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Recommended Citation

Available at: https://uknowledge.uky.edu/klj/vol52/iss2/4

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The Concept of "Law"

By Vilhelm Aubert

The growing concern with legal-sociological problems has one of its origins in the philosophy of law of recent years. Modern philosophy of law has had much the same function in relation to legal sociology as did epistemology relative to the growth of psychology and symbolic logic. When sociological studies of law are today becoming more prevalent, it is no doubt due to the particular bent of certain schools in modern philosophy of law. They have brought the problems of philosophical analysis to a point where they seem, almost inevitably, to require aid from sociology or social psychology. This is especially striking in recent analyses of the concept "valid law" and its synonyms, as they have been performed by philosophers of an empirical or logical-analytical inclination. In the United States this work has mostly been carried out by lawyers turned philosophers, often lumped together under the heading "legal realism." In Scandinavia some of the same basic themes have been running through the debates in legal philosophy. In this debate have participated lawyers of a philosophical bent, as well as philosophers turned lawyers. The two major names are Hägerström, the Swedish philosopher, one of the founders of the so-called "Uppsala-philosophy," and the Danish lawyer Ross. A brief survey of the analytical problems arising around the concept of "law" and of some major attempts to solve these problems along philosophical lines may be helpful to a deeper understanding of the sociological problems arising out of a concern with judicial behavior.

The terms "law," "valid legal rule," "right," etc. belong to the more difficult in our language. They are full of ambiguities.

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* University of Oslo.
2 Næss, Filosofiske Problemer (1939).
3 Hägerström, Inquires into the Nature of Law and Morals (Broad transl. 1953).
Whenever one appears close to some settlement of the terminological debate, one can be sure to be met with contradictory terminological suggestions from one source or another. Now, of course, most terms in the colloquial language are ambiguous. What is, then, the source of the very special troubles arising around the terms "valid law," "legal rule," etc.? Why have the innumerable attempts to arrive at the definition of "law" not met with success, but, on the contrary, rather tended to intensify the confusion?

In brief, I believe that the fundamental source of these difficulties lies in man's wish that the law should be something which is, in the empirical sense, as well as something which ought to be, on the normative level. On the one hand, the law is something to be found in code books, in the practice of the courts, and in the behavior and attitudes of the citizens. On the other hand, law should be an expressions of ideals, of something we value. Since there may often be a discrepancy between the state of affairs which is being upheld by legislators, judges and police, and the ideals which appeal to us, there is bound to arise some tension in the use of these basic legal concepts.

A few examples may illustrate the essential ambivalence in our attitude towards the concept of "law." It has been very common during and after the last war to speak about "our fight for the law" as a fundamental aspect of the Norwegian resistance to the German occupation. Here it is quite clear that the terms do not refer to just any legal system, upheld in the empirical sense, or any order of stable social power. The resistance purported to be a fight for certain ideals of law, against certain others, embodied in Nazi ideology. Speaking about "States of Law," something more is intended than the mere existence of rules being enforced regularly by courts disposing of society's resources of power and force. Ordinarily this term seems to imply the existence of certain guarantees of individual life, liberty, perhaps even property. "Law" in these contexts has very definite moral overtones.

Take on the other hand the case where the rich man or the bank instigates bankruptcy proceedings against the small peasant, because of his inability to pay his rent or debt. In such a case it may be claimed that "the bank has the law on its side." But
this will be claimed without enthusiasm. Nothing more will usually be intended than that this is the way particular code sections have to be interpreted, and this is the way the courts are likely to decide such cases. Saying that the law is on the side of the creditor refers to purely empirical phenomena: this is the way such cases end. Many will feel that it ought to be quite different, at least in the particular case.

The ambiguities and ambivalences attaching to the concept of "valid law" and similar terms are not uniquely associated with our time and modern industrial society. It seems that there have always been struggles around the concept of law. And as is so often the case with terminological disputes, it is also here concerned with something else, and more important. The fight about the correct definition of "law" is often no more than a preliminary skirmish. Behind it there is being prepared a struggle over ideology, politics or money. It is this background which makes the struggle over terms and definitions such a fascinating subject of inquiry.  

The term "law" has acquired a strongly positive emotive meaning, somewhat independent of empirical referents. If the term is being applied to an action, in itself commendable and good, it takes on increased positive value. And, if the term can be applied to behavior of morally dubious status, it tends to make at least for acquiescence with the state of affairs. Language is a powerful weapon, and not only because of its content. It is very important for all propagandists to attach the term "valid law" to that particular state of affairs in which they believe. They can do so by ordinary political means, by influencing legislation, possibly recruitment to the law-enforcing agencies. But there exists in addition to this long and laborious route, a philosophical "short-cut." Through legal-philosophical analyses it is possible to pull the concept of law in one direction or another, corresponding to basic cleavages of ideology or interests in society.

