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# Major Functions of Law in Modern Society\*

David A. Funk

*Jurisprudential writing has often failed to examine extensively the important question of the purposes or functions of law. The author suggests that such an inquiry implies a relationship between law and some "end-in-view." He selects social utility in attaining an ideal modern Western European society in constructing the theoretical framework for his inquiry. He then lists and explicates seven major functions of law in this sense and examines their interrelationships in preparation for empirical research. In conclusion he even suggests how existing empirical studies may test the adequacy of this theoretical framework.*

## I. THE METALANGUAGE AND GENERAL CHARACTERISTICS

**I**N THE PURSUIT of jurisprudential understanding, legal philosophers have more often dealt with what law is and what is good law than the third of the fundamental issues of jurisprudence<sup>1</sup> — what law is for.<sup>2</sup> This does not mean that the importance of this

line of inquiry has been overlooked. In fact it has been said that the concept of purpose is the key to understanding law<sup>3</sup> as well as an important guide to its application.<sup>4</sup> No brief is being held here for such a "one-key" approach to jurisprudence. The construction of a complete juridical science, however, re-

quires an understanding of the functions, purposes, and utility of law as part of the process by which law interacts with society.<sup>5</sup>

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<sup>1</sup> The succinct phraseology of these three issues is derived from a preliminary paper topic assigned by Professor Ovid C. Lewis to his jurisprudence seminar at Case Western Reserve University in the fall of 1970. For an illustration of the type of jurisprudential trichotomy mentioned in the text, see, e.g., J. STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS (1964); J. STONE, HUMAN LAW AND HUMAN JUSTICE (1965); J. STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE (1966) encompassing law and logic, law and justice, and law and society respectively. See also J. STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS 18-20 (1964).

<sup>2</sup> Some notable exceptions can be found. See, e.g., E. MÁYNEZ, THE PHILOSOPHI-

A scientific understanding of this interaction process requires both theoretical analysis and empirical research. Theoretical analysis of the major terms of the inquiry makes explicit the assumptions they contain and reveals the influence which those assumptions exert upon the conclusions reached. Other assumptions can then be imagined which would lead to different results. Moreover, clarity in terms is necessary if scientific work is to be useful to others working in the field. This is especially true of terms like function, purpose, and utility, all of which have been used in a number of different contexts. Finally, the process of analysis may produce hypotheses suitable for empirical testing. If the road to scientific knowledge may be thought of as a one-way street, it starts with a clear definition of terms, goes on to theoretical analysis of possible relationships, then proceeds to the development of testable hypotheses and eventual empirical testing. Actually the path to science then doubles back upon itself and adjusts the definitions and theories to more closely fit the empirical results. Thus, theory and testing themselves react upon each other endlessly as the search for scientific knowledge continues. Nevertheless, this article is an attempt to start at the "beginning." Its purpose is to develop a clear set of terms and a theoretical framework for understanding the major functions of law in modern society. In the final pages, it goes so far as to apply this theoretical framework to some existing empirical studies. It leaves

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CAL-JURIDICAL PROBLEM OF THE VALIDITY OF LAW, ch. IV (1935) translated and reprinted in LATIN-AMERICAN LEGAL PHILOSOPHY 497-512 (1948); R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW, ch. 2, *The End of Law* 25-47 (1954); 3 ANNUAIRE DE L'INSTITUT INTERNATIONAL DE PHILOSOPHIE DU DROIT ET DE SOCIOLOGIE JURIDIQUE 1-178 (1938) containing proceedings of the third session on *Le But du Droit: Bien Commun, Justice, Sécurité* with papers by L. Le Fur, G. del Vecchio, A. Carlyle, J. Delos, G. Radbruch, A. Levi, G. Leibholz, M. Djuvara, *et al*; Llewellyn, *The Normative, the Legal, and the Law-Jobs*, 49 YALE L.J. 1355 (1940).

<sup>3</sup> R. VON IHERING, LAW AS A MEANS TO AN END liv (1913), for example, claims that "purpose is the creator of the entire law" in the sense that "there is no legal rule which does not owe its origin to a purpose, *i.e.*, to a practical motive." Similarly, F. GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF 489-90 (1963), cites approvingly P. VANDER EYCKEN, MÉTHODE POSITIVE DE L'INTERPRÉTATION JURIDIQUE 56 (1907), that "[l]aw originates in the idea of its purpose, which determines its whole content," and concludes that "law is dominated by the idea of the final purpose, the concept of social value, teleology."

<sup>4</sup> See, e.g., F. CASTBERG, PROBLEMS OF LEGAL PHILOSOPHY 89 (2d ed. 1957). The author states that "[a]ll law is determined by its purpose . . . [a]nd the purpose of the law is a guide to its application."

<sup>5</sup> H. KELSEN, WHAT IS JUSTICE? 269-70 (1960) would describe this endeavor as "sociological jurisprudence" dealing with the efficacy of the law, rather than "normative jurisprudence" dealing with the validity of the law. On the other hand, O. SNYDER, PREFACE TO JURISPRUDENCE 12 (1954) minimizes such a distinction with the observation that "theories that positive law is a means to an end . . . are largely philosophical theories reworked into social philosophical theories."

for another time the task of empirically testing the adequacy of this framework, however, on the assumption that delineating the functions themselves and examining some of their theoretical relationships is the proper place to begin.

At the outset, any theoretical inquiry must face the problem of defining terms. This is necessary if language as we know it is to be used in an attempt to achieve intersubjective communication. The ordinary core meanings of key words often overlap to some extent. Furthermore, the key words themselves may carry various implications for various audiences. This is especially true of the terms already used above to outline the purpose of this inquiry. Hence it will be useful to develop a special set of terms with specified meanings — a metalanguage<sup>6</sup> — in which the discourse may proceed.

Various terms have been used to frame the fundamental issue: what law is for. The subject may, however, be approached most precisely in terms of the “functions” of law. But in order for this phrase to be useful it must be made clear which of the various meanings of “function” is being employed, since the term itself has been applied to a number of different concepts. Professor Nagel has analyzed these varied conceptualizations and has distilled six major meanings which will be reviewed in order.<sup>7</sup>

First, in mathematics and the physical sciences, “function” often designates abstract relations of dependence or interdependence between two or more variable factors. It is in this sense that the mathematician says that  $y$  is a function of  $x$ . This is also the simplest formulation of other meanings of function insofar as they imply a relation of dependence of some variables upon others. The very abstractness of this simple formulation is, however, its chief limitation in social inquiry. Other meanings become more useful as they provide more specific content in the general formulation of a functional relationship. Hence this article is seeking a definition of

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<sup>6</sup> Lewis, *Universal Functional Requisites of Society: The Unending Quest*, 3 CASE W. RES. J. INT'L LAW 3, 23 (1970) applies this term to one's own system perspective at a higher level of abstraction.

<sup>7</sup> E. NAGEL, *THE STRUCTURE OF SCIENCE* 520-26 (1961) sets forth the six numbered meanings of function which follow in the text. Professor Nagel observes, however, that an exhaustive list of the many meanings of the word “function” would be very long. *Id.* at 522. D. MARTINDALE, *THE NATURE AND TYPES OF SOCIOLOGICAL THEORY* 444-45 (1960) contains a similar but less comprehensive list as follows: (1) function in a mathematical sense, *i.e.* “a variable whose values are determined by those of one or more other variables”; (2) function as useful activity, in terms either of fulfillment of “presumed needs” or the instrumental value of activities in achieving purposes; (3) function as appropriate activity, as in the latent-manifest distinction; and (4) function as system-determined and system-sustaining activity.

"functions" of law which will be applicable in a more specific social sense. Moreover, specific meanings of "function" focus on the application of the general functional relationship to various separate systems. Since the purpose of this inquiry is to relate the legal system to the social system, a meaning of "function" which focuses on the social system should be more helpful than an expression of the pure relation itself.

Second, especially in the biological sciences, "function" often refers to functioning in the purely descriptive sense of the way something operates. In this sense a "function" is a more or less inclusive set of processes or operations within a given entity, or manifested by it, without any indication of the various effects that these activities produce upon either that entity or any other. Occasionally, the way law actually operates has been called a "function" of law in this purely descriptive sense.<sup>8</sup> Undoubtedly one ultimate goal of juridical science is to understand the "functioning" of law in this sense, and certainly the total functioning of law itself may depend on whether its societal functions are being carried out. But this article is especially concerned with the *social effects* of the performance of various functions, not merely the occurrence of certain activities within the legal system. This requires an analysis of "functions" of law beyond mere operational functioning.

Third, again particularly in the biological sciences, "function" may refer to the vital functions and specifically to certain types of organic processes occurring in living organisms, such as reproduction, assimilation, and respiration. Obviously this meaning of "function" does focus on "system maintenance," but it does so only on the level of the individual organism, so it can have no literal relevance to functions of law. It may, however, furnish the suggested analogy to vitalism which is implicit in the comment that the functional approach to law is "a modern form of animism."<sup>9</sup>

This brings to mind a meaning of "function" rejected by Professor Nagel, that "function" of living beings especially may refer

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<sup>8</sup> An instance of confusion of "function" and "functioning" may be found in A. RODENBECK, *THE ANATOMY OF THE LAW* 45 (1925). Though Professor Felix S. Cohen uses "function" in the descriptive sense of functioning, he at least clearly distinguishes this from the normative. See F. COHEN, *The Problems of a Functional Jurisprudence*, in *THE LEGAL CONSCIENCE* 77, 93 (1960).

<sup>9</sup> Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *COLUM. L. REV.* 809, 821 (1935). Cf. E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 49 (G. Simpson transl. 1933). Durkheim asserts that the word "function" expresses the relation existing between vital movements, such as digestion and respiration, and corresponding needs of the organism, so that the "function of the division of labor" is "the need which it supplies" in this sense.

to an implied duty to fulfill some immanent teleological purpose. Under that approach, the system under consideration usually includes not only the individual but some divinity as well. The scientific purpose in identifying an activity as a "function" in this sense is to understand it more fully by relating it to its ultimate end. Teleological explanation thus explains present actions by their immanent purpose.<sup>10</sup> The standard objection to such explanations is that the present appears to be explained in terms of the future.<sup>11</sup> This paradox has been avoided by a reanalysis in which the future does not act causally on the present, but the present desire for a certain future state acts causally in the present.<sup>12</sup> Recently there have been efforts to bypass this whole problem by rejecting the use of concepts taken from physical science in undertaking the analysis of purposeful behavior.<sup>13</sup> Instead it is asserted that the end or goal of an action is never a cause of that action.<sup>14</sup> Although this eliminates the problem of causation from explanation in teleological terms, the more immediate and knowable still seems to be explained in terms of the less immediate and knowable. Thus, scientific explanation requires a search for "functions" of law in a non-teleological sense.

Teleological explanation is, however, not the same as the identification of means as necessary conditions for achieving certain ends. Law in some respect may be a necessary condition for achieving some social end; but that end is not necessarily a teleological purpose im-

<sup>10</sup> Emmet, *Functionalism in Sociology*, in 3 THE ENCYCLOPEDIA OF PHILOSOPHY 256, 257 (1967), explains that:

[F]unctional statements can be explanations where they can be interpreted teleologically in terms of purpose: that is, where to say an element in a system has a function is to say that it is as it is because it has been so designed with reference to a purpose for which the system has been set up.

Hempel, *The Logic of Functional Analysis*, in SYMPOSIUM ON SOCIOLOGICAL THEORY 271, 277 (L. Gross ed. 1959) observes that "[h]istorically speaking, functional analysis is a modification of teleological explanation, *i.e.*, of explanation not by reference to causes which 'bring about' the event in question, but by reference to ends which determine its course . . . ."

<sup>11</sup> See, *e.g.*, V. FERM, FIRST ADVENTURES IN PHILOSOPHY 340 (1936). Professor Ferm argues that "if things happen by reason of a purpose, then the future determines the present and past and the effects thus become causes!" Levy, *Functional Analysis: Structural-Functional Analysis*, in 6 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 21, 23 (1968) calls this a scientific fallacy, though a useful assumption in models.

<sup>12</sup> E. NAGEL, *supra* note 7, at 24-25; *accord*, A. KAPLAN, THE CONDUCT OF INQUIRY 366 (1964), which adds:

When we explain some goal-directed behavior by reference to its goal we are not thereby assigning to the future a causal efficacy in the present, the causal agency is the present intention to reach a certain state in the future . . . .

<sup>13</sup> See R. TAYLOR, ACTION AND PURPOSE 203 (1966).

<sup>14</sup> *Id.* at 217.

manent in law so as to be identified as a teleological "function." For example, a social goal may be consciously chosen and law may be a mere instrument in achieving that end. Identification of instrumental functions of law does not imply that these functions are "socially immanent."<sup>15</sup> Social immanence means that there are certain transpersonal ends which inherently govern the shape of social conduct and are not attributable to the desires of any single individual.<sup>16</sup> In these terms good laws are those which increase consciousness of immanent social ends and are in harmony with them.<sup>17</sup> But such transpersonal ends are not necessarily assumed in this search for "functions" of law. At most, law is viewed as an instrumental means to achieving a certain chosen social goal. Of course what are "ends" from one narrow perspective may turn out to be "means" from another more inclusive one.<sup>18</sup> But even after the perspective defining means and ends is identified, it may turn out that various means and ends are interrelated in a manner beyond the conscious choice of any observer or actor in society. Similarly, there may be interrelations between various means and ends, on one hand, and the societal context in which they operate, on the other, and these interrelationships may likewise be beyond conscious choice. But this still does not imply teleologically immanent functions, and the search here is not for "functions" of law in this sense.

A fourth meaning of "function" approaches that used in this article except that it is too restrictive. The function of a thing may refer to some generally recognized use or utility of it, and the function of an action may refer to some normally expected effect. In this usage the system perspective is closely related to an individual actor. But inquiry into the functions of law requires a broader frame of reference than things or actions in a literal sense. Therefore, a fifth meaning of function is more appropriate. This is an extension of the notion of utility to encompass the more complex processes which are operative in a larger system. In this sense, "function" will be used here to refer to the more or less inclusive set of consequences that a given thing or activity has either for the whole system to which the thing or activity belongs, or for various other segments of the system; and the system perspective adopted is larger than that

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<sup>15</sup> Niemeyer, *The Significance of Function In Legal Theory*, 18 N.Y.U.L.Q. 1, 8 (1940) asserts that there are values "which are immanent from the point of view of social reality."

<sup>16</sup> *Id.* at 43.

<sup>17</sup> *Id.* at 32-33.

<sup>18</sup> See note 37 *infra*.

of an individual actor. This characterization may be abbreviated to "system utility," or, in the case of the social system, "social utility" in a non-Benthamite sense. It is unfortunate that utility is so closely associated with utilitarianism in the history of jurisprudential thought. This particular kind of utilitarianism is directed toward one particular end — the happiness of the party whose interest is in question.<sup>19</sup> In fact the greatest good of the greatest number is still sometimes mentioned among the ends of law.<sup>20</sup> However the mere notion of utility should not imply any particular end for which a thing or activity is useful.<sup>21</sup>

Finally, "function," especially in anthropology, may refer merely to system maintenance. This means the contribution an item or activity makes or is capable of making under appropriate circumstances to the maintenance of some stated characteristic or condition in a given system to which it is assumed to belong. Although the focus is upon the social system, it is closely associated with the original, narrow structural functionalism which places primary emphasis on social stability as opposed to change.<sup>22</sup> Sometimes functions of law

<sup>19</sup> J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 2 (1823). A note written by the author in July, 1822 restates the principle of utility as "the *greatest happiness* or *greatest felicity* principle" and explains that the number of interests affected is that "which contributes, in the largest proportion, to . . . the *standard of right and wrong*, by which alone the propriety of human conduct, in every situation, can with propriety be tried." *Id.* at 1 (emphasis in original).

<sup>20</sup> *E.g.*, G. PATON, A TEXT-BOOK OF JURISPRUDENCE 86 n.3 (3d ed. 1964); M. SETHNA, JURISPRUDENCE 178 (2d ed. 1959).

<sup>21</sup> Bentham recognized this "want of a sufficiently manifest connexion between the ideas of *happiness* and *pleasure* on the one hand, and the idea of *utility* on the other" in his note of July, 1822. J. BENTHAM, *supra* note 19, at 1 (emphasis in original).

