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What is sociology of law? (On law, rules, social control and sociology)

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ABSTRACT

In this essay, I recapitulate and reformulate an oft-interrupted conversation I have had with myself and with many others during the past more than half-century. The conversation concerns sociology of law and the question around which it has circled is this: "What is sociology of law?" and – implied in that question – is such a thing possible?

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INTRODUCTION

Anyone who has ever introduced himself as a sociologist of law – on occasions as disparate as a cocktail party or an academic encounter with a colleague from another discipline – knows how difficult it is to answer the innocent question: "What is sociology of law?" Apparently most people do not have the same ready mental picture of such an occupation as they do of farming or lawyering or even of physics. As simple as the innocent question sounds, giving anything like a satisfactory answer to it is not easy and the attempt has rarely been made.[1] In this essay, I make such an attempt, proceeding on the assumption that sociology of law is a part of social science generally and that the fundamental assumptions and principles of (social) science therefore apply. It should be emphasized that in this essay, I make no original contribution to theory itself: the essay is metatheoretical, that is, it concerns the criteria according to which every theoretical contribution to sociology of law should be assessed.

1. TO WHAT QUESTION IS SOCIOLOGY OF LAW ADDRESSED?

Gertrude Stein, shortly before her death, to Alice B. Toklas: What is the answer? Toklas remains silent. Stein: In that case, what is the question?[2]

All scientific work begins with a question about the world we live in. Scientific disciplines are defined by the sorts of questions they seek to answer. Questions go before concepts or

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theory or methods, and until one has settled on the sort of question one is dealing with, no sensible discussion of such matters is possible. For example:

- Whether "sociology of law" is part of the study of "law", or rather belongs among the social sciences ("sociology", "economics" or "psychology") depends on the sorts of questions it is taken to address. Thus the idea of "relational contract" – deriving from Macaulay's writings about contracting practices among businessmen[3] – has two subsequent histories depending on the question those who invoke his work are interested in. Among contract scholars, the question concerns contract doctrine (should the law take account of the nature of the relationship – long-term or one-off – between contracting parties?[4]). By contrast, from a sociological perspective, the question is a theoretical one concerning the importance of the relationship between the parties (and their relationships with third parties[5]) for the way they in fact use contract law. Nothing but confusion can arise when such questions are not distinguished.
- Whether "law" should be defined as the "commands of the sovereign" (or some more modern equivalent) or as a sort of "social control" depends on whether one is interested in what the traffic rules of English law are, or in how social order is maintained on English roads.
- What methodology is appropriate in studying law depends on whether one seeks to apply it, to compare it with the law in other social groups, to understand how it came to be what it is and what people think about it, or to ascertain what effects it has on behavior and how such effects come about.[6]

Black, who almost alone among sociologists of law has thought seriously about such matters, argues that every scientific discipline is defined by its dependent variables and that the sociology of law, properly so called, has as its dependent variable "the behavior of law" (in particular, the "quantity of law").[7] Since he defines "law" for his purposes as "governmental social control", the central question of Black's approach to sociology of law is this: *How can variation in the quantity of governmental social control be explained?* Why, for example, do some sorts of people and some sorts of relationships attract more governmental social control than others? One of the propositions of Black's theory is that the quantity of governmental social control in a particular case varies with the "relational distance" between the persons involved: close relationships attract little "law". This, and the proposition that "law" varies with "stratification" (inequality of wealth),[8] another of Black's propositions, are his way of formulating two general theoretical ideas in the sociology of law that enjoy a great deal of empirical support.

Relational distance: *The "social distance" between members of a group – their direct or indirect dependence upon one another. Relational distance is a function of the number, degree of overlapping and strength of social bonds (cf. Black 1976, 40–41). The basic idea goes back at least as far as Durkheim's (1964a) distinction between "organic" and "mechanical" solidarity and has a considerable theoretical and ethnographic history, especially in the anthropology of law.*[9]

Black's central question – explaining the quantity of governmental social control – is plainly an interesting and important one. That one can have serious reservations about some aspects of his theory, as he formulates it, does not diminish the respect one must have for the single mindedness with which he defines his discipline in terms of a central question and, in working out his theory, continually strives to keep concepts, theoretical propositions and methodology subservient to that question.

Black's central question, however, is fundamentally different from the question that – for reasons to be developed in this essay – I take to be the key to a sociological science of law. Black does not believe that legal rules – considered as independent variables – help explain the sort of variation he is interested in (for example, how likely it is that the police will arrest a given person[10]). Rules, therefore, play at most a marginal role in his "theory of law". By contrast, in my view, the proper subject of the sociology of law is social control, "legal" or otherwise, and more specifically: *rule-following.*[11] The central, defining question of the sociology of law is as follows:[12]

Under what circumstances do people follow (legal) rules?

Whether or not Black's exclusion of rules from his theory is tenable (I believe it is not[13]), it does entail that "sociology of law" in his sense and in mine are two quite different enterprises.

1.1. Differing "perspectives" on law

I can very clearly explain what a 'catholic' is. This is because as a sociologist I look at the church as if I were a non-believer. This does not mean that I ***am*** *a non-believer.*[14]

The character of the fundamental question or collection of questions that defines a scientific discipline is often loosely referred to as constituting a "perspective" that one can adopt concerning the subject matter of the discipline. One can look at nature, for example, from the perspective of a natural science but also from a religious (in terms of creation), an aesthetic (in terms of natural beauty), or a moral (in terms of environmentalism) perspective. The questions asked from these different perspectives differ fundamentally; they bring with them different concepts, criteria for the truth of assertions, and research methods.

In the case of "law", the most important difference of perspective, for my purposes, is what H. L. A. Hart in *The Concept of* Law (1961) describes with the dichotomy "internal" and "external".[15] The "internal perspective" is that of the members of a social group concerning its "law". The questions they ask, debate and answer concern the way in which behavior is regulated by the legal rules of their group, what the legal consequences are of particular sorts of behavior and so forth. These questions engage both laypersons and, if the group has them, legal specialists (lawmakers, judges, lawyers). In seeking to establish what the applicable legal rule is in a given situation and what its legal consequences are, legal specialists use more or less arcane methods of "legal reasoning" and have more or less exclusive access to special sources of information. Except in a situation of anarchy or revolution there will necessarily be a workable level of general agreement among the general public about what questions are "legal" and hence to be decided by specialists, and among the specialists about the criteria for assessing the truth of a statement that the legal rule about a given matter is R and not Q.[16] In circumstances of anarchy or revolution, a

workable level of agreement being absent, the participants' only recourse is not to law but to force.

External and internal perspectives on law: An external perspective on law is not necessarily empirical, and the external empirical perspective of sociology of law must be distinguished from an external moral perspective. In the latter case, the criteria of "critical morality" are used to come to judgments about law generally or about a particular legal arrangement. Natural Law, Utilitarianism and Social Contract theories are frequently used to this end (e.g. respectively, d'Entrèves 1970; Singer 1975; Rawls 1972). Of course, information and insight deriving from an external empirical perspective may be relevant for an external moral judgment – as in the case of Utilitarianism.

The formulation of a question (or a statement in answer to an implicit question) does not always reveal the perspective to which it belongs. Thus the statement "logical consistency is an important principle of German law" can be understood from the external perspective as an observed feature of German law, and from the internal perspective as the invocation of a guiding ideal in German legal decision-making. A similar ambiguity attaches to the statement "A and B were divorced in 1975": this can be a characterization of certain observations, or a shorthand way of invoking certain legal consequences (e.g. the possibility of remarriage). Interpretation of such statements requires that one specify the relevant perspective.

The distinction internal/external is furthermore a relative one. From the perspective of the sociology of law, statements about "law" are external relative to the internal perspective of a participant. But from the perspective of the sociology of science, the very same statements would be internal statements made by participants in the sociology of law.

The "internal" perspective is characteristic of, but not limited to, participants: anyone who is interested in what the law of a society other than his own "is" must act as a virtual participant in order to find out. If a person who is not a French lawyer wants to know what French law is concerning, for example, organ transplantation, she must use the same concepts, ask the same questions, consult the same (for the French) authoritative sources, ignore the same "irrelevant" considerations, and make the same informed guesses that a French lawyer would.[17] Comparative lawyers practice such "virtual insiderness" for a living.

On the other hand, the "external" perspective is that of an outsider, although – like Goddijn (quoted above) – someone who is in fact a participant can adopt the perspective of an outsider. Such a detached observer of legal behavior can take note of the fact that in his own or any other society, legal (and other) rules are produced, followed, interpreted and applied, and enforced, and that all this has consequences.

In describing the law of a society whose internal perspective on its law he does not (at least for present purposes) share, an observer will generally make use of concepts – such as "law" – that derive from the language of actors whose perspective is internal: that is, of actors who are native speakers in his own society or in the society he is observing, or in some third society (as in the case of the use for "external" purposes of terms derived from Roman Law[18]). The use for external purposes of concepts proper to the internal perspective (in particular, the concept "law") has often been a source of confusion precisely because the meaning of concepts is one of the things that depend on the sort of question one seeks to answer, and internal questions are different from external ones.[19]

1.2. "External" questions about law

Hart (1961) distinguishes two different sorts of external question ("moderate" and "extreme") about law, depending on whether or not the perspective adopted takes account of the fact that participants in the behavior concerned themselves have an internal perspective on their use of rules. Essentially alone among sociologists of law, Black does his best to adopt what Hart calls the "extreme external point of view"[20] and altogether to exclude rules, rule-following and the existence of an internal perspective from the sociology of law. In *The Behavior of Law* (1976), Black defines law as "governmental social control", that is (in his terms), the behavior of government officials such as policemen and judges.[21] In a review of Black, van Maanen, many years ago, noted the impossibility of such an approach, which depends on being able to distinguish official from non-official behavior without any reference to rules. As van Maanen observed, "not everyone with a policeman's hat on his head is a policeman".[22] Without reference to (legal) rules, it is not possible to distinguish "government officials" from other people nor "social control" from other behavior. Fundamental social categories – "property", "agreement", "official", and as we will see in Section 4.2, the most fundamental concept of all in sociology: "group" – can only be observed in relation to the rules that apply in the situation in which one is interested.

Sociology concerns itself with human social behavior. It may be possible to ask questions about this behavior in the "extreme external" way Black seeks to do, without regard to social rules. One would, in effect, be practicing conventional ethology.[23] Policemen would be identified in more or less the same way ethologists identify an "alpha male", without reference to social rules obtaining among the animals concerned. Although Black would have to refine his concepts, eliminating those that on their face refer to rules (like "government"), it might be arrogant speciesism to deny the possibility of such an extreme external approach to human behavior when we apply just that sort of approach every day to the behavior of other animals.

Everything depends, I emphasize again, on the question one seeks to answer. What distinguishes sociology – as I see it – from ethology lies precisely in what Black's "extreme external" approach seeks to leave out: the ordering of behavior with rules. This is what "social behavior" is: rule-ordered behavior. Behavior to which no social rules apply – the killing and pillage of Hobbes' state of nature – is not social behavior at all. Almost all human behavior is in fact to some extent social, that is, it does not take place in the context of a pure state of nature that knows no rules.

When, why and how do people follow rules? This is what sociology of law is all about. The questions to be answered involve rules of behavior ("norms"). The perspective is "external" – that is to say, not evaluative (not "normative"[24]) – but it is not an "extreme" external perspective, as Black's approach to the sociology of law purports to be,[25] because the rules (among them, legal rules) that govern the behavior of the members of a group can only be observed if one takes account of the internal perspective of the members of the group concerned. The proposition that R is a rule in a given social group means that it is an observable fact that people in that group generally accept the validity of R.[26] "Accept" here refers not to a subjective attitude but to behavior: the members of the group use the rule in various ways, both by following it (or by excusing or justifying deviations) and by invoking it in their explanations and evaluations of and reactions to the behavior of others.

Nothing I have said implies that one can only talk about the rules of a group if one oneself adopts the group's internal perspective. That the participants have an internal perspective on

R is, as I just noted, an observable fact. They have no "privileged" knowledge of the fact that they accept R as valid, no knowledge that exists only in their heads and cannot be observed by an outsider who sees them invoking and following R. This is a matter of everyday experience. The bizarre notion that because language is "normative" only the French can know that French is spoken in France seems not to have occurred to anyone, but its equally bizarre equivalent, that because rules of behavior are "normative" one can only know them if one adopts the internal perspective of the social group concerned, is often loosely bandied about as a self-evident truth by sociologists and philosophers of law.

In short, the oft-heard objection that the external, non-normative perspective on law ignores the internal perspective of the participants, and that if taken seriously it would make rules and their use in social interaction unobservable, is simply wrong. Nothing prevents us as sociologists of law from observing the fact that Roman law permitted slavery, and that this had consequences in Roman social life, without ourselves adopting the internal perspective of a Roman toward that law.

To sum up Sections 1.1 and 1.2: The criteria used to judge the truth of statements about "law" depend on one's perspective. From the internal perspective of a participant, it is the accepted validity criteria of one's society that determine whether an assertion of the form "it is the law in Xanadu that…" is true or not. On the other hand, from the external, empirical perspective of a sociologist of law, the truth of an assertion about law depends on what can be observed. *There is nothing impossible about observing the fact that the participants themselves have an internal perspective on their rules, "legal" or otherwise, and that in that sense those rules exist in their society.*[27]

2. An empirical concept of law

> *One cannot look for the poles of the Earth until one knows what a pole is – that is, what the expression 'pole' means, and also what counts as finding a pole of the Earth. Otherwise, like Winnie-the-Pooh, one might embark on an expedition to the East Pole.*[28]
> *The first problem for the sociology of law … is to identify the sort of social fact it takes as its subject matter.*[29]

The concept "law" denotes – on first impression – the object of the sociology of law. Nevertheless, after well over a century of attention to the matter, the definition of "law" as an object of empirical research and theory – that is, an *empirical concept of law* – is still fraught with difficulty and confusion.

2.1. The various manifestations of "law"

A quick look at what Galanter has called the "manifestations of law" – that is, things commonly referred to as "law" or "legal" – shows how various the phenomena are that fall within everyday usage of the word "law" (see Box 1). "Law" (*droit, Recht, derecho, ius*) is used to refer, more or less indiscriminately, to a whole variety of phenomena that seem related in some way to one another, but which certainly do not amount to the same thing. There are probably not many statements that are true for all these various "manifestations of law". So if someone asserts something about "law" (such as its fairness or its effectiveness), then the first question one needs to ask is: which manifestation is he or she talking about? The effectiveness of legal education in the formation of lawyers is surely quite a different matter from the effectiveness of the legal institution of property in bringing about the efficient use of resources.

And there is no point to criticism of Black's "theory of law" – in which "law" is conceived of as the social control behavior of government officials – on the ground that it does not permit us to explain the contents or effects of legal rules.

Galanter's overview makes one view with suspicion any claim that one or another of law's manifestations has a privileged position with respect to the concept of law. For a long time, the idea that law is essentially a collection of rules ("commands of the sovereign", for example[30]) was widely accepted.[31] Alternative conceptions see law as social order, maintained in a particular way, or a particular form of social control.[32] A few decades ago, the "dispute" paradigm of law was prevalent,[33] until Holleman put an end to the idea that law manifests itself exclusively or even primarily in "trouble cases" by calling attention to the importance of "trouble-less cases": the use of law as a "language of interaction" in everyday transactions.[34]

In short: without some clarification of the concept "law", it is impossible to say anything sensible at all about what the sociology of law is.

