Subsumption, Derogation, and Noncontradiction in "Legal Science"

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Until recently, only a few of the leading academic lawyers in England had looked with favor on Hans Kelsen’s Pure Theory of Law. Sir Hersch Lauterpacht, writing that Kelsen’s work was “a powerful contribution to legal thought,” was one of the few, and H.L.A. Hart, who described Kelsen as “the most stimulating writer on analytical jurisprudence of our day,” was another. Neither, however, was typical. The international lawyer Lauterpacht had been Kelsen’s student in Vienna and was a convinced proponent of Kelsen’s “monistic” view of the relation between international and domestic law, while Hart was—then as now—the leading legal theorist in the English-speaking world and a philosopher in his own right. Most English jurists, like their counterparts in America, followed C.K. Allen’s suggestion that Kelsen’s aim to reduce the law “to a scheme of purely intellectual conceptions,” was a “barren task” offering little understanding of how “[l]aw touches actual life.”

Judging by recent work in legal philosophy in England, particularly at Oxford, the scene has changed a bit. The opinions of Allen and others on the Pure Theory are nowhere evident in the

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1 The leading work on the Pure Theory is H. Kelsen, Reine Rechtslehre (2d ed. 1960) [hereinafter cited as Reine Rechtslehre]; H. Kelsen, Pure Theory of Law (2d ed. M. Knight trans. 1967). The English translation is inaccurate and incomplete at some points; quotations from the Reine Rechtslehre are my own translations and are cited by section number rather than page number to facilitate reference to the English translation.

2 Lauterpacht, Kelsen’s Pure Science of Law, in Modern Theories of Law 105, 106 (W. Jennings ed. 1933).


writings of Joseph Raz or Richard Tur, nor, most recently, in this suggestive and thoroughly Kelsenian monograph by J.W. Harris. Law and Legal Science is, however, in no sense exegetical. Harris writes in the spirit of Kelsen’s wish that the Pure Theory “be regarded not as a statement of final results but as an undertaking that has to be pursued further, supplemented, and otherwise improved upon.”

Following Kelsen, Harris describes legal rules as “pure norms”—that is, as units of “ought or may meaning-content[s]”—and he speaks of the legal system as a “collection of pure norms” that “legal scientists” understand as a “non-contradictory field of meaning.” These characterizations of legal rules and the legal system, however rarefied they may appear to the practicing lawyer, are representative of a long tradition in analytical jurisprudence—from Jeremy Bentham to, among many others, Ernst Rudolf Bierling in Germany and Kelsen and his colleagues, above all Adolf Merkl, of the so-called Vienna School.

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9 REINE RECHTSLEHRE, supra note 1, at vii.

10 Harris at 24 (italics in original).

11 Id.


13 See generally E. Bierling, Juristische Prinzipienlehre (1894-1917); Zur Kritik der juristischen Grundbegriffe (1877).

14 See generally A. Merkl, Allgemeines Verwaltungsrecht (1927); Die Lehre von der Rechtskraft (1923); Das doppelte Rechtsantlitz (pts. 1-3), 47 JURISTISCHE BLÄTTER 425, 444, 463 (1918), reprinted in 1 DIE WIENER RECHTSTHEORETISCHE SCHULE 1091 (H. Kletzsky, R. Marcic & H. Schambeck eds. 1968) [hereinafter cited as Wiener Schule]; Das Recht im Spiegel seiner Auslegung (pts. 1-3), 9 DeUTSCHE RICHTERZEITUNG 162, 394, 443 (1917), reprinted in 1 WIE RNER SCHULE, supra, at 1167; Prolegomena einer Theorie des rechtlichen Stufenbaues, in GESELLSCHAFT, STAAT UND RECHT 252 (A. Verdross ed. 1931), reprinted in 2 WIE RNER SCHULE, supra, at 1311.

15 On Kelsen vis-à-vis analytical jurisprudence and formalism, see R. Moore, Legal Norms and Legal Science 16-29 (1978); Golding, Kelsen and the Concept of “Legal Sys-
One theme in analytical jurisprudence, put briefly, is the effort to capture the systemic properties of the law by ordering its “raw materials” in terms of fundamental principles. Harris has done just that. A “basic legal science fiat,” as Harris puts it, comprises four principles, on the basis of which it is possible to make a statement about the legal system and the legal rules contained in it that is conceptually more or less complete. In particular, Harris claims that one can identify the system and establish the validity of its legal rules, including the abrogation of rules in cases of conflict. His ambitious effort, though not without problems, is of considerable jurisprudential interest. I briefly sketch Harris’s four principles, invite attention to some parallels in Kelsen’s work, and add an assortment of skeptical rejoinders.

