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Why Law? Philip Selznick and the Study of Normative Systems[2]

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Philip Selznick was a rare friend and a true teacher. The attention and support he gave me, not least when I first joined the Berkeley faculty; the instruction I received from his writing and conversation; and the example supplied by his conviction, generosity and personal authority – all continue to provide nourishment and inspiration. His presence remains vivid and my debt runs deep.

In the days immediately following his death, I was tasked to prepare a brief summary of Philip Selznick's career for U.C. Berkeley's News Center. Composing an obituary for a beloved friend is an inescapably melancholy task, but it provided a welcome moment to reflect on Philip's career and to be appropriately awed by the magnitude of his achievement. What I then wrote naturally was influenced by my perspective as a colleague and co-teacher in the JSP Program. I felt most confident in discussing his distinctive contributions to the law and society field, and in celebrating "an approach that ambitiously combined elements of traditional jurisprudence concerning the aims and nature of law with social science understandings of organizational dynamics and constraints."[3] In contrast, I felt much less qualified to take the measure of his no-less defining contributions to the theory and sociology of organizations and of such works as *Leadership in Administration*.

The experience led to me to think again about the shifting focus of Selznick's work in the 1950s, and the intellectual path which led him to take up so intensely the study of law and jurisprudence. In taking stock of Selznick's legacy, how should we understand the decision to devote so much energy and intelligence to the institution and promise of law? The consequences of this shift of focus were,

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of course, fateful. Selznick's own corpus came to include distinguished and, at times, controversial contributions to the law and society field. Institutionally, his leadership and vision for the field led to the founding of U.C. Berkeley's Center for the Study of Law and Society in 1961 and to the creation of the J.S.P. Program in 1978.

We learn from Martin Krygier's magnificent account of Selznick's contributions of the overarching unity in his diverse writing; a unity in part derived from matters of temperament and capacious learning; and in part due to a sustained and lifelong concern with the interplay between institutional dynamics and moral ideals.[4] Hence, there is no reason to exaggerate the changed scholarly direction or to prioritize the many factors that were in play. Law had been a major object of attention Selznick's teacher, Morris Cohen; and Selznick himself saw an important affinity between his prior studies of administration and his turn to the sociology of law. "Most of my specialized writings in the sociology of organizations and sociology of law," he explained, "have been preoccupied with the conditions and processes that frustrate ideals or, instead, give them life and hope."[5] The 1950s were a key period for the development in the U.S. of those forms of legal advocacy and civil rights litigation that would figure prominently in his later accounts of "responsive law" and "moral community."[6] The same period also saw significant foundation support for renewing law as the object of social science research. Selznick himself and the Berkeley campus were direct beneficiaries of the latter development. In 1956–7, he spent a year as law and behavioral sciences Senior Fellow at the Chicago Law School. A multi-year grant from the Russell Sage Foundation made possible the 1961 establishment of Berkeley's Center for the Study of Law and Society, where Selznick was to serve as founding Director until 1972.[7]

My concern, here, however, is not with these kinds of important biographical details. Rather my hope is to consider the way in which law came to provide Selznick with an especially valuable subject for practicing what he came later to describe as a "humanist science." Given his lifelong preoccupation with "the play of values and ideals in social inquiry" and "the interdependence of fact and

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4 Martin Krygier, *Philip Selznick: Ideals in the World* (Stanford, CA, 2012).
5 Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley and Los Angeles, CA, 1992), p. x.
6 See, as leading examples, Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (New York, 1978; Harper Torchbooks edn.), pp. 95–113, and *Moral Commonwealth*, pp. 463–76.
7 See Krygier, *Philip Selznick*, pp. 105–7, 133–5.

value,"[8] any number of arenas of might have been selected for sustained examination. Why law?

