PEER-REVIEWED

Approaching Law and Exhausting its (Social) Principles

Jurisprudence as Social Science in Early 20th-Century China

Daniel Asen*

The last decade of the Qing dynasty (1644-1911) and Republican period (1912-1949) saw intensive efforts to revise the Qing Code, promulgate modern legal codes based on Japanese and German law, establish a modern system of courts, and develop a professional corps of lawyers and jurists (Huang 2001; Xu 2001; Yeung 2003; Young 2004; Neighbors 2004). These institutional reforms were implemented as part of the drive to have extraterritoriality rescinded and safeguard the sovereignty of the Qing dynasty and then Republic of China.[1] The reforms were accompanied by new categories within civil and criminal law (including a new conceptual distinction between the two), new conceptions of legal knowledge and expertise, and rich discussions over sources of law which took place within the legal realm as well as the readership of Republican newspapers and journals (Young 2004; Lean 2007). If, as Roger Berkowitz (2005, 1) writes in his study of scientific codification in continental Europe, "in a legal system, there must be some way that the law comes to be known," how did ways of knowing law change during this period of legal reform and broader intellectual change? Through a survey of jurisprudence textbooks and other legal publications, this paper argues that writers in early 20th-century China came to define jurisprudence (*faxue* 法學, *falixue* 法理學) in positivistic terms, ultimately using new conceptions of science (*kexue* 科學) and social science (*shehui kexue* 社會科學) to identify its place within a new ordering of modern knowledge.

By defining jurisprudence in these ways, the writers of the works that I will examine were engaging with formulations of legal knowledge occurring in Japan, Europe and the United States. In mid-19th and early 20th-century continental Europe, the centuries-old impetus to seek rationalized justifications for law (which Berkowitz traces to the late 17th-century natural law of Leibniz) began in the Historical jurisprudence of Friedrich Carl von Savigny (1779-1861) to take the "social life of a people" as the ultimate source of law. This trend, which Berkowitz argues was a key factor in the emergence of social scientific conceptions of law, culminated in the 1900 German Civil Code, which represented "a pure technical means for the pursuit of social, economic, and ultimately political ends" (2005, 141). Within this context, the importance of the

*Daniel Asen is a PhD candidate in modern Chinese history in the Department of History at Columbia University. His dissertation examines the establishment of modern forensic medicine in early 20th-century China.

[1] See, for example, Dikötter 2002.

social in the methodological and philosophical syncretism of late 19th- and early 20th-century jurisprudence, which Roscoe Pound (1870-1964) would construe as presaging Sociological Jurisprudence, demonstrated an epistemologically significant shift in jurisprudential inquiry to the social sciences (Pound 1911).[2] In Meiji Japan (1868-1912)—a site which would become extremely important for the conceptualization of modern jurisprudence in China—the drafting and implementation of new codes as well as the establishment of modern legal education were accompanied by engagement with the various schools of French, Anglo-American, and, especially, German jurisprudence (Chen 1907; Takayanagi 1930, 746-747; Röhl 2005, 23-28).[3] In intellectual projects akin to those occurring in the early 20th-century works from China that I will examine, Meiji thinkers attempted to work out the place of jurisprudence (*hôgaku* 法學, *hôrigaku* 法理學) in new schemas of modern knowledge. Their classification of jurisprudence as a positivistic *gaku* 學 (science) as well as their creation of a broader social scientific vocabulary laid the groundwork in important ways for the discussions of jurisprudence that would occur in late Qing and Republican China.[4]

It was within this global context that Chinese writers of the first decades of the 20th century began to conceptualize jurisprudence in social scientific terms. The main sources that I will use to examine this shifting conception of law are editions of *General Introductions to Jurisprudence* (Faxue tonglun 法學通論), a name given to many of the introductory legal textbooks which circulated during this period. The first section of this paper discusses these circulations of printed material and their place in legal education in order to provide context for my analysis of the discourses of jurisprudence. The second section focuses on the ways that authors of these textbooks used social scientific conceptual frameworks organized around the Japanese-derived *kexue* 科學 (science) to define jurisprudence as a category of modern knowledge. It was through this new vocabulary that jurisprudence came into being as a distinct field of knowledge alongside other disciplines like economics and sociology. While writers identified the place of philosophical methods in these positivistic conceptions of jurisprudence in different ways, the social (*shehui* 社會) was a consistent concern of jurisprudential inquiry. The third section looks to

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[2] In early 20th-century America this development drew on an older inductive orientation rooted in antebellum Baconian natural theology. See Schweber 1999.

[3] See Wigmore 1897, Takayanagi 1930 and Röhl 2005 for overviews of legal reform in Meiji Japan.

[4] The philosopher Nishi Amane 西周 (1829-1897) developed particularly complex formulations of the epistemological status of jurisprudence. For example, in his 1870-1871 manuscript (published in 1945) Hyakugaku renkan 百學連環 (Links of All Sciences or, in Nishi's subtitle, Encyclopedia), Nishi identified "science of law" (*hôgaku* 法學) along with politics (*seijigaku* 政事學) as an intellectual science (*xinrijôgaku* 心理上學) within the broader category of particular sciences (*shubetsugaku* 殊別學). See Havens 1970, 92-94 as well as Nishi 1945, 183. Also see, for example, Inoue Tetsujirô's 井上哲次郎 (1855-1944) 1884 Kaitei zôho tetsugaku jii 改訂增補哲學字彙 (Revised and Enlarged Dictionary of Philosophy), which contains many of the words that would become essential to modern Chinese discourse on jurisprudence (for example: jurisprudence, *hôrigaku* 法理學; science, *rigaku* 理學, *kagaku* 科學; society, *shakai* 社會).

discussions of principles of law (*fali* 法理) to examine the changes in ways of knowing law that these social scientific conceptions of jurisprudence entailed. The discussions that took place in textbooks and journals presented these principles as inductively knowable, objective social facts that constituted the objects of inquiry of the *kexue* (science) of jurisprudence. As we will see, however, several writers productively combined this view of jurisprudential knowledge with a much older discourse on principle (*li* 理) that had been rooted in late imperial Cheng-Zhu orthodoxy in order to discuss the ways that principles underlying the law reflect ethical considerations.[5] In this sense, the case of jurisprudence as *kexue* is suggestive of the complex resonances that scientific discourse carried in early 20th-century China (Wang 1997).

Introductory Textbooks and Legal Education in Early 20th-Century China

The establishment of jurisprudence as a distinct field of modern knowledge did not occur solely at a discursive level. It took place in large part through institutional and sociological changes to the ways that knowledge about law circulated in early 20th-century China. The establishment of educational institutions for the specialized study of law, modern legal professionalization, and the work of modern judicial organs in applying and interpreting law contributed to restructure the economy of legal knowledge and define a new class of legal experts which included judges, prosecutors, and lawyers (Huang 2001, 44-46). In addition, the explosion of textbooks, specialist journals, and other kinds of printed material produced by a burgeoning print capitalism supported these new distributions of legal knowledge (Reed 2004). Because it was within this context of writing, publishing, and reading that discussions of the epistemological status of jurisprudence took place, it is important to consider briefly some of the ways that knowledge about jurisprudence was organized and made to circulate in early 20th-century China.

