DEFINITIONS OF LAW AND EMPIRICAL QUESTIONS

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TWO FUNDAMENTAL QUESTIONS FOR ANY discipline are: (1) What is the subject matter of the field? and (2) What is to be asked about the subject matter? The answer to the first question as it applies to jurisprudence can be given in a word—law. This designation may appear as a gross oversimplification, but that is not the problem at all. If there were consensus in jurisprudence as to a universal and empirically applicable definition of law, the term would be suited admirably for identifying the subject matter of the field. But such consensus is lacking. Debates over conceptions of law have an ancient history, and since the end of the eighteenth century they have become more intense. Given the fact that contemporary schools of thought in jurisprudence are distinguished first and foremost by the kind of definition of law advocated,[1] it is difficult to understand Selznick's assertion that definitions of law "are not really so various as is sometimes suggested."[2] To the contrary, one would be hard pressed to identify a more controversial issue in either jurisprudence or the sociology of law.

Why divergent opinions as to the definition of law? The contention here is that the issue will remain unresolved until jurisprudents consider the second fundamental question: What is to be asked about the subject matter? This question is closely related to the notion that a science explains phenomena; but that notion is, in a sense, erroneous. No phenomenon is ever completely explained. Further, explanation is pursued

1. *See* H. KANTOROWICZ, THE DEFINITION OF LAW (1958).
2. P. Selznick, *Sociology and Natural Law*, 6 NATURAL L. F. 94 (1961).

only by examining particular facets of the phenomenon. To illustrate, a complete explanation of cancer would yield answers as to why its incidence varies with age, why it evidently prevails more in some cultures than in others, why it occurs more frequently in some organs than in others, why it prevails more among human beings than other types of animals, and so on.

Now the important point for jurisprudence is that questions about the subject matter of any science are predominantly *empirical* in that they cannot be answered by conceptual analysis. Consequently, there must be questions about law that cannot be answered by a definition of it. On the whole, however, jurisprudents take the opposite position, by insisting that essentially empirical questions about law be answered by definitions; and, worse, they tend to accept or reject particular definitions on that basis.

COERCIVE DEFINITIONS OF LAW

Although one may argue that "law" is something more than the aggregate of particular laws in a given social unit, the latter are in some way involved in the former, and law cannot be defined adequately without first defining "a law." Ordinarily, given divided opinions as to a definition, we find contending alternatives, *i.e.*, a debate as to whether a particular definition is "better" than another. Strangely, the controversy in jurisprudence is for the most part over one particular kind of definition and not the merits of alternatives. The kind of definition in question is typically identified as "coercive" (or "positivistic"); and the objections to it by different critics are essentially the same. Indeed, even though the criticism is directed primarily at Kelsen's conception of law[3] and "analytical" jurisprudence in general, it applies also to definitions advanced by Weber (a sociologist) and Hoebel (an anthropologist), both of which are given below along with some of Kelsen's familiar statements.

WEBER: "An order will be called *law* if it is externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will be applied by a *staff* of people holding themselves specially ready for that purpose."[4]

3. H. KELSEN, GENERAL THEORY OF LAW AND STATE (Anders Wedberg transl. 1954).
4. MAX WEBER ON LAW IN ECONOMY AND SOCIETY 5 (M. Rheinstein ed. 1954).

HOEBEL: "A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting." [5]

KELSEN: "Law is the primary norm, which stipulates the sanction . . . .[6] If 'coercion' in the sense here defined is an essential element of law, then the norms which form a legal order must be norms stipulating a coercive act, *i.e.* a sanction." [7]

Because criticism is directed against coercive definitions of law in general, a composite definition of that type is needed as a point of reference. It also is needed because the above definitions differ in particulars and none of them are truly complete, *i.e.*, they are not explicit on some critical points. The composite definition of a law in this instance may be stated as follows:

(1) an evaluation of conduct held by at least one person in a social unit, and

(2) a high probability that, on their own initiative or at the request of others, persons in a special status will attempt by coercive or non-coercive means to revenge, rectify, or prevent behavior that is contrary to the evaluation, with

(3) a low probability of retaliation by persons other than the individual or individuals at whom the reaction is directed.

