

THE NOTEBOOK CORNER

In December 2009, in the “Notebook Corner” of Volume 22, Issue 4, of Ratio Juris, I announced two contributions meant to illustrate the proximity of thought between Scandinavian legal realism and Hart’s Concept of Law. The first of these was a contribution of my own, published in that earlier issue and discussing Hägerström and Olivecrona, and to some extent Ross, in relation to Hart. Here I am happy to publish the second contribution, by Svein Eng, which focuses on the relation between Ross’s On Law and Justice and Hart’s Concept of Law. With compelling arguments strung together in an impressive buildup, Svein Eng’s contribution points out crucial ways in which Scandinavian legal realism and Hart’s thought can be analogized.

E.P.

Lost in the System or Lost in Translation? The Exchanges between Hart and Ross*

SVEIN ENG

Abstract. According to the received opinion there is a theoretical incompatibility between Herbert Hart’s *The Concept of Law* and Alf Ross’s *On Law and Justice*, and, according to the received opinion, it stems above all from Hart’s emphasis on the internal point of view. The present paper argues that this reading is mistaken. *The Concept of Law* does not go beyond *On Law and Justice* in so far as both present arguments to the effect that law is based on a shared understanding between participants in a project perceived by every participant to be a project in common. The paper demonstrates that there are substantive parallels between Hart’s combination of “acceptance” or “acknowledgement” and a “critical reflective attitude”

* I should like to thank Uta Bindreiter, Jes Bjarup, Eugenio Bulygin, Åke Frändberg, and Stanley L. Paulson for comments on various parts of previous versions of the paper. I am especially indebted to Stanley L. Paulson, who commented upon the whole manuscript with a view to matters of English style and later, with unswerving patience, replied to my many queries in this regard. The responsibility for any and all remaining shortcomings, of whatever kind, rests of course squarely with the author.

and Ross's combination of "motivation" or "feeling" and a "coherent whole of meaning and motivation." The main conclusion is that the views of norms and normativity put forward in *The Concept of Law* and *On Law and Justice* are very close in essential respects, and, more specifically, that the two works are at root identical in their representation of the basis of normativity in reality.

I. Overview

The year 1953 saw the appearance of *Om ret og retfærdighed*, one of Alf Ross's major works in the fields of legal philosophy and the theory of norms (Ross 1953). In 1958 the work appeared in English, entitled *On Law and Justice* (Ross 1958).¹ While the translation of the title was pretty straightforward, the author would soon come to hold the view that a linguistic time bomb had inadvertently been placed in the translation of the text itself.

In 1959 H.L.A. Hart published his review of *On Law and Justice* (Hart 1959/ 1983). The review culminated in an emphatic distancing on Hart's part from Ross's theory of "valid law."²

Two years later, in 1961, Hart published *The Concept of Law* (Hart 1961/ 1994). In two papers appearing in that very year, Ross makes two claims that I shall take as constituting the core of our topic here. First, he expresses regret over the translation of his key term *gældende ret* as "valid law" (Ross 1961, 78, 84, 86/ 1998, 159, 162; 1961–62, 1187 note 12, 1190). Secondly, he claims that—given a correct translation, and what would then be the natural reading of his text—he and Hart were on all essential points in complete agreement (Ross 1961, 84, 88/ 1998, 162–3; 1961–62, 1187, 1190).

In Anglo-American legal theory, *The Concept of Law* soon achieved the very status of "instant classic" that Ross's book had already attained in Scandinavia. And Hart's review of Ross's book was no *bagatelle*, despite some indications to the contrary.³ It may in fact be read as an abstract of the theoretical core of *The Concept of Law*, that is, of Hart's views on norms and normativity.

¹ Other major works by Ross in the fields mentioned are Ross 1929, Ross 1933, Ross 1934/ 1946, and Ross 1968. In references to Ross and Hart, I use the forward slash ("/") to indicate references to two editions of the same work. Thus, Ross 1953, 90/ 1958, 75 refers to the same place in the Danish edition and the English-language edition; and Hart 1961, 95/ 1994, 98 refers to the same place in the two editions of *The Concept of Law*; and correspondingly for references of the same form to other titles by Ross and Hart. When "ibid." is followed by page numbers separated in this way, it will always refer back to two editions of the same work specified immediately before in the way now indicated. The forward slash gives more information than the semicolon, in that it indicates that each pair of page numbers refers to places that are identical in terms of content. This is helpful additional information since the exchanges between Hart and Ross are closely linked to particular texts.

² Hart 1959, 235–40/ 1983, 163–9; cf. 13–4. Hart's review is reprinted in unaltered form in Hart 1983. In addition, the latter contains a pertinent general discussion (Hart 1983, 13–4) as well as a few brief remarks and references added at the end of the review (ibid., 169).

³ For these indications, see section III.3 below.

There are two main sets of questions here. First, did Hart misunderstand Ross's theory of "valid law"? If so, was this due to the translation of Ross's *gældende ret* as "valid law" or a careless reading of Ross on Hart's part?

Secondly, what is the relationship between the views of Ross and Hart on the substantive issues that are related to the translation issue? Put pointedly: Given what Ross takes to be the correct rendering of his key terms in English, was Hart correct in perceiving a theoretical gulf between his own views on norms and normativity and those entertained by Ross?

Both sets of questions presuppose a stance on the translation issue. Therefore I shall first sketch the usage of the relevant Scandinavian terms and their semantic relations (section II). Then I shall return to the two sets of questions (sections III–IV).

With respect to the first set of questions, my main emphasis will be on the mapping of the linguistic usage of the relevant Scandinavian terms. This will have the added benefit of putting the reader in a better position to form his own views of the matters (sections III; cf. II). My conclusion in respect of the linguistic discussion has two parts: The linguistic data do not ground a claim to the effect that the translation of *gældende ret* as "valid law" is plainly wrong. Still, there are meaning components in the Scandinavian family of terms *gjældende* relating to the efficacy of the norm that are not clearly conveyed when the term "valid" is used (section II.4).

With respect to the second set of questions, my conclusion will be that Ross was right in claiming that he and Hart were on all essential points in complete agreement (section IV).

I submit that many claimed differences of theoretical principle between Hart and Ross simply do not exist. Instead of such differences, closer analyses reveal surface differences stemming from the fact that they approached the issue of the validity of law from two very different contexts (sections VI; cf. IV).

My main submission, covering both sets of questions, can be put simply: Rather than being lost in translation himself, Ross should have pointed to Hart's being lost in the Hartian system. More specifically: In addressing issues in Ross's work, Hart fails to distinguish clearly enough in two respects. First, there is Ross's fundamental distinction between the rules themselves and statements about the existence of rules, including Rossian predictions. Secondly, there is a distinction to be made within the Hartian framework between predictions made from an "extreme" external point of view and predictions made from a "moderate" external point of view, including those made on the basis of Rossian schemes of interpretation.

The lack of clarity on Hart's part with respect to these two distinctions made it possible for Hart to state, with apparent plausibility, what has become the prevailing view of the relation between Hart and Ross: the view that there is a theoretical incompatibility between Hart's internal point of view and Ross's theory, and that, given this incompatibility, there

is a difference of theoretical principle between *The Concept of Law* and *On Law and Justice*. This view, I submit, is mistaken. I submit that, beneath the differences in nomenclature, there are substantive parallels between Hart's "internal point of view" and Ross's "coherent whole of meaning and motivation." The main aim of this paper is to demonstrate that the views of norms and normativity put forward in *The Concept of Law* and *On Law and Justice* are very close in essential respects, and, more specifically, that the two works are at root identical in their representation of the basis of normativity in reality.⁴

Apart from the statements in the foreword to *The Concept of Law*, saying that the book might be read both as an essay in "analytical jurisprudence" and in "descriptive sociology," there is little in the book itself on the status of its own arguments. In this respect, Ross proceeds further than Hart, in that he demonstrates what an empiricist position in the philosophy of law would look like if consistently carried out on the basis of principles of ontology, epistemology, and meaning that are defined in a preceding philosophical argument. In this, Ross is to my knowledge alone in the history of legal philosophy.⁵

Whereas Hart's *The Concept of Law* has been given a great deal of attention in Anglo-American circles, Ross's *On Law and Justice* is seldom referred to, or, if the book is mentioned at all, it is often given short shrift: be it expressly, as when Frederick Schauer and Virginia J. Wise deem *On Law and Justice* to belong "in the museums of jurisprudential archeology" (Schauer and Wise 1996–97, 1081 at and in note 7); or be it by implication, as when Brian Bix bases his summary of Ross's position on Hart's review, not on the book itself (Bix 1999, 170 note 11). Relating such perceptions of *On Law and Justice* to my main submission makes it clear that we need a fresh start on the topic of the relation between Hart and Ross.

Given this need, and given the scarcity of discussion on this topic, I have accorded priority to a mapping of the most important dimensions in the discussion between Hart and Ross—see the headings throughout the paper—and to presenting and examining pertinent quotations in the relevant context.

⁴ The corroboration of this thesis of closeness and identity is to be found in the paper as a whole. The more specific submission that Hart in *The Concept of Law* is lost in his system is corroborated partly by the thesis of closeness and identity, partly by more specific discussions, see, e.g., sections III.3, IV.2.2.1 at and in notes 44 and 46, and IV.3.2 last paragraph.

⁵ Several of Hart's commentators have taken up the challenge of explicating the status of arguments advanced for and against legal positivism (see, e.g., Coleman 2001; Dworkin 2006; Raz 2009). Although the lack of discussion of the issue in *The Concept of Law* points to a difference from Ross, the issue is too comprehensive to be handled within the framework of this paper. I hope to be able to return to it at a later point. In the context of the present paper, see some remarks related to the issue, e.g., in sections IV.2.2.1 in note 39 and at and in note 49, IV.2.3, IV.3.3, and VI.

It is worth stressing that in order to understand the following discussion, one must distinguish sharply between, on the one hand, the tenability of Hart's and Ross's views, and, on the other, the logical and argumentative relations between their respective theoretical frameworks. Only the latter is under consideration here.

II. The Linguistic Background

II.1. Introduction

For two reasons, I have retained my discussion of the germane Scandinavian terms and their semantic relations in the main text, rather than relegating this discussion to an appendix. In the first place, Ross himself in his exchanges with Hart deemed the translation of *gældende ret* as "valid law" to be of fundamental significance. Secondly, issues of translation are often of critical importance in legal philosophy, and the process of moving from the more dense Germanic languages, including those in Scandinavia, to the grammatically more open English language is deserving of special attention, given the substantial literature in the field in these non-English languages.