"General introduction to jurisprudence" (Faxue tonglun 法學通論) was a title applied to numerous textbooks and courses during this period. It also represented a way of organizing the new body of *faxue* knowledge and as such provides an excellent window onto the intertwined institutional and epistemological dimensions of the birth of modern jurisprudence in China. The earliest course with the title appears to have been taught at the Capital Law School (Jingshi falü xuetang 京師法律學堂), which was established by Shen Jiaben 沈家本 (1840-1913) and Wu Tingfang 伍廷芳 (1842-1922) in October 1906 with

[5] While this intellectual movement has been grouped under "Neo-Confucianism," I follow Benjamin Elman in using "Cheng-Zhu orthodoxy" as a more specific term for the particular strand of intellectual orthodoxy which informed the late imperial civil service examinations. See Elman 2005, xxii.

the goal of training the personnel required for legal reform.[6] Under the tutelage of Chinese and Japanese instructors, students at the Capital Law School underwent either a three-year course of study or a one-year crash course. Courses included "Qing Code and codes of the Tang and Ming," "Current legal systems and the evolution of historical legal systems," "General introduction to jurisprudence," and a range of other courses in law, economics, and foreign languages. "General introduction to jurisprudence," which was taught by Okada Asatarô 岡田朝太郎 (1868-1936), was part of the first-year curriculum. Ostensibly as an adjunct to the school's instruction, Okada's lectures were published with a 1908 preface by Shen Jiaben (Shen 1911?, 2:25).

In the years after 1912, a number of other institutions for specialized study of law were established. A 1923 article by W.W. Blume, dean of the Comparative Law School at Soochow University (Dongwu daxue 東吳大學), describes the situation at the beginning of the 1920s (Blume 1923). In 1916 there were forty-nine Chinese "law colleges" which primarily taught German law via Japanese translations. According to Blume's statistics, there were twenty-one public and ten private law colleges in 1921. While judicial institutions and legal education in Republican China heavily relied on German models, institutions like the Comparative Law School, founded in 1915 and managed by American Protestant missionaries, maintained connections to American jurisprudence through its instructors and students who studied abroad.[7] Where did the "General introduction to jurisprudence" fit into early 20th-century legal education? In his 1935 work *Legal Education*, Sun Xiaolou 孫曉樓 (Shelley Sun), a Comparative Law School graduate, professor and associate dean (Conner 1993, 88), discussed the "general introduction" as part of law-school curricula (Sun 1935, 200). Extrapolating from a comparison of Anglo-American and continental systems, Sun argued that the continental emphasis on starting with the general and only later teaching the specific (*xian zonglun hou fenlun* 先總論後分論) was suitable for adoption in China. Sun noted that these courses, along with general introductions to criminal and civil law, were the first classes that law students took in a continental legal education.

A survey of works with the title *General introduction to jurisprudence* in the *Comprehensive Catalog of Republican Period Books* provides another picture—

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[6] The Capital Law School was not the first educational institution in China that taught modern law or that had provided introductory instruction in law. For example, by 1895 the Pei-yang University at Tientsin (Tianjin zhongxi xuetang 天津中西學堂) had included law in its curriculum. See Blume 1923, 305 and Shen and Wang 2005, 377. For more on the Capital Law School see Lin 2001 and Shen and Wang 2005, 380. The school was directly administered by Shen and the Office for Revision of the Law (Xiuding falüguan 修訂法律館) until 1912, when it was combined with the Capital School of Law and Politics (Jingshi fazheng xuetang 京師法政學堂) and School of Public Finance (Caizheng xuetang 財政學堂) to form the Beijing Specialized School of Law and Politics (Beijing fazheng zhuanmen xuetang 北京法政專門學堂) under the supervision of the Ministry of Education.

[7] The Comparative Law School played a major role in Shanghai's legal realm during the early decades of the 20th century. See Conner 1993, 84.

albeit limited—of where these introductory materials fit into legal education during the 1930s and 1940s (Beijing tushuguan 1986-1996, 5:2-7).[8] The following institutions had editions with which they were explicitly identified: Chaoyang University's Law Department (1927); Jiangsu Provincial Educational School (1931); Military School (Junshi xuexiao 軍事學校), mentioned in its wartime political educational materials (1938); and Personnel Training Academy of the Capital Police Board (1946).[9] Several tentative observations can be drawn from the list. First, editions of *General introduction…* were used as part of school curricula in different parts of China and saw use throughout the Republican period. Second, editions of *General introduction…* were used in the instruction of law students, government administrators, police, and military personnel. As basic introductions to jurisprudence, they served a range of audiences. Besides the relatively few editions affiliated with particular educational institutions, there were a number published by individuals without institutional affiliation. A count of all editions listed in the *Comprehensive Catalog* reveals that there were at least forty-six published between 1907 and 1946.[10] Of these titles, nine had second editions. One had three editions. Three had four editions. One had five, and one had six. Ouyang Xi's 歐陽谿 (1931) had eleven. Qiu Hanping's 丘漢平 (1933) had seven. Lou Tongsun's 樓桐蓀 (1940) had eight. My analysis below will examine exactly what these popular editions had to say about jurisprudence as a field of modern knowledge.

What did these books contain, and, for that matter, what did it mean to call something a *tonglun* 通論 (general introduction)? The 1932 *Dictionary of Law, Politics and Economics* defined *tonglun* as a "summarizing theory" (*gaikuo lilun* 概括理論) pertaining to any kind of matter (Yu 1932, 524). The term itself was applied to a range of topics—during the 1920s and 1930s these included libraries, municipal government, Buddhist philosophy, museums, and even the Tang Code. Within jurisprudence, there could be *tonglun* for more specific bodies of knowledge such as the law on civil procedure.[11] The editions of *General introduction to jurisprudence* published during the Republican period dealt with a constellation of basic issues in jurisprudence (Li and Wang 1999, 3). Li Long and Wang Xigen survey a number of these works and provide an overview of the main concerns: objects, scope, and methods of jurisprudence; origins, nature, and characteristics of law; relationship between law and other social

[8] Of course, editions of Faxue tonglun that are not specifically identified as teaching materials could also have served such a role.

[9] There were three entries which did not have dates: that of Hebei Province's local administrator training academy, that of the Politics Department of Zhejiang's Private Specialized School of Law and Politics, and that of Central Police Academy.

[10] I did not count multiple editions of the same book by the same author.

[11] See, for example, the advertisement for works published by graduates of Comparative Law School at Soochow University which appeared in Law Magazine (Faxue zazhi 法學雜誌), volume 5, no. 1. (Oct. 1931).

phenomena; sources of law and the types of law; legal relationships and political obligations; and uses of law and rule of law. Li and Wang's survey indicates a degree of consistency in the contents of the textbooks; however, as I will show, there were variations in the ways that individual writers engaged with these concerns.