Rather than employ the terms "norm" or "order," neither of which can be defined with precision or without controversy, the definition treats an evaluation of conduct as a necessary condition for a law. The concept is thus not purely behavioral, because regardless of average or modal behavior in a population, a particular type of conduct is not consistent with or contrary to a law unless at least one member of the social unit believes that the conduct ought or ought not to occur. In this sense, the conduct is subject to an evaluation. Note however, that the evaluation need not be collective, which is to emphasize the point that a law may not have popular support. Accordingly, while the evaluation of conduct may be designated as a norm, it does not necessarily reflect a consensus in normative opinions.

This composite definition is intended to apply to both literate and non-literate societies. For that reason, the term "special status" is used

5. E. A. HOEBEL, THE LAW OF PRIMITIVE MAN 28 (1954).
6. KELSEN, *supra* note 3, at 61.
7. *Id.* at 45.

rather than official, court, government, or state. The latter terms are not applicable at the cross-cultural level and tend to reflect an ethnocentric conception of law. The statuses are special in two respects. First, they do not include everyone in the society. The point is that if the persons who react to violations of a norm (*i.e.*, the evaluation of conduct) do not occupy a distinctive status (as opposed to just "anyone"), that norm is not a law. Second, the statuses are special in that the occupants have a universal rather than a particular relation to either the perpetrator of an act or the victim (*i.e.*, the person construed as harmed or the complainant). Accordingly, "revenge" by kinsmen or friends is not indicative of a law, however regular the revenge and however improbable the retaliation.

In reference to cross-cultural applicability, note that laws need not be written or codified. For that matter, some statements in a code may not qualify as a law under the above definition, because in the final analysis observations on behavior are necessary to detect and/or confirm the existence of a law.[8] Consequently, the definition differs (as does Weber's) from that of Kelsen in one important respect—the emphasis is on what persons in particular statuses actually do, not what they "ought" to do.[9] Similarly, the definition excludes such terms as "commands," "order," etc., because they never have had a clear meaning in jurisprudence, and in some instances they can be only imputed to

8. The emphasis on actual behavior is much in keeping with Justice Holmes's statement that law is a prophecy as to what courts will do. However, the "legal realists" in American jurisprudence are in error when they construe Holmes's statement as entirely consistent with the realists' principle that law is nothing more than the decisions of particular judges, a principle that is alien to analytical jurisprudence. Actually, Holmes's statement is highly ambiguous. Neither Holmes nor anyone else would argue that a prophecy by a janitor as to what a court will do is just as much a law as a prophecy by a district attorney. Further, the very notion of a prophecy in this context implies recognition of some degree of regularity in judicial decisions and it is this regularity that constitutes law. For details concerning the debate between the legal realists and analytical jurisprudents, *see* THE NATURE OF LAW: READINGS IN LEGAL PHILOSOPHY (M. P. Golding ed. 1966).

9. The most questionable aspect of Kelsen's scheme is that he does not provide an empirically applicable criterion for the identification of "ought" as a legal element. The word may not appear in a code; consequently, it can only be imputed to laws by equating "oughtness" with sanctions. But unless sanctions are administered with some *degree of regularity*, it is difficult to see how they can be equated with the "ought" of conduct. On the other hand, if such regularity is recognized as crucial, then Kelsen's conception of law is "behavioral," despite his disclaimer. Kelsen's attempt to divorce his conception of law from actual behavior is made all the more questionable by his admission that the "validity" of a particular law depends on the efficacy of the legal system as a whole, meaning regularity in enforcement and/or conformity to laws, either of which is clearly "behavioral."

statements in a legal code. Finally, unlike most coercive definitions, a low probability of retaliation is treated in the composite version as no less important than the use of coercion. The state does not have a monopoly on the use of force, because the perpetrator of an act may resort to violence in resisting the imposition of a sanction. It is only when a perpetrator can rely on *other parties* to rally to his cause that law does not exist. The variable of retaliation provides a means for specifying the empirical referent of "legitimacy," a concept that in the literature of jurisprudence or the sociology of law is as vague and controversial as law itself.

CRITICISM OF COERCIVE DEFINITIONS

The above coercive definitions share one characteristic. In varying ways they depict a law as a prescription or proscription of a type of act that is backed by the organized use of force. Criticisms of this kind of definition primarily question "coercion" as the common denominator of laws. However, close scrutiny of the criticisms reveals that the basic issue is actually methodological and not substantive.