<sup>22</sup> W. BUCKLEY, SOCIOLOGY AND MODERN SYSTEMS THEORY 76 (1967) observes that functionalism "seeks to understand or explain a present phenomenon in terms of its consequences for the continuity, persistence, stability, or survival of the complex of which it is a part." Whitaker, *The Nature and Value of Functionalism in Sociology*, in FUNCTIONALISM IN THE SOCIAL SCIENCES 127 (D. Martindale ed. 1965) views functionalism "as the doctrine which asserts that all recurrent social activities have the function of maintaining a social system." A. RADCLIFFE-BROWN, STRUCTURE AND FUNCTION IN PRIMITIVE SOCIETY 180 (1952) finds that "[t]he *function* of any recurrent activity such as the punishment of a crime, or a funeral ceremony, is the part it plays in the social life as a whole and therefore the contribution which it makes in the maintenance of the structural continuity." Holt, *A Proposed Structural-Functional Framework for Political Science*, in FUNCTIONALISM IN THE SOCIAL SCIENCES 84, 87 (D. Martindale ed. 1965) defines functions as "*system relevant* effects of structures" but equates "*system relevance* with system requiredness" and finds that "[f]or any social system there is a set of *functional requisites* — operational conditions that must be satisfied if the system is to continue to exist." *Id.* at 88 (emphasis in original). For example, if pattern maintenance is a functional requisite, and if capital punishment is necessary for social control and pattern maintenance, then the activity of government in punishing homicide is a function of government in these terms. *Id.* at 88-89. Aberle, Cohen, Davis, Levy & Sutton, *The Functional Prerequisites of a Society*, 60 ETHICS 100 (1950)



are discussed in these terms,<sup>23</sup> and some functions of law do provide stability. Law may, however, also be an instrument of individual or societal change,<sup>24</sup> and, therefore, the structural functionalist conception of function is too narrow.

The dual interaction of stability and change has been recognized by modern process functionalists who see the processes of stability and change as occurring on two levels. At the micro level there may be either stability or change, though over any extended period of time some change is virtually inevitable. At the macro level, encompassing the system as a whole, there can be no system stability without continuous adaptation and adjustment to lower level

likewise observe that "[f]unctional prerequisites refer broadly to the things that must get done in any society if it is to continue as a going concern, i.e., the generalized conditions necessary for the maintenance of the system concerned."

Structural functionalism also emphasizes the explanation of structures rather than rigorous analysis of functional prerequisites. Holt, *supra*, at 84 observes that structural functional analysis seeks "to explain why a given structure rather than another contributes to the satisfaction of a given functional requisite at a given time." Similarly structures are conceived as independent variables and functions as dependent variables. *Id.* at 89. In contrast the text emphasizes the identification and analysis of functions themselves rather than structures fulfilling assumed functions.

Structural functionalism emphasizing system stability and structural explanation has been justly criticized. Jarvie, *Limits to Functionalism and Alternatives to It in Anthropology*, in *FUNCTIONALISM IN THE SOCIAL SCIENCES* 18 (D. Martindale ed. 1965) finds four limitations in sociological functionalism:

- (1) a conservative ideological bias in favor of the *status quo*,
- (2) a lack of methodological clarity relating to its affinity for teleological constructions of social life,
- (3) a disproportionate estimate of the role of closed systems in social life, and
- (4) a comparative failure to handle adequately the problem of social change.

Whitaker, *supra*, at 143 found the following charges against functionalism to have "some degree of cogency": (1) "its teleological overtones," (2) "its faulty distinction between individual and social determinants of behavior," (3) "its use of static models which do not permit the analysis of change," (4) "its conservatism through stressing of the functional to the exclusion of the dysfunctional," and (5) "its inability to prove that an activity is essential to the survival of the system." For further criticism, see the literature cited in Lewis, *Systems Theory and Judicial Behavioralism*, 21 CASE W. RES. L. REV. 361, 374 (1970). For these reasons, *inter alia*, the text adopts a non-teleological definition of function allowing for change as well as stability for the analysis primarily of functions rather than structures.

<sup>23</sup> See, e.g., K. LLEWELLYN & E. HOEBEL, *THE CHEYENNE WAY* 290 (1941). The authors suggest that "the law-jobs entail such arrangement and adjustment of people's behavior that the society (or the group) remains a society (or a group) and gets enough energy unleashed and coordinated to keep on functioning as a society (or as a group)." H. BERMAN, *THE NATURE AND FUNCTIONS OF LAW* 31 (1958) defines a social function of law as "a tendency of law to contribute to the maintenance of social order," though one of these is the educational function. *Id.* at 37. Cf. K. RENNER, *THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS* 6 (1949). The author suggests that "the ultimate social function of the law is the maintenance of the species" and "[t]he maintenance of the species requires the organization of society."

<sup>24</sup> Others have made the same observation. E.g., N. TIMASHEFF, *AN INTRODUCTION TO THE SOCIOLOGY OF LAW* 338 (1939); H. BERMAN, *supra* note 23, at 13. See notes 95-114 & accompanying text *infra*.

changes. This condition of system stability through adaptation to change may be characterized as ultrastability.<sup>25</sup> Hence at the macro level there can be no stability without change. In fact if there is no stability there is not even any frame of reference by which to define change. Thus, stability and change become interdependent and this may have serious implications for law and legal institutions.<sup>26</sup> Thus, the concept of function used here includes not only the notion of system utility but also some degree of ultrastability for the system as to which the function is useful. To this extent the process functionalist approach is incorporated into the definition of "function." There is no intention, however, to incorporate the static system maintenance limitation of structural functionalism into this definition. Some functions of law may support stability on the micro level though law may also foster change here, particularly in individuals. At the same time, some functions of law may support stability of the system as a whole, though law may also foster change of the basic structure of the whole social system.<sup>27</sup> Thus, functions of law are defined in terms of social utility but without the structural functionalist limitation of system maintenance on the macro level.

If "function" is defined with reference to the end of social utility, and if this end is not teleologically immanent, it is appropriate to ask whose idea of social utility is used to delimit the concept of function. The answer will depend on who is speaking when a given activity is said to be a function of law. This then involves the relationship between the concept of function and human will.<sup>28</sup> Two different levels of discourse must be clearly distinguished in this re-

<sup>25</sup> Lewis, *supra* note 22, at 381 n.100, 393.

<sup>26</sup> The interdependence of stability and change in the legal system has been described in R. KBETON, *VENTURING TO DO JUSTICE* 24 (1969), as follows:

Superficially it may seem that the functions of changing the law and guarding its stability are mutually repugnant. But closer examination discloses that occasional legitimated changes in the law are essential to continuity itself. The aim of courts is to exercise their power of overruling precedents consistently with the principle that stability and change are to be not competitive but complementary values in the legal system.

<sup>27</sup> For a discussion of this process with respect to the withering of the state and transition to communism in Soviet legal theory, see D. Funk, *Law as Schoolmaster: Rule of Law Implications and Soviet Theory*, 1968 (unpublished thesis in The Ohio State University Library and Harvard Law School Library). See Lewis, *Parry and Riposte to Gregor's "The Law, Social Science, and School Segregation": An Assessment*, 14 W. RES. L. REV. 637, 640 (1963), for the suggestion that law may act as an educative force but in a democratically oriented society, as opposed to a Nazi or Soviet one, legal norms must not be too disparate from social norms. See also Lewis, *The High Court: Final . . . But Fallible*, 19 CASE W. RES. L. REV. 528, 567-71 (1968).

<sup>28</sup> This relationship has already been alluded to in the text accompanying note 16 *supra*.

spect. In this article it is the author who is identifying various functions of law and labeling them as such.<sup>29</sup> However, this does not necessarily imply that anyone, including the author, actually desires to use law in any of these ways. The identification of these functions is offered merely as a contribution to the understanding of law. Empirical studies could determine whether and to what extent the functions of law identified here are recognized as such by various groups in society, including legal scholars, and the extent to which law is actually used in these ways, consciously or unconsciously. At the same time the identification of functions of law does not imply that these functions are immanent in law and waiting only to be identified. Moreover, functions as used here set forth relationships. To speak of functions of law is to designate one of the terms being related. But the remaining term of the relationship must be made explicit for functions of law to have any definite meaning. In this case functions, by definition, set forth relationships between law and a particular goal chosen by the author which are expressed in terms of social utility. Of course the functions of law with respect to one chosen goal may differ from the functions of law with respect to another. Preference for analysis in terms of one goal or another will depend on the objectives of the particular author involved. One might analyze functions of law in terms of contributions to a society with explicitly specified characteristics or one he considers ideal. Here the author followed a desire to make the analysis as useful as possible for juridical science considering the time and place of writing. But it should be kept in mind that the relationships expressed in these functions are perceived by this author and isolated by him from the seamless web of law interacting with society. Because reality is considered to be a continuum, there can be no claim that these relationships are natural ones based on "natural joints" in the world.<sup>30</sup>

A particular member of society may be using law for certain purely personal purposes. Whether he is also using law in the ways labeled "functions of law" here depends on the actual state of his will. In fact the functions of law identified here may serve as a partial list of possible functions with respect to his will. But none of the functions listed become his functions until he decides that he will use law in one of these ways. If he so decides, as to him law

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<sup>29</sup> The opinions of legal scholars are juxtaposed, however, to connect the assertions of the author with jurisprudential literature.

<sup>30</sup> *Accord*, Lewis, *supra* note 22, at 370, 384.

becomes an instrument of his private will, and is used by him for his particular purposes. But this has no bearing on whether such a use is a function of law as defined in this article. Nor is the situation any different if the individual wills involved are those of the power elite of a particular society or even of all of the citizens of a democratic society. Analytically there are two completely separate universes of discourse. Thus, the functions of law identified here are "transpersonal" and distinct from the actual purposes of both individual persons and collectivities,<sup>31</sup> by virtue of the scholarly level of discourse adopted. Of course, insofar as the functions identified here grow out of the regularities of behavior of man in society, they may be necessary and unchanging conditions of that type of society completely apart from human wills. But again, this implies no social immanence and if behavior patterns should change, the functions identified may be no longer conditions for the particular social end. Thus, functions of law depend on the universe of discourse, whether that of an observer or a member of society: that of an observer has been adopted in this article.

The same principles apply to the end-in-view<sup>32</sup> to which the functions are instrumental. The author has explicitly chosen as the end-in-view with respect to which the various functions of law have social utility, an ideal modern Western European society. Western Europe is used in a societal sense here, not a strictly geographic one, and includes the "dispersion" of Western European peoples.<sup>33</sup> This

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<sup>31</sup> Professor Niemeyer seems to have been lead to his idea of transpersonal and socially immanent functions by a desire to avoid the problem of individual and collective wills. Niemeyer, *supra* note 15, at 17, 43. Though a collectivity, as such, has no will, its organization may affect the combination of wills of its individual members so that the net will of grouped individuals is different from that of the same separate individuals.

<sup>32</sup> E. NAGEL, *supra* note 7, at 19 uses this term to mean "a conscious goal."

<sup>33</sup> Funk, *International Laws as Integrators and Measurement in Human Rights Debates*, 3 CASE W. RES. J. INT'L L. 123, 152 n.126 (1971) includes in the "dispersion," analogous to the Diaspora, the following major States outside Western Europe: Australia, Canada, Israel, New Zealand, the Union of South Africa, and the United States. An argument could be made against the inclusion of Israel because of its sizable non-European population. Most Latin American societies do not qualify because of the influence of native and Negro populations, though it could be argued that Argentina and Uruguay are exceptions. Accurate determination of ethnic composition is especially difficult in Latin America. See, e.g., Christensen, *Latin America: The Land and People*, in GOVERNMENT AND POLITICS IN LATIN AMERICA 26, 39-43 (H. Davis ed. 1958). In any accurate classification even the concept of Western Europe presents problems; for example Greece has been included in spite of its location. Since the text uses modern Western European society as an ideal type, however, it is not necessary to establish more precise characteristics by which to classify borderline cases for this inquiry. The societies in Western Europe and the "dispersion" as defined above should be sufficient for construction of this ideal type and at least preliminary intersubjective communication.

refers to societies outside Western Europe where Western European peoples predominate in the society as a whole. Societies in Western Europe and its dispersion display considerable variation. Greece and Spain, for example, have authoritarian governments unlike the more typical liberal democratic ones. However, there is enough similarity, as compared with other major societal groupings, for the construction of an ideal type of modern Western European society based on general similarities of characteristics.

The addition of "ideal" to "modern Western European society" as the end-in-view refers to an ideal type of even greater abstraction. The specification of an "ideal" end-state implies that this ideal is not currently being realized, so that functions in this sense must be socially useful in attaining conditions different from those generally found in modern Western European society. "Ideal" is defined for this inquiry as modern Western European society living up to its own ideals. Such a society should allow some measure of individual freedom but should insure some feelings of social responsibility as well. There should be at least minimal conditions for high productivity and some effective means for maintaining a government responsive to the people on most public issues. These bare outlines of a tentative working definition of this ideal deserve extended treatment. They should, however, be sufficient for the inquiry at hand.

This method of defining the end-in-view is advantageous for the construction of a juridical science in several respects. First, it is concerned with what most people in modern Western European society consider ideal for that type of society. It is, therefore, more likely that the questions investigated will be considered important in modern Western European society. In contrast, were an ideal constructed by the author, it might be of mere peripheral current interest. Second, the empirical reference of the end-in-view chosen here should be greater than that of an ideal constructed by the author. It is therefore more likely that relationships involving the chosen end-in-view will be empirically verifiable. At the same time, the introduction of the concept of an ideal type, albeit empirically framed, avoids the limited generality of excessive empirical reference. Functions of law defined in terms of a specific existing society may have limited usefulness when applied to another existing society. Finally, incorporation into the end-in-view of an ideal, even if empirically determined, should make the inquiry more useful in improving existing society rather than merely understanding it. At least for an ini-

tial inquiry, ideal modern Western European society provides the most propitious end-in-view.

If functions of law are defined with respect to one type of society, it is inaccurate to say that law may serve exactly the same function in another type of society. Law may, however, serve a very similar function in the other type of society and the concept of function could be redefined to encompass both. For example, the functions of law identified here may be similar to ones that are socially useful in primitive, lesser developed, or Communist societies in achieving their ideal end-states, which may coincide only partially with that of modern Western European society. Perhaps these functions also are similar to those in embryonic regional societies such as the European Economic Community or the current international society, such as it is. These functions may even be similar to those in possible unknown types of society which may evolve in the future from societies now extant.<sup>34</sup> If a particular function were identified in substantially identical form in all of these contexts, it truly would be almost universal and this would be a very important conclusion. However, juridical science must walk before it can run. Identification and analysis of the functions of law in achieving an ideal modern Western European society should be a sufficient start. To this modern Western European, at least, it seems most propitious to begin with functions of law in his own type of society. If this cannot be explained adequately to other modern Western Europeans it seems less likely that he or they may understand functions of law in other types of society. But a satisfactory theoretical framework developed with respect to modern Western European society may aid modern Western Europeans in understanding functions of law in these other contexts, providing the origin of their framework is kept in mind. Though investigations of cross-societal similarities in functions of law are important, they should be left for later inquiries.

Definition of functions of law in terms of social utility and definition of social utility in terms of a specific end-in-view set the criteria by which a putative function is determined to be eufunctional or dysfunctional. By the same token, only putative functions which contribute to this end-in-view, *i.e.* are eufunctional with respect to this end-in-view, qualify in these terms as functions of law. Thus, a use of law which is dysfunctional with respect to this end-in-view

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<sup>34</sup> Cf. P. DIESING, *REASON IN SOCIETY* 6 (1962). There it is stated that "nonsurvival of societies hardly ever occurs" and "[e]ven in extreme cases they simply merge with other societies."

would not qualify here as a function of law even though it is eufunctional with respect to some other end. In other words the prefixes *eu-* and *dys-* must be construed in connection with the instrumental view of function already adopted. In this context functions of law, unlike moral values, are means for attaining some end but are not necessarily good in themselves.<sup>35</sup> Nevertheless, it is possible for a particular use of law to be dysfunctional with respect to one function of law and at the same time eufunctional with respect to another. In that event the net overall effect on the end-in-view would determine overall eufunctionality or dysfunctionality.<sup>36</sup>

The instrumental view of functions of law is subject to a further complication. Some absolute moral values include in their subject matter the means by which they may or may not be attained. Thus it is possible to speak of "the means-end relation and interaction."<sup>37</sup> Part of the end-in-view includes a selection among possible means of attaining it. Uses of law that initially appear to be available means, may turn out to be unacceptable on further reflection. For example, attaining an ideal modern Western European society by means which drastically interfere with the human dignity of those now living may be itself unacceptable to the ideal. Using law to

<sup>35</sup> This point is more fully developed in J. Dabin, *General Theory of Law* in THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH AND DABIN 225, 351-52 (1950).