Some writers of *General introductions to jurisprudence* addressed the question of the meaning of this format in greater detail. For example, in his 1931 edition, Ouyang Xi wrote that the "general introduction" is a "subject which is necessary preparation for studying jurisprudence" (Ouyang 1931, 2-3). Instead of providing solely a discussion of the divisions of knowledge within jurisprudence, it provides a systematic overview of the basic knowledge needed for studying jurisprudence, including basic questions of "law, country, rights, and obligations." In this sense, *General introduction*s provided the fundamentals that were required for more advanced study. Using almost identical language, Lou Tongsun made a similar point about rational organization in his 1940 edition while also touching on questions about the status of knowledge contained in the *General introduction* and scope of jurisprudence as a field of inquiry (Lou 1953, 3-7). In a wide-ranging discussion of the meaning of "general introduction to jurisprudence," Lou wrote:

> If knowledge is not systematic it can only be considered to be common sense (*changshi* 常識) and not scientific knowledge (*kexue zhishi* 科學知識). If all that is known about the truth of a matter are its fragments, this can only be considered to be general rules (*changli* 常理) and not principles which are common to the entirety (*gongtong yuanli* 共通原理). There are many divisions within the subject of law. Speaking of them as parts, a given section has its own principles and unique circumstances surrounding its establishment and evolution. But speaking of them in their entirety, within the legislative system of one country among every kind of law there are general principles (*yiban yuanli yuanze* 一般原理原則) which link them together.

For Lou, the "general introduction to jurisprudence" as a distinct subject of study ubiquitous in both law school curricula and those of less specialized educational institutions was "necessary preparation for studying jurisprudence" and provided "general, systematic knowledge about national laws and rights and duties." It contained precisely those principles that were common to the entirety (*gongtong yuanli* 共通原理) of jurisprudence. Lou's passage is significant in a number of ways. It demonstrates one definition of scientific knowledge as involving systematicity and, as we will see below, as intrinsically related to the extent to which inquiry into a particular subject exhausts its scope and the principles informing it. In addition, the assertions made by Ouyang and Lou that knowledge of background political and social phenomena was necessary

preparation for studying jurisprudence suggest the extent to which a social scientific conceptual framework largely translated from Japanese was essential for articulation of jurisprudence as a modern discipline. It is the role of this new set of concepts in the discursive establishment of jurisprudence as a modern field of knowledge to which I now turn.

Jurisprudence as Social Science

The establishment of law schools and other educational institutions offering modern legal education and the publication of journals and textbooks consolidated the institutional position of jurisprudence in early 20th-century China. Occurring at the same time was a fundamental restructuring of the possibilities of even talking about jurisprudence as a distinct body of knowledge. While the reforms of the early 20th century both encountered and grew out of a highly sophisticated body of legal codes, institutions, and what might be called jurisprudential knowledge, it was only during this period that jurisprudence as a category of modern learning came into being. This section examines the ways that early 20th-century writers used new conceptual frameworks to establish jurisprudence as this distinct field of knowledge. Through the designation of jurisprudence as a "science" (*kexue* 科學) as well as use of other "return graphic loans"—classical Chinese compounds which were given new, modern meanings by Japanese translators during the late 19th century (Liu 1995, 302)—writers began to conceptualize jurisprudence within the framework of a positivistic ordering of knowledge. In these schemas, jurisprudence existed on par with other disciplines like economics and political science in its claim to certain knowledge of a particular domain of human activity. That early 20th-century writers of textbooks and other works on law placed jurisprudence within this epistemology shows the extent to which the social sciences were becoming a crucial medium through which law would come to be known in Republican China and throughout the 20th century.

The word *kexue* (science) was introduced into Chinese from the Japanese *kagaku* 科學, which first appeared in Meiji Japan during the early 1870s (Reardon-Anderson 1991, 86). Japanese writers (and subsequently Chinese writers) used this term as well as the word *gaku* 學 (science) to create a unified, positivistic ordering of natural and social knowledge.[12] As will become apparent in my discussion of principles of law below, early 20th-century Chinese writers viewed inductive analysis as the essential means of knowing the laws of society. While *kexue* was an important means of organizing modern knowledge, a much older discourse rooted in late imperial intellectual orthodoxy appeared within these discussions in interesting ways. This was the discourse of "investigating

[12] See Wang 1997, 35-37 and Havens 1970, 92-111 for discussion of the term *gaku* in Nishi Amane's writings.

things to extend knowledge" (*gewu zhizhi* 格物致知)—an empirical method for developing knowledge of the moral principles inherent in the particularities of the world and, ultimately, bringing about the moral cultivation of the knowing subject. As part of the methodology of Cheng-Zhu orthodoxy, this epistemological orientation played an important role in late imperial intellectual life. During the late 19th and early 20th centuries, the vocabulary of the "investigation of things" was used in scientific translations, albeit without the positivistic origins and classificatory goals of *kexue*. After 1915, the more recent *kexue* came to encompass all senses of "science" as "intellectual paradigm, a method of acquiring knowledge, and a group of disciplines whose purpose was to explain physical reality" (Reardon-Anderson 1991, 88).

In late Qing and Republican editions of *General introduction to jurisprudence, kexue* (science) was integral to claims that jurisprudence was a distinct field within a broader ordering of modern knowledge. We might begin by examining Chen Jingdi's 陳敬弟 1907 *General Introduction*, which had been dictated from the Japanese legal scholar Ume Kenjirô 梅謙次郎 and his lectures at Hosei University (Hôsei daigaku 法政大学). Chen dealt with questions of epistemology in the chapter "Is law (*falü* 法律) a science or an art?" (Chen 1907, 25-27). Beginning with definitions of science (*xue* 學 or *kexue* 科學) and art (*shu* 術), Chen wrote that Japanese scholars define science as "studying in order to know the truth of a matter (or matters with a particular scope)."[13] Implicit in the definition is the circumscribed nature of the object of study and the specialized nature of the field. Thus, he wrote that "all of the sciences of the present era exist as different fields (*fenke* 分科)." In this way, engaging in a science means "specializing in one's affairs." In contrast to sciences, an art is a method used to attain a particular goal. Ultimately, law can be either a science or art depending on the kinds of knowledge produced and the goals of study. Chen wrote that law, or jurisprudence, is a science when the object of study is the principles of law (*fali* 法理) of a particular society and, specifically, "how law maintains the needs of society" as well as how it evolves and develops. Thus, jurisprudence was a science because it dealt with this circumscribed body of knowledge.

That Chen Jingdi defined jurisprudence by means of the social (*shehui* 社會) is indicative of the ways that study of law was being conceptualized in social scientific terms in early 20th-century China (Chen 1907, 1). In the textbooks that this paper surveys, jurisprudence is consistently located within the scope of this new category. For example, the very first sentence of Qiu Hanping's 1933 edition established that the following discussion of law was to take place within this particularly modern conceptual framework: "Looking at the phenomena of the universe from the point at which they arise, they can be divided into two classes: natural phenomena and social phenomena" (Qiu 1933, 1-3). In this schema, legal phenomena were essential features of social life. If science (*kexue*) was an important classificatory element through which jurisprudence was delineated as

[13] See Havens 1970, 95 for Nishi's early distinction between science (*gaku* 學) and art (*jutsu* 術) as "between knowledge and application."

a distinct discipline in early 20th-century China, "nature" (*ziran* 自然) and "society" (*shehui* 社會) were also crucial for this conception of the location of jurisprudence in, to borrow David Reynold's (1991) metaphor, a reordered "intellectual map." While both compounds appear in classical sources prior to the 20th century, they became "return graphic loans" when Japanese translators used them for modern conceptions of "nature" and "society" (Liu 1995, 326 and 336). As Michael Tsin argues, *shehui* (society), as a "discursive premise of modern government" accompanied by attempts to mobilize and order the populace, was a new form of political organization in early 20th-century China (Tsin 1999, 6). These discourses and, by extension, the intellectual frame in which jurisprudence was located were thus quite new.

