The Notion of Validity in Modern Jurisprudence

Truth or falsity cannot be attributed to legal norms, but an assertion of the validity of a particular legal norm can be either true or false. As a consequence, modern students of jurisprudence have adopted certain criteria for validity which, when applied to a particular legal norm, determine whether that norm can be called "law." In this Article, Professor Christie analyzes various notions of validity which have been put forth by contemporary legal thinkers, such as Hans Kelsen and Alf Ross. He discusses these standards in the context of various fact situations in which the problem of validity arises. On the basis of this discussion, Professor Christie concludes that the unavoidable choice among proposed criteria of validity is an important one and that the choice of a criterion of validity is not simply a matter of personal preference. Regardless of whether one has an "internal" or "external" point of view, he submits that certain methods of resolving the question of validity are more fruitful than others.

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I. INTRODUCTION

A. THE PROBLEM

It is said that legal rules or norms, like the norms of ethics, do not purport to tell anything about the world; rather, they purport to tell men what to do. Of course, not every norm which purports to tell men what to do is a legal norm. Yet, since legal norms are said to be prescriptions as to what men ought to do, and not descriptions of what exists in the material world, legal

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1. Ethical judgments, as distinguished for a moment from ethical norms, are usually considered to have some descriptive meaning, although under some theories it is rather minimal and consists merely in conveying the information that the speaker approves or disapproves of the object or the action which is the subject of the ethical judgment. See Stevenson, Ethics and Language (1945). Analogously, it would seem that ethical norms do convey the information that someone wants people to behave in a certain way, and certainly legal norms would convey this type of information as well. Nevertheless, I think it is reasonable to say that ethical and legal norms directly
norms cannot be said to be either true or false. How, then, can we distinguish those directives or prescriptions which are legal norms from those which are not?

Although thinkers whose work was grounded in the natural-law tradition also paid attention to the source issuing a purported legal norm, primary emphasis was placed upon the content of the norm in deciding whether it was law. But, ever since most men were no longer able to answer the question of whether a particular norm was law by reference to an external standard, such as the "law of nature," the "law of God," the "universal conception of Justice," or "the public good," legal thinkers have been looking for an acceptable substitute. Failing such a substitute, men would be thrown back on their individual conceptions of law and not law, right and wrong, just and unjust; meaningful discussion would be difficult and perhaps pointless.

Traditionally, collections of words which have been called law have been termed "valid" or "valid law"; collections of words as to which the appellation law has been withheld have been called "invalid" or "not valid law." In this manner the analytical difficulties imposed by the inability of predicating truth or falsity of legal norms are by-passed. For, although legal norms cannot be said to be true or false, statements that a particular norm is valid can be either true or false. And even if all of what are called rules of law or simply laws are not norms in the strictest sense, the same questions of validity—of separating the wheat from the chaff—still arise. The present inquiry is concerned with the criteria for validity which have been put forth by modern legal thinkers who have rejected the natural-law tradition.

B. REPRESENTATIVE ANSWERS IN BRIEF

One answer to the question of validity has focused on the "purport" only to tell men what to do. Cf. Toulmin, REASON IN ETHICS 78 (1960). It should be pointed out that Ross, who was much influenced by Stevenson, finds no representative meaning (i.e., no knowledge about the real world) in legal norms. Ross, ON LAW AND JUSTICE 8-9 (1939). On the relationship between legal and ethical norms, see also Williams, LANGUAGE AND THE LAW—V, 62 L.Q. REV 387, 395–99 (1946).

2. For St. Thomas and subsequent philosophers in the natural-law tradition, only the public authorities can make law, since only they can mobilize the coercive power of the state in support of the law Aquinas, SUMMA THEOLOGICA Q. 90(3); Dabin, GENERAL THEORY OF LAW ¶ 16 (1944), reprinted in THE LEGAL PHILOSOPHIES OF LASK, RADDUCH, AND DABIN 243 (Wilk ed. 1950). But the major controversy has raged around the assertion that certain laws emanating from the public authorities are not law. Aquinas, op. cit. supra at Q. 86(4); Dabin, op. cit. supra No. 210, at 424–25; cf. id. No. 245, at 455–57.
manner in which the legal rule being examined was created. Another has concentrated attention on whether the rule is efficacious in ordering the relations of men. The first has concerned itself primarily with the so-called formal elements of the legal system while the other answer has looked primarily to the behavior of human beings. The name of Hans Kelsen is preeminently associated with one answer; the American and Scandinavian legal realists have been associated with the other.

For Hans Kelsen, as for most legal philosophers, a legal system is a collection of norms, i.e., a collection of "ought" propositions. Kelsen distinguishes between two types of legal systems: One he calls a static system, the other a dynamic system. In a static system the validity of any particular norm is determined by whether the content of that norm is logically derivable from the content of the basic norm of the system. Kelsen's static system thus resembles a system in which the validity of particular norms is anchored in a notion of natural law and the Euclidean system of geometry whose method many systems of natural law have copied. Any particular theorem will be valid for a given system if it is logically derivable from the axioms of the system and from the theorems of the system which have already been derived from those axioms. In a dynamic system, on the other hand, the basic norm merely describes how the subsidiary norms of that system are to be created. It has no other content. Any given norm will be valid law, i.e. valid for a particular dynamic legal system, if it was created in the manner prescribed by the basic norm or in the manner prescribed by norms previously created in the manner prescribed by the basic norm. Such a dynamic legal system in its most extreme form resembles one of the so-called

3. For a contemporary illustration one might refer to H. L. A. Hart. For Hart a legal system requires the conjunction of primary and secondary rules held together by a particular type of secondary rule, a rule of recognition, which tells us how to identify the other secondary rules as well as the primary rules. Hart, The Concept of Law 92–107 (1961). By referring to authoritative sources such as a written constitution, legislation, and precedent, Hart's rule of recognition focuses attention on the manner in which a purported law was created rather than on what happens to it post-enactment. Id. at 98.


5. Id. at 112–15. This Article will be concerned with the adequacy of equating the term "law," as it is generally used, with membership in a system of norms. Whether marginal items such as particular judgments or the terms of a contract are law is therefore beyond the scope of this endeavor. For a criticism of Kelsen's inclusion of these items within the term law, and thus within the normative system, see Morineau, The Individual Norm, 5 Inter-Am. L. Rev. 81 (1968).
“formal systems” of modern logic in which one starts with arbitrary primitive symbols. Any arrangement of symbols will be a well-formed formula in such a system if it is derived from one of the initial arbitrary arrangements of symbols through the operation of one of the rules of transposition.

In both dynamic and static legal systems the validity of the basic norm is presupposed. For Kelsen, modern legal systems are primarily dynamic systems and it is thus with dynamic systems that Kelsen is principally concerned. It will be observed that, in Kelsen’s view, the validity of a particular legal norm does not

6. The basic norm is something postulated for the purpose of bringing order to our conception of the legal system being examined. Kelsen, op. cit. supra note 4, at 134. In the United States, the hypothetical basic norm for Kelsen would probably be that the founding fathers were authorized to frame (and that the constitutional conventions were authorized to adopt) a constitution. Id. at 115–17. Nevertheless, in a legal system, such as that of the United States, in which there are limitations upon what the legislature may do, the basic norm may be said to have a “material content” as well as to be merely prescribing the method of law creation. Id. at 125–28. To the extent that the basic norm has this material content, it resembles the basic norm of a static system. The nature of modern society, however, necessitates that the hypothetical basic norm relate primarily to law creation rather than to the material content of legal norms. Id. at 118. In the new edition of General Theory of Law and State, which has not yet been translated into English, Kelsen, I am informed, devotes more space to the nature of the basic norm. In this Article, however, I am interested only in functioning legal systems and not in the prerequisites a basic norm must fulfill in order to be the basic norm of an effective legal system.

