THE SCIENCE OF LAW: A STRUCTURAL OUTLINE

THE objective of this study is to present a systematic, structural outline of that sector of jurisprudence known as the science of law. The purpose is to offer an analytical tool for understanding law and its historical development in any society. The approach integrates large parts of sociological jurisprudence and analytical jurisprudence. For the most part they complement one another. While analytical jurisprudence is concerned with the meaning of legal concepts and their degree of logical consistency, sociological jurisprudence is concerned with assembling facts about the contents, origins and impacts of legal norms and using social science methods to estimate cause and effect. Where they conflict, sociological jurisprudence is given precedence over analytical. For example, law is treated as an open, growing social order, not a closed one. The view here is that a social theory of law can have the rigor of theory in the social sciences.[1] It is concerned in part with generalizing about the recorded decisions of those persons in societies who have been delegated authority to make binding, enforceable decisions to settle disputes. To the extent that these generalizations can be tested and shown to have predictive value, they meet the criterion of scientific method.

The foundation hypothesis is that jurisprudence must be divided into two distinct segments for scholarly, analytical purposes. It is most useful to label one of these the science of law and the other the normative philosophy of law. The science of law, using the word science in its generally accepted sense, is descriptive and concerned with positive law, that which exists or has existed in the past. It is based on empirical evidence and, like all science, seeks the ideal of objectivity. Following Hume,[2] Bentham, Austin,[3] Kelsen[4] and Llewellyn,[5] it holds that the legal scholar, standing on the margin of society as an observer, must distinguish the law that is from his and others' value judgments of what the law ought to be. Nevertheless, a study of positive law could include estimates or predictions of legal change in the future. Use of past empirical evidence of social trends has long

[1] Contrast the statements of Professor Honore: "Legal theory is a form of practical reason, not a science...." For this reason the grand contests of legal theory are never conclusive. Decade after decade Positivists and Natural Lawyers face one another in the final of the World Cup (the Sociologists have never learned the rules). Victory goes now to one side, now to the other, but the enthusiasm of players and spectators alike ensures that the losing side will take its revenge." A.M. Honore, "Groups, Laws and Obedience" in *Oxford Essays in Jurisprudence,* Second Series 1 (A.W.B. Simpson, ed., 1973).

[2] D. Hume, *Treatise of Human Nature* iii, i, i (1738).

[3] Benthem and Austin are discussed and cited in Hart, "Positivism and the Separation of Law and Morals", 71 Harv. L. Rev. 593, 594-599 (1958).

[4] Kelsen is reviewed in J. Stone, *Legal Systems and Lawyers' Reasonings* 106-107 (1964).

[5] K. Llewellyn, *Jurisprudence* 55-56 (1962). See M.R. Cohen, *Reason and Law* 161-62 (1950).

been the basis for social science projection of such trends into the future.

The science of law incorporates sociological jurisprudence.[6] In addition to describing the legal norms and their structural interrelations, it is concerned with the social origins of legal norms and their social impact. This too is empirical study of present and past human behavior. For example, a sociological study in legal history could investigate how much of contract law originated in commercial custom as compared to those technical contract rules that were developed by the judiciary in an effort to create a logical system of rules.[7] Likewise, one could study the joint impact on legal and political institutions of a major Supreme Court decision such as those creating a federal constitutional right of privacy and abortion.[8]

The other sector of jurisprudence is the normative philosophy of law.[9] It is the prescriptive sector of jurisprudence, concerned with what the law ought to be. Part of this sector centers on the concept and meaning of justice. In one sense, justice is a personal value judgment. In any given society, there may be such a consensus of certain value judgments so that they are known as mores. As Cardozo notes, the hard case in an appellate court, where two or more established legal norms are in conflict, may require judges to apply what they perceive as a community sense of justice to give precedence to one of the norms.[10] Unfortunately, Cardozo is misleading in labelling this the method of sociology. It illustrates, however, that current judicial decision making is prescriptive, a normative function.[11] Likewise, legal criticism that centers on judicial value judgments, as opposed to methodology of legal research, is normative.

This study will treat only the science of law. It begins with legal positivism, the conceptual framework of the science. Since law is best understood as a subset of social control, the next sections introduce and explain the empirical idea of a norm and of social control. This is followed by a general definition of law and the major legal norms, rules and principles. Subsequent sections treat the operation of law through right-duty relationships, sources of law, functions of law, the types of sanctions, and the impact of law.

POSITIVISM: LOGICAL AND LEGAL

Legal positivism, as one aspect of legal science, has had no clear meaning in the literature. Most writers suggest that it is related to positive law. Some suggest that it includes analytical jurisprudence, while still others suggest that it does not.[12] The elements of modern

[6] See J. Stone, *Social Dimensions of Law and Justice,* 6-82 (1966); O.W. Holmes, "Law in Science and Science in Law" in *Collected Legal Papers* 210 (1920).

[7] See E. Ehrlich, *Fundamental Principle of the Sociology of Law* 105-111, 219-227 (Moll, tr. 1936).

[8] See J. Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade", 82 Yale L.J. 920 (1973).

[9] For a survey of normative jurisprudence, see J. Stone, *Human Law and Human Justice* (1965).

[10] B.N. Cardozo, *The Nature of the Judicial Process* 66-75, 98ff (1921).

[11] See J. Shklar, *Legalism* 101-02 (1964).

[12] Compare H.L.A. Hart, *The Concept of Law, 1,* 18-19 (1961) and W. Friedmann, *Legal Theory* 163 (3rd ed. 1953) with S.I. Shuman, *Legal Positivism* 11-18 (1963).

legal positivism have been summarized by Hart.[13] From his viewpoint, analysis of the meanings of legal concepts is to be distinguished from, though in no way hostile to, historical inquiries, sociological inquiries or critical appraisal of law. Critics of legal positivism label it conceptualism that is static and that relies on logic alone to solve problems. They fail to realize that legal positivism is only a small sector of jurisprudence that attempts to construct theoretical models of legal systems. On the other hand, many elements of the models of legal positivism developed by Austin, Kelsen and Hart must be rejected as failing to meet the scientific test of empirical validity.[14] And to the extent that legal positivism is seen by some as a model of rules for judicial decision making, it is clearly misunderstood.[15] The conclusion here is that legal positivism can have useful meaning only if it is used in ways analogous to positivism in the social sciences, an application of logical positivism.

