Brian H. Bix: A Dictionary of Legal Theory. Oxford University Press, 2004

normative What *ought* to be done. The normative aspect of a discussion or a set of facts is its implications for how people should act, how rules should be changed, or even how theories should be constructed.

While references to 'normative' frequently refer to the moral analysis, 'ought' statements are not confined to moral evaluations. There are also purely self-interested or 'prudential' reasons for action, and one can also have a reason for action relative to some larger project (e.g. becoming a lawyer, building a boat, or robbing a bank)—though this project may be immoral or contrary to one's short-term or long-term interests.

normative legal positivism *See* legal positivism

norms Standards for how one ought to act. In discussion of laws and legal systems, the term 'norm' is sometimes used interchangeably with 'rule'. In the terms of practical reasoning, norms are standards that give reasons for action.

One question that has been raised by some legal philosophers is whether norms have their own distinctive logic (a question that could be applied either only to *legal* norms or to normative systems generally). This question has some practical applications in considering, for example, the proper treatment of legal norms within a single system that appear to be contradictory (whether two contradictory legal norms can both be valid, or whether one of the norms voids or modifies the other by some rule of inference derived either from the particular legal system or from the essential nature of normative thought, etc.).

While it is usual to connect norms with moral and legal *duties* (as in the beginning of this entry), it is important to note that statements of legal and moral claim-rights, immunities, powers, and liberties are also frequently classified as 'norms'.

HANS KELSEN: General Theory of Law and State. N.Y. Russell & Russell 1961

cannot be the "will" of the parties in which the binding force resides, and which continues, stays "valid," after the contract has been concluded. If we denote that which has the binding force by the term "contract," then the binding contract and the procedure by which it is created, i.e. the expression of the agreeing intentions of the parties, are two different phenomena. It is, furthermore, doubtful whether the procedure by which a binding contract is created necessarily involves that, in the mind of each party, there be a real intention, a "will," having as its object the contents of the contract.

3. The "Will" of the Legislator

If we designate a statute, decided upon by a parliament in the forms prescribed by the constitution, as a "command" or, what amounts to the same thing, as the "will" of the legislator, then a "command" in this sense has hardly anything in common with a command properly so called. A statute owing its existence to a parliamentary decision obviously first begins to exist at a moment when the decision has already been made and when — supposing the decision to be the expression of a will — no will is any longer there. Having passed the statute, the members of parliament turn to other questions and cease to will the contents of the law, if ever they entertained any such will. Since the statute first comes into existence upon completion of the legislative procedure, its "existence" cannot consist in the real will of the individuals belonging to the legislative body. A jurist who wishes to establish the "existence" of a law does not by any means try to prove the existence of psychological phenomena. The "existence" of a legal norm is no psychological phenomenon. A jurist considers a statute as "existing" even when those individuals who created it no longer will the content of the statute, nay even when nobody any longer wills its content, at least none of those who were competent to create the statute by their acts of will. It is indeed possible and often actually the case that a statute "exists" at a time when those who created it are long since dead and no longer able to have any sort of will. Thus, the binding statute cannot be the will in the mind of the individuals who make it, even if a real act of will were necessary for making the statute.

If we psychologically analyze the procedure by which a statute is constitutionally created, we shall further find that the act creating the binding rule need not necessarily be an act of "will" having the contents of the rule for its object. The statute is created by a decision of the parliament. The parliament — according to the constitution — is the authority competent to enact the statute. The procedure by which the parliament decides upon a statute consists essentially in the voting of a bill which