Even if the term "law" has acquired independent emotive meaning, it is tied to certain facts which cannot be completely ignored in the analysis. About good and evil it seems possible

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6 Stevenson, Ethics and Language (1944).
to debate almost without restrictions. No counter proof is likely to be produced. Discussing the law, there is also considerable room for private opinion, but not that much. Considerations for empirical phenomena are bound to enter on a variety of specific points.

How the two concerns for the empirical power-relationships and for the ideals and values may clash has been strikingly illustrated by the Greek historian and military commander Xenophon, reporting an alleged conversation between Pericles and Alcibiades:

It is said that Alcibiades, before he was twenty, had a conversation on the subject of law with Pericles, his guardian and head of the government, somewhat as follows:

"Tell me, Pericles," he said, "could you explain to me what a law is?"

"Why of course," said Pericles.

"Then for Heaven's sake explain it," said Alcibiades, "for when I hear people praised for being law-abiding I have the idea that a man couldn't rightly be accorded this praise if he didn't know what a law is."

"Well, what you want is nothing difficult, Alcibiades," said Pericles, "wishing to know what a law is. Why all these are laws which the people in assembly approve and enact, setting forth what is or is not to be done."

"With the idea that good is to be done, or bad?"

"Good, by Jove, my boy, and not bad," said Pericles.

"But if it is not the people, but, as in an aligarchic state, a minority who assemble and enact what is or is not to be done, what is this?"

"Everything," said Pericles, "that the sovereign power in the state enacts with due deliberation, enjoining what is to be done, is termed a law."

"And if a despot, then, holding the sovereign power in the state, enacts rules for the citizens, enjoining what is to be done, is this, too, law?"

"Yes, everything that a despot, as ruler," said Pericles, "enacts, this, too, is termed a law."

"But force," said Alcibiades, "and lawlessness, what are they, Pericles? Is it not when a stronger compels a weaker to do his will, not by getting his consent but by force?"

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7 Calhoun, Greek Legal Science 78-80 (1947).
"That is my idea," said Pericles.
"Then everything a despot compels the citizens to do by his enactments, without getting their consent, is lawlessness?"
"That is right," said Pericles. "I retract the statement that anything a despot enacts, without the consent of the citizens, is law."
"But anything the minority enact, not getting the consent of the majority but through superior power, shall we call this force or shall we not?"
"Anything, I think," said Pericles, "that anyone compels another to do without getting his consent, whether by enactment or otherwise, is force rather than law."
"Then anything that the whole people, by reason of being stronger than the well-to-do, enact without getting consent, would be force rather than law?"
"Let me tell you," said Pericles, "Alcibiades, when I was your age I too was good at this sort of thing. For we used to practice just the sort of clever quibbling I think you are practising now."
And Alcibiades said, "I should like to have met you in those days, Pericles, when you were at your best."

The conversation suggests that Pericles originally assumed "law" to be inseparable from the actually existing power-relationships, provided that certain forms are observed. But as the questioning of Alcibiades makes him realize the consequences of his views, doubts arise. It turns out that he is unwilling to apply the noble term "law" or "legal rule" to just any exertion of power, even though it may conform to formally established rules. Pericles seems to demand certain minimal standards of content to be fulfilled if the term "law" is to be applicable to a certain state of affairs. If they are not fulfilled he prefers to speak about "force" or "coercion" rather than of "law."

It is for good reasons that Pericles, and with him many modern lawyers, take an established order of power as their starting point, that is to say, rules given by legislators and enforced by courts. The tasks of the lawyer demand rapid solutions to problems of law, even though the problems may be very complex. A moral debate about good and evil in the case might be without end. Arguments concerning what is stated in the laws and established as judicial precedent are, after all, easier to terminate and less laden with affects.
Also sound scientific reasons favor a definition of "law" in terms of empirical facts, rules enforced and abided by in any one society. If we speak about law as ideal, as something which ought to be, the statements can not be directly and fully tested through a confrontation with empirical data. And yet, even those who are most eager to deal with legal rules in a purely scientific, objective manner will soon realize the difficulties in being consistent. Legal scholars are both observers and participants in the system which they study. As observers they may refer to the law as something purely factual. As participants such legal "purists" would in practice and in the consequences of their work become unfree and one-sided apologists for the status quo.

The term "law" is a slogan and a battle-cry. Everybody is in favor of the "law," as they are against the sin. Therefore also professional users of the term will feel a continuous temptation to apply it to the standards in which they personally believe, even should they not be quite clearly expressed in the law or in the practice of the courts. Sooner or later they will be placed in the same situation as was Pericles. They will face rules which are actually being enforced by the proper authorities, but which seem so reprehensible as to make for great hesitancy in the use of the term "law," even for a person with a good grasp of the facts of legal life. However firmly the definition of "law" links the concept to a set of empirical facts, the desire to break through the empirical limitation will persist in some people, even in some lawyers. This tension between the empirical and the normative in the legal realm will hardly ever disappear completely. It seems realistic to reckon with a certain ambiguity and inconsistency in the use of the term "law" and its synonyms. This inconsistency is in no small measure protected, often veiled, by the manifold and complicated structure of legal phenomena.