The various criticisms of coercive definitions differ in their particulars, but they uniformly emphasize certain points, most of which have been summarized by H. L. A. Hart[10] in what is scarcely less than a classic critique.[11]

The question of conformity. Perhaps the most common criticism of coercive definitions is that they do not explain why persons may conform to legal norms for reasons ostensibly unrelated to the threat of punishment. Stated otherwise, such definitions ignore that quality of laws, as observe Hart's statement:

> Only when the law is broken . . . are officials concerned to identify the fact of breach and impose the threatened sanctions. What is distinctive of this technique . . . is that the members of society are left to discover the rules and conform their behaviour to them; in this sense they "apply" the rules themselves to themselves, though they are pro-

10. H. L. A. HART, THE CONCEPT OF LAW (1961).

11. Although Hart provides an excellent summary of objections to coercive definitions, it should be noted that his criticism is not peculiar to jurisprudence. On the whole, sociologists of law have been as vociferous in their objections to this perspective as have the advocates of natural law theory in jurisprudence. *See, e.g.*, E. EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (E. Moll transl. 1936). Yet, as we have seen, Weber's conception of law is definitely coercive.

> vided with a motive for conformity in the sanction added to the rule. Plainly we shall conceal the characteristic way in which such rules function if we concentrate on, or make primary, the rules requiring the courts to impose the sanctions in the event of disobedience; for these latter rules make provision for the breakdown or failure of the primary purpose of the system. They may indeed be indispensable but they are ancillary.[12]

Reduced to its essentials, Hart's argument depicts a law as two rules—the first stipulates a type of conduct and the second stipulates the sanction if actual behavior does not conform to the stipulated type of conduct. Accordingly, since application of the second rule is contingent on violation of the first rule, then the rule that stipulates the sanction is secondary, not primary as Kelsen and other advocates of a coercive definition of law would have it. The conventional rejoinder would be that a law is not just any norm, and the stipulation or actual administration of sanctions backed by force is the primary element in the definition of law because it differentiates law from other types of norms. However, far more important is the reasoning that underlies Hart's assertion that the element of sanctions backed by force is secondary. Since that element distinguishes laws from other types of norms, it could be secondary if, and only if, conformity to law is realized primarily for reasons unrelated to threatened sanctions; and that is precisely the main thrust of Hart's argument, despite his admission that the threat of a sanction provides a motive for conformity. If Hart should concede that conformity is realized only because of the threat of sanctions, then how could that element possibly be designated as secondary in a definition of law?

Hart denies that conformity to laws is realized only through the threat of sanctions by alluding to the possibility that in a typical social unit the vast majority of the citizenry "apply the rules to themselves" and in most cases for reasons unrelated to the threat of sanctions. For present purposes, this aspect of Hart's argument is accepted; but, nonetheless, it is a misleading criticism of the coercive type of definition of law. It would be a justifiable criticism if, and only if, one demands that what is nothing more than a definition of law also explain phenomena! This writer argues that no definition can or does explain anything. Accordingly, why some individuals conform to law for reasons ostensibly unrelated to the threat of sanctions is an empirical question

12. HART, *supra* note 10, at 38.

that has nothing whatever to do with the merits of a coercive definition of law.

Why some persons conform to laws for reasons evidently unrelated to sanctions (or, as Hart puts it, apply the rules to themselves) is certainly an important question; but observe that the reference is to *some* persons. Neither Hart nor anyone else would argue seriously that everyone "applies the rules to himself." Accordingly, how can one possibly explain the "self-imposition" of laws by a definition? True, one could assert that unless all members of a social unit apply a norm to themselves the norm is not a law; but not even the most radical critic of coercive definitions has taken this extreme position. Similarly, even if the majority of persons conform to laws without regard to the threat of punishment, it would be most questionable to assert that this is true of law by definition. Indeed, Hart necessarily assumes that we know what a law is before assessing reasons for conformity to it.

The degree of "self-imposition" of laws probably varies considerably from one society or historical period to the next, but such variation will not be documented if the phenomenon continues to be treated as a conceptual issue. If the self-imposition of law does vary as suggested, a central empirical question is posed; but it must be answered by substantive theory and not by definitions. Consequently, criticism of a coercive definition because it does not explain conformity to laws is simply irrelevant, and all the more so since such definitions do not, in fact, necessarily assert that coercion explains conformity.