Lou Tongsun's 1940 *General Introduction* provides another example of the ways that this modern epistemological framework was used to delineate jurisprudence as a distinct body of social scientific knowledge during the Republican period. As we saw in Lou's discussion of the "general introduction," Lou considered systematic organization to be an indication of scientificity. His definition of learning (*xuewen* 學問) as possessing "systematic knowledge of all of the phenomena and principles pertaining to each given thing" is also indicative of this view of epistemological authority (Lou 1953, 2). In this definition and, more generally, Lou's discussion of the relationship between jurisprudence and the other social sciences (*shehui kexue* 社會科學), his main point was that individual sciences were distinct entities because of their claim to authoritative knowledge of particular areas. While Lou argued that jurisprudence was fundamental to the social sciences just as mathematics forms the foundation of the natural sciences ("for a modern, civilized person to have abandoned the law means that there is no way to continue existing within society") (Lou 1953, 6), he emphasized that the "status" (*diwei* 地位) of jurisprudence among the other sciences was not a question of importance (*zhongyaoxing* 重要性) but rather of division of labour (*fen'gong* 分工): because modern learning is so broad, it is more important to understand where jurisprudence sits in relation to the system of learning (*xuewen xitong* 學問系統) of modern knowledge than it is to make absolute distinctions (Lou 1953, 19). For this reason, when studying jurisprudence it is imperative to "know in advance in which section of the system of learning jurisprudence stands. Once the borders are clear, it will be easier to apply oneself to study."

Lou visually represented the status of jurisprudence by means of a chart showing the branches of learning (*xue* 學) (Lou 1953, 20; see figure 1 and my translation in figure 2). After dividing learning into science and philosophy, Lou further distinguished between the formal sciences (*xingshi kexue* 形式科學) and substantive sciences (*shizhi kexue* 實質科學). The substantive sciences were further divided into natural sciences and social sciences. Lou located jurisprudence (*falüxue* 法律學) under the social sciences. Lou's discussion and

visual representation of modern knowledge posits a kind of equivalence between sciences (*kexue* 科學) like jurisprudence, political science, sociology, and economics in the sense that all are legitimate fields of knowledge that claim jurisdiction over particular areas of learning. As we will see below, Lou's assumption was that jurisprudence also took inductive analysis of society's objective principles of law as its method of inquiry. While the institutional status of jurisprudence in relation to other social sciences in early 20th-century China is a story that is beyond the scope of this paper,[14] the important point for our purposes is that a positivistic epistemology anchored in a host of new words from Japan—key among them *kexue*—was being used to locate the modern discipline of jurisprudence within a new intellectual landscape. It was alongside the institutional work of reform and professionalization that these discourses on knowledge shaped the possibilities for jurisprudence to be a discipline within a framework of other disciplines.

While Lou considered jurisprudence to be a "science" (*kexue* 科學) within the broader ordering of modern knowledge, turning to the composition of jurisprudence itself he acknowledged that contemporary jurists had found myriad ways to classify the internal contents of this field of study (Lou 1953, 21-23). Relying on "usual opinion" (*tongchang de jianjie* 通常的見解), Lou divided jurisprudence into three branches: philosophy of law (*falü zhexue* 法律哲學 or *falixue* 法理學),[15] legal science (*falü kexue* 法律科學), and legal history (*falü shixue* 法律史學). These branches were represented in a chart (see figure 3 and my translation in figure 4). According to Lou, philosophy of law involved "seeking the [most] fundamental, common, and highest principles pertaining to any kind of law in its entirety." As such, philosophical inquiry into law involved "transcending the limits of time and space" to examine the ways that law arises, develops, and changes and the cause-and-effect relations which inform these developments. Legal science (*falü kexue* 法律科學) referred to the organization of the current legal system of one country, as suggested by the branches (constitutional law, civil law, criminal law) displayed on Lou's chart. Finally, legal history was itself a

[14] Sun Chung-hsing's study of the social sciences in pre-1949 China suggests some of the ways that jurisprudence was established as a social science in institutional arrangements. See, for example, Sun's (1987, 116) discussion of the founding of Academia Sinica in 1927. Alongside ethnology, sociology, and economics, jurisprudence comprised one of the four sections of the Institute of Social Science.

[15] Wei Hua, whose work I will discuss below, translated *falixue* 法理學 as "jurisprudence" and considered it to be a science (*kexue*) which was different from philosophy of law (*falü zhexue* 法律哲學). The 1936 Anglo-Chinese Law Dictionary (Huaying shuangjie fazheng cidian 華英雙解法政辭典) (Zhang 1936, 429-430) glossed "jurisprudence" as "The phylosophy (sic) of law, or the science which treats of the principles of positive law and legal relations." It provided the words *falixue* and *falü zhexue* as Chinese translations. The next page in the dictionary listed "Jurisprudentia" as a separate entry, with "Jurisprudence, or legal science" as the definition (with Chinese words *falixue* and *falüxue* 法律學 as translations). The fact that *falixue* was listed as a translation for both terms suggests some of the ambiguities which might have surrounded this word.

"science" (*kexue* 科學) that studied the "course of evolution" (*yan'ge jingguo* 沿革經過) of the legal doctrines and institutions of a single country.

That Lou considered the *kexue* (science) of jurisprudence to contain a philosophical (or metaphysical) component would not have been unusual in contemporary European and American jurisprudential discourse. Early 20th-century jurisprudence was becoming increasingly syncretic, as exemplified in Roscoe Pound's own formulation of Sociological Jurisprudence (Pound 1911, 592).[16] The philosophical component that Lou described also would not have been incompatible with his classification of jurisprudence as a social science given that by the early 20th century, "society" and social interests had become key considerations in ethical and philosophical discussions of law (Pound 1911, 615; Berkowitz 2005). Lou's description of the internal categories of jurisprudence was not the only way of conceptualizing the role of philosophical inquiry in this field of knowledge in early 20th century China. We find a different formulation of these boundaries in Wei Hua's 维华 1931 article in *Nanjing University Weekly (*Nanda zhoukan 南大周刊). Wei wrote explicitly that jurisprudence was neither an art nor a philosophy, but a science (*kexue* 科學) that studied the principles of law (Wei [1931] 2003, 218). Wei explained that the difference between philosophy of law (*falü zhexue* 法律哲學) and the science of jurisprudence (*falixue* 法理學) was the questions that were asked:

> Philosophy of law is the field of learning (*xuewen* 學問) which uses the methods of philosophy to study the basic principles (*genben yuanze* 根本原則), basic institutions and spirit of law and to critique their value… That which jurisprudence studies are questions pertaining to "what it is" (*shi shenme* 是什麼) whereas that which philosophy of law studies are questions pertaining to "why"(*weishenme* 為什麼). That which can be known in jurisprudential inquiry are things like what kinds of legal institutions have countries of the world—ancient and modern, Chinese and foreign—used and according to what kinds of principles of law (*fali* 法理) [have they operated]. Philosophy of law studies in more depth what influence particular kinds of legal institutions have had on human happiness, society,

[16] Also see the work of Edwin Borchard (1912, 25), who included the metaphysical alongside the historical, analytical, and comparative in his discussion of the methods used in contemporary jurisprudence: "Method is an essential characteristic of every science. Methods applied to legal science have gained recognition as they have proved of practical utility in producing a symmetrical system of law suitable to the needs of the people whose social relations it has to regulate. The four methods principally employed in legal science have been the metaphysical, or a priori, the historical, the analytical, and the comparative, each of which has had illustrious representatives."