All the doubts and uncertainties arising from the realities of legal life have made some believe that the ambiguities of legal rules, the lack of proper precedents, etc. are no more than symptoms of our inadequate knowledge. Behind this changing, inconsistent and incomplete law, there exists another law. And this law is comprehensive, certain and consistent, furnishing precise rules for the solution of all conflicts. It is only in part, perhaps not at
all, the product of human actions. In a way it is placed above the citizens, above the judges, yes even above the legislator.

The belief in a law of this kind has throughout historical time played an important part. It has occurred in many garbs, serving many different functions. As a belief in Natural Law, emanating from God, it served in some periods as a mighty weapon in the hands of the Catholic church opposing secular authority. As a belief in the natural rights of man it has inflamed revolutionaries to attack the existing order of law and power. And the pendulum swung once more, so that the American Supreme Court for a long time used the rights of man as a device for protecting the vested interests of the capitalist class. Today, the rights of man are invoked by the courts in defense of the Negro.

On a more pedestrian level, the faith in a law beyond the follies of man has given many people a sense of security. Positive law, law as fact, has lacunae and inconsistencies, and is beset with uncertainties concerning the future legal status of an individual. The belief in the complete and certain law behind the law we actually observe may serve some of the same function as faith in providence, distracting the attention from that uncertainty which is all pervasive within the realm of law.

The Legal Realism of Scandinavian Philosophy of Law

Some philosophers of law have attempted to define the concept of “valid law” in such a way that it refers purely to facts. These proposals for a stricter terminology do hardly accord with the actual use of terms within law, and can hardly expect to achieve widespread support. Nevertheless, some of these definitions merit our attention, for they establish an apparent link between dogmatic legal theory and the emergent sociology of law.

Let us start with a brief consideration of one definition which ties the concept of law to a certain type of empirical data: the legal beliefs of the citizens. In his book *Codes and Law* the Danish jurist Illum states: “A rule is not a legal rule simply because it has come about as a product of a social mechanism which has found its expression in the founding of a state. Those rules which are produced in this manner become law only by becoming an intergral part of the people’s common legal
beliefs." Now, Illum holds the opinions of lawyers to be the most important source of information concerning the content of these legal beliefs. But he makes it clear that conformity to the convictions also of lay-people affected by the rules in question, is a necessary condition for the validity of said rules. Illum is fully aware of the consequence of this definition, that there exists no uniform legal conviction with respect to any rule. "One searches for the law, but finds only the specific beliefs of specific people concerning the contents of the legal system. There are as many varieties of law as there exist legal convictions."

There is no doubt that this definition of law directs attention and thought to an interesting social phenomenon, and to one which is central in modern sociology of law. However, linking the concept of "law" by definition to people's beliefs makes for a radical breach with common usage of terms within legal theory. Thus, it seems highly improbable that one could stick consistently to such a definition throughout the analysis of the validity of specific rules and decisions. There is serious danger that this definition will remain no more than an apparently sociological mask to a method which is dogmatic and traditional, the conclusions of which are unaffected by empirical opinion research.

The point of view adopted by Illum in such an extreme form, has also been maintained by Alf Ross in his earlier work. In his earlier phase it seems as if the conformity of the citizens' behaviour to rules was a necessary condition for the validity of these rules as law. If the behavior of the people deviated massively from the rules they could not make claim to legal validity. At the same time Ross demanded that the obedience of the citizens be based upon motives of a certain disinterested kind, if it were to be interpreted as evidence for the validity of rules.

Illum, and Ross in his earlier works, developed concepts of "valid law" which have a democratic orientation. As we have seen already, this orientation in defining the concept of "valid law" has traditions as far back as to the alleged debate between

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8 Illum, Lov og ret 53 (1945).
9 Id. at 56.
10 Ross, Towards a Realistic Jurisprudence 89-90 (1946).
Pericles and Alcibiades. It has later recurred from time to time. Today, however, other types of “realistic” definitions of law loom larger in the legal philosophical debates. They can perhaps be said to have a more authoritarian orientation in so far as they attempt to anchor the concept of law in the legal enforcement machinery, or more specifically, in judicial opinion and behavior.12

Within Scandinavian philosophy of law, the Uppsala philosophers especially have sought a definition of “law” along these lines. The leading representatives of this school of thought, Hägerström and Lundstedt, arrived at first at the conclusion that terms like “valid law,” “right,” “obligation” have no empirical referents. To use such terms was characterized as metaphysics, and as such unworthy of endeavors making scientific claims.13 At the same time as they maintained this point of view they suggested that legal terms could be given a meaning so as to have them refer to empirical invariances, namely invariances in the behavior of the law-enforcing agencies.14 Unequivocally this point of view was first held by Ingemar Hedenius. He states that “the validity of a rule means that it is in fact enforced. A valid rule of law can be nothing but a rule of behavior which is actually being enforced, a habit which, by and large, is being exercised by certain persons of authority.”15 He makes this more precise by saying:

