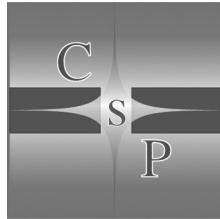


Talcott Parsons on Law and the Legal System

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By

A. Javier Treviño



Cambridge Scholars Publishing

Talcott Parsons on Law and the Legal System, by A. Javier Treviño

This book first published 2008 by

Cambridge Scholars Publishing

15 Angerton Gardens, Newcastle, NE5 2JA, UK

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

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ISBN (10): 1-84718-485-5, ISBN (13): 9781847184856

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ACKNOWLEDGMENTS

I am most grateful to the Sociology Department at the University of Sussex (Brighton, England) for giving me the opportunity to initially express the idea of this book at a spring Sociology Symposium on March 15, 2006. In this regard I especially thank William Outhwaite, Kevin McCormick, Ted Ulas, Mo Gonzalez and Jennifer Platt. I also thank all of the participants at the conference “Talcott Parsons: Who Now Reads Parsons?” held July 17-18, 2006 at the University of Manchester, England. I am particularly grateful for the comments and encouragement, provided at the conference by Roland Robertson, Victor Lidz and Matteo Bortolini, which served to give this collection its structure and organization. Giuseppe Sciortino was very kind in making available to me the pre-publication copy of Parsons’s *American Society* and Dean Birkenkamp, of Paradigm Publishers, for allowing me this sneak preview of the manuscript. As well, I thank for their kind words of encouragement with this project, John Holmwood, Jeffrey C. Alexander and David Sciulli. I very much appreciate all the help given me by Jenni Lund and Pam Jordan in formatting the manuscript. I thank Ru-Shyan Yen for designing the book’s cover.

A. Javier Treviño

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INTRODUCTION

One of the great ironies in contemporary sociology of law is that despite Talcott Parsons's enormously influential role as "the midwife of modern sociology" (Outhwaite 2005, 212), coupled with his three decades of focused and sustained analysis of the legal system's location in a total and complex society, it is nothing short of appalling that his particular social systems approach to law has been largely neglected.¹ Indeed, as Deflem (1998, 776) points out, although Parsons made only cursory mention of law in some of his best-known works—e.g., *The Social System* (1951, 269), *Structure and Process in Modern Societies* (1960, 142-44, 190-92)—he extensively discussed the role of the legal system in no less than five important papers (Parsons 1954a, 1962a, 1968, 1977a, 1982)² and two somewhat lengthy book reviews (Parsons 1962b, 1977b). What is more, in the two slim paperbacks where Parsons applies his cybernetic systems theory in explaining the progression from premodern to modern societies—*Societies: Evolutionary and Comparative Perspectives* (1966a) and *The System of Modern Societies* (1971)—he considers law to be an essential element in the analysis of just about every society under consideration: ancient Egypt and the Mesopotamian empires; China, India, and the Islamic empires; the Roman empire; Israel and Greece; medieval Western Christendom; the United States.

Additionally, one of the earliest formative influences on him was Max Weber's writings on law, in particular in *Wirtschaft und Gesellschaft*, portions of which Parsons read during his year as a student at Heidelberg, 1925-26. Indeed, Weber's treatment of the Continental tradition of law, and especially of the differences between Roman Law (both in antiquity and as it reemerged in late Medieval and Renaissance times into the modern Continental tradition), as contrasting importantly with Chinese, Indian, or Islamic legal traditions, was a major reference point for Parsons's understanding of law (Lidz 2007).

Parsons's academic experiences with more pragmatic legal matters also came early in his career and subsequently proved to be highly significant for him. For instance, sometime during the 1930's he first made the acquaintance of Roscoe Pound, the long-time Dean of the Harvard Law School and the father of "sociological jurisprudence." Some thirty years later Parsons (1968, 50) reminisced fondly that he had been

particularly impressed by Pound's "enormous concern for the common law"; that he regarded Pound's *The Spirit of the Common Law* as "one of my first serious concerns with legal thinking"; and that, in the 1930s, he had "had the good fortune" to sit in on Pound's seminar in the philosophy of law. Much later, during the late 1960s, Parsons collaborated with the noted legal theorist Lon L. Fuller in organizing—and teaching—seminars at Harvard on Law and Sociology (Deflem 1998, 776-77; Lidz 2007), and was especially influenced by Fuller's, and social historian Perry Miller's (1965), writings on the American common law tradition (Parsons 1968, 51). Notwithstanding the fact that Parsons derived great inspiration from Pound's and Fuller's work, he developed a distinctly sociological analysis of law, one that was rooted in the classical ideas of Weber and Durkheim and that departed radically from the sociological jurisprudence offered in the law schools (Deflem 2006).