has been submitted to its members. The statute is "decided" upon if a majority of the members has voted for the bill. Those members who vote against the bill do not "will" the contents of the statute. Despite the fact that they express a contrary will, the expression of their will is as essential for the creation of the statute as the expression of the will of those who vote for the bill. The statute is, it is true, the "decision" of the whole parliament, including the dissenting minority. But obviously this does not mean that the parliament "will" the statute in the psychological sense that every member of the parliament "wills" the contents of the statute. Let us consider only the majority that votes for the law. Even so, the statement that the members of this majority "will" the statute is clearly of a fictitious nature. To vote for a bill does not at all imply actually willing the contents of the statute. In a psychological sense, one may "will" only that of which one has an idea. It is impossible to "will" something of which one is ignorant. Now it is a fact that often, if not always, a considerable number of those who vote for a bill have at most a very superficial knowledge of its contents. All that is required of them by the constitution is that they vote for the bill by raising their hands or by saying "Yes." This they may do without knowing the contents of the bill and without having made its contents the object of their "will" — in the sense in which one individual "wills" that another individual shall conduct himself in a certain way when he commands the other to do so. We shall not here further pursue the psychological analysis of the fact that a member of parliament gives his constitutionally required "consent" to a bill. Suffice it to say that to consent to a bill is not necessarily to "will" the contents of the statute and that the statute is not the "will" of the legislator — if we understand by "will" a real will, a psychological phenomenon — and that therefore the statute is not a command in the proper sense of the term.

4. Customary Law as Command

The fictitious character of the common saying that a rule of law is a command is still more evident when we consider customary law. Suppose that, in a certain community, the following rule is considered valid: A debtor has to pay his creditor 5 per cent interest if there is no other agreement upon this point. Suppose further that this rule has been established through custom; that over a long period of time creditors have in fact demanded 5 per cent interest and debtors have in fact paid that amount. Suppose also that they have done this in the opinion that such interest "ought" to be paid, *opinione necessitatis*, as the Roman jurists formulated it.

Whatever may be our theory about the law-creating facts with respect

to customary law, we shall never be able to contend that it is the "will" or "command" of those people whose actual conduct constitutes the custom, that every debtor shall pay 5 per cent interest, in case he has accepted a loan without agreeing upon another rate of interest. In each particular case, neither the creditor nor the debtor has any will whatsoever concerning the conduct of other people. An individual creditor wants an individual debtor to pay him 5 per cent interest, and this individual debtor actually pays the demanded interest to that individual creditor. Such is the nature of those particular facts which together constitute the existence of the "custom," creating the general rule that under certain circumstances the loan-debtor has to pay 5 per cent interest to the loan-creditor. The existence of the custom does not involve any will having this rule for its contents. When, in a particular case, a court of the community condemns the debtor to pay 5 per cent interest, the court bases its judgment on the presumption that in matters of loan one has to act as the members of the community have always acted. This presumption does not reflect the actual "will" of any legislator.

5. The "Ought"

When laws are described as "commands" or expressions of the "will" of the legislator, and when the legal order as such is said to be the "command" or the "will" of the State, this must be understood as a figurative mode of speech. As usual, an analogy is responsible for the figurative statement. The situation when a rule of law "stipulates," "provides for," or "prescribes" a certain human conduct is in fact quite similar to the situation when one individual wants another individual to behave in such-and-such a way and expresses this will in the form of a command. The only difference is that when we say that a certain human conduct is "stipulated," "provided for," or "prescribed" by a rule of law, we are employing an abstraction which eliminates the psychological act of will which is expressed by a command. If the rule of law is a command, it is, so to speak, a de-psychologized command, a command which does not imply a "will" in a psychological sense of the term. The conduct prescribed by the rule of law is "demanded" without any human being having to "will" it in a psychological sense. This is expressed by the statement that one "shall," one "ought" to observe the conduct prescribed by the law. A "norm" is a rule expressing the fact that somebody ought to act in a certain way, without implying that anybody really "wants" the person to act that way.

The comparison between the "ought" of a norm and a command is justified only in a very limited sense. According to Austin, it is the binding force of a law that makes it a "command." That is to say, when

calling a law a command we only express the fact of its being a "norm." On this point, there is no difference between a law enacted by a parliament, a contract concluded by two parties, or a testament made by an individual. The contract, too, is binding, it is a norm, binding the contracting parties. The testament, too, is binding. It is a norm binding the executor and the heirs. If it is dubious whether a testament may, even by way of comparison, be described as a "command," it is absolutely impossible so to describe a contract. In the latter case, the same individuals would otherwise both issue the command and be bound by it. This is impossible, for nobody can, properly speaking, command himself. But it is possible that a norm be created by the same individuals who are bound by this norm.