The above observations suggest one crucial difference between the sociology of law and jurisprudence, and Hart's perspective in particular. Unlike contemporary jurisprudence, the ultimate goal of the sociology of law is (or should be) to explain variation in legal phenomena. This goal presumes, of course, that variation does exist, and the most immediate research problem is to systematically confirm the presumption. Consequently, the major theme of this paper rests on what is readily admitted to be an assumption, but the assumption of variation is by no means inconsistent with observations reported in the few truly comparative surveys of legal phenomena.[13]

Exactly how much variation one would find in the characteristics of legal phenomena from one social unit to the next is another question, and

13. *See* J. H. WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS (2 vols. 1928); Hoebel, *supra* note 5; A. S. DIAMOND, PRIMITIVE LAW (2d ed. 1960); and R. D. Schwartz & J. C. Miller, *Legal Evolution and Societal Complexity*, 70 AM. J. SOCIOLOGY 159-69 (1964).

providing an answer to that question is one of the major challenges for the sociology of law. It is a challenge in that the field must develop standard techniques and related measures to systematically describe differences among laws and social units. Certainly those techniques and measures will not be easy to formulate. For example, the phenomenon at hand—degree of self-imposition of law—cannot be measured by something as simple as the incidence of violations, and that is so regardless of the reliability of statistics. After all, the mere fact of a high degree of conformity may not reflect only the self-imposition of the related law; it also may reflect a fear of sanctions. At present, the most feasible approach is to observe the degree of conformity under two conditions: (1) where the possibility of detection is maximized and highly visible, as when a section of a road is conspicuously patrolled by traffic officers; and (2) where the possibility of detection is minimized and not highly visible. Designating the incidence of violations of a law in the first condition as *X* and the incidence in the second condition as *Y*, then the ratio X/Y is an indicator of the degree of self-imposition of the law in that social unit. The ratio probably would be less than 1 in all social units, but it is equally probable that the ratio varies considerably from one unit to the next, meaning that in some populations the amount of conformity to a law is markedly contingent on the perceived probability of violations being detected. Observe, however, that the suggested approach to the problem of measurement is more feasible for some types of laws than others. It probably is most applicable to public acts (*e.g.* driving) and least applicable to acts conventionally identified with private morality (*e.g.* sexual relations). Consequently, additional techniques may have to be developed and, in any event, a great deal of ingenuity is demanded in attempting to make systematic observations on the self-imposition of law.

The obligatory quality of laws. Whatever the reasons for conformity to laws, it is undisputed that a law may be perceived by those to whom it applies as "right," "just," "obligatory," etc. However the mental state be described, the subjective experience is entirely different from that "externally imposed," as when one feels obliged to obey a gunman (to employ Hart's illustration). But note that the subjective evaluation of a law is analytically distinct from the question of conformity. An individual may sense that a law is just but violate it nonetheless (*i.e.*, one should not confuse violation of a law with a "rejection" of it); and

individuals may conform to a law even though they view the law as unjust.

In most coercive definitions of a law there is no reference to or explanation of the subjective side of legal phenomena, and they are criticized for the omission. Consider Hart's statement as to the primacy of this objection:

> At any given moment the life of any society which lives by rules, legal or not, is likely to consist in a tension between those who, on the one hand, accept and voluntarily cooperate in maintaining the rules, and so see their own and other persons' behaviour in terms of the rules, and those who, on the other hand, reject the rules and attend to them only from the external point of view as a sign of possible punishment. One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view and not to define one of them out of existence. Perhaps all our criticisms of the predictive theory of obligation may be best summarized as the accusation that this is what it does to the internal aspects of obligatory rules.[14]

Now coercive definitions obviously do not explain why some persons "internalize" laws. Nevertheless, as with conformity to laws, Hart's criticism is not relevant. No one would argue that by definition all laws are internalized by all of the persons in all societies. There is every reason to believe that some laws are highly internalized, others are not; some persons internalize laws, others do not; and laws may be more highly internalized in some societies than in others. Why this should be so is another fundamental question; but, as before, the question cannot be answered by conceptual analysis.

Sociological research on the internalization of laws or, as Hart puts it, the internal aspects of obligatory rules, would be facilitated by a long history of concern in the field with public opinion and attitude measurement. The research also would be facilitated by a sensitivity on the part of sociologists to multiple dimensions of a seemingly unitary phenomenon. There are at least three dimensions of the internalization of law. First, there is the evaluation of types of conduct, without reference to law. Such evaluations can be investigated only by a field survey in which investigators pose normative questions and solicit responses from a representative sample of the social unit's membership.