Guy Rocher (1989, 144-45) identifies three specific "events" that he believes compelled Parsons to undertake a closer sociological analysis of law.³ The first was a paper, "A Sociologist Looks at the Legal Profession" (1954a), which Parsons read at the Fiftieth Anniversary Symposium of the University of Chicago Law School in December, 1952. Here he compared and contrasted the place and functions of the legal profession with those of the medical profession in modern society. The second event was a seminar on the relationship between law and sociology, organized in 1956 and co-sponsored by Rutgers Law School and the Rutgers Department of Sociology, where Parsons presented a paper titled, "The Place of Law in Social Systems," and which was later published as "The Law and Social Control" (1962a).

Third, and by far the most significant event which led Parsons (1962a, 56) to undertake "a fairly extensive treatment of the place of the legal system in American society, including the part played in it by the legal profession," concerned the preparation of a full-length monograph that he began writing, in the late 1950s, with the collaboration of Winston White, and with the assistance of Leon Mayhew. Parsons gave up on the project when White decided to leave academia, and Harvard, during the summer of 1962 (Lidz 1991, 33). Much later, throughout most of the 1970s, in an entirely different project, but one that deals with the functionally defined integrative subsystem of society—the American societal community—Parsons (2007), in a draft manuscript, gave detailed consideration to the integrative capacities of law—and in particular the law courts and the legal profession. In order to properly situate and adequately understand Parsons's treatment of the U.S. legal system's nature and function during the late-twentieth century—the express subject of this introductory

essay—it is first necessary to briefly summarize those elements of his systems theory most pertinent to his discussion of law.

Parsons's Systems Theory

Parsons regards the social system as one of four primary constituents of more general systems of action, the other constituent units—or subsystems of action—being the cultural system, the personality system, and the behavioral system. Because he distinguishes these four subsystems in terms of the primary functions they perform, Parsons attributes primacy of adaptation—the “A” function—to the behavioral organism, primacy of goal-attainment—the “G” function—to the personality of the individual, primacy of integration—the “I” function—to the social system, and primacy of latency-pattern maintenance—the “L” function—to the cultural system. This constitutes Parsons's famous four-function paradigm, or AGIL schema.

For simplicity's sake, our focus in consideration of law will be, within the action frame of reference, first and foremost on the social system, and secondarily on the cultural system. Briefly put, whereas the social-system focus considers the norms that regulate individuals' roles as members of collectivities, the cultural-system focus is on the meaning that values have for individuals in orienting their actions. Parsons conceived the social and cultural systems—and their concomitant norms and values—as being definitionally distinct and analytically independent from each other, but also interdependent.

Parsons treats *society* “as the type of social system which is characterized by the highest level of self-sufficiency relative to its environments, including other social systems” (1969, 38; 1971, 8). Society, as a social system, is itself analytically divisible into four primary subsystems, each with its own particular functional imperative. Thus, the latency-pattern maintenance subsystem, or the “fiduciary,” is particularly concerned with the relations of the society to the cultural system; the goal-attainment subsystem, or the “polity,” to the personalities of individual members; the adaptive subsystem, or the “economy,” to the behavioral organism.

For Parsons, of particular concern in reference to law, is the functional imperative of integration, which involves the mutual adjustments, the interrelations, of the aforementioned subsystems as regards their contributions to the effective functioning of the society as a whole. Integration seeks to maintain equilibrium and to avoid disequilibrium and, in the worst-case scenario, disintegration. Parsons calls the integrative

subsystem of society, the *societal community*.⁴ In Parsons's view, society's integrative function is so important that he regards it as constituting no less than "the central core of the concerns of sociological theory" (1961, 41). What is more, he sees the societal community's functional requisite of internal integration as the one that the legal system most directly serves in a society.

In the next section I briefly discuss Parsons's general views on the legal system in relation to the fiduciary, polity, and economy. The balance of this paper will then be devoted to Parsons's considered analysis of the legal system's place in the American societal community.

The Legal System

Any discussion of the legal system must first begin with Parsons's (1960, 264) conceptualization of *law*:

In the most general sociological sense, law may be said to be any relatively formalized and integrated body of rules which imposes obligations on persons playing particular roles in particular collectivities. Such a conception implies, I think further, that there is a machinery of authoritative interpretation, i.e., something analogous to a system of courts, and a machinery of the definition and implementation of sanctions, and a relatively clear focus of legitimation.

Several aspects of this, Parsons's most precise and clear notion of law, require amplification. To begin with, it is important to note that he conceives *modern* law to be, in the first instance, a "relatively formalized and integrated body of rules," which is to say, a network of consistent and universalistic *norms* anchored in the social structure. As such, this system of norms "imposes *obligations* on persons playing particular roles in particular collectivities." This means that certain compulsory duties regulate the conduct of individuals who hold determinate membership in concrete collectivities. Because these collectivities, or associations, may pertain to the public or to the private sectors of society—in other words, they may be part of the polity or part of the societal community—this allows Parsons, following Weber, to consider, on the one hand, the law of the state, and on the other, the law of "legal persons"—that is to say, private organizations but also individuals as full members of a society (Parsons 1977b).⁵

Moreover, Parsons attributes to law—or more accurately to the (public) legal system—three further elements: a *system of courts*, and particularly in the United States, the ramified system of courts of appeal

involved in “authoritative interpretation” though judicial review; a governmental agency specifically involved with enforcing negative *sanctions* toward those who fail to comply with their obligations; and a *legitimation* that makes the institutionalized norms not only legally binding, but more importantly, morally binding.

