VALIDITY OF LAW: TWO POSITIVIST VIEWS

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I.

The problem of validity most commonly arises in the dialogue (often at cross purposes)[1] between proponents of natural law (hereinafter "naturalists") and those legal theorists who share, if nothing else, at least the common view that merely because a law is morally bad does not entail the conclusion that it has no legal force (hereinafter "positivists"). In this paper, however, I propose to examine the views of two positivists, Professor H. L. A. Hart[2] and Professor Alf Ross.[3] Each has stated his position on validity at some length.[4] Professor Hart has criticised the views of Professor Ross[5] who in turn has replied that there really is no difference between their respective positions.[6] To give perspective to their respective approaches to validity I shall first give a brief account of what they conceive the province of jurisprudence to be.

For Professor Ross it is possible to ascertain the existence and describe the content of a particular legal system in purely empirical terms based on observation and interpretation of social facts (human behavior and attitudes) and to reduce legal concepts to predictions of future judicial behavior and feelings. Any legal notion not capable of being dealt with in this way must be dismissed as (meaningless) metaphysics. This is as far as jurisprudence goes. Consequently, there is neither a need nor any point in further appeal to natural (moral) law. This is not to say that law and morals are not inter-related, or that legal rules do not often incorporate moral standards. Professor Ross simply means that moral evaluation of itself is not the concern of the positivist—rather it is the task of the naturalist. After the positivist has determined what the law is it is perfectly legitimate for the naturalist to evaluate it in the light of what he thinks it ought to be: so if positivists and naturalists would stick to their

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1. See Jenkins, *The Matchmaker or Toward a Snythesis of Legal Idealism and Positivism*, 12 J. OF LEG. ED. 1 (1959).
2. Professor of Jurisprudence in the University of Oxford.
3. Professor of Law in the University of Copenhagen.
4. See HART, THE CONCEPT OF LAW 97-107 (1961); ROSS, ON LAW AND JUSTICE 29-74 (1958).
5. Hart, *Scandinavian Realism*, 1959 CAMB. L. J. 233.
6. Ross, *Review of Hart "The Concept of Law,"* 71 YALE L. J. 1185 (1962); Ross, *Validity and the Conflict between Legal Positivism and Natural Law*, IV REVISTA JURIDICA DE BUENOS AIRES 46 (1961).

respective theoretical "lasts", if the naturalist would stop telling the positivist he must also evaluate the law and the positivist stop decrying the naturalist for evaluating the law, each would be free to pursue the even tenor of his separate way without let or hinderance from the other.[7]

Professor Hart, who would agree that the inquiry is empirically based, sees the theorist's function as one of analysis and elucidation of the notions of law and legal system, and of legal concepts. He does not agree, however, that legal concepts must be analyzed solely as predictions of future judicial behavior and feelings. Rather, this analysis and elucidation is centered around the notion of a rule. What, asks Professor Hart, does it mean to say that a rule exists? Is merely convergent habitual behavior sufficient? If not, how distinguish merely convergent habitual behavior (people go to the cinema on Saturday evenings) from a social rule (men bare their heads on entering church)? Professor Hart explains the difference in this way. If one does not go to the cinema on a Saturday evening no one will care one way or the other. But if a man does not bare his head on entering church he will be met with hostile reactions. Thus the distinguishing feature of a social rule is that deviations from the rule give rise to criticisms and reproofs and those deviations are considered as justifying those criticisms and reproofs. This fact finds its linguistic expression in certain normative words such as should, ought, must, etc. The function of these words, therefore, is to indicate the presence of a rule requiring certain conduct.[8] Legal rules in turn are a subspecies of a social rules and fall into three broad categories, primary rules which impose duties, secondary rules which confer powers of adjudication and change, and rules of recognition which specify criteria for identifying rules of the system. The union of these three types of rules, the fact that it takes rules to make law, lies at the center of a legal system and illuminates, says Professor Hart, many of the perplexing problems of jurisprudence.[9]

II.