Box 1: Galanter's "manifestations of law"

- **legal norms,** which include:
  - **legal rules,** among which one can distinguish:
    - **legislation**: rules adopted through a formal procedure and having an authoritative formulation
    - **common law**: rules formulated by judges in the course of deciding cases
    - **customary law**: rules that emerge in social practice and are commonly regarded as binding
  - **legal principles and values,** such as the principle that no one can be a judge in his own case, and the value of legal certainty
  - **legal policy,** such as the importance of efficiency in the administration of justice
- **legal institutions** such as property, family, contract
- **legal organization:** the legal profession(s), adjudicatory, legislative and administrative bodies, the police and so forth
- **legal processes:** rule-making, judging, enforcement, administration, execution
- **legal reasoning:** arguments generally accepted among lawyers as good reasons for accepting R as a legal rule or for interpreting R in a particular way
- **legal behavior/interaction:** behavior/interaction ordered by the use of legal rules
- **legal scholarship and legal education**
- **the legal system:** all of the above taken as a whole (whereby it must be noted that the degree of coherence and autonomy of such a system can vary greatly)

Source: derived with a few minor changes from Galanter (1977).

2.2. What's in a name?

What's in a name? that which we call a rose, by any other name would smell as sweet.[35]
Law is only law if it is labeled 'Law'.[36]
When I use a word, it means just what I choose it to mean - neither more nor less.[37]
Rose is a rose is a rose is a rose.[38]
Ceci, ce n'est pas une pipe.[39]

2.2.1. Unsatisfactory approaches to an empirical concept of law

The common element in Galanter's "manifestations of law" is the adjective "legal". Whether their focus is on individual rules or, at the other end of the spectrum, on whole legal systems, what various authors seek to capture in the concept "law" is that property that distinguishes one or another of the manifestations of law from other similar – but not "legal" – phenomena. Those whose perspective is internal find this difficult, but not impossible. Lawyers construct the concept "law" in the course of their professional behavior. Hart (1961) describes what they do, when they identify some phenomena as "legal" and others as "not legal", as the application of a "rule of recognition"; in any given society the validity of that rule, according to Hart, is a matter of fact.[40] So long as most lawyers, most of the time, identify the "legal" in more or less the same way – that is, so long as a society's legal order is not fundamentally challenged – there is no problem. But for anyone in search of a secure external (empirical) basis for identifying the distinctively "legal", Hart's analysis has a distressingly Baron-von-Münchausen quality.[41] Hart himself observed that his philosophical analysis of the concept of law is ultimately "an essay in descriptive sociology": law is what the members of a given social group call and accept as law.[42] Ironically, this is precisely what makes his concept of law unsuitable for the sociology of law. Consensus within a group about what its "law" is, identifies for the external observer something that is apparently an important normative category *in that group*, but not a category that is usable for external, empirical and hence (necessarily) comparative purposes.[43]

One can, of course, define a word any way one chooses. When Black chooses to define "law" as "governmental social control",[44] it would be pedantic to object that the *Oxford English Dictionary*, lawyers, Joe the Plumber, Herbert Hart, or anyone or everyone else uses the word in some different way. Nevertheless, some definitions will be more useful – for some purposes – than others. I have come to share the view that because of the associations that the word "law" (and its derivatives, such as "legal") share with particular ideas about how social order ought to be maintained, it is in practice impossible to purge the word "law" by means of a mere definition of its normative connotations.[45] To borrow an expression from the philosopher J. L. Austin, "law" (and its relatives in other languages – *droit*, *Recht* and so forth) is a word that comes "trailing clouds of etymology"[46] and whatever one does by way of definition, these clouds will forever get in the way of clear thought. I conclude that the term "law" should not be used to denote the key variable in the sociology of law.[47] If we want to develop social scientific theory about "law" we must look for a more suitable theoretical concept.

2.2.2. The search for an empirical concept of "law"

A quick look at the history of efforts to define "law"" for purposes of empirical study is chastening. The search for an empirical concept of law – one not dependent on the normative preoccupations of lawyers and other participants but rather on the demands of sociological theory – has so far proven unproductive.[48] Box 2 collects a small chronological sample of some of the

most influential proposals (the preponderance of anthropologists of law in the sample reflects the fact that they have always been more aware than sociologists of law of the necessity of a general definition – that is, one suitable for intercultural and historical comparison).

Box 2: Proposed empirical concepts of law

Ehrlich (1936, 24)
A rule of law is an "ordering" of the social relationships in a group ("association"): "a rule which assigns to each and every member of the association his position in the community…and his duties."
Weber (1954, 5)
Law is order that is "externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will be applied by a *staff* of people holding themselves specially ready for that purpose."
Malinowski (1926, 55)
"The rules of law stand out from the rest in that they are felt and regarded as the obligations of one person and the rightful claims of another. They are sanctioned not by a mere psychological motive, but by a definite social machinery of binding force… ."
Radcliffe-Brown (1965, 212, quoting Pound)
Law is "social control through the systematic application of the force of politically organized society".
Llewellyn and Hoebel (1941, 23)
"[T]he *legal* is best seen as that which is marked by authority – which is recognized as imperative…".
Pound (1942, 25)
Law is social control by the state – "the systematic and orderly application of force by the appointed agents".
Hoebel (1954, 28)
"A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting."
Schwartz (1954, 473)
Legal control is "social control … which is carried out by specialized functionaries who are socially delegated the task of intra-group control…".
Bohannan (1965a, 36)
"Law is … 'a body of binding obligations regarded as right by one party and acknowledged as the duty by the other' (quoting, with several minor errors, Malinowski [1926, 58]) *which has been reinstitutionalized within the legal institution so that society can continue to function in an orderly manner on the basis of rules so maintained*". (Italics in original)
Selznick (1969, 7)
Law is "endemic in all institutions that rely for social control on formal authority and rule-making". (Italics in original)
Pospisil (1971, 95, 56)
Law consists of "principles of institutionalized social control, abstracted from decisions passed by a legal authority (i.e. a 'person whose decisions are followed')".
Black (1976, 2)
"Law is governmental social control."

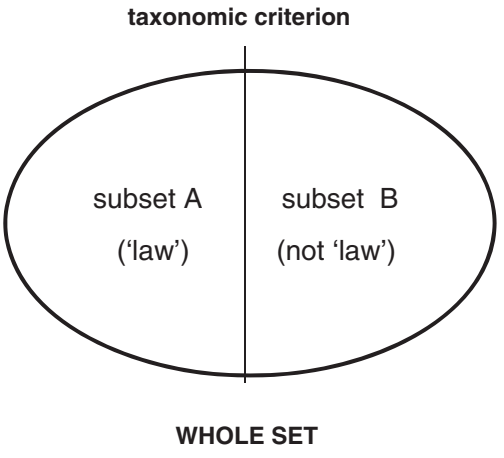

Figure 1. The structure of a taxonomic concept of law.

Despite their superficial differences, the definitions quoted share a common structure. Social scientists commonly consider law to be a special case of a more fundamental and general social phenomenon (morality, social control, social order, politics, rules). The more specific category "law" is defined by identifying it as a subcategory of the more general category. I refer to all such candidates for an empirical concept of law as "taxonomic", by way of analogy to the systematic way different species are identified in biology. The structure of such definitions of law is shown in Figure 1.

Among social scientists, the most common taxonomic concept of law considers it to be a special case of "social control": "specialized" social control (Schwartz), "governmental" social control (Black), "authoritative" social control (Selznick), "reinstitutionalized" social control (Bohannan) and so forth. In what follows, I limit myself to taxonomic definitions of "law" as a special case of "social control".[49]

Schwartz' definition of "legal control" is one of the most thoughtful in the whole taxonomic tradition and its defects are characteristic of such an approach. It, therefore, deserves special attention. His study concerned two agricultural settlements in Israel whose social control practices were strikingly different. He describes the differences he observed in terms of the dichotomy "legal" and "informal". "Legal" control he defines as social control "delegated to specialized functionaries". One of the two settlements (the *moshav*) had "legal control" in this sense: a "Judicial Committee" charged with hearing and deciding conflicts between members. The other settlement (the *kvutza*) had no such institution but relied entirely on "informal" control. Of course, from the point of view of the Israeli state, neither practice was "legal".[50] But Schwartz obviously felt the need to define "legal" in a different way for social scientific purposes.

Schwartz uses the term "specialization" to describe the Judicial Committee, but as far as one can tell from his description, the members of the Judicial Committee in the *moshav* were not "specialists" in social control: their special training, skills and experience had to do with farming, not with adjudication.[51] Nor did they perform some special part of a whole task (such as the making of pins, in Adam Smith's famous example of the increased productivity attendant upon the "division of labor"[52]). In short, they were not *specialized* but *differentiated* functionaries: set apart – when engaged in adjudication rather – from

the rest of the members of the settlement. The adjudicatory function was exclusively theirs, but it was one even they could not perform in the course of everyday life but only at special times and places and according to specific procedural rules. It was thus a function differentiated from the rest of social life in the settlement.[53] I will henceforth use the term "differentiated" social control in reconstructing Schwartz' argument and setting out my own conception of "law" for purposes of the sociology of law.

Differentiation: Although the idea of differentiation in social control is frequently invoked in the sociology of law, I know only one serious and explicit treatment of the concept: Abel's (1973b) article on dispute institutions in society. Abel regards "structural differentiation" as a key explanatory variable for variation in dispute processes (see, in particular, 253–262). In particular, his variable "role differentiation" – "defined by explicit prescriptions" that "demarcate private life from official business", "circumscribe the powers of the intervener" and "regulate conduct within the dispute institution" (262) – comes close to the definition I propose here.

I define differentiation as follows: the existence in a social group of secondary rules creating distinct social roles for the performance of particular social tasks (cf n 62 and §3.2.2). For example, social control in a school in which the maintenance of order in the hallways during breaks is not carried out by the teachers in the normal course of their daily activities, but is recognized as a distinct role and allocated to security guards, is more differentiated than is social control in a school where this is not the case. (I owe this example to a newspaper article on the budgetary difficulties of New York City public schools resulting from increased school size and the attendant reliance on hired guards to maintain order.)[54]

For purposes of describing social control in the two settlements and of the explanatory theory Schwarz brings to bear,[55] a rough-and-ready dichotomy between "differentiated" and "undifferentiated" social control was perhaps sufficient. Nevertheless, the closer one thinks about the matter, the clearer it becomes that it is simply not true that differentiation in social control was only present in one of the two settlements. While perhaps less clearly visible than in the case of the *moshav's* Judicial Committee, differentiated social control was also present in the *kvutza*. For example, a committee whose principal task was organizational engaged, as Schwartz shows, in social control as well. But most importantly, the *kvutza* had a "General Assembly" which occasionally imposed the most drastic sanction known to the community: expulsion. Although almost all adult inhabitants were members, social control by the General Assembly was differentiated: like the farmers who constituted the Judicial Committee of the *moshav*, the members could only engage in such social control while in a socially regulated "official" capacity *as members of the General Assembly*, they could not do so on their own in the course of everyday interaction. If we take Schwartz' definition of "legal control" literally, there was thus "legal control" in both settlements. The difference between them that he sought to explain did not, by definition, exist.

Schwartz was trapped, in effect, in the fundamental point of departure of the whole taxonomic approach, namely that the criterion that serves to define "law" as a subset of social control knows only two values. But differentiation is a continuous variable. If one focuses

on that rather obvious point, the whole taxonomic tradition in sociology of law begins to seem a little perverse. The other taxonomic criteria that have been proposed ("authority", "institutions", even the "state") all share the same problem: one cannot use them to divide social control into two sorts (legal and non-legal) because they are not dichotomous but continuous variables.

Further objections to taxonomic concepts of "law" include the following:

- The continuum of increasing differentiation knows no inherent discontinuities (such as the freezing point of water) of which one can say: past this point, all social control is "legal". The choice of a given point is empirically arbitrary. What the choice generally seems to reflect is an ethnocentric preference for what is called "law" in one's own culture.[56]
- All taxonomic concepts of law are both under- and over-inclusive. Observed social control phenomena on opposite sides of the taxonomic criterion (see Figure 1) but otherwise close to each other, will often have far more in common than either has with phenomena on its own side but otherwise very different. One of the two agricultural settlements and the State of Israel both had "law", according to Schwartz, while the highly organized other settlement shared "informal control" with amorphous social groups like the passengers on a cruise ship or the fellow inhabitants of a large apartment building. This sort of perverse classification makes powerful theory about things called "law" impossible.
- A more general observation is in order. Variation in social life and organization is seldom discontinuous. When social life exhibits continuous variation, theoretical propositions concerning it should be formulated in terms of continuous variables.[57] Only where nature itself is discontinuous can theory formulated in terms of a discontinuous variable be fruitful. It is in principle wrong for a social science to try to force social life onto the theoretical Procrustes-bed of a discontinuous variable such as "law".

2.2.3. A non-taxonomic concept of law

> *The ladder of law has no top and no bottom.*
> (Bob Dylan)[58]

The relationship between law and the rest of social control can be formulated in a better way.[59] Most taxonomic definitions of law are directly or indirectly concerned with levels of *differentiation* in social control. Social control above a particular level of differentiation is, by authors in the taxonomic tradition, considered "legal".[60] But instead of asking ourselves the ultimately unanswerable question, "When is there enough differentiation to be able to speak of *law*?", we can simply note that all social control is more or less differentiated. The world does not confront us with distinct sorts – *more or less differentiated* – of social control but with continuous variation in the degree to which social control is differentiated.

Having taken that simple step, we can then locate the various proposed taxonomic concepts of law on a scale from the imaginary absolute zero point of differentiation in social control (even below the social control observable in everyday interaction in the form of facial expressions, pointed silences and so forth) to the imaginary point of infinite

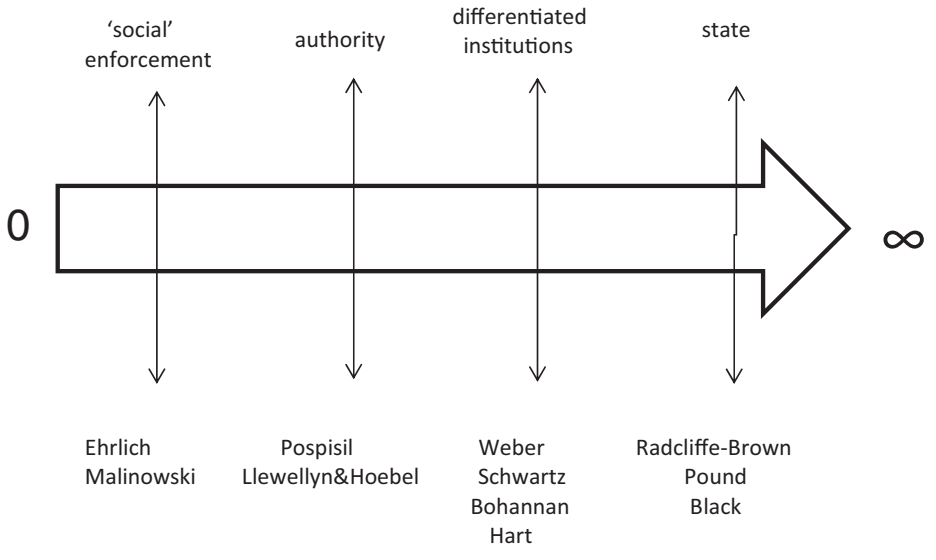

Figure 2. The relationship between various taxonomic concepts of law on a scale of increasing differentiation in social control.

differentiation (with the legislative and adjudicatory institutions of the modern state, for example, toward the upper end of the scale[61]). Figure 2 indicates how this can be done.