Additionally, Parsons sees as an essential component to the legal system of modern western society the ancient Roman conception of natural law (1977b, 146), in large measure because it contributed to the seventeenth-century idea of natural or inalienable *rights*; a principle which later found its most refined expression in the U.S. Bill of Rights. But Parsons also suggests that a Continental prejudice swayed Weber—and for that matter Ehrlich, Petrazhitsky, and Kelsen (1968, 50)—in the direction of Roman law and away from considering the contributions of English *common law*. Indeed, for Parsons (1968, 47), it is highly significant that during the “Golden Age of American law” in the years, 1820 through 1860, English common law was successfully transplanted, albeit with major modifications, into the highly complicated legal system of the United States (see Miller 1965, 99-265).

But the most important shared characteristic of the convergence of Roman law and English common law is that together they “institutionalized firm patterns of rights and obligations” that transcended the traditional foundations of social solidarity previously based on kinship and ethnicity (Parsons 1960, 142-43). Thus, for Parsons, it is not through the bonds of kinship and ethnicity that individuals are provided solidarity in modern society, but through the status of *citizenship*—with its complex of universal rights and obligations—that is institutionalized by modern law.⁶

The Fiduciary System

Modern law, Parsons maintains, is first and foremost a system of *norms*; that is to say, a set of prescriptions, permissions, and prohibitions bearing on social action. But in order to be efficacious, these legal norms must ultimately be grounded in *values*.⁷ And because values and moral premises operate in and through the fiduciary system, it is this component of society that in the last instance gives the legal system its legitimation.⁸ But what are those aspects of the fiduciary system that legitimize law, that make it morally binding, and as such, compel citizens to conform?

Prior to the advent of modernity (broadly understood as occurring during the seventeenth century) Western law, as a collective phenomenon, was legitimated through common value commitments, such as universalism,

rooted in the religious ethic of ascetic Protestantism (Parsons 1971, 92). However, in the case of modern society,⁹ and more particularly in the contemporary United States with its “neutralization” of religion, the core value became one of *instrumental activism* (Parsons 1960, 172; 2007, 144) that allows Americans to treat society as an instrument in relation to their interests, values, and goals. The American social character is thus endowed with an attitude of “active mastery” over the conditions and means of implementation of interests, values, and goals. As such, Americans are likely to want to proactively change these conditions of life, if for no other reason than because they desire to reduce the gap between their experienced actuality and their idealism.

Instrumental activism, as the paramount value to which Americans are “morally committed,” must, in order for them to “practically conform” with it, be closely associated with certain general legal norms. Accordingly, the fiduciary system, which through value commitment orients actors to pursue their individual interests and welfare, links itself with the legal system, and in particular the constitutional guarantees—the basic rights of personal liberty, of assembly, and of property—that purportedly give U.S. citizens control over these life situations. This interpenetration¹⁰ of the fiduciary system with the legal system makes for a “mutual reinforcement between the legal and the moral.” The upshot is that not only is the legal system legitimated by the moral, but that “the American type of morality has often been called ‘legalistic’” (Parsons 2007, 176).

The Polity

As previously mentioned, instrumental activism gives Americans, as individuals, relatively free reign in the pursuit of their life-goals—which are given higher-order legitimation in such valuative documents as the Declaration of Independence and the Preamble to the Constitution. Indeed, as we have seen, from the perspective of the general action system, Parsons attributes primacy of goal-attainment function to the personality of the *individual*. But from the perspective of the social system, however, the focus is on the collective goals of *organizations*. And those processes that are involved in an organization’s effective attainment of collective goals, Parsons calls “political” (1962b, 562).

Thus, for Parsons (1982, 182), “polity”—or in the more common American usage, “government” (in both the state and federal sense)—refers to “the organization of the social system relative to the attainment of goals accepted as binding on the system as a whole.” As a way of

motivating social action in the normative pursuit of collective goals, the polity in all modern societies has as one of its most important functions the maintenance of a public legal system. Thus, while the polity and the legal system are closely interrelated, particularly, as we shall see, with reference to the problems of jurisdiction and sanctions, Parsons notes again and again that a very important feature of the place of the legal system in modern societies is its *relative independence* of governmental structure and processes. More specifically, he (1960, 143-44) takes pains to point out the relative independence of the judiciary from both the executive and legislative branches of government, and credits the first Chief Justice of the U.S. Supreme Court, John Marshall, who served from 1801 to 1835, for formally separating the power of judiciary from that of the government (Parsons 1977b, 147). Taking a strong line in establishing the Court's right of judicial review, Marshall affirmed "the right of the court to declare unconstitutional, not only acts of the states, but of both the executive branch and the Congress" (Parsons 2007, 112).

