What is this thing called "the law"? Famously, Holmes announced that, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."1 In the century since Holmes wrote these words, much has been written about the soundness of Holmes's claims that the prophecies of judicial decisions just are the law.2 This is not surprising, for the emphasis on law as prediction pervades The Path of Law.3


2 Most famous are the critiques that question what law as prediction could mean to a judge or law applier, since it is nonsense to suppose that law to the judge—especially to a judge of a court of last resort—is a prediction of what that judge would decide. See Ronald Dworkin, Law's Empire 35-37 (1986) (explaining that in prediction theory, the lawyer predicts what a judge might do, and a judge predicts what the "path" of the law is); H.L.A. Hart, The Concept of Law 121-50 (1961); see also Felix Cohen, The Problems of Functional Jurisprudence, 1 Mod. L. Rev. 5, 17 (1937); David Luban, The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's The Path of the Law, 72 N.Y.U. L. Rev. 1547, 1577-78 (1997) (applying Holmes's prediction theory to judges). But if legal theory is importantly a matter of standpoint, see David Miers, Legal Theory and the Interpretation of Statutes, in Legal Theory and Common Law 115, 115-19 (William Twining ed., 1986) (arguing that the aggregate circumstances of a decision maker are an important factor in his or her statutory interpretations); David Sugarman, Legal Theory, the Common Law Mind and the Making of the Textbook Tradition, in Legal Theory and Common Law, supra, at 26, 46-48 (discussing the effect of criticism from legal sources on the precedential value of a case); William Twining, The Bad Man Revisited, 58 Cornell L. Rev. 275, 281-82 (1973) (arguing that the prediction theory may apply to the "bad man," even if it does not work for judges), then it is important to recognize that what the law is may vary with the standpoint of the inquirer, and it may consequently be correct to say that law is prediction from the perspective of the "bad man" even if law is something else from the perspective of the judge.

3 "The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts." Holmes, supra note 1, at 457, 78 B.U. L. Rev. at 699. "[A] legal duty so called is nothing but a prediction that if a man
Most of the commentary on Holmes’s argument for law as prediction, however, has focused either on the deep and controversial jurisprudential claim that prediction *is* law, or on the related and equally controversial claim that the most important perspective on the nature of law is the perspective provided by the so-called “bad man.” Much less attention has been focused on the idea of prediction itself, or on the mechanisms by which a person—good or bad, lawyer or layperson, judge or litigant—might predict what the law will do. My goal here is to look at the process of prediction, initially independent of the jurisprudential status that predictions of judicial behavior might have. When we look closely at the mechanisms of prediction, however, we will see that by looking at the various ways in which a person might seek to predict the future behavior of judges, we will have discovered something important about the type and size of the chunks with which law does or omits certain things he will be made to suffer in this or that way by judgment of the court—and so of a legal right.” *Id.* at 458, 78 B.U. L. REV at 700. “But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact.” *Id.* at 460-61, 78 B.U. L. REV. at 701-702.

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4 See supra note 2.


> 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 knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. Holmes, *supra* note 1, at 459, 78 B.U. L. REV. at 701.

It is worth noting that Holmes can be understood as addressing not only the bad man, but also the person who believes that there is a moral obligation to obey the law, and believes as well that the law that an individual has a moral obligation to obey is significantly dependent on predictable—in theory—judicial decisions. See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1375-81 (1997) (arguing that the settlement function of law is a strong reason for government officials to be bound to what they understand the Court’s interpretation of the Constitution to be).

6 Prediction of judicial decisions is not only sometimes important for ordinary people potentially affected by the law, but is also important for judges who would want to predict the decisions of other judges, as might be the case when judges seek to follow the decisions of higher courts. See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents*, 46 STAN. L. REV. 817, 850-55 (1994) (discussing the benefit of uniformity that comes from judges following precedent).

7 In referring to the “size” of judicial decisions, I refer to the size of the domain encompassed by some decision, such that a decision with respect to the people in Massachusetts is a larger decision than a decision with respect to the women of Suffolk County, which in turn is a larger decision than one with respect to the adult women of Boston. See
makes its decisions, and, less directly, something equally important about the nature of law itself.

I

I take as my point of departure Holmes's story of the churn. Because it is brief, funny—to some—and worth pausing over, I will quote it in its entirety:

There is a story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked through the statutes and could find nothing about churms, and gave judgment for the defendant.8

Holmes plainly is making sport of the Vermont justice of the peace9—and, en passant, of Vermont, but that is for another day—but Holmes is perhaps a bit too quick. Let us consider why it might be plausible to think that the Vermont justice of the peace has more (legal) sense than Holmes gives him credit for having.

