CHAPTER 2

Standards for the Individual’s Acts

Sec. 2-01. Lawmaker’s messages—coverage and analysis. The lawmaker, L, issues general directives to the community as the owner of a factory might issue instructions, blueprints, and models to guide the work of the men in his factory. These directives we call collectively “law” and severally “laws,” so that law is a general term embracing a multitude of laws. Laws differ from one another in many respects, as we shall see later on. They are alike in that all are formulated by some determinate law-making agency, a lawmaker; they are alike also in that all laws are intended to guide the behavior of all or part of the members of the community. 

The number of laws issued by L is very great, and the fields covered by them are many. From these facts it might easily be inferred that laws cover every kind of human activity. This is not the case, however; actually the coverage is far from complete. L provides guidance only in limited

1 Throughout the remainder of this book I shall often designate important parties by capital letters as follows: the lawmaker by L, the individual actor by A, the individual’s counselor by C, the official by O, and the law student and/or legal scholar by S.

Each one of these terms, and the corresponding letter, represents a class of persons and not a specific person. “The individual,” “the individual actor,” or “A” means a class of individuals, “the anyone who” is referred to in a general legal mandate.

2 See especially chapter 4.

* (I.R.) In the early chapters I shall speak only of statutes. I shall take them as the prototype for all laws and avoid mentioning case law, as well as constitutional law, and administrative regulations. This restriction of material is made for the purpose of simplifying the teaching job. I believe that the nature of legal standards can be adequately developed with statutory material and have organized the matter in chapters 2, 3, and 4 on that assumption. While this method neglects differences in the ways in which standards are formulated and differences in the places where they are to be found, I do not believe that ignoring these differences at the start leaves any final misconception. All these differences are fully discussed later; and the simplification of treatment which results from disregarding them for the time being, is considerable.
areas of behavior. The greater part of what A does is left free from any legal constraint. Besides such activities as eating and greeting friends, the way A uses his land and what he does with his money, where he goes and what he says, fall almost wholly beyond the scope of legal provisions. For practical reasons or reasons of policy L does not attempt universal control of A's conduct; he leaves most of it unguided and untouched by his legal mandates.

Almost all laws promulgated by the lawmaker are complex; they are what we have called mixed messages; they attempt to guide more than one type of act, and they may impart a great deal of collateral information besides. The usual statute, for example, contains not only instructions to A but also instructions to various officials, and it often contains a statement of the reasons why the statute was passed and of the general objectives which it is intended to promote.** In order to compare the important parts of different laws with one another and to discuss the relations of laws to various types of acts, it is necessary to break down these complex legal structures into smaller common units. The

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3 See sec. 1-13 above, regarding the nature of the mixed message. Note how many different acts are forbidden by the following statute:

"Any person who shall falsely make, alter, forge or counterfeit any public record, or any certificate, return or attestation of any clerk of a court, public register, notary public, justice of the peace, township clerk, or any other public officer, in relation to any matter wherein such certificate, return or attestation may be received as legal proof, or any charter, deed, will, testament, bond or writing obligatory, letter of attorney, policy of insurance, bill of lading, bill of exchange, promissory note, or any order, acquittance or discharge for money or other property, or any acceptance of a bill of exchange, or indorsement, or assignment of a bill of exchange or promissory note for the payment of money, or any accountable receipt for money, goods or other property, with intent to injure or defraud any person, shall be guilty of a felony, punishable by imprisonment in the state prison not more than fourteen (14) years." Mich. Stat. Ann. sec. 28.445.

What features do these acts have in common? In what respects are they different?

** (I.R.) And the matter which one finds in case law, constitutional provisions, and administrative regulations, is equally mixed and heterogeneous. Compare note * above.
basic unit which I shall adopt for this purpose is the legal standard.

The standard is a pattern for a particular type of action. It is a legally defined action picture, i.e., a standardized act. All legal directives, all laws, no matter how simple or how complicated, can be analyzed in terms of this legal unit. Their essential parts can be reduced to standards or combinations of standards. The advantage of treating the standard as the unit of law is that it corresponds with the unit of behavior which we have chosen, the act. Accordingly, we shall employ from this point on the legal standard as the unit of law and the act as the unit of behavior controlled by law.

Sec. 2-02. Scope of chapter. In the next preceding section I have defined the legal standard. The remainder of this chapter and the two chapters to follow, will treat the relations of standards to human acts. The standards of which we shall speak fall into two main types. Some standards are prescribed by the lawmaker primarily for the guidance of the individual's acts; other standards are designed for the guidance of official acts. Standards of these two main types are, of course, very numerous; many types of human activity, individual and official, are standardized. Each of the main types will call for further subdivision into subtypes of standard acts.

The present chapter will be devoted to standards for the individual's acts. These will be taken up and discussed under the following headings:

Standards for Acts.
Significance of Standard Acts.
Effectuation of Standards.
Uses of Standards to Guide Action.

1 In addition to standards for the individual and standards for officials, we shall also have occasion to mention standards regulating the activities of groups such as the church, the club, the labor union, the professional association, etc. See sec. 7-28 et seq.
Sec. 2-03. Kinds of standard acts. The traditional discussions of law are carried on in a manner to suggest that the lawmaker is concerned with just two kinds of standard acts: prohibited acts and obligatory acts. He tells persons what they must not do and what they must do; he undertakes to restrain them from doing certain acts and to compel them to do others. The impression which one gets is that law consists merely of prohibitions and commands. For instance, Blackstone's definition of law conveys this meaning; he says that a law is "a rule of civil conduct, prescribed by the supreme power in the state, commanding what is right, and prohibiting what is wrong." ¹ And similar definitions of law and of the standards which it prescribes are common in legal texts and judicial statements even in our own time.

No doubt laws do prohibit some acts and make other acts obligatory, as I shall point out in the following sections; but it does not follow that legal prescriptions define only these two kinds of acts. On the contrary, I think we need to make room for at least four other kinds of legally defined acts: permitted acts, discretionary acts, effective acts, and ineffective acts. All these types of acts have always been important in fact. But it seems not to have been generally perceived by analysts and writers how important they are, nor how different essentially they are from acts which are prohibited or obligatory; nor to have been generally understood how much of our law actually formulates standards for effective and permitted acts. This traditional neglect makes it the more necessary to consider here all these types of acts and to compare and distinguish them. Accordingly, in the six sections to follow I shall treat six types of standards for acts, or, if you prefer, six types of standardized acts: (1) prohibited acts;

¹ Bl. Comm. *28 (1765). [The * here represents star paging.]
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(2) permitted acts; (3) obligatory acts; (4) discretionary acts; (5) effective acts; and (6) ineffective acts.

Sec. 2-04. Prohibited acts. First among legally standardized acts are those which the individual must not do, prohibited acts. Here falls most of that large class of acts, commonly called crimes: such acts as killing a person, stealing another's goods, disturbing the public peace. These acts are legally regarded as injurious to the public; the basic legal aim is to protect the community against them;* and accordingly the individual, A, is forbidden to do them. A is confronted with detailed pictures of these acts which he is prohibited from doing and usually threats of punishment are coupled with their prohibition.

Acts of A are also prohibited because they are harmful to some other person, B. A legal duty is imposed upon A to refrain from doing such acts. If A does a prohibited act of this sort, in violation of his duty, he is required to make compensation to B for the harm done. Action contrary to standard is regarded as a private wrong, or in the terminology of the law, a tort. Typical tortious acts are the intentional injury of another's property, the injury of another's person through the negligent driving of an automobile, and the injury of another's reputation by an unjustified defamatory statement.

Accordingly, legally prohibited acts may be divided into two grand types, crimes and torts. The standards for both

*(I.R.) Here I use the expressions "legally regarded" and "legal aim"; I shall also employ from time to time such expressions as the "law forbids" and the "legal system provides." All these expressions are metaphorical and elliptical; they suggest that the "law" and "the legal system" are persons who have wishes and do acts. This suggestion can lead to misunderstanding; personification of an abstraction is always dangerous. However these forms of expression are terse and convenient; they carry about the same meaning as the lawmaker regards or aims or forbids or provides, and thus offer serviceable alternatives for the constant reference to the lawmaker. And "the lawmaker" is a personified abstraction, too, as we shall see later, so that whatever objections apply to these other abstractions apply to "the lawmaker." The actual factors involved in action by the "legal system" or by "the law" or by "the lawmaker" will be elaborated in chapters 3, 4, 5, 6 and 7.
types of acts are alike in that they serve a negative function as regards the actor; they tell him what he must not do; they are patterns of action to be avoided. They differ from one another as regards the interests which are violated by A's act; the crime is a wrong to the public, the tort is a private wrong. They differ from each other in a parallel way as regards the actions which may be brought for violation of the prohibition; a crime is prosecuted by public authority; a tort is the basis for private action by the injured party. However, it is important to notice that one and the same act may constitute both a crime and a tort; it may be both a public and a private wrong. A's act of striking B may be a criminal battery and a tortious injury to B. A's act of carrying away B's goods may constitute theft and may also furnish ground for a private action by B against A.

Our interest centers primarily on acts prohibited by law. Crimes and torts are acts of this sort. But parties may also prohibit acts by agreement or voluntary undertaking. If a valid contract is made by which A promises not to do a certain act, this promise establishes a specific pattern of action which A must not pursue. The contract restricts A's freedom of action; a failure to obey the restrictive provision is a breach of contract, and breaches of contract constitute an important type of legally prohibited act. Thus, a doctor may sell his practice in a particular town, and agree not to treat patients there for a period of five years. The doctor, by his agreement, puts shackles upon himself. His agreement is obviously an agreement not to act—a self-imposed prohibition. Inasmuch as this prohibition is legally enforced, it becomes a legal prohibition.

Sec. 2-05. Permitted acts. Legal provisions may define acts which are permitted, as well as acts which are forbidden. For lack of a better name, the legal provision which thus expressly defines a permitted form of action may be called
a legal permission. It constitutes, you will notice, a type of provision just the opposite in effect from a legal prohibition. It expresses a position of the law which is essentially neutral toward what A does. Such a provision declares, for example, that A may do what he pleases with his own property, that he may move about in regard to his own affairs, that he may speak his mind about matters which he chooses to discuss, that he may defend himself against attack, and so on. The most basic of these permitted activities are defined in our constitutions. They are the liberties for which our ancestors fought and died: freedom of religion, freedom of speech, freedom of the press, freedom to acquire and hold property, freedom to engage in an occupation of one’s own choosing.

The legal provision which defines permitted action is sometimes couched in positive terms, sometimes in negative terms. When it takes the positive form, the provision may simply state that it is lawful for A to act thus or so; or the provision may employ the verb “may,” as do the provisions which I have already cited, to indicate that A’s activity is allowed; or if the provision declares the lawful character of A’s activity in terms of nouns, it uses such permissive expressions as “freedom,” “liberty,” and “privilege.” When the legal provision defining permitted action takes the negative form, it declares that certain activities are not unlawful, not contrary to law, not forbidden or not prohibited. In actual use the negative form is less common than the positive. The reason for this is fairly obvious. Why go to the trouble of using a double negative “not unlawful” when a simple affirmative, “lawful,” will do as well?

Wide areas of A’s activity are untouched by law as I have already pointed out.¹ In these areas freedom from legal restraint is existent simply because restraint is not mentioned; and most free areas are free in this sense. Everybody from

¹ See sec. 2-01.
the lawmaker (L) on down proceeds on the assumption that what is not forbidden is allowed; that what is not expressly prohibited is impliedly permitted. The absence of a legal provision is treated as tantamount to the definition of an area in which A may do what acts he pleases. Accordingly, one way in which L can establish areas of legal nonrestraint is to make no reference to them whatever and thus leave A’s freedom to implication.

Why, then, does L define any areas of free action in express terms? Why does he set up explicit standards for permitted acts? Why not leave them all to implication? Is any function served by express definitions of lawful or nonprohibited acts? The answer to these queries is found in L’s general purpose to provide guidance for A’s behavior. If A is in the middle of the wide ocean, he does not need to be told that navigation in any direction is possible and safe, but if A is in shallow waters or in the neighborhood of solid land he is well served by an instruction that navigation in a certain place or along a certain course is possible and safe. And guidance is furnished to A no less when he is told, “This is a safe channel to navigate,” than when he is told, “Over there are certain rocks which you must stay away from.” By the same token A is no less guided when L declares, “Here is a course of action which you may freely take” than when he declares, “There is a course of action which is prohibited.” Both are useful as guides to A. In areas where prohibitions are close by, A needs to be told what he can safely and properly do. For example, it is useful to tell him that he is permitted to kill another in the necessary defense of his own life. Ordinarily A may not

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2 Contracts often provide that certain acts are permitted. Such contractual provisions are inserted by parties for essentially the same reasons that dictate the establishment of legally permitted acts. The parties agree that A is to be allowed to do certain acts so as to avoid doubt or controversy in regard to A’s freedom of action. Compare what is said in the last paragraph of sec. 2-04 regarding prohibitions established by contract.
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kill another, but in this situation he is allowed to do so.\(^3\)

Again, in areas where officials are tempted or inclined to interfere with A’s action, as in regard to free speech, free press, and free exercise of religion, the express mention of these freedoms is useful for other reasons. The declaration that these acts are free, serves as a direct admonition against official interference with them, and as an encouragement to A to stand up for his rights when, as, and if such interference occurs.* Accordingly, the answer to the general queries, with which this paragraph began, is that express standards for permitted acts, like all other forms of standards for acts, are intended to furnish guidance to actors, individual and official; and their practical value in this regard is beyond question.**

\(^3\) In fact, the prohibition of killing is usually stated in such broad and general form that it covers every killing, so that it needs to be supplemented by this exception in order to give an accurate picture of the law.

* (I.R.) The problem of drawing lines between the area of permitted action and the area of prohibited action is reserved for discussion in chapter 4. Problems connected with the generality of legal provisions—whether they define prohibited acts or define permitted acts—are reserved for discussion in chapters 4 and 5. To introduce these problems here would cloud unduly our examination of the permitted act as a type.

** (I.R.) Indeed it can be argued that the creation of permissive standards is more natural and logical than the establishment of prohibitive standards. The former are positive standards, the latter negative. Permitted acts are those which it is lawful for A to do; prohibited acts are those which it is unlawful for him to do; and it is simpler and more usual to issue mandates in positive than negative form.

Even if we accept this contention, it amounts to no more than the assertion of a rule of preferred usage. But negative terms and negative declarations are used and useful as well as positive terms and declarations. We do make informative statements in negative as well as positive form; and we do find in the law and elsewhere standardized acts which the actor is not to do as well as standardized acts which he is expected to do. Actually prohibited acts, i.e., acts which we are assuming for the moment are negative, are to be found in legal provisions with greater frequency and in greater number than permitted acts are. We cannot say that one type of legal standard or one form of legal declaration is necessary, or that one type or form is more fundamental than the other. Both positive and negative standards and positive and negative declarations are usual and useful. Usage and utility are the only criteria we have. If a type of standard or a form of statement is usual and useful, I see no alternative but to make a place for it in our classifications.

Another circumstance which militates against the argument which asserts a preference for positive standards, is the fact that the distinction between
Sec. 2-06. Obligatory acts. Third among the types of legally standardized acts—and somewhat less common than the prohibited and the permitted act—is the act which the individual must do, the obligatory act. The standard act is commanded or, what amounts to the same thing, a legal provision declares that it is the duty of the individual to act. For example, A is told that he must register for the draft; that he must serve in the armed forces; that he is required to file an income tax return. Such an act is required for the general public benefit. The failure to perform this type of act is usually declared to be a public offense, or crime, and penalized more or less seriously.¹

In addition to the standard acts which A must do for the benefit of the public, he must perform certain acts for the benefit of other individuals. He must support his wife, B; he must care for and educate his child, C. In these particular cases, perhaps, we might properly say that A's acts are required both for the benefit of B and C and for the welfare

positive and negative is a relative one; it depends entirely upon the viewpoint. Who shall say whether a permitted act is a positive or negative category? Who shall say whether the prohibited act is to be viewed as positive or negative? That the two are opposites is clear; this fact inheres in the difference in L's positions toward them—one act he disapproves, the other he does not disapprove; one act he restrains, the other he does not. But which of these positions is positive and which negative? Is approval or is restraint positive? May one not regard prohibited acts as controlled acts and permitted acts as noncontrolled acts? The point is that there is no positive or negative category outside of the attitude of the classifier. The belief in an intrinsic distinction of this type is merely a hangover from outmoded beliefs in necessary ideas. Certainly the mere form of words, whether positive or negative, is not decisive. Words shift from negative to positive connotations as usage changes, and vice versa. The word "independent" will serve as an example. Originally this word was a negative term opposed to the term "dependent," but today there is no doubt that independence is thought of as a positive quality, like self-assurance, of which it is the substantial equivalent. Both our terms, permitted and prohibited, are in a somewhat ambiguous condition; both are used today with connotations which are sometimes positive and sometimes negative. Which is stressed depends on the interests and approach of the user. And whether either or both were originally positive or negative terms does not seem very important now.

¹ So that the category of crime includes both the doing of acts which are prohibited and the failure to do obligatory acts. Prohibited acts are much the more common among crime pictures.
of the public.* However, there are obligatory acts which are owed strictly to other individuals. The most important acts of this sort are those which A has taken upon himself to perform pursuant to *contract* or other voluntary engagement; for example, acts of service which he has agreed to perform, or payments of money which he has promised to make. Contractual undertakings are legally enforced at the instance of the parties benefited. In this sense, the acts that contracts call for, fall both in the class of obligatory acts and in the class of acts owed to other individuals.²

Sec. 2–07. Discretionary acts. Discretionary acts are those which A is not required by law to do, nonobligatory acts. They are opposed to obligatory acts as permitted acts are opposed to prohibited acts. When we say that an act is discretionary we mean that it is free from legal compulsion; when we say that it is permitted we mean that it is unrestrained by law. A discretionary act is one which A is free to do or not do. If done, the act is voluntary; A is free to act or to sit back and do nothing. For example, bringing a lawsuit is discretionary with the injured party; he may sue or, if he chooses, allow the injury to go uncompensated. Being a Good Samaritan is discretionary; the actor may help his fellow man in trouble or he may pass by on the other side. Supporting an indigent father or sister may be a moral duty, but in the eye of the law it is discretionary; the son or brother may furnish support or decline to do so.¹

Just as most areas of human activity are free from legal prohibitions, so most acts of which A is capable are untouched

* (I.R.) I have not tried to make a neat distinction here between obligations implied by law and obligations arising from agreement. The aim is to do no more than make a beginning with problems of classification and division. Compare sec. 2–05, note *. ² Compare what is said in the last paragraph of sec. 2–04 regarding prohibitions arising from contract. ¹ Ordinarily the law makes a man responsible only for the support of wife and child; however, there is some modern legislation which makes him responsible for the care of other relatives.
by legal commands. These acts are discretionary because the law does not say anything about them. The absence of a legal command is treated as the recognition of an area in which A does not have to act unless he chooses to do so. Discretion is implied from the lack of command.