<sup>36</sup> D. MARTINDALE, *supra* note 7, at 473 observes that "[w]hen any unit, activity, structure, or organization is described as 'dysfunctional,' such a description can easily take the form of an implicit value judgment unless the system is specified." Holt, *supra* note 22, at 89 explains:

An activity is not distinguishable from a function on the basis of the concrete behavior involved, but only in relationship to a conceptual framework and the chain of referents which that framework provides. . . . It is essential to specify the system under consideration, because an activity that may contribute to the satisfaction of a functional requisite at one system level may be nonfunctional at another system level.

E. SCHUR, LAW AND SOCIETY 84 (1968) makes a similar point with respect to the legal system as follows:

[P]otentially negative aspects of the legal system [as in legal enforcement of morality or redistribution of power] suggest how important it is always to specify the unit of society from the standpoint of which one is asserting functions or dysfunctions.

<sup>37</sup> J. STONE, LEGAL EDUCATION AND PUBLIC RESPONSIBILITY 345 (1959). Cf. J. WU, THE ART OF LAW AND OTHER ESSAYS JURIDICAL AND LITERARY 34 (1936). The author states that:

[I]n reality the means and end form a living whole; they are interpenetrated with each other. The end permeates the whole process of thinking, and suggests the means, which in turn facilitates the realization of the end.

Again, L. FULLER, THE MORALITY OF LAW 197 (Rev. ed. 1969), states "that in a legal system, and in the institutional forms of society generally, what is means from one point of view is end from another and that means and ends stand in a relation of pervasive interaction."

attain an otherwise ideal society by such means cannot be a function of law because this end-state is not really ideal.

Just as the concept of function and the end-in-view depend on the universe of discourse chosen, so the distinction between manifest and latent functions takes on particular characteristics from this universe. In essence, manifest functions refer to intended consequences, whereas latent functions refer to unintended ones.<sup>38</sup> However, in making this distinction, it is important to keep in mind whose intent is being used as a criterion. From the viewpoint of this article any functions included must be manifest at least to the author. A critic may identify others that are manifest to him but latent here. Empirical work could be done to determine whether the functions identified here are manifest or latent ones in the minds of certain groups in society. Similarly, functions may be manifest in the minds of those members of society but latent here. The sociology of knowledge<sup>39</sup> of consequences may even cause initially latent functions to become manifest ones if there has been a change in the requisite societal intent.<sup>40</sup> For example, the usual application of the manifest-latent distinction to legislators<sup>41</sup> and judges<sup>42</sup> uses their intent as the determining factor. An observer who discovers latent functions promptly makes them manifest to his readers, who may include the legislators and judges studied. Functions that were latent have become manifest. Nevertheless, the adoption of an observer viewpoint in this article means that all functions of law identified here must necessarily be manifest ones.<sup>43</sup>

Any metalanguage must resolve problems of conversion whenever the literature uses metalinguistic terms in other senses or other terms for metalinguistic ideas. The metalanguage in this article pur-

<sup>38</sup> R. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 63 (1957). Cf. A. KAPLAN, *supra* note 12, at 363. Kaplan speaks of purposive explanations as including "motivational explanation" (act meaning) and "functional explanation" (action meaning), which seem analogous to manifest and latent functions respectively.

<sup>39</sup> A classic explication of this concept is found in K. MANNHEIM, *IDEOLOGY AND UTOPIA* (1936).

<sup>40</sup> V. VAN DYKE, *POLITICAL SCIENCE: A PHILOSOPHICAL ANALYSIS* 31 (1960) has called attention to this transition.

<sup>41</sup> See, e.g., Aubert, *Some Social Functions of Legislation*, in *CONTRIBUTIONS TO THE SOCIOLOGY OF LAW* 98 (B. Blegvad ed. 1966) (concerning the Norwegian Law of Housemaids).

<sup>42</sup> See, e.g., Bredemeier, *Law As an Integrative Mechanism*, in *LAW AND SOCIOLOGY* 73, 84 (W. Evan ed. 1962).

<sup>43</sup> Cf. H. BERMAN, *supra* note 23, at 33. Berman there uses "social functions of law" to include "the purposes of law as well as its important tendencies to produce unintended consequences," which seem analogous to manifest and latent functions respectively.



posely emphasizes functions in the sense of social utility and uses of law. However, the jurisprudential literature sometimes refers to "aims" of law, which is a personification assuming a humanly willed purpose.<sup>44</sup> The same objection may be lodged against "goals" of law, a term which also occurs in the literature. Jurisprudential writing likewise refers occasionally to "roles" of law. Actually this term is an analogy implying some human playwright who creates the roles for himself or others to play. Finally, discussion may be in terms of the "ends" or "purposes" of law. These two terms may carry too many teleological implications to harmonize well with the definition already adopted for functions of law. Despite these objections, however, it is often necessary to deal with the literature in its own terms. This is merely an attempt to bring the discourse being considered into closer harmony with the metalanguage developed for this article and does not imply any shift in meaning.

Before the major functions of law in modern society are identified, some preliminary questions may be asked concerning their general characteristics. Although it is not necessary to reach any *a priori* conclusions, the preliminary consideration of these issues facilitates understanding of the concept of function by pointing up major areas of openness. If these issues are kept in mind, empirical research should be more fruitful in resolving them.

The first open issue of a preliminary nature is whether one may expect to find one, two, or many separate functions. The Thomist view provides an example of a primarily monistic position in identifying one overall end of human law — the common good.<sup>45</sup> In the Thomist system this end is viewed, however, as an immanent and final cause, whereas the test of function in our conceptual system is merely instrumental utility. The monistic position may be contrasted with its opposite — the pluralistic claim that law has many functions. This pluralism may derive from many ends-in-view or many separate functions or purposes.<sup>46</sup> An intermediate, dualistic

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<sup>44</sup> For an example of personification see N. WIENER, *THE HUMAN USE OF HUMAN BEINGS* 117 (1950), wherein the author states that "the first duty of the law, whatever the second and third ones are, is to know what it wants." Even if this is a figure of speech it leads to explanation in terms of actual personal or social wills.

<sup>45</sup> T. AQUINAS, *THE POLITICAL IDEAS OF ST. THOMAS AQUINAS* 7 (1953); Davitt, *Law As Means to End — Thomas Aquinas*, 14 *VAND. L. REV.* 65, 69 (1960). Cf. F. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* 42 (1933). The author states that "the instrumental value of law is simply its value in promoting the good life of those whom it affects."

<sup>46</sup> G. PATON, *supra* note 20, at 86 observes that "the law of any period serves many ends and those ends will vary as the decades roll by." Selznick, *The Sociology of Law*, in 9 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 50 (1968) finds that

stance envisions two opposing uses of law with a harmonizing balance or mean as the end-in-view.<sup>47</sup> Presumably any separate set of concepts may be subsumed under one or two more general ones. One need only define his terms so they produce this result. However, from the standpoint of an observer seeking to understand law in society, the wisdom of combining particular concepts into more general ones would seem to depend on conditions in the real world. The best theory from this standpoint is the one most in accord with empirical reality. Ascertaining this relationship requires empirical investigations — bare theory can only clarify the issues and speculate about the outcome. Although the concept of function has been defined here by only one end-in-view, part II will list seven separate functions of law. Therefore, until appropriate empirical investigations resolve the issue, it will be theoretically assumed that the pluralist position is most likely correct.

Once the general number of separate functions of law has been determined, a second set of preliminary questions may examine their theoretical structure. If there are many functions, the principal question is whether these are relatively independent of each other or whether there is some hierarchy by which they are ordered. Similarly, if there are only one or two overall functions, the principal question is whether these include subsidiary functions which should also be separately identified. Although a particular conception of social utility has been used here as the end-in-view to define functions of law, some jurists have used social utility, or a similar concept, as an overall function in a hierarchy of purposes.<sup>48</sup> Such a con-

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in instrumentalism, "law is seen as having more than one function." F. CASTBERG, *PROBLEMS OF LEGAL PHILOSOPHY* 72 (2d ed. 1957) even finds that "the law . . . serves many purposes that are mutually at variance." L. FULLER, *ANATOMY OF THE LAW* 60 (1968) explains that laws and legal institutions characteristically serve more than one purpose. Dworkin, *Does Law Have a Function? A Comment on the Two-Level Theory of Decision*, 74 *YALE L.J.* 640-51 (1965) questions whether there is any one overriding, forward-looking function of law, such as utility, that can determine the selection of competing rules by a court at least.

<sup>47</sup> F. GÉNY, *Méthode d'Interprétation et Sources en Droit Privé Positif* (1899), in *THE SCIENCE OF LEGAL METHOD* 1, 14 (1917) holds that "every body of laws should tend toward realizing, in the life of humanity, on the one hand an ideal of justice, on the other an ideal of utility." G. PATON, *supra* note 20, at 86 n.3 suggests among other ends of law, "the reconciliation of the will of one with the liberty of another."

<sup>48</sup> See, e.g., P. VANDER EYCKEN as summarized in F. GÉNY, *supra* note 3, at 490. The author there finds law "dominated by the idea of the final purpose, the concept of social value," although there is "a hierarchy of secondary purpose — survival, freedom, security, equality, abundance (we can see here the influence of Bentham) — all of which converge on the supreme purpose: the social happiness realized through a social balance." Thomism envisages a hierarchy of immanent purposes of law in that the common good includes peace or order plus security, which in turn includes the necessities and safety. Davitt, *supra* note 45, at 67.

ceptual hierarchy of functions is not necessarily implied by the view that some functions are more common than others in the sense of being more nearly universal.<sup>49</sup> Nor is a hierarchy necessarily implied by the view that some functions are more important than others in achieving the end-in-view.<sup>50</sup> Again, empirical investigation must demonstrate whether various functions actually operate independently or whether arrangement in some hierarchical structure seems more isomorphic with reality. The seven functions of law listed in part II are not arranged in a hierarchy. Tentatively, therefore, it is assumed that they are relatively independent, even though there may be interrelationships of various kinds among them.

A third set of preliminary questions concerning the general characteristics of functions of law deals with their absolute or relative status. Functions of law may be absolute or relative with respect to various historical times as well as with respect to various societies. One view is that law fulfills virtually the same functions in all historical epochs, though the relative importance of particular functions may vary in each.<sup>51</sup> The contrasting position is that functions of law change over historical time.<sup>52</sup> Similarly, functions of law may be virtually the same in all societies, as is sometimes asserted,<sup>53</sup>

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<sup>49</sup> See, e.g., G. PATON, *supra* note 20, at 86 n.3. Paton recognizes that securing order is "[t]he end that seems most nearly universal . . . but this alone is not an adequate description," and suggests as other ends: security, order, the general good, the greatest happiness of the greatest number, and the reconciliation of the will of one with the liberty of another.

<sup>50</sup> See, e.g., F. CASTBERG, *supra* note 46, at 73. The author states that "[i]f the different purposes of the law collide, the decision must depend on the question of what order of precedence this legal system as a whole seems to assume in the relation between the conflicting purposes."

<sup>51</sup> See, e.g., N. TIMASHEFF, *supra* note 24, at 337.

<sup>52</sup> See, e.g., G. PATON, *supra* note 20, at 86. "[T]he law of any period serves many ends and those ends will vary as the decades roll by." See also R. POUND, *supra* note 2, at 25-47 for an attempt to equate various functions of law with various historical epochs as follows: (1) keeping peace in a given society during the stage of primitive kin organization (*id.* at 33-34); (2) preserving the status quo during the era of the Greek city-state and in Roman and medieval times (*id.* at 34-37); (3) making maximum free self-assertion possible during the Renaissance (*id.* at 37-42); (4) satisfying wants in the twentieth century (*id.* at 42-47), and (5) satisfying social wants in modern times (*id.* at 47). A more extensive attempt to discuss functions of law in relation to historical epochs along substantially the same lines is found in 5 R. POUND, JURISPRUDENCE 361-547 (1959). For a criticism of this attempt, see N. TIMASHEFF, *supra* note 24. For another discussion of functions of law in terms of historical epochs, see Duncan, *The End and Aim of Law*, 47 JURIDICAL REV. 157-77 (1935), 50 JURIDICAL REV. 257-81, 404-38 (1938).

<sup>53</sup> Cf. E. MÁYNEZ, *supra* note 2, at 500-01. The passage explicates the thesis that "the supreme end of law is the realization of justice" as follows:

The just is an absolute value, because it is identical with itself everywhere and at all times. Experience, in revealing to us the great diversity of juridical conceptions among different peoples at different times, seems to contradict

or may differ depending on the particular society involved. Nonetheless, the definition of "function" in terms of one specific end-state — an ideal modern Western European society — predetermines the outcome of those inquiries in this article. Whether functions of law, as so defined, would also be such in other times and other societies is excluded from the discourse by definition. Sometimes the question of relativity is raised concerning values themselves. They, too, may be considered relative to a particular time and place. Here, however, a particular end-in-view has been selected which is linked to a particular time and type of society. The assumption for the present is that the ideal end is unchanging and the question at issue is limited to uses of law as an instrument in achieving it. These methodological decisions are merely to provide a starting point for this theoretical inquiry. Once the functions of law in modern Western European society are understood more fully, it will then be possible to broaden the inquiry. Ultimately, functions of law in the broader sense may turn out to be relative to time and place. When these relationships are more fully understood, it may then be possible to construct a juridical science including the functions of law in general.

One purpose of this analysis of functions of law is to shift the emphasis in jurisprudence away from the more traditional emphasis on the definition of law. This is not to deny the usefulness of an inquiry into the definition and limits of law. In fact, an analysis of the functions of law requires a working definition of the concept of law which guides it. Law in this context includes both laws and legal institutions in a legal system, interacting in turn with other systems in society. As Professor Hart has observed, a legal system is a union of two different kinds of rules.<sup>54</sup> Primary rules are orders, usually backed by sanctions that oblige a subject to obey or endure the penalty.<sup>55</sup> Secondary rules are those involved in the administration of the primary rules and indicate how primary rules are recognized, changed, and adjudicated.<sup>56</sup> The secondary rules are con-

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this. . . . But these various conceptions of the just, which fight one another through the years and in different places, are not justice but the contingent appreciations of it by individuals and peoples. Doctrines and opinions change in aspect, like the mythological figure of Proteus; but the value of justice remains immutable . . . .

<sup>54</sup> H. HART, *THE CONCEPT OF LAW* 96 (1961).

<sup>55</sup> *Id.* at 82.

<sup>56</sup> *Id.* at 92-94. Secondary rules of recognition indicate what person or group may promulgate laws recognized as such. Secondary rules of change indicate how new laws

sidered legally binding if they are generally thought of, spoken of, and function as such.<sup>57</sup> Primary rules made in accordance with secondary rules are legally obligatory, however, even apart from sanctions.<sup>58</sup> This is evidenced by general social pressure for conformity to the primary rules, and the existence of claims for compensation and reprisals justified by them.<sup>59</sup> Legal institutions are the social organizations which deal significantly with these two types of rules. In a modern Western European society legal institutions include, for example, constitutional conventions, legislatures, executive agencies in some respects, courts, law enforcement agencies, the penal system, and even a formal system of arbitration. On the other hand, legal institutions should be distinguished from other major types of social organization, such as economic, religious and cultural institutions.

Legal institutions should likewise be distinguished from governmental ones.<sup>60</sup> One tradition in jurisprudence views governmental institutions as essentially legal,<sup>61</sup> and many governmental institutions are also legal ones. However, governmental institutions must have an intimate connection with the making, application, and enforcement of legal rules in order to be considered also as legal institutions. In the United States, for example, the electoral college, the bureau of the budget, and the state department should be classified as primarily governmental institutions and not legal ones, even though they operate in accordance with law. This distinction helps to minimize the confusion of legal and governmental institutions with respect to their functions. Functions of government traditionally have been divided into the legislative, executive, and judicial.<sup>62</sup>

may be introduced and old ones eliminated. Secondary rules of adjudication indicate who may authoritatively determine whether a law has been broken.

<sup>57</sup> *Id.* at 226.

<sup>58</sup> *Id.* at 212. In fact legal obligation may provide one motive for obedience to law. *Id.* at 225.

<sup>59</sup> *Id.* at 214-15.

<sup>60</sup> *Contra*, K. LEWELLYN, *On the Good, the True, The Beautiful in Law*, in JURISPRUDENCE 167, 200 n.j. (1962) which decides that "[t]oday I should see not Law, but Law-Government, as the more useful area for analysis . . ."

<sup>61</sup> See, e.g., H. KELSEN, *WHAT IS JUSTICE?* 281-82 (1960), "subsuming the concept of the state under the concept of a coercive order which can only be a legal order" in the *Pure Theory of Law*. For a criticism of this position see, e.g., J. STONE, *LEGAL SYSTEM AND LAWYERS' REASONINGS* 118 n.76 (1964).