The primary point of the story is obviously that there could10 not be such a thing as “churn law,” and Holmes is at least gracious enough to recognize

Frederick Schauer, Justice Stevens and the Size of Constitutional Decisions, 27 Rutgers L.J. 543, 543-44 (1996) (Symposium on Perspectives on Justice Stevens) (defining the “size” of a constitutional decision). “Particular” and “general” are the terms we ordinarily use to mark the extremes on the scale of conceptual or decisional size, although the distinction between the general and the particular itself has philosophical complications. See, e.g., P.F. Strawson, Individuals: An Essay in Descriptive Metaphysics 138 (1959) (discussing why “the traditional view . . . accords particulars a special place among logical subjects”); John R. Searle, Proper Names, in Philosophical Logic 89, 92-93 (P.F. Strawson ed., 1967) (discussing the philosophical implications of the particularity of proper names); P.F. Strawson, Particular and General, in Logico-Linguistic Papers 28, 29-31 (1971) (discussing some of the proposed differences between particular and general).

9 Partly for being a bumpkin, I suspect, and partly for not being a lawyer.
10 David Seipp suggests to me that Holmes’s point is more prescriptive, and that even if there could be a law of churms, Holmes would argue that there should not be. Whether a “could” or a “should” is preferable is in turn tied up with questions, touching on Fuller, about whether Holmes thought that churn law, if it existed, was “really” law. See Lon L. Fuller, The Morality of Law 46-49 (rev. ed. 1969). I suspect that on this question Holmes was with Fuller, believing that certain features of law—in this case, a certain kind of generality that departed from the categories of pre-legal existence—were necessary conditions for the existence of genuine law. This is consistent with Seipp’s conclusions, from Holmes’s writings, that Holmes had strong ideas about which legal categories were proper—“contract,” for example—and which were improper—“telegraphs,” for example. See Justice Oliver Wendell Holmes, His Book Notices and Uncollected Letters and Papers 59-63 (Harry C. Shriver ed., 1936) (discussing proper categories as those to which certain legal consequences follow through membership in that category).
that the mistake he takes the Vermont justice of the peace to have made is a mistake made by those substantially more learned, including some trained in law.

The same state of mind is shown in all our common digests and textbooks. Applications of rudimentary rules of contract or tort are tucked away under the head of Railroads or Telegraphs or go to swell treatises on historical subdivisions, such as Shipping or Equity, or are gathered under an arbitrary title which is thought likely to appeal to the practical mind, such as Mercantile Law. If a man goes into law it pays to be a master of it, and to be a master of it means to look straight through all the dramatic incidents and to discern the true basis for prophecy.\(^1\)

So if there were such a thing as churn law, and if churn law thus provided a valid ground for prediction of judicial decisions,\(^2\) the Vermont justice of the peace would not look so silly after all. It is only because there is no such thing as churn law, and thus no basis for predicting future judicial decisions on the basis of the presence or absence of a churn, that the Vermont justice of the peace commits what Holmes takes to be an obvious blunder.\(^3\)

\(^{11}\) Holmes, *supra* note 1, at 475, 78 B.U. L. REV. at 713 (emphasis added).

\(^{12}\) By “valid ground for prediction,” I do not mean that the prediction would necessarily be correct. I mean to suggest instead that a predictive factor is “valid” if that factor increases the reliability of a prediction over what it would be in the absence of that factor. So if we want to predict whether a dog will behave viciously or aggressively, the factor of the dog being a pit bull has predictive validity if and only if dogs that are pit bulls are more likely to behave viciously or aggressively than dogs *simpliciter*. Similarly, therefore, the factor of “churnness” would be predictively valid if and only if some legal result flowed more likely from the fact of churnness than if it flowed, say, from chattels generally.

\(^{13}\) The fact that the justice of the peace gave judgment for the defendant is an interesting jurisprudential sidelight. Even if we assume that there *might* have been churn law, but was not, the justice of the peace takes the presumed absence of law as grounds for a decision for the defendant. A different question, and not mine in this Essay, is whether the absence of law, in a common law system, is a sufficient condition for entering judgment for the defendant, as opposed to the possibility that common law judges, even in the absence of specific law, are empowered or authorized to make the law necessary to deal with the case. If we thus assume the background principle of law’s comprehensiveness, see Jonathan Cohen, *Theory and Definition in Jurisprudence*, 29 PROC. ARISTOTELIAN SOC’Y 213, 223-25 (Supp. 1955), the Vermont justice of the peace, even on his assumptions, was perhaps too quick to move from the fact of the absence of existing law to the conclusion of entry of judgment for the defendant. On this, see also RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 101-05 (1977), where for Dworkin the non-existence of a “smiling” rule did not *ipso facto* produce the conclusion that allegedly harassing smiling was to be permitted, and my more general discussion of legal “gaps” in FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 222-26 (1991). See also BRIAN BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY 25-28 (1993) (arguing that the discretion inherent in legal generalities is part of its efficacy); John Gardner, Concerning Permissive Sources and Gaps, 8 OXFORD J. LEGAL STUD. 457,
But why is Holmes so sure that there is no such thing as churn law? Suppose someone sells a churn to someone else, but the churn turns out to be defective. Suppose also that the seller knew this at the time of the sale, yet the possibility of a defect in the churn was never discussed at the time of the transaction. The buyer sues for fraud. On these facts, the purchaser does not recover, for the absence of an explicit misrepresentation, as opposed to the non-representation of a fact that the buyer is likely to take as material, is under typical circumstances fatal to a common law action based on fraud. But if all of the foregoing facts are the same except that instead of being for a churn the transaction is for 100 shares of stock, the result may very well be different, because although there might not be such a thing as churn law, there is certainly something called securities law. Moreover, one of the principles of securities law is that the otherwise applicable general principles of law, such as the otherwise applicable general principle defining fraud, might be modified when the object of a sales transaction is a security of a certain kind.