Figure 2 locates on a common scale the findings and theoretical conclusions of social scientists who have used different taxonomic concepts of law. Despite apparently fundamental conceptual differences, their work can in this way be made commensurable and hence contribute together to the cumulation of knowledge which constitutes scientific progress.

2.3. Conclusion

The most important conclusion of this discussion is that the theoretical object of the sociology of law is not "law" but "social control". The "legal" aspect of the sociology of law reappears in the form of the continuous variable differentiation.[62] Such a conclusion is not just a matter of terminology. A concept of law that permits continuous variation avoids the distortion of social reality that takes place when, like Schwartz, one struggles to force social control into a dichotomy such as "formal"/"informal" or "legal/not legal". Such a conception permits us to formulate the "relational distance" proposition as a relationship between two continuous variables: on the one side, the degree of "relational distance", and on the other side, the degree of differentiation in social control. The reformulated proposition explains not only one (supposedly) "big" difference in social control – that between "law" and the rest – but also all sorts of "smaller" differences, such as that between the social control in Schwartz' two Israeli settlements, or the different ways contractual relationships are created and adjusted in business communities varying from local merchants in face-to-face relationships to the global world of multinational corporations.[63] The relational distance proposition, so

conceived, is always applicable in all social groups, and not just when and where "law" (according to one or another taxonomic conception) is present. In short, the generality of the relational distance proposition is far greater than when "law" is defined in a taxonomic way. The proposition is more powerful and therefore more vulnerable to a far greater range of empirical tests. The process of testing should quickly reveal difficulties with the current, rather primitive formulation, and hence lead to refinement and reformulation, or to rejection in favor of something better. A non-taxonomic concept of law as more or less differentiated social control will thus stimulate instead of obstructing theoretical progress.[64]

I return to the idea that the theoretical object of the sociology of law is social control, and the significance of this idea not only for the sociology of law itself, but more generally for the relationship between sociology of law and sociology, in Section 4.

Social control is highly pluralistic. In all but the most idiosyncratically simple situation, the social groups that exercise it are multifarious, overlapping and competitive with each other. Furthermore, the rules of a group are at any given time not always consistent with one another[65] – for example, different state agencies may differ in the rules they seek to enforce, and different groups within a church may have different rules on matters such as birth control. Such differences are typical features of circumstances in which rule change is occurring (which is to say, most of the time). It follows that "law" in the non-taxonomic sense is intrinsically pluralistic and that in the context of empirical theory the expression "legal pluralism"[66] – strictly speaking – is redundant.[67]

3. Rules, social control and social order

Every year our nation is invaded by several million 'things' … that … threaten total chaos. They hold no brief for the Judao-Christian tradition. They have no modesty. They do not speak our language, nor know our history, nor value our customs. They lack any motive or knowledge that leads them to share, to give and take, to compromise, to accommodate, to cooperate… . They do not respect authority… . Though they do not swear, steal, chew tobacco, fornicate, desecrate the flag, or use four-letter words, they are unaware … that they should not do so… .These invaders are human infants… . Something must be done. We need them … but we need them on our terms, not theirs.[68]

Conscience is the inner voice that warns us somebody may be looking.[69]

"Law", I have argued, is for purposes of sociological theory best conceived of as a relatively differentiated form of "social control". But what is social control? The place to begin, as sociology classically has, is with the "problem of social order": how is human social behavior possible at all? If the "state of nature" had ever prevailed and human beings really once had been "rational actors" each pursuing his or her own immediate preferences, life would indeed in Hobbes' words have been "solitary, poore, nasty, brutish and short",[70] and it would have remained so forever. Constraint of individual freedom of choice is a precondition of the coordinated behavior that constitutes social life. Human beings do this to an exceptional extent by subjecting individual behavior to rules.[71] The "enterprise of subjecting behavior to the governance of rules"[72] has come to be known as *social control* in the social–scientific literature.[73] The concept of social control refers to the fact that the behavior of the members of a group in relation to one another is regulated. Maintenance of the rules resides largely and ultimately in the

mutual relationships and interactions of the members of the group. Behavior that is regulated in this way can be called, for short, social behavior.

It is the rules for social behavior that permit the existence of "collective goods", that is, states of affairs (like civil peace, property, language) that no individual can create on his own and that therefore cannot be brought into existence by individual volition.[74] Rules can, of course, and often are produced and maintained by institutions – as in Schwartz' two settlements – but the most fundamental forms of social control, from which the differentiated forms derive and on which they ultimately depend, take place in an undifferentiated way, in the course of everyday interaction. We learn how to follow and to use rules directly from personal experience: being told what they are, encountering positive and negative responses to our own behavior, and using rules to influence the behavior of others.[75] We also learn vicariously, by observing the behavior of others and what happens to them.[76] Except in the case of highly differentiated forms of social control – such as "law" – learning and sanctioning tend to be hardly distinguishable aspects of everyday interaction, but certainly not the less important for all that.

As Moore argues,[77] it is groups that are the social locus of rule-creation, rule-learning, rule-following and of the social (dis)-approbation required to support rule-following. Some of these groups are known as "states" and their rules as "law", a form of social control so elaborate that it consists not only of explicit rules, but also of explicit rules about rules ("secondary rules"[78]), and even of explicit rules about rules about rules (as in the case of a rule of constitutional law that limits the authority of a national legislature to create or modify rules).

3.1. Rules are facts

> *Anyone who says he doesn't know what a fact is, is lying, unless he nonchalantly pours water in his gas tank.*
> (V. Icke)[79]

Rules of behavior – including "legal" rules – are fundamental to the sociology of law. It does not follow from this that the sociology of law is itself "normative" (in the sense of evaluative). The existence of a rule – whatever anyone thinks about it, such as whether or not it is morally "good" or "legally" binding – can be established in just as empirical a way as the existence of any other fact.[80] It is, for example, a statement of fact that is either true or false – one of a rather complicated sort, to be sure, but nevertheless not an expression of a personal opinion or of approval or disapproval – that a man in Saudi Arabia can be married to more than one woman at a time, whereas in England he would be limited to one and in the Netherlands he can also marry a man, but only one at a time. It is also a fact that in the Netherlands, "business lunches" and "professional literature" are no longer deductible from one's individual income for income tax purposes. And it is a fact that the Supreme Court of the United States (but not the Hoge Raad of the Netherlands) has the authority to assess the constitutionality of legislation. As Vincent Icke might have said, anyone who says he does not know that these are facts is either lying (or trying to be scientifically cute), or he blithely drives on the right when in England.

Non-"legal" rules are also facts, things you can bump into just as easily as you can bump into a door. Anyone who does not believe this is invited to perform a small experiment: behave in a socially unacceptable way at a job interview for a white-collar job – show up in shabby, dirty clothes, for example – and see whether doing this reduces your chances of getting the job. If that is indeed the case, then the dress code in question (however silly or offensive you may think it to be) seems to be a pretty "hard" fact in your society.

As far as the sociology of law is concerned, it is irrelevant whether a legal (or a social) rule is good or bad (although the fact that local actors judge it one way or the other can be very important). The question is, rather, how it works, what people do with it, and why? Not only desirable behavior (environmental protection, for example) but also morally neutral behavior (getting married?) and repellent behavior (slavery, genocide) takes place pursuant to rules. How law works to realize evil is, sociologically considered, the same question – and every bit as interesting and theoretically important – as how it works to accomplish good.

3.2. The definition, ontology, epistemology, methodology and pluralism of rules

One consequence of the growing acceptance of the social fact of legal pluralism has not received the attention it requires. Abandoning the idea that "law" is taxonomically distinct from other social rules cuts us loose from the comfortable (apparent) legal certainty of formal "law" and requires that we have at least roughly serviceable answers to some fundamental questions about the concept of a rule. What counts as a rule (the *definition* of a rule)? When does a rule exist (the *ontology* of rules)? How can one know whether rule R exists in a particular social field (the *epistemology* of rules)? And how can such knowledge be acquired by a researcher (the *methodology* of rules)? Social scientists are in practice often simply unreflecting legal positivists who take the corpus of "legal" rules to be a distinct entity whose nature is obvious, whose validity is settled by legislatures and higher courts, and which can be known by applying the rules of legal reasoning or, if one is not a lawyer, by consulting a lawyer. Even anthropologists and others who take the idea of "legal pluralism" seriously, generally tend to apply a more or less watered-down version of legal positivism to the rules of "indigenous (i.e. non-state) law",[81] and both sociologists and anthropologists often treat the existence and social significance of non-"legal" social rules as a matter of unproblematic social fact.[82] A non-taxonomic approach to the concept of "law" requires a more careful approach to the concept of a "rule".

3.2.1. Definition

What *counts as* a rule? To begin with, we are of course concerned with rules of behavior – not with rules of thumb or of craftsmanship (how-to-do-it rules for things like gardening or photography), nor with the names of observed natural regularities (like the "law" of gravity). Second, rules of behavior are *social* facts: it is *groups* that have them.[83] Individuals may "make it a rule" to brush their teeth every morning for five minutes, but this is something different.[84]

"Rules" and "norms"

Some people prefer the term "norm" for (non-"legal") rules. I suppose this is because they think social rules are in some way vaguer, diffuser, ontologically or epistemologically more problematic, less binding, more "normative" (closer to "values"), or whatever than "legal" rules. I do not believe any of this, and I think it important not to fall into the taxonomic trap by using different terminology for certain social rules which differ from (some of) the rest only in their degree of differentiation.

Caveat: The discussion here pays no explicit attention to propositions other than rules (i.e. principles, values, policies) that, as Dworkin (1977) has shown, play a critical role in "legal" reasoning. Dworkin's analysis applies equally to less highly differentiated cases of social rules than "law".

Rules are *formulations of expectations that the members of a group have with regard to each other's behavior*[85] that generally are (or can be) *socially enforced;* a rule of behavior *limits a group member's freedom to choose how to behave*.[86] These expectations are not a matter of prediction nor of the exercise of purely private (i.e. not rule-based) pressure between individuals.[87] They are *social* expectations in the sense that breaching the rule entails the risk of a *socially approved sanction*. Such social sanctions consist of changes in the behavior of others, ranging from expressions of disapproval (which can be as subtle as the turning of a lip or the raising of an eyebrow), through temporary or longer lasting reduction of social interaction ("I expect him to stand behind his product if he ever wants to do business with *me* again"[88]), all the way to effective expulsion from the social group concerned (and hence the loss of the benefits of group membership).[89]

There are also secondary social rules (rules about rules) that regulate the nature and extent of appropriate sanctions, who is authorized to react in such ways, what the proper procedural approach is to a case of violation, and so forth.[90] These rules *authorize* the sanctions, in the sense that those who react in this way, can justify their behavior (otherwise itself a breach of the rules of social interaction) by pointing to the rule violated and to the relevant secondary rules, and can expect support from other members of the group. Such social sanctioning can, as we know from our discussion of Schwartz and the two Israeli agricultural settlements, be more or less differentiated.

It would be wrong to overemphasize the negative aspect of rules, assimilating all of them to the prohibitions of criminal law. Rules provide for facilities (how to do it rules, important among them: powers[91]), cooperation and coordination with others, and so forth, all of which greatly increase the range of behavioral choice, but which necessarily do so subject to particular constraints. Many rules do not themselves require any particular behavior: they simply provide, for example, for how a particular result is to be accomplished (you don't have to get married, but if you want to, here is how to do it).[92] The behavioral constraint imposed by such rules lies in the fact that if you do not follow them, you will not accomplish the desired result. If your "marriage", for example, is not valid, you will not be entitled to the special privileges enjoyed by married people – in, for example, the areas of taxation, inheritance, kinship, parental power – and if you are caught exercising them anyway, your social group will make life difficult for you in one way or another.[93] Similarly, someone seeking to exercise a power to which a group's rules do not

entitle him will simply not be obeyed (or worse: if the power in question is that of a king, for example, he risks being treated as a usurper, possibly at the cost of his head).

Finally, there is the problem of the "unit" of a rule. Behavioral requirements can be expressed at very different levels of generality. A rule can be so general (the requirement that a person take "reasonable care" to avoid injury to others) that the whole panoply of subrules it entails are themselves generally referred to as rules (e.g. the rule requiring a property owner to take adequate precautions to prevent small children from falling into his swimming pool). I do not believe there is any way to "solve" this problem[94] – that is, any way of identifying the essential unit of a rule. Whether something is described as one rule or as a part of a rule or as many rules is simply a matter of convention and convenience: the observer does the characterization, it is not latent or inherent in the regulatory material itself. This conclusion requires that in comparative research, in particular, one be very careful to formulate the rules to be compared at a comparable level of generality.[95]

3.2.2. Ontology

The existence of a rule in a social group is what Durkheim calls a "social fact", that is to say, it is a fact about the group. When can we say that R exists in a social group such as the New York garment industry (Moore 1973), an Israeli agricultural settlement (Schwartz 1954), the tuna court of Tokyo (Feldman 2006), or the farming community of a rural county in northern California (Ellickson 1991)? The matter is simple: to say that rule R "exists" in the group is the same thing as saying that the members of the group generally treat it as a binding rule of the group. And being able to say this means that one can observe – or could observe, if the question were raised – the moral argument and secondary rules required, in the group concerned, to establish the rule's existence and proper interpretation.

The question what it means to say that a rule *exists* in a particular social group has received considerable (indirect) attention among ethologists who concern themselves with "moral" behavior among animals. There is, of course, a great deal of animal (and human) behavior that can be described in terms of regularities: the behavior normally occurs in particular circumstances, and in some cases is learned (e.g. a rat can learn to avoid food that once made it ill, or an ape to use a twig to get ants out of an anthill). In a more limited sense, there are apparently animals with behavioral expectations that are socially shared and that elicit remorse and sanctions when broken. De Waal's[96] findings on chimpanzees imply, according to Mackor,[97] that chimpanzees have "social rules" because they follow learned, socially shared rules in their own behavior and in reacting to the behavior of others.

It is important, however, to go one step further and insist that a social rule can only be said to exist in a given group if it is a potential subject of reflection – of *conscious thought about rules*. If asked to explain their behavior, members must give the rule as a *reason* for it. And seeing the group's rules as *reasons for behavior* implies that the rules *could in principle be different*: if there were not a rule against keeping one's hat on in church, it would be OK to do so. A statement that simply warns of a danger ("No swimming: sharks!"), is only in the marginal sense of the way it is formulated a "rule": it is not the rule but the sharks that are the reason for not swimming. Similarly, apes do not have a "rule" requiring the use of a stick to extract ants from an ant-hill. Such cautionary or how-to "rules" simply

call attention to the natural constraints to which members of the group are subject. One does not really "follow" such a rule, one simply avoids unpleasantness or impossibility imposed, not by one's group, but by the environment.

Furthermore, the applicability of even the simplest social rule to a concrete situation always requires *interpretation* of the rule and often the consideration of other rules as well (for example, those concerning justifications and excuses). *Moral reasoning* is necessarily involved both in following rules and in assessing behavior (one's own or that of others) in terms of rules. The members of a group whose behavior is regulated by rules must thus be able to engage in *moral argument* about what the group's rules are and what they require, and the observable fact that such argument takes place is part of the ontology of a rule.

