority was always the study of the capitalist economy, Max Weber focussed a major portion of his intellectual energies directly onto the law. The result is a complex analysis in which are blended a variety of problems and perspectives. Weber shared Marx's interest in the role which a common conception of justice played in legitimizing social

⁷ One reason for this is that Marx's doctrine emerged from a critique of Hegel. Hegel's idealist philosophy claimed both (1) that ideas were independent of and prior to material reality; and (2) that the political realm—the state—was prior to and independent of economic life. Thus Marx, who, of course, rejects both (1) and (2) sometimes writes as if they were equivalent.

⁸ Described in Gombrich, *In Search of Cultural History* (Oxford, 1969).

arrangements. But he gave equal attention to other aspects of the law. For example, he explored the way in which legal structures promote or inhibit economic development; the conception of personhood presupposed by different types of legal association; the interaction between legal and other forms of authority; and—above all—the changes in the law necessitated by the emergence of modern, bureaucratic forms of social organization. Not only is the range of Weber's legal concerns much greater than Marx's, but his general approach to sociology is altogether more nuanced and pluralistic. Although operating within a framework for the explanation of long-run tendencies which is, in principle, no less sweeping than Marx's, Weber is at pains to complement this with an account of the multiplicity of factors, many of them contingent, which go to determine particular phenomena. So, for example, he not only asks what the general features of Western law were which permitted the development of modern commercial structures, but how those features came to be incorporated within the quite different frameworks of Anglo-Saxon and Continental jurisprudence. If one follows Isaiah Berlin's division of thinkers into hedgehogs and foxes—the fox knows many things but the hedgehog one big thing—then Weber is a hedgehog whose passion for detail makes him temperamentally a fox.

Anthony Kronman has taken the complexity of Weber's sociology of law as the starting-point for a full-scale interpretation of Weber's theory of modernity, with an emphasis on what he claims to be its neglected philosophical dimension. As Kronman shows quite convincingly, all of the great concerns of Weber's social theory—the nature of freedom, authority, secularization, bureaucracy and the rise of capitalism—are either present or implicit in his treatment of the law. Kronman's book offers a first-class general account of Weber's thought, well up to the high standards set by recent writing in English on Weber. Kronman has an excellent grasp of Weber's disparate writings and he is very well read, both in the secondary literature (including that in German) and in philosophy and sociology more broadly. He demonstrates the consistency of Weber's thought and untangles a number of notoriously confusing problems—for example, in his exemplary treatment of the distinction between 'formal' and 'substantive' rationality.

Kronman's exegetical undertaking does have its limitations, however. The reader simply in search of an introduction to Weber's sociology of law (to whom the book is—at least, to judge by its jacket—addressed) may find himself facing issues more complex than he bargained for. One suspects that Kronman—as is often the case with those professionally trained in philosophy—over-estimates the ability of the general reader to follow detailed discussion of philosophical questions, however clearly they are presented. What is more disappointing, however, is the fact that Kronman, although evidently highly sympathetic to Weber, restricts himself to the exposition rather than the defence of Weber's views. Although the account he gives is very relevant to the central objections which have been made to Weber's doctrines, Kronman does not meet the arguments of those critics (and there have been many, on the left and on the right) who saw in Weber, as de Maistre saw in Locke, the evil genius of his century.

An example of this attitude to Weber can be found in Alasdair MacIntyre's recent book, *After Virtue*.⁹ His critique of Weber's thought has an important bearing on the sociology of law and is typical of the objections which Weber's supporters must meet. The focus of MacIntyre's attack is Weber's moral agnosticism. Weber's rigid separation between facts and values, his willingness to accept the plurality of moral viewpoints to be found in modern society, and his endorsement of a view of morality which makes it ultimately a matter of subjective choice, undermine, MacIntyre believes, the very basis of moral life: a morality which one can choose is no morality at all. Weber rejects the alternative possibility of a rational basis for morality, MacIntyre claims, because of his commitment to an unduly restricted conception of rationality, modelled on the procedures of the natural sciences. This, the dominant conception of reason in our society, concerns only the relationship between means and ends; it does not extend to assessment of the validity of the ends themselves. Although Weber is right, MacIntyre argues, in believing that modern society has become increasingly 'rational' in this sense, he is wrong to value this as in any way a liberating development. The individual may no longer feel bound by traditional norms, it is true, but the freedom that is opened up is really no more than a dangerous arbitrariness; the subjectivization of morality fatally undermines the sense of its obligatoriness. Thus what starts out as a philosophical objection to Weber's concept of rationality has an important sociological implication: a society which is reduced to an instrumental conception of reason will prove incapable, it is alleged, of maintaining a viable sense of legitimate authority.