While constituting a part of the groundwork when forming a view of the relation between *On Law and Justice* and *The Concept of Law*, the linguistic discussion nevertheless has a preparatory character; it is of importance in some contexts as a means of sorting things out, but does not form an inherent part of the substantive discussion. For those who wish to skip the linguistic discussion, I recommend starting at section II.4.

In what follows, I shall confine myself to some elementary reflections on the pertinent Scandinavian adjectives and nouns and their counterparts in English and German. The main function of the German terms is to illustrate the meanings of the corresponding Scandinavian terms. I shall not attempt to make a paraphrase when a certain adjective or noun has no counterpart of the same grammatical type in one or another of the other languages. Suffice it to note that it is unlikely that such paraphrases should not be possible with regard to the terms under consideration.

II.2. The Adjective *Gældende*

II.2.1. Introduction

In the Scandinavian languages (Norwegian, Danish, and Swedish), we find the terms *gjeldende* (Norwegian), *gældende* (Danish), and *gällande* (Swedish). These terms are adjectives (compare the German *geltend*). The negations result from joining the adjective with a preceding *ikke* (in Norwegian and Danish) or *icke* (in Swedish) (compare the English "not" and the German *nicht*).

The differences between the Scandinavian languages with respect to *gjeldende*, *gældende*, and *gällande* seem to lie at the lexical level only. We may therefore speak in the singular form with the definite article of “the adjective” or in the singular form with a demonstrative of “this adjective.” For the sake of simplicity, it is convenient to use one of the Scandinavian terms as a placeholder for all three when discussing the linguistic properties in general. Since I myself am Norwegian, I shall be using the Norwegian term (*gjeldende*) to fulfill this role. When the discussion relates to Ross in particular, I shall be using the Danish term (*gældende*). This means that in what follows, if nothing else is explicitly stated or clear from the context, the Norwegian term *gjeldende* serves as a *variable for which the reader may substitute any of the Scandinavian terms*.

The adjective *gjeldende* has the following linguistic properties:

- there is no corresponding noun in ordinary use;
- the attributive use is its primary use;
- it is mainly used of general norms, not of individual norms;
- its main connotation is that of efficacy;
- a common feature of the claim to efficacy is the excluding function;
- there are a variety of empirical application-criteria of efficacy.

In the following, I shall offer some brief remarks on each of these properties (section II.2.2). The last property invites a specific elaboration, however; more precisely, a presentation of Ross’s application-criteria of efficacy (section II.2.3).

II.2.2. Linguistic Properties of the Adjective

(1) No Corresponding Noun in Ordinary Use. Ross’s *Gælden*

There is no noun in ordinary use that corresponds to the adjective *gjeldende*. For one thing, the usage according to which a noun is constructed by joining the suffix *[...]*het or *[...]*hed to the adjective (compare the German “[...]heit” and the English “[...]ness”) is inapplicable here; one does not say *gjeldendehet* (Norwegian), *gällandehet* (Swedish) or *gældendehed* (Danish).

Secondly, there is no form in ordinary use corresponding specifically to the German *Geltung*. In purely linguistic terms it may be possible to deploy noun forms like *gjelden* or *gælden*, in Norwegian and Danish respectively. (In Swedish, there is hardly even this possibility.) These forms are not living options, however, neither in the everyday languages nor in professional contexts. Since they are linguistically possible, the forms may, nevertheless, be deployed as technical terms. This is what Ross does when he speaks of *retssystemets gælden*, a term translated as “the validity of the

legal system" (see, e.g., Ross 1953, 47/ 1958, 34, in the heading and the following discussion).

Ross's *gælden* can only be understood by way of an understanding of his theory. It corresponds neither to *Geltung* in ordinary German nor to *Geltung* in Kelsen's work. (On the relation to Kelsen, see, further, the remark in section IV.2.2.1 below, in note 39.)

(2) The Attributive Use is the Primary Use

The adjective *gjeldende* is used first and foremost attributively. We may say *gjeldende rett* [*geltendes Recht*].

On the face of it, the adjective *gjeldende* may be used predicatively as well. For, in purely linguistic terms, one might say *Denne norm er gjeldende* ["This norm is *gjeldende*"].

However, the predicative use seems to be mainly an elliptical form for the attributive use. When one says *Denne norm er gjeldende* ["This norm is *gjeldende*"], it is presupposed that the sentence be read in light of the attributive use. More specifically, *Denne norm er gjeldende* ["This norm is *gjeldende*"] is read as *Denne norm er en del av gjeldende rett* ["This norm is a part of *gjeldende* law"].

(3) Mainly Used of General Norms, not of Individual Norms

The adjective *gjeldende* is used in the concatenation *gjeldende rett* [*geltendes Recht*]. Here the term *rett* refers to an abstract system of general norms constituting a legal system. It may be a national legal system, a transnational legal system (like the law of the European Union), or the system of norms constituting international law.

The adjective *gjeldende* is rarely used of individual norms. For example, when considering which version of a contract governs, a lawyer would prefer to use either the verb form: *Det er avtaleversjon B som gjelder, ikke C* ["It is version B of the contract that *gjelder*, not C"]; or to use the noun *gyldig* in the first sense enumerated in section II.3 below.

In purely linguistic terms, it would be possible to say *Det er avtaleversjon B som er gjeldende, ikke C* ["It is contract version B that is *gjeldende*, not C"]. This, however, would be less idiomatic. One reason for this is the fact that the attributive use is the primary use of the adjective *gjeldende* (see above), and that it is not obvious what noun it should be joined to in the present context, cf. the ellipsis *qua* placeholder for the noun in the following sentence schema: *Det er avtaleversjon B som er gjeldende [. . .], ikke C* ["It is contract version B that is *gjeldende* [. . .], not C"]. It is odd to substitute *rett* ["law," *Recht*] for the ellipsis, since lawyers are not used to seeing the content of a contract as a part of law, that is, as a part of *objektives Recht*. They see the content of a contract as conferring rights, that is, as constituting *subjektive Rechte*.

(4) The Main Connotation is Efficacy

The main connotation of the adjective *gjeldende* is efficacy; *gjeldende* is most commonly used to refer to a fact, namely, the fact of something's being efficacious.

Since the main emphasis in the present section II is on a mapping of the linguistic usage of the relevant Scandinavian terms, Scandinavian legal philosophers, *qua* legal philosophers, do not have any special authority. However, since the main issue is how to translate the key term *gældende ret* in Alf Ross, it is obviously of interest to see whether Ross and other Scandinavian legal philosophers take the connotation of efficacy as their starting point. In fact, they do.

"*Gældende ret*" [...] means "existing law," "the law in force." It refers without any evaluative connotation to [...] social facts [...]. "*Gældende ret*" is the opposite of imagined or proposed law, e.g., a draft. (Ross 1968, 104 note 2; italics added, Ross's italics omitted)

[I]n the Swedish language "*gällande rätt*" [...] is the technical term for law which is in force [...]. (von Wright 1963, 195; italics added, von Wright's italics omitted)

(5) A Common Feature of the Claim to Efficacy is the Excluding Function

Gjeldende often has an aspect of denying that some events have occurred, that some facts exist, or the like: It is *not* the case that the statute has been repealed or changed; it is *not* the case that any norm higher up in the hierarchy has been changed and has thereby invalidated some norms at lower levels; it is *not* the case that a norm has fallen into disuse and therefore is no longer a stricture to be taken into account; and so on.

With regard to this meaning aspect of *gjeldende*, we may speak of the excluding function of the term.⁶

(6) A Variety of Empirical Application-Criteria of Efficacy

When speaking of *gjeldende rett*, it is *rett* ["law," *Recht*] that is said to have the property of being efficacious.

In ordinary usage, the term "efficacy" and its derivatives may suffice. In legal philosophy this is not so. There the criterion of efficacy is itself a contested matter. Several candidates are possible and many of these have in fact been introduced into legal philosophy, separately or in combination. Some of the more popular candidates have been (a) *coercion*; (b) *obedience*; (c) *regularities* in the behaviour of officials or of citizens, and in the first case, of judges in particular or of supreme court judges in particular; (d) *motivation in general* on the part of one or more of the said groups; or (e) *species of motivation* on the part of one or more of the said groups, for

⁶ On the excluding function of words, see Eng 2003, 129–31, with further illustrations and references.

example, a “normative ideology which animates the judge” (Ross) or an “acceptance by officials of secondary rules” (Hart).⁷

II.2.3. Ross’s Application-Criteria of Efficacy. His Use of the Term “Ideology”

In the theory put forward by Alf Ross in *Om ret og retfærdighed/ On Law and Justice*, the criterion of efficacy refers to an entity at the level of individual psychology, namely, the motivation of the judge. In Ross’s theory, *gældende ret* signifies normative meaning-content in the form of directives that have the property of being part of the judge’s motivation when he is reaching a decision in the case at hand (Ross 1953, chap. 2/ 1958, chap. 2).

We should note that Ross employs the term “ideology” in a technical sense in this context:

The doctrinal study of law directs its attention to the abstract idea content of directives [. . .]. The doctrinal study aims (a) to discover the idea content—we might also say the *ideology*—which functions as the scheme of interpretation for the law in action, and (b) to present this *ideology* as an integrated system. (Ross 1958, 19/ 1953, 28–9; italics added)

To appreciate the more precise content of Ross’s criterion of efficacy, a few additional remarks may be helpful.

First, Ross’s criterion of efficacy refers to the psychological level of the motivation of the judge, not to the justification put forward by the judge in his formal judgment.

Secondly, Ross states that his criterion refers to future facts, that, in other words, it is prospective. He does not explicitly discuss efficacy as a dispositional concept. At first glance, then, the Rossian version of the efficacy of a norm does not seem to be on a par with, for example, the brittleness of glass. While the brittleness of the glass before me may be said to be a property present here and now, together with the glass, the efficacy of a norm is, if we read Ross literally, a fact that lies in the future.