To pursue this question, I find a useful starting point in two seminal articles Selznick published in the early 1960s – the 1961 "Sociology and Natural Law" and the 1964 "A Normative Theory of Culture" co-authored with Gertrude Jaeger.[9] The papers deserve to be paired. Each contained a major statement of scholarly self-definition, which remained permanent fixtures of Selznick's scholarly universe. Selznick's final book, the posthumously published *A Humanist Science*, reworked the content of the second article in a chapter-length discussion of the "Quality of Culture." Themes from the first article reappeared in another chapter on "Law and Justice."[10]

Both articles drew explicitly on the resources of Dewey's philosophy, and both were Deweyan exercises in the repudiation of "pernicious dualisms."[11] In this, they shared an intellectual strategy. In each case, the task was to overcome a powerful orthodoxy in contemporary social science and to redirect research in a manner that made normative issues a basic concern. In other words, these were dissident exercises that mapped a path for significant disciplinary reconstruction. The challenges and goals were neatly captured in the opening salvos of the first paper. "Among modern sociologists, the reputation of natural law is not high," Selznick began. Nevertheless: "I believe that a modern version of natural law philosophy is needed for a proper understanding of the law as well as for the fulfillment of sociology's promise."[12]

The target for criticism is an errant and influential form of scientism in the treatment of normative systems. In the case of the social science study of law, the orthodoxy to be overcome was sociology's mistaken effort to achieve objectivity by eliminating from attention those moral values and ideals that permeate the law as a social institution. In the case of the social science study of culture, anthropologists and sociologists had developed "a purportedly scientific concept of culture" that reduced it to the "entire social heritage" and removed connection with the ideas of human expression and creativity or the association in common usage with the idea of "high culture."[13] Much the same diagnosis was offered

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8 Philip Selznick, *A Humanist Science: Values and Ideals in Social Inquiry* (Stanford, CA, 2008), pp. xvii–xviii.
9 *Natural Law Forum*, volume 6 (1961), pp. 84–108, and *American Sociological Review*, volume 29 (1964). 653–69.
10 See *Humanist Science*, chapters 8–9.
11 On this theme, for Selznick, see *Moral Commonwealth*, pp. 20–9.
12 "Sociology and Natural Law", pp. 84–5.
13 "Normative Theory of Culture", pp. 653–4.

to explain the rise and entrenchment of these blinkered orthodoxies. A healthy methodological insistence on the distinction between fact and value had led to a sociology in which values were flattened into a kind of fact and any alternative attempt to treat values was resisted as dogmatic moralizing. Moral relativism, for the sociologists of law, and cultural relativism, for the anthropologists of culture, had silenced discussion of universal human values and aspirations in the effort to avoid ethical imperialism and ethnocentric judgments. The search for academic respectability and the initial educational missions of the social sciences had further strengthened these tendencies.

Against these orthodoxies, Selznick – as readers of his later books well know – insisted on the need to engage values and aspirations in order to understand successfully any part of social life that was normatively ordered. This did not mean an investigator simply recording as subjective facts the "values" reported by participants in a given social practice. Instead, it was the opportunity for "bridging the gap between fact and value."[14] And this required normative work: a critical assessment of the manner in which values helped constitute such practices; attention to the presence of latent as well as explicit values in the ordering of institutional routines; appreciation of the systemic quality of normative ordering, in which "master ideals" oriented and linked related values; and finally, the inescapable need to confront questions concerning which social arrangements and historical opportunities enabled such values and ideals to flourish and which stifled their realization.

In making the alternative case, the two articles again displayed a common approach. Elements of the normal science of sociology and anthropology that were congenial to his position were duly noted and emphasized, but more distinctive was the mobilization of scholarship outside the social sciences for instruction. The now-fashionable terminology of "multidisciplinary" approaches was absent, but it was practiced. Thus, each article proceeded by deploying the orthodoxies of other fields to reveal the narrowness of social science scienticism. The approach is nicely exemplified in a section of "A Normative Theory of Culture" entitled "Humanism and Anthropology," in which Jaeger and Selznick juxtaposed the two disciplinary perspectives and observed the humanists' robustly selective, evaluative and normative treatment of culture.[15] In a similar manner, as the title "Sociology and Natural Law" indicates, the task was to redirect the social science of law by embracing the perspectives of natural law. There was undoubtedly a certain augmentative shrewdness to the disciplinary dialectics. Selznick's

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14 "Sociology and Natural Law", p. 90.
15 See "Normative Theory of Culture", pp. 654–5.