I. The Basic Legal Science Fiat

Harris’s “basic legal science fiat” gives expression to the principles of (1) exclusion, (2) subsumption, (3) derogation, and (4) noncontradiction:

The Basic Legal Science Fiat: “Legal duties exist only if [1] imposed (and not excepted) by rules originating in the following sources: . . . or [2] by rules subsumable under such rules. Provided that [3] any contradiction between rules originating in different sources shall be resolved according to the following ranking amongst the sources: . . . and provided that [4] no other contradiction shall be admitted to exist.”

Taken together, the four principles provide a “rule-systematizing logic of legal science” with the machinery for identifying, in conceptual terms, the legal system and its rules, and for resolving conflicts between legal rules. The statements of the exclusion and derogation principles are to be completed by specifying the inde-
pendent legal sources and ranking them—in other words, by filling in the blanks at these two points in Harris's *fiat*.

What does it mean to say that the *fiat* provides a "rule-systematizing logic of legal science" and that it performs the functions of identification and conflict resolution in, as I put it above, "conceptual terms"? Harris answers by comparing the *fiat* with Kelsen's basic norm: "[T]he function of the basic legal science *fiat* is the same as that function which Kelsen most often claims for the basic norm, that of making explicit the logical procedures of legal science."21 Unlike Kelsen, however, Harris includes both derogation and noncontradiction in his *fiat*, whereas Kelsen regards the traditional counterparts to derogation (for example, *lex posterior derogat legi priori*)22 as positivistic or contingent23 and rejects altogether, in his latest work, the principle of noncontradiction in the normative sphere.24

In the *fiat* Harris speaks only of conditions for the existence of legal duties; this apparently severe constraint will suffice if, as he argues, the various familiar rule types (permissions, authorizations, and the like) are reducible in form to duty-imposing rules.25

A. The Principles of Exclusion and Subsumption

The principle of exclusion specifies the various independent sources of law in the legal system. In England, for example, these would include parliamentary legislation, judicial precedent, and, to a much lesser extent, custom. (To specify the independent sources

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21 Id. at 78 (footnote omitted).
22 "A later statute derogates from a prior one."
23 See, e.g., H. Kelsen, Allgemeine Staatslehre 308, 409 (1925) [hereinafter cited as Allgemeine Staatslehre]; H. Kelsen, Allgemeine Theorie der Normen 102-03 (K. Ringhofer & R. Walter eds. 1979) [hereinafter cited as Allgemeine Theorien]; H. Kelsen, Das Problem der Souveränität und die Theorie des Völkerrechts 115 (1920). In all of these works, Kelsen acknowledges his indebtedness to Merkl, who had defended a positivistic or contingent interpretation of the *lex posterior* maxim from the beginning, see Merkl, Die Rechtseinheit des österreichischen Staates, 37 Archiv des öffentlichen Rechts 56, 75-88 (1918), reprinted in 1 Wiener Schule, supra note 14, at 1115, 1130-39, whereas Kelsen, in his earliest treatment of the maxim, offered a quasi-logical interpretation, see Kelsen, Reichsgesetz und Landesgesetz nach österreichischer Verfassung (pt. 1), 32 Archiv des öffentlichen Rechts 202, 206-15 (1914).
25 Harris at 92-106.
of law for a particular system is to fill in the first of the blanks in Harris's statement of the basic legal science "fiat." Each of the independent legal sources is expressed in a "constitutional source-rule," and the set of constitutional source-rules identifies the legal system. The principle of exclusion is, for this reason, termed "the most basic of all the logical principles of legal science."27

The second principle is that of subsumption. For Harris, as for Kelsen, subsumption means simply "falling within the scope of" and presupposes the existence of an appropriate higher-order or subsuming rule. As Kelsen puts it: "[I]n the relationship between a general norm and the corresponding individual norm posited by the law-applying organ, a logical relation exists, insofar as the state-of-affairs established in concreto by the court can be subsumed under the state-of-affairs defined in abstracto in the general norm."28

How the principles of exclusion and subsumption function is perhaps most easily seen by considering them together. That is, by coupling these two principles one can trace the particular rules in question to their source and, ultimately, to their constitutional source rule, thereby identifying them as legal rules. Lord Bryce's well-known example illustrates Harris's point.