Moral argument in turn implies that a group's collection of rules consists not just of what Hart calls "primary rules" of behavior, but also of "secondary rules" – rules about the ascertainment, interpretation, application and change of primary rules – and it is this that makes social order through the governance of rules among humans so complicated.[98]

Crucial among Hart's secondary rules is the "rule of recognition", which specifies which rules are binding. In Hart's view, it is the observable fact of acceptance of its secondary rules by a group's officials that distinguishes "law" from non-legal social control. This seems wrong: a system of non-legal social control – without differentiated officials – will have secondary rules governing decision-making concerning its primary rules. For example, if there is a difference of opinion in a religious group over whether a rule requiring men not to wear hats in church applies in a given situation and what sort of informal sanctions are appropriate, participants in a discussion will appeal to much the same sort of considerations as do lawyers and judges: precedent, authoritative sources (e.g. texts, and the opinions of respected members of the social group), practical matters (e.g. how cold it is in the church concerned), whether the case is one for a differentiated "official" (priest or minister) to handle and so forth. In short, the validity, applicability and interpretation of the primary rules of both relatively undifferentiated social control and of a highly differentiated "legal" system is determined through reasoning in which appeal is made to a group's secondary rules, and the validity of the latter is in both situations a matter of social fact: acceptance in practice. The difference between "informal" social control and "law" depends not on the existence of secondary rules, but on whether the group's secondary rules recognize the authority of differentiated ("legal") control.

Moral reasoning implies that those who engage in it can formulate rules in *language* and use language in the process of applying secondary rules to the interpretation and application of primary rules. Possession of a language that permits such moral reasoning therefore seems to me an essential condition for the existence of rules of behavior, and hence of social order, in a social group. I am unaware of evidence that chimpanzees engage in moral reasoning – that they can make, interpret, compare, apply and change their rules of behavior or contemplate the possibility of doing so. I am, therefore, inclined to deny that rules of behavior can be said to exist in chimpanzee social groups. The behavioral regularities observable among chimpanzees therefore, it seems to me, cannot be included within the scope of the sociology of law.

The foregoing paragraphs imply that in practice the existence of a rule in a group will rarely be a matter of all or nothing. In every group, some rules enjoy more general support and more effectively limit behavior than others; some have a more secure foundation in the group's secondary rules than others. Many formerly effective religious rules – e.g. the

rule among Roman Catholics prohibiting the use of contraceptives, or the rules among Muslims requiring specific clothing for women – may be losing support in (some of) their respective social groups. A rule that once was effective may, like an old soldier, not die but just fade away, so that the question whether R is a rule in a given group can be contested in the group itself and therefore pose problems for an external observer – problems that can only be dealt with by careful observation and precise formulation. New rules may similarly emerge in a more or less gradual way (e.g. social rules limiting the freedom to smoke). How widespread and vigorous the social support for a rule, and how effective a limitation of behavioral choice it entails, is a matter for careful observation, as we will see in the next section.

3.2.3. Epistemology

How can we *know* that R is a rule of behavior in a social group G in which we happen to be interested? Epistemology follows ontology: rule R exists in a social group if its formulation is recognizable to the group's members,[99] if the group's members use R in social interactions, if R is accepted as a reason for behavior (rule-following, criticism, sanctioning, etc.), if the reactions authorized by R (and the relevant secondary rules) are accepted as appropriate by the group. In other words, R exists in G if behavior in G, in relevant respects, is observably different from what it would be if R did not exist. In short, the question whether R is or is not a rule in G, is the same sort of question as whether French is spoken in France, to be answered with the same sort of evidence. The proposition that R exists in G is falsified if R is in fact not generally accepted in G; if, when confronted by the proposition that R is a rule in their group, its members do not accept it as such and behavior in the group does not exhibit or reflect its use. The assertion that, in written French, all nouns must be capitalized (as in German) is easy to falsify by observing French practice. That some social rules may be contested is no different from the fact that there are always differences of opinion about peripheral rules of a language. In neither case is this a reason for doubting the real existence of a social group's rules any more than of its language.

When social control is highly differentiated and secondary functionaries such as lawyers and judges are charged with identifying and interpreting a group's rules, acceptance by these functionaries that R is a binding rule, and secondary behavior consonant with such acceptance, generally settles the matter. In the case of language, the secondary rules in some countries similarly make the decision of a differentiated authority definitive. Hence, in France, as far as the proper spelling of a French word is concerned, a decision by the Académie Française settles the matter; the secondary rules of English spelling are much less clear-cut and depend largely on the country one is in.[100]

The matter can, of course, be rather more complicated than I have suggested. The question whether R is a rule in G, and in particular, what its proper interpretation is, can be contested. Dworkin has analyzed with unequalled sophistication how, in a situation of differentiated social control, the generally accepted values, policies and principles of G (knowable in the same ways as are the rules of G) determine for lawyers and judges the "right answer" to such a question.[101] When maintenance of a group's rules is undifferentiated, "legal reasoning" about the group's rules proceeds among ordinary people in essentially the same way, making use of the same sorts of arguments. In either case, fundamental and insoluble differences concerning a group's important rules will

(ultimately) entail the dissolution of the group, often a gradual process (as in the case of the drifting apart of descent groups within families or of language communities). When maintenance of rules is differentiated and a group's functionaries cannot satisfactorily settle disagreements about its important rules, a dramatic schism may ensue, as is the case from time to time in religions, states and so forth. Whether the split be gradual or abrupt, the epistemological puzzle gets simplified, the original "group" having ceased to exist.

3.2.4. Methodology

In establishing the existence and specific contents of R in a group, individual-level variation among one's informants is often almost irrelevant. If you want to know whether to drive on the right or the left in Indonesia, asking one Indonesian will generally suffice. Since knowing the applicable rules – whether written and differentiated ('legal') rules, or relatively undifferentiated social rules on subjects ranging from non-verbal interaction (such as staring at another person[102]), clothing,[103] table manners,[104] the division of labor in a household[105] and even "illegal" or immoral behavior such as "bribery"[106] – can be of vital social importance, all normal members of society have learned how to acquire such knowledge.[107]

Knowing the rules of a group as an external, social scientific observer is not fundamentally different, although – especially when the group concerned is not one's own – it does entail some methodological care. If you want to know what the rule on queuing is in, say Armenia, how would you go about finding out? The obvious first thing to do would be to ask someone with local knowledge, for example, someone standing at a bus stop. Or (for example, if you do not speak Armenian) you might simply observe behavior at a bus stop: is there a queue or just a random-looking mass of people? And what happens if someone who arrives later than others tries to get on the bus ahead of them? Do other people react negatively,[108] remonstrate, invoke a queuing rule, either explicitly or implicitly (e.g. "I was here before you")?[109] What reaction does this produce (e.g. does the queue-jumper retreat sheepishly to the end of the line, does he seek to justify his behavior in terms of other rules, such as an exception in cases of urgency?) Finally, if the social group you are interested in has a system of differentiated control, you will look to see what position its officials take toward the queuing rule (e.g. which side of the dispute gets their support).

You will not necessarily take all of this talk at face value, but on the other hand, people will not on the whole invoke rules or interpretations of rules for which there is no local support: doing so simply will not get them anywhere. Here, however, you must keep a crucial *caveat* in mind: you may have stumbled upon an example of regulatory pluralism, the queue-jumper (and his supporters) may belong to a different subgroup from those who remonstrate with him – a subgroup, for example, with an idiosyncratic rule that men go first in such situations. If this turns out to be the case, your initial conclusion that there is a first come-first served queuing rule in Armenia will have to be qualified to the effect that certain subgroups do not share it, at least where different sexes are involved. Having done all this, you should know with some assurance what the rule on queuing is in the social group concerned.[110]

But what about the normal methodological requirements for sociological research? If we really want to know what the rule is on queuing, don't we need a proper survey of the population: how else can we know whether the population at large or – in the case of a differentiated social rule, lawyers and similar professionals – actually do "accept" the rule?

The answer to this sort of question is: no. Rules – unlike attitudes, preferences, behavior and the like – are not individual characteristics but social facts. Most members of the relevant population will be familiar with the group's most important rules. Just as mutually intelligible language would not be possible if there were not general agreement on the everyday rules, so social life in G would be anarchic (the "problem of social order" would be acute) if there were not the same sort of general agreement. Hence, when seeking to ascertain how one says "toilet" in Arcadian or how one asks for a woman's hand in marriage among the Inuit, asking one "normal" member of the relevant population may often suffice, these not being matters of personal opinion.

Apart from a body of fairly simple and straightforward rules, about whose existence and contents there is rarely any serious problem (not for members of the group concerned nor for an external observer), most groups have some rules whose status or interpretation is more or less contested, or could be if an appropriate case presented itself. This fact of life raises difficult methodological problems, but these are for an external observer neither more nor less insuperable than they are for members of the group concerned. Dworkin's analysis of "the necessary and sufficient conditions for the truth of a proposition of law",[111] gives an empirical researcher the help he needs on how to proceed in case of doubt. Stripped to the bare bones and applied to the question at hand, Dworkin's argument would be that when a group's rule on a particular matter is not clear to everyone in the group, the participants in a conflict invoke the group's principles to support their respective claims. The existence and weight of a principle is established by referring to the characteristic practices, rules and institutions of the group. Dworkin does not argue that the outcome of such a procedure is always noncontroversial, but he does claim that in a functioning legal/moral system there will in fact be sufficient agreement within the community on what counts as good or bad argument that, although different people will reach different judgments, these differences will be neither so profound nor so frequent as to make the system unworkable.[112] A social scientist would want to add, that where its normative order has proven unworkable, a group will generally be well on the way to extinction.

3.2.5. Regulatory pluralism[113]

What is more orderly, a jungle or a garden?[114]

Even if we know what a rule is and how to go about establishing the truth of the proposition that R is a rule of group G, we are not done with the difficulties that rules give rise to when we give them their (inevitable) place in sociological theory. The problem is that, unless we restrict our attention to entirely "pristine" social groups (groups whose members are not members of any other social group) – a notion that for practical purposes will almost always be beyond the vanishing point[115] – we will always be confronted with "too many" rules. That is to say, every group's members will also be members of a number of other groups, and the behavioral demands of these overlapping groups will often not be entirely consistent. The consequences of such regulatory pluralism for rule-following – and hence for sociology – are profound.[116]

The regulatory pluralism characteristic of social life at first sight looks very disorderly and it is in practice a major challenge for a serious researcher in the sociology of law. But before giving in to the urge to streamline social theory by factoring out social complexity,

one should reflect on Flannery's question (above). The idea that a single, exclusive system of social regulation is (or would be) more *orderly* than one of regulatory pluralism is comforting to legal positivists (among them, of course, lawyers, but also many social scientists), just as the idea that manicured gardens and "endless waves of grain" are more orderly than a jungle has its adherents. And the wish for a world of simple, uniform order seems often to be father to the thought that social life really is like that: that is, made possible by a single set of binding rules. But if by "order" we mean the sustainability of a self-regulating system, the jungle wins hands-down. Similarly, "orderly" social institutions are often not sustainable over time,[117] whereas the resilience of pluralistic social order, over time and through catastrophic social disturbances (natural and man-made disasters, war and terrorist attacks), is sometimes astonishing.[118]

3.2.6. Conclusion

The foregoing remarks on the empirical status of social rules are rather general and rudimentary. Nevertheless, they seem to me sufficient for present purposes, that is, for making plausible the claim that rules exist and can be studied as observable social facts. The common notion that rules are things that inhabit a rarified "normative" sphere and that "existence" therefore cannot be predicated of them, has on closer analysis little to be said for it. Having got over that false obstacle, what remains are some truly difficult problems of operationalization for purposes of empirical research. These problems have hardly been discussed in the literature, even the best researchers seeming to make the opposite mistake of treating the rules they are interested in as empirically unproblematic.[119]

3.3. Rules as dependent and as independent variables

In the sociology of law, as in every science, "explaining" something involves showing that it is a concrete instance of a general relationship between two (sets of) variables. A theory about something – the "dependent" variable – explains its value as the consequence of the value of one or more "independent"' variables.

The distinction between the dependent and the independent variables of a theory can be used to distinguish between two approaches to the sociology of law. On one approach, "law" is the dependent variable and what one seeks to explain is the observable variation in one or another of the "manifestations of law".[120] Such a theory might seek, for example, to account for differences between the rules of different social groups or for changes over time in the rules of a given social group. Another sort of theory treats law as an independent variable and seeks to explain, for example, the effects that one or another legal rule has on social life.

3.3.1. Rules as dependent variables

Theory that affords an explanation for the variation in the rules that can be observed in social groups is a very underdeveloped part of the sociology of law. In its underdeveloped state, it consists of two aspects: the quantity of rules and their contents.

3.3.1.1. The quantity of rules. The simplest sort of variation in rules would seem to be their *quantity*. Black includes the *number* of rules within his general conception of the "quantity of law".[121] A similar quantitative approach is implicit in the popular idea that

modern social life is suffocating from a "flood of norms".[122] A serious difficulty with the idea that the number of rules in a social group can be measured is that it presupposes that there is something like a *unit of regulation*. In fact, however, the rules of a social group tend to have the character of a "seamless web" so that it is hard to draw the lines that separate one rule from those adjacent to it: "Thou shalt not kill" is surely as close to a unit as one could get, but a moment's reflection leads one into a thicket of possible justifications (self-defense, justifiable cannibalism, euthanasia), problems of causation (withdrawal of futile life-support), the extent of responsibility for non-intentional (e.g. negligent) harm and complications such as the duty to rescue. In short, the idea of measuring the "quantity" of rules seems, except in the simplest and most artificial case (e.g. a game such as *Monopoly*), doomed to failure.

3.3.1.2. The content of rules. Variation in the content of rules over time or between social groups has always attracted a great deal of attention, from everyday seat-of-the-pants speculation to elaborate empirical studies. But despite its obvious importance, and occasional bold theoretical efforts,[123] there is little by way of serious theory concerning the content of rules. Differences and change in "moral" rules (e.g. concerning abortion, divorce, homosexuality, smoking and drinking, relations between the sexes and between adults and children) have over the last few decades been striking, but little in the way of satisfying explanation seems to have emerged so far.

One of the few examples of successful explanation for (changes in) the content of rules concerns the institution of property: socioeconomic circumstances are often thought to be important.[124] Thus Demsetz argues that exclusive territorial rights to hunt beavers arose among North-American Indians when the European demand for beaver pelts threatened traditional open-access hunting grounds with decimation of the beaver population.[125]

Well-known approaches to the explanation of legal change include diffusion, transplantation and evolution.[126] But such "explanations" generally boil down to little more than a retrospective *description* of the *process* of change and to have little *explanatory* value as to its *substance*.

It is sometimes possible to see normative change in a social group as a new use of existing normative resources. "Rule-making", closely examined, can be a matter not of creating something new out of nothing, but rather of the application to a specific situation of a pre-existing more general rule. I once described how a very specific rule among a small group of doctors in an intensive care unit – withdrawal of treatment considered "futile" should be made at such a time that the patient dies on the responsible doctor's shift – emerged out of a conflict in which one of the doctors was accused in effect of not having "cleaned up his own mess", thus violating a far more general rule that goes back to everyone's childhood.[127] More generally, the use of secondary rules in dealing with primary rules often gives rise to what can be considered a "new" primary rule. The phenomenon is obviously very interesting – although it, too, renders the idea of a "quantity" of rules, discussed above, problematic.