Although this relative independence is found in all politically organized modern societies, from fascist to communist, Parsons asserts that the U.S. system of government—being that it exists in a pluralistic liberal society—is particularly distinctive in the degree of autonomy it accords its courts of law.¹¹ By way of demonstration he explains that in certain other societies it would not have been possible for courts to undertake procedures with such potentially threatening implications for the government in power as happened in 1973 at the height of the Watergate scandal when U.S. District Court Judge John J. Sirica ordered that tape recordings of White House conversations between President Nixon and his associates be made available to prosecutors. In this case, the judiciary's independence was manifested in the Supreme Court's unanimous decision to reject Nixon's appeal to deny both to the House Judiciary Committee and to the special prosecutor access to the tapes (Parsons 2007, 35).¹²

It is this notion of the relative autonomy of law—or, more accurately, of the processes of adjudication carried out by the law courts—that Parsons uses to criticize the instrumental Marxists for politicizing law by treating it "as essentially a tool of exploitation of the proletariat by the bourgeoisie" (2007, 72). Similarly, Parsons excoriates C. Wright Mills for his "most biased appraisal of the role of the courts" in *The Power Elite* where Mills implies that the judiciary "simply does the bidding" of the higher managerial elements of business and government in the United States. "[T]he initiative taken by the courts in the matter of racial segregation and in the reassertion of civil liberties after the miasma of

McCarthyism,” writes Parsons, “does not appear to me to be compatible with Mills’s views” (1960, 219).

But while the courts are notably independent, not only relative to society but to the “state” of government, it is important to acknowledge that in highly differentiated social systems there also exists a close relationship, played out as a double interchange, between the legal system and the polity that is exhibited in several significant ways. For example, in a constitutional legal system like that of the United States, government itself is “bound” by the Constitution as constitutional law regulates executive procedure: “the conduct of office, the making of decisions, etc.” (Parsons 1962b, 562). The obverse of this, of course, is that only government can take on the high-order responsibility of making a constitution on behalf of the society as a whole (Parsons 1977a, 33).

Additionally, law has a special relationship with the polity in regard to several essential legal functions, or “problems,” that can only be solved with governmental involvement. One has to do with the manning of the courts (Parsons 1977a, 34). Here the close relation between the judiciary and government is evident in the fact that judges are almost always appointed by political authority (Parsons 1962a, 62-63). A second pertains to the nomination of candidates for elective office and the confirmation of nominations by legislative bodies, which involve legal considerations (Parsons and Platt 1973, 203). Another interface between government and the legal system concerns the definition of the scope of *jurisdiction*—a concept that Parsons regards “as a category of the political and legal systems” (1960, 10) and which refers, in one respect, to the territorial area in which the political authority can legitimately apply the use of force. Finally, a related and more fundamental function that involves political references is the problem of enforcement, or the authorization and implementation of *sanctions* by the political authority (Parsons 1960, 190; 1962a, 59). Later, we will examine in more detail the problems of jurisdiction and sanctions, as well as other, somewhat less political, functions of law.

The Economy

As a way of better understanding the interrelationships of the next two subsystems which are functionally integrative from the point of view of their contributions to the effective functioning of the society as a system—namely, the economy and the societal community—Parsons (2007, 156) points out that their “primary mechanisms of articulation” are found in the “set of phenomena including and clustering about the legal system.” In

this section I examine how three of these legal phenomena—contract, property, and occupation—have come to be highly elaborated in the economies of modern industrial societies.

It is important to begin by stating that, as was the case with the polity and the legal system, the economy and the legal system are also relatively independent from each other and thus need to be treated as analytically distinct. Indeed, for Parsons (2007, 251), a far more serious fallacy than regarding judicial decision as a mere feature of political power, as did Mills, is the Marxist notion that all action—including legal action—is, in the last analysis, economic. As he points out, two historical developments in law and the economy that were “antagonistic” toward each other had, by the 1830s, transpired in American society. The first of these, as we have already discussed, was the emergence of an autonomous system of courts under the leadership of Chief Justice Marshall. An “antagonism,” such as it was, subsequently developed with the emergence of a highly differentiated market economy in context of the fact that legal notables like Marshall, but also Joseph Story and James Kent, were not political populists in the Jacksonian tradition and, as such, did not see the federal courts as having any responsibility to respond to the problems of industrialization. Despite this antagonism, however, this is not to say that the law and the economy were, or currently are, inherently irreconcilable. To be sure, Parsons’s conceptual focus is on their congruence.