A dispositional analysis of efficacy, and a critique of Ross on this basis, is offered by Bulygin (see Bulygin 1965, 52–4). While I readily acknowledge the importance in many contexts of the category of the dispositional, I believe its pertinence in the present context may be questioned. The brittleness of glass has the peculiarity of being visible (“manifesting” or “instantiating” itself) only under certain conditions. Likewise it may be

⁷ Ross 1958, 43/ 1953, 56: “normativ ideologi der besjæler dommeren”; Hart 1961, 113/ 1994, 117. On Ross’s use of the term “ideology,” see immediately below. Further examples of corresponding sets of key terms in Hart and Ross will be given throughout the paper, but see in particular section IV.2.3 below, at and in note 61.

said that the efficacy of a norm, within the framework of Ross's theory, is visible ("manifested" or "instantiated") only under certain conditions: first, the condition that the norm is being appealed to in pleadings before a court in a particular case, and, secondly, the condition that the basis for claiming the efficacy of the norm has not changed (which in effect means that the constellation of the sources of law that formed the basis of the claim has not changed, see sections IV.2.2 and IV.3.2 below). In consequence, the distinctions between the dispositional, the conditional and the prospective may turn out to be of less import in relation to Ross's analysis than Bulygin is suggesting.⁸ To illustrate, see my italics in the following passage in Ross:

[T]he real content of the assertion [that a norm] is valid law at the present time of a certain state is a prediction to the effect that *if* an action in which the conditioning facts [of the norm] are considered to exist is brought before the courts of this state, *and if* in the meantime there have been no alterations in the circumstances which form the basis of [the assertion], *then* the directive to the judge contained in the [norm] will form an integral part of the reasoning underlying the judgment. (Ross 1958, 42/ 1953, 55; italics added)

Finally, there is a certain tension in Ross's criterion of efficacy between, on the one hand, the reference to individual psychology in his theory of *gældende ret*, and, on the other, his insistence that law is an intersubjective social phenomenon, that is, a phenomenon transcending the level of individual psychology.⁹

In this paper, pointing to these aspects of Ross's criterion of efficacy will have to suffice. While keeping in mind these additional remarks, the following discussion is based on the main thrust of Ross's analysis. This consists in defining the term *gældende ret* as referring to (i) normative meaning-content in the form of directives (ii) that have the property of being part of the judge's motivation when he is reaching a decision in the case at hand.¹⁰

II.3. *The Adjective Gyldig and the Noun Gyldighet*

The adjective is *gyldig* [*gültig*, "valid"], the noun is *gyldighet* [*Gültigkeit*, "validity"].¹¹ The negations result from affixing a *u* [compare the German

⁸ The distinction between disposition concepts and other concepts may be drawn in various ways, and is not always clear. For an illuminating discussion in the recent literature, see Mumford 2003, especially chaps. 1 and 3–4.

⁹ On law as a social phenomenon, see Ross 1958, 72 cf. 30/ 1953, 87 cf. 43. For a discussion of the tension, see Eng 2007, 611–12. See also section IV.2.2.1 below.

¹⁰ On Ross's wide use of the term "directive," see section IV.1 below.

¹¹ In German there are two noun forms, *Gültigkeit* and *Geltung*. As noted earlier, there is no noun in ordinary use corresponding specifically to *Geltung* in the Scandinavian languages, though all of them have corresponding adjectives (section II.2 above). English is still simpler

“un” and the English “in”), that is, *ugyldig* [*ungültig*, “invalid”] and *ugyldighet* [*Ungültigkeit*, “invalidity”] respectively.

These terms may be used in various contexts, in correspondingly various senses:¹²

- (1) the validity of an issued norm, that is, a norm created through the exercise of competence;
- (2) moral, religious or other kinds of normative tenability, assessed from a standpoint external to any empirically efficacious forms of normativity (be it law, morals, religion, or other forms in their empirical dimension);¹³
- (3) the tenability of propositions in general, from whatever realm of discourse;¹⁴
- (4) the tenability of a logical argument.¹⁵

We immediately see that sense (1) is an important part of the everyday business of the law. Lawyers speak all the time of the *gyldighet* of issued norms (the noun form) or of an issued norm as *gyldig* (the adjectival form). In this context, *gyldighet* seems to be synonymous with “validity” and *gyldig* with “valid.” Lawyers regularly speak of and discuss the “validity” of, for example, a last will and testament, contract, statute, an administrative decision, and so on, or speak of and discuss whether this or that last will and testament, contract, statute, administrative decision, and so on, is “valid.”¹⁶

The adjective *gyldig* may be used both attributively and predicatively, just like “valid.” We may say “This is a *gyldig* [‘valid’] contract,” “This is

in this respect; it has neither any noun corresponding specifically to *Geltung*, nor any adjective corresponding specifically to *geltend*.

¹² Ross 1961, 76–8/ 1998, 158–9, distinguishes between senses (1) and (2).

¹³ I use “tenability” and “tenability criteria” as philosophically neutral umbrella terms, covering, e.g., truth and falsity, normative goodness or the lack of it, and, in general, criteria deemed to be relevant in deciding whether to accept or reject a proposition; see Eng 1998, 3–4, 8, 9–10, 11–2, 18, 19, 369–435, 568–9, 579–84; 2003, 3–4, 8, 9–10, 11–2, 18, 19, 371–439, 539–40, 551–6. On my use of the term “proposition,” see the next note.

¹⁴ I use the term “proposition” in a neutral sense in relation to the distinction between the normative modality and the descriptive modality; more precisely, a proposition may be normative, descriptive, or have a fused descriptive and normative modality; see Eng 1998, chap. II F; 2000a; 2003, chap. II F.

¹⁵ I use “logical argument” here as shorthand for any stretch of discourse that is evaluated on purely formal-logical grounds, that is, irrespective of its empirical, metaphysical, or other argumentative merits; in everyday life we often speak of “argument,” in logic we also speak of “(well-formed) formulas,” “schemata,” and the like.

¹⁶ For an analysis of the relations between the concepts of competence and in/validity in lawyers’ language and argumentation *de lege lata*, see Eng 1990; 2007, 79–127, especially 110–27. On the omnipresence of discussions of in/validity in sense (1) in law, see Eng 1990; 2007, 104, 110.

an *ugyldig* [‘invalid’] contract,” or we may say “The contract is *gyldig* [‘valid’],” “The contract is *ugyldig* [‘invalid’]”—and similarly for other norms issued by exercising a presupposed competence.

Sense (1) does not by itself have any connotation of efficacy. It presupposes, however, a legal system that is, by and large, efficacious.

We immediately also see that sense (2) has no connotation of efficacy, neither directly nor in the form of a presupposition; it is an open question whether the normatively most tenable position is realised, and, if so, to what degree.¹⁷

II.4. The Translation of Gældende Ret as “Valid Law”: Linguistics and Philosophy

The most central technical term in Alf Ross’s book *Om ret og retfærdighed* (1953) is *gældende ret*. This corresponds to the Norwegian term *gjeldende rett* and the Swedish term *gällande rätt*.

In the English translation of *Om ret og retfærdighed*—*On Law and Justice* (1958)—*gældende ret* is translated as “valid law.” Is this a good translation?¹⁸ In answering this question, we should distinguish between linguistics and philosophy.

If we restrict ourselves to the linguistic perspective, my conclusion has two parts. I do not believe the linguistic data ground a claim to the effect that the translation of *gældende ret* as “valid law” is plainly wrong. Still, there are meaning components in the Scandinavian family of terms *gældende* relating to the *efficacy* of the norm that are not clearly conveyed in using the term “valid.” For both points, see sections II.2–3 above.¹⁹

From a linguistic perspective we may conclude, then, that the translation of *gældende ret* as “valid law” is not a perfect match.

A couple of things are worth noting regarding this conclusion, however. First, to the best of my knowledge Ross did not at any time suggest any alternative translation. In a few places in *On Law and Justice*, *gældende ret* was translated by terms other than “valid law”; in particular by “the law in force.”²⁰ This was, however, the exception. Secondly, this indicates that the translation issue is not resolved by rejecting the imperfect alternative;

¹⁷ Let the Kantian position serve to illustrate: “[R]eason commands how we are to act even though no example of this could be found [. . .]” (Kant 1996c, 371, Academy Edition, 6: 216); “[P]ure sincerity in friendship can be no less required of everyone even if up to now there may never have been a sincere friend [. . .]” (Kant 1996b, 62, Academy Edition, 4: 408).

¹⁸ I avoid the term “correct,” with its implication of there being one and only one tenable translation.

¹⁹ For the same conclusion concerning the English translation, and with information on the Spanish translation, see Bulygin 1999, 239 at and in note 4.

²⁰ See, e.g., Ross 1958, 22, first paragraph, seventh line, and Ross 1953, 31, penultimate paragraph. See also Ross 1961–62, 1189 at and in note 21 (“the law actually in force”), 1190.

it consists in searching for a better alternative, perhaps in relation to more limited settings or more specified issues.

I take it that a likely outcome of such a search will be the translator's telling legal philosophers that "valid law" is the best solution there is in general: Problems felt and improvements sought by legal philosophers transcend the art of *linguistic* translation, that is, the art of correlating terms pairwise in different languages.

When we shift to the *philosophical* side of the story, our task is, then, to proceed beyond the common ground in English nomenclature between Ross and Hart—"valid law"—and to map the similarities and differences in substantive matters discussed in connection with this term; see sections III–IV below.

III. Did Hart Misunderstand Ross's Theory of "Valid Law"?

III.1. Introduction

By way of introduction in this paper, I outlined, first, the contributions to and outer progression of the discussion between Hart and Ross, and, secondly, two main sets of questions. Having mapped some pertinent aspects of the meaning of the Scandinavian terms *gjeldende*, *gyldig*, and *gyldighet* (section II above), we are now in a position to approach these two sets of questions in greater detail. The first set of questions addresses whether Hart misunderstood Ross's theory of valid law—on linguistic grounds or on other grounds.

In a reply to Hart's review of *On Law and Justice*, Ross says:

The way the problem [of the meaning of the assertion "D is valid Danish law"] is raised and treated leaves no doubt that the issue discussed is what Hart treats under the heading of the *existence* of a legal rule or a legal system. [. . .] I am now aware that the Danish "*gældende ret*" should not have been translated into English as "valid law." I regret my lack of sufficient feeling for English usage, but, at the same time, I believe that had Hart been a little more attentive, he would have noticed that the problem I treat under "validity" is altogether different from the problem he considers under the same heading. Had he understood this, there would have been no basis for his criticism, namely, that the statements about legal validity have nothing to do with predicting judicial behaviour. It is interesting that when these misunderstandings are eliminated, there seems to be no disagreement between our views as to what is involved in the question of the *existence* of a legal system. (Ross 1961, 86–8/ 1998, 162; Ross's italics)

Ross makes several contentions in this passage. His main contention is that Hart misunderstood his discussion of "valid law." It is not possible to take a stand on this issue in isolation, of course. We shall have to look at the more specific claims Ross appends to this main contention. We find three appended claims:

In the first place, Ross claims that the translation of *gældende ret* as “valid law” was a mistake and that this translation is partly to blame for Hart’s having misunderstood him (section III.2 below).