Much of the serious attention to legal change has concerned legislative change and in particular the associated political processes. Often, as in the case of changes over the past few years in (legal) rules concerning smoking, what requires explanation is not so much the content of a new rule – this having often been anticipated in changes in non-legal rules concerning the same behavior – as, rather, the change in the level of differentiation in the

maintenance of a social rule that acquires "legal" status.[128] One fruitful way of explaining legislative rule change is in terms of the decision-making structure from which it emerges. Thus Weyers explains the legalization of euthanasia in the Netherlands, Belgium and Luxemburg – but so far nowhere else – in terms of the "political opportunity structure" characteristic of a given political system. This approach enables her to predict which European countries are most likely to legalize euthanasia in the near future.[129]

3.3.2. Rules as independent variables[130]

A second, much more prevalent approach in the sociology of law treats rules as independent variables. How much of behavior, of social life and of social change can be explained by the fact that social groups have rules and that people follow these rules?

3.3.2.1. Direct vs. indirect effects. Dealing with these questions requires a distinction – generally overlooked in the literature on the "effectiveness" of legal rules – between "direct" and "indirect' effects".[131] The behavior required by a rule – when it occurs and the rule is responsible for it[132] – constitutes the rule's "direct effects". But literal conformity is not the only way that a rule can be said to have direct effects. People may adapt their behavior to the existence of a rule even when they are breaking it, as in the case of a bicyclist who pays extra careful attention when biking the wrong way on a one-way street. Avoidance is another possible direct behavioral effect: a tax rule, for example, can make a particular sort of behavior especially costly and hence induce people to choose alternative sorts of behavior that are not subject to the rule. The lowest common denominator of all direct effects of a rule is that the behavior to which the rule is addressed be different from what it would have been in the absence of the rule. All of this I refer to henceforth as "rule-following".

The "indirect effects" of a rule are the consequences of the rule's direct effects – the consequences, that is, of rule-following. A hoped-for indirect effect of rules banning smoking in public places is a reduced incidence of lung cancer and other diseases, in particular among non-smokers ("passive smokers").[133] It is the indirect effects of rules that people interested in the "effectiveness" of regulation (legislators, social scientists and so forth) are concerned with, direct effects in themselves ordinarily being a matter of indifference: except in the case of the "enforcement of morals", even the worst sort of rule-breaking is usually only considered reprehensible because of its indirect effects.

As I have argued elsewhere, the "instrumentalist" project in the sociology of law has inevitably proven to be a disappointing failure because it requires two sorts of theory: a theory of rule following and an infinite number of "policy theories" which tie direct effects to indirect effects for every possible subject of legislation: one theory for the relationship between drinking and driving safety, another for the relationship between tenure arrangements and the sustainable use of agricultural land or fishery resources, another for the relationship between the reporting requirement for euthanasia and the effectiveness of societal control over such decisions, yet another for the relationship between legal form and the functioning of state enterprises, etc. ad infinitum. Since no general theory of indirect effects is possible, it is not surprising that the instrumentalist tradition has never produced one.[134]

In short, the relationship (if there is one) between the direct effects required by a rule and the indirect effects that are supposed to follow is different for every different subject

of regulation and is not a legal or sociological matter but one of some mixture of psychology, medicine, engineering, economics, physics and chemistry, and so forth.

3.3.2.2. The effects of rules on behavior. Direct effects – rule-following – are usually merely a means to an end, for policy-makers not in and of themselves interesting. Nevertheless, since, as we have just seen, no general theory of indirect effects is conceivable, and since the production of direct behavioral effects by a mere rule is in fact highly mysterious, it is to the direct effects of rules – to rule-following – that the sociology of law must address itself. How is it possible that a rule could influence behavior? We can distinguish at least three ways.

In the first place, an actor can avoid behavior he has been taught or has learned from experience – directly or vicariously[135] – to associate with a "pattern of sanctions"[136] (more accurately: pleasant or unpleasant social experiences of one sort or another). A large part of the socialization of young children takes place in this way (and in this case, interestingly, the sanctions often consist, at least partly, of rewards, as in the case of toilet training). An actor will often "internalize" a rule, so that his own behavioral inclinations are the same as those required by the rule;[137] in such a case, the rule itself will be far in the background of the actor's awareness, although he or she should be able to identify it if asked.

In the second place, if an actor knows or is informed or reminded[138] of the existence of a rule, he may adjust his behavior to it more or less automatically, without much thought and in the absence of any particular perceived risk of sanctions. He follows the rule because he has learned that it is generally a good idea to follow rules – a way to secure positive or to avoid negative reactions – and doing so more or less automatically saves him from having to think about the matter further. A rule is in such a case a social signal to which the actor has learned to respond in the appropriate way. A small sign on a church door asking gentlemen to take off their hats illustrates this possibility.

In the third place, if an actor knows or is informed or reminded of the existence of a rule and the associated positive or negative sanctions, this information may affect the relative eligibility of various available courses of conduct. A rule is in this case a way in which information concerning certain costs and benefits of behavior is summarized and communicated. Often, as in the case of rules that serve to coordinate behavior (such as right-of-way rules in traffic), conformity to a rule brings benefits quite apart from avoidance of the social sanctions attached to breach (for example, a reduced risk of being involved in an accident).

It seems likely that rules in all three possibilities play a role in a full account of the social working of rules. People follow rules because they have internalized them, they are inclined to follow rules generally because they have learned that doing so is advisable, they follow rules because of the effect rules have on the perceived costs and benefits of behavioral alternatives. All this rule-following is the foundation of social order.

3.3.2.3. Learning (how) to follow a rule. It is easy to say "people follow rules", but what exactly is involved? How is it possible that having internalized or upon remembering or encountering a statement of a rule, people can exhibit socially appropriate behavioral responses – that is, follow the rule? Homans (1950) provides the clue to an answer with his observation that both making (often implicit) statements about rules ("I think I was

next" to a fellow customer waiting to be served) as well as responding to such statements in the socially appropriate way (waiting one's turn), are learned behavior. How can we suppose this sort of learning to take place?

Essential to behavioral learning is the *general* element in the learned response. The chicken in a behaviorist's experiment learns to peck not just *this* red button but *all* more or less similar red buttons. The sorts of experiences from which an animal learns, the degree of generalization of what is learned, and the complexity of the learned response are presumably to a large extent biologically given for every sort of animal. Rats, for example, are said to learn very quickly from smells and to generalize from one bit of food with a particular smell that once made them sick, to all things with the same smell – which they do not eat. The learning involved is quite sophisticated, since the sickness may be at some temporal remove from the original eating. The survival value for a rat of this ability is obvious (and is daily evidenced in the difficulties exterminators are said to have in poisoning rats[139]). Other animals can learn highly general and complex responses. Thus sheepherding dogs, for example, are bred to be able to learn wonderfully complicated and creative responses to simple commands.[140] You can teach such an animal to do things you could never teach a chicken, for example, to do.

Human beings are capable of learning from a wide variety of sorts of experience (including, most importantly for our purposes, verbal communication), at a very high degree of generality, and of very complicated learned responses. There is no apparent reason why such an animal should not be capable of learning to respond in the appropriate way to rules – that is, to exhibit the required behavior in response not only to a specific situation it has learned how to react to (as does the chicken or the rat), nor in response to a specific command (as does the sheepdog), but when confronted with the situation specified in a rule it has learned. Once it has learned how to follow rules in general, if you tell it that people in the Netherlands expect you to bring flowers with you if you are invited to a dinner party, then even if it has never heard that rule before nor ever been sanctioned for not bringing flowers, nor ever seen anyone else so sanctioned, and even if it has no idea what the local sanctions might be, such an animal should be able respond appropriately to the situation of being invited out to a dinner party in the Netherlands. It is a matter of everyday experience that human beings in fact are capable of this sort of rule-following.[141]

The ability to learn rules from verbal communication, and to follow rules generally without having to learn separately to respond appropriately to the situation specified in each individual rule, enormously increases the possibilities of social order. Having learned to follow rules, human beings can follow not only primary rules of behavior, but also secondary rules about rules. It is the ability of human beings to follow rules about rules that makes differentiated social organization (government and other institutions; law) possible. This is the stuff of which the whole elaborate superstructure of legal order (the legal corpus, legal institutions, legal reasoning) is made.

3.3.2.4. The social working of rules. The discussion so far has focused on rule-following by individuals. But knowing how rules can be followed does not yet give us a full answer to the question, how to predict and explain the direct effects of rules. This is because, while rule-following is a matter of individual behavior, the factors that influence it are largely social. These factors include whether an actor learns about the existence of a rule; how the actor's social surroundings use the group's secondary rules to assess the relevance

and proper interpretation of the rule and of possible justifications and excuses; and whether – in circumstances of legal pluralism – there are countervailing rules and if so what their relative weight is. As I concluded a few years ago:

> The social working of law depends on the mobilization of legal rules… . [W]hat people do with a legal rule largely depends upon the secondary rules that obtain on the shop floor of social life. SASFs ['semi-autonomous social fields', that is, social groups] on the shop floor are the primary locus of moral training and orientation; they are the prime source of information about legal and other rules…; they are the source of the social secondary rules which govern rule-following…; they dominate the process of arriving at a definition of the situation; they determine the costs and benefits of mobilization; they resist or support the application of external law to internal relationships. And they invest vastly more resources in all this social control work that even the most totalitarian state can usually achieve. In short, it is not the legislator who determines when a legal rule will be followed in social interaction. It is society that determines when and to what extent it is regulated by law. And it does this in a highly self-regulated way.[142]

3.3.2.5. Social order through learned rules. In short, while there are certainly many aspects of the phenomenon of social rules and their social working that are not sufficiently understood, the basic idea – what rules are, how they can be learned, and how they are followed – does seem potentially capable of giving an empirically well-founded answer to the problem of social order. The attractions of a theory of the social working of rules are:

- that it can deploy a coherent conception of a rule of behavior and its relationship to behavior;
- that it permits a generous separation between actual sanctions and learned responses;
- that it does not assume a simple or "deterministic"[143] connection between rules and behavior;
- that it treats the constitution of social order at the macro-level as a matter of more than mere aggregation of individual behavior – that is, as a matter of social rules;
- that with the help of the idea of "secondary rules" it explains the way in which "primary" rules are used in social interaction, as well as the genesis of new rules, in the same terms used to explain the social working of "primary" rules: as the result of rule-following;[144]
- and finally, that it treats the social working of rules as something that – in circumstances of legal pluralism – is itself subject to social regulation.

All this is, of course, especially complicated in the case of highly differentiated social order. Nevertheless, however small or huge a group, and however undifferentiated or differentiated its social order, human beings manage to identify the valid rules of groups – their own and other groups – all the time, and – to return to the question discussed in Section 3.2.4 – there is no reason why a careful social scientist ought not be able to do so, too.

3.3.3. Is a choice between the two approaches inevitable?

Most sociologists of law have a preference for one or the other sort of theory – for treating rules as dependent or as independent variables – or they switch opportunistically back and forth. If the choice is a conscious one at all, the reasons for it are seldom articulated. Thus someone might study the process of legal change concerning euthanasia one day, and the

next day seek to establish to what extent medical practice is influenced by the current rules, without paying much attention to the fundamental difference between the two questions. Does this mean that the sociology of law is a sort of scientific hodge-podge, similar to a discipline of geology which included explanations both for the existence and location of deposits of coal or oil, as well as for the influence of coal and oil on social life: war, global warming and its social consequences, economic growth and so forth?

Black thinks that is the case, and he is one of the few sociologists of law who has thought carefully about the matter and has adopted a consistent position. In his opinion (as we have seen in Section 1[145]), every science is defined by its dependent variables. Sociology of law, he argues, is the science that seeks to explain "law", in particular its "quantity". Whatever influence law may have on other things is, in his view, no part of the sociology of law, any more than geology concerns itself with what people do with coal and oil.

However important Black's insistence on the fundamental difference between the two sorts of theory may be, and however clearly he articulates his choice for theory in which "law" (in his sense) is the dependent variable, in the end his position is untenable. It is of course true that one must not identify a rule with the behavioral effects it prescribes, among other things because a rule can be violated without thereby bringing its existence into question. But a concept of law (or, more generally, of social rules) in which the effect of rules on behavior played no role at all, would be empty. Social talk about rules would be a strange sort of ritual interaction without apparent social utility. That Black writes confidently about "policemen" and "judges", of "governments" and "law", seems to show that he does not appreciate the full ramifications of his radical position.[146]

The relationship between rules and their effects is complex and this fundamental fact must lie at the heart of theory in the sociology of law. Rules must, in sociological theory, always be seen as both dependent and independent variables, and it is high time that sociologists of law give explicit attention to the theoretical complexities to which such a reciprocal relationship between rules and rule-following gives rise, and in particular to the crucial role that secondary rules and legal pluralism play in the social working of rules ("legal" or otherwise).

4. What, then, is sociology of law?

The short answer to the question posed at the beginning of this essay can now be precisely formulated:

> *Sociology of law is an empirical social science whose subject is social control, that is to say, the social working of rules (primary and secondary), its causes and effects.*

Such a conception of the discipline brings with it specific requirements for the nature of the theory its practitioners seek to develop, for the concepts and methods they deploy, and for the criteria for the truth of statements they deem relevant. In short, such a conception has profound consequences for the work of a sociologist of law.

4.1. The expression "social control"

Is the traditional expression "social control" an adequate name for the key concept of the sociology of law? To recapitulate the theoretical setting in which such a question arises,

sociology is the study of the behavior of people in groups, groups are identifiable by their characteristic social order, social order is the product of social rules (which are constitutive of groups – without social rules there are no groups, just categories). It is the relationship between the social rules of a group and the group's characteristic social order that is traditionally referred to as "social control". But does the term do justice to the nature of the relationship between rules, behavior and social order?

The problem lies with the word "control", which suggests that the relationship between rules and social order proceeds through rule-following (leaving avoidance, for example, outside the picture), secured if necessary by social sanctions of one sort or another ("control"). And all this assumes, as well, that the key characteristic of a social rule is that it imposes *limitations* on behavior. But many rules do not so much limit behavior as offer possibilities – *facilities* – for sorts of behavior that without the rules would not exist at all: marriage rules, for example, and other rules that offer possibilities for *coordinating behavior* and for *special forms of interaction* (such as guest or employer).[147]

The fact that groups have rules concerning the behavior of their members does not entail the top-down implication that one person or group "controls" the behavior of others. Many of a group's rules may have no particular "author" nor anyone in particular charged with surveillance and "enforcement".

Finally, the critical role of secondary rules in a functioning system of social control (and not only, as Hart supposes, in a highly differentiated system: "law") – rules that govern the social processes by which primary rules are identified, interpreted, created and changed – fits only uncomfortably under the heading "social control".

In short, the expression "social control" carries with it some unfortunate connotations and limitations concerning the relationship between rules and social behavior. What we are interested in is the relationship between, on the one hand, a group's rules and their behavioral effects – the *social working* of those rules – and on the other hand, the characteristic *social order* that a group's rules bring about.[148] I have not been able to find an expression other than "social control" that encompasses the whole of this idea, and I suspect that others may not have fared any better and that this explains why the expression "social control" is so predominant in the literature. As long as we remain aware of its limitations, it is perhaps safe to continue using it.[149]

4.2. Sociology of law and sociology[150]

> *All collective human life is directly or indirectly shaped by law. Law is, like knowledge, an essential and all-pervasive fact of the human condition.*
> (N. Luhman)[151]

Sociology of law is the sociological study of law. There is more to this proposition than a play on words. It implies something that has seemed – over the last century or so – not at all self-evident. That is, that sociology of law belongs to the discipline of sociology and not to that of law.[152]

Sociology is the scientific study of social life: the life of human beings in groups.[153] It concerns itself with everything that distinguishes a group from a happenstance collection of individuals – a student association, for example, from the people (mostly students) who happened to pass under my window on the sidewalk below as I first wrote these lines.