The congruence between the institutional nature of the economy and the legal system begins with the advent of the regulation of market relations through the “subcomplexes” of contract, property, and occupation,¹³ with the main point of articulation lying with the institution of *contract* (Parsons 2007, 271). Parsons (2007, 261) maintains that “the social structure of markets, as distinguished from the settlement of terms in their transaction processes,” cannot be understood without an understanding of the contract, “in the Durkheimian sense.” This is to say, in the sense that the contract sets the normative conditions—the rights and obligations—under which an acceptable agreement about terms can be reached, acceptable not only to private individuals and collectivities, but to the moral “community” as represented by restitutive law. In order to do this, Parsons explains, the contract must be situated within a general system of norms, i.e., the legal framework.

Contract makes possible the freedom of individuals and collectivities to make ad hoc agreements to exchange goods and money, and to enter into mutual obligations involving future performances. But these freedoms could not be institutionalized within a stable system of social relationships unless there are adequate general rules defining, among other matters, the

content of permitted contractual relations, and the limits of such permission. (Parsons 1960, 146)

What is more, the actions of economic institutions—or more generally institutions in the performance of the “adaptation” function—are embodied in the contractual rights and obligations stipulated by the formal legal system.

Thus the directors of a business corporation are legally obliged, on penalty of liquidation, to operate to maintain financial solvency; governmental units are legally authorized to impose taxes to maintain their functions; and voluntary contributors to religious, charitable, and educational collectivities are legally privileged to deduct such contributions from taxable income. (Parsons 1961, 55)

Thus, for Parsons, as for Durkheim before him, the contract as a social institution is highly significant not only in market relations but in noneconomic social situations as well. It should be noted however, that in the context of market transactions, contract, as the institutionalization of rights relative to nonhuman objects of possession, is closely aligned with *property*—which Parsons (2007, 262) regards as “*the economic institution, par excellence.*” In granting the essential rights of the use, control, and disposal of physical objects, property is legitimized by the legal system. As such, law institutionalizes the *ownership* of physical objects by bundling all property rights to be held by a single owner, whether the owner be individual or corporate. Further, under law, the institution of ownership sharply distinguishes between property rights that are primarily economic and other noneconomic—e.g., political, or “jurisdictional”—rights in the same object. These two aspects of ownership—the aggregation and differentiation of property rights—Parsons makes clear, are functions unique to the modern legal system, given that under European medieval law several holders could have different kinds of property right to the same piece of land, and that property rights in land also carried with them elements of status in the political structure, e.g., the land-“owner” was at the same time the *landlord* in the sense of holding jurisdiction over the land (Parsons 1960, 146).¹⁴ This means, moreover, that only in a modern legal system is there true “freedom of contract” in the sense that parties have the freedom to enter into private agreements with limited content without involving their total status (e.g., political, economic, religious, hereditary, etc.), but only specifically limited interests (Parsons 1964, 83).

In addition to having a close connection with property rights, whether of a financial nature or not, the legal contract is also intimately tied with

the labor market—that is, with employment, or *occupation*—in two important ways. First, as concerns those rights of individuals in their occupational performances as employees. Very simply, and most obviously, employees have a right to expect, from their employers, money income—wages, in the economic sense—as compensation in exchange for their labor. And second, as concerns the “freedom-constricting obligations” incurred by employees (Parsons 2007, 279) given that they have a commitment to continuing satisfactory performance as members of the employing organization, the firm. Thus, the “commitment to performance and the expectation of wage-income” constitute the “quid-quo” relationship (Parsons and Smelser 1956, 114), which terms are defined explicitly in the employment contract, while “others are on the penumbra of customary law ... and still others are left highly implicit” (Parsons 2007, 279).¹⁵

According to Parsons (2007, 355), individuals’ commitment to occupational roles, on the one hand, and the legal contract “in Durkheim’s sense,” on the other, are two basic integrative components that are directly built into the structure of the modern economy. In the following section we look at how the legal system in general functions, in the first instance, as the integrative mechanism of the American societal community.

The Legal System and the American Societal Community

After giving book-length consideration to the three subsystems of society—the fiduciary (Parsons and Bales 1955), which is concerned with the maintenance of institutionalized cultural patterns through socialization; the polity (Parsons 1969), which is concerned with organizing collective action for the attainment of collectively significant goals; and the economy (Parsons and Smelser 1956), which is concerned with the efficient management of resources, such as money and labor—Parsons (1966a; 1969, 40-53; 1971, 10-18) then began to focus his attention on the fourth of these social subsystems, the integrative subsystem of society—or what he came to call the societal community—and ultimately, in his last book (Parsons 2007), to the societal community of *American society*.