That something is contrary to law, that a right or an obligation exists, is synonymous with claiming that certain rules of law have validity with respect to specific cases. That a rule of law is valid means that it is a rule of behavior, which is actually being applied by certain persons of authority, appointed for this purpose. Thus, the validity of the specific rule of law is synonymous with the existence of an empirical regularity in human behavior. This is always a question of behavior on the part of legal authorities. Regularities in the behavior of other persons, or of legal authorities outside their field of public authority, cannot acquire the status of a legal rule.16

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12 Ibid.
15 Hedenius, Sensationalism and Theology in Berkeley’s Philosophy 87 (1936).
16 *Id.* at 89.
Hedenius makes it quite clear that the term "valid law" refers to purely empirical phenomena, and that these facts have to do with the behavior of agents of public authority. This definition is clearly at variance with Illum's point of view, that the concept of "valid law" presupposes the existence of regularly occurring opinions and actions on part of the citizens.

Alf Ross and the "Valid Law"

The Scandinavian philosopher of law, who with the greatest penetration and consistency, has tried to anchor the concept of "valid law" in purely empirical phenomena, is Alf Ross.\(^{17}\) He has also attempted, but probably not succeeded, in preserving the terminological usages within jurisprudence. We shall here deal with some of his claims concerning the definition of "valid law" and investigate how they relate to a sociological study of law, or more specifically, to sociological studies of judicial behavior.

Ross attempts to preserve the bonds with the traditional study of law. His unwillingness to sever the ties with this traditional field of study appears already in his attitude to the function of legal philosophy. He defines legal philosophy as a discipline aiming at a study of jurisprudence itself. The problem of the nature of law is, deprived of its metaphysical formulation, the problem of the interpretation of the concept of "valid law" as an integral part of every doctrinal legal sentence. Nevertheless it may be somewhat doubtful if Ross's analysis of the concept of valid law is to be interpreted as an attempt to analyse the actual usage within jurisprudence, or if it should not at the same time be interpreted as a kind of suggestion concerning the most fruitful use of the concepts. In my view there is in Ross a mixture of these two attitudes.

Like the Uppsala philosophers, Ross is oriented towards the activities of persons in positions of authority when he defines the concept of valid law. But he defines it in a more refined way than these other philosophers had done, in my view also in a more sophisticated manner than most of the American legal realists. Ross defines the concept of law in these words:

A national law system, considered as a valid system of norms, can accordingly be defined as the norms which actually are

operative in the mind of the judge, because they are felt by him to be socially binding and therefore obeyed. The test of the validity is that on this hypothesis—that is, accepting the system of norms as a scheme of interpretation—we can comprehend the actions of the judge [the decisions of the courts] as meaningful responses to given conditions and within certain limits predict them in the same way as the norms of chess enable us to understand the moves of the players as meaningful responses and predict them.\textsuperscript{18}

And he emphasizes once more that the judge is the central figure in this theory:

Only the legal phenomena in the narrower sense, however—the application of the law by the courts—are decisive in determining the validity of the legal norms. In contrast to generally accepted ideas it must be emphasised that the law provides the norms for the behavior of the courts, and not of private individuals. The effectiveness which conditions the validity of the norms can therefore be sought solely in the judicial application of the law, and not in the law in action among private individuals. If, for example, criminal abortion is prohibited, the true content of the law consists in a directive to the judge that he shall under certain conditions impose a penalty for criminal abortion. The decisive factor determining that the prohibition is valid law is solely the fact that it is effectively upheld by the courts where breaches of the law are brought to light and prosecuted. It makes no difference whether the people comply with or frequently ignore the prohibition. This indifference results in the apparent paradox that the more effectively a rule is complied with in extra-judicial legal life, the more difficult it is to ascertain whether the rule possesses validity, because the courts have that much less opportunity to manifest their reaction.\textsuperscript{19}

Ross deviates from the American legal realism in so far as he is unable to accept the statement that law should be no more than what the courts do in fact. What Ross claims that one can predict on the basis of statements about valid law is not what the judge in the end will do to a case. The final decision is determined by many different factors, including the temperament and state of mind of the judge. In Ross's view it is no task for the theory of valid law to make statements on such individual

\textsuperscript{18} Id. at 85.  
\textsuperscript{19} Ibid.
properties of judges. It is solely concerned with that ideology which is motivating in the mind of the judge when he makes his decision. According to the explication of the validity of law given in this paragraph, this concept rests on hypotheses concerning the mind of the judge. What is valid law cannot be behavioristically observed, that is to say, not by external observations of invariances in the reactions of the judges.