Positivism is a system of philosophy elaborated by Auguste Comte that recognizes only positive facts and observable phenomena.[16] It concerns the empirical facts of objective relations and the behavioral regularities that characterize them. Logical positivism, as a school of analytical philosophy originating in the Vienna Circle, carried on this tradition of empiricism.[17] The logical positivists created a philosophy of science in their studies of the nature of mathematics and of language.[18] Much of their work centered on empirical facts and their confirmation, the verification principle.

[13] *"Legal Positivism.* The expression "positivism" is used in contemporary Anglo-American literature to designate one or more of the following contentions: (1) that laws are commands of human beings; (2) that there is no necessary connexion between law and morals, or law as it is and law as it ought to be; (3) that the analysis of study of meanings of legal concepts is an important study to be distinguished from (though in no way hostile to) historical inquiries, sociological inquiries, and the critical appraisal of law in terms of morals, social aims, functions, &c; (4) that a legal system is a "closed logical system" in which correct decisions can be deduced from predetermined legal rules by logical means alone; (5) that moral judgments cannot be established, as statements of fact can, by rational argument, evidence or proof ("non cognitivism in ethics"). Bentham and Austin held the views expressed in (1), (2), and (3) but not those in (4) and (5); Kelsen holds those expressed in (2), (3), and (5) but not those in (1) or (4). Contention (4) is often ascribed to "analytical jurists" but apparently without good reason." Hart, *supra,* note 12, at 253.

[14] Hall and Benditt summarize the many elements of Austin's model that have been found deficient. Hall, "Reason and Reality in *Jurisprudence",* 7 Buffalo L. Rev. 351, 355-368 (1958); T.M. Benditt, *Law as Rule and Principle: Problems of Legal Philosophy* 64-68 (1978). See J. Stone, *supra,* note 4, Ch. 2.

Kelsen's pure theory of law has also been greatly criticized Hall, *supra,* at 368-372; Stone, *supra,* note 4, Ch. 3. Kelsen finally admitted that his model of a basic norm lacked validity. See Stewart, "The Basic Norm as Fiction", 1980 Juridicial Review 199.

Hart's failure to note the significance of legal principles and that these principles can be an integral part of the legal systems was noted in Dworkin, "The Model of Rules", 35 Univ. of Chi. L. Rev. 22 (1967). The universality of Hart's rule of recognition is highly questionable. See Coleman, "Negative and Positive Positivism", 11 J. of Legal Studies 139 (1982).

[15] See Dworkin, *supra,* note 14; Herget, "Shaking Loose from an Old Jurisprudence: What is the Price?" 36 Southwestern L.J. 807 (1982). For a critique of Dworkin, see Lyons, "Principles, Positivism, and Legal Theory", 87 Yale L.J. 415 (1977).

[16] A. Comte, *Cours de Philosophic Positive* (1835-52).

[17] See C.W. Morris, *Logical Positivism, Pragmatism and Scientific Empiricism* (1937); J.W. Weinberg, *An Examination of Logical Positivism* (1936).

[18] See A.J. Ayer, ed., *Logical Positivism* (1959).

Some of the logical positivists have written about empirical method in the social sciences. Otto Neurath wrote of *Sociology and Physicalism.*[19] The foundation propositions are that science is measurement and that the objective is self-consistent systems of unified science capable of being utilized for successful prediction. In this context, Neurath postulates that sociology should be viewed as social behaviorism. If the sociologist wishes to avoid errors, "he must be careful to formulate all his descriptions of human behavior in a wholly straightforward physicalistic fashion."[20] The point is to distinguish the positive science of sociology from the normative activity of social philosophy. While social control, the branch of sociology of which law is a subsystem, is concerned with norms, it is a description, not an evaluation, of normative phenomena.

A modern approach to legal positivism is to treat it as a subset of logical positivism. Its task is empirical analysis of positive law, that which was adopted or presently exists in societies. In a modern state, positive law includes constitutions, statutes, administrative rules, customary law and all court decisions. Positive law concerns those norms actually enforced by government. The legal norms, rules and principles, in any society form an integrated legal order. For law, positivism should be descriptive analysis of both the legal norms and all other objective facts that help explain their scope and meaning.

The common law rules have posed the prime areas of discussion for the critics of positivism.[21] These rules are generalizations from precedents and their scope or breadth can only be estimated. Reasonable judges or text writers may express a given rule in slightly different language. But the problems of judicial consensus are not only linguistic. Most common law rules are dynamic. They change slightly from case to case as the behavior patterns in society change. As Levi says, the classification changes as the classification is being made.[22] The changing behavior patterns can result from changing social value judgments, from changing technology, or other causes. This dynamism provoked the legal realists to assert that there were no legal rules but only an unorganized forest of decisions.[23] Most scholars, including some labeled realists, have rejected this viewpoint.[24] They recognize that the common law is an open system in which old rules may wither and die because their social-control function is no longer needed and new rules will come into existence to control new social institutions.

Any lawyer who has mastered a body of law knows that there are rules of behavior. This is true even in the common law, where most rules have exceptions. Counsel is able to draft valid contracts for his client because he has mastered the general rules of contract in his jurisdiction, the detailed subrules and the exceptions to the rules and

[19] *Ibid*., at 282.
[20] *Ibid*., at 299.
[21] See A.W.B. Simpson, "The Common Law and Legal Theory", in *Oxford Essays in Jurisprudence,* Second Series, 77-99 (Simpson ed. 1973).
[22] E.H. Levi, *An Introduction to Legal Reasoning* 1-27 (1948).
[23] This is an example of nominalism, a failure to see the reality of the universals or generalizations that enter into all meaning. See M.R. Cohen, "Justice Holmes and the Nature of Law", reprinted in *Law and the Social Order* 198. 210ff (1933).
[24] See K.N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 178-199 (1960); Hart, *supra,* note 12, at 132-137.

subrules. His skill in reading precedents and generalizing from the facts of past similar cases is what enables counsel to find rules and serve his client. He is trained to weigh the facts of the past reported cases and predict which similar ones in a potential current case will be given importance by a current judge in stating a rule of law for today. His skill is an ability to predict the direction of change in a dynamic system.