A householder in a municipality is asked to pay a paving rate. He inquires why he should pay it, and is referred to the resolution of the Town Council imposing it. He then asks what authority the Council has to levy the rate, and is referred to a section of the Act of Parliament whence the Council derives its powers. If he pushes curiosity further, and inquires what right Parliament has to confer these powers, the rate collector can only answer that everybody knows that in England Parliament makes the law, and that by the law no other authority can override or in any wise interfere with any expression of the will of Parliament.29

The principle of subsumption enables us to trace the decision through the hierarchy, and at the point at which we appeal to the constitutional source rule, explicit in the last lines from Bryce, the principle of exclusion comes into play. In short, as Harris puts it,

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27 Id. at 71.
28 Id.
29 Kelsen, Law and Logic, supra note 24, at 246, quoted in Harris at 87.
20 2 J. Bryce, Studies in History and Jurisprudence 52 (1901). See also Reine Rechtslehre, supra note 1, § 34(c).
"[a] rule 'originates in' a source when it is directly subsumable under a constitutional source-rule describing that source."30

A coupling of the exclusion and subsumption principles gives us the option of traveling, as it were, in either direction. We can trace the legal rule back to its source to establish its validity, a move from the particular to the general that is familiar from the English doctrine of sources of law. Kelsen would add that we can also move in the other direction, from the general to the particular:

If an official whose appointment is governed by a general legal norm has established in a procedure prescribed by a general norm that facts are present with which a general legal norm associates a certain sanction, then this official, in a proceeding prescribed by a general norm, shall order the imposition of a sanction as provided in the aformentioned general legal norm.31

The move from the general to the particular, reflecting an application of Kelsen's Stufenbau or hierarchy of norms, determines whether a proposed "concretization" of a general norm is authorized. The Kelsenian answer, followed in the main by Harris, is clear: the proposed particular or "concrete" rule is authorized if subsumable under the general rule.32

B. The Principle of Derogation

Harris's third principle is derogation. It invalidates a legal rule that conflicts with a rule originating in a higher-ranking source33 and, within a statutory context, invalidates an earlier enactment that conflicts with a later one.34 The details of the derogation principle in a particular legal system will be determined by the ranking of its particular sources of law,35 including, in common law juris-

30 Harris at 71.
31 Reine Rechtslehre § 35(d).
32 See generally Harris, Concept of Authority, supra note 8.
33 This accords with the maxim lex superior derogat legi inferiori.
34 This accords with the maxim lex posterior derogat legi priori.
35 At any rate, this represents the received opinion in Anglo-American legal theory. See, e.g., H.L.A. Hart, The Concept of Law 98 (1961). Whether the hierarchical status of a norm (as reflected by the ranking of its source) determines its derogating force, or whether a derogating principle determines the hierarchical status of the norm is, however, an open question in Continental legal theory. The question has received special attention in Austria. See, e.g., R. Hauser, Norm, Recht und Staat 72-74 (1968); R. Walter, Der Aufbau der Rechtsordnung 55-68 (2d ed. 1974); Walter, Der Stufenbau nach der derogatorischen Kraft in österreichischen Recht, 20 Österreichische Juristen-Zeitung 169 (1965).
dictions, its higher and lower courts. (To rank the independent sources of law is to fill in the second of the blanks in Harris's statement of the basic legal science fiat.)

I might add one remark on the significance of Harris's treatment of derogation. As is well known, legal philosophers have worked at formulating distinct types or forms of legal rules. The aim, which might be termed "formal reduction," is to reduce the great variety of law to a small number of distinct types of legal forms. Well-known examples of formal reduction are the "commands" of Hobbes and Austin, the "duty-imposing rules" and "power-conferring rules" of H.L.A. Hart, and the "norms of conduct" and "norms of competence" of Alf Ross. Kelsen, too, speaks of various types of legal rules (or norms), distinguishing, in some detail in his latest work, among commands, permissions, empowering norms, and derogating norms. The question is how these norm types are to be understood in relation to each other. For example, are legal permissions to be regarded as independent of legal commands, or can they be reduced to, or explicated in terms of, commands? There are a number of different views on this and related questions, and nothing like a consensus has emerged.