<sup>62</sup> See, e.g., R. MACIVER, *THE MODERN STATE* 365-70 (1926). Cf. W. LUCAS, *THE PRIMORDIAL FUNCTIONS OF GOVERNMENT AND THE LEGAL STATUS OF SOVEREIGNTY* xviii (1938). The author lists as the three primordial functions of government:

1. The Creative or Originative Function, which alone possess authority to originate law and government.
2. The Discretionary Function, which applies wisdom to the creation of law,

To say that a legal institution serves a particular governmental function, such as the judicial, may properly classify the institution within the scheme of governmental functions. But this classification does not adequately indicate its social utility as a legal institution. Some legal institutions and governmental ones do overlap to some extent, but this overlap does not exhaust the range of legal institutions. Those found in a formal system of arbitration, for example, are virtually nongovernmental. A more extended definitional analysis of law, laws, legal institutions, and the legal system would be appropriate in an inquiry into the fundamental question of what is law. But the distinctions developed above should be sufficient for the present inquiry.

There is a special danger in trying to formulate precise definitions for concepts like law and legal institutions. Rigid advance definitions do not allow much flexibility for discussing interrelationships in a process of becoming. Use of a clearly defined noun introduces the tacit assumption that at any given time the definition either is or is not satisfied. But in a process of interaction and becoming, at any given time the definition may be satisfied in some respects and not in others. Moreover, the definition may be somewhat satisfied and somewhat unsatisfied in any particular respect. To decide in advance whether a given state of affairs qualifies as a law or a legal institution makes it difficult to discuss the process by which it is becoming more like a law or a legal institution. What initially appears to be non-legal may actually be undergoing the process of becoming more legal as a result of feedback from interaction with other systems. The problem is that linguistic definition itself is based on a static view of the phenomena being defined. Of course linear step-by-step reasoning from rigid definitions does produce an argument with greater internal consistency. But this type of logic may not be most useful in dealing with a feedback process. With the foregoing caveat in mind, the metalanguage developed above should suffice

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and to its administration. It is the *directing* authority in "Executive Government."

3. The Ministerial Function, or the Function of Performance, which consummates law, and carries out the conclusions of the Discretionary Function.

On the judicial function in particular, see *e.g.*, H. HART & H. WECHSLAR, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 77-79 (1953). It is there said:

[T]he judicial function is essentially the function (in such cases as may be presented for decision) of authoritative application to particular situations of general propositions from pre-existing sources — including as a necessary incident the function of determining the facts of the particular situation and of resolving uncertainties about the content of general propositions.

for the following examination of specific functions of law in modern society.

## II. SEVEN MAJOR FUNCTIONS OF LAW

The major terms of the inquiry have been defined and some general characteristics of functions of law have been discussed. It is now possible to list and explicate the major functions themselves. To be sure, some would deny that such a listing would be possible, since law serves many pragmatic ends.<sup>63</sup> But most functions of law can be seen to fall within one of seven major categories.<sup>64</sup>

### A. *The Major Functions Defined*

1. *To Legitimize.*— The first major function of law is to legitimize governmental institutions. This function has been described as "the arrangement of procedures which legitimize action as being authoritative"<sup>65</sup> and the conferring of political legitimacy.<sup>66</sup> To take the most obvious example, a primary function of constitutional law is to confer legitimacy on the acts of the law-makers. One paradoxical result is that ordinary legislation may in turn confer legitimacy on those governmental institutions which are also considered legal institutions, including courts. Of course the concept of legitimacy itself implies lawfulness, so that the legitimizing function of law initially sounds like a tautology — it is a function of law to make actions lawful. Further analysis reveals, however, that there are various fundamental types of law, and the interactions between the types must be considered in any assessment of the legitimizing functions. Thus, constitutional law may legitimize the legislative acts of a legislature, which in turn may legitimize a court as a legal institution, which in turn may promulgate "laws" through judicial legislation. The search for an actual historical beginning of this chain of legitimacy leads to the problem which besets the social con-

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<sup>63</sup> Cf. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 102 (1921). Cardozo states that "the juristic philosophy of the common law is at bottom the philosophy of pragmatism." See also the comment in F. RODELL, *WOB UNTO YOU, LAWYERS!* 222 (1939) to the effect that the end of law "is the practical solution of a human problem."

<sup>64</sup> Interestingly the resulting number falls within the  $7 \pm 2$  memory rule, though no conscious effort was made to limit or expand this number. See generally Lewis, *supra* note 22, at n.211.

<sup>65</sup> Llewellyn, *The Normative, the Legal, and the Law-Jobs*, 49 *YALE L.J.* 1355, 1373 (1940); K. LLEWELLYN & E. HOEBEL, *supra* note 23, at 293.

<sup>66</sup> Selznick, *supra* note 46, at 50.

tract theory of government.<sup>67</sup> To say that society is constituted or legitimated by a contract presupposes a legal system which makes certain acts of agreement legally binding. The difficulty in dealing with such issues derives from the language in which they are framed, which may not be isomorphic with reality. Law cannot literally legitimate law because this language assumes that law either exists or does not, and therefore cannot create itself. Yet law is always in a process of becoming and in this sense what is becoming law may in fact add to its own legitimacy. Thus, lawfulness ultimately depends on the existence of real psychological support by real people, not an arbitrary definition in words.<sup>68</sup> Conceptually secondary rules, by which laws are made *inter alia*, must historically precede primary ones. However, in reality these two types of rules interact with each other. So it is not merely tautological to say that the first major function of law is to create itself — to legitimate political institutions by making them lawful, and thus to increase concurrently the general level of support in society for both primary and secondary rules.

2. *To Allocate Power.*— The second major function of law is to allocate governmental power in society. This has been described as allocating “the say,”<sup>69</sup> which is another way of characterizing the distribution of power.<sup>70</sup> Whereas the legitimizing function confers the character of lawfulness on the acts of those exercising govern-

<sup>67</sup> On the basic difficulties of the social contract theory, see E. BARKER, *PRINCIPLES OF SOCIAL AND POLITICAL THEORY* 48-49 (1951).

<sup>68</sup> Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 645 (1958) observes that “the authority to make law must be supported by moral attitudes that accord to it the competency it claims,” which is “a morality external to law.” L. FULLER, *supra* note 37, at 198 criticizes the position of Professor Dworkin “that the existence of law cannot be a matter of degree; law exists or it does not, it cannot half-exist,” with the observation that “[t]he word ‘law’ . . . contains a built-in bias toward the black-and-white.” *Id.* at 199. L. FULLER, *THE MORALITY OF LAW* 122 (1964) explains that “both rules of law and legal systems can and do half exist” and “[t]he truth that there are degrees of success in this effort is obscured by the conventions of ordinary legal language.” L. FULLER, *supra* note 37, at 192 n.11 even criticizes Professor H. L. A. Hart for postulating his rule of recognition, rather than empirically verifying it. Fuller, *supra* at 669 further criticizes the theory of meaning implied in Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593-629 (1958), on the ground that even an assumed core of meaning for a word, such as law, depends on the context.

<sup>69</sup> K. LLEWELLYN, *supra* note 60, at 199; K. LLEWELLYN, *Law and the Social Sciences — Especially Sociology*, in *JURISPRUDENCE* 352, 359 (1962). E. HOEBEL, *THE LAW OF PRIMITIVE MAN* 275 (1961) refers to “the allocation of authority and the determination of who may exercise physical coercion as a socially recognized privilege-right, along with the selection of the most effective forms of physical sanction to achieve the social ends that law serves” as one of the functions of law. K. LLEWELLYN & E. HOEBEL, *supra* note 23, at 293 lists as a law-job: “[t]he allocation of authority.”

<sup>70</sup> E. BODENHEIMER, *JURISPRUDENCE* 259 (1967) states that “[l]aw is an instrument for the rational distribution and limitation of power in society.”



mental power, the power allocating function of law actually designates which individuals or groups in society may exercise which governmental powers. On one hand, law may allocate certain powers to one governmental official and not to another. And it also may allocate powers between government officials and the citizenry by denying certain powers to all governmental officials as a class. This particular use of law commonly goes under the rubric of the rule of law as opposed to the rule of men. The rule of law doctrine includes both procedural and substantive aspects. On one hand, under the rule of law, government officials may exercise powers only if they act according to reasonably general rules. Thus, it is said that one function of law is to serve as a restraint on power, especially arbitrary power.<sup>71</sup> This procedural aspect of the rule of law is supplemented by substantive restrictions on governmental power going beyond a mere prescription of uniformity in its exercise. These restrictions deny to all governmental officials the power to violate certain fundamental individual rights. Hence it is observed that one function of law is to establish and protect individual rights.<sup>72</sup> Both procedural and substantive aspects of the rule of law, however, would be included in the general function described as "surveillance of official action."<sup>73</sup> Law, therefore, fulfills its major function of allocating governmental power either by granting it positively to certain governmental officials or denying it to all of them on procedural or substantive grounds.

3. *To Order Society*.—The third major function of law is to order society by providing a framework or model for social and in-

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<sup>71</sup> See *id.* at 235, where it is observed that "[t]he institution of law, in one of its most significant aspects, may be viewed as an instrument to check and curb man's appetite for power." Selznick, *supra* note 46, at 50 states that: "law aims at . . . *legality* or 'the rule of law.' Its distinctive contribution is a progressive reduction of the arbitrary element in law and its administration." Denning, *Legal Institutions in England Today and Tomorrow*, in *LEGAL INSTITUTIONS TODAY AND TOMORROW* 249 (M. Paulsen ed. 1959) asserts that the purpose of legal institutions in Western society is "to protect the individual from arbitrary power whether exercised by the government or anyone else."

<sup>72</sup> Denning, *supra* note 71, at 253 characterizes this function as the "protection of basic freedoms." J. CARTER, *LAW: ITS ORIGIN, GROWTH AND FUNCTION* 344 (1907) sees "individual liberty" as the next function of law after peace, and observes that "the boundary line of individual action marks out not only the limits beyond which other individuals must not pass, but also the limits which the state in its corporate capacity must not pass, and so in determining the true function of law, we also determine the true province of legislation." *Id.* at 135. Cf. Stanmeyer, *Liberative Role of Law*, 8 *AM. CRIM. L.Q.* 209, 213 (1970). The author there speaks of "the vital role of law as a mechanism to release private, individual, and cooperative energies that are both humane and useful, both economically supportive and spiritually ennobling of the human person."

<sup>73</sup> C. HOWARD & R. SUMMERS, *LAW: ITS NATURE, FUNCTIONS AND LIMITS* 281 (1965).

dividual interaction. Here relatively little coercion is required as the structural pattern itself provides the categories within which interaction occurs. This function has been described in various terms: the ordering of society,<sup>74</sup> creating organization,<sup>75</sup> the ordering of social relationships,<sup>76</sup> and providing a framework.<sup>77</sup> One jurisprudential system has been built largely around the social ordering function of law as expressed in associational terms.<sup>78</sup> But law also supplies a framework within which individuals may arrange their private affairs. Thus, it is said that some laws "provide individuals with *facilities* for realizing their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law."<sup>79</sup> This is sometimes characterized as enabling<sup>80</sup>

<sup>74</sup> K. COUNTER, *THE FRAMEWORK AND FUNCTIONS OF ENGLISH LAW* 1 (1968) calls "[t]he ordering of society itself" "the first function of law." Tunks, *Foreword to LAW AND SOCIOLOGY* vii (W. Evan ed. 1962) claims that law has always been an orderer of society. H. BERMAN, *supra* note 23, at 29 states that law is "one of the order-creating, or ordering processes . . . which helps to restore, maintain and create social order." Cf. W. FRIEDMANN, *LEGAL THEORY* 70 (5th ed. 1967). Friedmann asserts that the function of law is to give form and order to politics, economics, social life and ethics. G. NIEMEYER, *LAW WITHOUT FORCE* 353 (1941) includes among functions of law the formulation of "the element of orderliness inherent in" the forces of social life.

<sup>75</sup> N. TIMASHEFF, *supra* note 24, at 337 claims that "[l]aw creates and enforces organization [and] [o]rganization assures to every group-member his relative position in the group and his function." Llewellyn, *supra* note 65, at 1373 includes in "the law-jobs," "[t]he net organization of the group or society as a whole so as to provide direction and incentive." *Accord*, K. LLEWELLYN & E. HOEBEL, *supra* note 23, at 293.

<sup>76</sup> M. BARKUN, *LAW WITHOUT SANCTIONS* 87 (1968). E. HOEBEL, *supra* note 69, at 275 states that the first function of law essential to the maintenance of all but the very most simple societies is "to define relationships among the members of a society, to assert what activities are permitted and what are ruled out, so as to maintain at least minimal integration between the activities of individuals and groups within the society." J. DABIN, *supra* note 35, at 407 claims that "the subject matter and the aim of law are to order the social relationships between individuals and groups and between states."

<sup>77</sup> L. FULLER, *supra* note 37, at 208 asserts that the primary function, even of criminal law, is "to provide a sound and stable framework for the interactions of citizens with one another." H. BERMAN, *supra* note 23, at 11 sees private law as applying a framework to "diffuse social activities." Cf. P. DIESING, *supra* note 33, at 132-33. "Law has a double function of providing a basis for both social and economic activity." The author later says that "[l]egal systems are the public setting of social and economic life." *Id.* at 135.

<sup>78</sup> E. EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 40 (1962) observes that:

In all legal associations the legal norm constitutes the backbone of the inner order; it is the strongest support of their organization. By organization we mean that rule in the association which assigns to each member his relative position in the association (whether of domination or of subjection) and his function.

But the "living law" provides an alternative model for interaction so the more the legal ordering framework differs from this, the more difficult it is to impose. *See id.* at 97.

<sup>79</sup> H. HART, *supra* note 54, at 27. "The power thus conferred on individuals to

or facilitating and protecting voluntary arrangements.<sup>81</sup> Of course law cannot fulfill its ordering function effectively unless the framework of rules is relatively stable. Thus, it is observed that one aim of law is to create predictability so that rules will not be changed after commitments are made and so that rational means may be chosen for individual ends of contemplated actions.<sup>82</sup> Similarly, it is claimed that law is to provide some predictability in social life as well.<sup>83</sup> But, whether the interactions are individual or social, the ordering function of law provides a framework within which these interactions may take place.

4. *To Control Individuals.*— The fourth major function of law is to control members of society by coercion and threats of coercion so as to maintain peace and order. Whereas the ordering function provides a framework for interaction at relatively low social cost, the control function insures actual order. Control becomes necessary, despite its social costs, when people refuse to accommodate their interactions to the legal framework. Law then deals with potential conflicts and prevents them from becoming actual breaches of the peace. Thus, law in general is often identified as a form of social control;<sup>84</sup> and this is especially the case with criminal law in

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mould their legal relations with others by contracts, wills, marriage, &c, is one of the great contributions of law to social life . . . ." *Id.* at 28.

<sup>80</sup> H. BERMAN, *supra* note 23, at 35 speaks of "[a] second general function of law in any society" as "enabling members of the society to calculate the consequences of their conduct, thereby securing and facilitating voluntary transactions and arrangements."

<sup>81</sup> See *id.* at 375 (commenting on "Law as a Process of Facilitating and Protecting Voluntary Arrangements"). Selznick, *supra* note 46, at 50 likewise sees one function of law as facilitating voluntary transactions and arrangements.

<sup>82</sup> M. BARKUN, *supra* note 76, at 154 observes that:

[T]he function of law in the most general sense is to make human actions conform to predictable patterns so that contemplated actions can go forward with some hope of achieving a rational relationship between means and ends.

Jones, *The Creative Power and Function of Law in Historical Perspective*, 17 VAND. L. REV. 135, 142 (1963) sees as a major task of law the provision of security so that rules will not be changed after commitments are made.

<sup>83</sup> D. LLOYD, *THE IDEA OF LAW* 294 (1964) indicates that one of the vital aims of law "is to bring into the social and economic life of man a tolerable measure of security and predictability." Similarly, F. CASTBERG, *supra* note 46, at 92, claims that "[t]he law is to serve, in the first place, to create calculability in social life."