MacIntyre's criticisms relate to the sociology of law in two ways. Most directly, the three concepts it bears on: rationality, freedom and authority, play a crucial role in Weber's understanding of the modern legal system. But, also, MacIntyre's criticisms represent a rejection of the whole enterprise of a 'scientific' approach to the study of society in favour of a return to views with a recognizable (and, on MacIntyre's part, acknowledged) ancestry in the natural-law tradition.

The issues at stake and the bearing which Kronman's interpretation has on them can be seen most clearly in the controversy regarding Weber's account of the nature of authority in the modern world. For Weber, authority in the modern world is primarily of a type which he calls 'legal-rational'. The nature of legal-rational authority is explained in terms of a famous distinction; there are, Weber says, three basic types of authority: traditional, charismatic and legal-rational. Traditional authority justifies the demands which it makes on the individual by the belief (necessarily illusory, one should say, for all societies are, in fact, subject to change) that its commands are issued on behalf of a timeless and 'natural' social order. Things must be so, it is believed, because they always have been so. Charismatic authority, by contrast, derives from the will of one individual who is acknowledged to be of exceptional status—a prophetic leader—who consciously interrupts the course of history (as in the New

⁹ MacIntyre, *After Virtue* (London, 1981). Other important critiques of Weber are to be found in the writings of Leo Strauss, Herbert Marcuse, Jürgen Habermas and Charles Taylor.

Testament: 'It is written, but I say unto you . . .'). Both are opposed, however, to authority in its modern form: the authority of an impersonally administered hierarchy of explicit, consistent and consciously enacted rules—a modern legal system, in short.

Now, Weber's critics do not dispute that these features of legal systems are, indeed, important in the way in which authority is exercised in modern society. But are they all that is involved? Can we believe that the willingness of the citizen of a modern society to acknowledge an obligation to obey a law relates solely to the fact that that law has been validly enacted and is being properly enforced? This is a very extreme position—far more so, for example, than Herbert Hart's apparently similar 'positivist' account of legal obligation. For Hart's claim is a conceptual one. In Hart's view, the enactment of a law according to a valid secondary rule (or rules) creates a *legal* obligation only. But in itself this does not entail that the citizen is obliged (morally) to obey the law or, indeed, that he will (sociologically), as a matter of fact, believe that he is obliged to do so.

There appear to be two ways to read Weber at this point.¹⁰ Either he is claiming that a sense of obligation is derived from the mere existence of a formally constructed legal system: that the citizen of an Eastern European People's Democracy will feel as much under an obligation to obey the law—and for just the same reason, namely, that it *is* the law—as the citizen of a Western democratic capitalist state. Or else he is claiming something more modest and less controversial: that the existence of formal legal structures is an important part of the exercise of authority in modern society, although it must be supplemented by some independent conception of justice or morality to act as a foundation for a sense of the legitimacy of the system as a whole.

Read Weber in the first way, his critics argue, and he is simply wrong: modern society does not rest on—indeed no society could rest on—such a minimal basis; the *Rechtsstaat*, valuable though it is in reducing the uncertainty of social life, is not an end in itself. But read him in the second way and what he has to say is, at the least, seriously incomplete; for it tells us nothing about how that necessary further belief, the shared conception of justice or whatever, comes to be developed. Furthermore, it seems as if the contrast between modern and traditional societies is undermined: where, if not from tradition, could the shared norms of even our modern society have come from? Weber's triadic division of authority leaves no other possibility. So the contrast now appears to be only that in traditional society authority is exclusively a matter of inherited norms while in modern society it is a combination both of such norms and a formal legal framework.

This second reading is the one which interpreters of Max Weber have normally preferred. Though perhaps not offering much in the way of insight, it is, at least, not wildly implausible. But there is a textual problem here. The assumption behind this reading is that the legal-rational system draws upon shared norms and, hence, only laws which embody such norms could be expected to be regarded

to See Habermas, 'Max Weber's Concept of Legitimacy' in *Legitimation Crisis* (London, 1976), 97–102.

as legitimate. Yet there are passages in Weber's text which appear specifically to contradict this. He says, for example, that under a legal-rational regime 'any given legal norm may be established by agreement or by imposition'.¹¹ Must we, then, return to the first reading?

Kronman evidently believes not, for he offers a third interpretative possibility which is both striking and distinctive. In stressing the independence of law from inherited moral norms, Weber is not, Kronman believes, committing the modern world to a blind belief in authority. What he is doing is drawing attention to the *created* character of legal systems (and, by extension, of the political communities which are organized around them). What gives the law its authority is not the morality which it embodies, or the fact that it has been enacted by some (unnamed) sovereign, but that it is an emanation of our wills, the citizens of the community who are subject to its jurisdiction.