Kelsen's own account is complex and incomplete. What is more, the problems in interpreting his work on legal norms are exacerbated by the fact that the various schemata and categories in the Pure Theory—such as "static" versus "dynamic" models of the legal norm, dependent, independent, and incomplete legal

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38 Contrast "material reduction" in legal theory, familiar from classical legal positivism and legal realism. Material reductionists claim that the validity of legal rules can be exhaustively analyzed in terms of some concatenation of fact, such as judicial behavior. Formal reduction does not, of course, imply material reduction; Kelsen, for example, is a proponent of formal reduction, see text at notes 41-42 infra, but he rejects all forms of material reduction. Most legal philosophers are formal reductionists of one type or other, but Honoré, Real Laws, in Law, Morality and Society 99 (P. Hacker & J. Raz eds. 1977), is an interesting exception. Reacting sharply to formal reduction in legal philosophy, Honoré develops in his paper some details of a taxonomy of the varieties of law.  
38 1 J. Austin, Lectures on Jurisprudence 86-103 (5th ed. 1885).  
41 Reine Rechtslehre, supra note 1, §§ 4(d), 6(b), (e), 29(c), (e), 35(g).  
42 See Allgemeine Theorie, supra note 23, at 76-82. See generally Kelsen, Derogation, supra note 24; Kelsen, Law and Logic, supra note 24.  
44 See R. Walter, Der Aufbau der Rechtsordnung 16-19 (1964). The static and dynamic models of the legal norm are not to be confused with static and dynamic models of
norms, legal norms versus normative functions, and primary versus secondary norms—cut across the distinctions he makes among the norm types themselves. As if this were not obstacle enough, derogating norms present special difficulties for Kelsen. They are, as he correctly recognizes, second-order norms; that is, they are norms directed to questions of the validity of other norms rather than to questions of conduct. Nor does a satisfactory position on derogating norms emerge in Kelsen’s most recent work, where the matter is given special attention.

Kelsen’s difficulties with derogation are not unique. One is reminded of John Austin’s “[l]aws abrogating or repealing existing positive law,” which he, too, was unable to incorporate into a framework of coercive rules. Harris neatly circumvents the problem by treating derogation as a principle governing relations between rules rather than as a species of rule.

C. The Principle of Noncontradiction

The fourth of Harris’s principles is noncontradiction. It serves to reject the possibility “that one could affirm the existence of a duty, and also the non-existence of a duty, covering the same act-situation on the same occasion.” Most conflicts between legal rules are resolved by the principle of derogation, but some are not; the principle of noncontradiction fills the gap. In particular, noncontradiction is addressed to situations in which conflicting rules were issued at the same time by the same source. Simultaneity of issuance rules out application of the lex posterior maxim (in Harris’s scheme, the derogation principle), while the common source of the conflicting rules precludes use of the lex superior maxim (again, the derogation principle).

Harris’s characterization of a rule conflict quoted above is addressed to a direct, partial conflict. The conflict is direct if both

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the legal system itself (concerning the latter, see REINE RECHTSLEHRE, supra note 1, § 34(b)); the static-dynamic distinction with respect to norms is to be understood within the context of a dynamic legal system.

45 See REINE RECHTSLEHRE, supra note 1, § 6(e); R. WALTER, supra note 44, at 19-20.
46 ALLGEMEINE THEORIE, supra note 23, at 76-81; REINE RECHTSLEHRE, supra note 1, § 4(d).
48 ALLGEMEINE THEORIE, supra note 23, at 84-92.
49 1 J. AUSTIN, supra note 38, at 103.
50 HARRIS at 70-81.
51 Id. at 11.
rules apply to the addressee at a given moment. It is partial if it is possible to avoid the conflict, as in a rule conflict between, say, a duty to do an act and a permission to forbear from doing it. Compliance with the first rule avoids the conflict; following the second rule, on the other hand, results eo ipso in a violation of the first rule.\(^6^2\)

Further, Harris emphasizes that his principle of noncontradiction applies descriptively, a qualification he explains by means of a momentary legal system. Harris begins, here, by distinguishing three interpretations of the concept of a legal system: first, as a system of rules constituting the "present law";\(^6^3\) second, as a "historic congeries of rules, principles, policies, doctrines, and maxims";\(^6^4\) and third, in sociology, as a set of complex institutional structures.\(^6^5\) Harris is concerned with legal systems only in the first sense, that is, the legal system as "present law." What, exactly, does present law mean? Harris answers with a theoretical construction introduced by Joseph Raz, namely, the "momentary legal system,"\(^6^6\)—understood, for present purposes, as the collection of rules accepted or recognized as legal rules at a given moment.\(^6^7\) What is important is that the momentary legal system cannot change; when change occurs (that is to say, change in the collection of rules constituting the system), the result is a new momentary legal system.\(^6^8\) Harris's concern in Law and Legal Science extends only to momentary legal systems;\(^6^9\) it is this interpretation of legal system that lends itself to conceptual inquiry of the sort his basic legal science\(^\textit{fiat}\) is designed to facilitate. In particular, the principle of non-contradiction, as Harris uses it, applies to momentary legal systems but not to a legal system understood either historically or sociologically.