Ross discusses how doctrinal statements on valid law are to be verified, and he makes this proclamation:

The real content of the assertion
A-section 62 of the Uniform Negotiable Instrument Act is valid law at the present time of a certain state is a prediction to the effect that if an action in which the conditioning facts given in the section are considered to exist is brought before the courts of this state, and if in the meantime there have been no alterations in the circumstances which forms the basis of A, the directive to the judge contained in the section will form an integral part of the reasoning underlying the judgement.

A is regarded as being true if we have good reason to assume that this prediction will be fulfilled.20

These quotations from the definition of "valid law" in Ross' theory might suggest that he is attempting to transform the doctrinal study of law into a kind of sociology, or at least into a social science of a new type, a pure empirical science. But other statements made by Ross create a certain scepticism with respect to the compatibility of jurisprudence in the traditional sense, with sociological research on legal phenomena. Ross begins by speaking about the ideology which lives in the mind of the judge. However, when he deals with the more concrete questions of verification he talks about the premises of the decision. This is in many ways more practical. It is easier to study the opinions of the court than to investigate motivation. There is, however, a great difference between the grounds given in the opinions of the court and the actual psychological motivation. We would not expect the ideology to be similar in two judges, one of which uses a certain argument simply as a rationalization, the other one using it because it is his firm belief. If one pretends to be able to make statements on motivation and on the state of mind of the

20 Id. at 40.
judge, it is necessary to be able to draw a distinction between two such states of affairs.

Also another point in the analysis of the question of verification merits serious attention. Ross discusses the possibility that doctrinal statements of valid law may influence the behavior of the courts, thus becoming self-fulfilling. A legal scholar who has identified himself with the ideology of the courts, and who then on the basis of his own evaluation makes "forecasts," stands a good chance of having them verified by the courts precisely because he put them forward. Doctrinal studies can therefore not in principle be distinguished from legal policy.\(^{21}\)

This may be true. But when Ross claims that doctrinal law in this respect is similar to the other social sciences, it is probably not correct. He states quite generally that in the social sciences it is, in principle, impossible to make a sharp distinction between theory and political action. He exemplifies this with a reference to a concrete forecast made in the Berlin conflict in 1950, a forecast which had practical consequences which in their turn influenced the truth of the prediction. He further mentions that the predictions of a price increase may lead to an increase in prices, simply by being believed in, even if it originally was poorly founded on facts. This situation may in principle be similar to the situation in law. The examples are, however, hardly representative of the social sciences, and certainly not of sociology or social psychology. Within these fields it belongs to the rare exceptions that concrete predictions are being made available to the subjects of research which the theories concern. In doctrinal studies of law on the other hand, it is a very common situation if we take Ross' view on valid law as our point of departure. In this very important difference, at least of degree, we find an explanation of Ross' reluctance to open up for methods of verification that are current in modern sociology. Doctrinal studies of law are—and have to be—influenced by the fact that their statements are to be used by attorneys and by judges whose task it is to reach decisions in concrete cases. For this reason a realistic legal theorist may calculate with the prestige of his own science as a factor in predictions, while this is something which a sociologist or a social psychologist rarely or never does in his theo-

\(^{21}\) Id. at 48.
retical work. The role of the sociologist is very different from that of the lawyer.

Let me terminate these considerations with a repetition of how Ross purports to verify the predictions of legal science concerning the normative ideology living in the mind of the judge. He wants to do so by studying the opinions of the court. In so doing he limits himself to a method of verification which is very narrow from a sociological or a social psychological point of view, since we are apparently dealing with the motivation and psychological structure of the judge. In reality it seems that this method is so limited that it once more will make the concept of valid law a term covering no more than certain written formulations and no social psychological entities at all. It is not possible at the same time to make the statements psychologically more interesting and easy to verify. In the process of verification Ross relies upon the "self-fulfilling prophecy" as an aid in fields where forecasts are uncertain. In doing so he creates a distance between doctrinal studies of law and the problem of verification as it is being found and discussed in the other social sciences.

Let us leave the question of verification and take a look at the formation of hypotheses. By the aid of what kinds of methods can doctrinal lawyers collect and analyse data with a view to make reliable predictions? An important point of departure in Ross' theory is the theory of sources of law. Within his theoretical system this becomes a theory of how judges act, or of ideologies which as a matter of fact, exist in the minds of judges.22 This notwithstanding, Ross' theory of sources of law contains the same elements which we find in other theories of sources of law. He does not add significant new material, even if it proclaims to be purely descriptive, and not like many others, wholly or in part normative in character. Statute, precedent and custom are the most important sources of law. That is to say that these three types of factual material must be known and analysed by those who want to predict anything concerning the activities of judges. In principle it is being claimed that these phenomena only are of importance in relation to valid law when they enter into the mind of the judge. Nevertheless, one is in practice led by Ross' theory of sources of law to study them as phenomena outside the mind.

\[22 \text{Id. at 75.}\]
of the judge. This is probably the most practical. The question is then if it is not a fiction that this kind of study is social psychology with the mind of the judge as its subject matter.