Here the objection might be raised: The contract itself does not bind the parties, it is the law of the State that binds the parties to conduct themselves according to the contract. However, a law may sometimes come very close to a contract. It is of the essence of a democracy that the laws are created by the same individuals who are bound by these laws. Insofar as identity of the commanding and the commanded is incompatible with the nature of a command, laws created in a democratic way cannot be recognized as commands. If we compare them to commands, we must by abstraction eliminate the fact that these "commands" are issued by those at whom they are directed. One can characterize democratic laws as "commands" only if one ignores the relationship between the individuals issuing the command and the individuals at whom the command is directed, if one assumes only a relationship between the latter and the "command" considered as impersonal, anonymous authority. That is the authority of the law, above the individual persons who are commanded and who command. This idea that the binding force emanates, not from any commanding human being, but from the impersonal anonymous "command" as such, is expressed in the famous words *non sub homine, sed sub lege*. If a relation of superiority and inferiority is included in the concept of command, then the rules of law are commands only if we consider the individual bound by them as subject to the rule. An impersonal and anonymous "command" — that is the norm.

The statement that an individual "ought to" behave in a certain way implies neither that some other individual "wills" or "commands" so, nor that the individual who ought to behave in a certain way actually behaves in this way. The norm is the expression of the idea that something ought to occur, especially that an individual ought to behave in a certain way. By the norm, nothing is said about the actual behavior of the individual concerned. The statement that an individual "ought to" behave

in a certain way means that this behavior is prescribed by a norm — it may be a moral or a legal norm or some other norm. The "ought" simply expresses the specific sense in which human behavior is determined by a norm. All we can do to describe this sense is to state that it is different from the sense in which we say that an individual actually behaves in a certain way, that something actually occurs or exists. A statement to the effect that something ought to occur is a statement about the existence and the contents of a norm, not a statement about natural reality, i.e. actual events in nature.

A norm expressing the idea that something ought to occur — although, possibly, it does not actually occur — is "valid." And if the occurrence referred to is the behavior of a certain individual, if the norm says that a certain individual ought to behave in a certain way, then the norm is "binding" upon that individual. Only by the help of the concept of a norm and the correlated concept of "ought" can we grasp the specific meaning of rules of law. Only thus can we understand their relevance to those for whose behavior they "provide," for whom they "prescribe" a certain course of conduct. Any attempt to represent the meaning of legal norms by rules describing the actual behavior of men — and thus to render the meaning of legal norms without having recourse to the concept of "ought" — must fail. Neither a statement about the actual behavior of those creating the norm, nor a statement about the actual behavior of those subject to the norm, can reproduce the specific meaning of the norm itself.

In summary: To say that a norm is "valid" for certain individuals is not to say that a certain individual or certain individuals "want" other individuals to behave in a certain way; for the norm is valid also if no such will exists. To say that a norm is valid for certain individuals is not to say that individuals actually behave in a certain way; for the norm is valid for these individuals even if they do not behave in that way. The distinction between the "ought" and the "is" is fundamental for the description of law.

b. General and Individual Norms

If law is characterized as "rules," it must be stressed that legal rules essentially differ from other rules and in particular from those which are presented as laws of nature (in the sense of physics). Whereas laws of nature are statements about the actual course of events, legal rules are prescriptions for the behavior of men. Laws of nature are rules which describe how natural events actually occur and why these events occur; that is to say what are their causes. Rules of law refer only to human behavior; they state how men ought to behave, and say nothing about

the actual behavior of men and of the causes thereof. In order to prevent misunderstandings (as to the nature of law), it is therefore better in this context not to use the term "rule," but to characterize law as norms.