purpose was critical and constructive, but his tone was ecumenical. His favored alternative might seem to emerge almost naturally as a higher ground above scholarly sectarianism. As he concluded the earlier of the two articles: "I have no doubt that the sociology law can gain immensely valuable guidance from the study of problems posed by the quest for natural law. I also believe that natural law philosophy would benefit from a greater effort to increase the scientific component of its discourse."[16]

But the disciplinary ecumenicalism was in some sense misleading. In each case, Selznick did not seek to utilize the standard or conventional wisdom of the scholarship outside the social sciences. Instead, his synthesis relied on large-scale, if remarkably compressed statements of conceptual reconstruction. And it was here that different components of Dewey's pragmatism proved so critical. Selnickian "natural law" was a distinctive normative project for law. Natural law retained its grounding in universal human needs and in the demands of reason. But the versions of naturalism and reason on offer were explicitly Dewey's and not St. Thomas's. Humanists implicitly adopted a normative understanding of culture. But Jaeger and Selznick elaborated a very specific theory of culture to explain its normative features. With acknowledged debts to Dewey's analysis of experience and aesthetics, they identified the sources of culture in the universal "capacity for symbolization" (the process by which humans gave meaning to experience through the creation of shared symbolic experience); and emphasized the no less basic capacity for cultural symbols to take on aesthetic form. It was on the basis of these conceptual reconstructions that Selznick maintained that the social study of law had to consider the shaping normative ideal of legality, and that Gertrude Jaeger and he insisted that study of culture could not avoid qualitative issues of cultural richness and expressive realization.[17]

These articles, then, were immensely ambitious statements. And as their authors fully understood, these statements had wide implication for social investigation. Little in the social world was left untouched by the processes of normative ordering and symbolic expression, and hence a multitude of subjects became candidates for study according to the program thus delineated. Among the phenomena that, like law, required study as normative systems, Selznick listed friendship, scholarship, statesmanship, love, fatherhood, citizenship, consensus, reason, public opinion, culture and democracy. Among the phenomena Jaeger and he identified for the advocated normative approach were included

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16 "Sociology and Natural Law", p. 108.
17 See "Sociology and Natural Law", pp. 85, 101–2, and "Normative Theory of Culture", pp. 654, 659, 663–6.

friendship, citizenship, law, education, and science itself.[18] These lists reveal just how many directions this research program potentially could take; and a careful perusal of Selznick's later writings would, of course, reveal discussion of each of these topics (and no doubt others as well). Yet, among all these candidate subject-matters, the dominant direction – at least initially – was the study of law and jurisprudence. Again, why law?

Once more, part of the explanation lies in biography. At the time both these articles appeared, Selznick was well underway in the preparation of his 1969 book, *Law, Society and Industrial Justice*. He had, in fact, rehearsed the study's main argument in a paper presented to the American Sociological Association in 1957.[19] The general program advanced in "Sociology and Natural Law" and "A Normative Theory of Culture" thus developed in tandem with the specific research and findings of *Law, Society and Industrial Justice*. Particular elements in the study of law and industrial relations, such as the jurisprudence of "fiduciary responsibility" and the idea of "legal culture," had been rehearsed in the articles. More broadly, a brief examination of the book reveals just how valuable the institution of law was for the larger project of a normatively-inflected social science.

Law, Society and Industrial Justice is an enormously rich undertaking. Perhaps only from the vantage-point of *The Moral Commonwealth* would it seem in any sense a bounded project, limited by its specialized focus on U.S. employment law in the immediate post-World War II era. One way to gauge its richness is to note that the historical developments that give content to much of the study figure predictably in standard treatments of 20th-century U.S. government and law: the growth of public administration and federal regulation; the shift in labor law from the paradigm of freedom of contract to a legislated law of employment; the changing organization of business enterprise and management techniques; the promotion of organized labor's goals through the vehicle of collective bargaining; and so on. Yet, Selznick's handling of these developments was far from conventional. Some of the novelty was the product of exceptional erudition and comparative range, but more especially it was the result of the pursuit of an investigation that bridged the gap between fact and value and treated law in depth as a normative system. As a card-carrying legal historian, I can testify that standard histories of 20th-century U.S. law do not begin, as Selznick did, with a discussion of "the morality of cooperation" and a review of the contributions of Durkheim, Piaget, Mead and Weber![20]

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18 See "Sociology and Natural Law", p. 86, and "Normative Theory of Culture", p. 666.
19 For details on the book's origins, see Selznick, *Law, Society and Industrial Justice* (New York, 1969), pp. v–vi.
20 See *Law, Society and Industrial Justice*, pp. 18–26.