Discretion may also be conferred by express provision, and the act of A which is thus expressly declared to be free from legal obligation is the discretionary act with which we are now concerned. In actual practice this kind of act is not as often mentioned as is the act which is expressly permitted; in fact it is not often mentioned at all. However, the discretionary act is not unimportant; and as we shall have to refer frequently to discretionary acts when we come to discuss the acts of officials, I introduce it here as one of our six kinds of acts.  

Sec. 2-08. Problems. In section 2-03, I have divided standardized acts into six general types. Of these we have now considered four: 1. prohibited acts, or those which A must not do; 2. permitted acts, or those which A may do; 3. obligatory acts, or those A must do; 4. discretionary acts, or those A is not required to do. I believe it will facilitate understanding to discuss a few problems involving the application of these four categories before we proceed with the remaining two types of standard acts.

1. A statute provides for the punishment of any act of cruelty to an animal. Which type of standard act is involved? For whose benefit is such act banned?

2. The law forbids the indecent exposure of one's person (nudism, exhibitionism, etc.). Where would you place this type of act?

2 Discretion may also be expressly given by contract, as where X is given an option to buy a piece of real estate within a specified period of time. The consummation of the purchase rests in X's election; it is a discretionary act.  

3 See chapter 3 passim.
3. Suppose that the law provides that an individual or group of individuals of one sex may bathe in the nude in streams or lakes at places remote from dwellings or highways. How should such bathing be classified?

4. The law allows a husband to recover damages from a third party who alienates his wife’s affections. How would you classify the third person’s act?

5. The First Amendment to the Federal Constitution provides that “Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble and to petition the government for a redress of grievances.” What types of acts of individuals are defined by this constitutional clause?

6. Consider the following statements of law governing the doctor-patient relation. How would you classify each of the acts indicated by the italicized words in terms of standardized acts?

   (a) The relation of doctor and patient commences when the patient calls the doctor and the latter undertakes the case.

   (b) There is no obligation on the doctor to serve patients, i.e., take cases; and this means that the doctor can arbitrarily decline to accept patients.

   (c) The general rule is well-established that before a doctor may treat a patient or operate on him, the doctor must obtain the consent either of the patient, if competent to give it, or of someone authorized to give consent for him. If the doctor acts without such consent, he will be liable for the resulting damages.

   (d) The doctor must care for his patient with reasonable skill and diligence while the doctor-patient relation continues.

   (e) The doctor-patient relation may be terminated at any time by the patient’s dismissal of the doctor.

   (f) The doctor may not abandon the case at will; he can withdraw from the case by giving reasonable notice to the
patient of such intention and allowing a reasonable time for the latter to obtain another doctor.

Sec. 2-09. Effective acts. The lawmaker also defines many acts which A can do with the purpose and intent of producing legal effects. These standardized acts are established for the use and benefit of A.* L tenders official aid to A if he calls for it in prescribed ways; he offers official services to A if A does certain acts.¹ He tells A what aid he can expect from the legal system and what acts he must do to obtain that aid.

Thus in the law of property, which you will pursue in your first year, you will find the definitions of various acts which are to be done in order to acquire property. The wild animal has to be killed or captured in order to obtain ownership of it. By doing either of these acts, the legal actor, A, pulls about himself the mantle of legal protection which we know as ownership; he becomes entitled to the services of the agents of the legal system in protecting his control. You will find also in your study of the law of property that there are standard acts, such as gift and sale, by which the chattel can be transferred; gift and sale are acts of donor and seller which invest the donee and buyer respectively with the perquisites of ownership. Interests in land can also be acquired and transferred by acts; the commonest of these we

* (I.R.) Some modern analysts speak of “juristic acts” or “legal transactions” at this point. However, the lawyer does not use such expressions frequently; their vogue is limited to the technical fraternity of jurisprudence. As I find no settled expression in general use, I feel free to create one which more definitely connotes what I have in mind, i.e., acts done with foresight of legal consequences. For this purpose I have chosen “effective acts.” This term also includes (as I want to do) such an act as filing a pleading, which I doubt if either of the other expressions would embrace.

¹ This aid need not be demanded in so many words, though often it is so demanded; but in any case the individual must indicate a need for legal assistance by doing the acts prescribed by law. These acts are the effective acts in which we are presently interested.
know as "taking possession," "making a deed," and "making a will." The legal system in all these cases presents A with model acts which he can do in order to produce legal effects. One might liken these legal acts to the order blanks which a mail order house furnishes to its prospective patrons for use in obtaining desired goods. The legal patron is furnished with a variety of formalized acts which he can use in calling upon the legal system to carry out his desires.

Similar to the acts by which A can acquire or transfer property is a whole arsenal of useful acts which he may do in the transaction of business. Most of these can be lumped together under the caption of contractual acts. In the contract, two acts are usually involved; the offer by A and the acceptance by B. These two acts in combination constitute an agreement which gives rise to contemplated legal effects, i.e., contractual obligations. Contractual acts have in view the performance of services, the subsequent transfer of goods, and many other objectives. Contractual arrangements may be simple as where two parties, A and B, make an agreement directly with one another; they may be more complicated as where P by contract appoints an agent, A, who in turn makes a contract with C for and on behalf of P. They may be even more complex as where an individual draws a check or bill of exchange—an act which involves a whole series of possible consequences and arrangements between himself, a bank, a payee, indorsers, and other persons. An individual may participate in the formation and operation of a corporation, in which case his acts join with the acts of many others to produce legal consequences which he alone could not produce.

As to each of these types of situation, simple or complex, the legal system provides beforehand both what it is necessary for A and others to do and what the legal effects of their acts will be. More than upon any other factor, transaction
of business depends on the ability to act with foresight of results. This is where these standardized legal transactions fit into the business picture. Indeed, our commercial life could hardly go on if these standard legal transactions, coupled with standard and foreknown legal consequences, were not provided and available for use.

And so I might go on through almost every branch of our law. The law of court procedure, for example, provides A with a variety of standardized pictures of acts which he is to perform in the prosecution of his claims and the assertion of defenses; he is told what he must do and what kind of paper he must file at each step of a lawsuit. But it is unnecessary to pursue the subject further. The law is replete with these standard acts which A can do with a foresight of legal results; with acts which A can do for the purpose of calling upon the agents of the legal system for their services in one respect or another.

You will note how different is the position of the law toward these legally effective acts from its position toward an obligatory act or a prohibited act. The law which authorizes A to dispose of his property by will, does not, for example, command him to make a will or forbid him to die without making a will. A is told, instead, that if he makes a will, certain legal effects will follow. A legal provision informs A that, by doing a specified act, he can invest his property at his death in persons of his choice. Every legal provision establishing a standard effective act and defining its consequences, follows essentially the same lines. The legal provision serves as a promise by the legal system that if the individual acts in the specified manner, certain legal consequences will ensue. The primary objective of the legal provision is to offer certain services to a prospective actor,

2 Compare what is said in sec. 2-11 regarding the positions adopted by the law toward different types of acts.
to instruct him regarding ways and means of obtaining desired legal results.**

Sec. 2–10. Ineffective acts. This is a category opposed, as its name indicates, to the category of effective acts.* Ineffective acts are attempted effective acts; they are undertaken as effective acts but fail to take effect as intended.** The effective act must be undertaken for a lawful purpose, and the act must be done in the manner prescribed by law. Two reasons why an act may fail of effect correspond to these two major requirements.¹

First, the legal actor may act for an unlawful purpose and his act may be denied legal effect for this reason. This type of act may be called an illegal act. A contract by A according

** (I.R.) Regarding the metaphorical and elliptical character of such expressions as the “position of the law” and “a promise by the legal system,” see sec. 2–04, note *.

*(I.R.) Some readers may challenge the need, or desirability, of creating the category of ineffective acts. Such a challenge is always proper. Some may even assume that this category is on a par with Hohfeld’s “no-right” and that we are talking of a “no-act” here. These assumptions are, however, not correct. We are definitely interested in a real act which A does with the intent to produce legal effects. In other words the negative quality here attaches to the effectiveness, and not to the occurrence, of the act. Everything else aside there is some convenience in pursuing the classification of acts in terms of three primary categories and their three opposites, even though some of the opposites are not quite as frequently used as the three primary categories. I could, of course, discuss ineffective acts at the point where I consider the significance of acts (sec. 2–15 et seq.). But I think it is quite as natural and convenient to consider them here along with other categories of acts. In other words, there are certain types of acts which are intended to have legal effects, and do have; there are other acts which are intended to have legal effects, but do not have such effects, i.e., the illegal acts and the defectively executed acts mentioned in the text.

** (I.R.) These statements are not accurate for all purposes; they do not take full account of cases where effectiveness and ineffectiveness depend on factors other than the actor’s intent; cases of fraud and estoppel, for example. However, the statements are sufficient for the present purpose; they do cover the two types of ineffective acts which I want to discuss here, illegal acts and defective acts.

¹ Two other main types of ineffective acts are worth mention, though we have not the time to treat them here: 1. Acts by persons lacking in legal capacity; 2. Acts which are tainted in the doing by the actor’s mistake or by fraud, duress, etc., practiced on him by another.
to which he is to pay B $1000 for services is valid and binding on A if executed in proper form. But if the service which B is to perform is unlawful, then A's promise is illegal and he is not bound. Thus if A promises to pay B $1000 if B will give C a thrashing, B cannot collect the $1000 after he has administered the thrashing because the promise of A was made to achieve an unlawful purpose, and the courts will not enforce a promise directed to such an end. Similarly, if A and B enter into an agreement to monopolize a market, the purposes of both men are unlawful, and their contractual acts (offer and acceptance) are ineffective. The agreement will be unenforceable by either A or B, and probably both parties will be exposed to tort liabilities in reference to specific parties injured by their contract, and to criminal prosecution for the violation of statutes which prohibit such a contract.

Second, A's act may fail of its intended effect because it is not done in the manner prescribed by law. This type of act may be called a defective act. If the law provides that certain contracts be written or that a will must be attested by two witnesses, A has no reason to be surprised or disappointed if his unwritten contract or his will attested by only one witness, is not given legal effect. The law has specified the terms and conditions on which his act will be effective; he must satisfy those terms and conditions; his act is ineffective by reason of defect in execution. Invalidity is inferred from failure to comply with explicit legal specifications. Ineffectiveness is implied from the fact that certain requirements are set up and are not met. However, the ineffectiveness of certain acts may also be expressly declared, not left to implication. Thus the Statute of Frauds provides that certain types of contracts are to be unenforceable unless they are in writing. Notice that it does not declare that contracts must be written, and leave to implication the conclusion that they will be unenforceable if they are not written; but rather it declares that unwritten
contracts are to be ineffective. Either way the unwritten contract is a standardized ineffective act; in the one case by reason of an implication, in the other by virtue of an express provision.

Sec. 2-11. Distinction and interrelation of kinds of acts. In the foregoing sections we have talked of six kinds of acts; we ought not to conclude the discussion of them without a few words about how these kinds are distinguished and interrelated.

All these acts are alike in that they are the doings of our hypothetical individual, A. What is the basis on which we have distinguished one act of A from another and divided his acts into classes? The acts have been classified on the basis of differences in the lawmaker's attitudes toward them. These acts differ from one another only as respects the position which L (or if you prefer, the law or the legal system) adopts in regard to them. One kind of act L disapproves and forbids, the prohibited act; another type of act he approves very strongly and commands A to do, the obligatory act; another type he assures A will evoke certain services from the minions of the law, the effective act; another type he approves and tells A he may do, the permitted act; and another type L leaves to A's judgment, the discretionary act; and a last type he refuses to support by the aid of the legal system even though effectiveness be the desire and intent of A in doing the act, the ineffective act. In short, it is important to realize that we have been classifying A's acts but classifying them in terms of L's attitudes toward them.

Three of these classes are opposed respectively to three of the others: the prohibited act to the permitted act, the obligatory act to the discretionary act, and the effective act to the ineffective act. There is nothing inherent or necessary about the opposition of these categories; they merely rep-
resent opposing attitudes of the lawmaker, as for example in the case of prohibited and permitted acts, the one type he disapproves and the other type he does not disapprove. These categories are opposed simply because the lawmaker adopts contradictory attitudes toward them.

However some of our categories overlap one another in large degree. The same act may be classified under two or more categories. We find acts which are effective, permitted and also discretionary; as, for example, the act of getting married, the act of enlisting in the army, or the act of making a contract, a deed, or a will. We find acts that are obligatory and effective, too, such as the filing of an income tax return, or the act of registration for the draft. We find acts which are prohibited and ineffective, e. g., the agreement to commit a crime. And we even find acts which are prohibited but effective; as where A wrongfully takes B’s goods, thereby becoming possessed thereof; A’s act is effective to give him legal control as against third parties even if it is a wrong to B. The point I want to make is that you must not take these six categories as mutually exclusive of one another; some are and some are not.

Also important is the fact that the categories of acts are often connected together in series. A’s acts are joined with B’s as they are actually done so that the state cannot prescribe standards for A’s acts without reference to B’s. Standards have to be developed to cover and include the acts of both A and B. Standards have to be stated in chains or sequences in which A’s act and B’s act are combined.¹ For example, in the making of a contract, we find such a standardized combination of acts: an offer followed by an acceptance. Likewise, in the situation where B defends himself against attack by A; attack and self-defense represent a conjoint action picture in which the activities of two persons are

¹ On this matter of interconnected acts, see sec. 2–27.
legally essential. And legal standards in both these instances are set forth in terms of sequences or combinations of acts.

Finally, for fear that I have made these categories appear more formidable and solid than they really are, I want to add two admonitions: First, do not look upon the six categories as final or necessary. Another classifier might make up an entirely different set with as much justification as I have for these. The categories are modes of classification and nothing more; they are merely useful pigeonholes into which you can put various activities of A which are the concern of the law. Second, do not try to memorize this list of categories as such, or try to keep in mind the definition of any category, or try to recall specifically which category is the opposite of which. Such efforts are unnecessary here as well as elsewhere in our course. If you read the text with care and attention and work out the problems in terms of the text, you will retain all that needs to be remembered about these types of standard acts. ²

Sec. 2-12. Problems. 1. Suppose A offers to work for B for ten days at ten dollars per day and B accepts this offer. This concludes a contract between the parties on the terms indicated. What kind of acts are involved in the making of the contract, i. e., the offer and the acceptance? What kind of acts are involved in the performance of the contract, i. e., the ten days' service by A and the payment of $100 by B?

2. L, a landlord, executes a lease of a house for five years to T, a tenant, at $1200 per annum. What kinds of standard acts are involved in the making of the lease? In the performance of its terms?

² This admonition about memorizing has already been given (sec. 1-03). If I did not know from long experience that students come to law school with a fixed notion that learning consists in memory work, and that this notion is very hard to eradicate, I would not regard it as necessary to repeat the admonition from time to time.
3. The law allows a husband to recover damages from a third party who alienates his wife’s affections. How would you classify the third person’s act? The husband’s act of bringing suit?

4. What is the difference in the actor’s attitude toward legal effects when he commits a legally forbidden act such as theft, and when he does a legally effective act such as the making of a will?

5. Under the rules of the common law the making of a bet is declared to be contrary to good morals, but is not punishable as a crime. The winner of a bet cannot be compelled to repay what the loser has paid. Under these rules, how would you classify the loser’s promise to pay? Is it an effective act? A prohibited act? An illegal act?

Under the common law rules how would you classify the loser’s act of payment? Is it illegal? Is it effective?

Sec. 2–13. Individual’s acts are physical and verbal. Before we leave the problem of classifying A’s acts, I ought to refer again to what was said earlier about two ways of controlling people—by physical force and by verbal acts (sec. 1–09). The individual’s acts may be divided in parallel fashion into physical acts and verbal acts. Both may be the subject of legal control. What is meant by physical act is sufficiently obvious and familiar. Among physical acts which may be legally important are such acts as striking another person or carrying away his goods, moving about in one’s business and the operation of a factory on one’s land. Verbal acts I have already defined as all uses of language, in speech or writing. The expression covers any form of statement made, question asked, or command given, by the individual.¹

¹ In secs. 1–08 and 1–10 we discussed the use of verbal acts (laws and orders) to control A. Here we are interested in verbal acts by A himself which may call for the establishment of legal standards of action.
The division of A's acts into physical and verbal cuts across the sixfold division of standard acts which we have just considered: 2

There are physical acts which are prohibited, such as striking another person. And there are verbal acts which are likewise forbidden, such as the publication of a defamatory statement.

Both physical and verbal acts are to be found under the class of permitted acts. For example, freedom of locomotion involves freedom of physical activity, while freedom of speech involves permitted verbal acts.