NORMS

Norm in the sociological use of the term is a synonym for custom. Norms are usual behavior patterns in a society which most people have come to consider the right way to behave. They are not merely ways of doing things; they are the correct ways.[25] They are folkways to which positive or negative social value judgments have attached. Sociologists label the aggregate of the norms of a social group as culture.

Most norms in any society are non-legal.[26] They concern food, clothing, shelter, education, recreation, the arts and other activities. Examples are table manners, American men wearing trousers, living indoors in temperate climates, rules for playing soccer and decision methods of museum curators on which paintings are acceptable for show. There are norms for dividing responsibility within a society and for the ways that centralized control is carried out. Other norms concern the spatial arrangement of living and the appropriate use of language. In most societies there is also a status hierarchy, and there are norms about the deference with which those in various positions are to be addressed. An important set of norms are the social sanctions which cause conformity to other norms.

Hans Kelsen[27] and Alf Ross,[28] among others, have written of norms as the primary concept for the understanding of social order. Kelsen notes that "from a psychological-sociological point of view, the function of every social order is to bring about a certain behavior of the individuals subject to this order; to motivate them to refrain from certain acts deemed detrimental 'socially', that is, to other individuals; and to perform certain acts deemed socially useful."[29] He then goes on to rank norms according to the severity of the social sanctions attached to each, noting that sanctions in their broadest sense include both rewards and punishments. Legal norms rank highest since their ultimate sanctions are most severe.

The characteristics that distinguish legal norms from non-legal norms are discussed subsequently under the definition of law. Here it is important to note that non-legal norms have distinct classes. Those norms that are of major importance to the society are labeled ethical or moral conduct. Some writers argue that moral conduct has as its main sanction the actor's own internal sense of right and wrong.[30] But there is substantial community consensus on basic moral conduct

[25] T. Shibutani, *Society and Personality* 45 (1961).
[26] Ehrlich terms these "social norms." E. Ehrlich, *Fundamental Principles of the Sociology of Law* 166 (Moll, tr. 1936).
[27] H. Kelsen, *The Pure Theory of Law* 3-23 (Knight, ed., 1967).
[28] A. Ross, *Directives and Norms,* Ch. 4 (1968).
[29] Kelsen, *supra* note 27, at 24.
[30] See T. Shibutanti, *supra* note 25, at 462.

in any social group. Immoral conduct includes firstly acts which harm oneself or others, such as cruelty or dishonesty to another or neglect of one's family. Morality is culturally relative. At any given place or time, immoral conduct may include any other types of behavior which most people consider thoroughly bad. Lesser norms, those of courtesy and manners, concern deviance that is not serious enough for most people to label the violator bad. The person who never washes or who eats stew with his bare fingers has violated Western social norms but few would label him immoral.[31]

SOCIAL CONTROL

Social control denotes all the means by which society causes confirmity to its norms.[32] Dean Pound defines it as "the pressure upon each man brought to bear by his fellow men in order to constrain him to do his part in unholding civilized society and to deter him from antisocial conduct.[33] It includes every way through which human society exercises a modifying influence upon itself or any part of itself.[34]

These definitions may be misleading in that most social control is internalized and becomes self control. The extent to which independently motivated persons are able to coordinate their respective activities depends upon the degree of consensus that exists among them.[35] Consensus refers to some type of mutual understanding, a sharing of general perspectives. Social control refers to keeping behavior within the bounds of group expectations, and in the last analysis this rests upon consensus.[36] It points to the fact that human behavior is organized in response to expectations that are imputed to other people. Internalized social control is the sense of obligation that participants in cooperative ventures have toward one another. Organized society is a cooperative venture of the largest scale.

Basic order in society; mutual respect for the integrity of the person and property of others rests firstly on internal social control, that is, self control. Learning from earliest childhood centers on what is correct behavior. This is the process of socialization.[37] Children learn, primarily by imitation, the socialized behavior of their parents.[38] Behavior of role models is much more determinative than verbal directions from those persons, which may be different.

External social controls reinforce internalized social control. They are all the objective forces in society that cause conformity to norms. These may be informal or formal. Informal social controls include, for example, ceremonies, prestige, and public opinion operating in the form of taboos, ridicule and ostracism.[39] Formal social control is

31 See C. Levi-Strauss, *The Origin of Table Manners* (1978).
32 The classic treatise is E.A. Ross, *Social Control* (1901).
33 R. Pound, *Social Control Through Law* 18 (1942).
34 H. Cairns, *Theory of Legal Science 22* (1941).
35 T. Shibutani, *supra* note 25, at 40.
36 *Ibid*., 60.
37 W. Stark, *The Social Bond,* 33-173 (1978). See R. West, *Conscience and Society,* Ch. 5 (1945).
38 See N.E. Miller and J. Bollard, *Social Learning and Imitation* (1941).
39 See R.E. Park and E.W. Burgess, *Introduction to the Science of Sociology,* Ch. 12 (1924); Lumley, *Means of Social Control* (1925); P.H. Landis, *Social Control,* Ch. 19 (1939); J.S. Roucek (ed.), *Social Control* (1947).

defined in terms of known procedures for adopting explicit rules of behavior and for imposing sanctions for violation. Any group which has such rules exercises social control whether it be a religious group like the Cathdlic Church, a fraternal order or other private club. Excommunication and expulsion are examples of the non-legal sanctions of these groups.

Law is the most significant formal social control. It concerns that minority of norms which are important enough to the society or the government in power to use its agencies of enforcement to force conformity. While non-legal norms are the way one ought to behave if one does not want to be labeled a non-conformist, law concerns a group of norms that are the command of the government. A Western businessman could violate the social norm prescribing the wearing of trousers and wear long flowing robes instead, but his idiosyncratic behavior may cause him to lose business. On the other hand, if a businessman fails to perform valid contracts he has signed, enforceable judgments ordering damages for plaintiff will be entered against him.

It is important to emphasize that formal and informal social controls are not mutually exclusive but often overlap and reinforce one another.[40] People refrain from hitting one another with clubs both because it is prohibited by law and because their childhood learning at home and in church is that this is not acceptable social behavior. Thou shall not kill is both a moral norm and a section of the criminal code.