Let me use an analogy with animal psychology to illustrate this aspect of the theory of sources of law of Ross. A psychologist studying learning will hardly consider it to be an independent task of research to describe the objective characteristics of the rat’s environment. The corridors of the maze and the objective properties of goals interest him merely because he has to know them as a background for the choice behavior of the rat when faced with this particular environmental structure. It seems to me that Ross—like other lawyers—mostly refers to this very complicated maze of external stimuli within which the judge moves during the hearings in court. It is probably most practical to do so. But it would be a fiction to believe that the subject matter of such a kind of research is the mind or psyche of the judge. The hypotheses concerning the mind of the judge fall victim to the methodological principle of “Occam’s razor.” They add to the number of premises beyond those that are logically necessary in order to arrive at the conclusions.

Now, the relationship between the rat and the psychologist is not the same as that between the judge and the theoretical jurist. The theoretical jurist is somewhat closer to the judge than the psychologist is to the rat. But even human psychologists would not dare to trust a method where he exclusively studied the environment of his subjects, and then made predictions of behavior on the basis of an intuitive understanding of the situation, without having made investigations of the psyche of his subjects. But this is what legal theory does according to Ross. When it turns out fairly well it is due to the fact that the judicial decision is one of the most “maze-influenced” actions in social life. The external obligations of the judge are exceedingly finely carved out. Furthermore, the success of legal theory is to a large extent based upon the communality between the judge and the theorist. They know much about the same things, and they talk the same language, based upon their common education. It is important, however, to retain that this is the basis of accurate statements concerning valid law, and not that the researcher has any clearly formulated knowledge of the mind of the judge. The
situation here has rarely any genuine parallels in the other social sciences. To range the existing legal theory among the other social sciences may becloud more than it clarifies.

The ambiguity of references to the judge or his environment (in this case a set of rules in books) need not affect the accuracy of predictions where the three central sources of law dominate. Tremendous problems arise, however, on two peripheral points. It is the so-called "empty fields" where the judge is unable to reach a decision without going beyond these sources of law. And the same is the case when the ambiguity of the statutes makes it hard to determine exactly what they express. These two questions put the system of Ross to its decisive test.

Within the areas empty of law it was earlier quite common for the theory to refer to a source of law which was called "reason." Instead of this Ross introduces a source of law which he calls the "cultural tradition." As a source of law the cultural tradition is a set of empirical facts that can be used as a basis for making predictions concerning the motivation of the courts in concrete cases. But here the problem becomes very acute of where the factors are to be observed—within or outside the mind of the judge.

Ross outlines no systematic method for the study of the cultural tradition as a part of the psyche of the judge. Instead he refers to the concept of culture within sociology or rather anthropology, as it has been developed for instance by Ruth Benedict in *Patterns of Culture*. Apart from this, however, he uses only some, necessarily rather loose, conceptions concerning what culture is. They furnish no basis for those who are searching for factors on which one can build predictions. It seems that, actually, the cultural tradition is no more than a new name for the great unknown in law, that unknown that previously sailed under other flags. The new term does not increase our knowledge, and what is worse, it suggests no useful methods by which to proceed.

If one went to the sociology of culture in search of material, I believe the following would happen: On the basis of available knowledge concerning our culture, it would be possible to predict

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23 *Id.* at 97.
24 *Id.* at 98.
a considerable number of legal decisions. But, by and large, these would belong among the more trivial questions of law. The uncertain and complex question of law are on the other hand such where traditions and massive group attitudes are lacking. I should think that it would, as a rule, be precisely these kinds of questions which have not got, and will not get, any very specific cultural definition nor a very definite cultural integration. It is an arbitrary assumption to believe that the solution of very complex juridical questions should remain in a state of cultural harmony. To assume so would mean a transfer of an extreme functionalism, which may be untenable even in its cruder form, to the finest pegs of the social machinery.

This does not mean, of course, that the judge is unaffected by the cultural traditions when he decides in accordance with the so-called "reason." But it is of little avail to know that it is so, in part, because as mentioned, our knowledge of these common cultural traditions are very crude and vague. In part it is also due to the fact that the judge and the lawyers live in their own subculture which does not in detail coincide with that of society at large. Besides, we have no reason to assume that judges are quite uniformly ideologically motivated within these difficult areas of the law.²⁵

We face a choice between accepting an empty reference to the sociology of culture or to choose a method for investigation of the motivation of the judge. Ross chooses the former and with the unfortunate consequences mentioned above. However, the other solution might not present a fruitful approach either. It would namely imply an attempt to study these very subtle deliberations and choice activities with methods that have been adapted to very different tasks.