At the same time, however, Ross also claims that the purport of his discussion of “valid law” is clear from the context, and that, as a consequence of this, Hart should have seen that his criticism was misguided (section III.3 below).

Finally, Ross claims that one of the main things Hart should have seen was that “the problem I treat under ‘validity’ is altogether different from the problem [Hart] considers under the same heading” (section III.4 below).

Let us have a look at each of these subordinate claims in turn.

III.2. *The Translation of Gældende Ret as “Valid Law”*

I concluded above that the translation of *gældende ret* as “valid law” is not a perfect match, while also suggesting that problems felt and improvements sought by legal philosophers transcend the realm of linguistic translation, that is, the realm of the pairwise correlation of terms between languages (see section II.4 above).

It might be tempting to reason here as follows:

To translate *gældende ret* as “valid law” is infelicitous, for the translation evokes one or both of two connotations, neither of which matches Ross’s intentions.

In the first place, the translation may evoke the connotation of “the validity of a norm issued on the basis of a presupposed competence.” This has nothing to do with Ross’s problematic.

In the second place, the translation may evoke the connotation of “extra-legal, especially moral, tenability.” This is exactly the problematic that Ross wishes to eliminate from any legal science. Let me elaborate on this.

Ross deploys a theory of science according to which the attribute of science is constituted by a reference to empirical facts. In his theory of legal science, the pertinent fact lies at the level of individual psychology. More specifically, the pertinent fact is the motivation of the judge; normative meaning-content is *gældende ret* if and when it enters into the judge’s motivation, and only then. Ross’s focus is on the empirical efficacy of normative meaning-content in this motivation-sense of efficacy.²¹ This focus is hardly captured by the translation “valid law”—as Ross would soon declare.²²

Bearing in mind the conclusions of our previous discussion of the translation issue, I believe Ross was too rash when he thus placed the responsibility for any confusion on the translation. Any confusion there is

²¹ Ross 1958, chap. 2/ 1953, chap. 2; cf. *ibid.*, 170/ 206.

²² Ross 1961, 76–8, 84–6/ 1998, 158–9, 161–2; 1961–62, 1187 note 12, 1190.

has to be solved not in *linguistic* translation, that is, the pairwise correlation of terms, but in *systemic* translation, the art of comparing and contrasting systems of thought.

Rather than being lost in translation himself, I submit that Ross should have pointed to Hart's being lost in the Hartian system.

In what follows, I shall corroborate this.

III.3. *Some Main Problems in Hart's Reading*

In his reply to Hart's review of *On Law and Justice*, Ross employs strong language with reference to Hart's reading of the book (I repeat part of the quotation from Ross 1961 in section III.1 above):

I believe that had Hart been a little more attentive, he would have noticed that the problem I treat under "validity" is altogether different from the problem he considers under the same heading. Had he understood this, there would have been no basis for his criticism, namely, that the statements about legal validity have nothing to do with predicting judicial behaviour. (Ross 1961, 86/ 1998, 162)

In what follows (sections III.3.1–3.3), I shall point to some indications that Hart did not bring his thoughts fully to completion in his study and representation of Ross's views, and supply references to further discussions of some main points in the subsequent sections.

III.3.1. Running together Rules and Statements about Rules

Purporting to reproduce Ross's view, Hart says:

A valid law is a verifiable hypothesis about future judicial behaviour and its special motivating feeling. (Hart 1959, 237/ 1983, 165)

In the first place, the grammatical subject of this sentence should be "A *statement* pronouncing a law to be valid law" (to keep to Hart's construction of the sentence). Secondly—assuming that Hart's use of "a law" here refers to a statute, which I think has to be the right interpretation, given the indefinite article—it is doubtful whether Ross could have said something like this. What he could have said is: "A statement pronouncing a statutory rule to be part of valid law [. . .]." ²³

Read literally, and there is no obvious reason to read it any other way, the quotation from Hart indicates that he has not grasped the theoretical

²³ We should also note Ross 1958, 40 note 1/ 1953, 53 note 1: "In the text [. . .] I have, for convenience, used the term 'verification'. Since a definitive confirmation of the truth of a scientific proposition is not possible, it would be more accurate to speak of 'testing'."

ramifications of Ross's fundamental distinction between the rules themselves and statements about the existence of a rule, including predictions. Or perhaps it was just a slip of the pen?²⁴

Later, however, I shall point out additional evidence of an insufficient grasp on Hart's part of Ross's theory as well as a reason for this. This is the fact that Hart's main object of criticism is Austin and that Austin's theory is very different from Ross's theory. This difference is something Hart seems never fully to have grasped (sections IV.2.1–2.2 below).

III.3.2. Leaving out Ross's "Coherent Whole of Meaning and Motivation"

Running together rules and statements about rules, implying that Ross's prediction analysis applies indiscriminatingly to both, represents the first of two possible and significant misreadings of Ross's prediction analysis on Hart's part. The second misreading errs in that it represents Ross's analysis as a combination of two elements, judicial behaviour and a feeling on the part of the judge.

The second misreading may go together with the first (see the quotation in section III.3.1 above), or it may start from a correct rendering of Ross's analysis, in so far as the analysis is said to refer to statements about legal rules, and then err (Hart 1961, 247). Either way, the second misreading simply omits to mention that what Hart terms the "internal point of view" is, according to Ross, constitutive for any understanding of law. I shall argue that *The Concept of Law* does not go beyond *On Law and Justice* in so far as both present arguments to the effect that law is based on a shared understanding between participants in a project perceived by every participant to be a project in common. Further, I shall demonstrate that there are substantive parallels between Hart's combination of "acceptance" or "acknowledgement" and a "critical reflective attitude" and Ross's combination of "motivation" or "feeling" and a "coherent whole of meaning and motivation." For these points, see section IV.2.2 below.

III.3.3. Hart's Main Argument against Ross

In his critique of Ross, Hart places great weight on the following argument:

²⁴ Here it may be worth remarking that the English language facilitates treating the two types of proposition together, in that the term "law" is used both of the rules themselves (Danish: *ret*, Norwegian: *rett*, Swedish: *rätt*, German: *Recht*) and of the discipline having these rules as its object (Danish: *jura*, Norwegian: *jus*, Swedish: *juridik*, German: *Jura*). This makes possible linguistic policies like, e.g., the following: "I will use 'law,' as it is often used, to refer sometimes to a legal system, and sometimes to a rule of law, or a statement of how the law is on a particular point" (Raz 2005, 341 note 6).

[E]ven if in the mouth of the ordinary citizen or lawyer “this is a valid rule of English law” is a prediction of what a judge will do, say and/or feel, this cannot be its meaning in the mouth of a judge who is not engaged in predicting his own or others’ behaviour or feelings. (Hart 1959, 237 cf. 240/ 1983, 165 cf. 168–9)

Hart’s argument is essentially based on this line of reasoning. Put pointedly: *This* is Hart’s argument against Ross. Above I have quoted from Hart’s review of Ross. The same argument occurs repeatedly throughout *The Concept of Law* (see, e.g., Hart 1961, 10, 88, 102, 139–40, 143/ 1994, 11, 90–1, 105, 143, 147).²⁵

In light of the widespread endorsement of Hart’s position here, it is well to point out the following. No logical problems arise in interpreting propositions about what the law is that stem from persons enforcing the law, including judges, as having a descriptive component, where “descriptive” refers to the opinions held by *other* segments of the legal community, including *other* judges (Eng 2000a, 242–3; 2003, 319–20).

Since I have discussed Hart’s argument elsewhere, including my grounds for rejecting it, it will suffice here to refer to my earlier discussions (see the references in the previous paragraph). In the present paper, my focus is on comparing and contrasting Ross’s and Hart’s systems, see section IV below.

Above I characterised the quoted argument in Hart as “Hart’s argument against Ross.” Hart himself, however, contends that there are “two objections which [Ross] never squarely faces” (Hart 1959, 237/ 1983, 165). After having presented the argument above, he proceeds to present the second argument as follows:

[T]he basis for [...] predictions is the knowledge that the judges use and understand the statement “this is a valid rule” in a non-predictive sense. (Hart 1959, 237/ 1983, 165)

My objection to Hart’s first argument, see above, applies here as well. In addition, there is the fact that what Hart here adduces as a problem that Ross “never squarely faces” is an integral and explicit part of Ross’s analysis: The prediction is only possible on the assumption of a coherent and intersubjectively shared scheme of meaning and motivation on the part of the rule followers, that is, the judges (section III.3.2 above; cf. section IV.2.2 below).²⁶

²⁵ Read literally, the quoted sentence from Hart is trivially true: A sentence cannot express a prediction when said by someone who is not engaged in predicting. I take it, however, that the sentence should be read as a shorthand reference to Hart’s discussions of the substantive issues.

²⁶ In light of the discussion in the main text, I cannot agree with MacCormick when he characterises Hart’s review of *On Law and Justice* as “Hart’s full critique of this school of thought,” that is, of the “Scandinavian Realist” school (MacCormick 1981, 168 note 52; 2008,

III.4. *The Problems Treated in Connection with the Term "Validity"*

Ross claims that one of the main things Hart should have seen was that "the problem I treat under 'validity' is altogether different from the problem [Hart] considers under the same heading." What Ross is implying here is that Hart deploys "valid" only in connection with the issuing of new norms, that is, *the exercise of competence*, cf. sense (1) in section II.3 above. This is not correct.

In fact, Hart does not give much attention to this sense of "valid." This may seem remarkable, since Hart gives prominence to secondary norms, including competence norms, and since there are intimate connections between in/competence and in/validity (section II.3 above, at and in note 16). Hart's demarcation of his treatment in this respect may be justified, however, by reference to the distinction between law (*objektives Recht*) and right (*subjektives Recht*). While acts in law are important in defining the legal position of the individual (*subjektives Recht*), they are not usually said to contribute to the content of law (*objektives Recht*). This justification does not apply to statutes and court-based law. In these cases, the first step in any assessment of validity is to determine whether there have been transgressions of the normative powers accorded to the legislator and the courts, or of the norms regulating the exercise of these powers. Here Hart's text is most coherently read as saying that the criteria pertinent to the validity assessment are part of the rule of recognition.²⁷

When Hart speaks of "valid rules," "legally valid or invalid," and so on, he most importantly employs "valid" in sense (3) in section II.3 above, that is, in the sense of *the tenability of propositions in general, from whatever realm of discourse*.²⁸

222 note 2 to chap. 6); this implies an argumentative depth and finality that is simply not there.