Another reason why the designation of law as "rule" is misleading is that the word "rule" carries the connotation of something "general." A "rule" does not refer to a single non-recurring event but to a whole class of similar events. The import of a rule is that a phenomenon of a certain kind occurs — or ought to occur — always or almost always when conditions of a certain kind are fulfilled. In fact, law is often explained as "general rules." Austin * draws an explicit distinction between "laws" and "particular commands": where a command, he says, "obliges *generally* to acts or forbearances of a *class*, a command is a law or rule. But where it obliges to a *specific* act or forbearance . . . a command is occasional or particular." Having identified "law" and "rule," we can of course recognize as law only general norms. But there is no doubt that law does not consist of general norms only. Law includes individual norms, i.e. norms which determine the behavior of one individual in one non-recurring situation and which therefore are valid only for one particular case and may be obeyed or applied only once. Such norms are "law" because they are parts of the legal order as a whole in exactly the same sense as those general norms on the basis of which they have been created. Examples of such particular norms are the decisions of courts as far as their binding force is limited to the particular case at hand. Suppose that a judge orders a debtor *A* to return $1000 to his creditor *B*. By expressly or tacitly threatening *A* with a civil sanction in case of nonpayment, the judge here "commands" *A* to pay $1000 to *B*. The decision of the judge is a legal norm in the same sense and for the same reasons as the general principle that if somebody does not return a loan then a civil sanction ought to be inflicted upon him on the motion of the creditor. The "binding force" or "validity" of law is intrinsically related, not to its possibly general character, but only to its character as a norm. Since, by its nature, law is norm, there is no reason why only general norms should be considered law. If, in other respects, individual norms present the essential characteristics of law, they, too, must be recognized as law.

c. Conditional and Unconditional Norms

General legal norms always have the form of hypothetical statements. The sanction stipulated by the norm is stipulated under certain conditions. Also an individual legal norm may have this hypothetical form. The court decision just mentioned provides an example. The civil sanc-

* 1 AUSTIN, JURISPRUDENCE 92f.

tion is stipulated on the condition that the defendant does not observe the conduct prescribed by the court. There are, however, individual legal norms which have no hypothetical character. For instance, when a criminal court first establishes that a certain individual is guilty of a certain delict and then inflicts upon him a certain penalty, e.g., two years in jail, it is on the basis of a hypothetical general norm that the court creates the individual norm that the accused shall be deprived of personal freedom for two years. This norm is unconditional.

d. Norm and Act

The execution of this court decision — the process implying that the condemned is actually put in jail and kept there for two years — is not itself a legal norm. If we designate this process as a "legal act," thereby expressing that this act also belongs to law, then the definition of law as a system of norms would seem too narrow. Not only the execution of a legal norm, the enactment of the sanction which it stipulates, but also all acts by which legal norms are created, are such legal acts. That it regulates its own creation is a peculiarity of law which is of the utmost theoretical importance and which will later be discussed. The act through which a legal norm, general or individual, is created is therefore an act determined by the legal order, as much as the act which is the execution of a norm. An act is a legal act precisely because it is determined by a legal norm. The legal quality of an act is identical with its relation to a legal norm. An act is a "legal" act only because and only insofar as it is determined by a legal norm. It is therefore incorrect to say that law consists of norms and acts. It would be more nearly correct to say that law is made up of legal norms and legal acts as determined by these norms. If we adopt a static point of view, that is, if we consider the legal order only in its completed form or in a state of rest, then we notice only the norms by which the legal acts are determined. If, on the other hand, we adopt a dynamic outlook, if we consider the process through which the legal order is created and executed, then we see only the law-creating and law-executing acts. To this important distinction between statics and dynamics of law we shall return later.

e. Efficacy as Conformity of the Behavior to the Norm

In the foregoing, we have tried to clarify the difference between the validity and the efficacy of the law. Validity of law means that the legal norms are binding, that men ought to behave as the legal norms prescribe, that men ought to obey and apply the legal norms. Efficacy of law means that men actually behave as, according to the legal norms, they ought to behave, that the norms are actually applied and obeyed. The validity is