<sup>84</sup> K. COUNTER, *supra* note 74 states that "[t]he purpose of law is the control of conduct in a social context." Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 795 (1967) finds that "[o]ne major function of law is social control." Gusfield, *Moral Passage: The Symbolic Process in Public Designations of Deviance*, 15 SOCIAL PROBLEMS 175, 176 (1967) sees law "as a means of direct social control." C. HOWARD & R. SUMMERS, *supra* note 73, at iii, treats law as "man's chief means of political and social control." D. LLOYD, *supra* note 83, at 12 sees the function of law "as part of the cement of social control." J. STONE, *supra* note 61, at 173 finds that "[w]hile the genus with which most definitions of law begin is that of a rule or body of rules for human conduct, others select that conduct itself as the genus, and

particular.<sup>85</sup> Just as often this function of law is described in terms of the ultimate goal of social control — maintaining peace and order.<sup>86</sup>

5. *To Adjust Conflicts.*— With respect to conflict adjustment the control function of law is merely preventive.<sup>87</sup> The fifth function of law is to adjust actual conflicts once they have broken out.

we ourselves would (if we engaged on such an enterprise) begin with the genus, means of social control." Parsons, *The Law and Social Control* in LAW AND SOCIOLOGY (W. Eyan ed. 1962) 56, 57 claims that "law should be treated as a generalized mechanism of social control that operates diffusely in virtually all sectors of the society." Davis, *Law As a Type of Social Control* in F. DAVIS ET AL., SOCIETY AND THE LAW 39, 45 (1962) defines law as "a means of social control employed by a political community." "Social control is the process by which subgroups and persons are influenced to conduct themselves in conformity to group expectations." *Id.* at 39. Cf. Yntema, "Law and Learning Theory" *Through the Looking Glass of Legal Theory*, 53 YALE L.J. 338 (1944). The author uses "law as a means of social control" in the sense of social engineering rather than mere preservation of peace.

<sup>85</sup> H. HART, *supra* note 54, at 38 observes that "[t]here are many ways by which society may be controlled, but the characteristic technique of the criminal law is to designate by rules certain types of behavior as standards for the guidance either of the members of society as a whole or of special classes in it." B. MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY 64 (1964) asserts that "[t]he fundamental function of law is to curb certain natural propensities, to hem in and control human instincts and to impose a non-spontaneous, compulsory behavior . . ." C. HOWARD & R. SUMMERS, *supra* note 73, at 231 claims that "[t]he deterrent function of the criminal law ranks alongside its reinforcement function as the chief legal means available to society to prevent socially disruptive behavior."

<sup>86</sup> R. POUND, *supra* note 2, at 33 asserts "that law exists in order to keep the peace in a given society" and this is the first and simplest idea of the end of law. *See also* I. R. POUND, JURISPRUDENCE 370 & 464. D. LLOYD, *supra* note 83, at 299 refers to the purpose of law "as a means of preserving peace and good order in the community." N. TIMASHEFF, *supra* note 24, at 334 finds a social function of law to be producing peace and "[t]he opposite of peace is conflict." R. VACHON, JUSTICIABILITY AND THE NATURE OF JUDICIAL OBLIGATION 63 (1962) sees the goal of the legal order as "social peace."

Selznick, *supra* note 46, at 50 lists "a vehicle for maintaining public order" as one function of law. C. HOWARD & R. SUMMERS, *supra* note 73, at 228-29 calls "[t]he maintenance of order . . . not only the most basic function of law [but] also the first of the functions of law to be recognized." T. DAVITT, THE ELEMENTS OF LAW 16-17 (1959) shows as the end of man-made law, under the heading of the common good, both peace and security and maintenance of order, asserting that "[p]eace and security are achieved by the maintenance of order . . ." E. BODENHEIMER, *supra* note 70, at 161 finds that although "law by no means exhausts its significance in the quest for the realization of order, its functions and aims in society cannot be understood in isolation from this fundamental striving of human nature." G. PATON, *supra* note 20, at 86 finds "[t]he end [of law] that seems most nearly universal is that of securing order," though law itself may be this order. W. FRIEDMANN, LAW IN A CHANGING SOCIETY 10 (abr. ed. 1964) implies that one function of law is to serve as "a paramount instrument of social order." H. STONE, LAW AND ITS ADMINISTRATION 6 & 8 (1924) lists social order as one of two ends of law, the other being welfare or well-being.

<sup>87</sup> Llewellyn, *supra* note 65, at 1373 refers to "the preventive channeling and the reorientation of conduct and expectations so as to avoid trouble" as a "law-job." *Accord*, K. LLEWELLYN & E. HOEBEL, *supra* note 23, at 293. H. BERMAN, *supra* note 23, at 31 says "law is invented to deal with actual or potential disruptions of patterns or norms of social behavior."

Here the goal is to restore the peace and order of the ordering framework rather than to maintain it, and the social cost is even higher than that resulting from the control function. The conflict adjustment function of law has been widely recognized,<sup>88</sup> and has been characterized as the "disposition of trouble cases."<sup>89</sup> Sometimes the conflict arises out of allocations of governmental power or specific interpretations or applications of the legal ordering framework. Often conflicting group interests underlie individual conflicts so that law must balance social interests in order to successfully adjust the conflicts.<sup>90</sup> This function is easily associated with the work of courts,<sup>91</sup> which, after all, are the most visible legal institu-

<sup>88</sup> E. BODENHEIMER, *supra* note 70, at 259 explains that "[t]he legal system of a social body also sets up machinery for the adjustment of conflicts arising between various members of the unit and also perhaps between these members and their government." G. SMITH, *ELEMENTS OF RIGHT AND OF THE LAW* 17 (1887), in considering the function of government with reference to the administration of justice, concluded that "[t]he principal end of government is to act as judge, or umpire, in the controversies which arise between men as to their mutual claims and demands upon each other." Bredemeier, *supra* note 42, at 74 states that "[t]he function of the law is the orderly resolution of conflicts." Lewis, *Parry and Riposte to Gregor's "The Law, Social Science, and School Segregation": An Assessment*, 14 W. RES. L. REV. 637, 642-43 (1963) alludes to the current view that law is a social instrument for cleaning up inevitable grievances and disputes. H. BERMAN, *supra* note 23, at 53 claims that "[o]ne of the most important ways of understanding law is to view it as a process, that is, a set of procedures, for the resolution of disputes." Cf. T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 44 (1962). The author states that "[l]egal institutions must constantly reconcile ideological conflicts."

<sup>89</sup> Llewellyn, *supra* note 65, at 1373; K. LLEWELLYN & E. HOEBEL, *supra* note 23, at 293. Llewellyn, *supra* note 60, at 199 lists as the first major job of law "the cleaning up of those grievances and disputes which societies secrete as surely as babies produce a diaper-problem." E. HOEBEL, *supra* note 69, at 275 likewise lists "the disposition of trouble cases as they arise" as a function of law essential to the maintenance of all but the most simple societies.

<sup>90</sup> 3 R. POUND, *supra* note 52, at 324 observes that:

Looked at functionally, the law is an attempt to satisfy, to reconcile, to harmonize, to adjust these overlapping and often conflicting claims and demands [social interests], either through securing them directly or immediately, or through securing certain individual interests, or through delimitations or compromises of individual interests, so as to give effect to the greatest total of interests or to the interests that weigh most in our civilization, with the least sacrifice of the scheme of interests as a whole.

Cf. *id.* at 304 (on reaching "a balance between the social interest in the general morals, and the social interest in general progress . . ."). Levy, *Law In a Dynamic Integration*, 5 BROOKLYN L. REV. 417, 451 (1936) finds that "[i]t is peculiarly the province of the law to effect a dynamic ordering of the various pressures in the community, representing the needs and desires of diverse interest groups." Hurst, *The Uses of Law In Four "Colonial" States of the American Union*, 1945 WIS. L. REV. 577, 587 found, with respect to pre-revolutionary American law, that "one function of law in this country has been regarded as the maintenance of a balance of power sufficient for a reasonable justice and decency between classes and interests." On the function of the law to adjust conflicting interests generally, see E. BODENHEIMER, *supra* note 70, at 262-64.

<sup>91</sup> H. BERMAN, *supra* note 23, at 53 claims that "[t]he court, that is, an impartial tribunal for adjudication of disputes, remains, nevertheless, the greatest invention of

tion. But, whether working through courts or other adjudicatory agencies, the adjustment of conflicts which have already occurred must be a major function of law in any legal system.

6. *To Dispense Justice.*— At first glance it may seem ironic that the sixth major function of law in modern society is to dispense justice. From the outset this article has focused on what law is for — which is, in comparison with the question of what is good law, a relatively neglected question in jurisprudence. If the notion of good law includes or is coextensive with the notion of just law, it may seem that the inclusion of this function vitiates the separation, for purposes of analysis, of the major issues of jurisprudence. However, inquiry into the nature of justice is not the same as analysis of the function of dispensing justice. First, the latter inquiry examines the process of dispensing justice *qua* process and not the characteristics of justice itself. Since function has been defined in terms of social utility, analysis of the function of dispensing justice deals with the social utility of the justice dispensing process. Secondly, the level of analysis of the justice dispensing process has been limited to the social system level by the limitation of the inquiry to social utility. An inquiry into the nature of justice itself, on the other hand, proceeds on the most inclusive level of analysis and often includes a divinity or at least a system of ethical standards. Thirdly, the particular notion of social utility adopted here further distinguishes analysis of the justice dispensing process from analysis of justice itself. The author has chosen an ideal modern Western European society as the end-in-view by which social utility is determined. This has been defined, however, as modern Western European society living up to its own ideals. This means that the evaluative standards of social utility are social facts — the ideals actually held in modern Western European society. Hence it is a major function of law to dispense the kind of justice necessary to attain the goal of modern Western European society living up to its own ideals, *i.e.* to achieve the ideals of justice actually held by most people in modern Western European society. In contrast, an inquiry into the nature of justice from a broader perspective may go beyond the social

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the law." G. SCHUBERT, *THE POLITICAL ROLE OF THE COURTS* 65 (1965) observes that "[i]n the most general sense, both the national and the state judicial systems have the function of resolving conflicts of interest between persons." E. EHRLICH, *supra* note 78, at 121 states that "[c]onsidered functionally, the court is a person or a group of persons who are not parties to the controversy and whose function is to establish peace by the opinion which they express about the subject matter of the controversy." F. AUMANN, *THE INSTRUMENTALITIES OF JUSTICE* 34 (1956) includes adjudicating disputes among the functions of the judicial branch of government.

fact that a certain notion of justice is generally held in a certain society. This broader inquiry may derive its definition of justice from its own broader analytic system. Finally, inquiry into the nature of justice is satisfied when this nature is adequately explained. On the other hand, inquiry into the social utility of dispensing justice must include the social effects of the process of dispensing justice as well. Thus, there is a fundamental difference between a theory of justice and a theory of the social function of the performance of justice.<sup>92</sup> The relation of social utilitarianism to justice furnishes an example of this distinction. An assertion that justice actually is that which has social utility is not the same as an assertion that performance of a particular kind of justice has particular social effects in achieving certain social ends. Social inquiry has more use for the latter type of proposition since it is more amenable to empirical verification and avoids the metaphysical characteristics of theories of justice.

The social utility of law in dispensing justice involves the satisfaction of two analytically different social conceptions of justice. Both are included as significant sub-components in attaining the end-in-view since an ideal modern Western European society living up to its own ideals includes an ideal system of law in both respects. One is substantive and requires that the content of the substantive rules applied in the process of dispensing justice meet generally held standards of substantive justice. The other is procedural and requires that the procedures and procedural rules used in the process of dispensing justice meet generally held standards of procedural justice. The latter may be considered in general as an internal morality of law. In both of these respects, however, law must meet general standards of critical morality in fulfilling its function of dispensing justice.<sup>93</sup> It has often been observed that the function of law is

<sup>92</sup> For theories of justice see, e.g., J. STONE, *HUMAN LAW AND HUMAN JUSTICE* 287-321 (1965). The promise of R. STAMMLER, *THE THEORY OF JUSTICE* 471-90 (1925) was unfulfilled in developing the distinction in the text. Hints appear in E. EHRlich, *supra* note 78, at 202, to the effect that "[j]ustice is a social force," and in the notes of Professor Cahn that "[j]ustice is not a collection of principles or criteria. . . . [but] the active process of the preventing or repairing of injustice." E. CAHN, *CONFRONTING INJUSTICE* 381 (L. Cahn ed. 1966). *Accord, id.* at 11 that:

For us, justice will mean neither a static diagram on the one hand nor a mere quality of will on the other; it will mean the active process of remedying or preventing what would arouse the 'sense of injustice.' [And] [i]t will be taken not as a condition or a quality but as a species of human activity.

*Accord, E. CAHN, THE SENSE OF INJUSTICE* 13-14 (1964).

<sup>93</sup> H. HART, *LAW, LIBERTY, AND MORALITY* 20 (1966) develops the distinction between "positive morality" — the moral rules actually accepted and shared by a given

to *attain* or *seek* justice.<sup>94</sup> These observations are, however, usually made from a perspective which assumes an immanent, teleological

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social group — and "critical morality" — the general moral principles used in the criticism of actual social institutions including positive morality.

L. FULLER, *supra* note 68 develops the distinction between an "external morality of law" and a procedural "internal morality of law." *Id.* at 39 calls the eight principles of the inner morality of law "Eight Ways to Fail to Make Law" and lists them as follows:

The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules; or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.

A total failure in any of these eight conditions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all . . . .

Though these two moralities may be analytically separated, Professor Fuller rightly observes that "[i]n the life of a nation these external and internal moralities of law reciprocally influence one another; a deterioration of the one will almost inevitably produce a deterioration in the other." Fuller, *supra* note 68, at 645.

This distinction already has been encountered in the substantive and procedural aspects of the rule of law with respect to the allocation of governmental power in the text accompanying notes 71-72 *supra*. The function of law in dispensing substantive and procedural justice could be considered a description of the way law must operate in performing each of its other functions. The requirement of dispensing justice would then sort out unacceptable means for attaining the end-in-view as discussed in the text accompanying note 37 *supra*. The activity of dispensing justice would also be necessary to reach the ideal end-state, but this activity would not be considered as a separate function of law, *i.e.*, it would not be considered as a separate kind of relationship between law and the end-in-view. Instead it would be incorporated into the meaning of the other six functions. These functions could then be restated as follows: (1) to legitimize governmental institutions justly; (2) to allocate governmental power justly; (3) to order society justly; (4) to control individuals justly; (5) to adjust conflict justly; and (6) to change individuals or society justly. In a mathematical formulation it is easy to factor out the common adverb and indicate the special relationship of this factor to each infinitive. However, this essay is in text and is producing a simple list of functions of law to guide empirical research. It seems advisable to "factor out" the activity of dispensing justice by including it on the list of functions to encourage separate empirical treatment. This relegates its modifying relation to the other functions, to a special kind of interrelationship. For interrelationships among functions generally see the text following note 140 *infra*. In any event, empirical research is required to verify the nature of these interrelationships, as well as the number and hierarchical structure of the functions as indicated in the text accompanying notes 45-50 *supra*. This inclusion of dispensing justice as a separate function of law with a special relationship to the other functions seems preferable at this stage of juridical science to considering substantive and procedural justice as a component of each of the other functions.

<sup>94</sup> O. SNYDER, PREFACE TO JURISPRUDENCE 13 (1954) claims that:

[I]n any situation, the definition of the end of positive law is the definition of justice and the definition of justice is the definition of the end of positive law; for, when due note is taken of the twin words *law* and *justice* and of the ambivalent meaning of such words as *right*, *ius*, *recht*, *droit*, *diritto* as law and justice, it is clear that positive law has always been considered to be that which



purpose of law to satisfy some transcendent theory of justice. But if the terms of the inquiry are defined as they are here, a major function of law is to *dispense* justice, even from the more limited perspective of the social system.

7. *To Change Society or Individuals.*— The seventh major function of law is to serve as an instrument of conscious change, either of society or of particular individuals in that society. In analyzing processes of change it is helpful at the outset to clearly identify the various persons involved. In order for law to be used as an instrument of conscious social change, some individual, individuals, or group must desire the change and use law as an instrument to effect that change. In a democracy the persons consciously desiring change may be a majority of the politically active people or an elite group of opinion leaders. In an authoritarian government the primary power-holder or power-holders may be the persons desiring change. In any of these events there also will be various individuals who are to be changed by law. If relatively few individuals are to be changed and these are not in positions of power, they may be considered deviants, and law is being used to bring them into conformity with certain social standards. The standards which define their deviance<sup>95</sup> may be set by the whole society, or again by an elite group of opinion leaders or power-holders. It is unlikely that a few individuals or a small group would use law as an instru-

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produces or ought to produce justice and justice as that which positive law produces or ought to produce, *i.e.*, that positive law is a means to an end and that its end is justice.