\(^{62}\) See Allegemeine Theorie, supra note 23, at 99-100; Kelsen, Derogation, supra note 24, at 349-51, reprinted in Essays, supra note 24, at 269-71. See also Munzer, Validity and Legal Conflicts, 82 YALE L.J. 1140, 1142-48 (1973). I also briefly consider the contrasting situation of the direct, total conflict, in text at notes 64-65 infra.

\(^{63}\) Harris at 12.

\(^{64}\) Id.

\(^{65}\) Id. at 13.

\(^{66}\) See J. Raz, Legal System, supra note 6, at 34-35.

\(^{67}\) Harris at 111-15.

\(^{68}\) Id. Harris adds that there is no inconsistency between the idea of a momentary legal system and retrospective legislation. "Legal science describes duties and exceptions stipulated by rules which are now valid . . . and the act-situations to which these duties and exceptions relate have whatever temporal dimensions the legislature chooses to give them." Id. at 112.

\(^{69}\) Id. at 43.
This constraint on the application of the principle of noncontradiction, as on the application of the other principles, ensures that the enterprise will be purely descriptive. To be sure, statements of legal science might be critical of the law, or they might be sociological in character, as, for example, when they are used to "compare rules of law with observable, behaviourally-based, social rules." Or they might present "historical explanations" for the current state of the law. Harris's own inquiry, however, and that of his predecessors in analytical jurisprudence, is different. His concern is "to inquire into the logical status of statements made by legal scientists when they purport to describe the present law on a topic, that is, when they convey information about part of the 'legal system' in the sense of a momentary system of valid rules." This descriptive inquiry, Harris adds, is the "primary" activity of legal science.

Kelsen, too, made a case for a principle of noncontradiction. As he argued in the second edition of the Reine Rechtslehre, the principle was required by the Neo-Kantian presupposition of unity (Einheit) in the legal order. Though Kelsen, like Harris, provides examples of direct, partial conflicts, he also considers direct, total conflicts. A conflict is direct if both conflicting rules apply to the addressee, and total if compliance with either of them results eo ipso in a violation of the other; the standard example is the simultaneous prescription and proscription of a given act. Kelsen's application of the principle of noncontradiction is, like Harris's own application, both descriptive and—although Kelsen fails to consider the matter himself—limited to what others have termed a momentary legal system.
Given the existence of a direct, total conflict, the principle of noncontradiction precludes the simultaneous validity of both conflicting rules—or so Kelsen argued in the second edition of the *Reine Rechtslehre*. In his latest work, however, Kelsen changes his mind, emphatically rejecting the principle of noncontradiction. He argues that where there is a direct, total rule conflict, then both conflicting rules will be—indeed must be—valid. A rule conflict is a two-place relation, and if one of the *relata* is not valid—does not exist—then there is no occasion to talk about a conflict after all.

To be sure, this argument will not do. The validity of the conflicting rules is precisely what is in question in a rule conflict, and Kelsen begs that question when he claims that both rules must be valid. Still, Kelsen's conclusion, formulated weakly to read that both conflicting rules *may* be valid, is a point of some interest for legal theory. To see what can be made of it, we might leave cases of direct rule conflicts and turn to a more general theme, namely, normative consistency.

Questions of normative consistency arise in connection with what might be termed "competing rules"; as before, these questions are considered descriptively, within the framework of a momentary legal system. Unlike the rule conflict, however, which is direct, questions of normative consistency pose indirect conflicts; the competing rules are not simultaneously applicable to the same person. Nevertheless, questions of normative consistency are not conceptually far removed from those raised by rule conflicts. Where rules are claimed to conflict or "compete," a prima facie case for the claim of inconsistency may be made by drawing out implications of each of the competing rules in the form of constructed rules. These constructed rules are to be understood hypothetically; that is, if applied to a given individual at a given moment, they would yield a direct rule conflict. In short, the hypothetical application of a direct rule conflict is sufficient for a showing of normative inconsistency.