a quality of law; the so-called efficacy is a quality of the actual behavior of men and not, as linguistic usage seems to suggest, of law itself. The statement that law is effective means only that the actual behavior of men conforms with the legal norms. Thus, validity and efficacy refer to quite different phenomena. The common parlance, implying that validity and efficacy are both attributes of law, is misleading, even if by the efficacy of law is meant that the idea of law furnishes a motive for lawful conduct. Law as valid norm finds its expression in the statement that men ought to behave in a certain manner, thus in a statement which does not tell us anything about actual events. The efficacy of law, understood in the last-mentioned way, consists in the fact that men are led to observe the conduct required by a norm by their idea of this norm. A statement concerning the efficacy of law so understood is a statement about actual behavior. To designate both the valid norm and the idea of the norm, which is a psychological fact, by the same word "norm" is to commit an equivocation which may give rise to grave fallacies. However, as I have already pointed out, we are not in a position to say anything with exactitude about the motivating power which men's idea of law may possess. Objectively, we can ascertain only that the behavior of men conforms or does not conform with the legal norms. The only connotation attached to the term "efficacy" of law in this study is therefore that the actual behavior of men conforms to the legal norms.

f. Behavior "Opposed" to the Norm

The judgment that actual behavior "conforms" to a norm or that somebody's conduct is such as, according to the norm, it ought to be, may be characterized as a judgment of value. It is a statement asserting a relation between an object, especially human behavior, and a norm which the individual making this statement presupposes to be valid. Such a judgment of value must be carefully distinguished from the statement asserting a relation between the object and an interest of the individual making the statement, or of other individuals. In judging that something is "good," we can mean that we (by which is meant the judging subject or other individuals) desire it or that we find it pleasant. Then, our judgment asserts an actual state of affairs: It is our own or other individuals' emotional attitude toward the thing called "good" that we ascertain. The same holds for the judgment that something is "bad," if thereby we express our attitude toward it, that is, that we do not desire it or that we find it unpleasant. If we designate such judgments as judgments of value, then these judgments of value are assertions about actual facts; they are not different — in principle — from other judgments about reality.

The judgment that something — in particular human conduct — is "good" or "bad" can also mean something else than the assertion that I who make the judgment, or other individuals, desire or do not desire the conduct; that I who make the judgment, or other individuals, find the conduct pleasant or unpleasant. Such a judgment can also express the idea that the conduct is, or is not, in conformity with a norm the validity of which I presuppose. The norm is here used as a standard of valuation.* It could also be said that actual events are being "interpreted" according to a norm. The norm, the validity of which is taken for granted, serves as a "scheme of interpretation." That an action or forbearance conforms to a valid norm or is "good" (in the most general sense of the word) means that the individual concerned has actually observed the conduct which, according to the norm, he ought to observe. If the norm stipulates the behavior A, and the individual's actual behavior is A too, then his behavior "conforms" to the norm. It is a realization of the behavior stipulated in the norm. That an individual's conduct is "bad" (in the most general sense of the word) means that his conduct is at variance with the valid norm; that the individual has not observed the conduct which, according to the norm, he ought to have observed. His conduct is not a realization of the conduct stipulated in the norm. The norm stipulates the behavior A; but the actual behavior of the individual is non-A. In such a case we say: The behavior of the individual "contradicts" the norm. This "contradiction" is, however, not a logical contradiction. Although there is a logical contradiction between A and non-A, there is no logical contradiction between the statement expressing the meaning of the norm: "The individual ought to behave A," and the statement describing the individual's actual behavior: "The individual behaves non-A." Such statements are perfectly compatible with each other. A logical contradiction may take place only between two statements which both assert an "ought," between two norms; for instance: "X ought to tell the truth," and: "X ought not to tell the truth"; or between two statements which both assert an "is," for instance: "X tells the truth," and: "X does not tell the truth." The relations of "conformity" or "nonconformity" are relations between a norm which stipulates a certain behavior and is considered as valid, on the one hand, and the actual behavior of men on the other hand.

g. Efficacy as Condition of Validity

The statement that a norm is valid and the statement that it is efficacious are, it is true, two different statements. But although validity and

* Cf. *infra* pp. 47 ff.

efficacy are two entirely different concepts, there is nevertheless a very important relationship between the two. A norm is considered to be valid only on the condition that it belongs to a system of norms, to an order which, on the whole, is efficacious. Thus, efficacy is a condition of validity; a condition, not the reason of validity. A norm is not valid *because* it is efficacious; it is valid *if* the order to which it belongs is, on the whole, efficacious. This relationship between validity and efficacy is cognizable, however, only from the point of view of a dynamic theory of law dealing with the problem of the reason of validity and the concept of the legal order.* From the point of view of a static theory, only the validity of law is in question.