So given that there is such a thing as securities law, it seems by no means implausible to think that there might be such a thing as churn law, existing under circumstances in which the nature of the market for churns was as distinct as the nature of the market for securities. When we see an economically and socially differentiated segment of the world, such as the segment of the world that deals with transactions in stocks and bonds, we are not surprised that this differentiated segment has generated a differentiated corpus of law. There is no similarly differentiated segment of the world dealing with transactions in churns, but there is no a priori reason there could not be, and thus no reason to believe that someone ignorant of churns should not or would not check to see if there were a churn-differentiated area of law.

But perhaps this example is too easy. Securities, after all, are themselves creatures of the law, created by law and existing by virtue of the rules of law

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14 See, e.g., Swinton v. Whitinsville Sav. Bank, 42 N.E.2d 808, 809 (Mass. 1942) (holding that the seller of a house did not commit fraud by failing to reveal a termite infestation to the buyer); see also Anthony Kronman, Mistake, Disclosure, Information, and the Law of Contracts, 7 J. LEGAL STUD. 1, 1-2 (1978).

15 I say "might be" only because in some important respects the interpretive decisions of the Supreme Court have suggested that parts of the federal securities laws are designed to reflect the principles of common law fraud. See, e.g., Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201 (1976) (holding that Congress intended the doctrine of scienter to apply to a provision of the Securities Act). Still, it is one of the central features of modern securities law that the common law requirements of affirmative misrepresentation are often inapplicable. SEC Rule 10b-5(b), for example, makes it unlawful "to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5(b) (1997).
in much the same way that home runs exist by virtue of the rules of baseball.\textsuperscript{16} If there were no law there would be no securities, and thus it should come as no surprise that law treats specially that which it has created, including securities, corporations, and trusts, among others. But the law did not create churns, and, we might well suppose, there would be churns even if there were no law. At the very least there could be. In such a case perhaps Holmes is on firmer ground in poking fun at the justice of the peace for thinking that he would find the law relating to damage of another's churn under the heading of "churns" rather than under the heading of "bailments," which is likely where Holmes would have wanted the justice of the peace to go in a case such as this.\textsuperscript{17}

But even where law is in its regulative rather than its constitutive mode, even where it is regulating objects and transactions whose existence islogically independent of, and temporally antecedent to, the law, it should hardly come as a surprise to discover that some of these objects and transactions had generated their own distinct legal principles. The first book written by the great theorist of the criminal law Glanville Williams was \textit{Liability for Animals},\textsuperscript{18} and we might suspect that Williams knew a bit more about law and legal theory than Holmes's apocryphal justice of the peace. Unlike securities, animals are not creatures of the law, and the types of animals that Williams was writing about existed before English law existed. Yet Williams still supposed that there was something worth writing about the law of animals. An even better example is the unsurprisingly forgotten early article co-authored by Louis Brandeis, \textit{The Law of Ponds}.\textsuperscript{19} Again neither ponds in general nor the ponds that Brandeis wrote about were legal constructs, but Brandeis still

\textsuperscript{16} Home runs are thus \textit{constituted} by the rules of baseball, leading John Searle to maintain that such rules are constitutive rather than regulative. \textit{See John Searle, Speech Acts: An Essay in the Philosophy of Language} 185 (1970) ("By undertaking to play baseball I have committed myself to the observance of certain constitutive rules."). Raz challenges Searle's account of constitutive rules, \textit{see Joseph Raz, Practical Reason and Norms} 108-11 (rev. ed. 1990), but not in any way that undercuts the idea that certain descriptions—"married," "home run," "checkmate," "guilty," "estopped"—presuppose background institutions, often but not necessarily the background institutions that are themselves created by or part of the legal system. For application of this idea specifically to law, see G.P. Baker, \textit{Defeasibility and Meaning, in Law, Morality, and Society: Essays in Honour of H.L.A. Hart} 26, 31-34 (P.M.S. Hacker & J. Raz eds., 1977); H.L.A. Hart, \textit{Definition and Theory in Jurisprudence, in Essays in Jurisprudence and Philosophy} 21 (1983).