14. HART, *supra* note 10, at 88.

Normative questions may be worded in various ways, but all of them would stipulate some type of conduct and then prompt the respondents to indicate their opinion of that conduct, using pre-established response categories, such as: strongly disapprove, disapprove, no opinion one way or another, approve, strongly approve. Maximum *evaluative consistency* with the law would be realized when the law regarding that type of conduct is proscriptive and all respondents voice "strong disapproval" of that conduct; or, alternatively, when the law is prescriptive and all respondents voice their "strong approval" of the conduct.

Even with maximum evaluative consistency, it would not be appropriate to speak of the related law as highly internalized. Maximum evaluative consistency may mean nothing more than agreement between extra-legal and legal norms, with members of the public unaware of the agreement, which is to say, ignorant of the law concerning the type of conduct in question. Accordingly, awareness of the law is another dimension—the *cognitive*. Maximum cognizance is realized only when all members can state correctly, with reference to some type of act, whether the law attaches a penalty to the commission or to the omission of that act.

Finally, *acquiescence* is the proportion of the members who voice an opinion favoring the retention of an existing law concerning the type of act in question (including the possibility that a sanction is stipulated for neither the commission nor the omission of the act). In each instance the solicitation of an opinion would be preceded by a statement as to whether the law stipulates a penalty for the commission or the omission of the act. Note in particular that acquiescence cannot be inferred from evaluative consistency. Thus, a respondent may voice strong disapproval of "homosexual relations between consenting adults" but at the same time reject retaining the law which stipulates a sanction for that type of conduct. He could do so on the ground that such sexual relations, though subject to his disapproval, are a matter of private morality.

Space limitations preclude a lengthy treatment of methods for measuring evaluative consistency, cognition, and acquiescence. Nonetheless, there is reason to believe that values for each dimension would vary appreciably from one social unit to the next and even from one law to another in the same social unit. Such variation would not only call for explanation but also might be particularly relevant in examining actual conformity to law; but these considerations are empirical questions and not appropriate conceptual issues.

Origin of laws. All advocates of a coercive definition of law labor under a handicap—the ghost of John Austin.[15] Specifically, any definition that stresses coercion is treated as though subject to all of the traditional objections to Austin's perspective. One common objection relates to the origin of laws. Arguments on this point pursue a curious line of reasoning—since Austin postulated the will of the sovereign as the source of all laws and emphasized coercion, it follows that any coercive definition necessarily implies the same origin.

If the above definitions (each post-Austin and coercive) did attribute all law to a sovereign, they would be dubious. Even defenders of Austin now admit that his sovereign is, as in the case of Hobbes' scheme, a gross fiction if interpreted as applying universally. Even assuming the existence of a sovereign in all societies, Austin's scheme does not explain why some laws were earlier extra-legal norms or why the sovereign converts some extra-legal norms into laws and not others. But none of the above definitions postulate a sovereign (and certainly not in the Austinian sense of the word). The composite definition, which speaks directly to the point, asserts that a norm is not a law unless there is a high probability that persons in special statuses will react in a certain way to violations of the norm. Thus, if members of a particular age group, social club, lineage, or other division of a society regularly avenge violations of a norm by fellow members and non-members alike and do so without regular retaliation, then that norm is a law.[16] Yet, needless to say, these social units hardly represent sovereigns by any reasonable interpretation of the term. Further, it is entirely conceivable that the members of a given generation did not enact the norm; it may have developed crescively.

When it is recognized that non-Austinian coercive definitions do not postulate a sovereign, criticism on the subject of the origin of laws takes a different tack. Hart again provides a succinct summary: ". . . there are legal rules which differ from orders in their mode of origin, because they are not brought into being by anything analogous to explicit prescription."[17] As an illustration, Hart points to the "legal recognition"

15. J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832).

16. The conventional Western view of authority is ethnocentric in that it focuses on "officials," meaning statuses that are defined exclusively in terms of enacting and/or enforcing laws (*e.g.*, legislators, police officers, district attorneys). But in some non-Western societies, essentially the same functions may be attached to statuses or social divisions that have other roles also. See Hoebel, *supra* note 5.

17. HART, *supra* note 10, at 77.

of custom, and he is correct in asserting that not all laws originate as orders, commands, etc. But, in the vernacular, so what? A coercive definition may state nothing about the origin of laws, because a law is described as a condition and not as a process of social change. Some laws may originate as custom; others may not. Viewed this way, Hart's criticism of coercive definitions is really that they do not "explain" the origin of laws. Indeed they do not! Such an explanation would call for answers to a series of empirical questions, as, for example: Why do some but not all extra-legal norms become laws? Why are some but not all laws retained despite a decline in evaluative consistency? Seeking or demanding answers to such questions from a definition is Aristotelian logic at its worst.