There are physical acts which are obligatory, e.g., furnishing food for one's child. And there are verbal acts of like

2 Physical and verbal acts are distinguishable as is indicated in the text, and it is often useful in legal discussion to distinguish them. But it is also important to remember that the two kinds of behavior, physical and verbal, are closely related to one another. First, behavior is often partly physical and partly verbal, and these parts are often interconnected and mutually qualifying. Thus physical acts may take a large part of their meaning from accompanying or preceding or succeeding verbal declarations. Suppose, for instance, S says to H, "Lend me a dollar." H forthwith hands S a dollar without remark. Here the physical act of H can only be understood in the light of S's request. And if S then says, "Thank you," his thanks too must be interpreted in reference to the verbal act and the physical act which have gone before. All these acts take color from one another. None of them can be interpreted apart from the others. Second, physical and verbal acts are largely interchangeable. They serve similar functions and can be substituted for one another to some extent. Consider again S's request for a loan. To this verbal act H may respond as aforesaid by the simple handing over of a dollar (physical act); or H may hand over a dollar with the statement, "Here is a nice new one" (physical plus verbal act); or H may reply, "I haven't a dollar with me; I'll give you one this afternoon" (verbal act promising a later physical act). Now all these combinations of physical acts and verbal declarations are substantially equivalent—provided, of course, that H hands over the dollar in the last case as promised. They all result in substantially the same legal obligation of S to repay the dollar at a later time.

In short, we must recognize that physical and verbal acts are conceptually distinguishable, just as we may distinguish a leg from the rest of the body; but in actual human activity the two forms of behavior are not ordinarily separated any more than legs are usually found separated from bodies. In actual life situations, physical behavior and verbal behavior are woven together like the warp and woof of one fabric; no part of the whole can be appreciated without taking account of the rest. (Cf. sec. 1-14.)
character, e. g., registration for the draft and filing an income tax return.

There are a few effective acts which are physical, though not many, e. g., the capture of a wild animal. The great bulk of effective acts is verbal. The making of a will is a verbal act; also, the making of a conveyance or a lease. The execution of a contract usually involves verbal declarations by two parties. And the steps which a party and his attorney must take in the course of a lawsuit are practically all verbal.

Similar observations might be made about discretionary and ineffective acts—but it is not worth the pains to pursue the subject or to produce further examples.

To the lawyer the verbal activity of A is far more important than the physical as has already been shown. Verbal acts engage most of the lawyer's attention in practice. And, I might add, these verbal acts are chiefly planned for legal effect; they are legally effective acts such as making wills, deeds, or contracts, or the incorporation of companies. The lawyer's main tasks are to guide the effective verbal acts of his clients and to perform such acts himself on their behalf.

Sec. 2-14. Problems. 1. There is an old saying, "With sticks and stones you break my bones but words will never hurt me." Consider in this connection the provisions of a Texas statute:

"Although it is necessary to constitute homicide that it shall result from some act of the party accused, yet, if words be used which are reasonably calculated to produce, and do produce an act which is the immediate cause of death, it is homicide; as, for example, if a blind man, a stranger, a child, or a person of unsound mind, be directed by words to a precipice or other dangerous place where he falls and is killed; or if one be directed to take any article of medicine, food or drink, known to be poisonous and which does produce a fatal effect; in these and like cases, the person so
operating on the mind or conduct of the person injured shall be deemed guilty of homicide.”

Obviously the acts here referred to are verbal. Would you regard them as informative verbal acts (sec. I-II)? As directive verbal acts (sec. I-08)?

Where would they fall in our sixfold classification of acts?

2. Commonwealth v. Randolph:

“It may be conceded that the mere intent to commit a crime, where such intent is undisclosed, and nothing done in pursuance of it, is not the subject of an indictment. But there was something more than an undisclosed intent in this case. There was the direct solicitation to commit a murder, and an offer of money as a reward for its commission. This was an act done, a step in the direction of crime; . . . It needs no argument to show that such an act affects the public policy and economy in a serious manner. . . .

“The authorities in England are very full upon this point. The leading case is Rex v. Higgins, 2 East 5. It is very similar to the case at bar, and it was squarely held that solicitation to commit a felony is a misdemeanor and indictable at common law. In that case it was said by Lord Kenyon, C. J.: ‘But it is argued that a mere intent to commit evil is not indictable without an act done; but is there not an act done when it is charged that the defendant solicited another to commit a felony? The solicitation is an act; . . .’

What act is made criminal here?

3. “No damages shall be awarded in any libel action brought against a reporter, editor, publisher or proprietor of a newspaper for the publication therein of a fair and true report of any public and official proceeding. . . .”

What is the status of this type of defamatory statement, under the terms of this statute?

1 Tex. Rev. Stat., Ch. 10, Art. 656 (1895).
2 146 Pa. 83 at 94, 95 (1892).
4. Iddings v. Iddings. 4

A will was read over to the testator and duly signed by him. The scrivener who drew the will made a mistake as to the meaning of the word "cancel" so that the will directed that the accounts of his children (for advances) were not to be cancelled; the testator had intended just the opposite meaning. On appeal the court held that evidence of the scrivener to prove this error was inadmissible. The court said:

"But, if mistakes were to be corrected by the scrivener's recollection of his conversation with the testator, it would open such a door for perjury and confusion, as would render wills of very little use. The rule of law therefore, is that the writing is not to be altered, or explained by evidence aliunde..."

What is the effective legal act here? Does the act operate as intended?

Significance of Standard Acts

Sec. 2-15. Act and significance. Thus far I have focused attention on standard acts of the individual; these are acts which are legally significant. I have directed only incidental or passing notice to the significance of these acts. It is now time to turn attention to the matter of significance. 1 In what ways is the act of A important? What is the legal standing


1 From here on I shall often refer to the "legal significance" of A's acts. Significance seems to me the most appropriate word. However, there are other terms which are substantial equivalents and which are sometimes used herein as well as elsewhere—such as legal meaning, legal importance, legal operation, legal effects, legal consequences. Significance is preferred because it gives the idea that A's acts have meaning to other persons, including officials; they do not operate on others as a physical force does. A's act of striking B operates physically on B, of course; but the physical character of the act and its physical effect are something different from its legal significance. The latter consists of the meaning of A's act, and its physical consequences, within the legal system—viz., what rights, powers, and privileges arise from the striking and what officials are going to do about the striking.
STANDARDS FOR THE INDIVIDUAL'S ACTS or legal meaning of his act? These are the questions to which we shall now turn.

The legal system furnishes patterns for A's acts. Important acts which he may do are standardized. The significance of his acts is likewise standardized. The significance which is attached to what A does is patterned out and prescribed just as his acts are.* In fact, significant act and legal significance of the act, are but two sides of one coin. They are coupled together and imply one another.

We cannot think and talk of the one without taking the other for granted. Nevertheless we can, at different times, stress one side or the other of this act-significance relationship; in the present and succeeding sections we shall keep our eye primarily on the significance side of this legal coin.

Sec. 2-16. Significance of acts—standard forms. The legal importance, or meaning, of A's acts is expressed in various standard forms, of which four are sufficiently common to call for specific mention:

1. Significance in terms of relations to the other person, B;
2. Significance in terms of effects on A himself;
3. Significance in relation to the state (or legal system);
4. Significance in terms of official (O's) acts.

* (I.R.) One reason why I have not used the terms act and consequence is that consequence is also used in a factual sense. If consequence is used, it becomes necessary to make and maintain a distinction between factual consequence and legal consequence. The failure to keep the two things apart results in great confusion in the consideration of causation problems. Factual causes and consequences (effects) are parts of standard action pictures. Legal consequences are the significance which we attach to these pictures. For example, the driving of a car may result in killing a pedestrian; in this sense it is the factual cause of his death and the death is a consequence of the driving. But the driving is not the legal cause and the death not the legal consequence of the driving, unless it appears that the driver was at fault in some way. If we use the term “significance” (instead of consequence) this kind of problem presents less difficulty of explanation and comprehension. Compare what is said in next preceding footnote.
Accordingly we can say that A's acts are significant in different respects or in different directions, and we can represent these different directions thus:

\[
A's \text{ act} \begin{cases} \\
\text{Significance to B} \\
\text{Significance to A} \\
\text{Significance to state} \\
\text{Significance to O} \\
\end{cases}
\]

The first way of stating significance, in regard to B, will be discussed rather fully in the next several sections; the second, in regard to A himself, will be treated in section 2–24; the third and fourth ways of stating significance, in regard to the state and in terms of acts of officials, will be developed in section 3–02.

Sec. 2–17. Significance of act—in relation to others.* To meet the need to discuss the bearing of A's acts upon other persons, our law has standardized the ways in which A’s acts

* (I.R.) On the subject matter of sec. 2–17 et seq., see generally:
Corbin, Arthur L., "Jural Relations and Their Classification," 30 Yale L. J. 228 (1921).
Goble, George, "Negative Legal Relations Re-examined," 5 Ill. L. Q. 36 (1922).
Hohfeld, Wesley N., Fundamental Legal Conceptions 35 et seq. (1923).
Kocourek, Albert, Jural Relations (1927).
may have significance in relation to them. It has developed a standardized relational terminology. To connect A's doings with B, it employs such terms as duty, right, privilege, discretion, power, and liability.

These are the common terms found in the legislative statement of the significance of standard acts; they are the common terms found in legal instruments, in orders, and in textbooks. Indeed, the greater part of all discussion of the legal significance of acts is carried on in these terms. For this reason, I shall devote the next several sections to the explication and illustration of the meanings of duty, right, privilege, discretion, power and liability.

You will find that this discussion is closely linked with our previous discussion of standard acts. Duty and right are connected with prohibited and obligatory acts; privilege with permitted acts; discretion with nonobligatory acts; power and liability primarily with effective acts. However, the treatment of these terms will carry us considerably beyond the subject of acts, and will tie up acts with other persons as well as the actor.

Sec. 2-18. Actor's duty to another. The legal importance of A's act may inhere in the fact that it is one which A must do for someone else's benefit, or an act which he must refrain from doing on someone else's account. The common terminology here is that of duty to act or duty not to act. In other words, the significance of an act is stated in terms of an actor's legal duty to act or his legal duty to refrain from action. Terry, a well-known writer, thus defines the meaning of duty: "A person who is commanded or for-
bidden by law to do an act is under a legal duty to do or not to do it. A legal duty is a condition of one who is so commanded or forbidden."  

Terry further says that a legal duty implies these elements: (1) a person on whom the duty rests; (2) a person to whom it is owed; (3) certain acts or omissions constituting the content of the duty. This connects up the duty with someone, "a person to whom it is owed"; it emphasizes the relation of A's act to another person.

Accordingly, the legal meaning of obligatory and prohibited acts can be, and often is, stated in the terms of an actor's duty to someone else. Legislatures, courts, draftsmen, and writers in declaring the significance of acts, probably talk more often in terms of duty owed by A to B than in any other terms. In this sense, acts which are beneficial to B and which A is obliged to do (sec. 2-06), are acts which he is under a duty to do; and acts which are injurious to B and which A is prohibited from doing (sec. 2-04), are acts which A is under a duty not to do. The significance of A's acts in both these situations is commonly expressed in terms of duties owed by A to B.

Sec. 2-19. Right of another against actor. The importance of these same standard acts may also be expressed in another way. Their significance may be stated in terms of B's claim rather than A's duty. B has a claim that A perform an act or refrain from acting.* This mode of statement makes the

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1 Principles of Anglo-American Law, sec. 1-08 (1884).
2 Ibid. sec. 1-10.

*I do not believe my definition of right is, in any essential, opposed to that of Hohfeld or his followers. However, they are accustomed to define rights in a way which leaves them practically without content. Hohfeld speaks of a right as correlative to a duty and says that right is synonymous with claim. (Fundamental Legal Conceptions 35 et seq. (1923).) But he does not state what the nature of the claim is. This leaves
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nonactor, B, the center of the picture. The claim, which we commonly call a right, belongs to him. For example, an act beneficial to B, and which A is under a duty to do (sec. 2–06), can equally well be characterized by saying that B, who would be benefited by the doing of the act, has a right that A shall do it. A similar mode of expression in terms of rights may be adopted in stating the legal significance of an act injurious to B, and which the actor is forbidden to do (sec. 2–04). Here it is usual to say that B has a right that A shall not do the act in question.

In fact, it is the common practice to state the significance of obligatory and prohibited acts in terms of both rights and duties at the same time. When B has a right, A has a duty. The significance of obligatory and prohibited acts is expressed in terms of a correlation between B's rights and A's duties. The imposition on A of a legal obligation to act for B's benefit is, at the same time, the creation of a claim on B's part to have the act done. The prohibition of A's action to B's injury is, at the same time, the creation of a claim or right on B's part to have the injurious act not done. The right or claim on B's part is, by definition, treated as the invariable correlative of a duty on A's part, to act or not to act.

completely unexpressed the very important and useful connections of rights with human acts. The effect is especially unfortunate in view of the tendency in all discussion of rights to treat them as independent things and to separate them from actual human activity. Even the reference, which is common in defining rights, to persons who have them and to persons who are subject to them, fails to counteract the devitalizing effect of the omission of all reference to action; and the same is true of the emphasis, in some discussions of rights, on their relation to things. All these modes of speaking of rights serve to hypostatize or reify them. What is needed is a form of expression which makes clear that the term "right" is merely a convenient mode of referring to human acts which ought, or ought not, to be done. These acts, of course, involve actors and persons affected by acts. They also involve things. But, starting with the general postulate that legal standards are norms for the guidance of human acts, it must be apparent that we are omitting something which is of the first importance when we state the significance of those standards in terms which entirely omit reference to human activity.
You will note from the above that we have tacitly defined right in two ways: (1) as a claim that A refrain from doing certain acts or that he perform certain acts; and (2) as the correlative of a duty.

We may also say, paralleling the analysis of a legal duty given in section 2-18, that a legal right implies these elements: (1) a person to whom the right belongs; (2) a person on whom the duty rests; (3) certain acts or omissions constituting the content of the right.**

Sec. 2-20. Actor’s privilege to act. In section 2-05 we spoke of permitted acts and pointed out that permissive legal declarations are functionally justified by the need to tell the prospective actor how far he may go in his actions. But other persons are also concerned with A’s liberties of action. Such a permissive declaration merely asserts that a particular type of action by A is permitted. We can, however, relate this liberty of action to other individuals who are affected by A’s act. In this sense, we say that A has a privilege, or liberty, of acting in relation to B. Essentially, then, the privilege is merely a permissive declaration of law, stated in relation to other persons than the actor. Examples are the privilege of A to defend himself against attack by B; and the privilege of the doctor to operate on a patient who has consented to an operation.¹

The privilege, you will notice, has quite a different connection with the actor than the right has, though the two notions are often confused in discourse. A privilege belongs

** (J.R.) At this point, it would be logical to insert a discussion of the distinction between rights in personam and rights in rem (and also of Hohfeld’s pantaclial and multital rights). However, this topic seems to me far too complicated for inclusion in an introductory course, and I have, therefore, decided to omit it. On this topic, see SALMOND, JURISPRUDENCE, 6th ed., sec. 81 (1920), and HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 67 et seq. (1923).

¹ Sec. 2-06, problem 6. See also sec. 2-14, problem 3, in which a privilege of defamation was involved.
to an actor, A; it is the freedom of A to act without treading on B’s toes in the legal sense; it is an opportunity of A to act without justifiable objection by B.\footnote{However, A may have a right against B and a privilege in regard to B at the same time. Thus A (as nonactor) has the right not to be struck by B (as wrongful actor), but A (as privileged actor) is allowed by law to defend himself against attack by B (a wrongful actor).} The right, by contrast, always belongs to a nonactor, B, and this right represents a restraint on A’s freedom of action; it means that A must refrain from acting in a manner to injure the right-holder, B. This is a distinction which we shall have to refer to repeatedly in discussing the problems in section 2–25.

Some writers have felt the necessity of conjuring up a correlative to match A’s privilege to act.\footnote{(I.R.) This position is taken by Hohfeld and some of his disciples. See the items by Hohfeld, Corbin, and Goble cited in sec. 2–17, note *; Sec. 2–07.} They have said that A has a privilege to act and that B has a “no-right” that A shall not act. This kind of “no-right” seems to me both unnatural and unnecessary. There is no reason, of course, why we cannot say in an ordinary way that B has no right to object to certain lines of behavior on the part of A. But inasmuch as all we are trying to say is that an actor, A, is free to act without valid legal objection by B, I do not see any reason why we should not say just that, and dispense with this correlative cast in negative terms.

Sec. 2–21. Actor’s discretion to act. The important legal aspect of an act may be that it is not obligatory on the actor. It may be necessary to express the fact that an act does not have to be done. It may be necessary to indicate the absence of obligation on A to do an act for B’s benefit. In speaking of acts in these terms, and developing their significance in this way, we are simply looking at the other side of the coin described in terms of discretionary acts.\footnote{Sec. 2–07.} And the examples earlier mentioned also serve as illustrations of what is meant here. A owes no obligation to be a Good Samaritan, and a
doctor owes no obligation to accept a patient who calls for his services. The reason it is worth mentioning these cases again is that there are times when it is useful to connect up A's discretion to act with other persons and point out the absence of obligation toward them.

Sec. 2–22. Actor's power over another. The primary meaning of "power" is the ability to do an effective act which affects another. In this sense, power expresses the possibility of A's doing an effective act, the possibility that A's act will be effective when, as, and if, done. On the other hand, it expresses the idea that A's act will affect B. Accordingly, power is defined as the ability, by an effective act, to change the legal position of another person. The potential actor, A, is the center of reference; the other person is passive and is simply affected by what A does. Examples are the power to adopt a child; the power to bring a civil action, e.g., a suit for damages; the power of the owner of land to make an effective conveyance to another; the power of a principal to invest an agent with authority to act on the principal's behalf; the power of a principal to terminate the authority of his agent; etc.

However, power is sometimes more broadly defined. It is used to include not only the ability to affect others by effective acts such as those mentioned, but also used to include the ability to affect others by wrongful acts, as by commission of a tort or a breach of contract. In this sense, A is said to have power to commit a battery by striking B, and to have

2 Mentioned in sec. 2–08, problem 6.

Suppose, however, that a doctor stops at the scene of a collision on the highway; that the principal person hurt is the wife of X; that the doctor declines to care for W because he has previously had a serious personal difference with X; that X draws a revolver and, standing over the doctor, compels him to give the needed medical service. The doctor not only has discretion about serving, but also has rights not to be coerced. Cf. sec. 2–20, note 2.

1 Llewellyn: Power refers to what A "can do, and so affect what the court will do." THE BRAMBLE BUSH 84 (1930).
power by refusal to perform, to breach his contract. The only point that needs to be noted about this broader use of the term power, is the necessity to make sure in any given case which usage is being adopted. Is the speaker employing the word power in the narrower sense of ability to do an effective act affecting another, or in the wider sense of the ability to do any legally significant act which affects B?