h. Sphere of Validity of the Norms

Since norms regulate human behavior, and human behavior takes place in time and space, norms are valid for a certain time and for a certain space. The validity of a norm may begin at one moment and end at another. The norms of Czechoslovakian law began to be valid on a certain day of 1918, the norms of Austrian law ceased to be valid on the day when the Austrian Republic had been incorporated into the German Reich in 1938. The validity of a norm has also a relation to space. In order to be valid at all, it must be valid, not only for a certain time, but also for a certain territory. The norms of French law are valid only in France, the norms of Mexican law only in Mexico. We may therefore speak of the temporal and the territorial sphere of validity of a norm. To determine how men have to behave, one must determine when and where they have to behave in the prescribed manner. How they shall behave, what acts they shall do or forbear from doing, that is the material sphere of the validity of a norm. Norms regulating the religious life of men refer to another material sphere than norms regulating their economic life. With reference to a certain norm, one can, however, raise not only the question of what shall be done or avoided, but also the question who shall perform or avoid it. The latter question concerns the personal sphere of validity of the norm. Just as there are norms valid only for a certain territory, for a certain time, and with respect to certain matters, so there are norms valid only for certain individuals, for instance for Catholics or for Swiss. The human behavior which forms the contents of the norms and which occurs in time and space consists of a personal and a material element: the individual who somewhere and at some time does or refrains from doing something, and the thing, the act, which he does or refrains from doing. Therefore, the norms have to regulate human behavior in all these respects.

* Cf. *infra* pp. 118 ff.

Among the four spheres of validity of a norm, the personal and the material spheres are prior to the territorial and the temporal spheres. The latter two are only the territory within which, and the time during which, the individual shall observe certain conduct. A norm can determine time and space only in relation to human behavior. To say that a norm is valid for a given territory is to say that it concerns human behavior that occurs within that territory. To say that a norm is valid for a certain time is to say that it refers to human behavior that occurs during that time. Any territory in which and any time during which human behavior occurs may form the territorial and temporal spheres of validity of norms.

Occasionally it is asserted that norms can have validity not for the past but only for the future. That is not so, and the assertion appears to be due to a failure to distinguish between the validity of a norm and the efficacy of the idea of a norm. The idea of a norm as a psychic fact can become efficacious only in the future, in the sense that this idea must temporally precede the behavior conforming to the norm, since the cause must temporally precede the effect. But the norm may refer also to past behavior. Past and future are relative to a certain moment in time. The moment which those who argue that a norm is valid only for the future have in mind is evidently the moment when the norm was created. What they mean is that norms cannot refer to events which had taken place before that moment. But this does not hold if we are considering the validity of a norm as distinguished from the efficacy of its idea. Nothing prevents us from applying a norm as a scheme of interpretation, a standard of evaluation, to facts which occurred before the moment when the norm came into existence. What someone did in the past we may evaluate according to a norm which assumed validity only after it had been done. In the remote past it was a religious duty to sacrifice human beings to the gods, and slavery was a legal institution. Today we say that these human sacrifices were crimes and that slavery, as a legal institution, was immoral. We apply moral norms valid in our time to these facts, though the norms which forbid human sacrifices and slavery came into existence long after the facts occurred that we judge now, according to these new norms, as crimes and immoral. Subsequent legitimation is possible and frequent, especially within the field of law. A special example is the German law by which certain murders, committed by order of the head of the State June 30, 1934, were retroactively divested of their character of delicts. It would also have been possible retroactively to give the character of sanctions to these acts of murder. A legal norm, e.g. a statute, can attach a sanction to facts accomplished before the creation of the norm. This norm is valid for the subject which shall refrain from the

delict as well as for the organ which shall execute the sanction. Such a norm is, with respect to the subject, valid for the past.