²⁷ Although Hart does not say much about the more precise relationship between a rule of recognition and his two other species of secondary rule, it seems clear that he does not view them as mutually exclusive. First, a norm can serve both as a rule of change and as a part of the rule of recognition. As Hart puts it: "Plainly, there will be a very close connexion between the rules of change and the rules of recognition [. . .]" (Hart 1961, 93/ 1994, 96). I take it that, e.g., all rules laying down criteria for the valid enactment of statutes also constitute parts of the rule of recognition (ibid., 246/ 293). Secondly, a norm can serve both as a rule of adjudication and as a part of the rule of recognition (ibid., 94-5/ 97). I take it that, e.g., both a doctrine of precedent and the rules laying down threshold values for possible precedents are parts of the rule of recognition. One such threshold value is constituted by the rules laying down criteria for what is to count as a valid decision of individual cases heard by the courts, and included here are the rules conferring powers on the courts to decide individual cases. Given Hart's text, we may ask whether we should say that a pertinent rule of change or adjudication is a part of the rule of recognition, that is, that there is one rule serving two functions, or that there are two rules that lay down the same criteria (a rule of change or adjudication, on the one hand, and the corresponding parts of the rule of recognition, on the other). Hart seems to prefer the first way of putting it (ibid., 94-5/ 97).

²⁸ Ross does not pay much attention to this sense in his overviews of various meanings of "valid"; see Ross 1961, 76-8, 84-8/ 1998, 158-9, 162; 1970, 90.

Applied to law, Hart's preferred sense of "valid" refers to the corroboration of claims about what the law is. More specifically, it refers to corroborating claims that a certain normative meaning-content is part of a legal system, by reference to a given rule of recognition.

To say that a given rule is *valid* is to recognize it as passing all the tests provided by the rule of recognition [. . .]. (Hart 1961, 100, cf. 97–107/ 1994, 103, cf. 100–10; italics added)

I used the expression "the rule of recognition" in expounding my version of the common theory that a municipal legal system is a structure of "open-textured" rules which has as its foundation a rule which is legally ultimate in the sense that it provides a set of criteria by which in the last resort the *validity* of subordinate rules of the system is assessed. (Hart 1965, 1292–3/ 1983, 359; italics added)²⁹

A rule of recognition may, and in practice always does, comprise more than criteria for what is to count as valid norm issuance; in addition there are criteria for what is to count as customary law and as sources of law. In consequence, there is more to Hart's use of "valid rule" than what is explicable by reference to the concept pair competence and validity.³⁰

Hart's rule of recognition may have aspects of the modalities of obligation and competence. Its primary modality, however, is the modality of *qualification*; it lays down the criteria for what is to *count as* belonging to the category of valid law.

Further, when lawyers, including legal officials, disagree, their focus is on getting their respective arguments recognised as—that is, qualified as—the most tenable one and, thereby, as the basis for the conclusion concerning what is to count as valid law. Thus, the rule of recognition also has a qualifying function as part of the criteria for assessing the degree of tenability of legal arguments.³¹

Like Ross, Hart places the judges of a legal system at the centre of his theory; through their decisions and arguments, judges instantiate the criteria for what is to count as valid law and as correct reasoning (Hart 1961, 112–13/ 1994, 116–17).

To make the point that the rule of recognition cannot be justified within the legal system, Hart deploys Wittgenstein's example of the standard

²⁹ See also Hart 1959, 236/ 1983, 164: "[W]e [. . .] speak of rules as 'valid' [. . .] where, as in the legal case, the system contains some general criteria for the *identification* of the rules" (Hart's italics); correspondingly *ibid.*, 238–9/ 167. On the theme of identification, see further section IV.3.2 below, in particular at and in note 73.

³⁰ In particular on the relation between Hart's rule of recognition and the subject of the Scandinavian doctrine of the sources of law, see section IV.3 below.

³¹ On the views of Ross and Hart on the extent to which the tenability in question is a matter of degree, see section IV.3.2 below.

metre in Paris. This metaphor also serves to illustrate the peculiar modality of the rule of recognition, the qualification modality.³²

We only need the word “validity,” and commonly only use it, to answer questions which arise *within* a system of rules where the status of a rule as a member of the system depends on its satisfying certain criteria provided by the rule of recognition. No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply accepted as appropriate for use in this way. To express this simple fact by saying darkly that its validity is “assumed but cannot be demonstrated,” is like saying that we assume, but can never demonstrate, that the standard metre bar in Paris which is the ultimate test of the correctness of all measurement in metres, is itself correct. (Hart, 1961, 105–6/ 1994, 108–9; Hart’s italics)

We are here approaching the second main question that I raised by way of introduction: Was Hart correct in perceiving there to be a theoretical gulf between his own views on norms and normativity and those entertained by Ross?

IV. Was Hart Correct in Perceiving a Theoretical Gulf between His Own Views on Norms and Normativity and Those Entertained by Ross?

IV.1. A Distinction. Ross’s Wide Use of the Term “Directive”

In order to separate the various strands in the discussion between Hart and Ross, we need to distinguish between two levels in their texts. Let us start by distinguishing between two kinds of existential propositions, according to the kind of normative meaning-content to which they refer.

First, there are existential propositions referring to individual items of normative meaning-content that are said to belong to the legal system. In the present context, the term “individual items of normative meaning-content” comprises all kinds of normative meaning-content: be they general or particular in one or more dimensions; be they part of private law, public law or international law; be they duty-imposing, competence-investing, or qualification-making (definitional).

Secondly, there are existential propositions referring to the rule of recognition.

The distinction I am drawing is only with respect to the rule of recognition. This rule makes possible the elements of the legal system.

³² Wittgenstein 1958, section 50. In contrast to what I argue here, some of Hart’s commentators hold that the modality of duty is the only or primary modality of the rule of recognition, see, e.g., Hacker 1977, 20, 23; Raz 1979, 92–3; Perry 1998, 428 in note 4, 435, 446–7, 450; others, again, hold that this role falls to the modality of competence, see, e.g., Waluchow 1994, 234. On the qualification modality, see Eng 1998, 108–9 cf. 101–24, 263–4; 2003, 110–12 cf. 103–25, 266–7; 2007, 51–3, 104–42. I see qualification norms as a subset of normative definitions; for this point in particular, see the references just given, especially Eng 2007, 128–42, and for my definition theory, see Eng 1998; 2003, chaps. II A 7, B, G, and III 2.

These “individuals” may take on all the characteristics normativity is capable of—except the characteristics specific to the rule of recognition.

To each type of existential proposition there corresponds an argumentative level. In what follows, I shall discuss whether there are any differences of systematic theoretical principle between Hart and Ross at one or both of these levels.

We should note that in *On Law and Justice*, the term “directive” comprises more than duty norms. It also comprises competence norms (Ross 1958, 32/ 1953, 45), and it also comprises the norms qualifying the meanings of the terms entering into the formulation of the duty norms and the competence norms.³³

Going back to the distinction introduced above, we should also note that the subject of the doctrine of the sources of law—the equivalent in Ross to Hart’s rule of recognition—is a set of directives in this very wide sense; for a closer discussion, see sections IV.2.2.2 and IV.3 below. For the terminological and conceptual points in focus here, see the following statement:

[T]he subject of the doctrine of the sources of law [is] directives which [...] indicate the way in which a judge shall proceed in order to discover the [...] directives decisive for the question at issue. (Ross 1958, 75–6/ 1953, 91; italics added)

In brief, to link up with the Hartian nomenclature, the term “directive” in Ross comprises “criteria” and “standards” of various kinds and at various levels.

IV.2. *The Level of Normative Entities Other than the Rule of Recognition and Its Constituent Parts*

IV.2.1. Types of Norm

Both Hart and Ross distinguish between the normative modalities of duty and of competence, and the corresponding norms.³⁴

Ross views competence norms as indirectly expressed duty norms (Ross 1958, 32, 39, 50–1, 166 ff./ 1953, 45, 52, 65–6, 202 ff.). I see no difference of theoretical principle here. It is clear that Ross fully recognises the importance of the competence modality, partly in theoretical respects, partly as a practical means of legal policy. Viewing competence norms as indirectly

³³ Note in this connection also Ross’s use of the chess metaphor, Ross 1958, 11–7/ 1953, 22–6. On Ross’s concept of directives, see also note 57 below.

³⁴ Ross calls them “norms of conduct”/ *forholdsnormer* and “norms of competence”/ *kompetencenormer*, respectively, see Ross 1958, 32, 161/ 1953, 45, 197; and Hart calls them “duty-imposing rules” and “power-conferring rules,” respectively, see Hart 1961, 27 ff., 78–9, 238–9/1994, 27 ff., 80–1, 284–5. Neither pair of terms is fully satisfactory: In ordinary parlance the exercise of competence is also a form of “conduct,” which counts against Ross’s term “norms of conduct”; and competence should be kept clearly apart from “power” in the sense of factual influence, which counts against Hart’s term “power-conferring rules.”

expressed duty norms is an additional step motivated by separate theoretical considerations.³⁵ This step is interesting and worthy of a discussion in its own right. It does not, however, mark any difference of systematic principle from Hart. Hart argues to the contrary. His criticisms of Ross are not, however, sufficiently focussed.³⁶

The differences between Hart and Ross concerning duty norms and competence norms is a matter of when to say what, and for what purposes. When Ross speaks of competence norms as being “*reducible* to norms of conduct” (Ross 1958, 33; italics added) it is meant in the precise *sense* outlined in Ross 1958/ 1953, *not* in the manner of Austin. Moreover, it is said with the explicit *purpose* of reconstructing statements in the doctrinal study of law with a view to making them fit into a certain conception of science (Ross 1958, 11 cf. chap. 2/ 1953, 21 cf. chap. 2), *not* with a view to presenting a scheme fitting all purposes. Ross may be criticised for his conception of science, but not for obscuring “the variety of laws,” as Hart does (Hart 1961, chap. 3/ 1994, chap. 3). If “the variety of laws” is at issue, then we should consult *On Law and Justice*, chaps. 5–9, rather than chap. 2 which Hart refers to.