Even as a claim about the proper interpretation of Weber's intentions Kronman's suggestion is bound to prove controversial; the evidence for it in Weber's text is limited, to say the least. But it does have the merit of avoiding the unattractive interpretations previously suggested and it can be connected to a theme which is of undeniable importance elsewhere in Weber's sociology: the contrast between intrinsic and associative forms of community. In his writings on religion Weber lays great stress on the difference in principle between those communities whose membership is determined passively (most commonly by birth in a certain place, or by inheritance) and those in which membership depends on some voluntary act of commitment. According to Weber, it is in embodying and promoting this latter conception of community that the revolutionary significance of Protestantism chiefly consists.

But can one really go so far as to see in this 'idea of voluntariness, of creative free choice' (Kronman, 60) a sufficient basis for a theory of the legitimacy of the modern state? How would Weber meet the natural objection that the modern state, of all communities, can least be seen as voluntary? It is implausible, surely, to claim that citizens who are indirectly represented (at best) in the legislative bodies of industrial societies have actually agreed to the laws which are enacted in their name. It is true that a rich tradition of Western political theory, going back to Hobbes and Locke, has sought to interpret aspects of citizens' behaviour—yielding to the life-and-death power of the sovereign, the enjoyment of property, and so on—as amounting to voluntary acts of commitment to the authority of the state. But must Weber's sociology be made dependent on the success of such bizarre constructions?

Kronman does not raise such questions; to do so would, presumably, take him beyond his self-imposed limitations. Yet possible defences do come to mind. It is not, one might argue, the truth of the claim that political communities have a voluntary basis so much as the hold which the belief has on members of a community which matters. In this way what supports Weber's view is that a

¹¹ *Economy and Society*, 217, quoted Kronman, 45.

whole tradition of Western political theory should have tried to give an account of the state on this basis—not that their attempts should prove ultimately unsuccessful. But, then again, surface appearances (not least the persistence of very different approaches to political theory) do not all point in one direction; the belief in the voluntary nature of the political community is latent at best.

These important issues are only some of the questions arising out of the debate between Weber and his critics. One can only regret that Kronman has not taken it as his task to pursue them; perhaps at some later date he will give us the sophisticated defence of Weber's doctrines which he is clearly well equipped to provide.

IV

Durkheim was a near-contemporary of Weber's and the two men were concerned with many of the same problems: the connection between sociology and history; how far (and in what sense) sociological explanation could be scientific; the interaction between individual and collective factors in social life. Indeed, they are often represented in direct opposition to one another. Such oversimplifications, however, have more to do with the need for writers of introductory text-books to present the world in terms of simple polarities than with the actual differences between two complex and original thinkers. In his writings on the law, Durkheim was as firmly committed as Weber to the central doctrines of classical sociology, a point which emerges clearly from Steven Lukes' and Andrew Scull's summary of its main features:

Durkheim advanced three bold and striking hypotheses about law. The first concerned how law should be conceived—as an 'external' index which 'symbolizes' the nature of social solidarity. The second concerned its evolution, as societies developed from less to more advanced forms, from an all-encompassing religiosity to modern secularism, and from collectivism to individualism . . . The third hypothesis concerned its functioning, above all in the context of crime and punishment, and claimed that crime is a violation and punishment an expression of collective sentiments and that punishment's 'real function is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigour'. (*Durkheim on Law*, 1)

The doctrine of the systematic character of social life is, thus, at the centre of Durkheim's treatment of the law and of the way in which changes in the law are related to social change more broadly. Yet it is clear, too, that Durkheim's approach to the law is dependent on his particular sociological doctrines. Durkheim's conception of the various types of social solidarity; his (extremely idiosyncratic) views on the nature of modern individualism; his belief in the existence of an underlying 'common consciousness' (*conscience collective*) are all indispensable presuppositions of his account of the place of the law in society. This invites scepticism about the value of collections such as the present one. It is not just the polite fiction that academic readers may be expected to cover their

subjects as comprehensively as possible which doubts the propriety of extracts lifted from works as self-contained as *The Division of Labour in Society*. What does most to counteract these doubts is Lukes' and Scull's excellent introduction. In twenty-seven short pages they provide an account of Durkheim's sociology which includes both trenchant criticism of its main theses and a survey of Durkheim's place in the wider tradition of the sociology of law. Lukes and Scull waste no sympathy on Durkheim's *a priori*—his exasperating tendency to play both ends against the middle and to come up with a confirmation of his own presuppositions no matter what the evidence. They are especially critical of his assumption of the impersonality and harmoniousness of legal systems. Conflicts between individuals or groups are not, they complain, accepted as signs of real divisions within society but are either reinterpreted as disguised forms of social integration—deviations which provide the opportunity of publicly reinforcing the norm—or dismissed as aberrations of no real significance.