i. Retroactive Laws and Ignorantia Juris

The moral and political value of retroactive laws may be disputed, but their possibility cannot be doubted. The constitution of the United States, for instance, says in Article I, section 9, clause 3: "No . . . *ex post facto* law shall be passed." The term "*ex post facto* law" is interpreted as penal law with retroactive force. Retroactive laws are considered to be objectionable and undesirable because it hurts our feeling of justice to inflict a sanction, especially a punishment, upon an individual because of an action or omission of which this individual could not know that it would entail this sanction. However, on the other hand, we recognize the principle — a fundamental principle of all positive legal orders — *ignorantia juris neminem excusat*, ignorance of the law excuses no one. The fact that an individual does not know that the law attaches a sanction to his action or omission is no reason for not inflicting the sanction upon him. Sometimes the principle in question is interpreted restrictively: ignorance of the law is no excuse if the individual did not know the law although it was possible to know the law. Then this principle seems not incompatible with the rejection of retroactive laws. For in case of a retroactive law it is indeed impossible to know the law at the moment when the act is performed to which the retroactive law attaches a sanction. The distinction, however, between a case in which the individual can know the law valid at the moment he commits the delict and a case in which the individual cannot know the law is more than problematical. In fact, it is generally presupposed that a law which is valid can be known by the individuals whose behavior is regulated by the law. In fact, it is a *presumptio juris et de jure*, i.e. an "irrebuttable presumption," a legal presumption against which no evidence is permitted, a legal hypothesis the incorrectness of which must not be proved, that all the norms of a positive legal order can be known by the individuals subject to this order. This is obviously not true; the presumption in question is a typical legal fiction. Hence, with respect to the possibility or impossibility of knowing the law, there is no essential difference between a retroactive law and many cases in which a non-retroactive law is not, and cannot, be known by the individual to whom this law has to be applied.

D. The Legal Norm

a. Legal Norm and Rule of Law in a Descriptive Sense

If "coercion" in the sense here defined is an essential element of law, then the norms which form a legal order must be norms stipulating a coercive act, i.e. a sanction. In particular, the general norms must be norms in which a certain sanction is made dependent upon certain conditions, this dependence being expressed by the concept of "ought." This does not mean that the law-making organs necessarily have to give the norms the form of such hypothetical "ought" statements. The different elements of a norm may be contained in very different products of the law-making procedure, and they may be linguistically expressed in very different ways. When the legislator forbids theft, he may, for instance, first define the concept of theft in a number of sentences which form an article of a statute, and then stipulate the sanction in another sentence, which may be part of another article of the same statute or even part of an entirely different statute. Often the latter sentence does not have the linguistic form of an imperative or an "ought" sentence but the form of a prediction of a future event. The legislator frequently makes use of the future tense, saying that a thief "will be" punished in such and such a way. He then presupposes that the question as to who is a thief has been answered somewhere else, in the same or in some other statute. The phrase "will be punished" does not imply the prediction of a future event — the legislator is no prophet — but an "imperative" or a "command," these terms taken in a figurative sense. What the norm-creating authority means is that the sanction "ought" to be executed against the thief, when the conditions of the sanction are fulfilled.

It is the task of the science of law to represent the law of a community, i.e. the material produced by the legal authority in the law-making procedure, in the form of statements to the effect that "if such and such conditions are fulfilled, then such and such a sanction shall follow." These statements, by means of which the science of law represents law, must not be confused with the norms created by the law-making authorities. It is preferable not to call these statements norms, but legal rules. The legal norms enacted by the law creating authorities are prescriptive; the rules of law formulated by the science of law are descriptive. It is of importance that the term "legal rule" or "rule of law" be employed here in a descriptive sense.