Most important, of course, was Selznick's overarching consideration of these historical and institutional developments in terms of a process of legalization. By "legalization" Selznick did not mean solely a process by which general rules and stable procedures were deployed to govern and coordinate complex lines of activity ("legal-rational" forms in the Weberian sense). More significant was the process by which the moral values and ideals specific to the law came to animate employment relations. Given the theme of "legalization", a study of a particular area of law in a particular national and historical setting offered the opportunity to exemplify and redeem the programmatic ambitions of "Sociology and Natural Law" and, by extension, of the broader – later termed – *Humanist Science*. For this reason, I believe, Selznick rehearsed in *Law, Society and Industrial Justice* many of those general ideas concerning law and jurisprudence to which he would frequently return in later writings. The book naturally moved beyond a discussion of the rules governing modern industrial relations to take up basic questions of law and justice.

Selznick, for example, explicated the claim, which first appeared more briefly in "Sociology and Natural Law," that the ideal of "legality" – understood as the normative goal *"progressively to reduce the degree of arbitrariness in positive law and its administration"* – furnished the "master ideal" in terms of which law's complex of values and aspiration were to be organized and judged.[21] In this setting, he also presented his distinctive response to the famous 1958 debate between H.L.A. Hart and Lon Fuller on the separation of law and morals. The debate reflected deep normative disagreement on how law was to be understood in light of the master-ideal of legality, and, on the substance of the matter, Selznick was with Fuller. But in good Deweyan fashion, he resisted the pull of simple and simplistic dichotomies, such as that produced by this debate over the nature of law. Hart provided an appropriate *definition* of law, and in social investigations it was appropriate to keep definitions weak. But the *definition* of law needed to be distinguished from the *concept* of law. Concepts required stronger and thicker specification; and here Fuller was correct to see that law could not be reduced to Hart's union of primary and secondary rules. And in good Selnickian fashion, against *both* Hart and Fuller, Selznick insisted on the benefit to jurisprudence of subjecting these normative dichotomies to sustained, sociological investigation. "Legality," he emphasized, "is a variable achievement;" and the abstract question of whether legal ideals and goals were better served by the separation of law and politics or by a form of legality that

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[21] See *Law, Society and Industrial Justice*, pp. 11–18, on the "Ideal of Legality", and compare "Sociology and Natural Law", pp. 97–100.

aimed at more than "strict procedure" and "formal justice" always needed to be considered in light of political context and institutional capacities. These points – indeed, the very terms of their expression – would recur routinely in Selznick's later contributions to law and society.[22] And again in this setting, he introduced the evolutionary perspective for comparing distinct forms of law and the promise of legality that would frame the discussion of the 1978 *Law and Society in Transition: Toward Responsive Law*, co-authored with Berkeley colleague, Philippe Nonet.[23]

For much of its account of the development of employment relations and industrial justice, the study adhered to the familiar law-and-society emphasis on "law in context" and "law in action." Thus, the study supplied an analysis of the diverse and ramifying impacts of Federal legislation supporting collective bargaining (Chapter 4) and the uneven impacts of later Federal mandates protecting the welfare and rights of government employees (Chapter 6). In a similar vein was the attention to the manner in which formal legal categories could work to obscure and distort the social relations they purportedly regulated. Hence, the study's purposeful neglect of law's own doctrinal boundaries in the interest of deeper social realism and insight, as when Selznick deployed the European "law of associations" (in preference to the relevant categories of U.S. law) to illuminate labor relations in the current business setting (Chapter 2). But through the thickets of court decisions and statutory enactments, the unifying concern was the fate of the ideal of legality and the question of how the advancement of this ideal might serve the project of industrial justice. Drawing on developments in the law that remained inchoate and piecemeal across distinct doctrinal fields, in the final chapter Selznick sketched a synthetic "law of governance" that would bring to bear on the operations of private associations, such as the modern business organization, the norms and standards of public and constitutional law, in particular "substantive due process." The prescriptive conclusion offered neither a historical prediction nor a descriptive statement of scholarly findings. Rather, Selznick's "law of governance" was based on a normative logic in which a complex pattern of social and legal developments and potentialities were brought together in the effort to fulfill the ideal of legality in the conduct of industrial relations. As he later put it, the book "sought to find, within the