7. With respect to what might be Kelsen’s most current views on the matters contained in the General Theory of Law and State, H. L. A. Hart’s report of his public discussion with Kelsen in the fall of 1961 at Berkeley is most interesting. Hart, Kelsen Visited, 10 U.C.L.A. L. Rev. 709 (1963). One of Professor Hart’s criticisms, however, is not well taken. He criticizes Kelsen’s view that a delict is the behavior of the subject which is the condition for the official imposition of a sanction upon that subject. Id. at 715–20. It is Hart’s contention that this is an inadequate definition because

Sanctions may take the form of compulsory money payments, e.g., fines; but taxes also take this form. In both cases alike to use Kelsen’s terminology certain behavior of the subject is a condition under which an official or organ of the system ought to demand a money payment from the subject. So if we confine our attention to the contents of the law as represented in the canonical form “If A then B ought to be” it is impossible to distinguish a criminal law punishing behavior with a fine from a revenue law taxing certain activities. Both when the individual is taxed and when he is fined the law’s provisions when cast into the Kelsenian canonical form are identical. Both cases are therefore cases of delict unless we distinguish between them by reference to something that escapes the net of the canonical form, i.e., that the fine is a punishment for an activity officially condemned and the tax is not. It may perhaps be objected that a tax, though it consists of a com-
depend upon whether it is observed or applied in practice. The only requirement he imposes is that the system of legal norms, i.e. the legal order to which a particular norm belongs, be efficacious, that it more or less successfully orders the conduct of the people whom it is purporting to regulate. This is the only contact that his theory has with the empirical world, and it is, of course, the closest his theory comes to having anything in common with the theories of the legal realists. In concentrating on the efficacy of the system rather than the particular norms of the system, Kelsen resembles John Austin.9

The Danish legal philosopher Alf Ross, on the other hand, pulsory money payment as some sanctions also do, is not a “sanction” and that Kelsen’s juristic definition of delict refers to a “sanction.” But this does not really avoid the difficulty but only defers it; for we shall have to step outside the limits of juristic definition in order to determine when a compulsory money payment is a sanction and when it is not. Presumably it is a sanction when it is intended as or assumed to be a punishment to discourage “socially undesired behavior” to which it is attached; but this is precisely the element which Kelsen considers to be excluded from the juristic definition of delict.

Id. at 720–21. (Footnote omitted.) Professor Hart’s criticism may or may not be well taken, but the illustration he gives does not really illustrate that criticism. “If A then B ought to be” when applied to a “fine from a revenue law taxing certain activities” would seem to mean “If the subject fails to pay his tax then the judge should impose a fine upon the subject” and this certainly describes a delict. If the subject pays his tax voluntarily, it would seem that Kelsen’s “canonical form” would not be applicable, for Kelsen is concerned with what officials do in response to a subject’s behavior. Professor Hart’s criticism would seem to apply exclusively to a case where the tax itself was assessed only after some type of official hearing, but then it is not the behavior of the subject which is the condition precedent to the order to pay but the official assessment which plays the part of A in the “canonical form.” The two situations—the fine and the tax—would then not be capable of comparison.


9. For Austin, law is the general command of the sovereign, reinforced by a threatened sanction for noncompliance, to a people the bulk of whom are in the habit of obedience to that sovereign. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Library of Ideas ed. 1954). See especially Lecture I and the early portion of Lecture VI. Id. at 1–33, 191–216. As long as the populace can be said to be obedient to the bulk of the sovereign’s commands, most of the time, any particular command is law, even if not observed in practice. Id. at 205–07, 15–16. It should be noted, however, that, among the other differences between Austin and Kelsen, Kelsen recognizes that the psychic compulsion which impels people normally to obey the law is not always based upon the fear of physical sanctions. There are, for most people, religious and ethical reasons for obeying the law. KELSEN, op. cit. supra note 8, at 274.
focuses his attention not only on the efficacy of the system but also on the efficacy of individual legal norms. A particular norm is valid for a given legal system if it will figure materially in the decision of a controversy calling for the application of that norm.\textsuperscript{10}

As a consequence, Ross is concerned not so much with what officials have done in the past but with what they will do. The descriptive statement "norm X is valid law" is a prediction that when facts arise which call for the application of the norm, the officials deciding disputes will apply the norm in question and will feel themselves "bound" to do so. If, when such a case does in fact arise, an official applies norm X, then the statement "norm X is valid law" will have been confirmed. If the official does not apply norm X, then the statement will be shown to have been false.\textsuperscript{11}

It should be observed that, although, according to Ross, the statement "norm X is valid law" implies not only that officials will apply norm X but also that these officials will feel bound to apply norm X, nevertheless the statement will be completely confirmed if an official applies the norm. Otherwise, the statement will be proven false. The statement "norm X is valid law" will be completely confirmed if norm X is applied by an official, because Ross does not seem to admit the relevance of any other evidence with regard to the question of validity, even though under his theory to say that a particular norm is valid law is to say that officials will not only apply the norm on appropriate occasions but will also feel bound to apply that norm. One would

\textsuperscript{10} Ross, op. cit. supra note 1, at 29–74. This work was discussed by H. L. A. Hart. Hart, Scandinavian Realism, 1950 CAMN. L.J. 283.

\textsuperscript{11} Ross, op. cit. supra note 1, at 38–51, especially at 38–48. Ross is unclear in his analysis as to what it means for a court to apply a norm. He does not want to say that it always means that the court will decide in accordance with the norm because he wants to take into account not only the situation where exceptions will be present which will justify departing from the norm—in which case, of course, the norm is not applicable—but also a situation where a judge might decide a case not on the basis of the valid law applicable to the situation but on other criteria. Id. at 42–43. Yet, when he defines what it is to apply a norm by stating that the norm must form an integral part of the reasoning underlying the judgment he obviously does not mean to say that all he means by the term "valid law" is that a judge will think of the norm on the factual occasions which call it into play. Id. at 42. For, if this were the case, the concept of valid law as used by Ross would be of little interest or help. It would seem, then, that by defining "valid law" in terms of predictions of what norms will be applied by the courts, he means decisions in accordance with the norm, subject to the proviso that some undefined failures to decide in accordance with the norm should not be taken, as they normally would under his theory, to indicate that the norm in question is not valid.
have supposed that, before reaching a definite conclusion with regard to the question of validity, Ross would ask an official who has just applied a norm whether he considered the norm binding on him. Yet, Ross seems to feel that this question is improper in a scientific examination of a legal system and that the only directly observable evidence for the proposition that the officials feel psychologically bound to apply a norm is that they do in fact apply that norm. It would seem necessary, then, to regard the proposition that officials feel bound to apply norm X as primarily an explanation of why they do in fact apply norm X, and this appears to be the position Ross actually takes.\footnote{12}

Ross' views are in many ways similar to those of the American legal realists, although the latter would probably have been loath to use such terms as "validity" or "legal norm." To the American legal realists, law concerned the interaction of official and lay behavior.\footnote{13} Insofar as it is meaningful to talk of rules or norms of law, rather than consisting of prescriptions these involve merely predictions, based on observations of past behavior, of what judges will do in the future when confronted with similar factual situations.\footnote{14} Although there is no mention of the word "validity," these

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12. See Ross, op. cit. supra note 1, at 18, 19, 73-74. In the passages to which reference has just been made, Ross speaks of this binding quality as a hypothesis which makes possible a scheme of interpretation (i.e., the series of statements concerning judicial behavior which the jurist postulates in order to describe the legal system). It is something which one can prove by asking the judge. For Ross, as for most other realists, actions speak louder than words. See note 14 infra. Ross seems driven to this position because, like the American legal realists whom he cites, he seems rather skeptical of any theories which assume that the opinion issued by a judge to explain his decision mirrors the psychological processes which led up to the decision. Ross, op. cit. supra note 1, at 43-44. Kelsen, it might be added, would not dispute the element of psychic compulsion in the application and acceptance of the law. See Kelsen, op. cit. supra note 8, at 274.

While this Article was in proof I had an opportunity to read Aubert, The Concept of "Law," 52 Ky. L.J. 383 (1964), which devotes considerable space to Ross, and particularly to Ross' emphasis on the judge's motivation.