To appreciate the views of Professors Hart and Ross on validity it may be helpful to take first a simple illustration. Consider the following statements:

(1) In Virginia a valid will must be attested by two witnesses;
(2) The rule, a will must be attested by two witnesses, is valid in Virginia;

7. Ross, *Validity and the Conflict between Legal Positivism and Natural Law*, *supra* n. 6.
8. HART, THE CONCEPT OF LAW 9-10, 85-88 (1961).
9. *Id.* at 89-96.

(3) This will is valid in Virginia, because it has been attested by two witnesses, as having been said respectively by a judge in court, an attorney to his client, and by one private citizen to another. To determine the precise import of the word "valid" we must consider its function in each of the nine statements. When the speaker is a judge in court, "valid" serves as a reference to a rule: in a case of

(1) Both a statute, precedent or custom, and a rule of recognition;
(2) A rule of recognition specifying criteria for identifying what is to count as a rule of the system;[10]
(3) Both a statute, precedent or custom (as in (1) supra), and a rule of recognition.

In the first statement the judge is merely informing us that there is a certain legal rule in existence; "valid" here means that in Virginia there is a rule that a will must be attested by two witnesses, and it is a legal rule (reference to a rule of recognition). The second statement is one of recognition or identification: the word "valid" tells us that the rule, a will must be attested by two witnesses, satisfies the criteria for identifying what is to count as a rule of the Virginia legal system. Statement (3) is a decision in which "valid" informs us that the case is subsumed under a rule and that rule is a legal rule (reference to a rule of recognition). When the speaker is an attorney addressing his client, the analysis is the same except that whereas the third statement (of subsumption) when made by the judge is a legal decision, it is merely a prediction of the judge's decision when made by an attorney. If the speaker were a private citizen, the analysis would be the same as for the attorney.

Logicians have developed a helpful distinction between the use and mention of a word.[11] Consider the following statements:

(1) A "puppy" is a "young dog."
(2) Fido is a puppy.

The significance of the quotation marks in (1) is that we are talking about words and not dogs; "puppy" means "young dog." Hence we mention the words in quotes rather than use them. In the second sentence we are talking about dogs rather than words and consequently use the word "puppy," the meaning of which is taken as understood. The legal analogue of this dichotomy is the distinction, recognized by Professors Hart and Ross, between internal and external statements.[12] But despite pro-

10. Ross uses the expression "norm of competence;" see ON LAW AND JUSTICE 32 (1958.) For simplicity, I shall use Hart's terminology.
11. See *e.g.*, SUPPES, INTRODUCTION TO LOGIC 121-127 (1957); RUSSELL, INTRODUCTION TO MATHEMATICAL PHILOSOPHY ch. XVI (1919).
12. See also Golding, *Kelsen and the Concept of "Legal System,"* 47 ARCHIV FUR RECHTS UND SOZIALPHILOSOPHIE, 355, 364 (1961).

testations by Professor Ross to the contrary, they use the terms quite differently. For instance, when the judge, attorney, and citizen make statement (2) (The rule, a will must be attested by two witnesses, is valid in Virginia,) they are, according to Professor Hart, making internal statements, *i.e.* statements from the internal point of view of those living in a society in which the various transactions of life are conducted in accordance with rules. All are making the statement *intra* system. This is to be contrasted with an external statement made by an observer who, without accepting the rules himself, may assert that they are accepted in the society in question. This seems to comply with the use—mention distinction: the judge, attorney and citizen are using the word "valid" whereas the observer merely mentions it.

For Professor Ross internal is reserved for statements about "acts in law" (e.g. wills, contracts) *according* to the legal system, *i.e.* statements involving the application of a legal rule to given facts. This would seem to cover only statement 3 (This will is valid) made by judge, attorney and citizen. External, therefore, would cover both statement 1 (A valid will must be attested by two witnesses) and statement 2 (The rule, a will must be attested by two witnesses, is valid) when made by judge, attorney, citizen and observer. And these for Professor Ross are simply statements about the rule, namely that it exists, which he says "in the last analysis" is a predicion of judicial behavior.[13] This is very different from Professor Hart's use of the distinction: statements 1, 2 and 3, when made by judge, attorney, and citizen will be internal, whereas external will cover statements 1 and 2 when made by an observer: presumably an observer would have no occasion to make statement 3 (This will is valid).