b. Rule of Law and Law of Nature

The rule of law, the term used in a descriptive sense, is a hypothetical judgment attaching certain consequences to certain conditions. This is

the logical form of the law of nature, too. Just as the science of law, the science of nature describes its object in sentences which have the character of hypothetical judgments. And like the rule of law, the law of nature, too, connects two facts with one another as condition and consequence. The condition is here the "cause," the consequence the "effect." The fundamental form of the law of nature is the law of causality. The difference between the rule of law and the law of nature seems to be that the former refers to human beings and their behavior, whilst the latter refers to things and their reactions. Human behavior, however, may also be the subject-matter of natural laws, insofar as human behavior, too, belongs to nature. The rule of law and the law of nature differ not so much by the elements they connect as by the manner of their connection. The law of nature establishes that if *A* is, *B* is (or will be). The rule of law says: If *A* is, *B* ought to be. The rule of law is a norm (in the descriptive sense of that term). The meaning of the connection established by the law of nature between two elements is the "is," whereas the meaning of the connection between two elements established by the rule of law is the "ought." The principle according to which natural science describes its object is causality; the principle according to which the science of law describes its object is normativity.

Usually, the difference between law of nature and norm is characterized by the statement that the law of nature can have no exceptions, whereas a norm can. This is, however, not correct. The normative rule "If someone steals, he ought to be punished," remains valid even if in a given case a thief is not punished. This fact involves no exception to the ought statement expressing the norm; it is an exception only to an "is" statement expressing the rule that if someone steals, he actually will be punished. The validity of a norm remains unaffected if, in a concrete instance, a fact does not correspond to the norm. A fact has the character of an "exception" to a rule if the statement establishing the fact is in a logical contradiction to the rule. Since a norm is no statement of reality, no statement of a real fact can be in contradiction to a norm. Hence, there can be no exceptions to a norm. The norm is, by its very nature, inviolable. To say that the norm is "violated" by certain behavior is a figurative expression; and the figure used in this statement is not correct. For the statement says nothing about the norm; it merely characterizes the actual behavior as contrary to the behavior prescribed by the norm.

The law of nature, however, is not inviolable.* True exceptions to a law of nature are not excluded. The connection between cause and effect

* WILLIAM A. ROBSON, CIVILISATION AND THE GROWTH OF LAW (1935) 340, says: "Men of science no longer claim for natural laws the inexorable, immutable, and objective validity they were formerly deemed to possess."

established in a law of nature describing physical reality has the character of probability only, not of absolute necessity, as assumed by the older philosophy of nature. If, as a result of empirical research, two phenomena are considered to be in a relation of cause and effect, and if this result is formulated in a law of nature, it is not absolutely excluded that a fact may occur which is in contradiction to this law, and which therefore represents a real exception to the law. Should such a fact be established, then the formulation of the law has to be altered in a way to make the new fact correspond to the new formula. But the connection of cause and effect established by the new formula has also only the character of probability, not that of absolute necessity. Exceptions to the law are not excluded.

If we examine the way in which the idea of causality has developed in the human mind, we find that the law of causality has its origin in a norm. The interpretation of nature had originally a social character. Primitive man considers nature to be an intrinsic part of his society. He interprets physical reality according to the same principles that determine his social relations. His social order, to him, is at the same time the order of nature. Just as men obey the norms of the social order, things obey the norms emanating from superhuman personal beings. The fundamental social law is the norm according to which the good has to be rewarded, the evil punished. It is the principle of retribution which completely dominates primitive consciousness. The legal norm is the prototype of this principle. According to this principle of retribution, primitive man interprets nature. His interpretation has a normative-juristic character. It is in the norm of retribution that the law of causality originates and, in the way of a gradual change of meaning, develops. Even during the nineteenth century, the law of causality was conceived of as a norm, the expression of the divine will. The last step in this emancipation of the law of causality from the norm of retribution consists in the fact that the former gets rid of the character of a norm and thereby ceases to be conceived of as inviolable.*

c. The Legal Norm as a Standard of Valuation †

The legal norm may be applied not only in the sense that it is executed by the organ or obeyed by the subject, but also in the sense that it forms the basis of a specific judgment of value qualifying the behavior of the organ, or the subject, as lawful (legal, right) or unlawful (illegal, wrong). These are the specifically juristic value judgments. Other value judg-

* Cf. my SOCIETY AND NATURE, pp. 233ff.

† Cf. my article *Value Judgments in the Science of Law* (1942) 7 J. OF SOCIAL PHILOSOPHY AND JURISPRUDENCE 322–333.