My assumption is that as a purely descriptive thesis, it is normative inconsistency that describes the facts. In the collection of rules termed the momentary legal system there are any number of rules that compete, and the normative inconsistency of paired,

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67 *Reine Rechtslehre*, *supra* note 1, § 34(e).
68 See sources cited note 24 *supra*.
69 I consider the argument at length in *Zum Problem der Normenkonflikte*, 66 *Archiv für Rechts- und Sozialphilosophie* 487 (1980).
competing rules can be shown by generating direct, albeit hypothetical, rule conflicts, in the manner suggested above. Harris, in sharp contrast, would have us believe that the legal system "is a field of meaning stipulating the totality of legal duties and exceptions to duty, within which no contradiction is allowed."

To be sure, there are respects in which one can speak of the consistency of a momentary legal system (and, by extrapolation, the consistency of a legal system generally), but none of these is incompatible with the purely descriptive thesis of normative inconsistency adumbrated here. For example, it is a commonplace that officials do reconcile the claims of competing rules by appealing to the state of the law; they may resolve the conflict by opting for the rule that is more easily squared with this greater body of normative material. The practice here reflects a judicial policy of resolving disputes and issuing norms consistently, of refusing as a policy matter to allow inconsistency. Harris himself sometimes speaks in this vein, as when he suggests that "[l]egal scientists characteristicistically insist on interpreting the legislative material of a state as a non-contradictory field of meaning." Harris's observation is indeed to be understood descriptively. To say that, however, is a far cry from saying that the rules making up a given momentary legal system are, as a matter of fact, consistent.

More interestingly, the lawyer, judge, or legal critic may offer an interpretation of the state of the law in a particular area and argue that new statutory enactments and recent adjudication ought to reflect the law as understood under the proffered interpretation. There is consistency of a sort in this, for the legal critic will argue that it is his interpretation, and not, say, the earlier statutes or cases, that reflects the law as properly understood. Indeed, some earlier legal material may be irreconcilable with the proffered interpretation. But normative consistency is, here, a prescriptive

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70 HARRIS at 81.
71 See, e.g., N. MACCORMICK, LEGAL REASONING AND LEGAL THEORY 106-07, 119-21, 126, 179 (1978).
72 HARRIS at 32 (emphasis added).
73 Cf. N. MacCormick, supra note 71, at 126 (footnote omitted):
A judge, by formulating a general principle as expressing the underlying common purpose of a set of specific rules at once rationalizes the existing law so as to reveal it in the light of a new understanding, and provides a sufficient ground for justifying a new development in the relevant field.
Here the interpretation (or "general principle") reaches to existing legal material, whereas in the situation I describe the legal interpretation is used as a basis for rejecting some existing legal material as irreconcilable.
thesis (or, at any rate, a descriptive thesis about the law at odds with the descriptive thesis tacitly presupposed in connection with the older statutory or case-law material); such instances of interpretation are familiar from areas of dramatic change in the law, as, for example, Brown v. Board of Education.\textsuperscript{74}

Neither the descriptive thesis reflected in the existence of a particular judicial policy nor any prescriptive thesis of normative consistency is difficult to square with the descriptive thesis of normative inconsistency suggested above. On the other hand, a descriptive thesis of normative consistency, however reasonable it may appear when one is dealing with the extreme case (the direct, total rule conflict) fails to reflect the facts of legal life.\textsuperscript{75}

These remarks conclude the brief sketch of Harris's basic legal science \textit{fiat}. I will now return to the principle of subsumption and consider, in particular, cases in which the putative subsumption is mistaken.

\section{II. Subsumption and the Mistaken Judicial Ruling}

At first glance, Harris's principle of subsumption, which combines, as we have seen, elements from the English doctrine of sources of law with elements from Kelsen's \textit{Stufenbau} or hierarchy of norms, may well appear unproblematic. Difficulties arise, however, in cases in which the putative subsumption is mistaken—for example, when there is an unconstitutional statute\textsuperscript{76} or, as Harris explains, a mistaken judicial ruling:

\begin{quote}
It may happen that a lawyer is faced with a judicial ruling which, in his opinion, cannot be subsumed under the statute cited by the court as its authority. He may none the less describe the ruling as law, because it is his primary function to describe as law those rules which will be enforced. In that case, he has to affirm a subsumptive relation which he avers ought not to exist. This is one of the instances in which a legal scientist may describe a judicial decision as "wrong, but binding" . . . .\textsuperscript{77}
\end{quote}

\textsuperscript{74} 347 U.S. 483 (1954).