A power in either of the senses just defined is a notion radically different from a right as defined in section 2–19, though right and power are often confused. Power is defined in reference to an actor, A. To say that A has a power is to assert that A can, by an act, produce legal effects; that he can do a legally significant act. Right is defined in reference to a nonactor, B; it expresses B’s claim that another, A, refrain from acting or that he act positively in favor of the right-holder, B. This is a distinction which we shall have occasion to develop in discussing the problems in section 2–25.

Sec. 2–23. Liability to effects of another’s act. In discussing powers, I pointed out that B is often subject to the effects of acts which A does, and that we often want to speak of the fact that B’s legal position will be affected when, as, and if A acts. The legal significance of A’s act may be cast in terms of B’s liabilities quite as well as in terms of A’s powers. By a liability, I mean subjection to the effects of the act of another person; or, one might say, exposure to the effects of such an act. B’s liability expresses the possibility of having his legal position altered by the effective act of another person. The liability of B is the correlative of the power of A, whose act can affect B. In other words, liability is the correlative of the power, by an effective act, to affect another’s legal position. Examples are the liability of B, who has breached his contract with A, to suit by A; the liability of a tenant to the landlord’s act of terminating the lease by
Liability, like power, may be given a broader definition. It may be defined, as I have defined it above, as the subjection to another’s effective act, but it may also be defined more comprehensively to include also the subjection to wrongful acts of another, such as tortious acts and breaches of contract. In this sense, B is exposed to wrongful acts such as a battery by A, and B is also exposed to breaches of contract by the other party to a contract. However, though there is no reason why one cannot define liability in this wide sense to correspond with the wide use of power, I think it is rather unusual to use the word liability in this way.

Sec. 2-24. Significance of act to actor himself. In the foregoing sections, I have discussed and defined terms in which we are accustomed to express the legal importance of A’s acts to B. Within a somewhat narrower range, it may be important to express the legal significance of A’s act to A himself. The terminology of rights and duties is hardly appropriate for this purpose. That terminology is essentially relational. It presupposes at least two persons to be related to one another. While we do sometimes say that a person owes it to himself to do or not to do some act, this usage is rather a reference to moral considerations or is to be taken as a figurative use of terms. We do not seriously mean that A is at one and the same time the claimant of acts and the person bound to act. He does not have rights against himself, nor owe duties to himself.

Similar observations apply to the use of the terms “privilege” and “discretion.” When these terms are used in a meaningful way, I believe a relationship to someone else is understood. A’s privilege to act means his freedom from
objection by others, not his freedom from complaint by himself. His discretion to act refers to the fact that others have no obligatory claim upon him, not to the fact that he can act in a manner to affect himself.

But when we speak of the significance of A's powers in regard to A himself, we introduce a new element. Power can be defined as A's ability by an act to affect the legal position of B—the definition given and used in section 2-22 above. But power may be defined as A's ability by an act to affect his own legal position. This latter is the sense in which the term power is used when we speak of A's power to make a will, or his power to abandon the chattel that he owns. These are both acts which immediately and primarily affect the legal status of A himself. This usage of power constitutes a third meaning to be added to the two already mentioned. And again, as I have said before, the chief point that needs to be noted about these three possible meanings of power is the necessity to make sure in any given case which usage is being followed.

Sec. 2-25. Problems. Unfortunately, the terms we have just defined are used in all sorts of confusing ways. This holds equally of use by legislatures, courts, lawyers, scholars, and students. Of these terms, the term "right" is probably the most loosely and multifariously employed. "Right" is used not only in the strict sense defined in section 2-19; it is also used in the sense of privilege (sec. 2-20) and of power (sec. 2-22). A similar confused use of "duty" is often found. The term is employed in the sense defined in section 2-18, but also in a sense which blends or confuses it with liability (sec. 2-23).

Ambiguity and carelessness in the use of language are facts with which we must reckon in law as elsewhere. No matter how careful we may be in our own use of terms, we always
have to look out for careless and misleading use by others, just as we have to be on the lookout for others who drive carelessly on the highway. Both for the purpose of keeping your own use of terms clear and for the purpose of detecting loose use by others, it will be helpful for you to practice discriminating the six important conceptions which I have defined. Which of the six terms would you use in each of the following statements?

1. Right of a creditor of A to repayment of $100 which he has loaned to A.

2. The claim of X, the owner of land, that Y, a third party, stay off the land.

3. The obligation of Y to stay off X's land in the case last put.

4. The right of X to transfer his land to Y.

5. The right of L to lease his land to P.

6. The right of a landowner to use and enjoy his land, as by building a house on it, plowing it, and walking over it.

7. Every man's house is his "castle" as the law declares. In this connection, Gray says: "... a householder has the right to eject by force a trespasser from his 'castle.'" Would you say right, power, or privilege here?

8. Suppose that X, the owner of land, gives Y a license to come on his land to hunt. How shall we characterize Y's opportunity to hunt? How shall we characterize the giving of the license?

9. The ownership of land is a complex aggregate of rights, powers, privileges, duties, and liabilities. On the basis of the preceding examples and what you know generally, what rights, powers, and privileges of the landowner come to mind? Do you think of any duties which rest upon the landowner? Do you think of any liabilities which rest on the landowner as such?

1 Nature and Sources of the Law, sec. 53 (1909).
10. A does not have any duty to support his indigent brother. Which category?

11. The right of A to acquire ownership of wild animals by capture.

12. The right of a tenant from month to month to terminate his lease by one month’s notice.

13. It is sometimes said that either party to a contract has a right to breach his contract inasmuch as either is able to break the contract and pay damages for the breach. In this case, should one say that either party has a right to breach the contract? A privilege to breach it? A power to do so?

14. The right of workmen to organize a union without interference by their employer. Should one speak of a privilege to organize? A right to organize? A power to organize?

15. My right to swear out a warrant for the arrest of a suspected thief. Suppose, first, that I act justifiably on the basis of reasonable cause to suspect that X has stolen my watch. Then suppose that I swear out such a warrant without justifiable cause. Would you use the term “right” in this case? Power? Privilege?

16. Sec. 4 of the Restatement of Torts (1934) declares:

“The word ‘duty’ is used throughout the Restatement of this Subject to denote the fact that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he may become liable to another to whom the duty is owed for any injury sustained by such other of which that actor’s conduct is a legal cause.”

Is the word “duty” used here in a sense which agrees with our definitions? Is the word “liable” so used?

17. It is said that the owner of a house is “bound” to make repairs on floors and walls of his house if he wants them to be made. How do you interpret the word “bound” here? Does this statement refer to a duty or something else?
18. Compare the statutory language quoted in section 2-14, problem 3: "No damages shall be awarded in any libel action," with the language of the fourth section of the Statute of Frauds which declares that, "No action shall be brought . . . upon any contract or sale of lands . . . or any interest in or concerning them . . . unless the agreement upon which such action shall be brought, or some memorandum, or note thereof, shall be in writing, and signed by the party to be charged therewith. . . ."

The defamatory statement does not give rise to a cause of action, and the unwritten contract is not a basis for an action, either. Is this an adequate statement of the effects of these statutes? The effect of the one statute is to make the actor's act privileged. What is the effect of the other statute, i. e., the Statute of Frauds?

19. Suppose A sues B for damages for false imprisonment. The evidence on the trial of the action shows that B locked A in a cellar overnight as a practical joke. The court and jury award damages in the amount of $500 to A. How would you analyze this result in terms of rights, duties, powers, privileges, etc., as between A and B?

20. A undoubtedly has discretion (as well as power) to convey his home by deed to B. Now suppose that B by threats of bodily harm coerces A to make a deed to this effect; the deed to B would be ineffective and would be ordered cancelled in a proper suit by A. How would you express this result in terms of legal right, power, and discretion?

Sec. 2-26. Significance of circumstances—natural conditions. A's act is not an isolated phenomenon; it takes its place among the phenomena of nature. The law recognizes the importance of the natural and social conditions surrounding A's act. These conditions are considered both in fixing a standard for A's act and in fixing the significance of his act.
Standard and significance are part of the social machinery through which A's act is integrated and harmonized with B's needs and acts. The natural and social bearings of what A does, have to be reckoned with in deciding whether his act is to be socially approved, disapproved, or what not; they have to be reckoned with also in deciding what effects the act shall entail if it is done. Thus A, who drives an automobile on the highway, carries on an activity under given weather conditions and at a given place where others are driving. The legal provision, which declares that he must drive with reasonable care under the circumstances, takes account of both natural and social conditions. And the accompanying legal provision, which declares that A shall be liable for damages to B if he fails to exercise reasonable care, likewise involves a reference to both weather conditions and conditions of traffic. Both the standard for A's act and the significance of his act involve a consideration of factors outside the act itself.

Accordingly we see that the act alone does not determine legal significance. We cannot look alone to what A does. We have to look also to the circumstances in which he acted. Legal significance is determined both by what A does and by other factors which we have called circumstances or surrounding conditions:

\[
\begin{array}{c|c}
\text{A's Act} & \text{Legal Significance} \\
\hline
\text{Circumstances} & \\
\end{array}
\]

Among the natural circumstances which help to determine the significance of A's act are many common facts. The circumstance may be a previous natural event. Thus, the significance of A's act in selling grape juice or cider may depend not only on the act of sale, but on the question whether the juice or cider has previously passed through the natural proc-
ess of fermentation; if it has, A's act constitutes a sale of intoxicating liquor and the violation of a prohibition law.

The important natural circumstance may be a factual condition accompanying the act, such as the weather conditions previously mentioned; the liability of A to B for negligent driving may depend not only on the speed at which he was driving, but on the question whether it was raining at the time, so that the pavement was wet and slippery; or whether it was snowing, so that A's range of vision was reduced.

And finally, the important circumstance may be the subsequent occurrence of a natural event; this event may be essential to the operation of a previous act, as the testator's death is essential to the operation of the will he has executed. Or the event may change or vitiate the legal significance of an act which has already been done. If A is the owner of a music hall and enters into a contract to lease the hall to an artist for a particular concert, the contract gives rise to an obligation on A's part to do what he has agreed; but, if the hall be destroyed accidentally by fire before the date of the concert, the obligations of the parties under the contract are terminated. The significance of A's act in entering into the contract is affected (i.e., completely wiped out) by the subsequent fire. In these three examples we see that the significance of A's act in a given situation may depend on a previous natural event, or on accompanying natural conditions, or on a subsequent natural event, as well as on the nature of the act itself.

Sec. 2–27. Significance of another's acts. The significance of A's act may also depend on the acts of B, as I have already pointed out. Indeed B's acts raise legal problems more often than natural circumstances do, and in this sense his acts are more important to us from a practical viewpoint.

B's previous act may be important in determining the effects of A's act. Thus if A fatally stabs B with a knife,
A's act is murder. But if it appears that before A stabbed B, the latter struck A a blow in the face with his fist, then A's act of killing B would ordinarily be adjudged manslaughter, not murder. The prior blow by B mitigates A's crime; it changes and qualifies the significance of A's act. In a similar way B's simultaneous activity may be important in determining the significance of A's act. The case of A's driving on the highway may be used again to illustrate this point. The legal standard requires A to drive with reasonable care under the circumstances. What is reasonable will depend largely upon the amount of traffic. This means the number of other persons who are driving. As a driver, A is bound to act in a manner which takes account of the driving which others are doing. And the subsequent act of B may be important too. If A and B have made a contract and if B subsequently breaches the contract, this breach by B excuses performance by A. It excuses the obligation of A to perform. In short, the acts of B prior to, simultaneous with, and subsequent to, the act of A, have a part in determining its effects.

Another noteworthy angle of the relation of A's act to B's is this: legal significance often attaches to two or more acts only when they are coupled together in a certain way.

```
A's act
then
B's act
```

Thus, in the case of the killing above mentioned, the temporal sequence of the acts is important. B strikes A first. If B had struck A after A gave the fatal stab, B's blow would not have mattered. Neither would the blow by B have had its mitigating effect if the sequence of events had been first a blow by A, then a blow by B, then the fatal blow by A. Here A would have been liable for murder because he struck the first blow as well as the one which was fatal. Another example of the same sort is the making of a contract. Nor-
mally a contract is made when two acts are coupled in this order: offer by A and acceptance by B. Legal significance attaches to the combination of the two acts.

Or sometimes the law requires that one or more acts occur together—simultaneously or essentially at the same time—alone neither act will produce legal effects:

\[
\text{A's act} \quad \text{and} \quad \text{B's act} \quad \text{at same time} \quad \text{Legal Significance}
\]

As an illustration of this kind of legal provision, I refer you to the statute set out in the fourth problem of section 2-28 below, which requires that all the witnesses to the execution of a will be present at the same time and attest together. If all are not present at the same time and acting together, the will is not effective and the testator’s act and the attestation of it are utterly without legal force.

Accordingly, we find that legal standards are often stated in regard to sequences, or combinations of acts: A’s act, then B’s act; or B’s act, then A’s act; or A’s act and B’s act together. And we find that, while legal significance may attach to A’s act alone, often such significance only attaches to a sequence or combination of A’s act with B’s, or that the significance of A’s act is different when it occurs in a sequence or combination with B’s, from what it would be if it occurred alone. These points about the essential interrelations of acts and about their combined significance will be further developed by the problems which follow.

Sec. 2-28. Problems. 1. Suppose a statute provides that a person who makes a public offer to pay for a service to be rendered (e. g., to pay a reward to anyone who finds and returns a lost article) becomes bound to make compensation according to his offer, whenever another person meets the
conditions of the offer and renders the service requested. If B loses his watch, and A finds it and returns it an hour later, would B be bound under the above statute to pay a reward? Why?

2. Suppose that A shot and killed B but it appears that B was attacking A with a pistol when A shot, so that A acted in the necessary defense of his own life. Here A would be exonerated completely.

Analyze this case in terms of interrelated acts and their significance.

Suppose B attacked A yesterday and A shot B today.

3. A and B enter into a contract under which A is to perform some service for B at $10 per day for 10 days. B later defaults and A sues for damages. Consider this situation as a sequence of interdependent acts which form the basis for A’s suit (see sec. 2–27). In other words, what acts must A prove, or do, in order to recover damages?

4. A statute of the State of Michianna provides:

   Execution of wills. Every will must be in writing and must be executed and attested as follows:

   (1) Subscription. It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto. A person who subscribes the testator’s name, by his direction, should write his own name as a witness to the will, but a failure to do so will not affect the validity of the will.

   (2) Presence of witnesses. The subscription must be made, or the testator must acknowledge it to have been made by him or by his authority, in the presence of both of the attesting witnesses, present at the same time.¹

   (3) Testator’s declaration. The testator, at the time of subscribing or acknowledging the instrument, must declare to the attesting witnesses that it is his will.

   ¹ Most states do not specifically require that the testator have all the attesting witnesses present at the same time. Atkinson, Wills 295 (1937). But this is always the safe procedure to follow.
(4) **Number of witnesses, attestation.** There must be at least two attesting witnesses, each of whom must sign the instrument as a witness, at the end of the will, at the testator's request and in his presence. The witnesses should give their places of residence, but a failure to do so will not affect the validity of the will.

Suppose the testator asks the attesting witnesses to sign first, which they do; and that the testator signs immediately afterward. Would his will be validly executed under the statute quoted?

5. *Aikens v. Wisconsin.*

"Malicious mischief is a familiar and proper subject for legislative repression as are also combinations for the purpose of inflicting it, and liberty to combine to inflict such mischief, even upon such intangibles as business or reputation, is not among the rights which the Fourteenth Amendment was intended to protect. . . ."

"Section 4466a, Wisconsin Statutes of 1898, prohibiting combinations for the purpose of willfully or maliciously injuring another in his reputation, trade, business or profession, is not in conflict with the Fourteenth Amendment so far as the section applies to such a combination made from solely malevolent motives. . . ."

Mr. Justice Holmes:

"But if all these general considerations be admitted, it is urged nevertheless that the means intended to be used by this particular combination were simply the abstinence from making contracts, that a man's right so to abstain cannot be infringed on the ground of motives, and further, that it carries with it the right to communicate that intent to abstain to others and to abstain in common with them. It is said that if the statute extends to such a case it must be unconstitutional. The fallacy of this argument lies in the assumption that the statute stands no better than if directed against the pure nonfeasance of singly omitting to contract. The statute is directed against a series of acts, and acts of sev-

\[195~U.~S.~194~(1904).\]
eral, the acts of combining, with intent to do other acts. . . . When the acts consist of making a combination calculated to cause temporal damage, the power to punish such acts, when done maliciously, cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law. . . .”

Consider this decision in relation to our discussion in section 2–27.

Effectuation of Standards

Sec. 2–29. Standards do not per se control behavior. The legal standard is not self-effectuating. It is an expression of a pattern of action—it is a standard act which the lawmaker prohibits, commands, assures of effect, permits or leaves to the discretion of the actor. As such, the standard is a mere verbal formula, just words. It is not enough that the lawmaker formulate his standard, he must also think about how to make it effective in controlling the acts of A. The words of which the standard is composed have no effects on A per se. Words have no influence over things, and they do not control persons unless these persons understand them and are ready to be guided by them.

1 By “effectuation of a standard” I mean the process of bringing about the kind of action which the standard is intended to secure. A command is intended to secure action of the type commanded so that the standard is effectuated when action of this type is done. A prohibition is intended to warn against action of the type forbidden, so that the standard is effectuated when action of this type is avoided. Another way of putting the same general idea is to say that effectuation is the process of making a standard operative in the actual activities of someone. These rough definitions will suffice for the time being; later we shall have to examine more closely the meanings of such expressions as “operative” and “effective.”
Despite these obvious truths, men have always been prone to ascribe intrinsic or magical effect to words. They have been ready to suppose that words can exert direct effects on things, events, and human behavior. King Canute gave commands to the waves; spells and incantations have often been used to sway natural forces; and persons have been assumed to be pushed about by words as if words were physical instruments instead of mere conventional symbols through which ideas are conveyed.