> and culture (*renlei xingfu shehui wenhua* 人類幸福社會文化). Has it impeded its development or encouraged its progress? Like this one can know whether or not any kind of legal institutions are sound and plan methods for attempting to improve them (Wei [1931] 2003, 219).

For Wei, questions surrounding the value of particular legal doctrines and institutions fell under the domain of philosophy of law, whereas questions of "what" had actually existed belonged to the domain of jurisprudence—itself informed by legal history and comparative law. While Lou Tongsun and Wei Hua divided up jurisprudential inquiry in different ways (as did their European and American contemporaries), several basic similarities are important for the epistemological problems that are at the heart of this paper. It was through a common vocabulary of modern terms such as science (*kexue* 科學), philosophy (*zhexue* 哲學), and society (*shehui* 社會) that Lou and Wei discussed knowledge of law and the disciplinary boundaries of jurisprudence. In this sense, the two writers shared a new way of talking about law as modern knowledge—both in terms of the placement of the study of law in broader orderings of knowledge as well as the social-scientific modes of inquiry used to produce certain knowledge of legal phenomena. As I will discuss below with regard to conceptions of principles of law (*fali* 法理), it was social facts—gathered through historical and comparative study—that served as the basis for knowledge of law and related phenomena.

Principles of Law

Beginning in the first decade of the 20th century with the late Qing Xinzheng reforms and continuing through the judicial activities of Republican governments, Chinese jurists, reformers, and litigants faced the problem of reconciling sources of law drawn from abroad with "traditions and usages" within China (Young 2004, 136). During the codification projects of the last decade of the Qing dynasty, this question became salient within the context of discussions over the decriminalization of sex out of wedlock. As Alison Sau-Chu Yeung (2003) shows, this debate was so explosive precisely because it highlighted the extent to which new legal norms, adopted in order to make Qing law compatible with that of other countries, might challenge existing social and cultural institutions such as the family. These questions remained just as pointed throughout the early Republican period. As Mary Buck Young (2004) shows in her study of the Supreme Court's handling of civil appeals, differences in conceptions of corporateness in the former Qing Code and the Japanese (and German) inspired reform codes directly affected the interests of debtors and lenders. Litigants and jurists drew on a range of sources of law to argue their positions in court. These included custom as well as the principles that informed the foreign-derived Draft Civil Code, which had been completed by the end of the Qing dynasty, but was never put into force (Young 2004, 159).

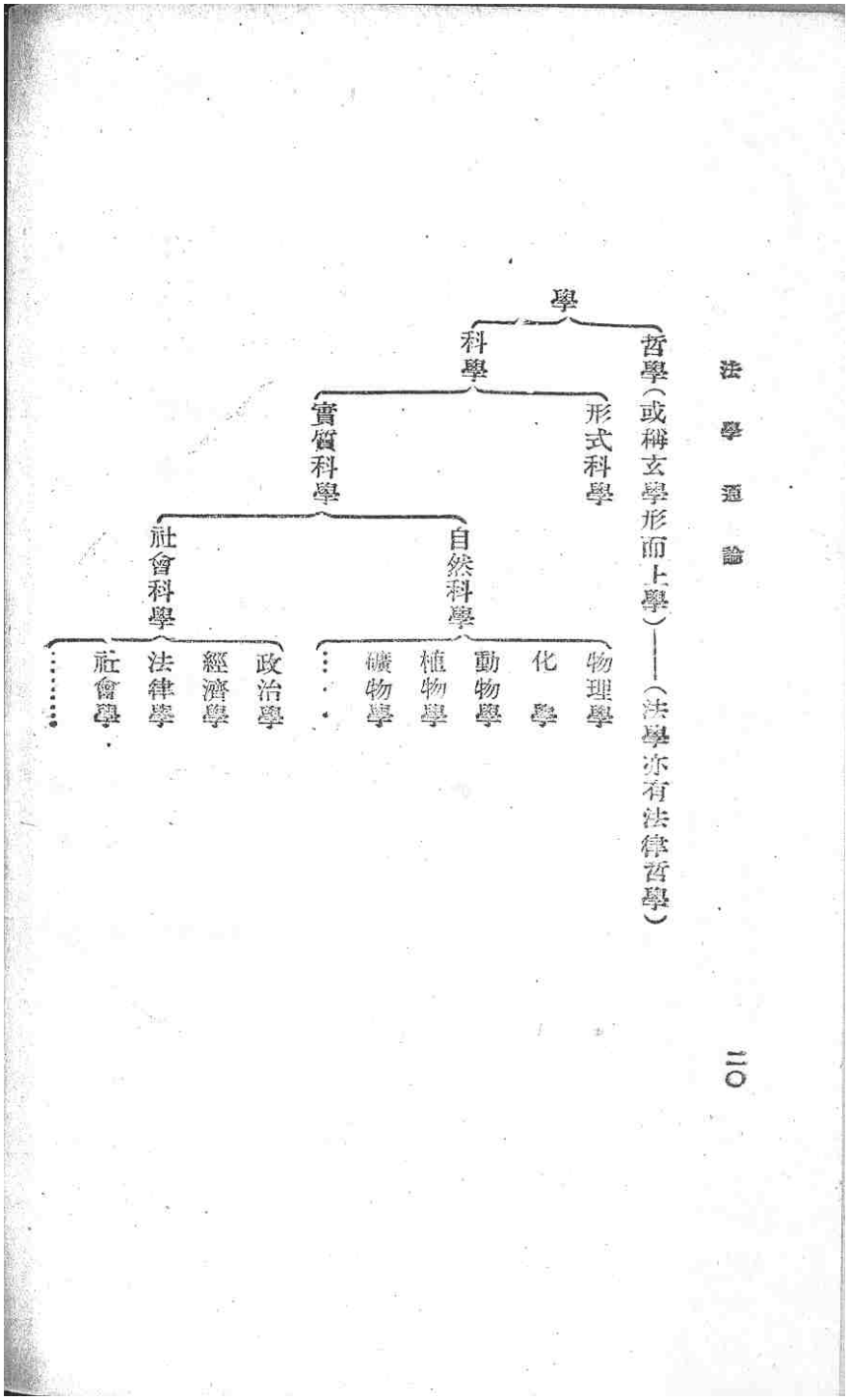

Figure 1 From: Lou Tongsun, *General Introduction to Jurisprudence* (1940, 20)


Learning (*xue* 學)
Science (*kexue* 科學)
Philosophy (*zhexue* 哲學), also known as Metaphysics (*xuanxue* 玄學, *xing'er shang xue* 形而上學)
Substantive Sciences (*shizhi kexue* 實質科學)
Formal Sciences (*xingshi kexue* 形式科學)
Social Sciences (*shehui kexue* 社會科學)
Natural Sciences (*ziran kexue* 自然科學)
Jurisprudence (*faxue* 法學) also contains Philosophy of Law (*falü zhexue* 法律哲學)
Political Science (*zhengzhi xue* 政治學)
Economics (*jingji xue* 經濟學)
Jurisprudence (*falü xue* 法律學)
Sociology (*shehui xue* 社會學)
.....
Physics (*wuli xue* 物理學)
Chemistry (*huaxue* 化學)
Zoology (*dongwu xue* 動物學)
Botany (*zhiwu xue* 植物學)
Mineralogy (*kuangwu xue* 礦物學)
.....