The core of a society as a social system is the societal community, whose general function is to assemble a system of norms through which a population of individuals can be collectively organized and integrated. As such, the individuals, as citizens of the societal community, must accept normatively defined obligations of *loyalty* to the societal collectivity. Loyalty, or allegiance, refers to “a readiness to respond to properly ‘justified’ appeals in the name of the collective or ‘public’ interest or

need” (Parsons 1969, 41; 1971, 12). Thus, for example, in most modern societies willingness to perform military service is a test of loyalty, primarily for men. The system of norms governing loyalties, the various citizen’s rights and obligations, must have cultural legitimation. The legitimation of loyalty stems, as we will see presently, from shared value commitments, and the citizen’s rights and obligations are defined in the legal system. Thus, it is at the core of the societal community that Parsons (1977a, 32) “would place the legal system, in a sense of paramount functional significance.”

By the *American societal community* Parsons (2007, 23) means:

the empirical social system ... which includes the process of government of an ascertainable territorial area, a government which exercises controls over a human population resident or otherwise present within that area, which is characterized by a legal system in some respects administered by that government, in which and among its population ascertainable processes of economic production take place [and] ... in which a common culture obtains.

To sum up: at the crux of American society lies integrative aspects of the societal community and at the crux of the American societal community lies its system of laws. To put a finer conceptual point on these observations, we may say with Parsons that at “the crux of the integrated problems” of the American societal community can be said to lie the ways in which citizen’s legal rights and obligations, that induce their loyalty to the collectivity, are related to each other (1977a, 35). The upshot is that for Parsons, “[i]n so far as the United States has a set of distinctive characteristics, they deserve to be understood under the formula of a ‘society under law’” (1962b, 564).

The Morality of Citizenship and the Universality of Citizens’ Rights

In Parsons’s (2007, 151) view, “the master concept of participation in the modern societal community,” indeed the very basis for full membership into American society, is the role and status of *citizenship*. And as the British sociologist T. H. Marshall had previously outlined, citizenship includes three components: the political, the social, and the “civic”—but which in the American reference, Parsons calls the legal. Pivotal to legal citizenship is the guarantee of certain freedoms and securities—rights—institutionalized mainly in the legal system. More specific to the American case, all U.S. citizens, through the federal

Constitution, possess the basic equalities of citizens' rights, expressed in the phrase, "equality before the law."¹⁶ These include: rights to protection, certain freedoms, certain basic conditions of welfare, and, at minimum, educational and occupational opportunities. Thus, at least in principle, citizenship in the American societal community "has come to be defined as a company of equals" (Parsons 1971, 94), each possessing certain basic rights.

But though they may have equality of membership, it is important that citizens' loyalty to the societal community be essentially *voluntary*, and that, as such, their constitutional rights and obligations be given moral legitimation. For Parsons, citizens' voluntary allegiance to the societal community is derived in part from their moral commitment to "valued association" in the collectivity (1969, 48; 1971, 18). Members are committed to the associational structure because it both implements their values and organizes their interests in relation to other interests (Parsons 1966b, 710). The commitment to association in a national community, especially through acceptance of citizenship, implies that members have a presumptive obligation to abide by the laws. It is in this way that, in the American societal community, "law concerns the morality of citizenship" (Parsons 1969, 48; 1971, 18).

Second-Class Citizens

But what of Black Americans¹⁷ who, throughout much of U.S. history, have been regarded as "second-class citizens," and thus denied the equal rights of full membership status into the societal community? Writing during the mid-1960s, at the height of the Civil Rights Movement, Parsons considers this moral dilemma—"the American Dilemma," in Gunnar Myrdal's term—in relation to law.

Parsons contends that over against particularistic solidarity based on kinship, ethnicity, religion, and so on, modern Western legal systems have rights and obligations that are endowed with *universalism*, which is to say that, in contemporary capitalist, welfare-state democracies, they are formulated and held to apply to *all* citizens of a given jurisdiction regardless of ascribed status (Parsons 1960, 143; 1962a, 61; 1977b, 146). The Roman Empire was the first and only premodern society that devised a legal system—the *jus civilis*—in terms of universalistic principles that applied to all citizens, whether resident in Rome or not (Parsons 1966a, 88). Later, the influence of the Enlightenment assured the natural rights of all individuals, independent of their ascriptive involvements. And then in the early seventeenth century, in England, the establishment of civil rights

was first begun with the consolidation of the independence of the common law in relation to the government (Parsons 1966b, 712, 716). Universal civil rights were then extended in various phases through the eighteenth century and, in the American experience, on through the nineteenth and twentieth centuries. Thus, it is particularly the case that, in the American societal community *as nation*, the idea of “inalienable” rights has been so fundamental to its tradition (Parsons 1970, 14). To be sure, civil or legal rights, Parsons (1966b, 719) maintains, have come closest to direct implementation of the values that define what it is to be an American—those that include liberty, egalitarianism, individualism—and that Myrdal formulated in his famous summary of the “American Creed.” This modernist principle of universal rights for all citizens notwithstanding, Blacks, regardless of any individual or collective achievements and contributions, had during the mid-1960s continued to be denied full inclusion as “Americans” into the societal community. This “civic exclusion,” to use Lockwood’s (1996) serviceable term, had the pernicious effect of depriving them not only of the “equal protection of the laws,” but also—because of the negation of the fundamental “equality of opportunity,” a theme that emphasizes equality in an individualistic way (Alexander 1984, 296)—of the freedom of the contract of employment (Parsons 1970, 26).