Many other animals also live in groups, but in the case of man, social life is extraordinarily complex and the part that biology plays in social life, while indirectly fundamental, is for our purposes relatively modest.

Sociology concerns groups, but a "group" does not exist independently of its members. Everything that can be said about a group can be reduced to statements about the members, their shared rules and their interactive behavior. There is no "extra" substance that, like the smile of the Cheshire Cat,[154] is left over if you think away all the members of a group, and that someone might want to call "the group itself" or its "essence".

The defining characteristic of a group is that the interactions between the members are regulated by rules that are to some extent idiosyncratic in the sense that they permit an observer to distinguish one group from another.[155] The behavior of the members of a group is "social behavior" to the extent it is effectively so regulated. The social working of rules – "social control" – is thus constitutive for all social groups. All of the characteristics and activities of a group, all of the social behavior of its members and all of the consequences that life in groups (social order) has for human beings, are derivative of and dependent upon rules and their social working.

Since sociology is the study of the behavior of human beings in groups, and since social control is the *sine qua non* of a group and of all social behavior, it follows that in addressing itself specifically to social control the sociology of law is conceptually foundational to the rest of sociology. The sociology of work, religion, medicine or whatever, all of them ultimately depend upon the fact that the characteristic internal order of every group is dependent on the social working of its rules – that is, of its "law" in the expansive sense necessary for the sociology of law. This explains why "law" played such a prominent part in the work of so many of the founding fathers of sociology, in particular Weber and Durkheim.[156]

It follows from the foregoing that the relationship between sociology of law and sociology generally is not one of daughter discipline to mother discipline, as is commonly supposed. Rather, sociology of law concerns the foundational element of all of sociology. Human social life is only possible – conceivable – thanks to rules and their social working, with which it is saturated, from top to bottom, from the most high-visibility institutions to the most mundane interactions. All of this, however, differentiated or undifferentiated it may be, is the proper subject of the sociology of law.

4.3. Sociology of law and related social–scientific disciplines

Sociology of law is not the only social–scientific discipline that concerns itself with "law". As far as the anthropology of law is concerned, the case is simple: there is no real (i.e. theoretical) scientific difference between the two: accidents of academic institutionalization and methodological preference aside, "sociology of law" and "anthropology of law" are two names for the same discipline.[157] I prefer to use "sociology" to refer to the discipline as a whole because it puts the emphasis on *social life* as the level at which questions are posed and answers sought. There are approaches to anthropology, such as "physical anthropology" that do not share such a focus; and "philosophical anthropology" is not scientific in character at all. All these seem to me good reasons to use the term "sociology". Nevertheless, there are some special features of the anthropological tradition in sociology of law that should be noted: (1) anthropologists of law have tended to focus especially on

the micro-level of individual transactions in small social groups.[158] (2) Anthropologists of law early on recognized legal pluralism as a universal characteristic of human societies and drew the necessary theoretical and methodological conclusions.[159] (3) Anthropologists of law have self-consciously adopted a comparative and historical approach to the study of legal behavior.[160]

There are several other social–scientific disciplines whose empirical research and theory formation partly overlaps that of sociology of law. This is obvious as far as general sociology is concerned.[161] To the extent that criminology, law and economics, legal history, and the biological or psychological study of law concern themselves with social (i.e. regulated) behavior, they are part and parcel of the sociology of law as I conceive it. Scientifically – that is to say, theoretically – considered, there is but one general social science whose subject is the social order for which rules and their social working are responsible. In daily life, of course, scientific considerations are often buried in a jungle of accidental traditions and institutional concerns, competition for scarce resources, rivalry, prejudices and similar theoretical irrelevancies.

4.4. The "relevance" of sociology of law

> *We must view with profound respect the infinite capacity of the human mind to resist the introduction of useful knowledge.*[162]

The most general and fundamental criterion for assessing the worth of a scientific discipline is that it produce some added value relative to the everyday way of looking at its subject. If one doubts the importance of the work of someone who presents himself as a sociologist of law, what one wants to be reassured about is that he has added something distinctive to the omnipresent cacophony in social and academic life of information, opinions, positions, reflections, exposures, critiques, pleas and so forth that concern "the law".

The objective of every science is the explanation of observable variation in the world around us. A scientific explanation involves showing that the differences to be explained can be seen as instances of a general theoretical proposition. The ultimate added value of scientific work lies thus in the theory it produces. The added value of sociology of law is to be found in empirical theory about rules, their causes and their social working.

Against the background of the foregoing assumptions, it is distressing to find oneself largely in agreement with the recurrent complaint made of sociology of law (and more generally, of the social sciences), that it has produced so little accumulation of theory.[163] Enormous efforts have been spent on the collection of data concerning "law", but most of this work has not led too much in the way of general insight. The complaint comes down to this: what is generally called "empirical research" consists largely of the collection of information thought to be relevant to some question of policy. The shelf-life of such information ends when the policy-maker one has in mind (often an institution that funded the research[164]) uses or (more commonly) ignores it, which helps to explain why so many of the products of empirical research by sociologists of law are of interest to no one shortly after they are published. The fact that when asked to explain or predict some sort of legal behavior, a sociologist of law usually has no answer at hand (for this, he would need a general theory on which to base an answer), contributes, I believe, to the rather low esteem in which knowledgeable outsiders hold the discipline. Contrast this with law and economics,

which is rich in theory (unfortunately, much of it probably false or tautological[165]), and therefore in a position to predict and explain social behavior with a great deal of (often undeserved) self-assurance, thereby making itself vulnerable to falsification – something that can too rarely be said of what is called "theory" in the sociology of law.

Such criticism can of course be exaggerated. The "relational distance" proposition predicts, to give one example among many, that increasing the size of social units (villages, prisons, apartment buildings, schools and so forth) will give rise to order-maintenance "problems" and hence to reliance on relatively "expensive" differentiated agents (police etc.).[166] Sociology of law is furthermore rich in insights which may not amount to explanatory propositions but at least caution against easy and common mistakes in thinking empirically about the social working of legal rules: concentrating on the special effects rather than the general effects of judicial decision-making;[167] assuming that adjudicated "cases" tell one much about typical legal interactions of the sort concerned;[168] ignoring the impact of legal pluralism on the "effectiveness" of "law"[169] and so forth.

The significant contribution that the sociology of law could make to policy-making lies in the production of powerful, well-tested empirical theory. It makes no difference whether the first inspiration for this lies in colonial Africa, in ancient Rome, in an American business or apartment complex, or in an intensive care unit in the Netherlands, whereas it does make a difference that it has been tested in those and other social situations. In the development of such theory, the demand for "relevance" that sponsors, funding agencies and research bureaucrats seek to impose on social–scientific research is a fundamental obstacle (worst of all, it is an obstacle that has been very largely internalized by the oppressed – "false consciousness", some would call this). A powerful theory of the "social working" of rules, for example, would be of enormous social utility, although a policy-maker (or the man or woman in the street, including most of one's colleagues in a university) will usually be unable to imagine the "relevance" of the various small scientific steps in the direction of such a theory, many of which concern societies far removed in time and place from where they happen to live, or aspects of our society that seem too "obvious" or banal, or on the other hand too "exotic", to deserve serious attention.

In short, the more sociologists of law – like any other empirical scientists – ignore the demands of "pure science" in order to produce "socially relevant" results, the more funding they will get for their research but the less they will contribute to theoretical progress, and hence to the only really "useful" thing a science can bring forth.

5. Other perspectives and different questions

In this essay, I have described and defended a particular conception of the sociology of law, one that has guided my work as a sociologist of law for almost half a century. Over the years, I have become more self-conscious about it, and, I like to think, more consistent. Although, like all post-Lapsarians, I am to some extent an opportunist and have therefore not always been faithful, I have never doubted that this conception provides the critical standards by which the work of a sociologist of law should be judged.

Many colleagues who consider themselves sociologists of law have quite different ideas from mine about the nature of the enterprise and the relevant critical standards. I do not regard the ideas I have sketched here as a program for purging the ranks. I have simply sought to formulate some ideas that guide my own work and that of colleagues who share

my perspective (although they might not express the ideas in quite the same way). The demands of such a perspective are relevant for those who hold it, in particular for and among themselves. There are other perspectives from which one might study law as a social phenomenon. Over time, each perspective can be assessed for its internal coherence, its capacity to stimulate further thought, and ultimately in terms of the most general criterion for all scientific work: does it lead to accumulation of insight? My personal conviction is that the perspective set out here will survive such an assessment and most of the others will not. But until the "proof of the pudding" is in, there is only one reasonable position to take: "Let a hundred flowers bloom, let a hundred schools of thought contend."[170]

"*Ça, c'est mon point de vue.*"[171]

Notes

1. For a rare exception, see Ehrlich (1936): "the theoretical science of law" (25) concerns the "inner order of … social associations" (37). See also Black (1993, 2): sociology of law is a part of the sociology of social control, that is, "how people define and respond to deviant behavior".
2. Freely from J. Malcolm, "Someone says yes to it: Gertrude Stein, Alice B. Toklas, and 'The Making of Americans'," The New Yorker, June 13, 2005, 148–165.
3. Macaulay (1963, 1977, 1985, 1995, 1996).
4. See e.g. McNiel (1985).
5. Macaulay emphasizes the importance for businessmen of maintaining a good name (i.e. acting in accordance with social expectations) as one reason not to approach contracting and disputes over a contract in a "legal" way. Compare the description by Baerends (1994) of social norms concerning the appropriate way to deal with a defaulting debtor; Engel (1993) on social norms concerning when it is appropriate to go to court over a neighborhood dispute.
6. Compare Adams and Griffiths (2012).
7. This position is largely implicit in Black's work (see e.g. Black 1976, 1993). In a letter to Griffiths in connection with Griffiths (2003) (see Griffiths 1996, 63–64, n 119), Black writes: "I do not believe that the effects of law fall within the jurisdiction of the sociology of law… I believe that each field of sociology should be defined by the range of variation it seeks to order, i.e. its cluster of dependent variables…" I prefer to emphasize the question(s) that a discipline seeks to address. The two approaches to the idea of a scientific discipline amount to about the same.
8. On 'stratification', see e.g. Ross (1901).
9. For studies of social control in which "relational distance" plays a key role (albeit under different names), see e.g. Malinowski (1926), Schwartz (1954), Gulliver (1963), Gluckman (1973), Todd (1978), von Benda-Beckmann (1984), Ellickson (1991). For further discussion of the concept and its place in the sociology of law, see Griffiths (1984a, 66).
10. See e.g. Black (1980).
11. Searle (1995, 145–147) argues that the relationship between rules and rule-conforming behavior is much more complicated than the expression "rule-following" suggests, including a large component of behavioral dispositions that have developed in a way that makes them sensitive to existing social rules. This seems to me a very important point, in particular in connection with the idea of rules as independent variables that explain behavior (§3.3.2). I will, nevertheless, largely avoid the additional expository complications entailed by Searle's argument. Whenever I refer to "rule-following", I mean to include behavior caused by such rule-sensitive dispositions.
12. The sociology of law studies social control at the group level (taking account of the "nature of the beast" but ignoring individual-level variation). It differs in this respect from the psychology (and perhaps, someday, the neurology) of rule-following at the level of individuals.

13. Black is not entirely consistent (or clear) about the place of rules in his theory: he includes legal "prohibitions, obligations and other standards" and "order[s] or command[s] of any kind" among the phenomena that make up the "quantity of law" (see Black 1976, 3). This seems – among other things – to render his conception of the "quantity of law" problematic, since as far as I am aware no one has yet found a way to operationalize the notion of a unit of regulation (cf. Griffiths 1984c). See further §3.3.1.1.
14. W. Goddijn (Franciscan, priest, Dutch sociologist of religion – see *Wikipedia*), interviewed by T. van der Werf, 'Recent history explains Catholic malaise', Nieuwsblad van het Noorden, 28 April 1993, 4 (translation JG).
15. Hart (1961, 55–56, 86–88, 99). See Tamanaha (1996) for a discussion of the distinction and its history in the philosophy of the social sciences. Abel (1973a) formulates the distinction in less technical terms: legal questions are not the same as questions about law (cf. also Abel 1973b).
16. See Hart (1961, 89–96, 113); compare Searle (2010, 97). See further §3.3.2.
17. Cf. Nowenstein (2010), a Spanish sociologist with French and Italian sociological training, who did precisely this in her study of the social working of "presumed consent" legislation in France.
18. Cf. the controversy about this between the anthropologists Bohannan (1965b) and Gluckman (1973, 375–382); for discussion, see Nader (1965) and Moore (1969a).
19. A purist might try to avoid this problem by inventing an entirely new descriptive vocabulary, but doing this took several millennia in physics and a number of centuries in the rest of the natural sciences, so that for the time being the sociology of law is probably stuck with the very imperfect concepts of natural languages.
20. Hart (1961, 87).
21. Black (1976, 2, 44).
22. Freely rendered from van Maanen (1977, 227). He referred among other things to a phenomenon prominent in the news at the time: "death squads" active in Brazil, whose members pretended to be policemen.
23. This does injustice to those ethologists who do take account of social 'rules' among some non-human animals (see e.g. de Waal 1989). But see §3.2.2 for the question whether such animals can be said to have rules in the sociological sense.
24. There is a confusing ambiguity in the way the word "normative" is often used. The internal perspective is "normative" in the sense that it concerns itself with evaluating behavior by measuring it against certain standards (rules of behavior). On the other hand, the external perspective can be described as "normative" because it concerns itself with the observable use of rules. I use the term "normative" exclusively in the first sense, as a characterization proper to the internal perspective, so that "normative" and "empirical" (or "external") are mutually exclusive terms.
25. Even a cursory exposure to Black's writings makes clear that his perspective is not really an "extreme external" one. As Hart observes: "If...the observer really keeps to this extreme external point of view ... his description of [the life of the members of a group] cannot be in terms of rules at all" (Hart 1961, 87). Black makes regular use of terms characteristic of the "moderate external" perspective and that imply the existence of rules, such as "official", "legislation", "adjudication", "arrest", "indictment", "conviction", "acquittal", "court", "plaintiff", "appeal" and so forth (1976, 2-3); see also 1980, *passim* and in particular the discussion of "violation of the 'law on the books' (1976, 72).
26. Hart's distinction between primary and secondary rules and the resulting complexity of the question, who it is who must "accept" the validity of R, if R can be said to exist in a group – matters of critical importance for the sociology of law – will be discussed in §3.2.2.
27. See further §3.2 on the definition, ontology, epistemology, methodology and relativity of rules.
28. M. Bennett and P. Hacker, *Philosophical Foundations of Neuroscience,* Malden: Blackwell, 2003, 71 (with thanks to Henri Wijsbek for calling this to my attention).
29. Griffiths (1984a, 39).
30. This is J. Austin's ((1832) 1965) classic definition of law, on which many others – including those of Malinowski and Pospisil (see Box 2) – are variations. Cf. Hart (1961, 25).