The applicability of laws. Regardless of the definition, it is generally agreed that a law may apply only to some persons. The contextual focus here is on the applicability of laws to those who enacted them. The Austinian scheme implies that the sovereign is above laws by virtue of having enacted them, but this implication does not square with the obvious fact that in some societies some laws apply both to sovereign and to subject. Despite the fact that coercive definitions do not necessarily imply either a sovereign or the formal enactment of laws, the range of applicability is still treated as a salient issue by the critics. Witness, for example, Hart's comment: ". . . though of all the varieties of law, a criminal statute, forbidding or enjoining certain actions under penalty, most resembles orders backed by threats given by one person to others, such a statute nonetheless differs from such orders in the important respect that it commonly applies to those who enact it and not merely to others." [18]

There are some key words in Hart's statement. His reference to "orders backed by threats" applies to Austin's scheme, not Kelsen's, and certainly not to the above composite definition. Observe also that a criminal statute only "commonly" applies to those who enacted it. We have in this instance an implicit recognition that universal applicability is not true of laws by definition, and elsewhere Hart tacitly admits that even Austin's scheme "fits" certain laws in some societies.[19] Moreover, no critic of coercive definitions would assert that a norm is not a law unless it applies to all persons, or even that it must apply to those who enacted it. To do so would be an abject surrender to the ethnocentricism

18. *Id.* at 77.
19. *Id.* at 41-42.

of a democratic ideology. What then is the issue? It is very simple. Hart and other critics are demanding that a coercive definition "explain" why the range of application differs from one society to the next and from one law to another. As a criticism, the demand is most questionable.

Content of legal norms. Perhaps the most compelling criticism of any coercive definition is the question of inclusiveness. Because of its emphasis on coercion, such a definition clearly applies to criminal law; but doubts are raised as to other spheres of normative phenomena that have an unquestioned legal status. As put most cogently by Hart:

> There is some analogy (notwithstanding many important differences) between such general orders and the law of torts, the primary aim of which is to provide individuals with compensation for harm suffered as the result of the conduct of others. Here too the rules which determine what types of conduct constitute actionable wrongs are spoken of as imposing on persons, irrespective of their wishes, "duties" (or more rarely "obligations") to abstain from such conduct. This conduct is itself termed a "breach of duty" and the compensation or other legal remedies a "sanction." But there are important classes of law where this analogy with orders backed by threats altogether fails, since they perform a quite different social function. Legal rules defining the ways in which valid contracts or wills or marriages are made do not require persons to act in certain ways whether they wish to or not. Such laws do not impose duties or obligations. Instead, they provide individuals with facilities for realizing their wishes, by conferring legal powers on them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law.[20]

The burden of the argument is that coercive definitions are not sufficiently inclusive because they exclude "private" law. But this would be true if, and only if, one accepts the assertion that these laws "do not impose duties or obligations." The assertion is not valid because a contract, a will, or a marriage does in fact create a condition of a potential sanction, which is, from the perspective of a coercive definition of law, the interpretation of duty.[21] Consider two statements: (1) If any person commits act X, action A will be taken against him. (2) If act Y occurs and subsequently act Z is committed, action B will be taken against the person who committed act Z. The first statement applies to crimes, but both statements specify the conditions under which persons in a special

20. *Id.* at 27.

21. *See* KELSEN, *supra* note 3.

status may regularly take action to prevent, rectify, or revenge a certain type of behavior; and this is the essence of a coercive definition of a law. Accordingly, any condition that can be formulated in terms of the second statement is a law; and it should be clear that contracts, marriages, and wills, can be so described. Consider marriage as a case in point. It is true the law does not prescribe or proscribe marriage (*i.e.*, attach a negative or a positive sanction to it); but neither does it merely "facilitate" marriage and nothing more. Here, the law deals with conditions and antecedents or subsequent acts in relation to that condition. The law of marriage then is something more than a set of directions as to how one enters into matrimony. The "directions" designate the antecedent acts that create the condition, and the remainder of the law is a specification of actions that may be regularly taken in the event of certain subsequent acts.

Hart recognizes that a law interpreted as a series of "if-clauses" (including the acts of plaintiffs as one condition) does apply to the exercise of private powers;[22] but then he claims that such an interpretation distorts the functions of laws.