DEFINITION OF LAW

Law is most usefully defined as those norms whch will be enforced, by threat or in fact, with the physical force of organized society.[41] In the modern state, the organized society is the government. So that modern law can be viewed as those norms which the government will enforce, if necessary, by the use of its monopoly on physical force. In the overwhelming majority of cases, it is not necessary to enforce legal norms with the ultimate sanction of force. The threat is sufficient. Most people obey the law because they have internalized the social control of law-abidingness.[42] Others who may be tempted to violate law obey the law because of the threat of governmental enforcement. And most civil judgments in Anglo-American law are paid without the sheriff having to use force to attach the property of the defendant.

The general descriptive definition of law used here meets the scientific test of universal application. It encompasses law in all societies, democratic, totalitarian, or primitive (non-literate). Until about 200 years ago, most governments were totalitarian. Even today, most governments are not representative in the sense of allowing citizens

[40] See J. Stone, *supra* note 6, at 747-49.

[41] See E.A. Hoebel, *Law of Primitive Man,* 28 (1954); R. von Ihering, *Law as a Means to an End,* 239-40 (1924). This definition of law may seem to exclude statutes which are merely definitions of terms or boundaries, but such statutory definitions are usually introductory parts of law which do constrain behavior. Likewise, rules of competence or qualification are ancillary to legal powers to create right-duty relationships. See Dickey, "The Concept of Rules and the Concept of Law", 25 Am. J. of Juris. 89 (1980).

[42] This is what Austin labels "habitual obedience", which he says arises partly from custom and partly from the utility of having government as opposed to anarchy. J. Austin, *Lectures on Jurisprudence* 302 (3d ed., 1869).

to vote for candidates of opposing political parties. Legal systems, however, existed in ancient totalitarian states and exist in modern totalitarian states.[43] Likewise, legal systems exist in primitive societies. A singular group of anthropologists specializes in studying the law of primitive societies.[44] Starting in the 1930s, they adopted a definition of law from Roscoe Pound similar to the one suggested here in order to distinguish primitive law from other tribal social controls.[45]

In modern states the use of force as the ultimate sanction of law is almost entirely vested in government. The use of force by individuals is authorized by law only in defense of person and home when police are not present to do the task for the state. The essentials of legal coercion in a democracy are general social acceptance of the application of physical power, in threat or in fact, by a party appointed by law, for a legal cause, in a legal way and at a legal time. In such a state, self-help or the unauthorized private use of physical force to remedy an alleged wrong is not law but the antithesis of law. In a totalitarian state, in contrast, some use of force by government, such as suppression of freedom of expression, may have general societal acceptance only out of fear, but its uniform application to dissidents by the authorized tribunals makes it the law of the land.

Some early writers wasted great energies arguing that law was the command of the sovereign (supreme person or persons) rather than of government as a unified whole.[46] In modern states, law may be created by legislatures, by executive agencies adopting secondary legal rules pursuant to enabling statutes of the legislature, and by the courts in the common law tradition. In some countries, basic and superior law is created by constitutional coventions and ratification by the citizens. For the minority of persons who violate legal rules, enforcement is by courts, prosecutors, bailiffs, sheriffs and all others appointed by law to carry out its process. The constitutional clauses and statutes that create the courts and the law of procedure determine who shall legally exercise governmental compulsion.

A significant aspect of the definition of law is whether statutes which are outdated and ignored by enforcement agencies are really law. From the point of view of scholarly analysis of legal systems, the best answer is *no*. Rules alone do not make law, as one observes when nations renounce solemn treaties. The possibility of compulsion is a necessary element of law. If enforcement agencies cannot be provoked to enforce certain statutes, they are not effective law of the community. If some statutes are enforced against only part of the community, such as distinct minorities, they are part of law. The minorities have been denied equal protection of the law, but the likely remedy is not to enjoin enforcement against them. It is a mandate to enforce the statute against all who violate it.

[43] See W. Friedmann, *Legal Theory,* 251-78 (3rd ed., 1953).

[44] See L.A. Fallers, *Law Without Precedent* (1969); M. Gluckman, *The Ideas in Barotse Jurisprudence* (1965); L. Pospisil, *Anthropology of Law: A Comparative Theory* (1971).

[45] A.R. Radcliffe-Brown, *Primitive Law* in 9 Encyclopedia of Social Sciences 202 (1933), noting Pound's definition: "social control through systematic application of the force of politically organized society."

[46] See J. Stone, *supra* note 4, at 75-77; L. Duguit, *Law in the Modern State,* Ch. 1 (Laski, tr. 1919).

Another significant question is whether government, the enforcer of law, is subject to the law. The answer is that if representative government prevails, officials in government are subject to the rule of law. If they violate the law, they will be removed at the next general election or even before by a special recall vote of electors. In totalitarian societies, where by definition representative government does not prevail, government is not subject to the law. It is clear that the issue of whether government is subject to the rule of law is a political issue. The extended discussions in earlier writings of a sovereign who is not subject to law is not useful to modern jurisprudence.

Some writers, while recognizing that the only useful method to define law is conceptual pragmatism, wanted to avoid the fact that law can be distinguished from other social controls only by its characteristic of ultimate compulsion by government.[47] Their most important objective was to include international public "law" as part of law. This area of "law" has no compulsory process and no compulsory enforcement. In light of this, it is more useful to label the norms of international relations as non-legal customs.[48] As to the set of these norms relating to aggressive acts, one must concur with Austin in labelling this part of the "law" of nations as international morality and not law properly so-called.[49] It is futile and sometimes self-deceiving to label acts of aggression in the international arena as violations of international law. It misleads the uneducated into assuming mistakenly that some enforcement agency will eventually force compliance. Since there is no world government with a monopoly on force, this is deceptive. The issue was illustrated in 1980-81, when Iranian terrorists seized U.S. diplomats in Teheran and held them with Iranian governmental acquiesence as hostages for 444 days. Orders of international agencies to Iran to release the diplomats were of no avail. It seems that Austin's view of labeling international morality for what it is makes more sense for those making policy to respond to deviant behavior of national governments.