\textsuperscript{17} I am merely guessing that the underlying transaction was a loan, for Holmes does not explain to us the circumstances under which one farmer broke the churn of another.


thought it worthwhile writing a distinct article about them, just as Williams thought it worthwhile writing a distinct book about the law of animals. Perhaps this was because Brandeis and Williams had the same legally inadequate "state of mind" that Holmes attributes to the writers of "common digests and text-books" as well as to the Vermont justice of the peace. But maybe Brandeis and Williams knew something that Holmes too easily dismisses, and it is worth exploring just what it is that Brandeis and Williams might have thought that they knew.

One possibility, and one that Holmes considered in *The Path of the Law*, is that there is no distinct law of, for example, ponds, but that pond law is a useful categorization for those in the pond business and who might find useful a collection of all of the legal principles that apply to ponds, even though, and this is the crucial point, none of those principles is exclusive to ponds, and all apply to many things other than ponds. Pond law might, therefore, be simply about property law, even though some of the property happens to be covered with water, and negligence law, even though some acts of negligence occur in boats and on the banks of ponds, and nuisance law, even though some nuisances are created by water. In none of these cases, however, are the principles of property, negligence, and nuisance law different when applied to ponds, and in this sense there is no distinct body of law that is pond law, although many different areas of law happen to apply to ponds. This is presumably what Holmes was referring to when he referred to Mercantile Law as an "arbitrary title," and we are certainly familiar with this today when we encounter books—and courses—with titles such as Sports Law, Entertainment Law, and—in part—Agricultural Law. If Sports Law is an aggregation of principles of antitrust law, labor law, trademark law, and contract law, among others, and if the principles of antitrust law, labor law, trademark law, and contract law are no different when applied to the world of sports than when applied to the world of non-sports commerce, then "sports" is not a legally relevant category, even though it might be thought valuable to collect in one volume the legal principles useful to someone involved in the business of sports. So as Holmes recognized a century ago, the mere fact that we may encounter things like Sports Law is no guarantee that sport-ness, any more than churn-ness, is a legally relevant fact and the subject of distinct legal principles.

What Holmes does not seem to have recognized a century ago, however, is the very different possibility that there might be features of churns as objects, or of the way in which churns were used, or of the market for churns, that were of sufficient legal importance that they generated distinct legal principles, or at least legally relevant and occasionally dispositive facts. Just as the law of torts has principles for explosives and wild animals that are different from the tort principles applicable to all other objects that one might keep on one's property,\(^\text{20}\) just as at least some of the principles of Sports

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Law are sports specific, and just as there might be distinct principles for the new communications technology, so might we imagine distinct principles for churn loans that distinguished churn loans from all other loans of property, and thus would make recourse to the general principles of the law of bailments inappropriate. If the issue is prediction, therefore, it is no means self-evident that a pre-legal fact about the world might be legally irrelevant. Perhaps the Vermont justice of the peace was wrong in supposing all of law to be object-specific, and thus wrong in taking the absence of churn law to be equivalent to the absence of law. But, Holmes’s intimations to the contrary notwithstanding, the Vermont justice of the peace was hardly mistaken in looking for an entry under “churns” in the law books, and hardly mistaken in thinking that there might very well be a law of churns just like there is a law of animals and a law of ponds.

Indeed, it is an interesting question whether an increasing specificity or particularity in legal categorization represents an advance or decline in the sophistication of the law. As Holmes notes in The Path of the Law, there is a type of typical treatise on jurisprudence, still to be found in England even if not in the United States, whose chapter headings are things like "possession," "negligence," "ownership," and "liability." Implicit in such a treatise is the view that even categories like "tort" and "contract" are rela-

21 The most obvious of these is the traditional exception for professional baseball from the otherwise applicable principles of antitrust law. See, e.g., Flood v. Kuhn, 407 U.S. 238, 282 (1972) (stating that baseball’s exemption from federal antitrust laws is an anomaly and an exception); Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953) (finding that Congress did not intend to include baseball in the scope of antitrust laws); Federal Baseball Club of Baltimore, Inc. v. National League of Prof’l Baseball Clubs, 259 U.S. 200, 209 (1922) (holding that the business of baseball is not commerce). The lawyer who would predict the application of the generally applicable rules of antitrust law to the business of baseball, on the assumption that the business of baseball was legally identical to any other business for antitrust purposes, but without looking specifically for the law of baseball, would be making every bit as large a blunder as the Vermont justice of the peace made by looking for the law of churns.