In any event, given Americans’ value commitment to universal equality, perhaps most popularly expressed in the phrase “liberty and justice for all,” Parsons believed that Black American’s total acceptance into the American societal community would most directly, immediately and completely occur, indeed was already occurring, through the legal component of citizenship—particularly through the judicial process.¹⁸ He points out, for example, that this had already begun to happen with the then recent U.S. Supreme Court’s decisions that extended the Bill of Rights to the level of the states, especially through re-interpretation of the Fourteenth Amendment, as well as with the Court’s school desegregation ruling in *Brown v. Board of Education*. Thus, it was through the law courts that the moral imperative of egalitarianism, in the sense of institutionalizing basic universal rights, would ensure full citizenship for Black Americans. For Parsons, then, law becomes the most important basis of (racial) integration for the American societal community.

Law as a Mechanism of Social Integration

In the essay most famous for his detailing of the characteristics and functions of law, Parsons (1962a, 57) states pointedly “law should be

treated as a generalized mechanism of social control.” This means that, relative to the citizens of the societal community, law functions to (1) regulate their interactions and, (2) define their social situations (Parsons 1969, 47; 1971, 18).¹⁹ These two legal processes of social control—*regulation* and *interpretation*—in the larger sociological sense, signify that “the primary function of a legal system is *integrative*” (Parsons 1962a, 58, see also Parsons 1977a, 52; 2007, 209, Chap. 6).²⁰ Further, the law’s integrative function is found in the agencies associated with its management, most notably the courts and the legal profession (Parsons 1961, 40).

The Law Courts

Parsons makes it quite clear that the focus of the societal community is the legal system (1961, 58), and that the focus of the legal system is to be found in the courts (1960, 191). Indeed, as he succinctly puts it in *American Society*, “the core of the legal system as institutional structure lies in the judicial system” (2007, 211). Parsons, therefore, pinpoints the analytical locus of the courts as being at the center of the center of the societal community.

Taking a slightly different perspective, the society-as-system point of view, we see that Parsons locates the courts of law in a particularly significant place in the larger social structure of American society: they are dispersed along the “interstitial” space, and the zone of interpenetration, that extends from the societal community’s core, and its very basis of integration, to the polity’s periphery, its system boundary. The U.S. judiciary is dispersed across this broad social expanse because, in contrast to those of Continental Europe which are more centralized, it consists, first, of a highly ramified, hierarchical network of courts which is divided into the federal, state, and local levels (Parsons 2007, 211),²¹ and, second, it “is partly official and authoritative if not authoritarian [i.e., political], and partly private, and which interpenetrates into the informal structure of the [societal] community at many different points” (Parsons 1968, 53).

The courts’ limited reach into the polity’s internal system environment is the result of, as we have already discussed, the American judiciary having long maintained a relative independence from the executive and legislative branches of government. Aside from Chief Justice Marshall’s strong leadership in the newly formed U.S. Supreme Court, another main reason for the Courts’ political autonomy stems from the historical fact that the framers of the Constitution, concerned as they were with the

separation of powers, made minimal provision for a judicial branch, stating only that a Supreme Court should be set up, and that its Justices should be nominated by the President and confirmed by the Senate. They did not even specify how many judges there should be. Determination of this and the establishing of the entire system of appellate courts (which, in addition to the Supreme Court, also includes, at the federal level, the district courts and the U.S. courts of appeals) has most certainly not occurred through governmental control (Parsons 2007, 111-12).

However that may be, it is important to recognize that, at bottom, the courts provide the “institutional machinery for the settlement of the innumerable disputes and conflicts of interest” which are bound to arise in American society given that it allows its citizens great independence with relatively loose executive control (Parsons 2007, 111). Resolving disputes and mitigating conflicts constitute the bulk of the processes of legal regulation, in both the trial courts as well as the appellate courts.²² But in order for a legal system to determinately regulate social interaction, Parsons suggests that there are four major problems that it must first resolve. These are the problems of legitimation, interpretation, sanctions, and jurisdiction (1962a, 58-59), and they, directly or indirectly, involve the process of integrative adjustment typically carried out by the law courts.