LEGAL RULES AND PRINCIPLES AND THE FUNCTIONS OF LAW

Legal norms can be classified as rules or principles. Legal rules are the more specific.[50] A legal rule is the statement of a group of major facts which lead to a certain legal consequence, usually liability of a defendant.[51] Hart classifies law into primary rules of obligation and secondary rules that provide methods to create new primary rules and create remedies and techniques of enforcement.[52] His rule of recognition is one of the secondary rules. It seems just as clear and simpler to use the traditional classifications of substantive and procedural, noting that procedures of lawmaking are included in the latter. Substantive rules define specifically and explicitly the primary relationship between the members of society in order to assert what activities are permitted

[47] See H. Kantorowicz, *The Definition of Law, 5* (1958); D.N. MacCormick, "Legal Obligation and the Imperative Fallacy" in *Oxford Essays in Jurisprudence,* Second Series (A.W.B. Simpson, ed., 1973).
[48] See H.L.A. Hart, *The Concept of Law,* Ch. 10 (1961).
[49] J. Austin, *Lectures on Jurisprudence* 188 (3d ed., 1869).
[50] See M. Black, "Notes on the Meaning of 'Rule', 24 Theoria 107, 139 (1958).
[51] See R. Pound, *An Introduction to the Philosophy of Law* 56 (1921). J. Stone, *Legal System and Lawyers' Reasonings* 199 (1964).
[52] Hart, *supra,* note 48, at 77-96. On the interactions between substantive and procedural law, see M.R. Cohen, *Law and the Social Order* 128 (1933).

and what are prohibited. Major substantive rules set up expectancies in the general public about the nature and limitations of legal rights, powers, privileges and immunities. This prior knowledge of the general scope of law channels conduct of citizens and thereby helps prevent disputes and controversies. Some statutes, such as parts of the negotiable instruments law, may be so clear that millions of transactions may be guided by them without ever provoking a controversy that requires judicial proclamation of the law.[53]

The rule-making function of law can be viewed most broadly as the preventive channeling and orientation of conduct and expectations.[54] In part, it reinforces internalized social controls to produce and maintain a going order in society instead of a disordered series of conflicts. The primary function of legal rules as guides to behavior makes clear why retrospective laws are considered unfair.

Legal rules in statutes are likely to have more stability over time than judge-made common law, at least in the Anglo-American legal system where *stare decisis* prevails. There is usually a strict application of precedent to statutes. Once the highest appeals court of a jurisdiction has been provoked by a case before it is to interpret the meaning of the words and phrases of a statute, that court and all lower courts will follow the interpretation in later similar cases. Under constitutional separation of powers, it is up to the legislature to keep statutes in tune with social change, not the courts. Thus, counsel can assure clients with a very high degree of likelihood that the first comprehensive interpretation of statutory language by the highest court is the correct legal rule to guide future behavior until the statute is amended or repealed. Common law rules, in contrast, are dynamic and change slightly from case to case so that over a long period of time the rules can undergo significant revision.

While substantive rules indicate *when* the law will, if necessary, enforce a given pattern of interpersonal relationship, procedural rules indicate *how* the agencies of government will enforce substantive rules if actual disputes should arise. The function of law of setting disputes as they arise can be performed only after the function of appointing certain individuals to administer the rules with the authority of the organized society.[55] These persons apply the procedural rules to make substantive decisions. In modern society, rules of procedure provide for creation of courts, methods of appointment or election of judges, and indicate how lawsuits shall be initiated, heard, decided, and decisions executed.

In modern states, most legal rules are either statutes or precedents set by courts in earlier decisions. The procedural rules of a written constitution or fundamental statutes determine when the legislature and chief executive (sovereign) have acted according to law in creating new statutes and when a judge has acted according to law in determining rules derived from precedents. This area of procedure is comparable

[53] The importance of unlitigated statutes as legal rules demonstrates that Gray's definition of law as rules which courts lay down is only partial and is misleading. See J.C. Gray, *The Nature and Sources of Law* 84 (1921).
[54] See K.N. Llewellyn, "The Normative, The Legal and the Law-Jobs: The Problem of Juristic Method", 49 Yale L.J. 1355, 1376-83 (1940).
[55] *Ibid.*, 1383-87.

to Hart's rule of recognition. In Anglo-American law, the procedure of demurrer or motion to dismiss a civil complaint provokes a judge to determine whether or not a plaintiff raises a dispute under a rule recognized by law. Thus, procedural rules determine how legal rules are validly created and their scope and breadth validly interpreted by courts.

Legal principle is used here as a collective phrase to include principles, standards and policies. Principles are more generalized statements of legal relations than legal rules.[56] Usually they are of such broad scope that they do not point to specific liabilities of a potential defendant.[57] They are general norms which are found in constitutions or have been adopted by the courts against which the reasonableness of legal rules can be tested.[58] In some cases they are widely accepted views in a society on fairness in human relations. A well-known example is the maxim of equity, the principle that no person should profit from his own legal wrong. As Cardozo noted, the principle was applied in *Riggs* v. *Palmer*,[59] where a beneficiary under a will murdered his testator and the court denied him his legacy. In fact, the maxims of equity are probably the most prominent set of legal principles.

Lyon has demonstrated that the conclusions Dworkin draws about principles from the *Riggs* case and others are incorrect.[60] Dworkin claimed that legal principles eliminate all indeterminacies in the law. He rejected the idea of judicial discretion to resort to non-legal social values in the novel case with apparently conflicting precedents or statutes. He thus rejected Cardozo's analysis of the judicial process. It is clear that legal principles cannot cover all hard cases, that they do not have determinable weights, and that the balancing process might possibly yield equal weight for opposing principles.

Many constitutional clauses can be looked on as legal principles. They allocate broad general powers of government or they set up civil rights against government. Specific statutes creating legal rules must conform to the constitutional clauses. The Constitution of the United States, for example, delegates to the Congress the power to regulate commerce among the several states.[61] State legislature may also regulate commerce but only that which is local and unregulated by some national law unless Congress authorizes state regulation of specific national commerce. For example, a state statute regulating the length

[56] See J. Dickinson, *Administrative Justice and the Supremacy of Law in the United Stales* 128 (1927); R. Pound, "Hierarchy of Sources and Forms in Different Systems of Law", 7 Tulane L. Rev. 475, 483-84 (1933); J. Raz, "Legal Principles and the Limits of Law", 81 Yale L.J. 823 (1972).

[57] Some writers have disputed whether the distinction between rules and principles is one of kind or only one of degree. See R. Dworkin, "The Model of Rules", 35 Univ. of Chicago L. Rev. 22, 25-27 (1967); J.M. Eckelaar, "Principles of Revolutionary Legality" in *Oxford Essays in Jurisprudence,* Second Series 30-37 (A.W.B. Simpson, ed., 1973). The dispute seems trivial.