13. See Llewellyn, A Realistic Jurisprudence—The Next Step, 30 Colum. L. Rev. 431, 434-37 (1930). See also Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 Harv. L. Rev. 1222 (1931). Professor Llewellyn's views underwent some modification since these Articles were written, and I do not mean to intimate any opinion as to how Professor Llewellyn should have been classified during his later years. See Llewellyn, The Bramble Bush 8-10 (1951 ed.); Llewellyn, The Common Law Tradition 3-18 (1960). Those Articles of Llewellyn cited in this Article are among those reprinted in Llewellyn, Jurisprudence (1962).

statements of what legal rules really are, like Ross' statements that
norms $X, Y, Z$ are valid law, involve descriptive statements of
what judges will do in hypothetical factual situations which might
arise. As such, the confirmation of these descriptive statements
depends upon whether the judges do or do not act in the pre-
dicted manner. Unlike Ross, however, the American legal realists
did not try to account for the reason why officials will act in the
predicted manner. Their interest was solely in what judges do,
although the reasons which prompt a particular judge or group
of judges to act will be important for purposes of predicting what
will be done.\textsuperscript{15}

Despite their attempts to make the study of law, as evidenced
in human behavior, as free as possible of preconceived notions of
“validity,” “legal rights,” and other traditional juristic con-
cepts, Kelsen and others point out, rightly I think, how much
the legal realists are themselves caught up within this traditional
conceptual web.\textsuperscript{16} To determine, for example, whose behavior to
examine, the legal realists presuppose that they know what a
legal order is. Moreover, it is usually not every bit of the judge’s
behavior which is examined but only certain portions of his be-
havior. Such selectivity again involves a considerable degree of
presupposition as to what constitutes official behavior, and how
are these questions to be determined except by reference to pre-
existing norms specifying who are officials and what is official
behavior. This difficulty in escaping from the old conceptual web
is, of course, inevitable. It has been well said that modern man
in examining and criticizing his conceptual framework is engaged
in a labor not unlike one who is attempting to rebuild his boat

\textsuperscript{15} See at Boston University School of Law, Jan. 8, 1897, in 10 Harv. L. Rev. 457
(1897). See also Cohen, The Problems of a Functional Jurisprudence, 1
Modern L. Rev. 5 (1897). The more radical of the American legal realists,
such as Jerome Frank, also focused on the judicial decision and the prediction
of judicial decisions as the central subjects in the study of the law. Frank,
however, felt the predictability of judicial decisions was very low, particu-
larly, though not exclusively, because of uncertainty as to how the facts
would be found by the tribunal. See Frank, Law and the Modern Mind
(1930); Frank, Are Judges Human?, 80 U. Pa. L. Rev. 17, 283 (1931). He
emphasized the uncertainties which the need to resolve factual controversies
injects into law suits. Frank, Law in the Making (1949). In the preface to
the sixth printing of Law and the Modern Mind he also reiterated his disas-
sociation from any attempts to define law and expressed his regret if anything
in Law and the Modern Mind appeared to imply the contrary. Frank, Law
and the Modern Mind vii (1948).

\textsuperscript{16} Ibid.

15. Ibid.

16. Kelsen, op. cit. supra note 4, at 175–78; cf. KANTOROWICZ, THE DEFI-
nITION OF LAW 18 (1958). See also Kelsen, op. cit. supra note 8, at 270.
while afloat in it upon the ocean. If he tries to change too much at once the boat will sink.\textsuperscript{17}

C. A Related but Different Question — Why Men Obey the Law

Closely related to the question of validity is the question of why men obey the law. Some men, of course, may obey the law purely from habit, without ever thinking about what might happen to them should they disobey the law. Since most men, however, occasionally do think about why they should obey the law — more likely some particular and personally unpleasant law — legal philosophers have tried to give men good reasons to justify as well as explain obedience to the law. Under natural-law theories the natural law not only forms part of the test of the validity of a particular law; it also supplies the main reason why men obey the law. The natural law supplies this reason simply by telling men to obey human law,\textsuperscript{18} although the question then arises as to why men should obey the natural law.

For John Austin it was the principle of utility which justified the obedience of men to their sovereign.\textsuperscript{19} Other writers have focused, even more than Austin is sometimes thought to have, on fear itself as the chief reason men have for obeying the law. Thus, according to Hobbes, men obey the law because of a desire for self-preservation.\textsuperscript{20} Holmes' bad man obeys the law because he does not want to get caught and suffer punishment and, if the only way he can insure this is by obeying the law, then he obeys

\textsuperscript{17} The analogy is Otto Neurath's and is cited in Quine, From A Logical Point of View 78–79 (1953).

\textsuperscript{18} See Aquinas, op. cit. supra note 2, Q. 96(4); Dabin, op. cit. supra note 2, § 210, reprinted in The Legal Philosophies of Lask, Radbruch and Dabin 424–25 (Wilk ed. 1930).

\textsuperscript{19} Austin, op. cit. supra note 9, at 277 n.25. Included in Austin's concept of utility is a fear of anarchy as being among the least beneficial states. \textit{Id.} at 186. But even here, as well as in the passages first cited in this note, it is recognized that sometimes even anarchy might be preferable to some forms of government. I have thus far been advertsing to Austin's notion that the principle of utility justifies a person's general obedience to the political order of which he is a member and thus supplies a motive for obedience for one who accepts this justification. As far as the motive men have for obeying particular laws, that aspect of utility which counsels avoidance of the unpleasant consequences visited upon lawbreakers would be among the most important factors. As far as particular laws are concerned, Austin would in practice seem to be resembling very closely both Hobbes and Holmes. See notes 20–21 infra.

\textsuperscript{20} Hobbes, Leviathan 63–83, 87–90, 110–17 (Everyman ed. 1914).
the law. On the other hand, social pressures to conformity, rather than fear of legal sanctions, have been stressed by some philosophers as supplying men their motive for obeying the law. Finally, others have said that men obey the law because they have a psychic need to feel bound by the law and that the very forms of the law themselves create in men a psychic compulsion to obey.

As intimately connected as they are, however, the question of why men obey the law or obey particular laws is a very different question from that of how men know what the law is. Of course, if the realists are correct and if an unobeyed law is no law, then the two questions cannot be separated in practice, although separation for purposes of analysis may still serve some purpose. Since, however, this Article will reject the realist conception of law as not being the most helpful way of looking at the law, the separation of the two questions and a concentration solely on the question of validity are justified.

D. The Scope of the Discussion

The discussion that follows will examine at greater length the implications of the concepts of validity which have been briefly described in the introductory part of this Article. It is sometimes suggested that the choice between competing ways of answering the question of validity depends upon the purpose for which the question is being asked. Someone with an “internal” point of view, such as a judge, might want one kind of answer while someone with an “external” point of view, such as a political scientist, might desire another type of answer. As will be indicated by the succeeding discussion, I do not think that the problem of choice can be completely “dissolved” in this manner.

Prior to a general critique, however, a satisfactory basis for the critique must be established by a detailed examination of the application of competing concepts of validity to various concrete situations. The analysis of a legal philosophy which focuses the quest for validity on the manner by which the purported norms


of the legal system have been created is patterned, in the main, upon that of Hans Kelsen. Nevertheless, the present analysis de-
parts from Kelsen's at several points, and the reasons for these
departures will be explained. In presenting a realist analysis of
the questions to be posed, this Article will often refer to the work
of Alf Ross. Ross has been chosen to represent the realist position
because he is the most systematic of the realist philosophers who
have focused on this issue. He is also, in my view, the most con-
vincing. 24 Finally, the concluding portions of this Article will
attempt to dispose of some questions which perhaps for many
people still remain to be grappled with even after the analysis
has been completed.

II. A CLOSER EXAMINATION OF REPRESENTATIVE
MODERN ANSWERS TO THE PROBLEM
OF VALIDITY

A THE ANALYSES IN ACTION

This section of the Article will apply analyses patterned after
those proposed by Ross and Kelsen to hypothetical concrete situa-
tions. It must be noted, of course, that, unlike Ross, Kelsen
addressed himself only to the question of formulating the rules
prescribing what courts ought to do. 25 As a consequence of this
orientation, Kelsen did not address himself to many of the prob-
lems presented in the hypothetical factual situations discussed
below, problems which the predictive theories have generally tried

24. Another reason why I shall, in general, explicitly follow Ross' analysis
in presenting the realist position is that I wish to avoid quibbles about whom
I am including within the realist school and what I mean by "realism." As
already indicated, all the realists were concerned with anchoring the scientific
study of law in the "facts" of human behavior. There is continued interest
running from Holmes to the Llewellyn of the thirties and on through to Ross
in the problem of validity being discussed in this paper and this interest more
than justifies talking about a realist position on the issue. I do not wish to be
taken as asserting that all realists focused their interest on this particular issue.
I have already referred to Frank's views. Note 14 supra. Hagerstrom and
Olivercrona, of course, were particularly concerned with Alf Ross' second and
less well-emphasized point about validity, namely, the feeling of being bound
which seems to accompany the law. See note 23 supra. Hagerstrom and Olive-
crona sought to find the source of this feeling of obligation, which they saw
evidenced in the behavior not only of judges but also of ordinary citizens, not
in what they decided as `metaphysical notions but rather in "facts" about
human beings.