Legitimation

The first problem in legal regulation concerns the basis of legitimation, or justification, of the legal system (Parsons 1962a, 58). One important basis of legitimation, as Weber pointed out in his concept of formal rationality, involves the use, by duly authorized agencies, of proper *procedure*. In the case of the law courts procedure “concerns the actual process of deciding itself,” and the deciding agency is a jury, judge, or panel of judges (Parsons 1969, 54; 1971, 25). For Parsons, procedural institutions like the courts are particularly prominent in “associational” social structures made up of a body of citizens holding cooperative relations, and of which the American societal community is prototypical. The associational societal community in the U.S. provides a framework, through its various courts of law, by which parties, with grievances about their rights, can cooperatively be brought together to adjust their legal interests with each other (Parsons 1977a, 41-42). In this way, the legal system, through the court’s implementation of procedural rules and practices, is able to regulate the interactions of citizens with conflicts of interest. “This ‘civilized’ way of dealing with conflicts of interest,” writes

Parsons (2007, 270-71), “clearly implies that there is an integrative order superordinate to the focus of conflict of the litigating parties.” Moreover, in a larger sense, Parsons (2007, 212) explains that procedural order is crucial to system integration, for without proper procedure highly complex social systems would simply “break down into chaos.”

But in back of formal procedure lies the deeper set of questions of “ultimate legitimation” (Parsons 1962a, 62) that can be articulated as: Why, in the value sense, should individuals conform to legal rules? What, in other words, is the higher source of right and obligation? In the last analysis ultimate legitimation always leads in some form or another to religious questions or, in the case of modern American society, to a “secular moral order” that is functionally equivalent to religion. The secular moral order, which is found in the fiduciary system, renders a broad conception of what is “right” and also what is “wrong,” especially as concerns the legal rights and obligations of individuals (Parsons 2007, 67).²³ The law courts, as procedural institutions, thus derive their authority to decide cases as an output from the fiduciary system to the polity. It is, therefore, one of the fundamental institutional features of a legal system that parties to litigation are obliged to accept the court’s decision, even if it conflicts with their own interests (Parsons 2007, 148).

The court’s oblique political affiliation stems from the fact that, in a constitutional democracy like the U.S., the ultimate basis of legitimation lies with the Constitution, particularly with its value commitment to universal rights. From this point of view, then, law constitutes a “focal center” of the relations between the fiduciary and the polity (Parsons 1962a, 62). Further, if we accept the view that a legal system is in the first instance “anchored” in the societal community, then the legitimation of the court system is an aspect of the valuation of social integration (Parsons 2007, 64).

Interpretation

The second problem for social control—and, concomitantly, for the law’s integrative function—is that of *interpretation* (Parsons 1962a, 59). This has to do with the meaning that the legal rules have for individuals’ actions, in particular situations and in particular roles. In the nature of the case, laws must be formulated in general terms. But even with a high level of generality, the laws may not cover all of the circumstances of individuals’ particular situations. Or there may be two or more laws, the implications of which for an individual are, at the time, contradictory. The operative questions in this regard are: Which laws apply and in what

degree and in what way? What specifically are individuals' obligations in this particular situation or their rights under law?

The *rule-focused* aspect of legal interpretation, which concerns the integrity of the system of rules itself, is primarily the locus of the appellate courts. As cases are brought to them for adjudication, the appellate courts directly institutionalize the process of arriving at decisions, in the course of which not only are the rights and obligations of individual petitioners settled, but the legal rules themselves are given authoritative interpretation. Parsons (1961, 58) considers the court's authoritative interpretation to be "the central judicial function."

We may say with Parsons (2007, 63) that the primary function of the courts is to interpret the meaning, to define the situation, to the litigants in the cases that come before them for adjudication. This is done so that the litigants "know better what their rights and obligations are and what the consequences of alternative courses of action will be for themselves and for others with whom they are concerned" (Parsons 1977a, 25). Further, the U.S. appellate courts, given that they rely on the common law tradition of *stare decisis*, generalize from these particular cases to whole classes of individuals or collectivities who are in similar situations and have similar interests. Judicial interpretation, then, serves as an "institutionalized 'definition of the situation,'" and is, as such, "primarily an integrative function" (Parsons 2007, 63).

In American society, in particular, the function of judicial interpretation, or adjudication, has become an especially prominent and important feature because, first, it is focused on the background of the written Constitution; second it operates in a federal structure of government; and, third, it institutionalizes the separation of powers in three "branches" (1977a, 25, 33). At all of these levels, legal doctrine must be properly interpreted by the appellate courts. The U.S. courts must, however, settle cases—specify the balances of rights and obligations in social relationships—within the context of the paramount value of instrumental activism. But because this shared value commitment is much too general to give guidance in specific situations, it leaves certain problems of concrete action undetermined; it is, therefore, up to the courts "to 'define the situation' for action more circumstantially than general value principles do" (Parsons 2007, 77). This is doubtless what Parsons means when he speaks about an imperative of the legal system as involving "the specification of the application of higher-order norms to levels where they can guide the action of the society's lower-level structural units by defining the situation for them" (1961, 58).