[58] See K.N. Llewellyn, *The Common Law Tradition* 36, 434-35 (1964).

[59] 115 N.Y. 506, 22 N.E. 188 (1889). See B.N. Cardozo, *The Nature of the Judicial Process* 40-41 (1921). On the maxim of equity applied here, see F.W. Maitland, *Equity and the Forms of Action* 61 (1909).

[60] Lyon, *supra,* note 15, at 418-422. Dworkin concedes the correctness of the criticism in "No Right Answer", in *Law, Morality and Society* 58, 82-83 (P. Hacker and J. Raz, eds. 1977).

[61] *U.S. Constitution,* Art. 1, §8, Cl. 3.

of interstate trains crossing a state was held to infringe the national regulatory power.[62] The most prominent example among the constitutional civil rights are the protections against denial of life, liberty or property without due process of law.[63] These clauses guarantee full and fair procedure if one is to be denied his life, liberty or property.[64] For example, no citizen may be incarcerated without trial, even in war time, so long as civil courts are in operation.[65]

The most important characteristics of legal rules and principles are that they are probabalistic in scope and dynamic over time. Justice Holmes emphasized the probabalistic character of law by suggesting that a lawyer's definition of law is prophecies of what courts will do in fact.[66] When a lawyer counsels his client on how to behave in an upcoming transaction or confrontation with others, he must estimate the breadth or scope which will be given by the courts to the statutes or precedents that his research indicates are relevant. A significant minority of the fact situations describing potential disputes which are brought by clients to lawyers have some novel facts. They do not fall clearly and without question within the known scope of established law. Rather they test the breadth of the norms. They fall within the gray, uncertain borderline areas of the norms. A contributing factor to this uncertainty is the fact that common-law rules, much more than statutes, are growing and changing over time as society changes.[67] Dynamic law cannot be a closed system. It is expanding in some areas and contracting in others at all times.

LEGAL RIGHT-DUTY RELATIONSHIPS

The words right and duty have many nonlegal uses, especially in moral value judgments on human behavior. In this discussion, following Hohfeld, the words "rights" and "duties" are used in the narrow sense as substitutes for "legal rights" and "legal duties".

Right-duty relationships describe how legal rules operate. They are the objectives which the law protects or interpersonal relationships which the law will enforce. Rights and duties are correlative.[68] A right may be defined as an expectation that another person or persons will behave in a certain way, which expectation the law will protect or enforce. A duty is the expectation that one must behave in a certain way, which expectation the law will enforce. The concepts can be illustrated in both public law and private law. Every citizen has a duty to obey the criminal law, and the government, acting through its executive branch, has the right to enforce the criminal code. The civil side of public law can be illustrated by the duty of each citizen

62 *Southern Pacific* v. *Arizona,* 325 U.S. 761 (1945).

63 *U.S. Constitution,* Amendments V, IV, Sec. 1.

64 On the original meaning of due process of law, see 2 W.W. Crosskey, *Politics and the Constitution in the History of the United States* 1103-16 (1953). See also, the history of the 1789 Act to Regulate Processes in the Courts of the United States in J. Goebel, "Antecedents and Beginnings to 1801", *History of the Supreme Court of the United States,* Vol. 1, Ch. 12 (1971).

65 *Ex Parte Milligan,* 71 U.S. (4 Wall.) 2 (1866); *Ex Parte Endo,* 323 U.S. 283 (1944).

66 O.W. Holmes, *Collected Legal Papers* 173 (1920).

67 See E.H. Levi, *supra* note 22.

68 W.N. Hohfeld, *Fundamental Legal Conceptions* 36 (reprint ed. 1964). See H.L.A. Hart, "Bentham on Legal Rights" in *Oxford Essays in Jurisprudence,* Second Series 171 (A.W.B. Simpson, ed., 1973).

to pay taxes which are lawfully assessed against him or his property and lawfully due for payment. The government has the right to receive the taxes and will bring a legal action to collect them if they are not paid voluntarily.

Legal obligation is a synonym for legal duty. In the science of law, they are objective terms whose specific application is ultimately tested in litigation and determined by courts. In contrast, moral obligation is a subjective concept dependent on the particular person's views of his relationships to others. The distinction between legal and moral obligation does not cover the entire scope of social control. There are large groups of norms to which the concept obligation would not attach. Etiquette is a prime example. The correct use of the salad fork is neither an issue of law nor of ethics. Much of the writing on the distinction between "ought to" and obligation seems to be concerned with semantic issues and not with the substance of social control.

Right-duty relationships in the private law in the Anglo-American system are easiest to understand when divided between *in rem* and *in personam.*[69] Rights *in rem* create status relationships. They center on the status of persons to the subject matter and are effective against all other persons. Title to property is the prime example. A property right is the expectation that one may possess, use or dispose of the thing which is the subject matter, which expectation the law will enforce. The duty in all other persons is not to attempt to possess, use, or dispose of the subject matter. Legal action to enforce this right, such as a suit to quiet title, is also *in rem.* Other legal actions pertaining to property which do not center on title are usually in tort and are *in personam.* Trespass is the most common.

Rights *in personam* center on the interpersonal relationships of the parties and the legal wrong is the breach of a personal duty of the defendant. They are created by some action of the party or parties. Contract right-duty relationships are created by voluntary promise or promises. A contract right is the expectation in promisee that promisor will perform his promise, which expectation the law will enforce. A contract duty is the corollary obligation of the promisor. In tort, right-duty relationships do not come into existence until a legal wrong is committed. When a person does an act which violates a rule of tort law, a duty arises in him to render a remedy to the party he has wronged. The right to a remedy in the party whose person, property, reputation or business relations was injured is the corollary of the legal obligation which arises in the tortfeasor.

Other major legal relations are sometimes thought of as subclasses of legal rights. Legal privileges, like rights, are presently existing, enforceable relations. Privileges are one class of liberties.[70] They are actions in which persons are free to engage, affirmative or active liberties that no person or government has a present legal right to restrain. A lessee has the privilege of entering the land on which he has a valid lease and the owner has no legal right to stop him. In Anglo-American constitutional law a person has a privilege from self-incrimination and

[69] See G.W. Paton, *Textbook of Jurisprudence* 262-66 (3d ed. 1964).
[70] Hohfeld, *supra* note 68, at 38.

no official of government has a legal right to force the person to testify against himself.