31. See Ehrlich, Malinowski, Hoebel, Bohannan, Pospisil (Box 2).
32. See Weber, Radcliffe-Brown, Pound, Schwartz, Selznick, Black (Box 2).
33. See Pospisil (Box 2). Llewellyn and Hoebel (1941) were very influential in promoting this conception of law, especially among anthropologists (cf. also Abel 1973b).
34. Holleman (1973). The expression "language of interaction" is taken from Fuller (1969). Ehrlich's (1936) sociology of law shares this insight.
35. W. Shakespeare, *Romeo and Juliet*, Act II, scene 2. This is the *functional approach* to the concept of law: the term "law" refers to whatever it is that is involved in one of what Llewellyn called the "law jobs" (see Twining 1985, 175ff).
36. Pieterman (1993b, 132) ("recht is alleen recht als er recht op staat"), paraphrasing an old Dutch candy advertisement that amounts to about the same as "Coke is only Coke if it says 'Coke' on the label". This is the *Baron von Munchhausen* [legal positivist] *approach* to the concept of law, named after the mythological character who sought to save himself from sinking into a bog by pulling himself up by his hair. It is the normal approach of legal scholars and uncritical sociologists of law.
37. L. Carroll, *Through the Looking Glass, and What Alice Found There.* London: Macmillan 1871, Chapter 6. This saying of Humpty Dumpty is the *Frank Sinatra approach* to defining the concept of law: everyone does it his way.
38. G. Stein, in *Bartlett's Familiar Quotations*, 14e ed., 933a. This is the *essentialist approach* to the concept of law: it is what it is (and you know it when you see it).
39. This is the title that is part of Magritte's painting of a pipe. It might be called the *natural law approach* to the concept of law ("Nazi law is not law").
40. Hart (1961, 107).
41. See note 36.
42. Hart (1961, vii).
43. For this reason, among others (such as the latent terminological circularity it shares with Hart's definition and its inapplicability in many cases of what is generally regarded as legal pluralism, *cf.* n 52), Tamanaha's suggestion (2001, 167) that a social scientist interested in legal pluralism should regard as "law" in any social group that which "sufficient people with sufficient conviction consider … to be 'law'…" is unusable for purposes of sociology of law.
44. Black (1976).
45. For an example of such an approach, see Griffiths (1984a), justly criticized for this by van den Bergh (1986, 380–382).
46. Austin (1961, 149).
47. Abel (1973b) is one of the few who have seriously confronted the question whether "law" is a suitable theoretical concept in the sociology of law. His pessimistic conclusion anticipates the conclusion reached here (224): "[f]or the time being, at least, it seems clear that we must displace law from the center of our conceptual focus as we attempt to build social theory".
48. Compare Moore (1969b) for an extensive overview of the anthropological literature on the concept of law; see also F. and K. von Benda-Beckmann (2006).
49. Other taxonomic conceptions of "law" see it as a special case of commands (Austin), rules (Hart, Malinowski), politics (cf. Gulliver 1963, 299) or positive morality ("social norms": Hoebel). For F. and K. von Benda-Beckmann (2006, 12), "law" is a special case of "objectified cognitive and normative conceptions for which validity...is authoritatively asserted".
50. There is also no reason to suppose that either group of settlers would have regarded the social control in their settlement as "law" – they probably reserved that term for the "law" of the Israeli state. But to be clear about the matter: *pace* Tamanaha (see n. 43), their "internal" point of view on the matter is not relevant as far as an empirical concept of law is concerned.
51. The formulation of the 'relational distance proposition' in Griffiths (1984a) (discussing Schwartz 1954) was unfortunate in using the term "specialization".
52. Smith (1776, Book 1, Ch. 1).
53. It is also not the case that specialization implies differentiation. One can be "specialized" in something without necessarily occupying a distinct social role to which performance of that

thing is allocated: a particular sort of medical "specialist" such as a surgeon may or may not be entitled to practice (a particular variety of) surgery to the exclusion of all other doctors.

54. Differentiation plays a central role in the "systems theory" approach to sociology of Luhmann (1982), in which the "social system" as a whole is seen as differentiated into discrete subsystems. Differentiated "roles" allocate the performance of the essential social functions responsible for the various distinct subsystems ("religion", "politics", "economics") over the population. Luhman emphasizes the idea of society as a self-differentiating system that becomes ever more complex as it continually proliferates subsystems to deal with an environment of increasing complexity. Stripped of its essentialist/functionalist assumptions and the jargon of "systems theory" (and an occasional evolutionary assumption such as "stages of differentiation"), and of a tendency to confuse specialization with differentiation, the "systems" approach seems much the same as that proposed here: differentiation refers to the existence of distinct roles (defined, I would add, by social rules) for the performance of distinct social tasks. For a rather different use of the term to denote social divisions based on things like class, age, ethnicity, etc., see e.g. Juteau (2013).
55. Schwartz' formulation of the theory is in embarrassingly "functional" terms – societies get the sort of control they "need" – but nevertheless, after more than half a century, his analysis is still one of the most sophisticated to be found in the literature.
56. Cf. Abel (1973b, 222–224).
57. Cf. Abel (1973b, 221), arguing generally against the use of dichotomies in the sociology of law. His argument has not received much attention and the use of dichotomies remains ubiquitous. Black's theory, as he formulates it, is typical in this regard: all social control is either "governmental" or "informal" (Black 1976). Such an approach stands in the way of powerful theory. Black's "relational distance" proposition (see text at n 9 above), for example, would be far more powerful if formulated in terms of two continuous variables: "differentiation" in social control and "relational distance". Many contributions to litigation theory similarly make use of dichotomous variables: Galanter (1974) distinguishes between "one shotters" and "repeat players", Todd (1978) between "insiders" and "marginals", Merry (1982) and many others between "mediation" and "adjudication", Gluckman (1973) and others between "simplex" and "multiplex" relations, Gulliver (1963, 299) between "political" and "judicial" dispute processes and so forth. The observations of such authors concerning matters "legal" could easily be formulated in a continuous way, for example, in the case of Todd and Gluckman, by using the continuous variable "relational distance". Similarly, exchange relationships need not be classified as "contractual" or "non-contractual" but rather, as Macaulay's (1963) analysis implies, as "more or less contractual". Such differences of formulation may seem trivial at first sight, but in practice the consequences of discontinuous formulation have got profoundly in the way of theoretical progress in the sociology of law.
58. "The lonesome death of Hattie Carroll".
59. I first formulated the following idea in Griffiths (1984a). There are, of course, earlier suggestions that point in a similar direction (see e.g. Blankenburg 1980; cf. Abel 1973b, 244–251).
60. The idea that it is differentiation in the sense used here that distinguishes "law" from other social control is latent in the approaches of a number of authors in Box 2, in particular Hoebel (1954, 26–27) but also, less explicitly, Weber, Malinowski, Radcliffe-Brown, Selznick and Black.
61. It is of course not the case that all social control for which a state is responsible is equally differentiated, nor that social control by a state is always more differentiated than non-state control, nor that social change is always in the direction of greater differentiation, although the "evolutionary" idea often more or less latent in the sociology of law assume that it is (see for an explicit example, Schwartz and Miller [1964]).
62. Compare Geiger (1947). The idea that differentiation is the key to an empirical concept of law is related to Hart's (1961) idea that law is to be distinguished from other forms of social control by the fact that law knows not only "primary rules" that regulate social behavior but also "secondary rules" concerning the use of the primary rules (validity, change and adjudication),

although Hart seems mistaken in supposing that secondary rules are unique to "law". See further §3.2.2.

63. Cf. Macaulay (1963, 1977, 1985, 1995).
64. If this is convenient, for example, in conversations with or interviews of non-specialists, it is always possible to refer to all social control above a given level of differentiation as "law". Cf. Moore (1973, 745) and Galanter (1981, n 16) for such an approach. It may also sometimes be handy to use the term "law" as a *pars pro toto* to refer to social control at various different levels of differentiation (as in "sociology of law" or "legal pluralism"). There is no objection to a certain amount of this sort of conceptual sloppiness, so long as when one lapses temporarily and for good reasons from conceptual rigor, one remains fully aware of what one is doing and its risks. What is important is that such a folk concept of law be resolutely banned from the professional heart of the discipline: theory.
65. The group's secondary rules will generally afford ways of dealing with or eliminating such inconsistencies.
66. See Griffiths (1986b).
67. In an earlier essay, *The social working of legal rules* (Griffiths 2003), I dealt from this perspective with one of the key questions for the sociology of law: how does a theoretical emphasis on pluralistic social control contribute to understanding how, when and why people follow rules, "legal" or otherwise. The expression "legal rules" in the title I now regard as unfortunate because it obscures the crucial role of legal pluralism in the social processes through which *all* rules – "legal" or otherwise – have behavioral effects.
68. E.Q. Campbell (1975, 1).
69. H. L. Mencken, *A Mencken Chrestomathy*, New York: Knopf, 1949. Compare Hoffman (1977, 123) (formulating Mencken's *bon mot* as follows: "the general expectation that people often have, without necessarily being aware of it, that their actions are constantly under surveillance … [with the result] that the individual often behaves in the morally prescribed way even when alone, in order to avoid punishment").
70. Hobbes (1651, 82). Hobbes proposed an *analysis* of social order, not its *history*. The suggestion in some of the social contract literature that there actually once was a moment when human beings sat down together and agreed to establish social order – or, as in the case of Coleman (1990), that the emergence of the rules essential to social order can be explained as the outcome of "transfers of rights" by rational actors pursuing their individual self-interest – is just a metaphor gotten out of hand. See further Griffiths (1995); compare Sunstein (1996) for a similar criticism of the state of nature/rational actor approach to the emergence of social norms; cf. also Hardin (1968, n 74). Another approach to the origins of social rules seems more plausible. Rules as a way of coordinating social life presumably have an evolutionary basis, existing in latent form among primates and hence from the beginning among human beings, who took advantage of language to formulate them and to do all the things with rules that secondary rules make possible. There has thus never been a "norm-free" state of nature among humans.
71. There are other possibilities, as the birds and the bees illustrate. But maintenance of social order with rules is a good deal more flexible and adaptable and undoubtedly has a considerable evolutionary advantage, at least for a "higher" ape. Which is, of course, not to suggest that the mechanisms available to other species (chemistry, instinct) are not also responsible for some of the ordered behavior observable among humans.
72. Paraphrasing Fuller (1964, 91), referring specifically to "law".
73. See Ross (1901) for an early use of the concept of social control.
74. The impossibility that collective goods like property or other institutions can be accounted for in terms of self-interested "rational choice" was famously demonstrated by Hardin (1968). Hardin's argument is simply generalized here to all of social order (compare for general theoretical analyses, Olson [1965], Elster [1989]; and see more generally on the question of "common property" McKay and Acheson [1987], Ostrom [1990]). See §3.3.1 for further discussion of the emergence and change of rules.

75. "(M)en state norms, as they perform other actions, because the results are often rewarding" (Homans 1974, 97).
76. Two useful accounts of "socialization" (i.e. learning rules) are Schwartz (1954) and J. F. Scott (1971). Schwartz describes how new members of a group can learn the group's rules without ever having heard them articulated: by observing the behavior of others and by being sensitive to the reactions of others to one's behavior; one of the agrarian settlements he studied selected candidates for membership on the basis, among other things, of their capacity to learn rules without being told what they were. Scott defines the learning ("internalization") of a norm as follows: "a person … [has learned] a norm to the extent that (other things being equal) he conforms to it at a spatial or temporal remove from sanctions" (Scott 1971 (xiii); compare Coleman (1990, 292–299). Learning other kinds of behavioral rules can be compared with learning a language (speaking and understanding a language being a matter of following social rules). There may well be a genetic basis for such learning – for the capacity for and the limitations upon learning this sort of thing – and such a genetic basis may entail that only certain sorts of rules can be learned. Compare Chomsky (2007) on the learning of language.
77. Moore (1973).
78. See Hart (1961), discussed in §3.2.2.
79. Professor of Theoretical Astrophysics at the University of Leiden. The quotation is from Icke (2009, 107–108) [transl. JG].
80. Compare Searle (1995).
81. E.g. Pospisil (1971); Llewellyn and Hoebel (1941); Gluckman (1973, 1965).
82. See e.g. Malinowski (1926); Schwartz (1954); Ellickson (1991, 2008); Coleman (1990).
83. "Social rule" is, in the context of the sociology of law, a tautology, but it is sometimes a useful one since it emphasizes what is essential.
84. Compare Winch (1963).
85. Homans defines a "norm" (what I call a "rule") as "a statement specifying how a person is, or persons of a particular sort are, expected to behave in given circumstances… ." (Homans 1974, 96); compare Winch (1963); Searle (1995, 2010). In general, a group's rules only apply to the behavior of its members. There are, of course, partial exceptions and qualifications to this based on territoriality (groups may require strangers to abide by their rules when on their turf), on extraterritorial rules, on the emergence of virtual or meta-groups like "mankind" in the case of crimes against humanity, and so forth. None of this seems important in connection with the present discussion of the concept of a rule.
86. Cf. Hart (1961, 7) (rules "withdraw certain areas of conduct from the free option of the individual to do as he likes").
87. The line between enforcement of a social rule and the exercise of pressure to secure private preferences is a thin one, the choice to enforce a rule being itself to some extent a matter of personal preference (cf. Macaulay 1963).
88. See e.g. Macaulay (1963) for a description of the informal – relatively undifferentiated – sanctions that support the extra-"legal" contracting behavior (and the mutual trust involved) of American businessmen. See Bernstein (1992) for the somewhat more differentiated but still mostly "non-legal" regulation that regulates transactions in the (international) diamond industry, thereby making possible the mutual trust on which the industry depends. Bernstein shows how adherence to the group's rules rests in the first instance on the fear of damage to reputation, which would affect both one's ability to trade in diamonds on the basis of trust but would also entail risk to pleasurable association with others and to one's self-esteem. See also Ellickson (1991); Coleman (1990, chapter 5); Engel (1993) (relations between neighbors).

    The common post-Macaulay explanation – "efficiency" – for the use of "informal" dispute mechanisms is criticized by Feldman (2006) in his study of the "Tuna Court" of Tokyo. This institution, established by the city government to deal with disputes over the quality of tuna sold on auction, is apparently used at least as readily by tuna buyers as Bernstein's diamond traders and Ellickson's cattle-rearing neighbors use the "informal" institutions available to them. Feldman's "falsification" does give important support in a rather exotic setting to the

"relational distance" proposition. Relational distance is in the Tokyo tuna market extremely low, and the Tuna Court (whatever its origin) is extremely "informal" (i.e. undifferentiated).