25. KELSEN, op. cit. supra note 4, at 168–69. Of course, Kelsen would in-
sist that the legal order as a whole possesses a minimum degree of effectiveness, id.
at 120, but in this paper we are assuming the existence of a legal order possessing this minimum degree of effectiveness.
to solve. These problems arise because actual experience is im-
measurably richer than any verbal formulation of experience. This
is, of course, the source of the truism that no two cases are ever
exactly alike. Thus, one can rarely say that he knows with cer-
tainty what, in Kelsen’s sense, courts ought to do in any given
factual situation. This given factual situation will always differ
from the factual situation which was the occasion for the formu-
lation of the norm in question by a prior court (and may even
differ somewhat from the more general type of factual situation
considered by the legislature). At the same time the two factual
situations might be sufficiently similar so that it would be unsatis-
factory, and perhaps most people would say even incorrect, to
apply Kelsen’s maxim that where there is no preexisting general
norm to the effect that the plaintiff shall recover in a specific
factual situation, then the preexisting rule of law for that situa-
tion is that judgment must be given for the defendant.26 This is
a major problem of jurisprudence and I hope to have even more
to say about it in the future. Nevertheless, despite Kelsen’s avoid-
ance of the question of how to deal with such hard situations
which are bound to arise in practice, the attempt to evaluate the
usefulness, as applied to actual cases, of an analysis patterned
upon Kelsen’s approach will well reward the effort expended. Let
us therefore consider the application to the following situations
of an analysis which, like Ross’, seeks to predict the behavior of
officials and of an analysis which, like Kelsen’s, seeks validity in
the manner by which a norm was created. As the discussion pro-
ceeds I shall, for reasons that have already been noted, try to
indicate explicitly the extent to which my analysis departs from
Kelsen’s more simplified model.

1. A Statute Has Been Enacted Which Has Not as Yet Been
Construed by a Law-Applying Organ

If the statute has been enacted in accordance with the method
of law creation prescribed by the basic norm and the norms pre-
viously created in accordance with the basic norm, we would,
under an analysis patterned upon Kelsen’s theory, state that
statute X is valid law and that would be the end of the matter.
Under Ross’ method of analysis, under which one attempts to
predict the behavior of officials, several possible approaches sug-
gest themselves. First, we might simply say “statute X is valid
law,” thereby predicting that in appropriate circumstances offi-

26. Id. at 145, 147. Kelsen rejects the idea that there are any gaps in the
law. Id. at 146–49.
cials will apply statute $X$. Although the focus is different, the verbal formulation under this approach resembles that arrived at by using an approach patterned upon Kelsen's analysis. The important qualification, of course, is that under a Kelsen type analysis we are not making any prediction as to what courts will or will not do.

Using an analysis which is oriented towards prediction, however, we may not wish simply to say "statute $X$ is valid law." We may feel, for example, that the statute is too general for any prediction which merely repeats the words of the statute to be meaningful. Consequently, in our statement as to what is valid law, we may wish to use more specific language. We might therefore wish to formulate and describe as valid law several specific norms enumerating instances falling within the statute and at the same time to formulate and describe as not valid law specific norms enumerating instances which we feel fall without the statute. Take, for example, a statute making it a crime to transport stolen vehicles in interstate commerce. We might wish to formulate and describe as valid law specific norms making it a crime to transport in interstate commerce stolen automobiles, motorcycles, and motor scooters and to formulate and describe as invalid law (i.e., not within the scope of the statute) norms proscribing the interstate transportation of stolen airplanes, bicycles, and baby carriages.\textsuperscript{27}

Or, again, we may not wish to simply parrot the words of the statute in our predictions made in the form of "$X$ is valid law" because we feel that the statute does not mean what it superficially appears to say. Take, for example, a statute unqualifiedly prohibiting the importation of contraceptive devices into the United States. We may want to formulate our statements as to what is valid law, i.e. our prediction as to what an official will do, so as to read the statute as only prohibiting the importation of contraceptive devices for immoral purposes and not as prohibiting such importation by physicians.\textsuperscript{28}

Certainly, in allowing us to interpret unconstrued statutes in the formulation of our statements as to what is valid law, the Ross approach has much appeal. It seems to allow us to be much more exact. Statements as to what is valid law become more meaningful and helpful. Yet, many of the benefits of this approach

\textsuperscript{27} The illustration is suggested by McBoyle v. United States, 283 U.S. 25 (1931), which construed what was then 18 U.S.C. § 468 (now 18 U.S.C. § 2312 (1958)) so as not to cover aircraft.

\textsuperscript{28} 46 Stat. 668 (1930), 19 U.S.C. § 1905(a) (1958), was so construed in United States v. One Package, 86 F.2d 737 (2d Cir. 1936).
are illusory. The statute may, for example, be very ambiguous. In interpreting the statute so as to formulate statements as to what is valid law, the experts may come to contradictory conclusions. Accordingly, in place of that statement under the Kelsen type analysis that "statute X is valid" we now have statements that "rule X is valid law," "rule Y is valid law," "rule Z is valid law," where rules X, Y, and Z are all mutually contradictory and cannot all be "valid law." Even where the statute is not ambiguous or, if ambiguous, the experts all agree in their interpretations, difficulties remain. The experts may all agree in their predictions as to what officials will do, which predictions will be made in the form "rule X is valid law." The fact remains, however, that the courts may do the opposite of what it is predicted they will do. Such situations arise more often than one would wish. The unhappy experiences under the Fair Labor Standards Act, which forced Congress to resort to retroactive legislation, are perhaps the most dramatic recent illustration of this point.29

Moreover, treating predictions as to what courts will do as "the law" involves other problems. As the composition of the courts changes, predictions as to what the courts will do might also change. The meaning of the hypothetical statute as expressed in predictions as to what courts will do would therefore be subject to change with changes in the composition of the courts. If the hypothetical statute is not judicially construed relatively soon after its enactment, there might be a series of different and contradictory assertions as to what is valid law before the statute ever reaches the courts, unless, of course, we are willing to hypothesize one authoritative prediction-maker, in which case the whole point of the theory is lost.

Finally, Ross and most other people who espouse the idea that statements about what is valid law must be predictions about official behavior include within the concept of official behavior not only action taken by courts but also action taken by other law-applying organs, including administrative agencies, prosecut-

ing officials, and even the police. The reason for this is that, as already noted, a statute may not reach the courts for 40 years, but it may nevertheless be applied or consciously not applied quite regularly by other law-enforcement officials. If the predictive theories of law are going to make sense they must also involve predictions as to what these officials will do. At this level, however, the idea that law consists of predictions of official behavior is very unsatisfying. In prosecutions under section 5 of the Federal Trade Commission Act, the FTC has refused to consider unlucky litigants' contentions that the challenged conduct conformed with the Commission's own Trade Practice Rules, and persons dealing with other governmental agencies have learned that one often acts at his peril in relying upon "official construction" of statutes. Moreover, prosecutors do bring out of mothballs, when it suits their purpose, statutes whose enforcement had long been neglected. Finally, courts, when they function

30. Ross, op. cit. supra note 1, at 35 n.1; see Llewellyn, supra note 14, at 456.

31. See American Life & Acc. Ins. Co. v. FTC, 255 F.2d 289 (8th Cir.), cert. denied, 358 U.S. 875 (1958). Petitioner urged that the Commission erred in refusing to consider its own trade practice rules and in excluding evidence that petitioner had been advised by Commission attorneys that its advertisements complied with these rules. The court dismissed the contention; petitioner was charged with violating the FTC Act and not the trade practice rules.

32. See SEC v. Torr, 22 F. Supp. 602 (S.D.N.Y. 1938) (Defendant's contention that he had been advised by the SEC's staff that his operations were not illegal held not to state a defense); cf. FCC v. WOKO, Inc., 329 U.S. 241 (1946) (Respondent was denied a renewal of its license for misrepresentation of its stock ownership. Respondent's contention that this was a much more severe sanction than any that had been imposed by the FCC in similar cases was held unavailing.). See also United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (United States not bound by federal officials' "approval" of price maintenance arrangement even during the period before the NRA legislation was declared unconstitutional); Clemons v. United States, 245 F.2d 298 (6th Cir. 1957) (Appellants were convicted of violating the Migratory Bird Treaty Act which prohibited the taking of migratory birds except as permitted by regulations issued by the Secretary of the Interior. Appellants had requested an interpretation of the Secretary's regulations and had received a letter from an Assistant Secretary which they claimed supported their position. Held, even if the letter supported appellants' position, that was still no defense).

33. In United States v. Classic, 313 U.S. 299 (1941), 18 U.S.C. §§ 51, 52 (1940) (now 18 U.S.C. §§ 241-42 (1968)), which originated, respectively, in statutes of 1870 and 1866, were held to make it a crime to deny or to conspire to deny a citizen the right to vote in a primary election. These were the first prosecutions for these crimes. Cf. Monroe v. Pape, 365 U.S. 167 (1961), in which the Court held that Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983 (1938), first enacted in 1871, gave a remedy against a state official who abused his authority under state law. It was argued that the statute, designed to protect
in a quasi-administrative capacity such as in the sentencing of offenders, are constantly providing surprises for the unwary. Corporate executives who relied upon counsel's predictions that conviction for violation of the antitrust laws did not involve the risk of prison sentences have lived to regret their gullibility. Furthmore, however consistent and long-continued the administrative construction of a statute, courts have been known to completely disregard such constructions.