24 See, e.g., R.W.M. DIAS, JURISPRUDENCE (5th ed. 1985), especially Part II (listing “possession” and “ownership” as individual chapters).
tively specific, and that law in its essence contains categories spanning even the specific topics of legal doctrine. But when we observe the “path” of the law—its change in character over, say, the last one hundred years—what we see is not the increasing utility of such trans-doctrinal categories, but rather their decreasing utility, and the increasing use of statutes, regulations, and common law principles that hook onto relatively specific parts of the pre-legal world. The book on sports law, or AIDS law, or automobile law may not only be useful to practitioners in the fields that would use such books, but may also be increasingly necessary in order to track statutes and cases for which such categories are central. As we look at the path of the law since *The Path of the Law*, it seems likely that the possibility of churn law is more and not less likely to exist now than it did then, and this in turn may tell us something important about the desirability and necessity of fitting law to its pre-legal background.25

II

Let us connect this line of thinking more closely to the idea of prediction. Holmes treats a churn as a *particular* object, and he is best understood as arguing that knowledge of the law, and knowledge of how to predict the future application of official power, is of necessity *general*. I want to return presently to the question of particularity, but let us assume for the moment that Holmes is correct in supposing that predicting the future application of legal power involves abstracting from particular cases to those features of an event that would make effective prediction possible. One possibility, and the only one that Holmes takes seriously, is that certain features of cases or events fall under legal headings like “contract,” “consideration” “waiver,” “mutual mistake,” “assumption of the risk,” and “self-defense.” If you do not know and understand the legal categories, Holmes claims, your predictions will be defective, for these are the categories employed by the judges whose future behavior you wish to predict. “The reason why a lawyer does not mention that his client wore a white hat when he made a contract, while Mrs. Quickly would be sure to dwell upon it along with the parcel guilt goblet and the sea-coal fire, is that he foresees that the public force will act in the same way whatever his client had upon his head.”26

25 Consider, for example, Llewellyn’s view of the importance of fitting commercial law to the pre-legal practices of those to whom it would apply. See *William Twining, Karl Llewellyn and the Realist Movement* 302-40 (1985) (noting Llewellyn’s goal of searching for “commercially significant type-fact patterns when drafting the UCC”). There are undoubtedly many areas of law whose task is to change existing practices rather than conform to them, but insofar as significant parts of law are less inclined to move the center of gravity of human behavior as opposed to reducing the variance around that center of gravity, we would expect law to move in the direction of more subject-specificity and not less.

26 *Holmes, supra* note 1, at 458, 78 B.U. L. Rev. at 699.
When put this way, however, it becomes apparent that Holmes is making an empirical claim, and a claim that subsequent commentators, most notably Karl Llewellyn, have insisted on denying. Llewellyn did not deny that there were regularities in law. Nor did he deny that those regularities might facilitate the process of predicting future legal outcomes. He did, however, deny that those regularities were regularly captured by the generalizations typically referred to as "legal doctrine," and thus claimed that legal doctrine did not reflect empirical regularities, and that legal regularities were reflected by categorizations that did not resemble traditional legal doctrine.

Suppose you wished, in 1954, to predict the outcome of two West Virginia disputes, and thus of two potential West Virginia court cases. One case deals with a request by a coal company for an injunction against a labor union, the requested injunction being based on practices by the union that allegedly interfere with operation of the company's mines. These practices, however, have been taking place in the same form for more than three years, and the union has taken numerous measures in reliance on the presumed permissibility of, or at least company acquiescence in, these practices. The other case

27 See supra note 25. I will avoid categorizing Llewellyn as a Legal Realist in this context, not only because the category of Legal Realism is itself increasingly contested (Is Legal Realism "really" about contingency and the non-existence of natural baselines, as Robert Hale argued, see Robert Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 POL. SCI. Q. 470 (1923), reprinted in AMERICAN LEGAL REALISM 101, at 45-62 (William W. Fisher III et al. eds., 1993), or is it about the indeterminacy of legal decision, as Jerome Frank might be interpreted as arguing, see JEROME FRANK, LAW AND THE MODERN MIND (1930), or is it about determinacy along unexpected and unarticulated dimensions, as Llewellyn argued, see KARL LLEWELLYN, THE BRAMBLE BUSH (1930)), but also because I want to distinguish, rather than conflate, the claims of Frank and Llewellyn, both typically described as Legal Realists.

28 Llewellyn frequently insisted on referring to these regularities as legal rules. See THE THEORY OF RULES (1938-40) (unpublished manuscript, available at the University of Chicago Law School, and described throughout TWING, supra note 25). There is nothing "incorrect" about this usage, because the use of the word "rule" to refer to an empirical regularity is standard English, as in "as a rule it is warm in August in North America." See generally SCHAUER, supra note 13, at 191-96. But the word "rule" has a prescriptive sense as well as a descriptive one, and Llewellyn's tendency to refer to legal rules in the descriptive sense when the reader is expecting the word to be used in the prescriptive or normative sense is both tendentious and potentially confusing. In his earlier writings, Llewellyn recognized the distinction, and he was careful about explaining the difference between descriptive and prescriptive rules. See, e.g., Karl N. Llewellyn, A Realistic Jurisprudence—The Next Step, 30 COLUM. L. REV. 431, 442-43 (1930) ("‘Rules’ is a term sufficiently ambiguous. A rule may be prescriptive: ‘this is what ought to be; what the judges ought to do in such cases.’ Or it may be descriptive: ‘this is what is; what the judges actually do in such cases.’"). As the years went on, however, he would typically use the word "rule" in the descriptive sense in contexts in which some readers might be expecting the prescriptive, thus planting and trading on the precise ambiguity that in his earlier years he was at such pains to explain.
PREDICTION AND PARTICULARITY