This dissimilar use of the internal - external dichotomy clearly reflects the different approaches of Professor Hart and Professor Ross to legal problems. For Professor Ross the internal statement is addressed to what he calls "acts in law" (e.g. a will, a contract): when "valid" is predicated of an act in law in such an internal statement it is a legal judgment, by which Professor Ross means it applies a legal rule to the given facts and tells us that those given facts—the act in law—have the intended legal effect (*i.e.* legally they constitute a will, a contract, etc.).[14] Professor Hart, we have noted, is concerned mainly with rules and so does not address himself to this use of the word valid at all. And as Professor Ross' concern with rules goes solely to the question of factual existence, he in turn does not address himself to what primarily concerns Professor Hart—the internal (normative) aspect of rules as contrasted with merely convergent habitual behavior, and the internal

13. *Op. cit. supra*, n. 7 at 84.
14. *Id.* at 76.

(*intra* system) need to identify what rules are to count as legal rules. Only statements about rules by observers are external for Professor Hart, whereas Professor Ross treats any statements about a rule, whether by a person concerned within the system with identifying the rules of the system or by an observer, as external. It is thus extremely difficult to agree with Professor Ross that "there is virtually no disagreement" between himself and Professor Hart on validity.[15] The only point at which their different paths really cross relates to statement 3 (This will is valid). Statements 1 (A valid will must be attested by two witnesses) and 2 (The rule, a will must be attested by two witnesses, is valid) are about a rule rather than an act in law and so are external for Professor Ross regardless of who the speaker is whereas Professor Hart would call them external only when made by an observer. As external, for Professor Ross, they reduce to a prediction of judicial behavior. But Professor Hart has pointed out that the judge when making statement 1 or 2 is not predicting anything about his or anyone else's future behavior.[16] On the other hand he is, as Professor Hart argues and Professor Ross also seems to agree, making a reference by use of the word "valid" to an unstated but accepted rule of recognition.

III.

Professor Ross discusses the conflict between positivist and naturalist in terms of the choice between regarding statement 2 (The rule, a will must be attested by two witnesses, is valid) as either:

(i) A statement about the existence of either the rule or the system of rules: or

(ii) A statement evaluating the rule or the system of rules by reference to some standard outside the system.

and argues that if we keep the two questions separate, reserving (i) for the positivist and (ii) for the naturalist, then there need be no conflict between legal positivism and natural law.[17] For question (i) is necesarily prior to question (ii). Until we have settled what law or a legal system is, we cannot attempt to evaluate it. When logical positivism has settled question (i), then natural law is free to settle question (ii), its evaluation. To support this position, Professor Ross argues in effect that (ii) entails the proposition that there is a duty to obey the law. Presumably he means particular rules must first conform with natural (moral) law and then there will be a moral duty to obey the conforming rules of positive law. But this duty is, says Professor Ross, a *moral* duty

15. *Id.* at 84.
16. Hart, *Scandinavian Realism*, 1959 CAMB. L. J. 233; THE CONCEPT OF LAW 102 (1961).
17. *Op. cit. supra*, n. 7 at 60-68.

toward the legal system and not a *legal* duty *according* to (*i.e.* by reference to a valid rule of) the legal system. If you have a legal duty to perform your contract you fulfill that duty by performing your contract. If you do not perform, the sanction will be applied because you do not perform—not for "not obeying the law." So, if you have "a duty to obey the law" this duty must come from outside the legal system. Hence, when Kelsen, for example, says "the existence of a norm is its validity . . . that a norm possesses validity means that individuals ought to behave as the norm stipulates,"[18] this accounts for the strange (for Kelsen) assertion that there cannot be a conflict between a valid rule of law and a valid moral law[19]— (presumably) because only those rules of law are valid that one has a (moral) duty to obey, and one only has a moral duty to obey valid moral rules. Yet this seems inconsistent with Kelsen's statement that the jurist ignores morality as a system of valid norms just as the moralist ignores positive law as such a system.[20] Professor Hart has observed that to say "there are good legal reasons for doing A and good moral reasons for not doing A" asserts nothing contradictory or logically impossible although, of course, it is logically impossible for one person to do both A and not A at the same time.[21] But Professor Ross concludes that when Kelsen talks of a duty to obey the law, he is talking like a naturalist rather than a positivist. This follows, however, only if, when Kelsen says "validity means that individuals ought to behave as the norm stipulates," his use of ought is a reference to a natural law rule: individuals ought to obey the positive law. Moreover, alternative (ii) does not properly bring out the problem posed for the positivist by natural law, which is not whether positive law must be evaluated by reference to some external standard, or that it must include a standard for evaluating its rules, but whether it necessarily includes a moral evaluation as part of the criterion for identifying its rules. This can be seen more clearly if we consider Professor Hart's own special theory of natural law.