Figure 2

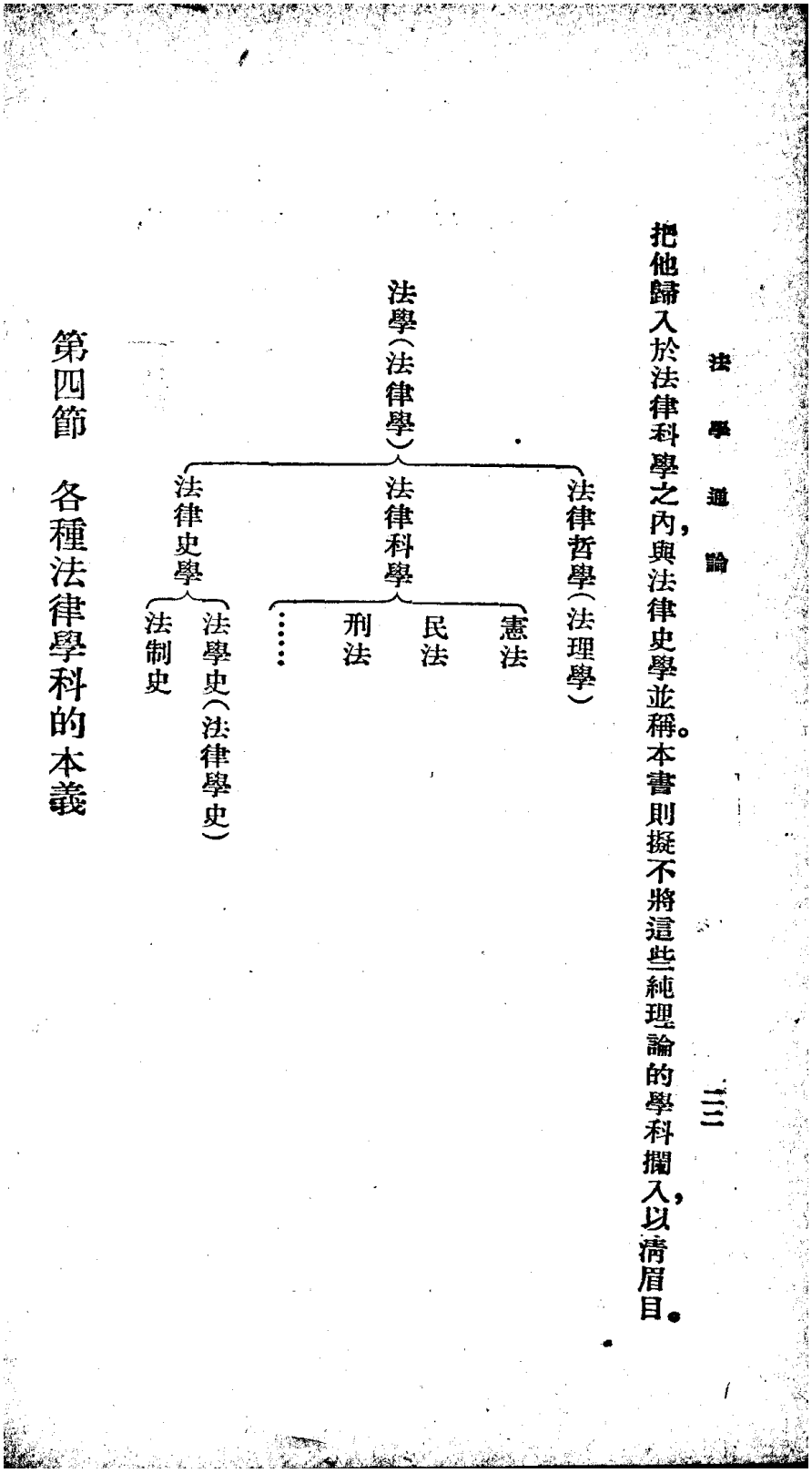

Figure 3 From: Lou Tongsun, *General Introduction to Jurisprudence* (1940, 22)

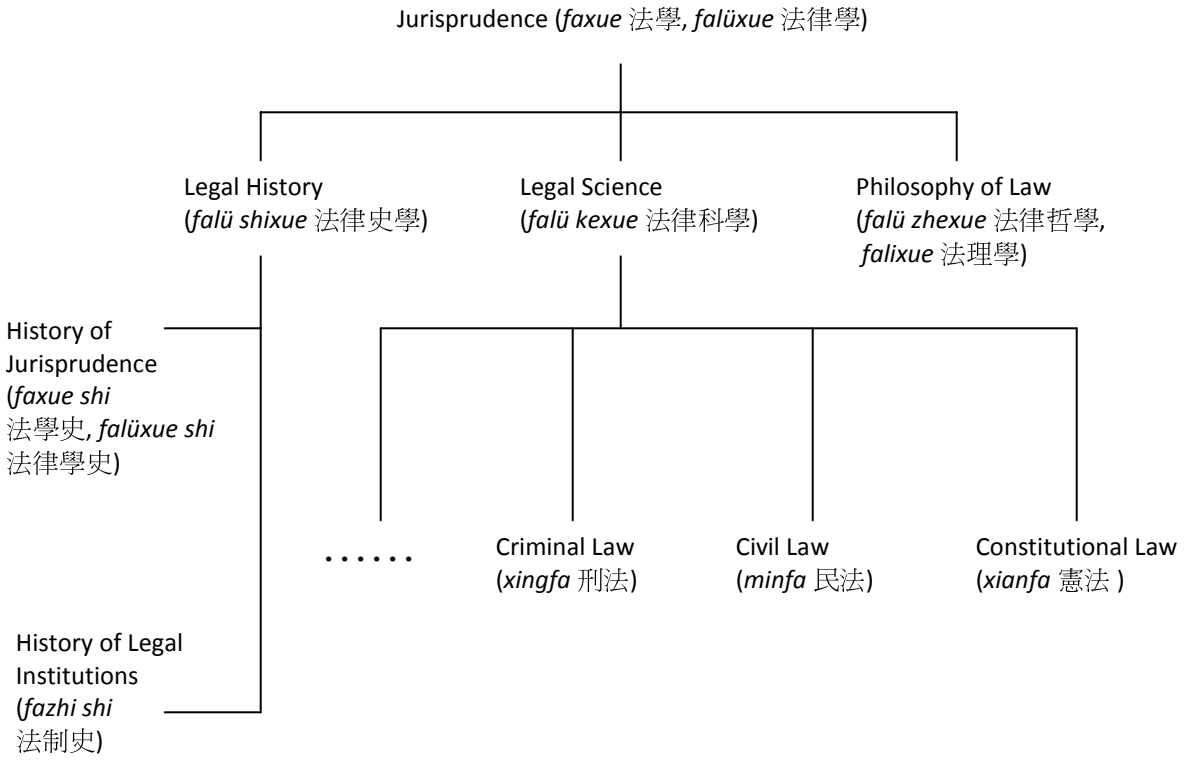
Jurisprudence (*faxue* 法學, *falüxue* 法律學)
Legal History
(*falü shixue* 法律史學)
Legal Science
(*falü kexue* 法律科學)
Philosophy of Law
(*falü zhexue* 法律哲學,
falixue 法理學)
History of
Jurisprudence
(*faxue shi*
法學史, *falüxue shi*
法律學史)
. . . . . .
Criminal Law
(*xingfa* 刑法)
Civil Law
(*minfa* 民法)
Constitutional Law
(*xianfa* 憲法)
History of Legal
Institutions
(*fazhi shi*
法制史)