89. Expulsion is the ultimate sanction for failure to obey the rules of any group (cf. Schwartz 1954). In the extreme ecological circumstances of many "primitive" societies, this is in effect a death sentence; among economic actors who are heavily dependent on one another, the same may be at least metaphorically true.
90. Such authorized reactions are sometimes considered part of a full expression of the rule, or even the "real" rule (cf. Raz 1973, 83). On this view, many things normally regarded as rules are actually only indirect references to the "real" rules: the rules of marriage, for example, are "really" the prohibitions of adultery, bigamy, etc. and the requirements of mutual support and so forth. I do not see the point of such departures from ordinary usage (cf. n 94 below).
91. See Hohfeld (1946) on different sorts of rules, giving rise to different sorts of legal relationships.
92. See Vezzoni (2008) for the difficulties of assessing the social effects of legal "facilities" (in his case, the right of patients to formulate binding "advance treatment directives"). Vezzoni introduces the concept of a "vital social practice" to take the place of "effectiveness" in assessing the social consequences of such rules.
93. Sanctions are often indirect: there is nothing less "real" about the "rule against perpetuities" (which renders invalid a legal instrument that creates a future interest which only becomes effective a long time after the creator's death) than about rules requiring or prohibiting the wearing of headscarves, although the sanctions – if one prefers: undesired consequences of failure to comply – in the two cases are very different.
94. Cf. Raz (1973), whose almost incomprehensibly complicated effort to solve the problem of the unit of "law" is ultimately, I think, unsuccessful (cf. n 90 above). One of the unsatisfactory aspects of his approach is the Kelsenite assumption that all (legal) rules are ultimately penal in character (prohibitions, with specified sanctions to be applied by a judge – Kelsen 1961).
95. See further §3.3.1 on the "quantity of law".
96. De Waal (1989).
97. Mackor (1997, 168–174).
98. Hart (1961, 89–96).
99. If, as is often the case, R is not explicitly formulated as such in social discourse, a rule statement of the form "if X, then Y" can be constructed on the basis of discussions with group members and observation of actual social practice. Such a constructed rule must be recognizable to the members of the group.
100. The most generally accepted secondary rules of English spelling seem to involve reference to the authors/publishers of "authoritative" (i.e. socially so considered) dictionaries: Samuel Johnson, the Oxford English Dictionary, Merriam Webster and so forth.
101. Dworkin (1977), discussed from this point of view in Griffiths (1978); see further §3.2.4. Dworkin's idea of a "right answer" is, of course, an internal one. For the sociologist, possible *differences of opinion* about the "right answer" are themselves important data.
102. See Reisman (1999).
103. Clothing rules can be very complicated, depending on the time of day and the day of the week (e.g. Friday office informality), the occasion (parties vs. funerals), the message one wants to convey, the country one is in, one's function and status, and so forth. Clothing rules can be both prescriptive (e.g. black – or, as in Ghana, traditionally red – clothing for funerals) and proscriptive (e.g. sumptuary rules).
104. See Elias (2000).
105. See Ellickson (2008).
106. A variety of more or less subtle rules serve, for example, to distinguish between a socially acceptable "gift" and an unacceptable "bribe" (see e.g. Smart 1993, Darr 2003); cf. also Moore (1973, 725–728) on "fictive friendships".
107. In "common-law" legal systems, and in situations in which the applicable rule is that of a (non-written) extra-"legal" source (e.g. custom, especially in situations where – as in colonial legal pluralism – the applicable legal rule can be part of the "customary law" of a "recognized"

tribe or other indigenous group), judges are often confronted with the necessity of establishing the "existence" of a rule, and there is a considerable literature about how they should do this (see e.g. Woodman 1969). Perhaps even more interesting is the problem of establishing that a rule once thought to exist, no longer does: the problem of *desuetude* (see *Harvard Law Review* [2006] for an exhaustive discussion of this legal doctrine). Social scientists for whom it is important to establish the existence and precise implications of a social rule can learn much from the legal literature and judicial practice.

108. As Reisman (1999) makes clear, non-verbal exchanges can be important indicators of an underlying rule.
109. See Comaroff and Roberts (1981) for a discussion of the ethnographic literature on the invocation of rules in dispute processes. From their data concerning the Tswana of Botswana, they conclude that "most arguments [in a dispute process] are organized with *implicit* reference to *mekgwa le melao* [Twsana law and custom]. The latter constitute the indigenously acknowledged universe of discourse within which meaningful debate proceeds and the assumptions upon which it is predicated, so that the very construal of allegedly relevant facts necessarily entails tacit allusion to rule. Explication is not required to make this apparent to an audience.... [N]orms are explicitly invoked by a disputant only when he wishes to question the paradigm elaborated by his opponent and to assert control over (or change) the terms in which the debate is proceeding" (Comaroff and Roberts 1981, 102 [Italics in original]).

    Observing and understanding such implicit references to rules requires a sound understanding of local meaning and context; the same is true of moral and legal discussion in every society. Compare, for example, Fallers (1969).
110. Intuition – so long as its results stand up to intersubjective testing – is often a good research tool, at least in a social group with which one has some affinity. Such educated guesswork, informed by rudimentary ideas about human behavioral preferences, can come up with a plausible rule on a given subject for a particular social group, a provisional guess that one can then check by seeing whether an outsider's formulation sounds plausible to members of the group (cf. Ellickson 2008). Fictional accounts of human interaction in the group concerned can be useful too, since in order to be believable they have to be ethnographically accurate.
111. Dworkin (1977, vii).
112. Dworkin (1977, 217).
113. Cf. Griffiths (1986b, 2001) on legal pluralism.
114. T. Flannery, quoting from "an Indian friend" in a review of a biography of Rachel Carson (author of the classic of environmentalism, *Silent Spring). New York Review of Books,* 22 November 2012, 23.
115. The problem is not just that essentially all social groups exist in an environment full of other social groups to which their members also belong, but that even a totally isolated group (if such a thing exists) will generally have sub-groups to which various of its members belong (based, for example, on age, sex, function and so forth).
116. See Griffiths (2003).
117. See in particular Scott (1998), for the environmental disaster attendant upon "Prussian scientific forestry", together with examples of a variety of social disasters resulting from similar efforts to impose uniform "order". See also Luttwak (1979) on the vulnerability of tidy, centralized political systems.
118. See for numerous examples, Scott (1998). See Solnit (2009), for an enthusiastic journalistic account of social behavior following disasters; compare the review of the social–scientific literature by Kaniasty and Norris (2004) for a more sober and differentiated view of "social support" in the aftermath of natural or man-made disasters.
119. For examples of otherwise sophisticated and careful scholars who appear to address very little attention to the empirical status of the social rules they discuss, see Ellickson (1991, 2008); Homans (1950); Macaulay (1963); Riesman (1999); Bernstein (1992). Their rather rough-and-ready accounts of local rules are probably generally correct, but for a dramatic and cautionary counter-example, see Orans (1996).

120. See §2.1 on the "manifestations of law". There are theoretical propositions concerning "legal norms" (see §3.3.1), "legal behavior" (e.g. Macaulay 1963; Todd 1978), dispute processes (e.g. Abel 1973b; Merry 1982), legal organization (more or less differentiated – e.g. Schwartz [1954]; Schwartz and Miller [1964]), types of control ("status" vs. "contract" in the case of Maine [1906]; "organic" vs. "mechanical" in the case of Durkheim [1964]), and so forth.
121. See Black (1976, 3).
122. See Griffiths (1984c), discussing an inaugural lecture by Schuyt (1982). Is it clear that modern man is subjected to more rules than his forebears, or has there simply been a shift from non-state rules (church, clan, guild, locality) to state law? Is the equally common supposition that individualism is on the rise consistent with the idea that individuals are subject to more and more rules? The latter question does suggest a way of operationalizing the idea of the quantity of rules indirectly as a function of the behavioral freedom of the individual, in which case I would hazard the guess that the individualism-thesis (i.e. that nowadays there is more behavioral freedom) would come out on top. See further on the "unit of a rule", §3.2.1.
123. E.g. Engels (1893); Wittfogel (1957).
124. Adam Smith (and later, Karl Marx) are among the first seriously to have confronted this question in an empirical way (see Stein 1980, 110–111 and *passim*).
125. Demsetz (1967). For the more general argument that "efficiency" explains the emergence of social norms, at least in connection with economic transactions, see Coleman (1990) for the general theoretical approach and, for supposed empirical examples, Bernstein (1992), Charny (1990), Ellickson (1991). Feldman (2006), however, is skeptical.
126. See Twining (2004, 2005); Stein (1980).
127. Griffiths (2003, 70–72); cf. Sudnow (1967).
128. See e.g. Rubin and Sugarman (1993); Weyers and Bantema (2014).
129. Weyers (2008).
130. The following discussion borrows from Griffiths (2003).
131. The debate between Rosenberg (1991) and McCann (1994), in which many others joined, on the effects of court decisions recognizing fundamental rights (against discrimination, to abortion, etc.) turned on a seemingly similar, but theoretically quite different distinction: not that between behavioral conformity to rules (direct effects) and realization of the policy objectives of those rules (indirect effects), but between direct (realization of rights) and indirect (ideological support for social movements) contributions to social change. In the first case, indirect effects *presuppose* direct effects; in the second case, indirect effects are an *alternative* for direct effects.
132. That rule-following behavior takes place of course does not necessarily entail that the behavior concerned is fully determined by the rule. Rules are not always entirely effective, but the required behavior may take place anyway. Furthermore, regulation often leaves room for an element of "free" choice, in which self-interest, imitation and so forth can play a role (although, as Sunstein [1996] emphasizes, the "freedom" of such choice can often be exaggerated if one ignores the social rules that guide it – a mistake, in Sunstein's view, characteristic of "rational choice" theories; compare Henrich [2000] and Henrich et al. [2005] for interesting cross-cultural experimental falsifications of the hypothesis that self-interest – as opposed to social rules – can account for social behavior: "there is no society in which experimental behavior is fully consistent with the selfishness axiom" (2005, 797).
133. See Kagan and Skolnick (1993); Weyers and Bantema (2014).
134. Griffiths (2003, 21).
135. See Schwartz (1954) on the vicarious learning of rules.
136. Scott (1971, 92) (for whom this is the definition of a "norm").
137. See Scott (1971). Scott argues that in the absence of a continuing perceived chance of sanctions, such internalization will gradually diminish.
138. See Cialdini (1991) and Cialdini and Goldstein (2004) for extensive experimental evidence in support of the idea that if a person's attention is called to a relevant social rule, the chance of his following the rule dramatically increases.

139. This example derives from a conversation many years ago with a rat-exterminator in Washington, DC, in which he explained why – according to him – it is so difficult to eradicate rats with poison.
140. For a detailed observation study of how a domestic cat teaches her kittens how to catch a mouse, see Baerends-van Roon and G.P. Baerends (1979).
141. Cf. on "moral development" Piaget (1932); Kohlberg (1958, 1969); Gilligan (1977).
142. Griffiths (2003, 66).
143. F. von Benda-Beckmann (1989).
144. The foregoing discussion borrows from Griffiths (1995).
145. See above, note 7 and accompanying text.
146. See §1.2. However, hard Black insists, in his major study of the behavior of the police, that "the written law seems to have limited value as a predictor of what the police will do from one case to the next" (1980, 186), it is clear from the observations he reports that this is an exaggeration based on a very narrow conception of the behavior relevant to such a conclusion. While it is true that the police do not uniformly and mechanically apply all relevant legal rules, it is also true that their behavior is by no means an anarchic application of brute force, as if the applicable legal rules were irrelevant.
147. Goffman's (1969) concept of "interaction rituals" nicely captures the importance of many such rules for everyday encounters. Cf. also e.g. Coleman (1990); Ellickson (1991, 2008); Goffman (1967); Riesman (1999).
148. See Griffiths (2003).
149. Van den Bergh (1985, 210) has criticized such an inclusive concept of social control as follows: "I think that the concept ... will quickly lose all meaning ... and become useless as an analytic instrument for social-scientific research." I do not agree. Highly general terms are crucial to empirical theory. It is of course the case that a theoretical term must be operationalizable and that in Black's case, for example, this seems problematic, but van den Bergh does not show that operationalization of a well-defined concept of social control is not possible.
150. This section derives in significant part from Griffiths (2005).
151. Luhmann (1985, 1).
152. This is, of course, not to deny the fact that the sociology of law has historically had – and to this day continues to have – its principal roots in the interest of socially conscious legal scholars in the social effects of law. Hunt (1978) refers to these historical roots as the "sociological movement in law" to distinguish it from the "sociology of law" as a social–scientific discipline. Compare Campbell and Wiles (1976) for a similar distinction in British academic quarters between "socio-legal studies" and "sociology of law".
153. This conception of sociology is exemplified in the work of Homans (in particular, The Human Group, 1950). In modern sociology of law Moore's (1973), rather cumbersome technical term "semi-autonomous social field" is commonly used to identify the social groups within which the regulation of behavior takes place (cf. e.g. Griffiths 2003) This has the virtue of emphasizing the limited autonomy of social groups, but it does so at the cost of putting terminological awkwardness at the heart of sociological theory. On reflection, and after many years of using Moore's terminology, I have come to prefer Homans' use of the word "group". Two other serious contenders in the literature – "association" (Ehrlich 1936) and "rechtsgemeenschap" [legal community] (van Vollenhoven 1981) – have their virtues, but at the cost of suggesting too close an affiliation with "law" in the everyday sense.
154. See L. Carroll, Through the Looking-Glass and What Alice Found There (London: Macmillan, 1871). The Cheshire Cat could gradually disappear, until ultimately nothing more than its smile remained.
155. In principle, a set of individuals could constitute more than one group; for example, the co-owners of a condominium could also be the only members of a sport club. If the two groups have different origins (with distinct memberships) or if they are, independently of one another, in principle open to new members and in particular if they have two distinct sets of primary and secondary rules, it might for some purposes be useful to describe them as two groups rather than as a single group with distinct rules for distinct activities.

156. See Weber (1954); Durkheim (1964).
157. See Griffiths (1986a) and F. von Benda-Beckman (2009) for more extensive discussions of the relationship between anthropology of law and sociology of law.
158. Compare, for example, the approach to legal effectiveness of the sociologist Aubert (1966) with that of the anthropologists Moore (1973) and Collier (1976). To every such generalization there are of course exceptions, and the sociologist lawyers Macaulay (1963) and Galanter (1981) come immediately to mind.
159. Ehrlich (1936) is a notable exception to the general indifference to legal pluralism characteristic of sociologists of law.
160. See e.g. Nader (1965); Pospisil (1971); Abel (1973b); Moore (1969a); Gulliver (1979); Bohannan (1969); Merry (1982).
161. I am thinking of the writings of, for example, Durkheim, Weber, Homans and Coleman.
162. F. Lounsbury, quoted by F. von Benda-Beckmann (1989, 129).
163. Compare Friedman (1986).
164. In other sciences, in particular medicine and related disciplines, a financial tie of a researcher to an institution with an interest in the results would generally be taken to raise questions about those results. It is presumably only a matter of time before sociologists of law are forced to be more circumspect concerning conflicts of interest and other threats to the integrity of science.
165. Cf. Ellickson (1991); Griffiths (1995); Sunstein (1996).
166. Cf. §2.2.2, text box on differentiation.
167. Cf. e.g. Holleman (1973); Griffiths (2003).
168. Cf. e.g. Ehrlich (1936); Macaulay (1963); Todd (1978).
169. Cf. Griffiths (2003).
170. Attributed to Mao Tse-Tung. Some readers may recall with misgivings another remark Mao allegedly made in the same speech, concerning "enticing snakes out of their lairs". See J. Chang, *Wild Swans*. New York: Simon & Schuster, 1991, 211–212.
171. Tchamdja Kpelinga Ata, Juge de Paix, N'Zara, Northern Togo (referring to the desirability of codifying customary law). In E. van Rouveroy van Nieuwaal, *A la recherche de la justice, règlement des litiges au Nord-Togo*. Documentary Film, African Studies Centre, Leiden, Netherlands (©1980, Stichting Film en Wetenschap).

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