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22 See *Law, Society and Industrial Justice*, pp. 4–8, 13–4, and compare: *Law and Society in Transition*, pp. 10–14; *Moral Commonwealth*, pp. 442–5; Philip Selznick, "Jurisprudence and Social Policy: Aspirations and Perspectives," *California Law Review*, volume 68 (1980), 209–10.
23 See *Law, Society and Industrial Justice*, pp. 26–34, and compare *Law and Society in Transition*, pp. 18–27.

internal dynamics of industrial organization, conditions that encourage the rule of law."[24]

The manner in which *Law, Society and Industrial Justice* was designed to instantiate a specific kind of social study received revealing emphasis in a substantial and fiercely critical review of the book which appeared in the prestigious *American Journal of Sociology*. Donald Black, its author, noted the work's range and erudition, but sharply repudiated its sociological and scientific credentials. *Law, Society and Industrial Justice* was a study in "sociological jurisprudence" and embodied "the natural-law approach." But as an exercise in jurisprudence, it necessarily failed as a contribution to the "sociology of law." Selznick, Black insisted, wrote as "an advocate." His book was "saturated with ideology and evaluation and interest. There is no other kind of legal interpretation."[25] Selznick supplied a rejoinder, published in the same journal, in which he no less firmly rejected the disciplinary and methodological boundaries Black was so determined to entrench. In so doing, he returned to the defining themes elaborated and defended a decade earlier in "Sociology and Natural Law" and "A Normative Theory of Culture," and explicitly referred to the former article in his response. As before, he readily acknowledged the difference between fact and value, but (again expressly following Dewey) warned against the common tendency to treat the difference as a dichotomy that rigidly bounded different kinds of scholarly enterprise or that constrained the terms of social investigation and understanding. His book had purposefully combined the concerns of sociology and jurisprudence because the mixture "yields valuable lines of thought." As with other basic features of human experience, law "invites the perception of latent values in the world of fact. Law 'as fact' is often and properly seen as a vehicle of power and domination ... But law as fact is also the crucible of emergent legitimacy, rule making, and claims of right. To recognize this other face of law is not an exercise in wishful thinking."[26]

Law, Society and Industrial Justice, like all of Selznick's books, was a work of repeated insights and enviable learning. My reading here has emphasized how the book practiced a distinct approach – the bridging of fact and value; the explicit judgment of matters of value and quality – for the social study of normative

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24 *Moral Commonwealth*, p. x.
25 Donald J. Black, "Review of *Law, Society and Industrial Justice*," *American Journal of Sociology*, volume 78 (1972) pp. 709–14, quoted material at pp. 709, 712.
26 Philip Selznick, "Rejoinder to Donald J. Black," *American Journal of Sociology*, volume 78 (1973), pp. 1266–9, quoted material at 1266–7. For a fuller discussion of the episode and the methodological issues it aired, see Krygier, *Philip Selznick*, pp. 197–206.

systems. This approach was identified, elaborated and defended in "Sociology and Natural Law" and in "A Normative Theory of Culture." And while the approach could in principle have been applied to any number of arenas of human experience (and the fact that this was so formed part of the case in support of the approach itself), it was in the study of law that Selznick first redeemed its goals. From the start, law offered especially fertile ground for the conduct of sociologically grounded normative theory. We can be thankful, but not surprised that he returned to law so often and masterfully in the distinguished writings which followed.