> If we look at all law simply from the point of view of the persons on whom its duties are imposed, and reduce all other aspects of it to the status of more or less elaborate conditions in which duties fall on them, we treat as something merely subordinate, elements which are at least as characteristic of law and as valuable to society as duty. Rules conferring private powers must, if they are to be understood, be looked at from the point of view of those who exercise them. They appear then as an additional element introduced by the law into social life over and above that of coercive control. This is so because possession of these legal powers makes of the private citizen, who, if there were no such rules, would be a mere duty-bearer, a private legislator. He is made competent to determine the course of the law within the sphere of his contracts, trusts, wills, and other structures of rights and duties which he is enabled to build. Why should rules which are used in this special way, and confer this huge and defensive amenity, not be recognized as distinct from rules which impose duties, the incidence of which is indeed in part determined by the exercise of such powers? Such power-conferring rules are thought of, spoken of, and used in social life differently from rules which impose duties, and they are valued for different reasons. What other tests for difference in character could there be?[23]

22. HART, *supra* note 10, at 35-36. This is one of a few instances where Hart recognizes that criticisms of Austin's scheme do not necessarily apply to contemporary coercive definitions of law, Kelsen's perspective in particular.

23. *Id.* at 40-41.

This part of Hart's critique borders on a contradiction. He asserts at one point that the definition excludes norms conferring private powers, but the objection is cancelled by recognition that they are not excluded by all coercive definitions (Kelsen's in particular). Here the thrust of Hart's argument changes. Coercive definitions are now declared inadequate because they do not *distinguish* private from criminal law. Insofar as a coercive definition of law purports to be generic, it is difficult to see how Hart's criticism can be valid. It is as though someone rejects a definition of *Equus caballus* because it applies equally well to thoroughbreds and Shetland ponies. For that matter, a coercive definition does not preclude the very distinction emphasized by Hart; in the one case (contracts, wills, etc.) the condition of a potential sanction is created by acts of particular individuals, and in the other case (crime, torts) the potential is not so created.

Hart's real objection is that a coercive definition does not accurately describe how laws actually operate, *i.e.*, their social function. But neither Hart nor anyone else would argue that each and every law has the same social function. For that matter, one could argue that the social function of law in general is not the same in all social units. Questions as to the functions of law form the heart of both jurisprudence and the sociology of law, but they cannot be answered definitively through conceptual debates.

ADDITIONAL QUESTIONS BY EXTENSION OF THE ARGUMENT

Up to this point we have considered only the primary objections to a coercive conception of law. However, if the logic of the criticism is extended, numerous other considerations are suggested. The logic of the criticism is, in fact, rejected; but it does serve to generate other significant empirical questions about law.

The existence of persons in special statuses who regularly react to prevent, rectify, or avenge particular types of conduct is simply taken for granted by a coercive definition of law, *i.e.*, it is a *condition* of law. Rather than criticize this perspective on that point it is far more constructive to pose a question: Why and how do such statuses come into being? This inquiry is amenable to research along comparative lines, because the literature suggest the existence of societies in which the

type of status under consideration is absent.[24] What is the essential difference between these and Western nations? Moreover, why is it that in some societies these statuses have roles or functions in addition to rectifying, preventing, or revenging particular kinds of conduct? Finally, does the emergence of these statuses follow an evolutionary course?[25]

Most coercive definitions explicitly or implicitly postulate a certain degree of regularity in the reactions of "legal authorities," but none of them stipulate a definite minimum standard of regularity. Perhaps no precise and defensible standard can be formulated without extensive research. Given the possibility of variation in the regularity of reactions from one social unit to another, attempts to explain the variation through comparative research would be all the more important, because they could provide a basis for specifying a minimum standard of regularity in legal reactions. Whereas some of the previous questions call for studies of an anthropological character, the question of regularity in reactions can be examined in relation to literate and urban populations, for there is every reason to believe that the regularity of legal reaction varies from community to community in some societies.

Finally, rather than debate coercion and retaliation as conceptual issues, an answer should be sought to a relative question: Why does the use of coercion and the incidence of retaliation vary from one social unit to another? There are non-literate societies where retaliation evidently is or was common,[26] and its incidence is probably highly variable even among and within literate societies. What has been said of retaliation applies equally well to the use of coercion. Specifically, to what extent does the use of force by legal authorities vary among social units, and why does it vary? Research on coercion and retaliation need not be restricted to anthropological studies. As suggested earlier, there probably are considerable differences among and within urban societies

24. *See* in particular, E. E. EVANS-PRITCHARD, THE NUER (1940); *The Eskimo: Rudimentary Law in a Primitive Anarchy*, in HOEBEL, *supra* note 5, at ch. 5; R. F. Barton, *Ifugao Law*, 15, No. 1: UNIVERSITY OF CALIFORNIA PUBLICATIONS IN AMERICAN ARCHAEOLOGY AND ETHNOLOGY (Feb. 1919); and HOEBEL, THE POLITICAL ORGANIZATION AND LAW-WAYS OF THE COMANCHE INDIANS (American Anthropological Association, Memoirs, No. 54, 1940).