I think one must, and ought to, capitulate in the face of this problem of prediction. It is, on the other hand, no doubt true that legal theory in these areas have influenced the practice of the courts. But this is of little avail in those instances where two theoretical jurists establish each their own rule on the basis of their conception of the nature of the case. The scientific debate

between these two can not be conducted as a debate about which one has the greatest prestige, and will therefore most likely be adhered to by the courts. As a rule it will not turn into a debate on predictions, and it will not be a debate merely about norms, but a debate within a normative system. In so far as this is so, legal analysis is no pure social science at all. Not only will the debate have a certain normative character, but the empirical statements made will necessarily have rather shallow foundations. The whole problem surrounding the concept of "reason" springs out of a purely practical need, the necessity for the court of reaching decisions in all cases. One can not expect fruitful research to emerge from the attempts to find immediate solutions to a vast number of practical problems. It is important to be aware that the difference, albeit one of degree, between the treatment of "reason" within law and the methods of social psychology, is very great.

The problem of the motivation of the judge emerges in an even clearer form in connection with the interpretation of statutes and the application of the law. Ross emphasizes how theoretical knowledge and practical choice, on the basis of the personality and social attitudes of the judge, are inextricably woven together in his motivation.26 This again raises the question of how fruitful Ross' concept of law is. Doctrinal statements are to be verified by the opinion of the court. Therefore the method of verification excludes very important normative factors, not to be read out of the written records. This is of less importance, however. It is also unclear how large a part of the motivation of the judge belongs within the domain of valid law. More important, however, is the question whether it at all exists any method of studying those aspects of judicial motivation which Ross deals with under the interpretation of statutes. What are these methods?

Some of the methods of interpretation turn out to be identical with those applied by judges and other lawyers. Therefore, and because the judges read juridical literature, the interpretations of legal theory will often be reaffirmed by the courts. But are these interpretations for that reason statements about the motivation of judges? If this is more than a fiction, this will be revealed in

26 Ross, op. cit. supra note 4, at 151.
those instances where the interpretations are uncertain and where the accepted doctrinal methods are vague and unsystematic. Does the point of view of Ross, emphasizing predictions, make any new contribution in this area?

That would presumably appear in his discussion of the so-called "pragmatic" factors in the interpretation. Here the personality of the judge enters seriously into the analysis. Ross makes this statement among others:

The constructive part played by the judge in the administration of justice to define more precisely or to correct the directive of the statute is only rarely manifest. Usually the judge will not admit that his interpretation is of this constructive character, but attempt by a technique of argumentation, to make it appear that his decision was arrived at objectively and is covered by the "meaning of the statute" or the "intention of the legislator." He will try thus for his own benefit, or at least for the benefit of the rest of the world, to uphold the image discussed in § 28—showing the administration of justice as determined solely by the motive of obedience to the law in combination with a rational insight into the meaning of the statute or the will of the legislator.

When the combined motivating factors—the wording of the statute, the pragmatic considerations, the estimation of the facts—have produced their effect in the judge's mind and influenced him in favour of a decision, then a facade of justification is constructed, often differing from that which in reality made him decide the way he did.27

And he goes on to say, "The secret of this technique of argumentation lies in the fact that no criterion exists indicating which rule of interpretation to use."28

Ross further emphasizes that it is an interesting social psychological problem why the realities have to be veiled by the use of such a technique of argumentation. He suggests that the veiling perhaps may be socially useful. But he also states that such a beclouding of truth is not appropriate for science. If the interpretations have no basis in precedent, Ross believes that these patterns of arguments must not be presented as statements on valid law. "The task of doctrinal law is to make clear the assumed evaluations, to clarify the considerations and analyze

27 Id. at 151-152.
28 Id. at 153n.
social facts and relationships, thereby giving to the courts some advice which they may use when they create law through constructive interpretation."

This is certainly a sensible attitude to the task of legal theory, which is, however, quite different from making predictions or studying the psychology of judges. Ross is fully aware that an important part of legal science is political, and does not attempt to enunciate valid law. Nevertheless a curious aspect of his system appears here. As long as the judges are receptive, automatic receivers of external stimuli, legal theory is in principle a kind of description of judicial behavior, based upon social psychological hypotheses. When, however, the external framework is less restrictive, legal theory is no longer prediction, but turns into advice. To make a caricature, it reminds one of a theory of architecture which pretends to be psychology when it describes where the walls, the corridors, the stairs, the floors, etc. are, because it is fairly certain that people are bound to walk up the stairs and not up through the floor, that they will enter through the doors and usually not through the windows or the walls. But when the theory has to describe what goes on within any one room, it must capitulate, because this is not unequivocally determined by the architectural structure.

In the same way it appears that the moment the external legal architecture no longer compellingly determines a certain result, that is, when the personality of the judge enters, it becomes clear that Ross has talked about the psyche of the judge without disposing of any useful method to study it. Now, the judge is placed within a more solid and better known architecture than most people are. For that reason the gap between the terminology of Ross and his operational methods appears only on certain crucial points.

I do not believe that one could successfully develop a psychological science of prediction concerning difficult problems of interpretation of laws. It may be doubted that this would, in the end, serve a useful function. Scientifically speaking, it is hardly more fruitful than if a physicist started in detail to record all the traces followed by the balls in the game of bowling. This

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29 Ross, Om Ret og Retferdighed 183 (Danish ed. 1953).
objection to Ross' theory points back to the analysis of the concept of valid law. It seems that he has assumed daring scientific and philosophical attitudes from which he has later been forced to retreat. Since the decision to retreat appears sensible, there must be some fault with the original position.