deals with a request by an adjacent land owner for an injunction against a coal company for creating a nuisance. The condition that creates the nuisance, however, has existed for more than three years, and the coal company has similarly taken various measures premised on the presumed permissibility of, or at least landowner acquiescence in, the nuisance creating condition.

Were the faithful reader of The Path of the Law to confront the necessity of making a prophecy about the outcome of these two disputes, she would be wary of thinking that “labor union” or “coal company” were relevant to this predictive task. These categories would appear no more relevant than the categories of “churn” or “white hat.” The categories of labor union and coal company, presumably, are part of what Holmes referred to as “dramatic incidents,” and those are the categories that the true “master” of the law would “look straight through.” The master of the law, therefore, would look to categories like “laches,” and all of the other legal categories relevant to the law of equity and injunctions, none of which would make reference to specific pre-legal features of the world such as “labor union” or “coal company.”

There is a substantial possibility, however, that the faithful reader of The Path of the Law, as well as the master of the law, would get it wrong. For if one actually looks at the cases dealing with injunctions decided by the West Virginia Supreme Court of Appeals from 1920 to 1954, one would likely discover that the principle “the coal company wins” has substantially more predictive power than the principle, “a party who delays claiming its rights to the detrimental reliance of another party is precluded from obtaining an injunction.” This being the case, the master of the law, including the master of equity and laches, might well predict a verdict for the labor union in the first case and for the coal company in the second case, but would then likely be 50% wrong. The master of prediction, following Llewellyn and seeking to identify those variables that would best enable her to predict future cases, would predict a verdict for the coal company in both cases, and would likely be correct with respect to both.

One might suspect that Holmes himself would have been at least slightly sympathetic to Llewellyn’s analysis. Holmes, after all, repeatedly calls for the use of statistical and related knowledge in law and legal education, although it is far from clear that this is what he had in mind. Still, if we were to undertake a statistical analysis of “the law” in order best to engage in the process of predicting future legal outcomes, we would, in some form or other, look to identify the variables that had the greatest predictive value. These variables might, as Holmes suspects, be the variables of legal doctrinal categorization. But whether the variables were in fact what Holmes suspected—and desired—would be an empirical question, and it might turn out,

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29 I once did this, in the process of teaching courses on Equity and Injunctions at the West Virginia University College of Law from 1974 to 1977, but the specific details, to say nothing of the written notes, are long gone.
as Llewellyn suspected to the contrary, that they were variables not likely to be identified from the opinions of the courts that reached those decisions. In this respect, therefore, Llewellyn might be seen as coming to the defense of the Vermont justice of the peace, who, after all, might merely have suspected that the category "churn," like the category "coal company," might have had significant predictive power, even though the category tracked the divisions of the pre-legal world rather than the chapters of books of jurisprudence.

Although Llewellyn's call for an analysis of the categories or features that in fact contained explanatory or predictive power has largely gone unheeded within law school-based legal scholarship, the same cannot be said for the work of those in the social sciences who think and write about legal decisions. Of particular interest is a large quantity of work that has tried to examine Supreme Court decisions with an eye to identifying the variables that in fact appear both to influence judicial decisions and that would therefore enable someone to predict future decisions. Within this literature it is commonplace to reject the so-called "legal model," for insofar as the legal model is based on the idea that Supreme Court precedents have predictive power vis-a-vis future decisions, the existing social science research indicates that the legal model is empirically false. And much the same holds true about other features of Supreme Court cases, such as the legal category in which they might be placed, the parties to the case, or the identity and number of amici. Rather, it appears that just as there is little empirical basis for the legal model, at least for the limited set of Supreme Court cases that these scholars tend to study, there is great empirical support for what they call the


"attitudinal model," the view that the best predictors of Supreme Court decisions are the policy attitudes or preferences of the Justices, and that, often, the best predictors of those are the party affiliations of the Presidents who appointed them. When Llewellynesque attempts to identify the actual categories of decision are applied to the Supreme Court of the United States, it turns out that legal categories like the ones that Holmes lauded as the province of the "master" of the law turn out to have virtually no predictive power. Law may be prediction, as Holmes supposed, but in one prominent area that often goes under the name of "law," legal categories are by and large useless to the predictor.32