Instead, therefore, of the formulation "statute X is valid," which is admittedly vague and, for many purposes, perhaps unhelpful, those who base their conceptions of what is valid law upon predictions of what officials will do have given us a series of more detailed but sometimes contradictory and often constantly changing norms, each purporting to be valid law. The reasons why I prefer the first method of analysis may perhaps

citizens against deprivation of civil rights under "color of state law," applied only to state officials who acted within the scope of their authority. Mr. Justice Frankfurter's remarks in Poe v. Ullman, 367 U.S. 497, 501-02, 508 (1961), as Mr. Justice Harlan's dissent rightly points out, id. at 535-86, cannot be taken to support the view that failure to enforce a statute over a long period of time results, so to speak, in the statute's repeal. Bickel, Forward: The Passive Virtues, The Supreme Court, 1960 Term, 75 Harv. L. Rev. 40 (1961) gives some reasons to support the Court's disposition of that case. Id. at 66-64. His arguments in favor of the acceptance of a doctrine similar to the doctrine of desuetude of the Roman law, however, are not only without support in the authorities but are also unconvincing and insufficient. A discussion of some of the problems of Poe v. Ullman is contained in Comment, Threat of Enforcement — Pre-requisite of a Justiciable Controversy, 62 Colum. L. Rev. 106 (1962). More recently Professor Bonfield has stated that there are indirect ways of accomplishing the results that would be accomplished by a doctrine of desuetude. Bonfield, The Abrogation of Penal Statutes by Non-enforcement, 49 Iowa L. Rev. 389 (1964). Strict interpretation and equal protection objections to discriminatory application are the more important of these ways. Id. at 393-94, 409-15. Bonfield feels that due process notice requirements require a doctrine of desuetude. He sees Poe v. Ullman as perhaps pointing the way. Id. at 406-9. It should be pointed out, however, that the civil-law doctrine of desuetude requires more than persistent failure to enforce. The failure to enforce must be in the face of widespread and flagrant disregard of the statute. Id. at 395-97. This is the usual case and, as indicated, the realists go beyond this type of situation in asserting "no law" where failure to enforce is the more likely prediction of official behavior. Kelsen, a civil lawyer, states that laws may be repealed by desuetude. Kelsen, op. cit. supra note 4, at 110-20.


35. In United States v. E. I. duPont de Nemours & Co., 333 U.S. 586 (1957), § 7 of the Clayton Act, prior to its amendment in 1950, was held to apply to noncompeting corporations despite the fact that for 40 years the FTC had construed the provision otherwise. See id. at 590, 615-16.
be already apparent, but I should like to save them until I conclude my examination of the two systems of analysis in operation.

2. *A Point of Law Upon Which There Are Two Conflicting Lines of Decision, or a Statute Which Has Been Construed in a Conflicting Manner by Two or More Coordinate Courts*

To handle these two situations under an analysis which concentrates upon the method by which norms are created, it is necessary to go considerably beyond the suggestions of Hans Kelsen. For Kelsen, there is no such thing as conflicting legal norms. If one norm commands *A* and another not-*A*, an observer must conclude not that there are two inconsistent norms in the legal order, but that one or both of the norms is invalid. Accordingly, to resolve such difficulties, Kelsen falls back upon such maxims as that, in case of conflict, norms created by a superior law-creating body supersede the norms created by an inferior body and that, among norms of equal authority, norms later in time supersede earlier norms.

However straightforward and plausible such an analysis may seem in the abstract, it nevertheless cannot be directly applied, without modification, to an actual legal system, particularly an Anglo-American one with its heavy reliance on case law. Kelsen's analysis works satisfactorily when the contradiction between two norms is evident, i.e., when one norm commands *A* and the other not-*A*. Here the application of the *lex superior* and *lex posterior* rules would seem to dispose of the difficulty. But let us assume a situation where one norm expressly commands *A* and, in general terms, acts of like character, and where another norm expressly prohibits *B* and, in general terms, also prohibits acts like *B*. What if an act, *C*, is similar to both *A* which is expressly commanded and *B* which is expressly prohibited. As indicated earlier in this paper, it would be completely unjustifiable to conclude, as Kelsen would perhaps seem to, that there is no law with respect to *C* and that, accordingly, *C* is neither commanded nor proscribed. An analysis which insisted upon making such an assertion would be too unrealistic to warrant much attention. In the application of the method of analysis which looks to the method of law creation for validity, it will, therefore, be assumed that several properly created general norms may all be valid despite the fact that, with

37. Ibid.
38. See text accompanying notes 25–26 supra.
respect to many particular applications, they may appear to conflict with each other. How to dispose of this conflict is, as already noted, obviously not an unimportant question, but it is beyond the scope of this Article.

The situation which we shall now examine, then, is one in which there are two conflicting lines of decision upon either a point of common law or the meaning of a statute, or a situation in which a statute has been construed in a conflicting manner by two or more coordinate intermediate courts. In both of these situations using an analysis which looks to the method of law creation, we would be forced to say "norm X is valid law" and "norm Y is valid law." By hypothesis, norm X and norm Y, on their face at least, will conflict with respect to some proposed application. Under an approach patterned upon the methods of Ross and other realists, on the other hand, norm X and norm Y cannot in their present form both be valid law. One must make a prediction as to which norm will be applied by the courts—particularly higher courts—in future cases involving the issue in question, and then, on the basis of that prediction, declare that norm X or norm Y or, as is more likely, some combination of both of them or some other new norm, norm Z, is valid law. One cannot, however, say that norm X and norm Y are both valid law.\(^{36}\)

By following the approach suggested by the realists, we avoid having to say that there are conflicting norms concerning the same facts in our legal system. At the same time this approach forces us to conclude that an ostensibly valid norm enunciated by a competent court is not valid law, even though no subsequent statute has been enacted and no subsequent judicial decision has been rendered touching upon the matter.

To make perfectly clear what type of situations are being referred to, perhaps a few illustrations would be helpful. In Massachusetts before 1950 there was a long line of decisions which consistently declared that an agent who made use for his own benefit of information acquired in the course of acting on behalf of his principal was under no obligation to account to his principal even when the information concerned the precise matter in which the agent was representing the principal. On the other

\(^{36}\) In a situation in which two extremely broad and relatively unstructured general norms are involved, the realists' approach provides the seeming advantage, if analysis requires that there cannot be two valid norms on a point, of not requiring a choice between two general norms. This is the result of the fact that law for the realists consists not of general norms, but of predictions as to what courts will do in particular situations. Cf. text accompanying notes 26–29 supra.
hand, there was an equally long line of cases declaring that a professional real estate broker who so acted was required to account to his principal. What norm would apply to one who held himself out as a broker in the purchase of going businesses?\(^{40}\)

The New York law on manufacturer's liability to third parties prior to MacPherson v. Buick Motor Co.,\(^{41}\) is a familiar illustration of the same problem. We will return to these illustrations later in the course of the critique of the two approaches toward validity now being discussed.

3. **A Decision Has Been Rendered on a Point but the Consensus of the Bar Is That the Decision Will Not Be Followed in Future Cases**

If one wishes to be cynical one could cite United States v. Colgate,\(^{42}\) as an instance of this type of situation, the protestations of the United States Supreme Court to the contrary notwithstanding.\(^{43}\) A perhaps more appropriate illustration is Balian Ice Cream Co. v. Arden Farms Co.,\(^{44}\) which seemingly held that local competitors who claimed they were hurt by a national concern which charged uniformly low prices for locally manufactured products in their section of the country and higher prices in other widely separated parts of the country had no cause of action based upon the Robinson-Patman Act for geographic price discrimination. Although this doctrine was not expressly repudiated for several years,\(^{45}\) few members of the antitrust bar used the case as a basis for advising clients. Under an approach which seeks validity in the method by which a norm is created, one would still have to say that the norm created by the court was valid law. Under a realist approach one would say that the norm in

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40. The conflict of precedents was resolved, at least partially, in Berenson v. Nirenstein, 326 Mass. 285, 93 N.E.2d 610 (1950). The "broker" in business opportunities was held to the standards required of a real estate broker in such a situation. The example has been taken from Hart & Sacks, The Legal Process (tentative ed. 1968).

41. 217 N.Y. 383, 111 N.E. 1030 (1916).

42. 250 U.S. 300 (1919).