Durkheim's writing on the law does, indeed, often show him at his very worst: applying concepts of dubious coherence to inadequate evidence in order to generate wild generalizations which are then represented as the 'laws' of the science of sociology. One is simply amazed at an author who can write:

It is relatively easy to determine whether one social type is more or less advanced than another: one has only to see whether they are more or less complex and, as to the extent of similar composition, whether they are more or less organized. (*Durkheim on Law*, 103)

The assumption that the social scientist could measure relative degrees of 'complexity' and 'organization' with no more difficulty than he might have in comparing steel production or the size of the rice harvest is breathtaking—no less so for the fact that such assumptions continue to appear in the writings of modern sociologists who owe their allegiance to 'systems theory'.

But this collection also shows the strengths of Durkheim's approach. The assumption that legal phenomena can always be shown to have a latent function of social integration is, admittedly, an absurd over-generalization. But it can, in fact, lead to the fruitful reappraisal of familiar phenomena. The chapters reproduced here from *Professional Ethics and Civic Morals* give a good illustration. In them Durkheim is concerned to relate the origins of the right to property to a deeply held distinction between the sacred and the profane spheres:

Human property is but sacred or divine property put into the hands of men by means of a number of ritual ceremonies. (*Durkheim on Law*, 181)

Durkheim challenges the rationalism of accounts which see a 'natural' right to property originating in appropriation or the 'mixing' of labour. The persistent appeal of such ideas about the origin of property relates, Durkheim asserts, not to the fact that they embody rational values of fairness or efficiency, but to profound and often unacknowledged beliefs about contagion, pollution and taboo. Many of Durkheim's claims are, no doubt, too bold; his description of Roman law and its place in society is often all too reminiscent of Vico's over-confident

pronouncements on the same subject in the *New Science*. But, nevertheless, the hypothesis that mythical and symbolic elements are to be found within purportedly secular or rational institutions remains powerful and suggestive—particularly so when, as in the case of the law, the presence of such elements is consistently denied by the institution's own self-understanding. If later writers—for example, the historians of the *Annales* school—have brought far higher standards of research and evidence to the study of symbolic practices, one should not ignore how much their work owes to Durkheim's at times unrestrained speculations.

V

This assessment may perhaps point towards an answer to the more general question of the value of reading these classical sociologists today. Insofar as their theories take the form of indefeasible generalizations with, at most, fragmentary empirical evidence, it is easy for critics such as MacIntyre to dismiss them as simply projecting the outward form of the nineteenth-century ideal of science onto the study of society.

But that would be to ignore the way in which their question: when and why do men obey the law? remains central and indispensable to any proper study of the law and its place in society. The fact that the question was initially posed from an intellectual perspective which is in many ways open to challenge should not lead one to lose sight of its fundamental importance.

The difficulty is that, for each of the three authors, the commitment to a certain vision of the place of law in society precedes rather than results from investigation.

The orthodox Marxist, notoriously, asks only *how* the law fulfils the function (of promoting the interests of the ruling class) which, by the assumptions of the theory, he knows it has. Critics (in particular those sympathetic to the philosophy of Karl Popper) have seen such 'unfalsifiable' commitments as a reason to eschew any attempt to explain institutions in terms of their social function.

Yet such a blanket dismissal is too hasty. There is still the question of whether explanations similar to those which Marx, Weber or Durkheim have to offer might find a place within a less 'totalizing' (that is to say, more modest, empirical and open-textured) approach. It must be said that Collins, Kronman, Lukes and Scull do little to suggest how this might be achieved. Their concerns as commentators lead them to stress the dependence of Marx, Weber and Durkheim's views on the law upon the conceptual frameworks within which they were originally developed. To get a sense of how notions drawn from the three authors might make a contribution outside that original setting one would have to turn to more modern writers. Several examples come to mind: Mary Douglas, the anthropologist, whose studies of symbolic processes show an obvious debt to Durkheim without in any way endorsing the doctrine of the 'collective consciousness';¹² Frank

¹² Douglas, *Purity and Danger* (London, 1966); *Natural Symbols* (Harmondsworth, 1970).

Parkin, one of several sociologists who have used Weber's ideas (particularly that of the 'status order') to challenge exclusively economic views of the nature of class conflict;¹³ the members of the Frankfurt School who have attempted to develop a Marxist strategy for the interpretation of cultural phenomena without, thereby, committing themselves to its more deterministic aspects.¹⁴

It is true that all of these writers have met with criticism; they have been accused (not unexpectedly, perhaps) of eclecticism. Yet, whatever the final verdict, their writings show the continuing power of the classical sociologists to stimulate a diversity of new approaches. There are plenty of avenues left for the sociology of law to explore.

¹³ Parkin, *Class Inequality and Political Order* (London, 1971); *Marxism and Class Theory: a Bourgeois Critique* (London, 1979).

¹⁴ Arato and Gebhardt (eds), *The Essential Frankfurt School Reader* (Oxford, 1978).