While it is not common today to commit so gross an error as King Canute's, and most of us have passed beyond the belief in the efficacy of spells, it is not uncommon even now for the lawmaker, and other speakers as well, to forget that his message is intended to influence people, and that its effects in this regard will depend first and foremost on the attitudes and reactions of the people addressed. It is not unusual for those who propose or who enact laws to assume that all the lawmaker has to do is to declare, "Be it enacted that . . . .," and that in some indefinite way the standard becomes realized in fact. Nothing could be further from the truth.

The national prohibition law of recent unhappy memory illustrates the point I have in mind. This forbade the manufacture, possession, transportation, and sale of intoxicating liquor. It was hardly enacted before it was violated almost openly in many parts of the country. Why was this? Because the lawmaker had not given adequate consideration to the attitudes of the population and to means of enforcement. The law ran counter to the customs and desires of too many people. The legal machinery of enforcement which was available was not equal to the task of eradicating the drinking habits and suppressing the thirst of a large proportion—in some areas, the majority—of the population. In reality the lawmaker had done little more than declare a prohibitive standard; he had implicitly assumed that his declaration would
somehow effectuate itself. He had not adequately considered the problem of enforcement.\(^2\)

Sec. 2–30. "Law in the books" and "law in action." Not only is the legal standard not self-effectuating but it is also never 100 per cent effective. There is always some discrepancy between the "law in the books" and the "law in action."\(^\ast\) Some murders are committed despite the threat of direst penalties. The law in the books expresses what the lawmaker wishes to achieve or avoid; the law in action always falls short of this ideal. The difference between the prohibition law and other laws which we regard as satisfactorily enforced is merely one of degree. If the gap between the legal standard and its enforcement is too wide we speak of a "breakdown" of law; if it is not too marked we consider the situation more or less normal. The point can be illustrated by referring to the legal norms which regulate driving on the highway. Many drivers, as we all know, exceed the legal speed limit and pass other cars on hills. The regulations covering these acts fall far short of complete enforcement. To make such traffic regulations completely effective would require a vast police force. It would cost more than the public is willing to pay, to provide enough policemen on urban and rural roads to supervise driving and to prevent all infractions. With present machinery of enforcement, the public has to be satisfied with a reasonable degree of observance of these standards, or perhaps with something less than that.

\(^2\) I use effectuation as the broad general term for all methods of bringing about approved types of action; enforcement, which is a term more often heard, is narrower. Enforcement refers only to coercion of the actor by threats or by physical force. Effectuation includes the use of threats and physical force but also includes the use of rewards, and the creation of favorable habits. See sec. 2–40, note *\(^\ast\), for further explanation of the terminology here employed.

\(^\ast\) (I.R.) The ideas here developed go back to Ehrlich and Holmes. They have been heavily stressed by Llewellyn and other so-called realists. The contrasting phrases, "law in the books" and "law in action," are Pound's.
And the discrepancy between standard and actuality is not limited to the commands and prohibitions of the criminal law; the standards relative to private injuries and benefits are likewise only imperfectly realized in practice. Personal injuries are suffered and not redressed. Contracts are broken and nothing is done. Property is damaged and compensation is never made. Perhaps the individual who causes the injury or commits the breach of contract can not be found or can not pay, or perhaps the amount involved is small and the injured party can not afford the trouble of a lawsuit. There is always a substantial discrepancy between the standard and its effectuation in real life.

The lawmaker, therefore, will not expect the impossible. He will realize that commands are not always obeyed; that forbidden acts are done; that boundaries of permitted action are sometimes overstepped; that prescribed formalities for effective action are not always complied with. He will realize that persons who are subject to regulation often defy, or attempt to evade, applicable standards of behavior, or they fail to act in prescribed ways through carelessness or ignorance. The realization of these facts is the beginning of legislative wisdom, but it is not the whole of it. While the lawmaker will not hope for perfection, he will try to hold to a minimum the discrepancy between his standard and its fulfillment.

Sec. 2–31. The actor's existing attitudes. The standard is a pattern of behavior addressed to A for his guidance. In preparing such a standard L must consider A's existing attitudes as the maker of a wooden object must consider the grain of the wood on which he is about to work. A's attitudes are the springs of his action; they are at the center of the problem of controlling what he does. What are these attitudes? How far can they be influenced or changed? What
can A fairly be expected to know or do? How far is it necessary to stimulate action along approved lines or deter action along disapproved lines? What devices are available for these purposes, and how will they operate on A? All these questions must be carefully considered and answered by the lawmaker who establishes standards with an intelligent appreciation of what he is doing.

If the attitudes of persons to be controlled run counter to a proposed standard, as the attitudes of a large part of our population were set against the prohibition law, L must concern himself seriously with problems of changing them. He must consider whether he will be able to induce action along desired lines, whether he has the means available to arouse adequate law-abiding motives, and whether in regard to the particular standard the benefit attained will be worth the cost of attaining it.

On the other hand, if existing attitudes of persons to be controlled are in harmony with what L desires, the legal task of coercion or persuasion is reduced. If he can rely upon favorable habits or if such institutions as the church and the family inculcate and enforce essentially the same standard as his own, e.g., a prohibition of lying and stealing, L may have to concern himself only with the problem of creating motives for favorable action in a relatively small group. As regards most of the population, the standard will be realized in fact through existing habits. The problem of enforcement will be minimal.

Indeed the task of enforcing legal standards without the aid of law-abiding habits and extralegal sanctions would be quite impossible. On the asset side of the law enforcement ledger must always be reckoned the fact that not all actors need to be coerced or persuaded, or at least that most standards do not require enforcement against more than a small number of persons simultaneously. Just as the bank relies
upon the fact that not all its depositors will want to withdraw their money at any one time, so the state counts on the fact that it will not need to enforce its standards of behavior against more than a small part of the community at any one time.

A reference once more to the fiasco of national prohibition will show what part established habits and extralegal factors play in the effectuation of legal standards. Even at the worst period of prohibition enforcement, most persons did not violate the law; they did not want to. They conformed because they were not accustomed to using, making, or selling intoxicants, so that the law did not run counter to their habits; or because they lived in dry communities and were restrained by the opinions of their neighbors; or because they belonged to church groups which regarded the use of intoxicants as immoral. Or they obeyed the prohibition law on principle, regarding obedience to law as a moral or social duty. Habitual attitudes or extralegal sanctions were sufficient, along with legal disapproval, to keep these persons out of the way of the law's ban. The breakdown of this law did not mean, therefore, that no one whatever observed its mandates; it meant only that the lawmaker had failed to reckon with the hostile attitudes of a large dissident group. This was the group which needed to be controlled if the law was to be effective, and this was the group which set the law at naught.

These observations sound obvious enough, and yet they have only too often been neglected or overlooked. As a result, the problem of effectuating standards has sometimes been conceived as a much larger problem than it is, i.e., as a problem of inducing all acts of all persons at all times. In this view, the job looks too big and L does not undertake all that he might. Or else L, if he is not critical, passes a law and overestimates his accomplishments; like the dog that chases the car down the street and comes back with his tail
in the air, L cheerfully assumes that he made all people do what many were going to do anyhow. But the opposite mistake is the more common; the problem is not perceived to be as large as it is. L fails to realize that he is enacting a standard of behavior which is opposed to the habits of many persons, which therefore needs to be backed up by strong and effective sanctions, and which breaks down in practice when these sanctions are not provided.

Sec. 2-32. Problems. 1. In an earlier problem we spoke of a case where a city installs a traffic light on one of its streets for the purpose of regulating the movement of vehicles and pedestrians (sec. 1-10). This was treated as an example of control by the use of symbols. What control factors lie behind this symbolic device and its use?

2. What is the point of these bitter words of Anatole France: “The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread”? 1 What does this mean as regards legal prohibitions?

3. In an address delivered in 1897 Justice Holmes said that if you want to know how the law (in our terms, legal standards) is going to operate you must look at it as the bad man does.

“You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practiced by his neighbors is likely, nevertheless, to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can. . . . If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowl-

1 Cohen, Ethical Systems and Legal Ideas 79 (1933).
Do you agree? Why?

4. Consider in this connection the following passage from an article by Llewellyn:

"... most pieces of law affect only a relatively small number of persons ever or at all, with any directness—or are intended to. Where that is the case, the organization, attitude, present and probable behavior of the persons sought to be affected is what needs major consideration, from the angle of getting results (or of understanding results). Indeed, the very identification of those persons may be a pre-condition calling for much study. Which is a somewhat absurdly roundabout way of saying that unless those matters are studied, the rules drawn, and the administrative behavior adapted to the persons in question, results will be an accident. "To the persons in question," and, indeed, "to those persons under the conditions in question." It cannot be too strongly insisted that our attitude toward 'rules' of law, treating them as universal in application, involves a persistent twisting of observation. 'Rules' in the realm of action mean what rules do; 'rules' in the realm of action are what they do. The possible application and applicability are not without importance, but the actual application and applicability are of controlling importance. To think of rules as universals—especially to think of them as being applicable to 'all persons who bring themselves within their terms'—is to muffle one's eyes in a constitutional fiction before beginning a survey of the scene. To be sure, constitutions purport to require rules of law to be 'equal and general.' But most rules, however general as to the few they cover, are highly special, when viewed from the angle of how many citizens there are. And most rules 'applying to' all who come within their terms (all those who set up barber shops, or are tempted to commit murder, or to bribe officials, or to embezzle from banks or certify checks without the drawer having funds, or to adopt a child, or run

a manufacturing establishment employing five or more persons) do not and will not, realistically considered, ever be ‘applicable’ in any meaningful sense of the term, to most people in the community. Such rules are indeed open. Persons do move in and out of the sphere of their applicability. But that sphere is much more clearly seen, when viewed (as compared with the community) as narrow, as special, as peculiar.”

How are Llewellyn’s observations related to our present topic?

5. In this country the established practice is to pass vehicles which one meets by driving to the right; this practice is sometimes called a “rule of the road.” Suppose a general traffic statute were being prepared, would it not be important from the lawmaker’s point of view to know this prevailing practice and to adopt it?

What would be the effect of adopting the English rule which requires drivers of vehicles to pass to the left?

Compare the situation dealt with by Mussolini when he came to power in Italy; right-hand driving was customary in some parts of Italy and left-hand driving in other parts. In deciding to establish a uniform rule what facts should have had weight with Mussolini?

Sec. 2–33. Enforcement by physical force. When the lawmaker has given due attention to the existing attitudes of persons whom he wants to control, he will pass on to the problem of methods of shaping their behavior to his desires; he will consider the devices and incentives through which he can deter or stimulate their action.

First, physical force may come in question. This includes physical restraint and physical compulsion. The application of force may be the only method available for controlling

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certain insane actors; force may have to be applied as a last resort to other recalcitrant actors. Some persons, like the wild bull, can only be prevented from doing harm to others by physical constraint or by extermination. Certain persons can only be induced to do what is legally required, by the application of physical force.

But the physical force method of enforcing standards is costly and narrow in application. Our society could not possibly exist in its present form if only this method of control were available. As Lumley says, "But, with physical control as the only means for the management of human beings, the maintenance of a social order would be impossible. Let us follow the series through, for purposes of contrast—in a world with nothing but physical force to move men. If it is desired to take the culprit to jail, two or three policemen would have to be assembled at the spot, and be forced to pit their strength against that of the victim. But how would the two or three policemen be assembled? They would have to be forced there by others. They could not be called there. But who would the others be and who would push or drag them around to push or drag the several policemen to the required spot?"

Sec. 2–34. Enforcement of prohibitions by penal threats. More serviceable and more widely used than actual physical force is the penal threat. Control by threat is symbolic control. The penal threat is conveyed by words and usually accompanies a legally stated standard such as a prohibition or command. Let us consider first its use in connection with the prohibition. A is forbidden to do such an act as murder, robbery or arson and the prohibition is coupled with the

2 The distinction between control by force and control by verbal acts is discussed in sec. 1–09 above.
3 But compare the implied legal mandate and implied threat conveyed by a traffic light, sec. 1–10, problem 1.
threat of penal consequences such as imprisonment or hanging. It is not the mere prohibitory language that controls A's behavior; it is the penal threat that deters him from committing the prohibited act. The prohibitory standard tells him what he must not do and the threat of punishment supplies a motive for not doing it.

It is not to be inferred from the examples just given that only the prohibitions of criminal law are supported by penal threats. Penal threats are found in other parts of the law, in fact in every part. In the law of procedure, for instance, important prohibitions are coupled with penal consequences. I need only mention the fact that persons may be punished for disorderly conduct in court, and that a party may be committed for contempt in violating a prohibitory order of the judge, such as an injunction. Likewise in the field of tort, where A is prohibited from striking B or injuring B's goods, A is threatened with the exaction of compensation to B if he does either of these forbidden acts. From A's point of view, this exaction is a penalty with which he is threatened; it operates on A's motivation in a manner analogous to the threat of punishment for crime.3

Sec. 2-35. Deterrent effect of penal threat. What is the nature of the penalties threatened? Penalties may vary widely in character and in the way they affect A. The penalty may be imprisonment; it may be death by hanging or otherwise; it may be the exaction of a fine; it may be the payment for damage which A has done to someone else; it may be the

3 This, however, is looking at the matter only from A's point of view. From B's point of view and from the social viewpoint, the protection of B against injury is the main thing. The threat of loss to A if he acts improperly, and the requirement of payment for B's loss, are both means directed to one end: the protection of B. The threat and the exaction of payment are simply two stages in this protection. One stage represents the effort to prevent improper action by A; the other stage represents an exaction of compensation if A does act improperly. Compare what is said in sec. 2-35 about the effect of penal threats and their execution.
performance of some disagreeable act such as repairing damage or making an apology; \(^1\) it may consist in a loss of certain legal advantages such as civil rights; and so on.\(^2\) But all penalties have one feature in common—a feature which accounts for their motivating force upon A’s behavior. All are detrimental consequences to A or his pocketbook; all are consequences which A will presumably wish to avoid.

The purpose of the threat is to create motives in A which will make it unnecessary for the threat to be carried out. If the threat of penalty is effective, of course the penalty is not imposed. The thing threatened is a mere substitute for performance along desired lines. If the threat operates as intended, this substitute does not have to be exacted.

However, the threat does have to be executed sometimes, or at least the probability of its execution must be real; if not, the penal threat loses its motivating force on A’s action. This force depends on three factors: First, it depends on what is threatened—the nature of the penalty. A threat of death obviously will have a stronger effect in deterring or coercing A’s act than a threat of a short term of imprisonment or a small monetary fine.\(^3\) Second, the remoteness of the penalty in time is important. If the penalty will be exacted immediately it will be more influential on A’s behavior than if it is to be exacted a long time from now. It is common knowledge that some of us take plenty of chances on eternal damnation.

\(^1\) In certain European countries the unsuccessful defendant in an action for defamation is required to publish an apology.

\(^2\) This list is not exhaustive. Many other penalties have been used at some time or some place in world history. Of these, loss of bodily members, killing in cruel fashion, selling into slavery, would no longer be tolerated; in fact, they would conflict with various provisions of our constitutions.

\(^3\) The law proceeds on a quantitative calculus of penal consequences which is often of doubtful validity—at least of doubtful accuracy from the viewpoint of psychological science. I can put these questions to make the point. Does the threat of five years' imprisonment for theft deter the bum in the same degree that it deters a respectable citizen? How much more deterrent effect has a ten-year term in prison than a five-year term? Is its motivating force twice as great? What about the deterrent effect of a threatened $2000 fine as compared with a threat of a fine of half that amount?
tion because that seems a long way off. Third, the certainty of the exaction of the penalty is important in determining its force. Where there are enough policemen patrolling the streets and the speeder is very likely to get caught and punished, the deterrent effect on speeding is at a maximum.

Sec. 2–36. Deterrent effects of taxation and other governmental measures. The lawmaker is not confined to out-and-out prohibitions. He may endeavor to discourage rather than forbid certain acts by A. A common method of checking activity by A is to impose high or discriminatory taxes upon it. The power to tax, like the power to penalize, may be used to deter action. Taxes may be made so high as to be prohibitive; as the great Chief Justice Marshall once said, "The power to tax is the power to destroy." But more often disfavored acts are visited with discriminatory taxes.¹ Examples are the taxes with which the production and sale of oleomargarine until recently have been burdened both by our federal and state governments.

Restrictive regulations are often used as checks on disfavored activities. There can be no doubt, for example, that the liquor business has long been a problem child for the lawmaker. Even when he does not go so far as to prohibit the manufacture, sale or possession of intoxicating liquor, he closely regulates dealings in this commodity. The lawmaker

¹ If a real prohibition is intended, taxation usually seems too indirect a method of achieving the end desired, though this has not always proved true. The federal government has used special taxes in order to drive notes issued by state banks out of circulation. Veazie Bank v. Fenno, 8 Wall. 533 (1869). And the Congress of the United States once attempted to use its taxing power to prevent the products of child labor from using the channels of interstate commerce. The Supreme Court held this exercise of power invalid; its conclusion, however, was rested primarily on the ground that Congress could not bar such products from interstate shipment. Bailey v. Drexel Furniture Co., 259 U. S. 20 (1922). Today, as a result of the Court's broader conception of Congressional power, either the tax or the prohibition on the products of child labor would be sustained. There can be no question that generally our state and federal governments can employ taxes to restrict or prevent acts which they are empowered to prohibit.
permits sale only by licensed persons to particular persons and at particular times and places; he controls the manufacture with equal care. These limitations on sale and manufacture reflect a continuing frown of the lawmaker and achieve in large degree the same results as a complete prohibition.\(^2\)

All of which leads to the conclusion that we greatly oversimplify when we treat prohibited acts as a neat clear category standing by itself. Prohibited acts shade over into disfavored acts. The lawmaker does not always speak with a full and certain voice; he does not always impress an unqualified "no" on behavior by A. Certain of A's acts may be not forbidden but handicapped by discrimination or discouraged by restriction.

Sec. 2–37. Problems. 1. A statute provides:

"If any person drawn or summoned as a juror, shall take anything to give his verdict, or shall receive any gift or gratuity whatever, from any party to a suit, for the trial of which such person shall be drawn or summoned, in addition to any criminal punishment to which he may be subject by law, he shall be liable to the party aggrieved thereby in ten times the amount or value of the thing which he has taken or received, in addition to the actual damages sustained thereby."