43. The Supreme Court has refused to overrule Colgate, which held that a manufacturer may lawfully refuse to deal with a merchant who refused to observe minimum resale prices, yet all who try to avail themselves of this doctrine have found its protective mantle illusory. See, e.g., United States v. Parke, Davis & Co., 362 U.S. 29 (1960). See also United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944).

44. 231 F.2d 356 (9th Cir. 1955), cert. denied, 350 U.S. 901 (1956).

question was not valid law and would formulate some other norm which, with regard to that situation, would be declared to be valid law. One might object, of course, that he could not make a prediction of future judicial behavior upon which such other norm could be based, that all he was sure of was that the existing norm was not valid law. In that case one would probably be faced with the somewhat paradoxical necessity of saying that there was no valid law on the subject although there was a case directly in point.

B. Critique

Let us return for a moment to the situation in Massachusetts prior to 1950, which has been described above. It will be recalled that there was one line of cases declaring that an agent could take advantage for his own exclusive benefit of information he received while representing his principal. Another line of cases declared that the same conduct by a real estate broker was an actionable breach of a fiduciary relationship. Let us now assume that a client has come to us who holds himself out to the public as a broker in business opportunities. He tells us that in negotiations for the purchase by his principal of a restaurant business he has come upon information indicating that the business is even more valuable than had previously appeared and that he would like to purchase this business for his own account. Like Holmes' much misunderstood "bad man" he wants to know if he can get away with it. What do we tell him? Do we make a prediction as to what a court would do in the situation and declare that this is the law on the subject? Or, do we say that there are cases which hold that an agent can act in this manner, but that there are also cases which hold that a professional real estate broker cannot, and then give the client our prediction as to how a court will handle his situation? It will be noted, of course, that under this second alternative, counsel does not say that his prediction as to what courts will do is the law on the subject. I do not think there is much doubt that most attorneys would operate according to this second method.47

46. See text accompanying note 39 supra.
47. In Berenson v. Nirenstein, 326 Mass. 285, 93 N.E.2d 610 (1950), the "broker in business opportunities," as indicated in note 39 supra, was held to the standard applied to professional real estate brokers. A somewhat similar example of the same general problem was cited at note 40 supra. Before MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), one knew that manufacturers of poisons, scaffolds, and coffee urns might be liable to third parties for personal injuries which they might suffer. One also knew
We must also now return to the situation in which counsel is confronted with an unconstrued statute. Under an approach patterned upon Kelsen's analysis, counsel would merely say "statute $X$ is valid law" but he would not thereby be predicting that courts will apply the statute nor would he be making any predictions as to how statute $X$ will be construed. Under the realist method, on the other hand, whatever we assert to be valid law is what we predict a court will do when confronted with a fact situation bringing the statute into play. Of course, a lawyer using a Kelsenian approach will make a prediction as to what he thinks courts will do in given situations but he does not glorify his predictions by calling them law.48 Here again, I submit most lawyers would use an approach patterned upon Kelsen's theory.

I think I have given enough illustrations to demonstrate that, in my view, an analysis which, like Kelsen's, seeks validity in the method of law creation more nearly approximates the method of analysis actually used by practicing lawyers and legal scholars. Of course, this does not necessarily prove that such an analysis is better than Ross', although I must admit that the fact one particular method is used in practice is for me very strong evidence that the method so used is the best one. I propose therefore to go further and give other reasons why I think an approach based upon Kelsen's theory is the better approach.

Under a method of analysis which seeks validity in the manner in which norms are created, we would describe the law in force in a given legal system in a series of propositions of the form "norm $X$ is valid law." In the case of statutes still in force we would, if the statute is as yet unconstrued, substitute "statute $X$" for "norm $X$." If the statute has been construed we would put the statute as construed in place of "norm $X". If we were concerned also with common law we would try to formulate, in the narrowest sense possible, the rules of decision of all unoverruled cases and substitute these for "norm $X".49 Now, having done this, we can by

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48. Kelsen, of course, recognizes the importance of this aspect of a lawyer's activities. Kelsen, op. cit. supra note 4, at 45. H. L. A. Hart debated with Kelsen the logical nature of the results of such activities which Kelsen calls "rule[s] of law . . . in the descriptive sense." Hart, supra note 6, at 710–17.

49. The formulation of the "rules of law" laid down in the cases is a difficult task, but it is certainly no harder than the task under the predictive theories of formulating predictions as to what future judges will do using the necessary precedents as a starting point. I would suggest that the former is a more practically possible task. The task is not so dissimilar from fixing upon the meaning of a statute, for, although the verbal form of a statute is fixed for
no means claim that we have stated how courts will actually decide new cases. Certainly the norms formulated by law-creating organs are very strong evidence of what they will do in the future, but they are neither conclusive evidence on this point nor are they all the evidence that is obtainable. Not only do cases arise involving slightly different facts from those in which the past norms were created, but we all know that courts have been known to overrule (or repeal, so to speak) past norms.

When faced with such possibilities, then, what should one do? Should one hypostatize his prejudices and call these law? Or, should one say, when faced with a novel situation, that he does not know what the law is in this situation but that he thinks courts, if presented with the situation, would do such and such? I think the latter course, in addition to being the one actually used in practice, is much the more preferable one. To say that what is valid law are predictions as to what courts will do is to encourage the view that the law covers every conceivable situation. I realize that all modern theories of law based on a predictive theory reject any notion of a “brooding omnipresence in the sky” known as the law. Nonetheless, by refusing to accept the norms created by courts and legislatures as a complete or even partial description of the law, they may have brought back into the “science of law” the notion of some all-pervading entity known as the law, which has something specific to say on every
time, the meaning of the words used in the statute as well as the meaning of the statute as a whole is not. Some would despair of ever being able by the use of words to convey to others, who do not share the exact same values and experiences, any precise ideas. But the history of the human race indicates that this despair is not justified. This is not the place to get into a discussion of the ratio decidenti of a case. For present purposes, because I wish to avoid controversy as to what are the material facts in a case, I will assume that at the very least each case stands for the proposition that on the facts stated in the case plaintiff (or defendant) wins, and I will treat this proposition as the rule of law laid down by the case. This is admittedly a narrow view of the case law. Nevertheless, it enables us to identify with reasonable precision something like a language used in a statute, even though this language is subject to the normal vagueness and ambiguity of language. Perhaps we should focus on the cases and forget about “rules of law”; for “norm X” substitute “case X” in the canonical form. On the general subject, see Gooderson, Ratio Decidenti and Rules of Law, 30 CAN. B. REV. 802 (1952); Goodhart, Determining the Ratio Decidenti of a Case, 40 YALE L.J. 161 (1930); cf. Llewellyn, The Bramble Bush 50–69 (1951 ed.). With respect to vagueness and ambiguity, see Christie, Vagueness and Legal Language, 48 MINN. L. REV. 885 (1964).

conceivable point. They intimate that if we were only industrious enough and intelligent enough we might know what this law is. Yet surely, even if we could formulate enough rules to satisfy the most fastidious, is a prediction which we know is of low order of probability to be called law? Ross thinks it can properly be called law, but I disagree.

If, then, I might sum up my objections to the predictive theories of the realists, I should state them in the following manner. My objections are partly that by basing the validity of a purported norm of law upon the predicted behavior of officials, the function of the judge is obscured. It has long since been pointed out that, insofar as a judge is concerned, predictive theories based on guesses as to what he will do are of no help at all. The predictions of legal scholars as to how he will decide a certain case will no doubt often influence him, but these predictions do not give him a sufficient reason for deciding the way he does. The fact that legal scholars make a certain prediction does not give the mark of validity to the content of the prediction. For the judge, as for anyone who is a participant in a game and not an observer, there must be some other non-predictive mark of validity because the judge is not trying to predict what his decision will be but, rather, to decide, and in making his decision he is at the very least applying the law. Moreover, when a judge has to decide between two conflicting lines of decisions, he is not discovering law, he is making law. What is the point of calling counsel’s, or even a legal scholar’s, predictions as to what a court will do “valid law,” when a court may disregard those predictions? Are we to have one notion of validity when it is judges who are endeavoring to find what is valid law and another when it is attorneys and legal scholars who are so endeavoring? The judges’ notion would seemingly focus primarily upon the method by which the norm was created in the past, and the lawyers’ and legal scholars’ notions would involve predictions as to what courts will do in the future.