Starting with survival as the end of human activity, the goal desired by all men, Professor Hart argues to certain necessary social rules for the protection of persons, property and promises which form the minimum content of natural law and which are common to law and morality. These are the rules of conduct which any social organization must contain if it is to be viable and which are necessitated by certain truisms about human beings and the world in which they live. In other words,

18. KELSEN, WHAT IS JUSTICE 214; (1957); GENERAL THEORY OF LAW AND STATE 115-116, 369, 395-396 (1946).
19. KELSEN, GENERAL THEORY OF LAW AND STATE 374-375 (1946).
20. *Ibid.*
21. Hart, *Kelsen Visited,* 10 U.C.L.A. L. REV. 709, 728 (1963).

assuming survival as an end and knowing what we know about human beings and their world, certain social rules become a matter of (natural) necessity. This does not mean, says Professor Hart, that the truisms, the natural facts of social life, are necessary (causal) conditions for the social rules in question; they are simply reasons why the rules are necessary. The rules, therefore, are not (inductive) generalizations established scientifically from (sociological or psychological) experiment and observation though conceivably they may be so established. At the same time, Professor Hart avoids any charge of absolutism or dogmatism by insisting that survival, the natural fact of life, and the related truisms, the natural facts of social life, are contingently true only; conceivably things could be otherwise than they are.[22] What emerges is thus a theory which purports to be empirical rather than metaphysical about a natural law that states contingent rather than absolute truths and that is established rationally rather than scientifically; a formidable achievement indeed. Two comments may be made:

(1) Professor Hart's claim to have avoided any *causal* explanation may have to be qualified if as a means—end argument his theory must, as all such arguments, rest on some kind of causal law.

(2) His notion of validity may have to be amended to the extent that to (internally) say of a legal rule that it is valid means that

(a) it satisfies the *formal* part of the criterion of indentification; and

(b) it satisfies the *material* part of the criterion of identification, consisting of certain (minimum natural law) standards included therein.

Assuming the second point to be the case, if Professor Hart should then add "and people ought to obey the law," would he be talking like a naturalist and would he be stating some sort of natural law rule? According to Kelsen, the basic norm of international law is that the states ought to behave as they have customarily behaved,[23] *i.e.* the states ought to obey the customary rules of positive international law. He also says "that a norm possesses validity means that individuals ought to behave as the norm stipulates."[24] Professor Ross implies that these statements indicate that for Kelsen there are duties to obey the rules of municipal and international law respectively, which means that for Kelsen those rules are valid in a normative sense, *i.e.* by reference to natural (moral) law rules outside the positive municipal and international legal systems. Hence these duties in effect refer to the rules: individuals ought to obey the positive law, and States ought to obey international law. In Kelsen's

22. HART, THE CONCEPT OF LAW 181-195 (1961).
23. KELSEN, GENERAL THEORY OF LAW AND STATE 369 (1946).
24. *Op. cit. supra*, n. 18.

theory, therefore, both municipal and international law must rest ultimately on natural law rules, *i.e.* the basic norms of municipal legal systems (people ought to obey the constitution) and the basic norm of international law (states ought to obey the customary rules) are really rules of natural law. But this position of Professor Ross rests on his analysis of the expression "you ought to obey the law." Specifically it rests on his supposition that to say "you have a duty to obey the (positive) law" is a reference to a natural law rule "you ought to obey the (positive) law."