What prohibited act is involved here? What three methods (acts) of effectuation are mentioned?

2. It is often said that certainty of punishment for crime is more important than severity of punishment. Thus it might be argued that it is more important that most traffic offenders

\(^2\) Of course these limitations themselves usually take the form of prohibitions, e.g., a prohibition of sale after certain hours or a prohibition of sale to minors. But my point is that the liquor business is permitted although it is not favored. These subordinate prohibitions are, as regards the liquor business, restrictions on the way it is carried on. At the same time they indicate an unfriendly legislative attitude toward this line of activity.
be caught and fined $5 than that an occasional offender be caught and fined $50. Do you agree? Explain in terms of motivation by threat of penalty.¹

3. "In England the punishment for suicide was at one time forfeiture of goods and an ignominious burial, but both modes of punishment have been done away with. In the United States the person committing suicide is not punished, and it has been held that suicide is not a crime on that ground. This reasoning makes the existence of a crime depend on the punishment, whereas the punishment should depend upon the existence of the crime. Where suicide is a crime, the mere fact that the offender by this act places himself beyond the reach of punishment no more serves to make his act not a crime than would the fact that one after killing another person should commit suicide and thus make his punishment impossible. . . ."²

Was there any effective threat of penalty in the old English law? Is there any effective threat now, in the English law or in ours?

What do you think of this author's arguments pro and con on the question whether suicide is still a crime: suicide is no crime because it is not punished, and suicide is a crime though not punished? How would you restate these arguments in terms of standards and means of effectuation?

4. A generation ago the nature and purpose of tariffs on the importation of foreign-made goods was much debated. On the one hand it was contended that these tariffs should be used for purpose of revenue only. On the other hand it was argued that these tariffs should be made sufficiently high to protect American industry and labor against competition with the products of other countries where living and working standards were relatively low. How would you restate this problem in terms of methods of effectuating standards?

¹See sec. 2-35, last paragraph.
²Miller, Criminal Law 272 (1934).
Sec. 2-38. Enforcement of commands by penal threats. We have already discussed the use of penal threats to deter A from doing forbidden acts. Such threats are also used in an opposite sense, to coerce A to do obligatory acts. A is commanded to register for the draft or to file an income tax return, and is threatened with fine or imprisonment if he fails to do the act prescribed. Witnesses are required by law to appear and testify when properly summoned by court order. If the witness fails to appear or refuses to testify he may be punished by fine or imprisonment. If A assumes certain obligations by contract he may likewise be penalized for failure to perform them. For example, if A agrees by valid contract to convey his farm Blackacre to B, his obligation to do so may be enforced by threat of exaction of damages for breach of contract or by threat of imprisonment for contempt if he refuses to comply with the court’s order to make the conveyance promised.¹

Sec. 2-39. Government spending and the effectuation of standards. You will not see the processes of effectuating standards in proper perspective unless you see them in relation to the total functions of government. L has at his command the fiscal powers of the state, the power to tax and the power to spend public money, as well as the powers of creating standards of behavior and of providing machinery to make them effective. The fiscal powers are just as important as regards the effectuation of standards as are the power to define standards and the power to create enforcement machinery. Indeed all these powers are interlocking and interdependent in their operation.

Tax monies furnish the sinews of enforcement and the means of effectuation in other ways. To make standards effec-

¹ The damage remedy is much the more common as you will find in your courses in Contracts and Equity. Both remedies have a coercive tendency as regards A. Compare what was said in sec. 2-34, note 3, regarding the deterrent effect of the threatened exaction of compensation for tort damages.
tive, officials must be provided and paid. When a new standard of action, prohibitive or obligatory, is being considered, L must weigh its probable financial cost as well as its desirability as such. If he is about to create a liquor prohibition law or to establish an income tax law, L will probably have to provide for an increase in the number of police and other officials in order to insure the effectiveness of this new standard of behavior. He will have to lay additional taxes to meet new costs. At some point the financial burden will be regarded as too heavy, and the legislative proposal will be modified or abandoned. And the matter is not always thought out thus clearly beforehand. A law is sometimes passed with vicious looking teeth in it; but, when L considers the machinery of enforcement he is seized by a fit of economy. As a result the funds necessary to administer its provisions and police its operation are not forthcoming and the law falls flat. Which all goes to show the essential dependence of law enforcement on financial considerations and of lawmaking powers on fiscal powers.

In everyday life prizes and premiums play an important part in the motivation of behavior. Probably offers of reward, and other advantages to the actor, are as common devices for obtaining socially desirable conduct as threats of penalties. Willie is induced to act as often by promise of a soda as by fear of a spanking. To some extent L also offers rewards for legally approved behavior, and here again his fiscal powers become important because it is through them that he obtains the means of so doing. He offers a reward to persons who furnish information regarding the criminal conduct of others; he offers bonuses and subsidies to persons who produce certain kinds of goods, e.g., wheat, cotton, or potatoes; he offers special advantages to persons who enlist in

1 We have already noted how taxation may be used to achieve the same objectives as prohibitions coupled with penalties (sec. 2-36). This fact also shows the close interconnection of fiscal and regulatory powers.
the armed services; and he offers tax exemptions to certain charitable enterprises such as hospitals and colleges. These are all ways of effectuating standards of approved behavior.

This type of "bought" behavior is closely related to behavior which is made legally obligatory. Both are socially needed types of action. The one type is induced by benefits offered, the other by penalties threatened. Obligatory acts are those that are deemed by L especially important and which are therefore commanded and coupled with strong sanctions. Where L does not feel that it is necessary or feasible to enforce unqualified commands, he leaves the act to A's discretion and offers a premium to A for doing the act. Which mode of inducement is used will depend on various circumstances. Thus, if service in the armed forces is deemed sufficiently pressing, men may be required to enter the forces by compulsory draft coupled with penalties for failure to register and serve. But, in times of less pressure, men may be induced to enlist by promise of high pay and other advantages. Again, though it may be important that the farmer raise certain crops it would hardly be practical for the government to command him to raise them and threaten him with penalties for failure to do so. Instead the government allows him to raise what crops he will but offers him a subsidy for raising the crops desired. Accordingly we must realize that obligatory acts do not stand as a class apart. They are one type of act which L views as socially desirable; they stand alongside other types of favored acts which L tries to induce A to do by assuring him of special benefits.

Sec. 2-40. Indirect methods of effectuation—education. The control of the purse also gives L many ways of controlling behavior indirectly. Social welfare measures may be undertaken. Slums may be cleared and housing provided at public expense; parks and playgrounds may be established
for wholesome recreation; old age pensions and unemployment compensation may be set up to guarantee the individual against financial need; the public health may be protected in various ways; medical service may be provided for indigent individuals. All such measures tend to reduce the pressures toward illicit behavior, due to economic need or unhealthy living conditions.

But more important than other measures which L may adopt is a system of education at public expense. We have already spoken of the importance of law-abiding habits in the community. The state, through schools and other public agencies may take a hand in building such habits into the individual.¹ This at least is the theory of our prevailing system of popular education. It is intended to implant in the child both available knowledge and approved behavior patterns. Of chief interest to us are the latter; the child can be brought up with sound attitudes and ideals, with settled notions of sportsmanship, honesty, democracy, and consideration for his fellows. All these attitudes and ideals contribute directly or indirectly to law-abiding behavior. In this sense education is to be viewed as a long-range method of controlling behavior, as contrasted with penal threats and offers of reward which are used in the immediate inducement or deterrence of action.*

¹ To be sure, the state with all its devices plays only a secondary part in the training of the child. Parents play the leading roles; and are backed up by such social institutions as the church. And when we speak of good habits we must not forget that threats of penalty and offers of reward have a place in habit formation. When sound behavior has become habitual, penalties and rewards become virtually unnecessary. But the course of proper training like "the course of true love never did run smooth"; in the process of habit building, penalties and rewards and physical force have always had a part.

* (I.R.) "Effectuation" and "enforcement"—a note on terminology. Effectuation of standards is commonly treated in terms of enforcement, and enforcement is taken to mean deterrence or compulsion by force or by penal threats. This treatment of the subject requires a word of caution because it results in a wholly penal conception of the effectuation of standards. It gives an incomplete view of the motivation of A's acts and of the ways of making standards operative. It involves a tacit assumption that A's acts are controlled exclu-
Sec. 2–41. Maintaining standards for effective acts. By and large, standards for effective acts are established by L in order to serve the needs of A. These standards are methods by which A can achieve desired results. L examines the usual attitudes and objectives of A and tries to furnish convenient methods of satisfying A’s desires.* A wants to acquire chattels and L provides standard acts through which A can acquire them. A wants to transmit his property to relatives and friends at death, and L establishes a testamentary act by means of which this desire can be accomplished. A wants to obtain advantages through the co-operative acts of other persons, and L makes this possible by providing standard forms

sively by force or threats and that legal standards are effectuated wholly by these means. As a matter of fact, the lawmaker must rely largely on existing law-abiding habits of A as well as legal threats, to motivate A’s action (sec. 2–31). He may also rely on the offer of rewards or benefits to stimulate the action of A in desired directions (sec. 2–39). And finally, throughout a large and important area of human behavior, the lawmaker may rely on long-range training to direct A’s behavior into desirable channels (sec. 2–40). All these devices must be added to penal threats and physical force when we are listing the means and methods of controlling behavior, and all fall outside of a penal theory of effectuating standards.

You will see, therefore, that a purely penal conception of the effectuation of standards is open to objection; it gives an incomplete and even misleading view of the motivation of behavior and of the methods which are used by the legal system to effectuate standards. You will also see why I prefer to speak, as a general matter, in terms of effectuation rather than of enforcement of standards. Enforcement is an adequate and convenient term when we want to refer to effectuation through force or threats; but it is not as broad a term as effectuation; and enforcement can not be safely used where it might be understood to include the whole ground covered by the broader term.

The penal theory of the operation of the legal system has been associated with, if it is not an outgrowth of, the old notion that the exclusive functions of the law are to command and to prohibit. This long-standing association of penal theory and legal function was one reason why I went to so much pains to point out earlier that law is concerned with effective and permitted acts as well as prohibited and obligatory acts. When we see this, we are also ready to appreciate the roles of existing habits and the creation of new habits and the role of premiums and rewards, as well as threats of penalties, in the effectuation of legal standards.

*(I.R.) To be sure, forms for effective acts are sometimes antiquated and obstructive rather than helpful. They are not always framed or maintained with the clearly conceived purpose of serving the needs, or following the habitual practices, of the typical actor. However, the existence of nonfunctional or obstructive forms represents mainly a blind retention of the traditional, without critical consideration of its utility. The retention is not strictly inten-
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of contracts and other legal transactions which A can use to obtain these desired advantages.

Usually L does not undertake to induce A to do the effective act nor does he endeavor to discourage A from doing it. The act is ordinarily permitted and discretionary as well as effective. Whether the act is performed or not depends on the existing self-interest of A and not on any legally stimulated motivation. So far as the law prescribes the purpose for which an effective act may be done or the manner in which it may be done, the common sanction is failure of effect. If A attempts to accomplish an unlawful purpose through an effective act, as where he enters into a contract in unreasonable restraint of trade, his contract is illegal and unenforcible. Likewise, the sanction for failure to comply with legal provisions prescribing the way the act is to be executed, is ineffectiveness. For example, if the law requires that A sign his will and have his signature witnessed by two persons, his will is a nullity if it is witnessed by only one person. In both the case of the illegal contract and the case of the defective will, A fails to comply with the terms and conditions under which legal services are tendered and the result is that the services are withheld.

However, there is no reason in the nature of things, why the lawmaker must adopt an attitude of neutrality toward the act which is effective.¹ There is no reason why he cannot combine effectiveness with sanctions of various sorts. There is no reason why he cannot make an act effective and forbid

ternal, but rather results from inattention or inertia. The statement of the text expresses what L should do in the establishment of patterns for effective action. Whether or not L's action or nonaction always produces this result is another question. If a discrepancy exists it is merely another instance of the discrepancy between the ideal and the actual in the legal processes.

¹ In general, the legal system also adopts a "hands-off" policy toward permitted, discretionary, and ineffective acts; it does not punish or reward them; it does not seek to deter A from doing them nor does it try to encourage him to act. The legal attitude is neutral or indifferent. For this reason it does not seem necessary to discuss further the relations of sanctions to these types of acts. Nothing essential would be added to what is said in this and the preceding sections about the operation of sanctions.
it too, or why he cannot make A’s act effective and also command A to do the act. If the lawmaker sees fit he can declare an act effective and at the same time try to deter or encourage the actor who does it. This is all to say that effectiveness is but one of several types of consequences which L may attach to the doing of an act and that the several types of consequences are not mutually exclusive. In fact, in earlier sections it was pointed out that effectiveness and other consequences are not infrequently combined. I refer again to the following:

(1) The wrongful seizure of another’s goods which is effective for certain purposes even though it is prohibited;
(2) Filing an income tax return and registration for the draft, which are effective acts and at the same time obligatory;
(3) Enlistment in the army which is an effective act but which is favored by special inducements such as high pay, etc.;
(4) Engaging in the liquor business—a series of effective acts—which may be discouraged by various restrictions and tax burdens.

Sec. 2-42. Problems. I. Consider the provisions of section 1092 of the Civil Code of California (enacted 1872): A grant of an estate in real property may be made in substance as follows:

“I, A B, grant to C D all that real property situated in (insert name of county) County, State of California, bounded (or described) as follows: (here insert description, or if the
land sought to be conveyed has a descriptive name, it may
be described by the name, as for instance, 'The Norris
Ranch.')

"Witness my hand this (insert day) day of (insert month),
18—.

"A B."

How would you interpret these provisions in relation to the
discussion in section 2-27 above?

2. The 4th section of the Statute of Frauds enacts that:

"No action shall be brought . . . upon any contract or
sale of lands . . . or any interest in or concerning them . . .
unless the agreement upon which such action shall be brought,
or some memorandum, or note thereof, shall be in writing,
and signed by the party to be charged therewith. . . ." ¹

This section obviously makes writing and signature by the
party to be charged requisites of a binding contract for the
sale of land.

What is the effect of the lack of these formalities?
Would you regard this effect as a penalty for not using
writing?

3. P swept manure from the street into piles intending
to haul it away on the following day. D, however, hauled
it away before P returned to get it. In a suit to recover the
value of the manure the court held that P had taken posses­
sion thereof in a sense sufficient to be entitled to recover the
value of the manure from D. ²

How would you characterize P's act of sweeping the ma­
nure into piles? How does the law figure in the problem?

Suppose P had only decided that he would sweep up and
haul away the manure the next day; and that D had swept
it up and taken it away as he did, knowing of P's decision.
Would the result have been the same? Why?

¹ This is a celebrated statute first enacted in England in 1660 and adopted
in substantially the same words by the various states of the United States.
² Haslem v. Lockwood, 37 Conn. 500 (1871).
4. Informers are frequently offered inducements by law to furnish information leading to the conviction of criminals or to the recovery of taxes and other money due to the government. For example, at the present time, the federal government offers to pay a certain percentage of the amount recovered from A who fails to make a correct income tax return, to B who gives information leading to such recovery. Note here that four important acts are involved:

(i) The legislative act of creating a standard applicable to A.

(ii) The act of A (filing a return) required by the legal standard.

(iii) The offer of a reward to B for giving information.

(iv) The act of B in giving information.

What is the ultimate act which government is trying to induce? Would you regard the offer of a reward to B as a method of enforcement? How does this offer appear to B? How does this offer differ from a subsidy offered to the farmer for raising certain crops?

Why not simply command everyone (B) who has information regarding tax evasion, to furnish it to the proper authorities?

5. When A drives his car recklessly and collides with a car which is being driven properly and carefully by B, what standard is involved? Suppose that B's car is damaged to the extent of $25, but that it will cost him $50 for fees and costs to pursue a lawsuit to a conclusion? How would you criticize this situation in terms of motivation of acts? Of effectuation of standards?

6. Consider the following provisions of the Michigan statutes regarding wagers:

"All notes, bills, bonds, mortgages, or other securities or conveyances whatever, in which the whole or any part of the consideration shall be for any money or goods, won by play-
ing at cards, dice, or any other game whatever, or by betting on the sides or hands of such as are gaming, or by any betting or gaming whatever, . . . shall be void and of no effect, as between the parties to the same. . . .”

“Any person who by playing at cards, dice, or any other game, or by betting or putting up money on cards, or by any other means or device in the nature of betting on cards, or betting of any kind, shall win or obtain any sum of money or any goods, or any article of value whatever shall, if the money, goods, or articles so won or obtained be of the value of fifty dollars or less, be guilty of a misdemeanor. If the money, goods, or articles so won be of the value of more than fifty dollars such person shall be guilty of a misdemeanor, punishable by imprisonment in the county jail for not more than one year, or by a fine of not more than five hundred dollars.”

“Any person who shall lose any sum of money, or any goods, article, or thing of value, by playing or betting on cards, dice or by any other device in the nature of such playing or betting, and shall pay or deliver the same or any part thereof to the winner, and shall not, within three (3) months after such loss, . . . , prosecute with effect for such money or goods, the winner to whom such money or goods shall have been so paid or delivered, shall be guilty of a misdemeanor, punishable by a fine not exceeding three (3) times the value of such money or goods. Such loser may sue for and recover such money in an action for money had and received to the use of the plaintiff. . . .”

What is the general standard sought to be effectuated here? Can each of these sections be regarded as making provision for a method of effectuation?

7. *Thompson v. Commonwealth.* Opinion of the court by Judge Bennett:

“The appellant was convicted of the crime of robbing J. R. Barnes. The money that the appellant is accused of robbing

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6 13 Ky. L. R. 916 (1892).
said Barnes of, was won by Barnes from the appellant that evening at an unlawful game; and the appellant, thereafter, presented his pistol on Barnes and compelled him to return him the money thus won.

"Under our statute the title to the money won by Barnes did not pass to him or from the appellant; nor did the right to its possession pass to Barnes as against the appellant.