Hart’s criticism of Ross at this point is not unlike claiming that we should let it suffice with the concepts of chair and table because the introduction of additional umbrella concepts for particular purposes, like the concept of furniture, does not “do justice to the complexity of facts” (Hart 1961, 88/ 1994, 91).

I have earlier pointed to some indications that Hart did not grasp the theoretical ramifications of Ross’s basic distinction between the rules themselves and statements about the existence of a rule, including Rossian predictions (section III.3.1 above). Here we see further evidence of this. Hart seldom disambiguates his use of terms like “reduce” and “eliminate.” Instead his usage equivocates between, on the one hand, the sense of

³⁵ For Ross, the main consideration was his theory of science, see section IV.2.3 below. Another consideration, unrelated to Ross’s consideration, may be the wish to apply the reaction of the language user to discrepancy between proposition and reality as a criterion of what is to count as a normative proposition, see Eng 2000a, 238; 2003, chap. II F cf. chap. II E 2.2.4 (3)(b). Of course there may be other reasons as well for applying this scheme; it all depends on what one wishes to illuminate.

³⁶ Compare Hart 1961, 35–41/ 1994, 35–42, which do not mention Ross, with the endnote *ibid.*, 238/ 284: “Ross adopts the view criticized [at 35–41/ 35–42] that norms of competence are reducible to ‘norms of conduct’ since both types of norm must ‘be interpreted as directives to the courts’.” This is not sufficiently focussed since the *that*-clause in the quotation covers only a slice of the discussions in the main text to which the quoted passage refers, i.e., *ibid.*, 35–41/ 35–42. I cannot pursue all aspects that Hart touches upon in these pages; let the following suffice to illustrate: Ross does *not* purport to have discovered the “true, uniform nature of law” (*ibid.*, 36/ 37); he does *not* interpret competence norms as “orders backed by threats” (as Hart may be read as implying, *ibid.*, 36–7/ 37–8); and he would *not* contest that “the introduction into society of rules enabling legislators to change and add to the rules of duty, and judges to determine when the rules of duty have been broken, is a step forward as important to society as the invention of the wheel” (*ibid.*, 41/ 41–2).

conceptual analyses and the establishing of conceptual levels, which seems wholly innocuous in theoretical terms when carried out as in the furniture example, and, on the other, what is implied to be some more sinister form of reduction and elimination, the more precise sense of which is left, however, unexplained.³⁷ What is left as an unstated possibility is that Ross can be assimilated to a behaviourist position like that of Hart's stylised version of Austin, so that the charge of reduction that may be fitting in relation to the latter also holds good for Ross. This, however, is a basic confusion; see section IV.2.2 below.

Since Hart's emphasis on "the variety of laws" and his criticism of Ross in this context seems to imply a difference of systematic theoretical principle, it is worth stressing that Ross's investigations of the competence modality are, if anything, more nuanced and incisive than the analysis in Hart (Ross 1958, chaps. 5–6/ 1953, chaps. 5–6).³⁸

IV.2.2. Conceptualising Meaning and Motivation as Components of Norms

IV.2.2.1. Situating Ross in Relation to Hart's Internal-External Distinction. Both Hart and his commentators emphasise the importance of the set of concepts "internal point of view," "internal aspect of rules," and "critical reflective attitude" in *The Concept of Law*. In this respect, both Hart and his commentators have deployed the term "hermeneutic" of Hart's method. On the "hermeneutical" aspect, and why I avoid this term, see section IV.2.2.3 below. Here I shall focus on the fact that Hart's internal-external distinction is a source of grave misunderstandings of the relationship between Hart's theory and what he calls, in a generic fashion, "predictive theories." Let us begin with the basics of Ross's approach.

Ross argues consistently against a purely behaviouristic approach, and consistently emphasises that the meaning structure called "valid law" represents a "scheme of interpretation."

[T]he legal system forms a whole [. . .]. Fundamentally, validity is a quality ascribed to the system as a whole. The test of the validity is that the system in its entirety, used as a *scheme of interpretation*, makes [it possible for] us to comprehend, not only the manner in which the judges act, but also that they are acting in the capacity as "judges." There is no Archimedes point for the verification, no part of the law which is verified before any other part. (Ross 1958, 36/ 1953, 49; italics added, trans. amended)³⁹

³⁷ See, e.g., Hart 1961, 238–9/ 1994, 284–5, where a reference to Ross 1958 is combined with an immediately following discussion of "attempts to *eliminate* the distinction between these two types of rule" (italics added) and later on: "To *reduce* the two types of rule in this way to a single type would, however, obscure their character [. . .]" (italics added).

³⁸ For discussions of Ross's views on competence, see Alexy 2008; Spaak 1994; Eng 1990.

³⁹ Three points deserve mentioning in connection with this quotation. First, in viewing the legal system as a scheme of interpretation, Ross is following Kelsen (see, e.g., Kelsen 1934, 4–5,

A behaviouristic interpretation [...] achieves nothing. The changing behaviour of the judge can only be comprehended and predicted through ideological interpretation, that is by means of the hypothesis of a certain ideology which animates the judge and motivates his actions.

Another way of expressing the same thing is to say that law presupposes, not only *regularity* in the judge's mode of action, but also his *experience of being bound* by the rules. (Ross 1958, 37/ 1953, 50; italics added)

Already in the opening pages, and then subsequently throughout his discussions, Ross emphasises in a most emphatic and clear manner that law is based on a shared understanding between participants in a project perceived by every participant to be a project in common. In his painstakingly elaborated and exemplary chess metaphor, Ross states that the actions "reciprocally motivate each other," that "fellowship is an essential factor,"⁴⁰ that the understanding we are seeking is not a "causal" one, but one based on connections of "meaning," that this meaning consists of "rules," and that these have an "intersubjective character" (Ross 1958, 13/ 1953, 23–4; see also Ross 1950a, 250–3 et passim). In brief, what Hart would later term the "internal point of view" is, according to Ross, constitutive for any understanding of law.⁴¹

36, 66–7; 1992, 10, 34, 58). Secondly, in the Danish original, the term corresponding to "the validity of the legal system" is *retssystemets gælden*, a very unusual linguistic construct due to the noun form *gælden* (section II.2.2 (1) above). As deployed in Ross's theory, the noun *gælden* is related to Kelsen's *Wirksamkeit* and different both from the latter's *Sollgeltung* and *Gültigkeit*, as Kelsen himself would emphasise (Kelsen 1959–60, 9–11 cf. 16–25). Since Hart and Ross are in agreement on the ultimate primacy of *Wirksamkeit* (section IV.3 below), I shall not pursue the relation to Kelsen's distinctions here. Thirdly, in the passage quoted, Ross defends a coherentist view of legal cognition and justification; Hart, by contrast, states his adherence to a foundationalist model, see the quotation at the end of section III.4 above. Whether these passages reflect a real disagreement is a question that has no obvious answer since the contexts are different: Ross is presenting his reply to an objection of circular reasoning; Hart is differentiating his theory from Kelsen's. As neither Ross 1958 nor Hart 1961 discusses philosophical theories of justification in particular, it shall suffice here to present my conclusion: Differences between Ross 1958 and Hart 1961 on justification that are not discussed in the present paper have no bearing on its topic, i.e., their respective views on norms and normativity.

⁴⁰ An alternative translation is: "the perceived communality is constitutive for and in the participants' own experience."

⁴¹ Already at an early stage in his work, Ross had argued that it is necessary to incorporate our idea of normative validity into any viable concept of law, and this view came to represent a recurring and central theme in his writings. At the beginning of the 1930s he stated: "The law is not, like morality, pure ideality. But neither is it, like the tyranny of crude power, a purely empirical social reality. The law is both, valid and factual, ideal and real, metaphysical and physical—not, however, as two things co-ordinated, but as a manifestation of validity in reality, which is only thereby qualified as law" (Ross 1934, 25/ 1946, 20; trans. amended, Ross's italics omitted; the latter work is an English version of the former, somewhat reworked with an eye to an Anglo-American audience). Taking his point of departure in this framework, Ross rejected the conceptions of law found in the so-called "American legal realism" (Ross 1946, 59–75, cf. 1934, 81–9; the work of 1934 presents the theoretical framework, but does not contain the references to American legal realism).

On this basis Ross proceeds to the presentation of his so-called “predictive theory” of “valid law” (Ross 1958, chap. 2/ 1953, chap. 2). It falls outside the scope of this paper to present this in detail. Let it suffice to point out what I deem to be most pertinent in the context of the discussion with Hart.⁴²

First, Ross’s “predictive theory” offers an analysis of statements *about* the existence of rules, not an analysis of the rules themselves. Secondly, it is neither an analysis of all statements about the existence of rules, nor an analysis of all members of that subset of such statements which consists of lawyers’ propositions as to what the law is. It is far more restricted and technical in scope. It is an analysis of propositions in what Ross calls “the doctrinal study of law,” by which he refers to scholarly literature on what the law is, typically textbooks, articles, or expert opinions from professors of law.⁴³

Of these two points, the first is of paramount theoretical importance; the first and second together are necessary in order to place the contested points on the larger map of issues discussed in *On Law and Justice* and *The Concept of Law*.

In light of this map, I return to the first point. When this point is recalled and combined with Ross’s point of departure in the intersubjective, rule-guided consciousness of the participants themselves—see the quotations above—we have the basic elements necessary to understand Ross’s concept of valid law.

First, Ross’s theory is categorically different from any gunman theory. In the latter kind of theory, the existence of the order can be established in behaviouristic terms. In Ross’s theory, the existence of a norm cannot be established by appeal to behaviouristic criteria; the intersubjective, rule-guided consciousness of the participants themselves—their “normative ideology” as Ross says in regard to judges—is inescapable. Therefore the existence criteria for law are categorically more complex than those for an order.

Secondly, the existence criteria for norms relate to motivation for action. In ontological and epistemological terms, the criteria relate to the individual and her psychology. Law, however, is a social phenomenon; in consequence, it requires something approximating communal acceptance, that is, the individual’s accepting in the knowledge of the same acceptance on the part of others and with the reciprocal demand of such acceptance.

⁴² See also section II.2.3 above.

⁴³ In this respect, Hart 1961, 10/ 1994, 10–1, including endnotes, is misleading when he speaks in general terms of “a predictive account” and “a whole school of legal theory in Scandinavia.” There is no such thing as one predictive account characterising one school of legal theory in Scandinavia. On Hart’s attitude to sources and references, see Lacey 2004, 211, 214, 230–1; see also *ibid.*, 223, quoting from Hart’s notebook with ideas for *The Concept of Law*: “One novelty in the book is to be a refusal to draw topics of importance from named authors’ theories but to look at *the object*” (Hart’s italics). On the related issue of the method of ideal types, see at and in note 47 below.