J. SALMOND, ON JURISPRUDENCE 60-65 (12th ed. P. Fitzgerald ed. 1966) lists achieving justice among three functions and purposes of law. P. SAYRE, PHILOSOPHY OF LAW 50 (1954) finds that the end of law is justice and not a logical system of legal relations. A. TROLLER, THE LAW AND ORDER 27 (1969) concludes that "[t]he purpose of legal order, then, is to further that virtue [justice], to achieve justice, to give to each man what is his due." Radin, *The Goal of Law*, 1951 WASH. U.L.Q. 1-29 *passim* states that the goal of law is justice. M. RADIN, LAW AS LOGIC AND EXPERIENCE 141 (1940) likewise indicates that the goal or purpose of law is to achieve justice. E. MÁYNEZ, *supra* note 2, at 500-04 finds that the end of law is the realization of justice, which is objective, immutable, everywhere the same, and a relation (like equality) with two aspects: (1) subjective or individual (virtue) and (2) objective or social (social justice). R. VON IHERING, LAW AS A MEANS TO AN END 139 (1913) concludes that the function of reward and punishment, which are the two egoistic social levers, is realization of the idea of justice.

On seeking justice, see, *e.g.*, E. BODENHEIMER, *supra* note 70, at 211 that "a legal system, in order to fulfill its function properly, must aim at the creation of order as well as the realization of justice." See also *id.* ch. XI on "The Quest For Justice." F. GÉNY, *supra* note 47, at 14 concludes that "laws should tend toward realizing, in the life of humanity, on the one hand an ideal of justice, on the other an ideal of utility."

<sup>95</sup> The function of social standards in defining deviance is just beginning to be recognized. See, *e.g.*, E. SCHUR, LAW AND SOCIETY 154-57 (1968); H. BECKER, OUTSIDERS (1963).

ment to change themselves. However, a predominant majority of society might use law to change a small group of deviants, and might even use law to change society itself. In any event those actually making laws or operating legal institutions are likely to constitute an elite group; but while holding such status they may nonetheless be mere agents of the great masses of society who may be the motive force in using law for purposes of change.

The social change which law is used to produce may, in turn, be of the systemic or non-systemic type.<sup>96</sup> Systemic change requires a transition to a new social system, *i.e.* a new self-sufficient system of social interaction. Non-systemic change involves mere accommodation of the existing system of action to new circumstances. However, the definition of function adopted here prevents systemic change, for the time being, from being included in the rubric of functions of law in modern society. By our definition, a major function is one which significantly contributes to a certain type of society: the end-in-view here is an ideal modern Western European society. Therefore, using law for change to some other type of society cannot qualify under our terms. For example, the use of law during the dictatorship of the proletariat in Marxist theory, to achieve the withering of the state and an eventual communist ideal society, would not satisfy this limited definition,<sup>97</sup> even though the

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<sup>96</sup> T. PARSONS, *THE SOCIAL SYSTEM* 480 (1951) draws a distinction between "processes of change within social systems" and "processes of change of social systems as systems." There may be only one ever-changing social system from the broadest possible perspective. But the distinction of Professor Parsons at least implies several different major types of social system and is useful for more precise analysis. Identification of these types depends on the definition of social system or society. According to *id.* at 5-6 "a social system consists in a plurality of individual actors interacting with each other in a situation which has at least a physical or environmental aspect, actors who are motivated in terms of a tendency to the 'optimization of gratification' and whose relation to their situations, including each other, is defined and mediated in terms of a system of culturally structured and shared symbols." Similarly D. MARTINDALE, *SOCIAL LIFE AND CULTURAL CHANGE* 32-33 (1962) defines society (or community) as "a complete system of social interaction, *i.e.*, a set of social groups sufficiently comprehensive to solve for a plurality of individuals all the problems of collective life falling in the compass of a normal year and in the compass of a normal life." The definition of Aberle, Cohen, Davis, Levy & Sutton, *The Functional Prerequisites of a Society*, 60 *ETHICS* 101, often quoted, is that "[a] society is a group of human beings sharing a self-sufficient system of action which is capable of existing longer than the life-span of an individual, the group being recruited at least in part by the sexual reproduction of the members." (Emphasis in original). See Lewis, *supra* note 22, at 379, n.84. Such definitions of society allow for different types of social system and therefore the possibility of change from one society or social system to another. The distinction between change within a social system and change of a social system is the distinction between behaving and becoming on the social system level. Behaving involves short-term reversible changes and becoming involves long-term irreversible changes. *Id.* at 382.

<sup>97</sup> For the example in Marxist theory of systemic change from bourgeois society to communism, see, *e.g.*, D. Funk, *Law as Schoolmaster: Rule of Law Implications and So-*

analogy may be sufficiently close to warrant comparison of these two uses of law for social change within a broader set of terms.

The process of change itself may be viewed from at least two different perspectives. Viewed from within the system, non-systemic change qualifies as change. However, from outside the system, non-systemic change is seen as mere accommodation to changes in the environment necessary to enable the system as a whole to remain basically unchanged.<sup>98</sup> Moreover, non-systemic change may consist of social change not resulting in a new system of social interaction, or merely change of deviant individuals to bring them into conformity with generally accepted and relatively unchanging social norms.

In any event, to say that law may change society or individuals, is to place some faith in the efficacy of rules or institutions or both as agents of change.<sup>99</sup> This in turn implies that man may control his destiny to some extent and, therefore, is not totally subject to impersonal forces of history or a superhuman will.

Various general terms have been used by jurists to describe how law may effect change. Some emphasize the rechanneling of conduct along new lines,<sup>100</sup> or refer to law as an "instrument for conscious shaping."<sup>101</sup> It has been said that law may redistribute social forces<sup>102</sup> and even that it is one of the greatest forces of social change.<sup>103</sup> Finally, this use of law has been characterized

viet Theory, *passim*, 1968 (unpublished thesis in the Ohio State University Library and Harvard Law School library). In contrast, changes which took place in the United States during the presidency of Franklin D. Roosevelt were merely accommodations to particular economic conditions and not systemic change as that term is used here.

<sup>98</sup> The text accompanying note 25 *supra* applies the term "ultrastability" to this condition.

<sup>99</sup> For a theoretical model of how legislation may influence behavior, see Stjernquist, *How Are Changes in Social Behavior Developed by Means of Legislation?* in LEGAL ESSAYS: A TRIBUTE TO FREDERICK CASTBERG 153-69 (1963).

<sup>100</sup> Llewellyn, *supra* note 60, at 199; Llewellyn, *Law and the Social Sciences — Especially Sociology*, *supra* note 69, at 359.

<sup>101</sup> K. LLEWELLYN, *THE BRAMBLE BUSH* 9 (1960).

<sup>102</sup> N. TIMASHEFF, *supra* note 24, at 330 states that "[f]rom the individual's viewpoint, the most general function of law is the redistribution of forces within society." Friedmann, *The Role of Law and the Function of the Lawyer in the Developing Countries*, 17 VAND. L. REV. 181, 183 (1963) finds an example in developing countries and concludes that "[l]aw in such a state of social evolution is less and less the recorder of established social, commercial, and other custom; it becomes a pioneer, the articulated expression of the new forces that seek to mold the life of the community according to new patterns."

<sup>103</sup> Jones, *supra* note 82, at 135 claims that "[t]hroughout recorded history, law itself has been one of the greatest of the forces of social change." Cf. Simpson & Field, *Social Engineering Through Law: The Need for a School of Applied Jurisprudence*, 22 N.Y.U.L.Q. REV. 145 (1947). There, it is said that "[l]aw is man's principal peaceful

as social engineering.<sup>104</sup>

The idea that law may be used to change individuals has a long history in jurisprudence. In the Greek *polis* the citizen was to become trained by habit in the spirit of its laws.<sup>105</sup> The philosopher kings of Plato, once they had made a clean slate of the existing state and manners of men, were to remake men through legislation.<sup>106</sup> Aristotle, after observing that men become just by doing just acts, concluded that "[t]his is confirmed by what happens in states; for legislators make the citizens good by forming habits in them . . ."<sup>107</sup> In the Middle Ages, St. Thomas Aquinas declared that "[t]he purpose of human law is to lead men to virtue . . ."<sup>108</sup> Later Rousseau relied on the legislator to change human nature.<sup>109</sup> Though

means of controlling his collective social environment." See also C. HOWARD & R. SUMMERS, *supra* note 73, at 341-42. The authors there state that "[t]he formulation and administration of substantive social policy toward social change is a distinct function of law."

<sup>104</sup> 3 R. POUND, *supra* note 52, at 311 includes social engineering as part of the social interest in general progress. Cf. R. POUND, *supra* note 2, at 47. Pound declares:

. . . I am content to see in legal history the record of a continually wider recognizing and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and precluding of friction in human enjoyment of the goods of existence — in short, a continually more efficacious social engineering.

Friedmann, *supra* note 102, at 185 claims that the legal scholar should assess the legal system as a tool of social engineering. Chroust, *The Managerial Function of Law*, 34 B.U.L. REV. 261, 265 (1954) sees law in its second aspect as "an instrument for ordering certain aspects of human conduct through social planning and social engineering." Podgorecki, *Law and Social Engineering*, 21 HUMAN ORGANIZATION 177-81 (1962) includes a theoretical discussion of this subject from the Polish point of view.

<sup>105</sup> E. BARKER, GREEK POLITICAL THEORY 41-46 (1960). C. FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 13-26 (2d ed. 1963).

<sup>106</sup> Plato, *The Republic* in 2 THE DIALOGUES OF PLATO 73 (B. Jowett transl. 4th ed. 1953).

<sup>107</sup> Aristotle, *Ethica Nicomachea*, in 9 THE WORKS OF ARISTOTLE 1103b (W. Ross transl. 1915). The passage concludes that "the things that tend to produce virtue taken as a whole are those of the acts prescribed by the law which have been prescribed with a view to education for the common good." *Id.*

<sup>108</sup> T. AQUINAS, SUMMA THEOLOGICA Q. 96, art. 2, reply obj. 2 (Benziger ed. Dominican transl. 1947). For a modern statement of this position see Brown, *Natural Law: Dynamic Basis of Law and Morals In the Twentieth Century*, 31 TUL. L. REV. 491, 493 (1957), that law should lead men to virtue "affirmatively by regulating human conduct so that men may habitually seek the ends in which their perfection will be found" and "negatively by restraining them from doing evil."

<sup>109</sup> J. ROUSSEAU, THE SOCIAL CONTRACT (G. Hopkins transl. 1962) 205, in discussing the legislator, observes that:

Whoso would undertake to give institutions to a People must work with full consciousness that he has set himself to change, as it were, the very stuff of human nature; to transform each individual who, in isolation, is a complete but solitary whole, into a part of something greater than himself, from which, in a sense, he derives his life and his being; to substitute a communal and moral

Marxism considered bourgeois law as mere superstructure, even that doctrine would rely on socialist law after the proletarian revolution, in order to prepare men for the withering away of the state.<sup>110</sup> Thus, using law to change individuals has a tradition almost as old as jurisprudence itself. Recent writers, however, describe this process in new terms and call it the educational function of law.<sup>111</sup> It has been said that legal institutions are to bring the level of social behavior up to the accepted standards of the law.<sup>112</sup> Sometimes it is contemplated that legal rules will accomplish this directly by altering human behavior.<sup>113</sup> Others are less optimistic but admit that legal rules can establish legal institutions which in turn effectuate change.<sup>114</sup> Thus, legal rules may operate directly on individuals or indirectly through institutions. But the notion that one function of law is to somehow bring about change is not new.

On the other hand, modern jurisprudential opinion is by no means unanimous concerning the educational possibilities of law. In fact, the legal scholar most often associated with the idea of social engineering has commented on the futility inherent in lawmaking which is intended to educate in the sense of setting up an ideal of what men ought to do rather than imposing a rule as to what they

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existence for the purely physical and independent life with which are all of us endowed by nature.

<sup>110</sup> D. Funk, *supra* note 97, *passim*.

<sup>111</sup> Berman, *supra* note 23, at 37-38 concludes that:

[A]t least one of the functions of criminal law is to teach people what is socially dangerous, that at least one of the functions of contract law is to teach people that contracts should be kept, that at least one of the functions of judicial procedure is to teach people that disputes should be settled peacefully and rationally, and that this educational function of law extends throughout law as a whole.

Brogan, *Law and Social Change In a Democratic Society*, 1956 ILL. L.F. 242, 246 discusses lawyers and the role of courts in the United States in matters of race discrimination as examples of the "educational role" of law. Selznick, *supra* note 46, at 50 claims law "promotes education and civic participation." Cf. C. HOWARD & R. SUMMERS, *supra* note 73, at 182. The authors distinguish the "educative function of law" from the "reinforcement function," and limit the former to mere knowledge of what to do and what not to do, as opposed to belief in the basic values reflected in law.

<sup>112</sup> E. ROSTOW, *THE SOVEREIGN PREROGATIVE* 4 (1962).

<sup>113</sup> Rose, *The Use of Law to Induce Social Change* in 6 *TRANSACTIONS OF THE THIRD WORLD CONGRESS OF SOCIOLOGY* 52, 62 suggests that increasing enforcement of a law designed to induce social change tends to shift opinion in the direction of acceptance, "as people have a tendency to adjust their opinions to their behavior — in other words, to rationalize what they must do." For a review of recent theories concerning this aspect of the educational function of law in the international field, see Funk, *International Law as Integrators and Measurement in Human Rights Debates*, 3 *CASE W. RES. J. INT'L L.* 123 (1971).

<sup>114</sup> Drot, *Law and Social Change* in *THE SOCIOLOGY OF LAW* 663, 673 (R. Simon ed. 1968) observes that "[l]aw plays an important indirect role in regard to social change by shaping various social institutions, which in turn have a direct impact on society."

shall do.<sup>115</sup> Professor Sumner is often quoted as saying that state-ways cannot change folkways, and this apparently reflects his position accurately over the short run at least.<sup>116</sup> There are some who doubt the ability of law, acting alone,<sup>117</sup> to stamp out opposing belief systems by force,<sup>118</sup> or to promote civilization directly.<sup>119</sup> Whether these pessimistic predictions will survive empirical testing remains to be seen. But in the present state of knowledge, it may be said that one of the major functions of law is to change society non-systemically, and to cause deviant individuals to conform to ends chosen by certain groups or individuals in society.

The seven major functions of law isolated and identified above should not be considered as completely independent variables. Each of them is related to all of the others through their common relationship to the total legal system, although they are not necessarily related to each other in the same ways. Law probably cannot carry out any of the seven functions without in some measure carrying out the others. For example, without legitimacy there can be no legal system to allocate, order, control, adjust conflicts, dispense justice, or change society or individuals. Without allocation of power there can be no control or adjustment of conflicts. Without dispensation of justice to some extent there can be no legitimacy or conflict adjustment, and without conflict adjustment there can be no ordering of society. Law cannot change society or individuals without legitimacy, allocation of power, order, control, conflict adjustment, and dispensing justice to some degree. On the other hand, law cannot carry out these seven functions fully in the sense of moving most rapidly toward an ideal modern Western European society, without using law to change society and at least some of the individuals in it. Admittedly this statement of the major functions of law and their interrelationships is only a preliminary one. But in time it may facilitate a more exact analysis of how these functions are interrelated and how each operates in society.

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<sup>115</sup> R. POUND, *THE TASK OF LAW* 88 (1944).

<sup>116</sup> Ball, Simpson & Ikeda, *Law and Social Change: Sumner Reconsidered*, 67 *AM. J. OF SOCIOLOGY* 532 (1962) claims that if enough time is allowed Professor Sumner would admit that law might be an instrument of social change.

<sup>117</sup> D. LLOYD, *supra* note 83, at 328, concludes that:

[D]oubts may reasonably be entertained whether modern society has not allowed itself to be carried away with a certain degree of enthusiasm, in yielding to the belief that man may be educated and his social progress assured by legislation alone.

<sup>118</sup> Skolnick, *Coercion to Virtue*, 41 *S. CAL. L. REV.* 588, 641 (1968).

<sup>119</sup> See E. BODENHEIMER, *supra* note 70, at 257, which states that: "[t]he law cannot, of course, directly initiate or promote the erection of the edifice of civilization . . . ."

### B. *Other Suggested Functions and Criticisms*

The seven major functions of law set out above are intended to be an empirically useful list of relatively independent functions of relatively equal generality. However, as others have admitted concerning their lists,<sup>120</sup> the exact number and division is a matter of convenience. Moreover, these seven functions are advanced for law in general and no attempt has been made to apply them to particular branches of law. Some writers have attempted to do so by including functions like recognition of ownership, provision for redress of harm, provision for redress of broken agreements, and reinforcement of the family.<sup>121</sup> Some go so far as to observe that each particular law may have its own individual function.<sup>122</sup> Presumably, general categories could be built up inductively from functions of particular laws, and theoretically they should match those derived deductively here. Verification of this relationship between these two fundamental approaches to scientific knowledge requires further inquiry.