Figure 4

This section focuses on Republican-era writings on *fali* 法理, or "principles of law," which constituted a source of law in these deliberations. Young writes that the term *fali* denoted principles with the greatest possible degree of universal (indeed, global) applicability and, as such, could be found in the Draft Civil Code and elsewhere (Young 2004, 118; Escarra 1936, 126). While my own survey of early 20th-century legal textbooks finds that these principles could be construed to be so universal as to pertain to the legal activities of humanity as a whole, textbooks such as that of Qiu Hanping acknowledge the conflicts that could exist between principles so generalized as to be universal and those linked to the particular conditions of individual countries. Thus, jurists who drew from principles of law were limited by the imperative that they not "turn their backs on national sentiment and custom" (Qiu 1933, 34).

The exact nature and role of "principles" in contemporary continental and Anglo-American jurisprudence were points of contention among the various schools.[17] As we saw in my discussion of the ways that early 20th-century writers delineated the boundaries of jurisprudence and philosophy of law, *fali* (principles of law) as well as more generalized "principles" (i.e. *yuanze* 原則) played various roles in different conceptions of jurisprudential inquiry. The important point for the purposes of this paper is that discussion of *fali* in early 20th-century legal textbooks and other publications was another site at which knowledge of law was being conceptualized in social scientific terms. For example, Qiu Hanping defined "principles of law" as principles pertaining to the conduct which is necessary in social life (1933, 34): "There are two sources for these principles. One is the concrete laws of social life, such as being filial to one's parents, respecting one's elders, and being kind to the young—China's innate social rules. The other is society's conception of justice, such as 'curbing the strong and helping the weak' or 'equal treatment.'"[18] In Qiu's formulation, principles that could serve as sources of law were social norms or conceptions of justice rooted in society. Principles of law thus mediated the relationship between social values and the rules of a legal system.

As Howard Schweber (1999, 449) has shown, early 20th-century American jurisprudence inherited a view of law and its principles as knowable through

[17] For example, see Pound's (1911, 599) summary of the differences between use of principles in philosophical and historical jurisprudence: "The philosophical jurist conceives that a principle of justice and right is found and expressed in a rule; the historical jurist, that a principle of human action or of social action is found by human experience and is gradually developed into and expressed as a rule."

[18] Qiu's definition is almost identical to that found in the 1932 Dictionary of Law, Politics, and Economics: "Principles of law (*falü zhi yuanli* 法律之原理). The conduct which can be inferred to be necessary in social intercourse. For example, serving one's parents with filiality, nurturing children with love, as well as all [norms] which must be observed." Yu 1932, 284.

inductive reasoning.[19] Writers in Republican China shared the basic view that social life has rules, standards, or principles that can be objectively sought out from particularities. This was a point made by Qiu, who wrote that the social followed knowable rules (*guize* 規則) or standards (*guifan* 規範), just as nature does (Qiu 1933, 2). It was these socially and historically embedded principles of law that constituted the object of jurisprudential inquiry (Qiu 1933, 34). Wei Hua, whose distinction between jurisprudence and philosophy of law has already been discussed, also wrote that after obtaining data from comparative law and legal history, those engaged in the science of jurisprudence "seek out the principles which govern human legal behaviour" (Wei [1931] 2003, 218). Once known, these principles can be evaluated from the perspective of philosophy of law.

While the search for the principles underlying social life certainly befit jurisprudence as a positivistic *kexue* (science), some early 20th-century writers explicitly linked their conception of modern principles of law to the empirical methods and epistemology of Cheng-Zhu orthodoxy. In this way, the use of principles in this new, social-scientific way of knowing the law also involved the refiguring of an older discourse on knowledge in which "principle" was a key epistemological element. At the heart of the matter was the character *li* 理 (principle), which was part of the compound *fali* 法理 (principles of law). In the writings of Zhu Xi 朱熹 (1130-1200), for example, *li* was part of his attempt to establish a philosophical system which could tie Confucian social relationships to a broader cosmology. Principle was "the origin of the universe and the noumenon of the supreme ethical and moral principle" (Wang 1997, 25). These principles, as Wang Hui writes, were knowable in part through the empirical enterprise of "probing thoroughly the principle" (*qiongli* 窮理), which necessarily took the "nature and rules of concrete things" as its objects. In Zhu's writings, human beings and the universe were an "integrated whole" girded by these fundamentally normative principles which were distinct from the "material embodiment" (*qi* 氣) of the universe (Wycoff 1975, 92-105). Principles as well as the human enterprise of studying them (*gewu zhizhi* 格物致知, of which "probing thoroughly the principle" was a crucial component) were both manifestations of this transcendent moral order.

The moral implications of this conception of principle for law had been addressed in late imperial China long before *fali* 法理 became the "principles of law" of modern jurisprudence. Eugenia Lean (2007, 93) has described this discourse as "the long-standing configuration that had posited human sentiment

[19] Also see, for example, Corbin 1954, 162. Corbin's discussion of legal principles can be productively analyzed in comparison with a piece by Heldon Gueck which appeared in a 1933 issue of Annals of the American Academy of Political and Social Science. Glueck promoted methodological overlap between jurisprudence and social scientific disciplines. According to Glueck, jurisprudence could be methodologically scientific by either making use of these scientific disciplines (for example, by using crime surveys) or by adopting a social-scientific methodology itself. Both writers share the assumption that society can be studied empirically and, crucially, that legal principles are derived from this data.

(*qing* 情) as the moral core of the general principles of the universe (*li* 理), which, in turn, formed the basis of the codified regulations of the body politic (*fa* 法)"—a configuration which 20th-century legal reformers challenged. Lean shows that while there were diverse opinions on the role of sentiment in legal decision-making during the Nanjing decade (1927-1937), legal reformers did consider sentiment to be in opposition to the rational rule of law (*fa* 法) and were wary of its use in adjudication (Lean 2007, 93-98). In the context of these contemporaneous debates over the role of sentiment in adjudication, it is perhaps not surprising that assertions about the relevance of sentiment appeared within discussions of modern principles of law (*fali* 法理) in the literature on jurisprudence. In the remainder of this section, I will examine the ways that two writers who took part in these debates productively combined this older discourse of principle with the social-scientific epistemology that I have been arguing played an important role in establishing jurisprudence as a field of modern knowledge.