What is false, or at least one-sided, must be the general attitude to what makes a presentation scientific. There are not many explicit statements on this question in Ross' treatise. He claims, however, in one place:

It is a principle of modern empirical science that a proposition about reality [in contrast to an analytical, logical-mathematical proposition] must imply that by following a certain mode of procedure, under certain conditions certain direct experiences will result. The proposition for example, "this is chalk" implies that if I place the object under a microscope certain structural qualities shall appear; if I pour acid over it, certain chemical reactions will result; if I rub it on a blackboard a line will show, and so on. This mode of procedure is called the procedure of verification and the sum of verifiable implications is said to constitute the "real content" of the proposition. If an assertion—for example, the assertion that the world is governed by an invisible demon—does not involve any verifiable implications, it is said to be without logical meaning; as "metaphysical" it is banned from the realm of science.

The interpretation of the doctrinal study of law presented in this book rests upon the postulate that the principle of verification must apply also to this field of cognition—that the doctrinal study of law must be recognized as an empirical social science. This means that the propositions about valid law must be interpreted as referring not to an unobservable validity or "binding force" derived from a priori principles or postulates but to social facts. It must be made clear in what procedure the doctrinal propositions can be verified; or what their verifiable implications are.

Our interpretation, based on the preceding analysis, is that the real content of doctrinal propositions refers to the actions of the courts under certain conditions. The real content, for example, of the proposition that section 62 of the Uniform Negotiable Instruments Act is valid Illinois law is the assertion that under certain conditions the courts of this state will act in accordance with the tenor of this section. This tenor is a directive to the judge to order the drawee to pay the bill
which he has accepted but failed to pay on the day it fell due (§ 7).  

Ross' concept of science has this in common with the Uppsala philosophy and many other representatives of positivism, that it is established with the main purpose to distinguish science from evaluation, from preaching and metaphysics. This distinction has often been veiled within the area of legal and moral philosophy. By and large I can subscribe to Ross' demand that the truth-value of scientific expositions must be testable by experience. It must on the other hand be clearly stated that testability is only one of the criteria of science. Not all presentations which contain true statements, even solely true statements, are "science" in the real sense of the term.

It is true as Ross claims that a scientist has to be cautious so as not to fall into the abyss called "metaphysics," evaluation and untestable theories. On the other side of the narrow path of science, however, there is another abyss. And we fall into that if we are satisfied with presenting trivial and disconnected true statements. Apart from testability, scientific presentations must also fulfill the demand of fruitfulness and economy of thought.  

If we compare everyday, and true, statements on weather and wind, on the height of houses and distance to the street-car, with modern physical theories, we soon realise that the difference is quite as big as the difference between physics and metaphysics, although of a different kind.

I shall not attempt to suggest what those criteria of science are which come in addition to testability. They are less worked through than the problems of testability, especially within the social sciences. And the borderline between the scientifically uninteresting, although true statements, and the scientifically fruitful statements, is very difficult to draw.

Ross is certainly aware of these considerations. But in his theory of valid law the attempt to make doctrinal studies of law scientific is completely dominated by a reaction against metaphysics. Ross has on the other hand, as far as I can see, not made any attempts to prevent the new science of law from becoming a system of theoretically trivial and uninteresting statements, as

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30 Ross, op. cit. supra note 29, at 40.
long as they are in principle testable. This new science of law does in the first instance attempt to make a vast number of specific predictions, not to arrive at a set of general empirical assumptions.

I have mentioned earlier that this hardly coincides with what legal theorists commonly conceive as their task. It may be doubted that it would better satisfy the practical needs to develop such a science of prediction, than to stick to the traditional doctrinal studies. This reservation only applies, however, to the extent that legal science is a theory on valid law. It does not affect legal political advice to judges and others.

As far as I can see, building a theory of valid law as suggested by Ross would lead to a social science which is neither fowl nor fresh. This science will not be able to fulfill the traditional functions of doctrinal law, or to put it differently, this is hardly the most fruitful way of reforming doctrinal studies from a practical point of view. It seems, on the other hand, that the discipline implied by the program of Ross would not develop into an interesting theoretical social science. This outcome is probably due to the fact that Ross from the very beginning had set himself an insoluble task: to show that the traditional doctrinal studies constitute a certain kind of social science, in other words, that doctrinal law and the sociology of law could melt together into one science. I do not believe this to be the case. Nevertheless it is very useful to pay attention to Ross' attempt to build up such a synthesis. Even if one cannot follow him on all the points, he gives one of the clearest and best exposes of the various problems that arrive in the area of contact between doctrinal law and the sociology of law. His work makes it imperative to study judicial behavior on a purely sociological basis.