Since, in Ross's theory, "valid law" signifies normative meaning-content that has the property of being part of the judge's motivation when he is reaching a decision in the case at hand, the existence criteria have to relate to rules motivating the community of judges. This leap from the individual to the community is problematical in Ross (see section II.2.3 above). The same goes for Hart, however, and since Hart does not criticise Ross on this point, I shall not pursue the matter here.

Earlier I pointed out some indications to the effect that Hart did not grasp the theoretical ramifications of Ross's basic distinction between the rules themselves and statements about the existence of a rule, including Rossian predictions (sections III.3.1 and IV.2.1 above).

Here we see still further evidence of this, now in relation to the way in which Rossian predictions combine the aspects of meaning and motivation with the aspect of behaviour. The following is a brief outline. Hart's main object of attack is his stylised version of Austin's gunman theory. To facilitate his critique, Hart makes a distinction marked by the terms "internal" and "external." Hart calls upon this distinction in various respects (aspects of rules, attitudes, points of view, statements); it is the distinction itself, however, that is most important in relation to Ross's "predictive theory" of "valid law." Whereas the manner in which Hart draws the internal-external distinction may suffice to demarcate his own theory in relation to Austin's gunman theory, it is inadequate in relation to Ross's theory, which straddles the distinction. It is not always clear at whom Hart aims his criticism. To the extent that his criticism of "predictive theories" applies to Ross's theory, it is confused, for key terms in his critique—like "external" and "reduce"—are systematically ambiguous as between an extreme and a moderate sense. Earlier I pointed this out with regard to "reduce," "eliminate," and the like (section IV.2.1 above). I now turn to Hart's key term "external."

I shall use the term "moderate external point of view" to refer to a point of view which presupposes (or includes) an understanding of the rules from the internal point of view, but which does not include the attitude of acceptance inherent to the internal point of view.

[T]he observer may, without accepting the rules himself, assert that the group accepts the rules, and thus may from outside refer to the way in which *they* are concerned with them from the internal point of view. (Hart 1961, 87/ 1994, 89)⁴⁴

⁴⁴ Hart's text places several constraints on the context and meaning of the term "acceptance": First, in making statements about the existence of rules from the external point of view, the speaker neither presupposes nor states that he accepts the rules in question; secondly, acceptance does not entail any philosophically necessary moral content of the rules in question (Hart 1961, 181–2, 198–9/ 1994, 185–6, 202–3). In addition, Hart seems to be making a third distinction, between acceptance in a "thin" sense, consisting of the internal point of view *qua* critical reflective attitude, and acceptance in a "thick" sense, in the form of positive value judgments about rules; i.e., the internal point of view does not entail approval of the

The “extreme” sense, in contrast, is the one which focuses on regularities in behaviour and does not take into account the levels of meaning and motivation.⁴⁵

The essential thing to see here is that *the moderate external point of view comprises the perspective of prediction in Ross*.⁴⁶ Ross sums up and ends his discussion of the validity of law, thus:

[J]urisprudence must have as its task the interpretation of the “validity” of the law in terms of social efficacy, that is, a certain correspondence between a normative idea content and social phenomena. (Ross 1958, 68/ 1953, 82; trans. amended)

To arrive at a tenable interpretation of the validity of the law is possible only by a *synthesis* of psychological and behaviouristic views, as I have attempted to explain in the present chapter. The view is behaviouristic so far as it is directed toward finding *consistency and predictability* in the externally observed verbal behaviour of the judge. It is psychological so far as the consistency referred to is a *coherent whole of meaning and motivation*, only possible on the hypothesis that [...] the judge is governed and motivated by a normative ideology of a known content. (Ross 1958, 73–4/ 1953, 89; italics added)

Hart, however, never seems to be able to relate his own theory to Ross’s synthesis of the pertinent points of view into one theoretical construct. He criticises what he calls “predictive” theories without further clarification of how this concept relates to Ross in comparison with other authors.

Since Hart’s main aim of attack is his ideal type of an Austinian kind of theory, since he forges his concepts with a view to this attack, and since he does not develop the concept of moderate external point of view as a clear alternative to the extreme, behaviourist interpretation, his criticism of “predictive” theories fails if read as a criticism of Ross. While ideal types may serve to highlight forms and degrees of social phenomena, they

rules in question (ibid., 56 cf. 54–6, 85–6, 104–5, 198–9/ 57 cf. 55–7, 87–8, 107–8, 202–3). This last distinction seems, however, to blur the distinction between the internal point of view and the moderate external point of view, see the passage quoted in the main text, which delineates the latter. This passage also illustrates how Hart often links acceptance to the internal point of view. For interpretations of this link in Hart; see, e.g., Hacker 1977, 17, 24–5; Raz 1990, 58 cf. 50–8; MacCormick 2008, 59, quoted at the end of the present section IV.2.2.1. For one response in Ross to a Hartian thin acceptance, see at the beginning of section IV.2.3 below.

⁴⁵ On extreme and moderate forms of the external point of view, see Hart 1961, 87–8, 244/ 1994, 89–91, 291, and the elaboration in MacCormick 1981, 36–40; 2008, 50–5. For related conceptualisations, see Raz on “statements from a point of view” and “detached statements” in Raz 1990, 170–7; 1979, 153–7; 1980, 235–6; 1996, 17; 1998a, 14–5.

⁴⁶ I submit that neither separately nor conjointly do Hart’s remarks on his key ideas of “internal point of view,” “critical reflective attitude,” and “acceptance” produce a well-delimited concept of “acceptance;” see the last note but one, and, in consequence, that different readings may render his system with an equal degree of coherence. The focus here is not on a mapping of such possible readings—which would lead us into the vast literature on varieties of positivism published subsequent to *The Concept of Law*—but on the fact that the Hartian matrix is very close to, and on many points identical to, the one found in *On Law and Justice*.

cannot serve as a basis for a critique of particular authors. And Hart does not provide the necessary mediation between his ideal type generics and Ross's position in *On Law and Justice*. Hart's statements are either clear, in that "external" is to be read in the extreme sense—and then they miss the mark, since Ross's theory is not of the extreme kind. Or Hart's statements are ambiguous as between the extreme and the moderate senses—and then they miss the mark if read in the extreme sense, or fail due to misunderstandings and non-sequiturs on his part if read in the moderate sense.⁴⁷

In the last quotation above, we saw Ross's summation of his theory of valid law. Hart sums up his discussion of the idea of obligation as follows:

At any given moment the life of any society which lives by rules, legal or not, is likely to consist in a tension between those who, on the one hand, accept and voluntarily co-operate in maintaining the rules, and so see their own and other persons' behaviour in terms of the rules, and those who, on the other hand, reject the rules and attend to them only from the external point of view as a sign of possible punishment. One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view and not to *define one of them out of existence*. Perhaps *all our criticism of the predictive theory of obligation may be best summarized as the accusation that this is what it does to the internal aspect of obligatory rules*. (Hart 1961, 88/ 1994, 90–1)⁴⁸

Two things should be evident by now. First, we should see how these statements in Hart utterly fail if read as part of a critique of Ross's theory. Ross does not define the internal aspect of the rules out of existence, to follow Hart's way of putting it. On the contrary, he defines the law as "a coherent whole of meaning and motivation" *into* existence (see Ross's summation, quoted above, for the expression in quotation marks). Ross's predictive analysis demonstrates that an empiricist position, consistently carried out, can attain its main goal of establishing an external point of reference for the doctrinal study of law *only* on the assumption of a

⁴⁷ On the ideal type character of Hart's approach, see, e.g., Hart 1961, 18/ 1994, 18. For Weber's discussion of the method of *Idealtypus* in relation to motivation, action, and social phenomena, see Weber 1964, 87–112 et passim, and 1973. As Hart was influenced by the substantive content of these analyses, see Lacey 2004, 230–1, including endnote, there is reason to assume an influence at the level of method as well. Hart's imprecise renderings of the sources—including his failure correctly to place Ross's prediction theory in relation to Ross's basic distinction between the rules themselves and statements about the existence of a rule—have been taken as authoritative in later Anglo-American literature. Leslie Green, e.g., states: "Hart's main dispute was with two forms of reductionism: the coercion-based theories of classical positivism, which conceived of rules as orders backed by threats, and the behaviorist accounts influential among legal realists, which conceived of *rules as predictions* of official action. Against these, Hart's arguments are decisive" (Green 1995–96, 1694; italics added), and this statement, again, is later quoted by Liam Murphy as the definitive truth of the matter (Murphy 2001, 378 in note 34).

⁴⁸ See also Hart 1961, 10/ 1994, 10: "predictive account [. . .] a whole school of legal theory in Scandinavia" and the endnote with a reference to his review of *On Law and Justice*, *ibid.*, 233/ 278–9.

coherent whole of meaning and motivation that is shared by the doctrinal literature and the external point of reference, the courts.⁴⁹

Secondly, we should see the extent to which Hart's concept of the "external" point of view is in need of further elaboration. One such elaboration, given by MacCormick, is especially pertinent for the discussion here, in that it not only clarifies Hart's distinction but also corroborates our thesis that the moderate external point of view comprises the perspective of prediction in Ross:

The "external point of view" is not necessarily that of an outsider to the group. In its "extreme" form it comprehends the point of view of all those who, whether from ignorance of agents' subjective meanings or from *scientific commitment*, are restricted or restrict themselves to observation of human behavioural regularity. This viewpoint is distinct from Hart's "non-extreme external point of view." I called that the "hermeneutic point of view," since it is the viewpoint of one who, without (or *in scientific abstraction from*) *any volitional commitment of his own*, seeks to understand, portray, or describe human activity as it is meaningful "from the internal point of view." Such a one shares in the cognitive element of that latter point of view and gives full cognitive recognition to and appreciation of the latter's volitional element. Thus she can understand rules and standards for what they are, but does not endorse them for her part in stating or describing them or discussing their correct application. This "hermeneutic point of view" is in fact the viewpoint *implicitly ascribed to and used by the legal theorist, scholar, or writer who follows Hart's method* [. . .]. (MacCormick 2008, 59; italics added, MacCormick's italics omitted)⁵⁰

As I have submitted in my discussion above, the method referred to here by MacCormick as *Hart's method* (see the italicised part at the end of the quotation) is also *Ross's method*.⁵¹

⁴⁹ The main function of the external point of reference is to furnish an empirical basis for assessing the tenability of statements in the doctrinal study of law. Two of Ross's elaborations are worth recalling in this context. First, the tenability assessment takes the form of testing, not verification; see note 23 above. Secondly, individual directives are nested within the legal system in such a way that the object of testing is the system as a whole at each and every point in time; see at and in note 39 above. In sum, Ross's analysis offers a certain *perspective* that may or may not be entertained by those participating in the doctrinal study of law (Ross 1958, 45–6/ 1953, 59); his analysis does not offer any new method.