We find the first example in a 1922 issue of *Gaizao* 改造 (*Transformation*) in which Wu Jixiong 吳繼熊 argued that standards (*biaozhun* 標準) could serve as the spiritual (or moral) sciences' (*jingshen jie kexue* 精神界科學) equivalent to the formulas and immutable laws of the natural sciences. These standards were the principles (*li* 理) that serve as the ethical expectations underlying the law (Wu [1922] 2003, 29). Wu went on to assert the intrinsic relationship between *li* 理 (principle) and *qing* 情 (sentiment), arguing ultimately for the relevance of the idea that "the kingly Way is none other than human sentiment" (*wangdao buwaihu renqing* 王道不外乎人情) (Wu [1922] 2003, 30). Wu's invocation of the relationship between principle, sentiment, and law (which originally belonged to a way of conceptualizing knowledge completely different from that of *kexue*) was not incompatible with the assertion that the methods of jurisprudence were scientific. Indeed, the connections that Wu posits between the methods of the natural and social sciences is one of the most interesting features of this text.[20] We find comparable discussions of methodological overlap between the natural and social sciences in early 20th-century American jurisprudential discourse,[21] as

[20] Wu made explicit analogies between the methods of law, a spiritual science, and those of natural and formal sciences such as algebra, geometry, physics and chemistry: "The methods of studying jurisprudence and studying other kinds of sciences are the same. Having first thoroughly comprehended the basic principles, other minor problems can be pondered without difficulty and easily solved" (Wu [1922] 2003, 28).

[21] For example, Glueck (1933, 110) viewed the modern evolution of jurisprudence as involving a shift from being based on "some theory involving supernatural, transcendental, or other dogmatic authority" to one informed by Pound's Sociological Jurisprudence, which investigates "the physiology as well as the anatomy and histology of law as a social institution and an instrument of social control." Compare Glueck's use of biological metaphors with Taylor's (1909, 243): "In the masterly demonstration that followed [Sir Henry Summer Maine, an adherent of the Historical School] showed that legal ideas and institutions have a real course of development as much as the genera and species of living creatures; that they cannot be

well as in contemporary writings from China.[22] By couching discussion of sentiment-based principles (*li* 理) within the positivistic epistemology of the natural and social sciences, Wu was working within the bounds of contemporary tendencies to consider socially and historically grounded "public sentiment and opinion" as elements in legal decision-making (Pound 1911, 600).

In his popular 1940 *General Introduction to Jurisprudence*, Lou Tongsun also used a set of classical concepts and allusions to convey that principles of law in modern jurisprudence were commensurable with the older category of principle. Lou began his chapter on principles of law by writing that "(the statement that) the 'ten-thousand things are none other than principle' is similar to the ancients' saying that 'the kingly Way is none other than human sentiment (*wangdao buwaihu renqing* 王道不外乎人情),'" thus equating principle and sentiment (Lou 1953, 58).[23] If there were no laws or customs on which to base a legal decision, one could use the seeking of sentiment and deliberating on principle (*zhenqing zhuoli* 斟情酌理) as the standard of legal decision-making. In Lou's discussion, sentiment as the basis of principle was compatible with modern jurisprudential discourse on socially grounded principles of law: "All things rely on an idea of society's axioms and justice (*shehui gongli zhengyi de guannian* 社會公理正義的觀念). If one carefully analyzes them, one will be able to discover a kind of objective, distinguishable natural principle (*keguande shifei quzhide ziran tiaoli* 客觀的是非曲直的自然條理)." Lou concluded this segment of the section by claiming that this conception of principles of law was actually what "China's ancient sages" meant when they talked about "extending knowledge by investigating things" (*zhizhi gewu* 致知格物) and "approaching things and probing thoroughly their principles" (*jiwu qiongli* 即物窮理). Lou thus combined the Cheng-Zhu category of principle with a social-scientific view of law framed with modern conceptions of society (*shehui* 社會) and objectivity (*keguan* 客觀). As in the case of Wu Jixiong, this discourse on moral principles productively supplemented the modern conception of principles of law.

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treated as mere incidents in the general history of the societies where they occur. The works of these epoch-making men- the one German, the other English- have resulted in the creation of what may be called the natural history of law." While Glueck acknowledged that "there is a certain naiveté among recent writers in the social sciences who speak glibly about applying the technique of the test tube and the microscope to problems that are as complex as are human behavior and motivation, and the shifting sands of social transformation," he wrote ultimately that the "methodology of 'pure science'" is not inapplicable to the social sciences, of which jurisprudence was one (Glueck 1933, 117-8).

[22] For a more circumscribed discussion of the methodological parallels between the natural and social sciences, see John C.H. Wu's (Wu Jingxiong 吳經熊) piece in a 1926 issue of The China Law Review. Wu argued that the natural sciences and law can share methods such as analogy and hypothesis; however, the goals of these methods differ based on fundamental differences between the two classes of sciences.

[23] Zhu Zuyi's 朱祖貽 General Introduction, which was first published in 1944, began its chapter on principles of law with a variant of this phrase: "The ten thousand things are none other than principle. Law must certainly have legal principles" (Zhu 1946, 24).

How are we to view the hybrid discourses surrounding principles of law that appeared in the writings of Wu Jixiong and Lou Tongsun? As part of an effort to establish jurisprudence as social-scientific knowledge, these writers were participating in what was fundamentally a universalizing project. As in the case of all authors whom I have discussed, they were engaging with contemporary jurisprudential discourse of other countries. Yet, if late Qing and Republican legal reform was one more example of the negotiation of "global universals" that were occurring in myriad "*translated and contested* moments in colonial and cultural encounters in which the translator… is a central agent" (Liu 1999, 128), we might consider these discussions of principles of law to be a prime example of the negotiated character of jurisprudential knowledge in modern China. Indeed, the classical allusions that both authors used strongly suggest that in early 20th-century China, the modern compound *fali* could have "excess signification" (Liu 1999, 152) in the direction of the older discourse of *li* 理 as moral principles. The complex meanings surrounding this term and the traces of semantic transformation that they represent demonstrate the contingency and, implicitly, the politics of the historical process through which the vocabulary of modern jurisprudence gained authority.

Conclusion

This paper has examined some of the ways that modern jurisprudence was both a site and product of epistemological transformation in late Qing and Republican China. My argument has been two-fold. First, I have argued that jurisprudence as a category of modern learning was established in part through its placement in a social scientific ordering of knowledge for which *kexue* 科學 (science) was a key element. Second, I have argued that early 20th-century writers conceptualized principles of law (*fali* 法理)—sources of law and objects of jurisprudential inquiry—in positivistic terms as objective social facts. I have also shown that in some cases these principles were discussed in terms of both the social-scientific epistemology appropriate to a *kexue* as well as a discourse informed by Cheng-Zhu orthodoxy for which principle was a fundamental element of knowing, albeit in a different way. By refiguring legal knowledge within this new conceptual framework, these discourses of jurisprudence also implicitly naturalized the modern nation as well as the newly established category of jurisprudence (*faxue* 法學) itself as crucial subjects of history.[24] It is in this sense, and in the newfound association between law and science, that these changes in conceptions of legal knowledge can be viewed as important elements of the modernity of legal reform in 20th-century China.

[24] See Ruskola 2002 for more on this point.

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DANIEL ASEN
Fayerweather Hall 611
1180 Amsterdam Ave.
Mail Code: 2527
New York, NY 10027 U.S.A.
+1-917-796-6171
dsa2108@columbia.edu

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