52. See Ross, op. cit. supra note 1, at 44-45.
53. For an interesting recent treatment of the importance of distinguishing between the “external” point of view, which may be suitable for an observer, and the judge’s “internal” point of view, see Hart, The Concept of Law 77-96 (1961). Hart criticized Ross for failing to face this problem. Id. at 847. His criticism was based on an earlier critique of Ross’ book, Hart, supra note 10, in which failure to consider the internal point of view was Hart’s major criticism of Ross. Ross did not seem to have fully appreciated the point when he tried to reply to Hart’s criticism. Ross, Validity and the Conflict Between Legal Positivism & Natural Law, 1961 Revista Juridica de Buenos Aires, Oct.-Dec., 1961 pp. 46, 84-88.
Even if one were prepared to make such a distinction to overcome these difficulties, there still exist even greater obstacles which cannot be met in this manner. For, regardless of whether one has the judge’s “internal” point of view or someone else’s “external” point of view, under an approach whereby the validity of particular purported legal norms is determined by the method of their creation, it is possible to identify the law. This is a point which I want to stress. Admittedly, this identification will not be enough for one who wants to advise clients or to decide cases or to write a scholarly treatise on patterns of judicial behavior. To supply these lacks, at least insofar as a legal adviser or a political scientist is concerned, the realists’ predictive theories expand the scope of the term “law.” But it must be stressed that what the law is now is no longer identifiable. It consists of an infinite number of predictions by the “experts” — whoever they are — as to what courts will do. These predictions may often conflict and there will be no present method of resolving this conflict. True, a future decision by a court will resolve this conflict, but the conflict which is being resolved is between past statements of what the law is. Since, however, the law at any given time consists of present predictions of what courts will do in future cases, we must start the whole process all over again. The new decision which seemed so helpful is now only material relevant for new predictions as to what courts will do. The realists, on this issue have taken their point of departure from John Chipman Gray who maintained that a court’s decision was only “law” the moment it was handed down; afterwards it was only a source of future law.54 Ross, for example, explicitly recognizes that statements as to what is valid law can only be more or less probable at the time they are made.55 They can never be certain nor are they ever conclusively proved. It is therefore not only the sheer bulkiness of what the predictive theories call law which prevents us from identifying the law, it is, rather, also the fact that it is a basic postulate of the predictive method of defining law that one can never really know what the law is. Have any benefits been gained to compensate us for this loss of identifiability? I think not.56

55. Ross, op. cit. supra note 1, at 38–45.
56. In this regard it must be noted that if, as maintained by the writers mentioned in note 23 supra, the very forms of the law are what create the feeling of being bound on the part of those governed by the law, then there must be some authoritative form for law. Law cannot be a collection of haphazard predictions if such a notion of obligation is to be meaningful.
It is interesting to note that Ross, who rejects the notion that it is the method of creation which determines what is valid law, falls back on the notion of sources of law. Here again the parallel to Gray is present and indeed even more evident. Having made it impossible any longer to identify what the law is, he tries to save the day by achieving identifiability on a higher level of abstraction. But I, for one, would rather have a technique which allows me to know what the law is, than one which merely tells me where the law comes from. After all, even if I know the sources of law, I still do not know what the law is. Moreover, if law is defined as predictions of what courts will do in the future, why not define a source of law as a prediction that a court will use certain material as a premise in judicial reasoning. Frankly, I can see no reason for not taking this further definitional step. After all, even if Ross would maintain, and it may be doubted if he would, that the class of sources of law is a closed class, the problem still remains of deciding whether a particular collection of words comes within any of the particular sources of law which Ross recognizes. This seems to be the same type of problem for which the predictive theory of law was invented. The legal scholar, then, makes a prediction, which he calls "law," as to what courts will do in the future, based upon a prediction, which he calls "sources of law," as to what materials the courts will treat as premises for judicial reasoning. Once one gets on the predictive treadmill it is never possible to find any place to stop. The sources of law are no more identifiable than is the law under such a theory; nor are the sources of the sources of law, ad infinitum.

In conclusion it should be stressed that no one would be foolish enough to deny that there is a large element of prediction involved in the work product of lawyers. Indeed, skill at predicting is the bread and butter of a good lawyer. The point being made here is that, admitting all this, it is definitely not helpful to define law itself in terms of predictions of the behavior of officials. As has been recently pointed out, there is a difference between saying that it is characteristic of a legal system that its judicial decisions are predictable and that it is characteristic of a legal system that all particular decisions are predictable. Certainly the former proposition is true of our legal system; it is possible to predict the outcome of most litigation. But it is certainly not possible to predict the outcome of particular cases with suffi-

57. Ross, op. cit. supra note 1, at 75–107. See also id. at 45.
59. See King, The Basic Concept of Professor Hart’s Jurisprudence, 1968 CAMB. L.J. 270, 292.
cient specificity to permit one to define rules of law in terms of such predictions.

III. OBJECTION: one can only know what the law is if he knows what it is becoming

One hears with increasing frequency the statement that one can only hope to know what the law is if he knows what it is becoming. The position is stated more succinctly in Professor Henry Hart’s notion that the “law is a process of becoming,” a notion based on the evident fact that the law is constantly developing and adapting to changing circumstances. Taking this truism as a starting point, the argument some people seem to wish to make is, briefly stated, that one can never accurately describe what the law is at any given time unless one is aware of what are the purposes which the law is trying to fulfill. Perhaps the most famous recent exposition of the view occurred in the widely read debate between Professor Fuller and Professor Nagel in the Natural Law Forum. Unfortunately, a great deal of the argument on both sides was expended upon the issue of whether one could accurately describe the behavior of a boy who was opening clams with a knife if one were not aware that the boy was in fact opening clams. According to Professor Fuller one could not; according to Professor Nagel one could.

Needless to say this is no place for an extended discussion of this issue. For what it is worth, it might be noted that it appears that many psychologists engaged in the study of behavior would contend that an ascription of purpose is unnecessary for any useful description of human behavior. Purposes might be a convenient shorthand for describing the facts, but to many psychologists, and some philosophers, at least, they are not essential and, accordingly, under this view had best be dropped from a detailed analysis.

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62. Fuller, Human Purpose and Natural Law, 53 J. Philos. 697 (1956), reprinted at 3 Natural L.F. 68 (1958); Nagel, On the Fusion of Fact and Value: A Reply to Professor Fuller, 3 Natural L.F. 77 (1968); Fuller, A Rejoinder to Professor Nagel, 3 Natural L.F. 83 (1958); Nagel, Fact, Value, and Human Purpose, 4 Natural L.F. 26 (1959); cf. Witherspoon, supra note 61 (comment on the Fuller-Nagel controversy).
63. See Skinner, Science and Human Behavior 87–88 (1953). For a philosopher who regards a behavioral explanation as a satisfactory explanation of notions such as “I promise,” “I’m in love,” “I’m in pain,” see Ryle, The Concept of Mind (1949). Ryle in his very well written and persuasive book
nently are not merely or primarily shorthand statements of fact. 64 Whether this is so or not, however, the example of the boy opening the clams does not seem to illustrate Professor Fuller’s point as adequately as he might wish. For suppose the boy had never seen clams before and did not know that they could indeed be opened by prying the shells with a knife. We might still wish to say he was opening clams, and we would also probably wish to say this even in the case where the boy knew what clams were and knew that they could be opened by prying the shells with a knife but where the boy only wished to probe the strength of the clams and misjudged his strength. In this later case we might still say that the boy was opening clams even though he definitely did not want to open the clams. Thus it would seem that to know what the boy was doing to the clam we would not have to ascribe to him a purpose; the same description fits several purposes. In order to predict the boy’s future conduct, of course, it would be helpful to know what the boy wants to do and then we might be better off asking him rather than trying to infer this from his conduct. But describing the boy’s present behavior is a completely different activity from predicting what he is going to do.

The law, however, is not the opening of clams. The issue remains whether to know what the law is one must know what the law is becoming, what its purposes are. This is not to say that if one wants to predict what courts or legislatures will do in the future, one need not have a pretty good idea of the values and motives of judges and legislatures. The point is, however, how helpful is it to define the law in terms of these hard to articulate and imprecise values and motives? I am not at all sure that Professor Fuller and Professor Henry Hart want to take this extra step and actually attempt to define what the law itself is in terms of these inchoate values. 65 But, should anyone wish to do this,

argues that these notions are a shorthand way of referring to certain physical occurrences. Cf. note 75 infra for Llewellyn’s somewhat similar views on the subject.

64. For Fuller immediate purposes—which some might call a shorthand description of matters of fact, such as an attempt to reach end X by means Y—can only be understood in the context of ultimate purposes which latter involve the realm of ends and not of means to given ends. Fuller, Human Purpose and Natural Law, 55 J. Philos. 697, 698–99 (1958), reprinted at 3 Natural L.F. 68, 70–71 (1959).