III

For all of their apparent differences, however, Llewellyn and Holmes still can be understood as agreeing about a significant point. For whether it be the categories of the law, as Holmes maintained, or some other categories of our existence, as Llewellyn argued, both of them seemingly believed that legal outcomes fell into categories, the discovery of which would enable us to predict future decisions with some degree of reliability. Llewellyn believed that the categories of decision departed from the categories of justification, a pos-

32 This literature about the explanatory variables for Supreme Court decisionmaking is interesting, important, and a useful corrective to the Holmesian presuppositions about the importance of legal variables that occupy the pages of the law reviews. But it is important not to take this empirical literature as making more claims than it does, because there are many reasons to suppose that its conclusions are much less applicable outside the Supreme Court of the United States. One is that the array of Supreme Court decisions may overwhelmingly and disproportionately be concentrated on cases in which policy preferences are likely to be very strong. Part of this is due to the selection effect. See generally L. George Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. LEGAL STUD. 1 (1984) (concluding that uncertainty is correlated with case selection). See also KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 6, 64-68 (1960); Richard Posner, The Jurisprudence of Skepticism, 86 MICH. L. REV. 827 (1988); Frederick Schauer, Judging in a Corner of the Law, 61 S. CAL. L. REV. 1717 (1988). It is possible, therefore, to conclude that the set of Supreme Court decisions on the merits, about 80 in recent years, is a set defined substantially by the fact that the law, in a formal sense, is non-dispositive. This might suggest that the attitudinal model has produced the conclusion that the law does not matter for the set of cases in which the law, by operation of the selection effect, does not matter. In addition, the Justices of the Supreme Court, like many of the rest of us, likely have stronger policy preferences about abortion, affirmative action, prayer in the schools, pornography, gay rights, and the rights of those accused of crimes, than about many questions of common law or statutory interpretation. See Frederick Schauer, Statutory Construction and the Coordinating Function of Plain Meaning, 1990 SUP. CT. REV. 231, 247. That being the case, the empirical analysis might conclude that legal variables of the kind that Holmes described would have more explanatory and predictive power for non-Supreme Court constitutional cases than they do for that quite limited set.
sibility that Holmes never considered, but both believed that legal outcomes were amenable to categorization.

But what if legal outcomes are not amenable to categorization? Although the possibility that legal outcomes may be totally random seems too remote to be taken seriously, it could still be the case that no variable had any substantial amount of predictive power, such that no single factor, and even no collection of factors, could provide with any confidence a prediction of a future legal outcome. Even the kind of empirical analysis that Llewellyn championed, and even when that analysis was done with the best possible tools of multiple regression, might simply yield the conclusion that no identifiable variable yielded a useful correlation with decisional outcomes.

This is the possibility taken most seriously by Jerome Frank,33 and possibly also what Llewellyn himself had in mind when he referred to "situation sense."34 In both cases, as well as with many contemporary calls for decisions to be made "in context,"35 the claim is made, descriptively, that judges and other decisionmakers are far more influenced by the particular features of a particular case than they are by the abstractions and generalizations we call "legal rules," or even by the non-legal—in the doctrinal sense—abstractions and generalizations that Llewellyn urged us to identify. The descriptive claim is presumably what Llewellyn had in mind when he referred to "the power of the particular." Typically, the claim is coupled with a prescriptive claim that this is not only how judges in fact do operate, but also that it is how they ought to operate. The variations in the human experience are so great, the argument goes, that it is unwise to constrain in advance the

33 See Frank, supra note 27, at 111-12 (arguing that exactness and predictability in law are impossible because the legal system lacks finality); see also Joseph C. Hutcheson, Jr., The Judgment Intuitive: The Role of the "Hunch" in Judicial Decision, 14 CORNELL L.Q. 274, 284 (1929) (explaining that, from a judge's point of view, judicial decisions are based on both the law and intuition).

34 Llewellyn, supra note 2, at 201-08. For useful commentary, see Twining, supra note 25, at 206-44. See also Patrick J. Rohan, The Common Law Tradition: Situation Sense, Subjectivism or "Just-Result Jurisprudence"?, 32 FORDHAM L. REV. 51, 54-55 (1963) (clarifying Llewellyn's attempts to recognize relevant facts).

sensitive application of broad principles like justice and fairness to the particular facts of particular cases. This is the method employed by the q’adi of Islamic law, it is the method of act-utilitarianism, it is the method implicit in the particularist strand of modern feminist theory, and it is the method that Frank urged, as well as described, when he likened ideal judicial decisionmaking to golf, and urged that the best judges, like the best golfers, keep their "eyes on the ball" and not look too far down the fairway. In other words, Frank can be understood as arguing, like many of his successors, that the best decisions were concerned with this case, and not with the other cases with which this case might happen to share some features.