"It is a uniform rule that a person is not guilty of stealing that that belongs to him and to which he has a right. Robbery is larceny, accompanied by violence, and putting the person from whom the property is taken in fear. Here the fact that the appellant was entitled to the money, and Barnes’ possession of it was not rightful as against the appellant, stripped the appellant’s act of feloniously taking the property of another with the fraudulent intention of permanently depriving the owner of it.

"The judgment is reversed, and the cause is remanded for further proceedings consistent with this opinion."

What method of effectuating an antiwagering standard does this decision allow?

8. Suppose the state adopts a policy of trying to reform the persons confined in its prisons. Where would its efforts along this line fit into our scheme of methods for effectuating standards?

Uses of Standards to Guide Action *

Sec. 2-43. Uses generally—use by lawmaker (L). We have now examined the standards applicable to A’s acts and the ways in which these standards are effectuated. There remain for consideration the intentional uses of these standards to guide action. How are they used and by whom? How does the lawmaker use them? How does the actor, A, use them? What do officials do with the standards? And the legal

*(I.R.) The uses of standards to guide action will be discussed further in chapter 3, “Standards for Official Acts.” The division of material between that chapter and this is largely dictated by considerations of convenience in teaching.
counselor? And the student of Law? The discussion of these questions will occupy us in the next several sections.

The discussion of the use of standards to guide action will follow closely what has already been said about the use of language for the purpose of guidance. This is not remarkable inasmuch as standards are patterns in verbal form and any use of a standard is a use of language. The creation of a standard is a directive use of language and the other uses to be considered are all responses or reactions to what the lawmaker has declared as a standard.1 First, then, of the lawmaker's use of standards.

The lawmaker, L, is in the position of a speaker. He issues verbal directives for the guidance of others.2 He uses standards instrumentally, to control the behavior of others. He creates them as one might devise tools for particular purposes. He sets them up in order to achieve results which he wishes to bring about.** These observations hold equally of all standards; whether for obligatory, prohibited, effective, permitted, discretionary, or ineffective acts. All standards alike are related to a maker as his handiwork; all are employed to guide the activity of others, by furnishing them with verbal patterns to follow.

Sec. 2-44. Use of standards by A and his counselor (C). The standards with which we are now concerned are addressed to the individual actor, A. He is in the position of hearer, and is intended to shape his acts by reference to the

1 In addition to standards, which are directive uses of language (sec. 1-08), we shall also have occasion to speak of habit patterns, which are informative uses of language (sec. 1-11). These observed patterns of behavior are used primarily in predicting the acts of others. Their discussion does not fall strictly within our title, "Uses of Standards to Guide Action"; but an understanding of their role is essential to our present job. See sec. 2-46 below.

2 This is not the place to go into the ways in which standards are created; the modes of their creation are reserved for detailed discussion in chapters 4 and 6. It is only essential for you to note at this point that a standard is produced by a lawmaker for the guidance of others.

** (I.R.) See sec. 2-01, note * above.
standards. In this sense they are standards for A's use; they cover, in more or less detail, important acts which he may do or think of doing. They are patterns which he can use in planning action of any kind. They tell him when and how he must act; they tell him what he must not do, what he must do, what he can do effectively, and so on.

When A is planning to act he will probably think first of safe lines of conduct; he will use standards for prohibited acts as criteria of what he must avoid, and use standards for permitted acts to determine how far his range of activity is free, and in that sense, safe. When he wants to know whether he must act or not, the standards for discretionary acts will be instructive. When he is undertaking obligatory action he will be anxious to fulfill legal requirements in all respects; he will use the standards as models with which to compare his own proposed act to make sure that it satisfies all requisites. And when he is aiming to do an effective act, he will treat the standards for effective acts, and their opposites, as check lists against which to measure the act he is doing so that he will omit nothing essential to its effectiveness.

But the legal system presents a vast arsenal of standards applicable to A's conduct, an arsenal so large that it is quite impossible for him to be familiar with them all. Many of these standards are set forth in technical legal terms which A cannot understand. Many of them are very complicated or indefinite in nature so that A does not know how to interpret or apply them. The result of all these factors together is that A frequently cannot apply the appropriate standards without assistance. He cannot act safely and effectively on his own and he cannot determine for himself the significance of acts that he has done. Whether he is trying to plan action or to determine the consequences of action already taken, he must be aided by an expert in the law, a legal counselor.

This legal counselor, whom I shall henceforth call C, is a man trained in the art of dealing with legal standards. He
is familiar with many more of the established standards than the ordinary man is. Yet C does not know all the standards that are in the law books; not even learned judges do, nor professorial oracles of legal doctrine; there are far too many standards to be known and remembered by anyone. C's value to his client lies quite as much in his mastery of legal method as in his knowledge of the law. He knows how and where to find the relevant legal standards; he knows how to read a statute and how to analyze a case; he knows how to interpret and apply standards to cases; and he knows the standards and methods by which courts and other official agencies operate. In short, C is familiar with the legal processes; he can "reason like a lawyer" and find his way about in the legal labyrinth.

With his knowledge of legal standards and his experience in their use, C is prepared to aid A in planning action. He steers A's activities along safe and effective lines. He warns A away from the rocks and shoals of forbidden action; he advises A as to the best ways of bringing about desired results. For instance, such questions as these may have to be determined: Is it better to organize A's business in the form of a partnership or in the form of a corporation? What advantages and what dangers are involved in each form of organization? Or again, is it better for A to convey Blackacre to his son by deed in A's life, or by will to him at A's death? Is it better to convey to the son outright, or to set up a trust and allow the son to have only the income therefrom? The answers to such questions will depend largely on relevant legal standards and the way they are applied. The answers will involve the weighing of A's general objective successively with reference to possible standard acts and their consequences, and the making of a choice between acts on the basis of what will most nearly accomplish A's objective.

Frequently A requires more than the advice of a lawyer; he has to have the latter's help in the actual doing of acts
which will conform to standard. He may require the lawyer to do acts on his behalf, and he may require the lawyer to draft papers for him. When A embarks upon a lawsuit, he needs the knowledge and skill of an advocate who will draw and file pleadings on his behalf and carry his case through the intricacies of legal procedure. When A wants to join with others in the organization of a corporation, he requires the services of a legally skilled draftsman to prepare the necessary papers for himself and his associates to execute. Even when A knows that he wants to dispose of his estate by will and knows whom he wants to make his beneficiaries, A needs for safety's sake to have a lawyer draw the instrument in assured legal terms and form.

But only too often A does not plan his action in reference to applicable standards; he fails to evaluate his act beforehand in terms of legal patterns of conduct. He drives at a reckless rate of speed and strikes and injures B, and then worries about consequences. He enters into a contract with X without proper advice or deliberation, and later comes to appreciate the improvidence of what he has done. In such cases, standards first enter A's calculations when he realizes that he has landed in trouble and tries to take stock of his situation. Is he liable to B for damages? Has he any defenses? Is the contract with X binding? Legal standards furnish A with answers. Moreover, standards furnish him with patterns for further possible acts by which he can extricate himself from his present difficulties, such as settling or litigating the respective claims of B and X.

And incidentally, it is of special interest to us as lawyers that it is just at this point—where A must have answers to questions like these—that he is apt to call on his legal counselor to help him, to decide on the significance of what he has done or to suggest ways of getting out of trouble with as little pain as possible. When he is threatened with prosecu-
tion or lawsuit or bankruptcy, A calls upon C. C gives his opinion on the facts as A states them, and decides whether A has failed to do what he should, has done a forbidden act, has exceeded the limits of permissible action, or has executed a legally effective contract.\(^1\) If the answer to any of these queries is in the affirmative, C must decide what the effects of A’s acts are and then advise him what to do. When this point is reached, C finds himself once more engaged in planning future acts. He is using his knowledge of legal standards and legal procedures as a basis for guiding A’s acts. Usually such a situation presents to C and A a choice of courses of action. In the case of the collision, A may plead guilty to a criminal charge or may elect to go to trial. He may admit his liability for damages for reckless driving and pay the injured party; he may decide to fight the case, especially if there is doubt as to the facts; or he may deny liability but try to make a settlement of some kind. A may have to consider similar alternatives with reference to an improvident contract: performance, defending a lawsuit by the other party, or even bankruptcy. C advises A in his choice in the light of the consequences which are applicable to the various alternatives.

Sec. 2–45. Use of standards by O. The standards which we are considering are addressed immediately to A, the individual, and are intended to guide his behavior. But these standards are also of great interest to official agencies (which we shall designate generically by "O"): the policeman, the prosecutor, the court. Their official acts are largely concerned with steering or pushing A’s activities along approved lines of behavior. By the same token their acts are tied to his acts and involve important uses of the standards applicable to his acts.

\(^1\) In such a case, C must size up the situation in terms of existing standards in about the same way that the judge does. See the next following section.
First, the standards which are applicable to A’s acts also define the occasions when O, the agent of the social giant, is to move. In this sense, the standards which are directed primarily to A carry secondary messages to O; the latter is to act if A acts in certain ways. When A commits a crime, O must see that he is punished; when A commits a tort, O must aid A’s victim to obtain compensation; when A does an act which the legal system has undertaken to make effective at his behest, O must carry out A’s verbally expressed desires according to the legal assurance which was given.

The use which the court makes of standards applicable to A’s act may be taken as typical of the use of such standards by officials generally. The court must decide whether A’s act fits a particular standard and hence calls for action on its part. The court uses the standard as the doctor uses the standardized picture of disease in medical diagnosis. The doctor checks off the features of his patient’s condition against the list of symptoms which constitute a disease syndrome such as typhoid. He notices perhaps just one symptom, e.g., a fever, belonging to the typhoid picture; this suggests that the rest of the symptoms may also be present. He then examines the patient to determine whether the other symptoms can be found, and if they can, he proceeds with treatment for typhoid. If he fails to find the other symptoms, he compares the case with another disease picture, and another, until he finds a standard picture which it fits. And the court proceeds in a similar way. It compares a presented case with a legally established behavior pattern to see if it fits.

1 As we have not yet discussed the separate functions of judge and jury, I speak here of the court as a unit embracing both. The functions of judge and jury will be treated in chapter 3.
3 An appreciation of the judicial method of applying standards to cases, here analyzed and illustrated, should be helpful to you in understanding the cases which you read in your casebooks. Most of what appears in a judicial
Suppose, for example, that A is charged with larceny (theft) of an automobile. It is shown that he took an automobile which he saw standing on the street to use it for a “joy ride” of an hour or two. Can he be held for the crime charged? Larceny is defined as the act of taking and carrying away the goods of another with intent to deprive the owner permanently thereof; this definition fixes a standard criminal act for the court to apply. A, in our supposed case, would not be guilty of larceny, because one of the elements of the crime is lacking; he did not intend to deprive the owner permanently of his automobile. However, the prosecuting authorities might find another standard pattern of crime which A’s act would fit, e.g., unlawfully driving away an automobile, and might then prosecute him for the latter offense. When and if the court finds that A’s act fits a legally prescribed pattern, it acts: it metes out to him the legally specified consequences of what he has done, quite as the doctor applies the remedy which the patient’s case demands.

So much for the first and most general use which O makes of a standard applicable to A’s act: to decide whether an occasion is presented which calls for action by himself. But there is a second important use which O often makes of this kind of standard. He uses it in planning what he shall do as well as in deciding whether he shall act. He treats the standard as the delineation of a goal for his own action. This is just another way of saying that O recognizes it as his task decision is an exposition of the reasons for applying or not applying a particular standard to a presented case.

Thus far we have referred chiefly to the standards which are found in statutes; many of the standards which decisions involve are found in the case law rather than the statutes. We shall have a great deal to say about the case law later on. But for the moment we are interested only in the method of applying standards and this method is essentially the same whether the standards be found in the statutes or in the case law.

Other incidental uses of standards applicable to A’s act will be mentioned in chapter 3. These uses seem to be less closely associated with A’s act than with O’s, and are therefore reserved for discussion along with official acts.
to effectuate the standard. It means that the remedy that O gives follows the lines of the standard applicable to A's act. Consider again, for example, a case previously mentioned, where A agreed by a valid contract to convey his farm Black-acre to B. If A refuses to convey, his obligation may be enforced by a court's order to make the conveyance agreed. In this case the court shapes its act, i.e., order to perform, so as to bring about the obligatory act which a legal standard imposes upon A. This standard marks out for the court what it shall put in its order; and the order is an act which makes the standard effective in this particular instance.* Suppose, for another example, that O, a policeman, arrives on the scene when A is robbing B. O stops the robbery and takes A into custody. O does not have to wait until a robbery is complete; he is entitled to act when a robbery is in process; he acts to prevent its consummation. In this sense the standard fixes the objective of O's act (as well as the occasion for it) and this objective in turn defines the kinds of acts which O can appropriately do, such as arresting A, or frightening him away, or pursuing him, or killing him if necessary.

Not all remedial acts by O are so obviously tailored to a standard applicable to A's acts as are the two remedies just mentioned. Most remedies are mere substitutes for what a standard calls for, as where A is required to pay money damages for a barn of B which A has wrongfully destroyed. The property is gone and nothing can restore conditions

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* See sec. 2-38.

* (I.R.) My purpose in citing remedial examples in this and the following paragraph, is very limited. For this reason I do not attempt to state all the "ifs" and "ands" of the law applicable to the remedies mentioned.

6 This case is also interesting because the standard has to be applied to an act by A which is underway rather than complete. This change in the facts makes no real change in the use which O makes of a standard. The standard is used as a basis of comparison with A's activity whether that activity be complete or only begun. The difference in the time at which the standard is applied to A's act does not affect the method of applying it to measure the quality of A's conduct.
which should now exist. However, so far as O acts to enforce or effectuate a standard, O is necessarily guided by what the standard provides. He must consider the standard in order to devise a suitable substitute. He must consider the nature and value of B's barn which would now be standing but for A's violation of a standard, in order to decide how much A must pay B by way of damages. To take another example, a legal standard requires A to support his child according to its need and his own financial ability. If A fails in his duty to provide shelter and necessaries for his child, a court will, in a proper suit by those who furnish these things, compel A to pay therefor. The court's judgment in this case is intended to achieve as nearly as may be the results which the legal standard requires. The amount of bills chargeable to A will be measured by reference to the child's needs and to A's ability to pay, just as the legal standard measures A's obligation to support. In other words, the remedy follows the lines of the standard of activity required of A.

Sec. 2-46. Use by A of standards applicable to B—reliance on B's habits. Our ubiquitous individual, A, frequently has occasion to apply standards to the acts of another individual, B. This results from the fact that B's acts affect A in various ways and he must determine the significance of B's acts in

Similar observations hold of criminal penalties (see sec. 2-35 above). The imposition of a penalty does not restore, in fact it does not even approximate, the status quo ante. The murderer's victim cannot be revived by anything that is done to the murderer. And yet the size and character of the penalty is always affected in some degree by the character of the standard which is violated. This is true whether we are concerned with the penalty imposed by law or the penalty imposed in the individual instance by the sentence of a court.

Many of A's acts affect other persons. For this reason, the standards applicable to his acts are important to them as well as to officials and to A himself. These persons use the standards in essentially the same way that officials use them in deciding whether to act and what to do.

Compare sec. 2-46, where I mention the reverse situation, in which A applies standards applicable to B's acts.
relation to his own undertakings. When A applies standards to acts done by B, he uses the standards in essentially the same way as officials use them who are deciding whether to act and what to do. A, who is loaning money to B, asks and answers the question whether B has executed his promissory note in due and proper form; A, who has been injured in a collision with B, asks and answers the question whether B's conduct fits the standard for a negligent act in order to determine whether to sue B for damages; and so on.

But A's concern with acts of B is not confined to acts which B is doing or has already done; it is not confined to questions whether B's actual acts measure up to prescribed standards. A often wants to figure out what B is going to do at some future time. He needs to predict the future behavior of B. As a basis for prediction, A relies not so much on standards as on another kind of behavior pattern, the pattern which summarizes and describes B's habits of action. A knows, as we all do, that human behavior manifests certain constancies which enable him to forecast the ways of future action. These constancies are the observed patterns of the past behavior of B. When A is in possession of such observed patterns of behavior, he is in a position to prophesy the lines which B's future action will take. He knows what to expect from B.*

Of course, A may, and sometimes does, use the prescribed standards of the community as a basis for predicting B's behavior. This A is able to do because he can assume that

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1 Notice that here we are returning to a distinction earlier made—the distinction between directive and informative uses of language. (secs. 1-07 to 1-12.) There we looked at this distinction primarily from the speaker's viewpoint. Here we are interested in A's utilization of directions and information as guides for his action.

* (I.R.) This section, regarding actual behavior of B and A's forecasts of B's behavior, parallels a later section (3-32) relative to O's behavior. The statements of the text are intended to express the views of a miscellaneous group of modern writers often lumped together under the name "realists." In sec. 3-32, note *, will be found a short bibliography of items representing and discussing the realist viewpoint.
STANDARDS FOR THE INDIVIDUAL'S ACTS

B, like other members of the community, has habits which conform to these standards. Thus, A may take for granted that B will pay his debts, and drive with proper care. But what A must not forget in such a case is that he is resting his calculations on assumed law-abiding habits of the community, and that he is also assuming B's habits are like those of the rest of the community in this regard.  

If standards covered every act which B might do, and if standards were always effectuated to the letter, A might in all cases rely upon legal standards as bases of predicting B's conduct. A might simply look to the applicable legal standards and say, "This is what legal standards prescribe for B, and I expect him to behave accordingly." But most of B's conduct falls beyond the range of coercive legal standards. Most of the acts which he may do are neither prohibited nor obligatory; they are privileged, or discretionary, or both. When A wants to formulate a prediction of what B will do in this nonregulated area, A can only rely on B's habits and B's declarations. Thus, if A as host issues a dinner invitation to B, he relies upon the verbal acceptance of his invitation. B is not legally obliged to come, even if he has promised to.  