At least one legal philosopher would include among functions of law the maintenance of legal craft skills necessary to keep the legal machinery operating.<sup>123</sup> But the definition of function adopted

<sup>120</sup> See, e.g., H. BERMAN, *supra* note 23, at 40, where it is stated that "[o]ther qualities and functions of law *could* be listed" in addition to resolving disputes, facilitating and protecting voluntary arrangements, molding and remolding the moral and legal conceptions of a society, and in the Western tradition, at least, to maintaining historical continuity and consistency of doctrine.

<sup>121</sup> These more specific functions are listed as some functions of private, as opposed to public, law in C. HOWARD & R. SUMMERS, *supra* note 73, at 103-206.

<sup>122</sup> *Id.* at 37.

<sup>123</sup> K. LLEWELLYN, *supra* note 60, at 200 suggests as the last major job of law in any group or in any society "the job of juristic method, that of building and using techniques and skills for keeping the men and machinery of all the law-jobs on their job and up to the job." The same author wrote in the same year that "machinery for stiffening character, for maintaining sensitivity and *responsive* responsibility, for building men up to this over-all job, can in important part be provided by a clear and transmissible *craft-tradition*." See also K. LLEWELLYN, *American Common Law Tradition and Democracy*, in JURISPRUDENCE 282, 287 (1962). K. LLEWELLYN, *Law and the Social Sciences — Especially Sociology*, in JURISPRUDENCE 352, 363-64 (1962) explains this further as follows:

It is the peculiar job of developing, maintaining, and bettering the craft know-how among the specialists engaged on any of the other jobs. For the basic jobs of an institution, its life-functions, can be handled either on a barebones level of just enough to keep the group or society from going under, or they can be handled on a high and successful level of questing for beauty, health, glory. And to achieve any portion of this latter, the know-how, the method, the reckonable tradition of the craftsmen, must be and stay itself on a high and successful level.

*Accord*, K. LLEWELLYN & E. HOEBEL, *supra* note 23, at 292-93. Cf. C. HOWARD & R. SUMMERS, *supra* note 73, at 209-26. The authors speak of "[p]reservation of the

here precludes consideration of this activity as a function of law. In order for law to have any functions, of course, there must be law. But the present inquiry into instrumental uses of law proceeds on the assumption that the legal system at least can maintain its identity. No doubt some of the energies in the legal system must be devoted to the maintenance of its own systemic character. This may be a law job in the sense of something that must be done in any legal system, and it may even be a necessary condition for the performance of any functions by the system. But this does not mean that legal system maintenance is a function of law in society according to the definition of function adopted here.

A similar objection applies to claims that one function of law is to preserve the *status quo*, if that means preservation of a particular set of social conditions as opposed to a doctrinal framework within which change toward the ideal may occur. The Greek idea was that the law's function was to preserve the *status quo* in the absolute sense.<sup>124</sup> The definition of function adopted here, however, allows either stability or change within the bounds of ideal modern Western European society. Whether change toward the ideal actually takes place depends on other societal factors in addition to the law's effects. Other writers have further suggested a less restrictive function of law to maintain historical continuity and consistency of doctrine.<sup>125</sup> In itself this function would not necessarily inhibit change and, in fact, it fits well with the ordering function of law. A framework within which change may take place actually enables change with a minimum of social friction. But maintenance of the *status quo* as such is too restrictive to be included as a function of law.

There may be minor functions of law which do not fit well within the categories listed above. For example, law may fulfill a need for ritual or ceremony in society. It has been said that law is "pri-

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existing legal system" as one of four functions of public law. Maintenance of legal craft skills is more appropriately included in the internal operation of the legal system and is a less significant component of an ideal modern Western European society than the procedural aspects of dispensing justice discussed in text accompanying note 93 *supra*. Hence it would be inappropriate to add "skillfully" to each of the other major functions of law or include maintenance of legal craft skills on the list of major functions with a special relationship to the others.

<sup>124</sup> R. POUND, *supra* note 2, at 37; 1 R. POUND, *supra* note 52, at 464. For a criticism of the "so-called conservative function of law," see J. Dabin, *supra* note 35, at 413-14, concluding:

The law has neither to conserve itself, in the sense of maintaining the legal status quo, nor to fight against life, once the change (supposing it depends on the will of men) offers nothing socially reprehensible. It would be better on the contrary to speak of a duty of adaptation and thus of renewal of the law.

<sup>125</sup> H. BERMAN, *supra* note 23, at 39, 277.



marily a great reservoir of emotionally important social symbols" and that "the function of law is not so much to guide society as to comfort it."<sup>126</sup> It is argued that people tend to construct in their minds little dramas in which they are the principal character, and when a person is satisfied with the role he has thus created he wants to believe that his conduct conforms to it. The words, ceremonies, theories, principles, and other symbols which men use in their conduct then aid their belief in the reality of their dreams. As applied to government, the argument continues that symbols include both ceremonies and the theories of social institutions. Thus, law is examined, not as a collection of truths, but as symbolic thinking and conduct which condition the behavior of men in groups.<sup>127</sup> The symbolic function of law has been observed especially in criminal law, where "a ritual act of expiation on the part of the guilty man" has been given as one of four competing justifications for punishment.<sup>128</sup> This argument has been rephrased in the view, espoused especially by certain psychoanalysts, that "the public trial and condemnation of the criminal serves the symbolic function of reinforcing the public sense that there are certain acts that are fundamentally wrong, [and] that must not be done."<sup>129</sup> These views are consistent with the notion that symbols are anything that recall or summarize experience.<sup>130</sup> In this sense the most widely known legal rules and events involving legal institutions do function to some extent as symbols. However, absent some convincing empirical evidence to the contrary, the symbolic function of law in this sense hardly seems as important a function of law in modern Western European society as the seven listed above.

Some discussions of the symbolic function of law use "symbol"

<sup>126</sup> T. ARNOLD, *supra* note 88, at 34.

<sup>127</sup> *Id.* at xiii-xv.

<sup>128</sup> N. WIENER, *THE HUMAN USE OF HUMAN BEINGS* 116-17 (1950).

<sup>129</sup> L. FULLER, *ANATOMY OF THE LAW* 48 (1968). "[M]en need to have their sense of guilt restored; they must be brought to see that certain things are fundamentally wrong and that it makes no difference how much company the criminal has in his wrong-doing." *Id.* at 49.

<sup>130</sup> Barkun, *Legal Innovation and Behavioral Change*, 53 *IA. L. REV.* 352, 353 n.1 (1967) defines a symbol as "anything that brings up from memory something felt, imagined, thought, or learned in the past, and consequently is a means of summarizing experience." This definition includes both the "referential symbols" and "condensation symbols" of J. EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964). *Cf.* K. DEUTSCH, *THE NERVES OF GOVERNMENT* 10 (1966). Deutsch declares that "[a] symbol is an order to recall from memory a particular thing or event, or a particular set of things or events." These definitions are broader than that in C. FRIEDRICH, *MAN AND HIS GOVERNMENT* 99 (1963), who includes only "signs for meanings transcending the empirical content," such as flags, coats of arms, signatures and the like.

in an even broader sense, in order to distinguish between the instrumental and symbolic functions of legal acts. Instrumental functions are said to depend for their effect on enforcement, whereas the importance of the symbolic function lies merely in the designation of public norms. Law is thus seen as symbolizing the public affirmation of social ideals and norms chosen by governmental officials from among those of one or another competing groups in society.<sup>131</sup> In essence this argument is similar to the view that law sets standards as guides for individual behavior regardless of the application of sanctions.<sup>132</sup> At least one system of jurisprudence has been built on the idea of law as a system of norms, *i.e.* of provisions as to how individuals ought to behave.<sup>133</sup> If the enunciation and application of these norms in legal institutions becomes widely known, then perhaps they may be considered symbolic acts for the society as a whole. This may occur, for example, in cases where the mass media have given wide news coverage to particular legal events. But the enunciation and application of most legal norms scarcely even comes to the attention of the general public. Hence it is difficult to see how ordinary legal activities may be considered symbolic to any significant degree for modern Western European society as a whole. It is true that legal norms may be promulgated to change individual behavior, to choose between competing interests, or to control members of society so as to preserve order without having to apply sanctions. But this does not necessarily mean that the norms are thereby fulfilling an important symbolic function in society.

An objection could be lodged against this entire effort to discover and state the major functions of law, on the ground that law is actually a relatively dependent factor in modern society. If this is so then law cannot have any major functions in the sense of having a significant effect on society. This objection has been epitomized in the couplet:

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<sup>131</sup> Gusfield, *supra* note 84, at 175-76.

<sup>132</sup> H. HART, *supra* note 54, at 38-39 claims that:

The characteristic technique of the criminal law is to designate by rules certain types of behavior as standards for the guidance of the members of society as a whole or of special classes within it: they are expected without the aid or intervention of officials to understand the rules and to see that the rules apply to them and to conform to them . . . [and thus] the law is used to control, to guide, and to plan life out of court.

<sup>133</sup> See, e.g., Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44-70 (1941).

Of all the ills that human hearts endure,  
How small that part which laws may cause or cure.<sup>134</sup>

For example, it has been asserted that "the change in the social functions of legal institutions takes place in a sphere beyond the reach of the law and eventually necessitates a transformation of the norms of the law."<sup>135</sup> The Marxist view that bourgeois law is mere superstructure leads to a similar conclusion.<sup>136</sup> Still another tradition finds that law primarily follows custom in society.<sup>137</sup> Moreover, the claim is sometimes made that law may serve *any* social objective,<sup>138</sup> thus implying that a search for a framework of particular functions of law would be pointless.<sup>139</sup>

These objections cannot be overcome in a purely theoretical essay. All that can be done here is to set out and analyze what appear to be the major functions of law in modern society and refer to any pertinent jurisprudential literature. Appropriate empirical tests are necessary to demonstrate more conclusively the adequacy or inadequacy of the functions advanced as explanations of the actual operation of law in modern society. On the other hand, theoretical essays claiming that greater explanatory capabilities can be found in economic factors, custom, or other social forces do not adequately demonstrate their explanatory power either. Similar empirical testing is required before these other factors should be accepted as the more significant variables. Meanwhile, refinement and analysis of the theoretical concepts involved should help to clarify the issues so that adequate testing programs may be designed. There have been

<sup>134</sup> T. UTLEY, WHAT LAWS MAY CURE 3 (1968) attributes this to Oliver Goldsmith, not Samuel Johnson as is widely believed.

<sup>135</sup> K. RENNER, THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS 52 (1949).

<sup>136</sup> See, e.g., MARX, *Preface to a Contribution To the Critique of Political Economy*, in 1 KARL MARX AND FRIEDRICH ENGELS: SELECTED WORKS 361, 363 (1962). See also MARX, *The Civil War in France*, in *id.* 473, 516; Engels, *Socialism: Utopian and Scientific*, in 2 *id.* 93, 135.

<sup>137</sup> W. SUMNER, FOLKWAYS 75 (1906); *but cf.* note 116 *supra*. Ehrlich, *Foreward* to E. EHRLICH, *supra* note 78 states:

At the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself.

<sup>138</sup> A. ROSS, ON LAW AND JUSTICE 327 (1959) rejects "the idea of a specific idea of law that gives to the law an absolute value of its own, and instead looks upon positive law as a social technique or as an instrument for social objectives of any kind (economic, cultural, political) . . . ."

<sup>139</sup> Dworkin, *Does Law Have a Function? A Comment on the Two-Level Theory of Decision*, 74 YALE L.J. 640-51 (1965) questions whether there is any overriding, forward-looking function of law, such as utility, that can test legal rules, but does not attempt to provide any answer to the query.

warnings of the complex interrelationships between law and society,<sup>140</sup> and formidable difficulties may be expected. Nevertheless it seems far better to have tried and failed than never to have tried to isolate and measure these variables. Otherwise pessimistic predictions of the impossibility of isolation and measurement must be accepted as mere doctrine.

### III. SOME SUGGESTIONS FOR EMPIRICAL RESEARCH

Once the major functions of law are identified and analyzed, specific questions may be formulated about them in preparation for empirical research. The legal system, of course, is only one sub-system within the total social system. Hence one set of questions may identify those functions performed primarily by law and those performed primarily by non-legal sub-systems. There is no reason to exclude a function from the functions of law merely because some non-legal sub-system may also perform it, even if the role of law is relatively minor in comparison. Ultimately, empirical testing will be required to estimate the relative efficacy of each sub-system in performing a specific function.

Perhaps some preliminary speculations on the outcome will encourage research of this type. Law may prove to carry the primary burden with respect to legitimizing, allocating governmental power, controlling, adjusting conflicts, and dispensing justice. Although religion was a primary legitimizer in some ancient societies, this is no longer true among Western European peoples. Of course, one kind of power is allocated by the economic system, but this only indirectly affects governmental power. Custom and the family also provide important frameworks within which many aspects of society are ordered, so law may not be the primary orderer. Finally, individuals and society may be changed by religion, education, and other non-legal forces, so law may not prove to be the primary force of social change. But regardless of the outcome it should be possible to design some measures by which various sub-systems may be compared in carrying out particular social functions.

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<sup>140</sup> N. TIMASHEFF, *supra* note 24, at 330 alludes to the prevalent theory that "in the interplay of various factors law plays simultaneously an active and a passive role. . . [*i.e.*] law is a function of social factors . . . [and] law possesses social functions, . . . [but] the relative strength of these two influences cannot be measured." W. FRIEDMANN, *LEGAL THEORY* 26-27 (5th ed. 1967) refers to "an increasingly active interrelationship between the legal and moral order" and says "we should think of a fluid interrelationship, variable with regard to the separation of interpenetration of the three spheres [law, morality, and ethics] according to the character of the society in question."

Empirical research could also measure the relative importance, in carrying out particular functions, of legal rules and legal institutions.<sup>141</sup> A few preliminary speculations on the results may suggest some specific projects along these lines. For example, legitimation could result primarily from the rules of constitutional law, whether promulgated by constitutional conventions or a customary process of acceptance. But, on the other hand, it may turn out that the convention or customary process as an institution is the real key to the acceptance of constitutional rules. Allocation of governmental powers and ordering may be accomplished primarily by legal rules as such. However, control of society seems to be a task for both rules and institutions. Conflict adjustment and dispensing justice are closely associated with adjudication and it may be expected that legal institutions are paramount in performing these functions. Yet, social changes seem to be accomplished both by rules and institutions. For example, the United States Supreme Court promulgates rules that have social effects extending beyond the process of adjudication which gives rise to them. However, the institutions established to deal specifically with labor disputes in the United States may have

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<sup>141</sup> The relative importance of legal rules and legal institutions in carrying out various functions of law, especially with respect to change, underlies the controversies which have arisen over codification. Codes emphasize the efficacy of rules, whereas allowing natural development of the law relies more on institutions reflecting the spirit of the people. For the debates between Professors Thibaut and Savigny concerning the German Civil Code, see, e.g., A GENERAL SURVEY OF EVENTS, SOURCES, PERSONS, AND MOVEMENTS IN CONTINENTAL LEGAL HISTORY 441-52 (1912). For analogous debates between Justice Field and James Coolidge Carter concerning the New York Code of Civil Procedure, see, e.g., Field, *Codification*, 20 AM. L. REV. 1-7 (1886); J. CARTER, THE PROPOSED CODIFICATION OF OUR COMMON LAW (1884); E. PATTERSON, JURISPRUDENCE 421-25 (1953). For general discussion of codification with specific reference to these debates, see, e.g., 3 R. POUND, *supra* note 52, at 675-738; C. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND (1897).

The relative importance of legal rules and legal institutions, particularly with respect to allocating governmental power in society, underlies the dispute over administrative agencies. The classic discussion of the rule of law as opposed to administration emphasized the type of tribunal involved — "the ordinary tribunals" as opposed to administrative bodies. A. DICEY, INTRODUCTION TO THE STUDY OF THE CONSTITUTION 193 (10th ed. 1959). Today the significant element is the relationship of rules to the result. The rules must be general enough to cover many specific cases but not so general as to constitute mere "general clauses." Regulations of administrative agencies may satisfy these general-specific requirements. On the other hand legislatures may operate "administratively" in enacting private legislation, as may courts in applying rules to the specific case at hand. D. Funk, *supra* note 97, at 11-24. For discussion of the proper role of rules as opposed to administrative discretion, see, e.g., Wigmore, *The Dangers of Administrative Discretion*, 19 ILL. L. REV. 440-41 (1925); Fuchs, *Concepts and Policies in Anglo-American Administrative Law Theory*, 47 YALE L.J. 538-76 (1938); Pound, *The Rule of Law and the Modern Social Welfare State*, 7 VAND. L. REV. 1-34 (1953); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 53-64 (1958); *id.*, 1970 SUPP. 1-39.

been more effective in changing attitudes than the mere rules they enforce. Finally, both legislation and adjudication may be used to change individual behavior. On one hand, laws may have the effect of self-fulfilling prophesies. But, in addition, courtroom procedures may be designed to have an educative effect on litigants. Again empirical research should develop measures to test speculations like these concerning the relative importance of rules and legal institutions in carrying out particular functions of law.