Suppose that the descriptive account of particularism is correct. What does this say about the ability to predict judicial decisions? Consider, for example, an area in which particularism in this sense is more likely to be descriptively accurate, as with custody decisions based on the "best interests of the child." Suppose we were to ask someone to predict a future judicial decision under the "best interests of the child" standard. My suspicion is that the predictor would first ask about the features of the dispute whose resolution she is being asked to predict. She would want to know the characteristics of the parents, the characteristics of the child, and related matters. But when it came down to prediction, she would predict on the basis of these characteristics by knowing which of these characteristics were likely important in this court, based on an analysis of past decisions by this court. If this judge were known to have a weaker presumption in favor of the mother in custody cases than was generally the case in other courts, this would be part of the assessment, and so would, for example, what we might know about the judge’s previous inclinations about the relative resources of the parents, their respective residences, and so on. In one respect, therefore, the process of prediction would resemble Llewellyn’s search for descriptive rules, for each identification of a feature likely to be relevant in the future based on its having been relevant in the past is the identification of just this kind of regularity, tendency, or, as Llewellyn would put it, rule.

36 The institution of the q’adi and its accompanying particularism was most famously described—or mis-described—to Western legal scholars in MAX WEBER, LAW AND ECONOMY IN SOCIETY (M. Rheinstein ed., 1954). See also LORD LLOYD OF HAMPSTEAD & M.D.A. FREEMAN, LLOYD’S INTRODUCTION TO JURISPRUDENCE 554 (5th ed. 1985) ("[T]he cadi in the marketplace," according to Weber, “is guided only by reaction to the individual case.”).


38 See supra note 35.

39 FRANK, supra note 27, at 167 n.7.

40 N.Y. DOM. REL. LAW § 70(a) (McKinney 1997) (stating that the right to child custody should be based on the best interests of the child).
But, it might be objected, the number of potentially relevant features might be so large—even if based on identification of features that have been relevant in the past—and the possible weightings among these factors so infinite, that prediction would be difficult, or even impossible. We might say that resources, residence, psychological profile, child’s preference, age of the child, gender of the child, and many other things were all relevant, but that it would be impossible to predict from case to case which weighting of these factors would be applied in the next case, and thus impossible to predict the outcome with any confidence. If this were the case, then the possibility of prediction that Holmes believed to be the central feature of law would become impossible.

This is, of course, an empirical question. Even in the application of “the best interests of the child” or the other phrases that commonly go under the heading of “standards” rather than “rules,” it might turn out upon serious empirical investigation that there were explanatory variables that would enable people to predict the outcome of future cases. Some of these might reflect background but non-legal norms, such as “give custody to the parent with the higher income” or “give custody to the mother.” Others might in fact reflect unstated legal variables. And still others might simply track convergences in human beliefs and behavior, not necessarily easily captured by a norm in a narrow sense. But not only might Llewellyn’s program reveal that the explanatory variables of judicial decisions—the descriptive rules—would depart from the variables announced as explaining those decisions, but it might also be the case that such explanatory variables filled what would otherwise be gaps or indeterminacies in the law.

For all of this, however, it is still possible that the search for explanatory variables might for some parts of the law—or possibly for all of it, but that is highly unlikely—produce the conclusion that prediction was impossible precisely because the number of decisional variables turned out to be so great that no one of them, nor any common confluence of them, had any significantly high correlation with judicial outcome. In such a case, would Holmes have said there was no law? Would he have said, relying possibly on Fuller, that the procedural circumstances under which non-predictable decisions were made still operated within a sufficient outcome-limiting constraint that it was useful to refer to the decisions so made as law or part of the legal system? Would he have challenged the methods we employed to search for


42 See generally FULLER, supra note 10.
explanatory variables? Of course we do not know the answer to any of these questions. We do know, however, that Holmes posed the issue of law as prediction, and that he implicitly asked us to consider which explanatory variables had the greatest explanatory power and which were best attached to the idea of law. And we know that Holmes answered these questions by relying on the traditional doctrinal categories of legal analysis. In the interim the Legal Realists and then the empirical social scientists have, in effect, taken up Holmes's call to search for explanatory variables, and much that we have learned suggests that even if Holmes posed the right questions, he may still have given the wrong answers.

Holmes's wrong answers are highlighted by his use of the story of the Vermont justice of the peace and the churn. Holmes used the story to suggest that only an uneducated rural bumpkin, or at least a non-lawyer, could have supposed the law to be particular to the pre-legal and potentially small units of the world, rather than to the large units formed by the legal consciousness and detached from the particularism of the pre-legal world. As the law becomes more complex, however, what we see is not an increase in the number of general legal categories, but instead an increase in the number of legal topics and doctrines that are specific to pre-legal social, economic, cultural, and technological categories. That may suggest that for all of the prescience we see in Holmes in *The Path of the Law*, the greatest prescience in *The Path of the Law* comes not from Holmes, but from the Vermont justice of the peace.