\textsuperscript{75} In thinking about normative consistency and related questions, I have profited from a reading of F. Schauer, Is Law Coherent? (unpublished manuscript on file with The University of Chicago Law Review).

\textsuperscript{76} See generally O. Field, The Effect of an Unconstitutional Statute (1935).

\textsuperscript{77} Harris at 87.
A case in point is *Korematsu v. United States.* There the Supreme Court held that the military had acted constitutionally when it issued an evacuation order in early 1942 to Japanese aliens and American citizens of Japanese descent living in certain areas of the West Coast. The judicial ruling is, adopting Harris's language, "wrong, but binding"—wrong because it is not subsumable under the due process clause of the fifth amendment, proscribing racially discriminatory measures, and yet binding because, as Harris put it, it "will be enforced."

I do not quarrel with the description of this ruling as "wrong, but binding." Indeed, the *Korematsu* example is my own. I do take issue with Harris's resolution of the problem of "wrong" or mistaken judicial holdings. In his view, if the lawyer describes the concededly wrong or mistaken judicial holding as law, he is then affirming a subsumptive relation that he "avers ought not to exist." Harris makes his point a second time: "Because of the institutional deference shown to courts, which leads their rulings to be enforced as 'law,' descriptive legal science has to insert their unappealable decisions into the corpus of the law by virtue of a forced subsumptive relation, even if, critically, the relation is denied."

Does the "forced subsumptive relation" make sense? Consider two situations. First, in the extreme sort of case illustrated by *Korematsu,* the legal critic will make the most of the impossibility of subsuming the judicial ruling. In the eyes of its critics, *Korematsu* represented an "abandon[ment of] the Constitution to military fiat," and an "elevat[ion] of racism to a constitutional principle," and this critique reflected an overwhelming consensus in the American academic community. Far from "forcing" a subsumptive relation, the critic correctly argues that the judicial ruling, even though binding in the case at hand, is not subsumable at all.

To be sure, the judicial ruling in the extreme case is unlikely to arise later as persuasive judicial authority. A second situation,

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78 323 U.S. 214 (1944).
79 Bolling v. Sharpe, 347 U.S. 497 (1954), is the leading authority on the use of the due process clause of the fifth amendment in cases of racial discrimination brought against the federal government.
80 Harris at 87 (footnote omitted).
82 See, e.g., M. Grodzins, Americans Betrayed (1949); Dembitz, Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions, 45 Colum. L. Rev. 175 (1945); Rostow, The Japanese American Cases—A Disaster, 54 Yale L.J. 489 (1945).
suggested by Harris's own remarks, has more ready application. Here the lawyer, while recognizing that the judicial ruling in question cannot be subsumed, may nevertheless have reason to believe that the ruling will not be corrected for a time and that his client can therefore safely rely on it. (Reliance on such a ruling over a considerable period would lead, all things being equal, to a change in the law, but we may assume that for now counsel correctly judges that the ruling is aberrant.) Again, the idea of a "forced subsumptive relation" is, in my view, less then helpful. The situation is anomalous, and the judicial ruling aberrant, precisely because the ruling cannot be subsumed.

Why, then, does Harris talk of a "forced subsumptive relation"? The reason is that he sees no other way to account for the binding quality of the mistaken judicial ruling. If it is binding, then it is subsumable; if it is binding though "wrong," then—because subsumption is a necessary condition of bindingness—it must be subsumed by force.

There is, however, another way to account for the binding quality of the "wrong" or mistaken judicial ruling. In such cases it is proper, indeed necessary, to distinguish two species of subsumption, which might be termed "material" and "formal" subsumption. The more general phenomenon is material subsumption, a rubric for talking about the higher-order legal rules that confer law-making powers and impose constraints on the exercise of these powers. A material subsumptive rule comprises the conferrals of power and constraints on its exercise that apply in accounting for the validity of a given judicial holding, statutory enactment, or regulation. In Korematsu, for example, the material subsumptive rule might be reconstructed from the article II war powers of the President (exercised by President Roosevelt through his executive order authorizing the military to issue evacuation orders), the article I war powers of Congress (exercised through enactment of a statute endorsing the executive order), and the due process clause of the fifth amendment (proscribing racially discriminatory measures). The second doctrine is formal subsumption, by which I mean, first, the purely formal conditions associated with the law-making process in question (legislation, adjudication, or administration) and, second, conferrals of power to legal officials, in particular to judges, who review the product of the law-making process.