Legal powers and immunities differ from rights in that they are not presently enforceable legal relations but concern potentialities of creating new enforceable relations. A legal power is the ability, with authority of law, to create new right-duty relationships in the future.[71] An offeree of a potential contract has the power to accept or reject. If he exercises the power to accept, valid contract rights and duties are brought into existence. Similarly, an agent is delegated legal power by his principal to act within the scope of his authority and create contract rights and duties between the principal and third parties. Powers of appointment in wills are a common example. In public law, one speaks of the legal powers of the chief executive, of judges and of legislators.

Immunities are exemptions.[72] They are negative or passive liberties, a person's freedom from the power of other persons or government to act against him and create new duties in a particular area of law. If real property has been filed as a homestead pursuant to statute, an exemption is created under bankruptcy law. The owner is immune from a writ of execution designed to sell his interest in the property. Under constitutional law, all persons are immune from unreasonable searches and seizure. A peace officer without a warrant usually has no power to search the premises.

ORIGINS OF LAW

Since law concerns norms enforced by government, the formal sources of modern law are written constitutions ratified by citizens, statutes enacted by legislatures, administrative rules proclaimed pursuant to statutes, and common-law rules adopted by courts. But the origins of law are another matter. The majority of the general legal norms adopted by courts as common law had their origins in disputes over customary behavior. Economic institutions, the state of technology, methods of education and many other social institutions determine basic norms of behavior in society. As Maclver explains, the firmament of law is customary behavior.[73] But its actual adoption arises largely from resolution of disputes over the breadth of customary norms.

The process by which certain classes of customary norms become legal norms is most easily observed in legal history. Maine writes of the epoch of customary law in which society is governed by a privileged minority, an aristocracy.[74] He postulates the rise of legal rules from the settlement of disputes between members of the privileged minorities. A true unwritten law arose from the remembered precedents of decisions by rulers who settled disputes on the correct customary behavior. Behind the decisions of rulers on these major internal disputes of the society was the threat of force of the warriors who maintained elemental

[71] Hohfeld, *supra* note 68, at 50. See H.L.A. Hart, "Bentham on Legal Powers", 81 Yale L.J. 799 (1972).
[72] Hohfeld, *supra* note 68, at 60.
[73] R.M. Maclver, *The Web of Government,* Ch. 4 (1947).
[74] H.S. Maine, *Ancient Law,* 13 (10th ed. 1885). On the theory of customary law, see E. Ehrlich, *supra* note 7, at Ch. 19.

order in the society. Maine illustrates this most clearly in his chapter on the early history of property.[75] Ancient behavior patterns relating to acquisition and possession of land and goods were treated in Roman society as ordinances of nature. The dignity with which they were invested led to their enforcement under the procedures created by the Roman lawyers.

Turk labels the process of transforming social norms into legal norms as legalization.[76] This is a fundamentally political phenomenon. Societal pressures lead to the adoption of specialized language and operational forms that makes certain norms officials. They are proscriptions, prescriptions and permissions which come to be backed, if necessary, by use of a governmental enforcement staff. Rights, privileges, powers and immunities are defined into existence by authorities of the state. Turk offers an eight-step schema of legalization that begins with new substantive values and proceeds with adoption of procedural norms to facilitate enforcement. He suggests four main sources of legalization: (1) moral indignation; (2) legalism, placing high value on coherence, order and certainty; (3) response to threat to the social system; and (4) political tactics.[77]

Even though a majority of general legal norms originated in customary behavior, the majority of legal rules in a modern state are technical and originate in the legislature and the judiciary. As to the part of law whose basic structure originated in custom, much of its detailed technical development cannot be related to customary behavior. The commercial law of sales and negotiable instruments, for example, originated in commercial practice, but thousands of judicial decisions filled in the detail and made it into a body of law. Some of these decisions were based on commercial customs and fostered efficiency in transactions. Most, however, were technical rules based on developing a logical system of law. Codification of the commercial law was designed to simplify what had become an unwieldy collection of judicial precedents, some of them conflicting. The technical rules of the code are largely the creation of lawyers built on the foundation of a few principles that originated in commercial customs.

Other parts of law have basic structures that did not arise from custom. Most of the rules in the United States Code and the Federal Regulations do not have customary origin but are creations of Congress in its effort to regulate a complex, industrial society. A large part of the law relating to taxation and spending by governments to provide educational and social services are designed to redistribute income, another area without customary foundation.

IMPACT OF LAW

The first issue is the degree of compliance, the extent to which any law promulgated by those in authority is voluntarily obeyed.[78] Degree

[75] Maine, *supra,* note 74, at 244.
[76] A.T. Turk, *Legal Sanctioning and Social Control,* Ch. 2 (Dhew Pub. No. 72-9130, 1972).
[77] *Ibid.*, Ch. 3.
[78] See L. Friedman, *The Legal System,* Ch. 3 (1975); T.L. Becker and M.M. Feeley, *The Impact of Supreme Court Decisions* (2nd ed. 1973); S.L. Wasby, *The Impact of the United States Supreme Court* (1970).

of compliance can be divided into four separate parts: (1) compliance by courts to constitutions and statutes; (2) compliance by trial courts to directives of the highest court of appeal, a special problem in a federal system; (3) compliance by officials of the executive branch to orders of courts; and (4) compliance of citizens to standing law. As noted earlier, if a statute or judicial decision is disobeyed by a substantial sector of the public so that enforcement is physically and financially impossible, there is no longer an effective legal norm. Each instance of a generally disrespected law illustrates to some persons that they need not internalize law-abidingness, the basic element of order in a society. If such cases become common, that order which some writers characterize as social cohesion or social solidarity can be threatened.