Empirical research may also be designed to determine the morphostatic or morphogenetic effects of particular functions of law. It has been said that legal theories at least tend to stress stability rather than change. This has been applied particularly to scholastic theories of natural law, historical jurisprudence, analytical positivism with its emphasis on logic and obedience to written law, and theories based on written constitutions.<sup>142</sup> At the same time, some natural law theories, utilitarianism, sociological jurisprudence based on interest balancing and social engineering, modern totalitarian theories, and theories based on unwritten constitutions are said to associate law and change.<sup>143</sup> Moreover, law itself has been characterized as an instrument of both stability and change.<sup>144</sup>

At first glance the ordering function of law would appear to be associated primarily with stability. But it has been noted that even this function facilitates the process of change by providing organization during a transition.<sup>145</sup> One key to understanding the interrelationship of stability and change in this context may be concealed in the particular concept of change which is usually implied. If the de-

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<sup>142</sup> W. FRIEDMANN, *supra* note 140, at 86-87. On the morphostatic character of law itself, see E. BODENHEIMER, *supra* note 70, at 237, which claims that "[w]hen a state of balanced power and social equilibrium has been achieved, the law will strive to protect it from serious disturbances and disruptions" and this is "one of the essential functions of the law." A. RODENBECK, *THE ANATOMY OF THE LAW* 49 (1925), concluded that "[t]he consideration of the functions of the law suggests the end or purpose of the law which is to find the center of gravity in governments, preserve societal equilibrium and avoid public and private warfare." H. BERMAN, *supra* note 23, at 34, includes as a primary function of law "restoring equilibrium to that social order (or some part thereof) when that equilibrium has been seriously disrupted."

<sup>143</sup> W. FRIEDMANN, *supra* note 140, at 86-87.

<sup>144</sup> N. TIMASHEFF, *supra* note 24, at 338 claims that "it is inaccurate to ascribe to law either a conservative or progressive tendency" and "[l]aw can be the instrument of stability as well as the instrument of change." H. BERMAN, *supra* note 23, at 13 observes that "law is an instrument not only for social change but also for social continuity."

<sup>145</sup> Jones, *supra* note 82, at 145 claims that law "must build on accepted foundations, [and] grow within a living tradition." C. HOWARD & R. SUMMERS, *supra* note 73, at 112 observes that "[o]ne function of law is to provide means for orderly social change."

sired end-state is complete anarchy, then perhaps organization during the transition does impede the process of change. However, the desired end-state is almost always some ideal ordering of society different from the present one. In that case maintaining some organization may actually aid transition to the new order. Even in Marxism the revolutionary movement may itself serve as an organized bridge between the old bourgeois society which is being destroyed and the new socialist society which is to arise from its ashes. If this is so, some stability becomes a necessary condition for social change, though not a sufficient one. Thus, functions of law which preserve stability may be considered indirect agents of change. The indirect aids to change hold society together so that the direct agents may actually move society toward the desired goal. On these assumptions, forces of stability and change are both necessary if the desired end-state is to be achieved. On the other hand, the negative feedback or the damping action of the stabilizing functions must not be so great as to completely cancel out the positive feedback of the morphogenetic functions.

Despite the symbiotic relationship of stability and change, it should be possible to separate morphostatic functions of law from morphogenetic ones for purposes of analysis. The first six major functions seem to be primarily morphostatic. This includes the legitimizing, power allocating, ordering, controlling, conflict adjusting, and justice dispensing functions. To the extent that law merely changes deviant individuals to conform to majority standards, it may be considered morphostatic. On the other hand, to the extent that law changes the majority of individuals or society itself, it should be considered morphogenetic. Empirical research should indicate whether these speculations are correct and, if so, to what degree.

Admittedly the broad deductive approach used in this article has certain limitations. More specific analysis of particular groups of legal rules or legal institutions may reveal additional functions that do not fit well within the major categories for law in general, as well as more specific examples of these general functions in specific fields of the law.<sup>146</sup> Moreover, the practical considerations involved in using law for various purposes may turn out to be significant.

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<sup>146</sup> See, e.g., H. MANNHEIM, CRIMINAL JUSTICE AND SOCIAL RECONSTRUCTION vii (1946). The author declares that "[i]t is one of the most important functions of Criminal Justice to play some part in the great task of Education for Citizenship." See also Litwak, *Three Ways In Which Law Acts As a Means of Social Control: Punishment, Therapy, and Education — Divorce Law As a Case in Point*, 34 SOCIAL FORCES 217-23 (1956).

For example, Dean Pound suggests the following as limitations on the usefulness of law as an agency of social control: first, "the necessity which the law is under, as a practical matter, of dealing only with acts, of dealing with the outside, not the inside, of men and things"; second, "the limitations inherent in the legal sanctions — the limitations upon coercion of the human will by force"; and third, "the necessity which the law is under of relying upon some external agency to put its machinery in motion, since legal precepts do not enforce themselves."<sup>147</sup> Similar considerations may be recognized in the process of specific research design or in the research itself.

The construction of a juridical science cannot stop with mere theory. Ultimately the need is for "efficacy research"<sup>148</sup> to ascertain how law actually performs its major functions. Existing empirical impact studies may be seen as the beginnings of this type of inquiry. For example, one function of United States Supreme Court decisions is to maintain the legitimacy of the Court itself. Surveys of public attitudes toward the Court should indicate how well the Court is performing this function, as well as whether public opinion simply agrees or disagrees with particular decisions.<sup>149</sup> Similarly, Supreme Court decisions on first amendment freedoms may be seen as allocations of power between governments and private citizens. Hence impact research concerning school prayer<sup>150</sup> and obscene literature<sup>151</sup>

<sup>147</sup> R. POUND, *supra* note 115, at 72.

<sup>148</sup> H. JONES, *THE EFFICACY OF LAW* 63 (1969) observes:

Efficacy research, that is, close empirical study of the influence legal precepts are having on actual behavior in society, is what we need for evaluation of the contemporary legal system . . . .

A similar point was made almost forty years earlier in A. KOCOUREK, *AN INTRODUCTION TO THE SCIENCE OF LAW* 43 (1930) as follows:

The object of Constructive Jurisprudence is to be able to state the social effects of law and to be able to achieve desired social effects by scientific legislative methods. For this purpose, existing rules and institutions are investigated and the effects produced on social practices are noted as a basis of generalizations concerning the probable efficacy of legislation.

<sup>149</sup> See, e.g., Dolbeare, *The Supreme Court and the States: From Abstract Doctrine to Local Behavioral Conformity*, in *THE IMPACT OF SUPREME COURT DECISIONS* 206-13 (T. Becker ed. 1969); Dolbeare, *The Public Views the Supreme Court*, in *LAW, POLITICS AND THE FEDERAL COURTS* 194-212 (H. Jacob ed. 1967); Murphy & Tanenhaus, *Public Opinion and the United States Supreme Court: A Preliminary Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, in *FRONTIERS OF JUDICIAL RESEARCH* 273-303 (J. Grossman & J. Tanenhaus eds. 1969); Barth, *Perception and Acceptance of Supreme Court Decisions at the State and Local Level*, 17 J. PUB. L. 308-50 (1968); Kessel, *Public Perceptions of the Supreme Court*, 10 *MIDWEST J. POL. SCI.* 167-91 (1966).

<sup>150</sup> See, e.g., Patric, *The Impact of a Court Decision: Aftermath of the McCollom Case*, 6 J. PUB. L. 455-64 (1957); Sorauf, "Zorach v. Clauson": *The Impact of a Supreme Court Decision*, 53 *AM. POL. SCI. REV.* 777-91 (1959); Birkby, *The Supreme Court and the Bible Belt: Tennessee Reaction to the "Schempp" Decision*, 10 *MIDWEST J.*



decisions should show the effects of these allocations. Various impact studies have dealt with the efficacy of legal ordering frameworks for business activities.<sup>152</sup> So far, empirical studies have dealt more frequently with the function of law to control individual behavior rather than any of the other major functions. Much of this research assesses the effectiveness of criminal penalties,<sup>153</sup> especially those for traffic offenses,<sup>154</sup> though other attempts to control individual behavior have been evaluated.<sup>155</sup> While one existing study may be considered an assessment of the efficacy of law in adjusting conflicts,<sup>156</sup> another

POL. SCI. 304-17 (1966); Johnson, *Compliance and Supreme Court Decision-Making*, 1967 WIS. L. REV. 170-85; W. MUIR, JR., *PRAYER IN THE PUBLIC SCHOOLS* (1968); Reich, *Schoolhouse Religion and the Supreme Court: A Report on Attitudes of Teachers and Principals and on School Practices in Wisconsin and Ohio*, 23 J. LEGAL ED. 123-47 (1971).

<sup>151</sup> See, e.g., Levine, *Constitutional Law and Obscene Literature: An Investigation of Bookseller Censorship Practice*, in *THE IMPACT OF SUPREME COURT DECISIONS* 129-48 (T. Becker ed. 1969); Levine, *The Supreme Court and Sex Censorship: A Study of Judicial Efficacy*, in *THE AMERICAN POLITICAL ARENA* (J. Fiszman ed. forthcoming).

<sup>152</sup> See, e.g., W. HURST, *LAW AND ECONOMIC GROWTH* (1964), which studied dam franchises as an ordering system to provide stable expectations so that stream use could be increased; Levine, *Is Regulation Necessary: California Air Transportation and National Regulatory Policy*, 74 YALE L.J. 1416-47 (1965), which studied air rate regulation as a requirement for an orderly market in air transportation; L. FRIEDMAN, *GOVERNMENT AND SLUM HOUSING* (1968), which studied housing regulations as an ordering system affecting entry into the business of supplying low-income housing; Shay, *The Impact of the Uniform Consumer Credit Code Upon the Market for Consumer Installment Credit*, 33 LAW & CONTEMP. PROB. 752-64 (1968).

<sup>153</sup> See, e.g., Tittle, *Crime Rates and Legal Sanctions*, 16 SOCIAL PROBLEMS 409-23 (1969); Samuelson, *Why Was Capital Punishment Restored in Delaware?*, 60 J. CRIM. L.C. & P.S. 148-51 (1969); Biddle, *A Legislative Study of the Effectiveness of Criminal Penalties*, 15 CRIME & DELINQUENCY 354-58 (1969); Gray & Martin, *Punishment and Deterrence: Another Analysis of Gibbs' Data*, 50 SOCIAL SCI. Q. 389-95 (1969); Lovald & Stub, *The Revolving Door: Reactions of Chronic Drunkenness Offenders to Court Sanctions*, 59 J. CRIM. L.C. & P.S. 525-30 (1968).

<sup>154</sup> See, e.g., W. MIDDENDORFF, *THE EFFECTIVENESS OF PUNISHMENT* (1968); Moore & Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L.J. 1-136 (1943); Chambliss, *The Deterrent Influence of Punishment*, 12 CRIME & DELINQUENCY 70-75 (1966); Andrenas, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949-83 (1966); Campbell & Ross, *The Connecticut Crackdown on Speeding: Time-Series Data in Quasi-Experimental Analysis*, 3 LAW & SOC'Y REV. 33-53 (1968); Feest, *Compliance With Legal Regulations: Observation of Stop Sign Behavior*, 2 LAW & SOC'Y REV. 447-61 (1968); Ross, Campbell & Glass, *Determining the Social Effects of a Legal Reform: The British "Breathalyzer" Crackdown of 1967*, 13 AM. BEHAVIORAL SCIENTIST 493-509 (1970).

<sup>155</sup> See, e.g., Schwarz & Orleans, *On Legal Sanctions*, 34 U. CHI. L. REV. 274-300 (1967), concerning compliance with income tax laws; M. CLINARD, *THE BLACK MARKET* (1952), concerning compliance with price regulations; Chilton, *Social Control Through Welfare Legislation: The Impact of a State "Suitable Home" Law*, 5 LAW & SOC'Y REV. 205-24 (1970), concerning denial of aid to dependent children benefits as an incentive to moving children to more suitable homes.

<sup>156</sup> Whitford, *Strict Products Liability and the Automobile Industry: Much Ado About Nothing*, 1968 WIS. L. REV. 83-171.

bears indirectly on the effectiveness of law in dispensing justice.<sup>157</sup> Most of the empirical work to date on law as an agent of change has dealt with legally induced change in individual attitudes toward Negroes.<sup>158</sup> However, a few studies have dealt with the efficacy of law in changing individuals in other respects.<sup>159</sup> Finally, there is at least one empirical attempt to study the function of law to facilitate change from one basic type of social system to another.<sup>160</sup>

Thus, existing empirical studies of the general impact of law on society<sup>161</sup> may be considered more specifically as tests of the efficacy of law in performing one or another of its major functions. Reviewing these studies from such a perspective illustrates one application

<sup>157</sup> Zeitz, *Survey of Negro Attitudes Toward Law*, 19 RUTGERS L. REV. 288-316 (1965).

<sup>158</sup> See, e.g., M. BERGER, *EQUALITY BY STATUTE* (1962); L. MAYHEW, *LAW AND EQUAL OPPORTUNITY* (1968); F. WIRT, *POLITICS OF SOUTHERN EQUALITY* (1971); Blumrosen, *Antidiscrimination Laws in Action in New Jersey: A Law-Sociology Study*, 19 RUTGERS L. REV. 189-287 (1965); Schwarz, *Comparative Analysis of the Eight Cities*, 2 LAW & SOC'Y REV. 89-104 (1967).

<sup>159</sup> See, e.g., Aubert, *Some Social Functions of Legislation*, in CONTRIBUTIONS TO THE SOCIOLOGY OF LAW 98-120 (B. Blegvad ed. 1966); Kaufmann, *Legality and Harmfulness of a Bystander's Failure to Intervene as Determinants of Moral Judgment in ALTRUISM AND HELPING BEHAVIOR* 77-81 (J. Macaulay & L. Berkowitz eds. 1970); Berkowitz & Walker, *Laws and Moral Judgments*, 30 SOCIOMETRY 410-22 (1967); Funk, *supra* note 113.

<sup>160</sup> See, e.g., Bentzon, *The Structure of the Judicial System and Its Function in a Developing Society*, in CONTRIBUTIONS TO THE SOCIOLOGY OF LAW 121-46 (B. Blegvad ed. 1966).

<sup>161</sup> Empirical studies of the impact of law on the legal system itself have been considered above as "black box research" and not impact research. See Jones, *Impact Research and Sociology of Law: Some Tentative Proposals*, 1966 WIS. L. REV. 331, 339. Impact research investigates the effects of events within the legal system on the social system. *Id.* at 331. See also Lempert, *Strategies of Research Design in the Legal Impact Study: The Control of Plausible Rival Hypotheses*, 1 LAW & SOC'Y REV. 111 (1966). Examples of "black box" studies are: Souris, *Stop and Frisk or Arrest and Search — The Use and Misuse of Euphemisms*, 57 J. CRIM. L.C. & P.S. 251-64 (1966) (concerning the Escobedo rules); Bordua & Reiss, *Law Enforcement*, in THE USES OF SOCIOLOGY 275-303 (P. Lazarsfeld, W. Sewell & H. Wilensky eds. 1967) (concerning Miranda requirements); Wald, Michael, et al., *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519-1648 (1967); Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capitol: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347-1422 (1968); Milner, *Comparative Analysis of Patterns of Compliance With Supreme Court Decisions: "Miranda" and the Police in Four Communities*, 5 LAW & SOC'Y REV. 119-34 (1970); N. MILNER, *THE COURT AND LOCAL LAW ENFORCEMENT* (1970) (concerning Miranda requirements); S. NAGEL, *THE LEGAL PROCESS FROM A BEHAVIORAL PERSPECTIVE* 294-320 (1969) (concerning the effects of excluding illegally seized evidence); Zeisel, *Optional vs. Obligatory Pre-Trial*, 4 TRIAL 11-12 (1967-68) (concerning the effect of the New Jersey pre-trial experiment); and Zeisel, *The Law*, in THE USES OF SOCIOLOGY 81-99 (P. Lazarsfeld, W. Sewell & H. Wilensky eds. 1967) (concerning the Manhattan bail project). These studies are useful in understanding the operation of the legal system; however, studies of the impact of law on society are more relevant to verifying the major functions of law in modern society.

of the theoretical analysis of seven major functions of law in modern society. Applying this theoretical framework reveals the relative strength or weakness of existing empirical inquiries into particular functions. Perhaps further application of the same framework will suggest hypotheses for future empirical testing to fill the gaps in this area of juridical science. If so, then the major function of this article will have been fulfilled.