2 Constancies of observed behavior may be: 1. patterns which describe behavior of persons generally (any B), or 2. patterns which describe the behavior of a particular person (specific B). Of the first type is the observation that businessmen usually pay their debts. Of the second type is the observation that a specific B is a conscientious person and always inclined to perform his duties. Both types of pattern put the observer in a position to predict future action by a specific B. Both are patterns based on past conduct. Both are general, the one a generalization of the conduct of the many, the other a generalization of B's modes of behavior. 

Also included in the factors on which A relies are the habits of officials. Just as A assumes that B, like the rest of the community, habitually performs according to standard, so he makes this kind of assumption about O. He assumes that O's habits of action conform to prescribed standards. This factor will be considered later, in sec. 3.32.  

3 See secs. 2.05, 2.07 and 2.11, regarding the unregulated areas of individual action. We have already considered the importance of the actor's motives for action in these areas. At the moment we are interested in bases of prediction, and are therefore concerned with B's habits rather than his motives. Nevertheless, it is worth noting that motives other than those legally
However, A knows that guests usually make a practice of coming when they say they will. He knows that B is accustomed to keep his promises, and he has B's declaration of intention to come. And again, if A is a dealer in men's suits, and is about to lay in a stock for sale to the spring trade, he procures a stock based on his knowledge of the buying habits of his clientele. He makes his best guess as to what, and how much, that clientele will want. As none of his clientele is obliged to buy from him, A can only count on their habits of so doing.

Furthermore, even where legal standards are applicable, B does not always conform to them. There is always some divergence between prescribed standards and the forms which B's behavior actually takes. Indeed, A, who is planning action and trying to forecast what B will do, may find observations of B's past behavior more useful in making these calculations than he does the prescribed patterns of the law. Thus, if A is a banker and about to loan money to B, he probably counts more on what he knows about the habits of businessmen like B in paying their debts, or on what he knows of B's character in particular, than he does on the abstract legal requirement that B must repay the loan.

What is said of the basis for A's predictions and calculations applies no less to those of his counselor. The counselor draws heavily on his fund of experience with the actual behavior of clients, witnesses and opponents. Trying cases, drawing papers, advising clients, are not just matters of knowing induced may determine B's conduct. B may not want to accept, or may not want to go after he has accepted; but social pressures such as fear of group disapproval or of deprival of business may coerce performance. Whatever the reasons, A may count on his coming.

Popular and business journals are replete with prognostications of future behavior of groups and individuals. Typical is the following calculation of future buying behavior which is taken from *Newsweek* for December 11, 1950: "A General Electric official said, 'The company expects a 25–30% drop in next year's demand for electrical appliances. Higher taxes and prices, credit restrictions, and less residential building would cause the decline.'"
legal standards, or knowing where to find them. The successful pursuit of his professional tasks involves knowledge of people; it involves experience in dealing with people. It involves the ability to predict what people will do. It is hardly less important that the counselor be acquainted with business practices and with the actual ways of life in his community, than that he have knowledge of the legal standards which are applicable to them.

Sec. 2-47. Use by student of law (S). We have now examined characteristic uses of standards by lawmaker, by actor, by officials, and by legal counselor. To these uses, which may be regarded as uses by actual participants in the legal drama, we must add the uses of another class of interested persons who view the operation of the legal system from the outside, somewhat as the theatergoer views the play. This class of observers of the legal scene includes many persons.¹ But I propose to notice only a limited group of them—students of law, whom I shall designate henceforth by the letter S. I have picked the student group for attention because it includes both you and the more experienced students who serve as your instructors. S’s methods of using standards are those which you will employ as you work alone. S’s methods are those which you will employ as you and your instructors

¹ Other serious and significant groups of observers of the legal scene are legal scientists, legal scholars, and legal historians. Their work is most important; but their uses of standards present no features not illustrated by the uses herein discussed. In fact, in most essentials, the uses which scholars and scientists make are like the uses of the student, and the uses of the historian are like applications to past acts which are made by A and O.

Observers include also the ordinary citizen when he is not immediately involved in a legal problem. They include writers and readers of detective fiction who see in legal standards and their applications merely dramatic opportunities, opportunities to portray distortions of law, technical hardships, and clever evasions. This attitude toward legal standards is well expressed in the following publisher’s blurb attached to Arthur Train’s Tutt and Mr. Tutt: “Come Right In! Here Is Your Ringside Seat! Any law case in the hands of Ephraim Tutt, America’s best loved lawyer, is as much fun as a ringside circus.”
analyze decisions together, and apply standards in your various law courses.

Standards are used by S in two distinctive ways; both underscore the fact that he is a nonparticipant in the operation of the legal system. First, S considers how others have applied standards to actual cases. He observes and talks about cases which others have already disposed of. However S is not a mere passive spectator. Though he is outside the legal drama, he is by no means indifferent to what transpires in it. He follows the applications of standards which judges and others make, and does this critically. S may be likened to the drama student who thinks about the action of a play and decides how he would have acted the various roles if he were playing them. S reads the reported case, such as you have in your casebooks, and notes how the judge applied standards to the facts of the case. S then acts in the sense that he makes imaginative applications of standards to the case himself. This imaginative application of standards to cases gives S necessary exercise in the use of standards. He develops skill in the methods of using them and develops his critical faculties as regards their use. This reworking of the work of others prepares him for the day when he will be an actual participant in the operation of the legal machine as counselor, as advocate, as judge, or as lawmaker.

The second distinctive use which S makes of standards is the hypothetical use. He deals with hypothetical acts, hypothetical applications of standards, and even hypothetical standards. He propounds hypothetical cases and tries to find appropriate standards to apply; he makes up supposed case

2 The lawmaker, the actor, the judge, and others can also put themselves in imagination into other roles than those which they are playing. As Hamlet could tell the players how they should speak their lines, any player can project himself into another role. But the fact remains that the legal players are primarily concerned with doing legally significant acts. They do not often find time to look at the operation of the legal system from the outside as S does.
after supposed case to see whether each case fits some existing standard; and he also engages in debate about what the standard ought to be rather than what it is. All this means that S is interested in possible applications of possible standards to possible acts, and not merely interested in actual applications which he sees others make to actual acts. This kind of speculation is not mere idle play, however; it is not a pointless use of standard pictures and imaginary cases. Practice in applying standards to cases is the core of legal training; and a potent legal imagination is the most valuable instrument that a lawyer can have. Practice gives readiness to deal with the ordinary or easy case as it arises; and imagination represents the capacity to deal with the novel or difficult case. Working with hypothetical cases and hypothetical standards greatly expands S’s range of practice; he handles hypothetically many times the number and variety of cases that he finds reported in decisions. And working in this speculative way develops his legal imagination. For these reasons the neophyte in law should give full rein to his curiosity as regards possible standards and their uses, and labor with all the manifold acts and standards and applications that his ingenuity can muster.

Beyond these abstract exercises in the use of legal standards, the lawyer’s training must include practical experience in preparing pleadings, in trying cases, in advising clients, in

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3 The hypothetical use of standards is quite characteristic of S. For this reason I have treated this type of use in connection with S. However speculation is not limited to students of law; all persons who plan action make speculative applications of standards as they plan. The judge, for example, makes such applications as he ponders the decision to make in a particular case; he thinks out possible applications and their consequences; he weighs the arguments for applying this standard or that to the case. In his own planning the actor likewise considers the possible applications of standards to what he is about to do. And the counselor makes similar speculative applications. But the thinking of all these persons is normally limited by the needs of particular situations. They confine themselves to consideration of standards applicable to actually presented cases. S is not so restricted; he is not tied down, by time or purpose, to actual cases. He can and should venture as far as his imagination will carry him into the outer reaches of legal possibilities.
using the library, in drafting instruments. His training must include experience with business usages and with various kinds of people. The necessity for training in these respects has been suggested in the preceding sections where I have mentioned the work and the functions of the counselor. However, I think it will be better to reserve the discussion of these practical phases of a lawyer's training for a later point; they raise questions which we are not yet ready to treat. Sufficient it is for the present to stress the law student's need to learn the traditional methods of using legal standards, of applying standards to cases and of fitting cases to standards. Whatever additional learning may be necessary, a familiarity with these methods is basic in the making of a lawyer.

Sec. 2-48. Problems. The last several sections have indicated the ways in which standards are used by lawmaker, actor, official, counselor, and law student. Consider the standards which are involved in the following problems, in relation to the materials of these sections.

1. A statute provides: "Whoever shall wilfully and maliciously wound or inflict bodily harm upon any person, either with or without any weapon or instrument, shall be guilty of a felony." D is charged thereunder with wilfully and maliciously wounding P. The undisputed evidence at the trial shows that D set fire to a haystack on the farm of X with the intent to injure X; that P was a tramp who was sleeping in said haystack; and that P received serious burns as a result of D's act.

Is D liable for the crime charged? How is the statutory standard used in answering this question? Whose use of the standard is the focus of our interest here?

Suppose another statute of the state provides: "Whoever shall wilfully and maliciously destroy or injure the personal

4 See secs. 2-44 and 2-46.
property of another, shall be guilty of a felony." Would D be liable under this provision? Would he be liable for the wounding of P?

2. State v. McGowan: ¹

"The statute of this state prescribes the punishment of arson, but it does not define the crime. We look to the common law for its definition.

"Arson, by the common law, is the wilful and malicious burning of the house of another. The word *house*, as here understood, includes not merely the dwelling-house, but all outhouses which are parcel thereof. 1 Hale 570. 4 Bla. Com. 221. 2 Russ. on Crimes 551.

"This information charges the accused with burning a dwelling-house and the question in the case, is, whether the building, which was in fact burned by him, was a dwelling-house, within the meaning of the common law on this subject? That it was a dwelling-house, as distinguished from a building of any other kind, is certain.

"The building is described to be one built and designed for a dwelling-house constructed in the usual manner. It was designed to be painted, but was not yet finished, in that respect, and not quite all the glass were set in one of the outer doors. The building had never been occupied, and it was not parcel nor an appurtenant of any other.

"We think this was not a dwelling-house in such a sense, as that, to burn it, constituted the crime of arson. In shape and purpose, it was a dwelling-house, but not in fact, because it had never been dwelt in—it had never been used, and was not contemplated as then ready for the habitation of man.

"Arson, as understood at the common law, was a most aggravated felony, and of greater enormity than any other unlawful burning, because it manifested in the perpetrator, a greater recklessness and contempt of human life, than the burning of any other building, and in which no human being was presumed to be. Such seems to be the spirit of the English cases on this subject, and especially the late case of Elsmore v. The Hundred of St. Briavells, 8 B. & C. 461. In that case,

¹ 20 Conn. 244 (1850).
Bayley, J., in speaking of the building therein described, says, 'It appeared to have been built for the purpose of being used as a dwelling-house, but it was in an unfinished state, and never was inhabited. There can not be a doubt, that the building in this case, was not a house in respect of which burglary or arson could be committed. It was a house intended for residence, though it was not inhabited. It was not therefore a dwelling-house, though it was intended to be one.'"

Where did the court find the standard defined? Why was it not applicable to the case before the court?

Suppose a statute had penalized the act of setting fire to a building. Why would this have been important?

3. Suppose you are an attorney practicing in the state of Michianna. The statute quoted in section 2-28, problem 4, is in force there. You are asked by John Smith to draw a will for him leaving all his estate to his wife, Sarah. You take down from the shelf your book of legal forms and draw the following will according to a form therein contained. In what respect is this will insufficient to show execution according to the requirements of the statute?

I, John Smith, a resident of the city of Ypsi-Ann, county of Washtenaw, state of Michianna, and residing therein at 205 Green Street, being over the age of twenty-one years and of sound and disposing mind and memory, and not acting under duress, menace, fraud, or undue influence of any person whomsoever, do make, publish and declare this my last will and testament, in the manner following, to wit:

1. I direct that my executor hereinafter named pay and discharge all of my just debts and expenses.

2. I hereby give, devise and bequeath unto my beloved wife, Sarah, all my property and estate, both real and personal, of whatsoever nature or wheresoever situated, to have and to hold the same absolutely.

3. I hereby nominate and appoint Bank of Ypsi-Ann the executor of this, my last will and testament.
Lastly, I hereby revoke all former wills and codicils to wills heretofore by me made.

In witness whereof, I have hereunto set my hand and seal this 10th day of September, 1950.

John Smith

The foregoing instrument, consisting of one page, was at the date hereof signed, sealed and published by said John Smith, and declared by him to us to be his last will and testament who at his request have signed our names as witnesses hereto.

Richard Jones
Residing at 1010 Main Street, Ypsi-Ann, Michianna

Henry Brown
Residing at 915 First Street, Ypsi-Ann, Michianna

4. Cochrane v. Moore: ²

Action to try the right to one-fourth of the proceeds of the sale of a horse called Kilworth. The plaintiff Cochrane claimed the entire proceeds under a bill of sale. The defendant Moore claimed a one-fourth interest in the horse by virtue of a prior transaction in which Benzon, the then owner of the horse, purported to give said interest to Moore.

The relevant facts, as they appear in the judgment of Lopes, L.J., and in that part of the evidence to which he attached credence, are shortly as follows:

"The horse was in June, 1888, the property of Benzon, and was kept at the stables of a trainer named Yates, in or near Paris, and on the 8th of that month was ridden in a steeplechase by Moore, a gentleman rider. In consequence, as it appears, of some accident, the horse was not declared the winner, and on the same day, according to the view of the evidence taken by the learned judge, Benzon by words of present gift gave to Moore, and Moore accepted from Benzon, one undivided fourth part of this horse.

"A few days subsequently Benzon wrote to Yates, in whose stables the horse was, and told him of the gift to Moore. But

he did not inform Moore, nor did Moore know of any com-
munication to Yates of the fact of the gift.”

In the following month Cochrane made several large
advances of money to Benzon by way of loans, and finally
Benzon executed a bill of sale of Kilworth and other horses
to Cochrane by way of security for repayment of the money
which Cochrane had advanced.

“It is proved by the evidence of the witnesses, whom the
learned judge believed, that, before the execution of the bill
of sale, Benzon, with the assistance of a friend, Mr. Powell,
was going through the list of horses to be included in the
schedule, and that when Kilworth was mentioned Powell
spoke of Moore’s interest in the horse, and that thereupon
a discussion arose as to what was to be done with it, and that
Cochrane undertook that it should be ‘all right.’ After this
the bill of sale was executed by Benzon.

“On these facts, it was argued that there was no delivery
and receipt of the one-fourth of the horse, and, consequently,
that no property in it passed by the gift. The learned judge,
has, however, held that delivery is not indispensable to the
validity of the gift.”

In the Court of Appeal Lord Justices Fry and Bowen and
Lord Esher, M.R., were unanimous in holding that the
attempted gift from Benzon to Moore was ineffective for the
lack of delivery. Fry, L.J., reviewed the authorities and con-
cluded that according to the old law no transfer of a chattel
whatever was effectual without delivery, and that on that
doctrine of the old law two exceptions had been grafted: one,
the case where the chattel is transferred by deed and the
other, the case of a contract of sale, where the intention of
the parties is that the property shall pass before delivery.
He declared that in these two exceptional instances title may
pass without delivery but in all other cases, including the
case of the oral gift, delivery is essential to the transfer of
title.
However, the Court of Appeal did support Moore’s claim to a one-fourth interest in the horse and dismissed Cochrane’s appeal from the judgment of Lopes, L.J., on the theory that “what took place between Benzon and Cochrane before Benzon executed the bill of sale to Cochrane, constituted the latter a trustee for Moore of one-fourth of the horse Kilworth.”

Here the Court of Appeal mentioned four possible effective acts. What were they? The court considered two verbal acts done by Benzon. What were they?

The court chiefly discussed oral gift; it came to the conclusion that Benzon had not made a good gift of the one-fourth interest in the horse to Moore. Why not?

However the court held that Benzon had created a valid trust in Moore’s favor. Do you think Benzon intended to create a trust? (Of course you have not yet learned what a trust is; but it is not necessary that you should know more than that a trust is an arrangement under which one person holds property for another’s benefit.)*

Not all courts would conjure up a trust as this court did. If you were a legal counselor today for a party (like Benzon) who wanted to make a present of a one-fourth interest in a horse to another (like Moore), what would you advise your client to do?

Sec. 2-49. Summary. The foregoing chapter has been centered on the acts of the individual, A, and the standards which the lawgiver establishes to guide A’s acts.

* (I.R.)

“In the early days, before the evolution of the informal contract, if any one of the formalities requisite for the consummation of a contract under seal was not observed, no contractual obligation whatsoever resulted, regardless of the intention of the parties. In the modern law this is not always so, since an undertaking which fails to become a contract under seal, or deed, for want of observance of some necessary formality, may nevertheless have the force of an informal contract, if the requisites for the formation of such a contract be present.” GRISMORE, LAW OF CONTRACTS, sec. 79.
In the first subtopic we considered the various kinds of acts which are standardized by the lawgiver, and the significance of these acts. Six kinds of standard acts (or standards for acts) were described: prohibited, permitted, obligatory, discretionary, effective, and ineffective, acts. And two ways of stating the significance were discussed in some detail. In the first of these ways, the significance of A’s acts was cast in terms of relations of A and B: duty, right, privilege, discretion, power, and liability. We spent a substantial amount of time in applying these various relational concepts as they are much used in all forms of legal discussion. In the second way, the meaning of A’s acts was put in terms of their effects upon A’s own legal status.

In the second subtopic we dealt with problems of effectuating standards established to control A’s behavior. These were found to be chiefly problems of habituation and motivation. The lawgiver’s aim must be either to play upon habits or motives which A is known to have, or to create habits or motives which will result in action along lines which the lawgiver approves.

In the third subtopic, we looked at standards from the point of view of application. We considered what the lawgiver uses standards for, how A and his counselor use them to guide A’s actions, and what uses are made of standards by various officials and by the student of the law. The methods of using standards in the cases herein presented, are typical of methods of applying standards to acts and of fitting acts to standards. And finally, I have suggested to you that both A and his counselor must rely on established habit patterns of others in their calculations. Success in applying standards in real life depends on the ability to predict the behavior of people; it involves a wide acquaintance with people, their habits and modes of living, as well as familiarity with legal standards and their use.
This second chapter constitutes the first major division of our examination of the structure and operation of the legal system; it is intended to serve as the foundation for all of the rest of our study.