In most Western societies, law has a prominent place among social institutions. Few statutes are enacted which are widely ignored. But in a pluralist society, enactment of some laws provokes much greater public outcry than others. Legislators and other ruling elites may have limited understanding of the bulk of citizens who have status levels and incomes far below these rulers. These rulers may respond to vociferous minorities and enact laws which the majority dislike. In the United States in 1919, religious fundamentalists provoked the Congress to pass a constitutional amendment to prohibit the manufacture and sale of alcoholic beverages and then provoked the state legislatures to ratify it.[79] The clause and enforcing statutes were violated by large sectors of the society, who patronized criminal purveyors of alcohol. A great surge in organized crime took place whose effects are still felt today. This breakdown in law led eventually to repeal of the original constitutional amendment.[80]

A second major issue on legal impact is the feedback effect. The hypothesis here is that while customary social behavior is a significant source of law, law in turn has a significant impact on social thinking, which then affects behavior patterns. The latter is especially true when there is substantial division of views on a topic in a society and a large segment of the public, even a majority, await an official pronouncement of correct behavior. In the United States, the *Dred Scott*[81] case was a prime example. The primary issue was the legal status of free Negroes. The majority opinion held that they could not be citizens of a state and of the United States for purpose of suing in the Federal Courts. This ruling was propounded in spite of the fact that at the time of the founding of the United States, five of the states held all native-born inhabitants to be citizens regardless of color.[82] After holding that Dred Scott had no standing to sue in Federal Court and ordering his action dismissed for want of jurisdiction over his person, Chief Justice Taney went on to make an additional substantive ruling. He held that Congress did not have power to prohibit expansion of slavery into the territories of the United States. This had been a key issue of contention between North and South, perhaps the leading one. The decision is believed to have influenced large numbers of undecided citizens, especially in the border states, to favor the Southern view.

[79] *U.S. Constitution,* Amendment 18 (1919). See A. Sinclair, *Prohibition: The Era of Excess* (1962).
[80] *U.S. Constitution,* Amendment 21 (1933).
[81] *Dred Scott* v. *Sandford,* 19 How. 393 (1857).
[82] *Ibid.*, 572-75.

Thus, the impact of this widely noted judicial decision was one significant factor of support to the Southern states in their ultimate decision to rebel.[83]

Another aspect of legal feedback is the organized public reaction against the Supreme Court's decisions when it has created new legal doctrines either to bar or to replace legislative adjustment to social change. The Court's function of judicial review of statutes is in effect counter-majoritarian.[84] This vests in the Court the duty and power to protect civil rights when the legislatures succumb to popular hysterias and pass oppressive statutes, but it also enables the Court to overstep its judicial function and usurp the legislative or amending powers. Historically, the Court majority in the exercise of judicial review has at times fabricated out of whole cloth concepts which had no basis in constitutional language. The outstanding example was substantive due process.[85] As noted by Justice Curtis, the original meaning of process was procedure.[86] Due process meant required or appropriate procedure. Nevertheless, the Court majority, overcome by laissez-faire economic biases, held unconstitutional many regulatory statutes on the basis of substantive due process.[87] This was especially true of wages and hours statutes which were favored by the great majority of Americans.[88] The impact on the public was so negative that the president in 1937 proposed increasing the size of the Court so that the old majority of justices could be outvoted.[89] The Court finally responded by overruling its key earlier decisions utilizing substantive due process.

In more recent times, another majority has resurrected substantive due process as part of a move to replace legislative change by fabricating a general constitutional right of privacy. The birth control and abortion cases are prime examples.[90] Many Northern and Western states had liberalized their abortion statutes greatly before the Supreme Court decision creating a constitutional right to abortion. The social trend toward free choice of women on reproduction was well under way via legislative repeal of old state prohibitions when the constitutional litigation was initiated. The cases arose in Georgia and Texas where fundamentalist religious groups had greater control in the society. The social impact of the *Roe* and *Doe* decisions was to create a rallying point for certain religious groups to start a political campaign for a constitutional amendment to prohibit all abortions. It is unlikely that this vociferous minority would have had such preliminary success without the unfounded Court opinion as the center of its campaign.

[83] See V.C. Hopkins, *Dred Scott's Case* 170-76 (1951); D.E. Fehrenbacher, *The Dred Scott Case,* Ch. 21 (1978).

[84] See H.S. Commager, *Majority Rule and Minority Rights* (1943); L.W. Levy, ed., *Judicial Review and the Supreme Court* (1967).

[85] See R.G. McCloskey, "Economic Due Process and the Supreme Court: An Exhumation and Reburial" in The Supreme Court and the Constitution (P.B. Kurland, ed., 1965).

[86] *Murray's Lessee* v. *Hoboken Land and Improvement Co.,* 18 How. 272 (1855). See authorities cited in note 64, *supra.*

[87] See B.R. Twiss, *Lawyers and the Constitution,* Ch. 2 (1942).

[88] See, e.g., *Adkins* v. *Childrens Hospital,* 261 U.S. 525 (1923), overruled in *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379 (1937). See also R.L. Hale, *Freedom Through Law,* Ch. 14 (1952).

[89] See R.H. Jackson, *The Struggle for Judicial Supremacy* 187-196 (1944).

[90] *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *Roe* v. *Wade,* 410 U.S. 113 (1973); *Doe* v. *Bolton,* 410 U.S. 179 (1973).

CONCLUSION

The purpose of this study has been to outline an approach to the science of law which integrates analytical method and sociological analysis of cause and effect. Following logical positivism, a set of definitions, each derived from the previous one, gives a structure to the outline. Norm is defined in its generally accepted sociological sense. Social control is defined in terms of enforcing norms. Law is defined as a sector of social control. Legal rules and principles are defined as types of legal norms. Right-duty relationship are defined as the method of operation of legal rules.

Legal science can be viewed as one of the social sciences in its efforts to describe the structure and workings of legal order. The primary function of the legal scholar is scientific of existing law. Only at the conclusion of his study does he turn to normative recommendations for enactment of new statutes or adoption of new constitutional clauses. The practicing lawyer also uses legal science to describe existing law in order to advise clients on conduct that will conform to law. Even the judge makes a scientific analysis of existing law before turning to the task of judging.

The judge, in deciding a current case, is performing a normative function. His function is to set the exact scope or breadth of legal rules as he decides a controversy. To the extent that any aspect of the case before him is novel, the judge must use the limited discretion vested in him as a governor to make law. Writers who have confused the positive science of the legal scholar with the normative function of the current judge have created a major impediment to rigor and clarity in the study of jurisprudence.

MICHAEL CONANT *

* B.S. (Illinois), A.M., Ph.D., J.D. (Chicago), Professor Business Law, University of California, Berkeley.