25. For evidence of an evolutionary trend in the characteristics of statuses related to reaction to deviant behavior, *see* Schwartz & Miller, *supra* note 13. This is one of the few studies in recent years that is in keeping with the early tradition of the sociology of law (*i.e.*, a comparative focus).

26. The Nuer, Ifugao, Eskimo, and Comanches are cases in point. *See supra* note 24 for references.

(*i.e.*, from one community or region to the next). There are even instances of somewhat dramatic changes in the use of coercion and the incidence of retaliation. For example, certain past events related to the desegregation of schools and civil rights legislation in the United States are of interest beyond the study of race relations, because they dramatically revealed coercion and retaliation as elements of law and lawlessness.

Fuller's morality of law. As suggested previously, critics of coercive definitions of law do not agree in their formulations of alternative definitions of law. Moreover, they often ascribe qualities to laws which, taken together, only give the appearance of a definition. As a case in point, Lon Fuller[27] has set forth eight "desiderata" of laws: (1) generality, (2) promulgation, (3) non-retroactive, (4) clarity, (5) noncontradictory, (6) requiring only the possible in the way of conduct, (7) constancy through time, and (8) congruence between official action and declared rule.

At no point does Fuller explicitly assert that these qualities are true of laws by definition,[28] and his use of the term "desideratum" suggests that they *should* characterize laws. Accordingly, two alternative interpretations may be entertained. First, the qualities in question represent a value judgment on Fuller's part. Or, second, Fuller has formulated a theory about the effectiveness of laws, that is, a specification of the necessary and/or sufficient conditions for maximum conformity to laws.

Now the question of the effectiveness of a legal system is not only of interest to the sociology of law (or should be) but also is a crucial factor in policy considerations. But observe that the question is an empirical one, not a conceptual issue. Consequently, whatever the merits of Fuller's observations on legal desiderata as a *theory*, they neither refute a coercive definition of law nor represent an alternative to it.

Fuller claims that is not simply effective

27. L. L. FULLER, THE MORALITY OF LAW (1964).

28. Fuller defines law as "the enterprise of subjecting human conduct to the governance of rules," but he does not state the relation between this definition and his eight "desiderata." Some relation is suggested, however, by his rejection of the idea that the "law of Nazi Germany was as much law as that of any other nation" (*id.* at 107, 123). The idea is rejected, evidently, not because the Nazis failed to engage in Fuller's "enterprise" but because their "laws" were not characterized by one or more of the eight desiderata. Conceivably, then, Fuller regards his desiderata as not just qualities but *criteria* of law. In any event, as for his definition of law, at no point does Fuller define "rules" or stipulate the fundamental distinction between laws and other types of rules.

OVERVIEW

It is not through mere inadvertence that Hart and other critics refer to coercive conceptions of law as "a theory," "a model," etc.[29] They do so because they are actually posing empirical questions that cannot be answered by a definition. This confusion of definitions with substantive theory is widespread in jurisprudence, and it is most unfortunate. For one thing, it leads to irresolvable conceptual issues. Equally important, it discourages the formulation of, and a search for, answers to empirical questions about law.

Since jurisprudents show little inclination to engage in the construction of substantive theory (as opposed to purely conceptual analysis) and to undertake nomothetic research, the empirical questions about law could pass to the sociology of law by default. But that field cannot and will not respond to the opportunity unless it ceases to be preoccupied with the "legal profession" and the behavior of jurors in *particular* social units. The sociology of law should reconsider its relation to jurisprudence. Specifically, it should answer empirical questions generated by conceptual issues in that field.

29. In all fairness it should be noted that Kelsen (*supra* note 3) has contributed to the misuse of the term "theory." He never recognized that analytical jurisprudence is primarily a conceptual scheme and not a substantive theory which generates empirical propositions about law. On the whole, Kelsen and members of the analytical school have been as insensitive to empirical questions about law as have their critics.