65. H. L. A. Hart seems to indicate that he thinks Professor Fuller might be making this argument. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 568, 628–29 (1958); cf. Witherspoon, supra note 61. I am not at all sure this is so however. See Fuller supra note 64, at 701–04, reprinted at 3 Natural L.F. 72–75. These passages are susceptible of conflicting interpretations.
his theory would be open to serious objections. Like the predictive theories, which are actuated by the same desires, this theory has much initial appeal and has much factual support. It also seems to allow us to achieve a much higher degree of knowledge about this evasive thing called law. One must reply at the outset, however, that, if one must know what the purposes of the law are before one can know what the law is, then one will never know what the law is. And, how can anyone ever know what the law is becoming until it becomes? Notions like Lord Mansfield's that the common law "works itself pure" are appealing but unhelpful. I know the law changes. I would not be so rash as to say that the law changes for the better. Peoples' notions of what is right or wrong in social matters change so drastically that it is pointless to argue whether the law of one generation is better than that of another. The later generation always wins the argument.

To return to the Fuller-Nagel controversy, Professor Fuller gives a hypothetical illustration of the development of a principle of common law. The purpose of the illustration is to demonstrate that in the development of the principle the successive courts are engaged in giving expression to the often unconscious human ends underlying the initial decision on the point. Fuller believes that

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66. Obviously, a predictive theory could be constructed that, for all practical purposes, would be almost exactly like the "law is a process of becoming" theory now being discussed. Law would then still consist of predictions of judicial behavior, but the focal point of all prediction would be the values permeating a given society and presumably acting upon the judges whose behavior one was trying to predict. I have kept the two theories separate because Ross and the American legal realists, while admitting the relevance of ethical and religious values to the attempt to predict judicial behavior, distrusted all attempts to formulate ultimate values. In this regard see note 75 infra. Professors Hart and Fuller, on the other hand, regardless of whether or not they accept the extreme view which I am now discussing, that law itself must be defined in terms of its values, do not seem to think of law as consisting of patterns of behavior but rather as being something much more than that. See also Fuller, The Law in Quest of Itself (1940); Fuller, American Legal Philosophy at Mid-Century, 6 J. Legal Ed. 487 (1954).

67. Omychund v. Barker, 1 Atk. 21, 38, 26 Eng. Rep. 15, 22-23 (Ch. 1744) (argument of Lord Mansfield (then Solicitor General Murray)).

68. Holmes, supra note 14, at 472-74 gives an illustration of an instance where judicial development of a rule of law changed it clearly for the worse with reference to almost any scheme of values. For other such illustrations, see Llewellyn, The Common Law Tradition 110-14 (1963); cf. id. at 200-08. Whole periods of judicial development of the case law have been criticized as retrogressive. See id. at 87-41.

69. Fuller, A Rejoinder to Professor Nagel, 3 Natural L.F. 83, 90-99 (1958).

70. Fuller, Human Purpose and Natural Law, 53 J. Philos. 697, 708 (1956), reprinted in 3 Natural L.F. at 74.
by pooling their intellectual resources men come to understand better what their "true purposes" are. 71 To the extent that men in a given society are similarly motivated and have many values in common, it is certainly true that by sharing their experience and knowledge men achieve many benefits, including often a more precise knowledge of what they want. But if it is suggested that this statement means more than this or that the expression "true purposes" has a definable content — and it should be noted that I am not suggesting that Professors Fuller and Hart are making such a further step — then I must in all candor respectfully disagree. Moreover, in any helpful sense, how does one ever know that the courts are engaged in what Professor Fuller calls "the collective articulation of shared purposes"? 72 As a remark attempting to summarize in a few words the entire legal system of a functioning society the phrase is, of course, certainly objectionable. But an attempt to apply such a notion to the decision of particular concrete cases would be another matter. Why can't the same phenomena be explained as merely indicating that each court which participated in the process of development had a purpose in mind when it considered the point? Why must all the courts engaged in the process have had the same purpose in mind and how would we find out about it if they did? Moreover, how does the pooling of their intellectual resources enable men to discover their "true" purposes? What is the criterion of truth? More importantly, what kind of proof can be adduced to settle disputes over any of these issues? Can the furnishing of such proof stop short of an appeal to some absolute purpose of human existence, a purpose of which man must be said to be intuitively aware or which is revealed to him by authority? Obviously at the most general level we might be able to arrive at some agreement. Who could fault St. Thomas' percept that one must do good and avoid evil? 73 Certainly the development of the case law articulates this and other equally broad shared purposes. But, beyond that, how much general agreement could one hope to achieve? 74

I think that the development of the case law and the description of what is the law can be adequately managed without any such hypotheses. Under the circumstances I do not think it un-

71. *Id.* at 703–04, reprinted in 3 *Natural L.F.* at 74.
72. *Id.* at 702, reprinted in 3 *Natural L.F.* at 73.
74. Moreover, one must not overlook what might be called the converse situation. There are times when men can agree on the correct action in a given situation without being able to achieve any agreement at all on the general principle justifying this action.
reasonable to demand more concrete evidence before adding new
and considerably more vague entities, called “purposes,” into our
analysis of what is the law. Moreover, the shared-purpose ap-
proach is apparently only to be applied to the development of
law by courts. Insofar as law is being created by the legislature
and by the executive, such an approach to describing the law
would seem to lose much of its attraction because the interests
of legislators and administrators, other than at perhaps the most
general and unhelpful level, are too disparate.

It has by now become apparent, I think, that here again my
overall objection is that the approach suggested — defining law
in terms of “true,” “common,” or “shared” purposes, or even as
a process whereby these notions are developed — requires us to
give up any identifiable thing called “law.” In its place we are
given a vague notion called “purpose” or “becoming” with which
one can discover the law. I find this no more helpful than the
predictive theories of which the “law is a process of becoming”
theory would seem to be a further development, a development
which I think the legal realists would not have applauded. 18
Everyone knows that men have purposes, but 2000 years of de-
velopment have shown, I think, that agreement on purposes at
a sufficiently concrete level to permit the incorporation of pur-
poses into the actual statement of legal rules is, for all practical
purposes, impossible. I just cannot see, therefore, how it is a gain
in theory to scrap an identifiable concept of law for one that is
not identifiable, one that is almost by definition unidentifiable.
I would rather know what the law is, even if it means that there is
a lot more that I must know before I can decide cases or predict
how cases will be decided, than expand the notion of law so as to
include everything I want to know but at the cost of making the

18. In expounding his own version of the American legal realists’ predic-
tive theories, Llewellyn expressed his reluctance to make value judgments
above those necessary “in any scientific inquiry.” Llewellyn, A Realistic Juri-
prudence — The Next Step, 30 Colom. L. Rev. 491, 446–47. Llewellyn felt
that such value judgments would so dilute the content of law as to prevent
useful analysis. Ibid. He states that he is opposed to attempts to set up “a
fictitious unity in the law.” Id. at 455. Ross also recognizes that any study
of behavior must study human values, but he finds no unifying theme for such
values and indeed distrusts all attempts to find such unifying themes. Ross,
op. cit. supra note 1, chs. 10–17. He concludes that “the legal consciousness
prevailing among the population can only be taken into consideration (by
the legislator) as a spiritual factor on which the practical feasibility of a legal
reform depends.” Id. at 372. In his earlier work Ross also struck out against
the “magic” and “superstition” permeating discussion about law. Ross,
Towards a Realistic Jurisprudence (Fausboll transl. 1946).
law unknowable. I am particularly afraid that by defining purpose into the law one will be able more readily to inject his personal prejudices into the law than if one were frankly to recognize that the ascription of a purpose to a statute, or even to a line of precedents, by a court is usually a law-creating activity and not a law-discovering one. As skeptical as I am of my ability accurately to discover the true purposes of other's actions, I am even more skeptical of the ability of others to tell me what my "true" purposes are.

As Professor H. L. A. Hart has already noted, the point is not that judges in deciding cases must not or, in fact, do not appeal to notions of what law ought to be.76 Professor Fuller is right to stress this and to suggest that such appeal is to some degree present in more cases than many people seem willing to admit. I might add that the point is not even whether human beings may not be said to share some common general urges and desires. There would be no reason for grouping individual men together in the class of human beings if this were not the case. The point is, rather, whether these vague notions of what law ought to be are to be considered part of what is called law. The dangers consequent to the making of this incorporation are, if some repetition may be excused, that what would now be called law is unmanageably complex and vague and that the law-creating function of judges, the discovery of which was a major advance in the development of legal philosophy, is again in danger of being obscured.

76. Hart, supra note 65, at 612. See also id. at 614.