The validity of the judicial ruling in the *Korematsu* case cannot be explained by appeal to the material subsumptive rule, for the ruling violates the material constraint imposed by the fifth amendment and thus is not materially subsumable. Nevertheless, the ruling is formally subsumable and therefore "binding." There is, in other words, a prima facie case that the conditions associated with the legal process in question—here, constitutional adjudication—obtained. This prima facie case, coupled with an appeal to the doctrine of finality, provides a full account of the binding quality of the ruling without invoking the fiction of a "forced subsumption." The doctrine of formal subsumption will apply a fortiori in less extreme cases.

Finally, the doctrines of material and formal subsumption—or something comparable—are necessary, for without them all judicial rulings are treated alike in the end; that is, all are subsumable, even if the subsumption sometimes requires a bit of a push. To treat all judicial rulings alike, however, is to obliterate the very distinction with which Harris began, namely, that between "wrong" or mistaken judicial rulings and correct ones.

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84 A comparable theory can be constructed from Kelsen's talk of "normative alternatives":

If a statute enacted by the legislative organ is considered to be valid although it has been created in another way or has another content than [that] prescribed by the constitution, we must assume that the prescriptions of the constitution concerning legislation have an alternative character. The legislator is entitled by the constitution either to apply the norms laid down directly in the constitution or to apply other norms which he himself may decide upon. Otherwise, a statute whose creation or contents did not conform with the prescriptions directly laid down in the constitution could not be regarded as valid.

H. Kelsen, *supra* note 47, at 156. (Kelsen applies his "normative alternatives" in the adjudicative context in *Reine Rechtslehre*, *supra* note 1, § 35(j).) Harris is mistaken when, referring to the above-quoted text, he contends that Kelsen's position is "bizarre," HARRIS at 86. On the contrary, Kelsen's position provides one means of rationalizing a well-entrenched doctrine in the Austrian Constitution, namely, that if the Federal Constitutional Court (*Bundesverfassungsgerichtshof*) holds a federal or state statute unconstitutional, see *Bundesverfassung* art. 140 (Aus.), the holding will have only *ex nunc* or prospective effects, save for its application to the instant case. See L. Adamovich, *Handbuch des Österreichische Verfassungsrechts* 454 (6th ed. 1971); H. Haller, *Die Prüfung von Gesetzen* 198-207 (1979); R. Walter, *Österreichisches Bundesverfassungsrecht* 750 (1972). The Austrian doctrine is to be sharply distinguished from a judicial holding to the effect that a statute, because unconstitutional, is null and void; here one has a warrant for *ex tunc* or fully retroactive effects. Given the Austrian doctrine, the question arises, at least in theory, of where one turns for an account of legal validity for the entire life of the norm before the High Court's judgment takes effect. On Kelsen's view of the matter, one turns to the second of the normative alternatives.
CONCLUSION

In reviewing *Law and Legal Science* I have dwelt on aspects that are at once interesting and problematic. I would do readers a disservice, however, if I were to close without alluding to some of the other noteworthy aspects of the book. There are, for example, helpful remarks on whether distinct forms of legal rules must reflect distinct legal functions;\(^{85}\) Harris answers, correctly I think, in the negative.\(^{86}\) There is an instructive chapter on legal validity, in which Harris distinguishes no fewer than five interpretations of that notoriously ambiguous notion and shows that some questions in jurisprudence turn on conflations of one interpretation with another.\(^ {87}\) In the last chapter, he develops distinct models of rationality in judicial decision making.\(^ {88}\) No single model, such as consequentialism, will do; instead, as Harris argues, adjudication is to be understood in terms of four different models of rationality—will, natural meaning, legal doctrines, and utility. The approach is suggestive and could be developed at much greater length.

Finally, I might add that Harris's basic legal science *fiat*, however problematic, is a remarkable attempt to develop something akin to Kelsen's doctrine of the basic norm—and in an idiom that is fully accessible and intelligible.

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\(^{85}\) *Harris* at 92-106.
\(^{86}\) *Id.* at 99.
\(^{87}\) *Id.* at 106-31.
\(^{88}\) *Id.* at 132-64.