Let us consider a simple group which has three rules for protecting persons, property and promises. In this situation, says Professor Hart, the only means of social control would lie in the general attitude of the group toward the three rules.[25] That attitude could be expressed in the statement: the three rules ought to be obeyed. But this expression does not amount to a fourth rule: rules 1 to 3 ought to be obeyed. For what is expressed is a general attitude to rules and not a rule itself. Both Professor Ross and Kelsen, however, seem to think that the statement "the rules ought to be obeyed" itself states a rule though not a rule of positive law. But this does not follow. Every statement purporting to describe an "ought" attitude does not necessarily also state a rule. In order for an ought statement to state a rule it must be of the form: you ought to do (or not do) X, where "doing X" means doing something other than obeying the rule: you ought to do X. Otherwise whenever we find a rule about "doing X" we would also have a rule about the rule about "doing X." But, of course, "you ought to obey the rules" is not a *genuine* rule any more than "this statement is false" is a *genuine* (complete) statement.[26] Kelsen sees this when talking about sanctions and norms[27] but not when talking about basic norms. Perhaps Kelsen's basic norm is really what Professor Ross would call a non-normative expression of a general attitude toward rules in force, namely the attitude of acceptance; and this, I think, is what Professor Hart would say. For when speaking of a general attitude here, he would merely be describing the force of that part of the analysis of each of the three rules that consists in the internal (normative) aspect which distinguishes them from merely convergent habitual behavior and which finds its linguistic expression in words such as ought, should, must, etc. It would not involve him, as Professor Ross would probably argue, in a reference to a standard (natural law rule) outside the positive legal system. Consequently Professor Hart can say "you ought to obey the law" without having to concede that he has stated a fourth rule. So if Professor Hart's three minimum

25. *Op. cit. supra*, n. 22 at 89.
26. LEWIS AND LANGFORD, SYMBOLIC LOGIC 438-485 (1959).
27. *Op. cit. supra, n.* 23 at 28-29, 59-60.

natural law rules themselves are not derived from any natural (moral) law system, he can include his minimum natural law as the material content of the criterion of identification in his rule of recognition and still keep his theory empirically pure.

The three rules are, of course, a means to an end—which for Hart is human survival. But this is not fatal to his position as a simple (commonsensical) empiricist. Like Hume, Professor Hart has, no doubt, looked "around the world" and noted "the curious adapting of means to ends" both "throughout all nature" and "[t]he productions of human contrivance."[28] In the process he has, it seems, observed certain facts about human beings and the world in which they live which justify (*i.e.* are reasons for, not causes of) the social need for certain rules. This simple method will not, of course, earn for Professor Hart the title of social scientist. Nor can he be called a conventionalist: although he uses the expression "natural necessity,"[29] this does not mean that the three rules are conventions; they are simply justified by certain contingent empirical truths. And he cannot be labelled (by Professor Ross) a naturalist, though he does not deny there is a natural (moral) law and does (like Professor Ross) acknowledge that positive law may incorporate such standards. His position is simply that if positive law does not incorporate those standards we are not therefore necessarily required to say that it is not law, anymore than we should say that black swans are not swans.

As for justice, this is mainly a matter of how the rules are administered. All that justice requires us to say, says Professor Hart, is that like cases be treated alike, while recognizing that the criteria for determining when, for any given purpose, cases are alike, will vary.[30] This will apply to all legal rules, (morally) good or bad. Even an iniquitous law will be justly administered if only persons genuinely guilty of breaking the law are punished under it and then only after a fair trial.[31] But requiring justice (*i.e.* fairness) in administering the rules of the system has nothing to do with identifying what are to count as rules of the system. So even if we include as a rule of the system that "like cases are to be treated alike" and admit it is also a natural law standard, this does not mean that it is part of the criterion for identifying the rules of the system. It would seem therefore that Professor Hart can, without thereby acquiring the dubious title of Kelsenian naturalist, include within his concept of law both his minimum natural law and his notion of justice and still remain free to differ with Professor Ross as to the meaning of validity.

28. HUME, DIALOGUES CONCERNING NATURAL RELIGION 17 (ed. Aiken, 1951).
29. For an interesting theory about natural necessity, see COHEN, THE DIVERSITY OF MEANING ch. X (1962).
30. *Op. cit. supra, n.* 22, *at* 156; *Hart, Justice,* 28 PHILOSOPHY 348 (1953).
31. However, if the "iniquitous law" is inconsistent with Professor Hart's minimum natural law, he may not be able to call it a law at all.