⁵⁰ Apart from linguistic detail, the same in MacCormick 1981, 43. See also MacCormick 1981, 37–8; 2008, 52–3. What MacCormick terms the "hermeneutic point of view" is obviously very similar to what I termed the "moderate point of view" in the main text preceding note 44 above.

⁵¹ The main point in the quotation from MacCormick was concisely stated by Ross twenty years earlier in his review of *The Concept of Law*, see Ross 1961–62, 1189 (italics added): "To me it is astonishing that Hart does not see, or at any rate does not mention, the most obvious use of the external language in the mouth of an observer who as such *neither accepts nor rejects* the rules [. . .]: the legal writer in so far as his job is to give a true statement of the law actually in force." On this "hermeneutic point of view" in Ross, see further in sections IV.2.2.2–2.2.3 below, and then sections IV.3.2–3.3, where, in the context of the doctrine of the sources of law, we shall see how Ross views the subject of this doctrine as the set of argumentative means by which lawyers generate their interpretations of, and subsumption under, terms in norm formulations, that is, generate the cognitive patterns of action in the norms.

IV.2.2.2. *Parallels between Some Conceptualisations in Hart and in Ross.* Within Hart's interpretations of *On Law and Justice* as more at odds with his own theory than I deem justifiable, there is one argument in particular that deserves a closer look, since it pertains to a blind spot in the view many people have of the book and its overall contents. This is the argument that while Ross is right in distinguishing between the internal and external aspects of rules, he draws the distinction in the wrong places:

[Ross] misrepresents the internal aspect of rules as a matter of "emotion" or "feeling"—as a special psychological "experience." [...] The required distinction between external and internal is not one dividing physical behaviour from feeling [...]; it is one dividing two radically different types of statement [...]. (Hart 1959, 237/ 1983, 166)

Hart goes on to point out how internal statements are only comprehensible within a context where the rules are treated as premises or conclusions in arguments, in brief, where they are seen in a justificatory perspective (Hart 1959, 237–8/ 1983, 166).

Hart ends by pinpointing the source of Ross's failure, thus:

The normal central use of "legally valid" is an internal normative statement [...], and Ross's failure to give a plausible account of the use of this expression in the mouth of a judge [...] is due to his more general failure to allow for the internal, non-factual, non-predictive uses of language inseparable from the use of rules. (Hart 1959, 238/ 1983, 167)

There is an incoherence in Hart's review on this point. On the one hand, there is the argument above, that Ross misrepresents the internal aspect of rules in its capacity of essential part of the justificatory perspective of the participants in the group; and there are attendant claims like the one quoted, on "Ross's failure to give a plausible account of the use of th[e] expression ['legally valid'] in the mouth of a judge." On the other hand, there is the sole remark Hart made on chaps. 3–9 of *On Law and Justice*: "Many a lawyer and judge would be better off for reading his powerful pages dealing with interpretation of statute" (Hart 1959, 233/ 1983, 161). How can a judge learn anything about what is perhaps the most important element in the justificatory practices of his profession—statutory interpretation—from an author who fails "to give a plausible account of the use of th[e] expression ['legally valid'] in the mouth of a judge"? This cannot be, for statutes and their interpretation are among the most frequently adduced and contested types of argument in inferences to what the law is, that is, to what is "legally valid."

The error consists in a failure to see that chaps. 3–9 of *On Law and Justice* constitute a powerful map of the internal aspect of the justificatory

practices of lawyers. These chapters may be seen as reconstructions of the conceptual structures of the law and of the logics of lawyers' language and argumentation; see, for example, the discussions of the doctrine of the sources of law and its subject, of legal modalities, and of rights.⁵² This map and these reconstructions represent *interpretative schemes that are shared* by those who endorse the rules and those who suspend judgment as to endorsement. The first attitude—endorsement—falls within the Hartian internal point of view, and in regard to this attitude, Ross speaks of the schemes as representing a “coherent whole of meaning and motivation” on the part of the rule followers, and as representing their “normative ideology”; see, e.g., Ross 1958, 73–4/ 1953, 89, quoted in section IV.2.2.1 above. The latter attitude—suspending judgment—represents the moderate external point of view, which is central to legal scholarship; see section IV.2.2.1 above, including the quotation from Ross in the last note there.

Reaching back to the discussion of Ross's predictive analysis in section IV.2.2.1 above, we may cast the relationship between and among the first nine chapters of *On Law and Justice* in the following terms: After an introductory chapter, the predictive analysis is presented in chap. 2. Rossian predictions, however, are only possible on the assumption of a coherent and intersubjectively shared scheme of meaning and motivation on the part of the rule followers, that is, the judges. The main conceptual structures of this scheme, and the method of generating its more detailed content, are the subject of the subsequent chaps. 3–9.

In light of this, it is misleading when Hart says:

Apart from the reference to feeling and the treatment of a legal rule as a “scheme of interpretation” as well as a basis of prediction, Ross's analysis is not very different from the cruder American realist theories which treat statements of legal rights and duties as predictions of official action.” (Hart 1959, 237/ 1983, 165)

In the first place, Hart's statements here fly in the face of Ross's express argument with regard to American legal realism. Ross rejects the approach of seminal authors in the American legal realist movement, authors such as Gray and Frank, and explains, systematically and in detail, just how his own view differs from theirs (Ross 1958, 72–3/ 1953, 88–9; cf. 1946, 59–75 and 1940, 159–60; see also section IV.2.2.1 above, at and in note 41). In the second place, Hart's statements suggest, bordering on the bizarre, that Ross's conception of an interpretative scheme is not an essential element in Ross's theory; see the opening “Apart from”-clause in the quotation, which, in effect, relegates the combination that constitutes the core of Ross's theory to something of minor importance.

⁵² On reconstructions in law and legal theory, see Eng 2003, chap. V.

I submit that, beneath the differences in nomenclature, there are substantive *parallels* between Hart's "internal point of view" and Ross's "coherent whole of meaning and motivation" and "normative ideology." More specifically, there are substantive parallels between Hart's combination of "acceptance" or "acknowledgement" and a "critical reflective attitude" and Ross's combination of "motivation" or "feeling" and a "coherent whole of meaning."

Rossian interpretative schemes furnish criteria that belong in the dimension of Hart's "critical reflective attitude." Hart seems unable to transcend his perception of a stark contrast, and, by implication, a theoretical incompatibility, between a "critical reflective attitude" and a "feeling of being bound" (Hart 1961, 56/ 1994, 57; cf. 1959, 237–8/ 1983, 165–7). In consequence, he fails to grasp Ross's argument that the two do not belong in the same dimension, that any theoretically constructed opposition between the two is spurious, and that only their combination can yield a tenable theory.

As we shall see, when reaching the rule of recognition, this is, in the end, Hart's view as well (section IV.3 below).

IV.2.2.3. *The "Hermeneutics" of Normativity.* As mentioned by way of introduction in section IV.2.2.1 above, in order to emphasise the importance of the internal point of view in *The Concept of Law*, both Hart and his commentators have deployed the term "hermeneutic" in referring to Hart's method.⁵³

Deployment of the venerable term "hermeneutic" may perhaps serve a purpose in some contexts, but in the context of the debate between Hart and the representatives of the so-called Scandinavian legal realist school the term is infelicitous if taken as a sign of demarcation, that is, as a sign of a theoretical difference of importance. None of the three main representatives of Scandinavian legal realism—Hägerström, Ross and Olivecrona—may be defined as "non-hermeneutical" without a risk of grave distortion.

Olivecrona's *Law as Fact* (1939) bears witness to the acute awareness of Hägerström and those inspired by him of the phenomenology of normativity. Olivecrona's argument progresses by rejecting one naturalistic reduction of normativity after another, this by referring to how we speak and

⁵³ Hart 1983, 13–4; Hacker 1977, 8–9, 12–8; MacCormick 1981, 38; 2008, 53; Twining 1984, 313 note 55: "The link between Hart's 'internal point of view' and the so-called hermeneutic approaches of social theorists such as Weber and Winch as well as philosophers (notably the later Wittgenstein and J. L. Austin) is admirably portrayed in [MacCormick 1981] chap. 3." For a discussion of the relative importance for Hart of Weber and Winch, see Lacey 2004, 230–1, and for an interpretation of, and attempt at disambiguating, Hart's appeal to the "hermeneutic" method, see Perry 1998, 441.

think of normativity. If anything, this argument is a *paradigm case of the "hermeneutics" of normativity*.⁵⁴

In fact, some of Hart's basic reflections on and from the internal point of view of rules are paraphrases on Olivecrona.⁵⁵ Hart and several of his followers and commentators see a difference of systematic principle between Hart and what—caught in the trap of ideal-type generics—they variously refer to as “a whole school of legal theory in Scandinavia” (Hart 1961, 10/ 1994, 10), “some of the earlier ‘Scandinavian Realist’ writings” (MacCormick 1981, 57; 2008, 75), or the like. I submit that the purported difference is one of emphasis only and not one of systematic theoretical principle; see the present work throughout, and, with a view to the present step in the discussion, compare and contrast the following two quotations, from *The Concept of Law* and *Law as Fact*, respectively:

[T]here is *no contradiction* in saying of some hardened swindler [. . .] that he had an obligation to pay the rent but felt no pressure to pay when he made off without doing so. To *feel* [Hart's italics] obliged and to have an obligation are different though frequently concomitant things. To *identify* them would be one way of misinterpreting, in terms of psychological feelings, the important internal aspect of rules [. . .]. (Hart 1961, 86/ 1994, 88; italics added unless otherwise indicated)

The binding force of the law, therefore, must be something different from the fact that we expose ourselves to the risk of sanctions when we overstep certain limits drawn up by the law. How then is it to be explained? Perhaps it might be suggested that we have a certain *feeling* of being bound by the law, and that this feeling constitutes an actual hindrance to law-breaking. In fact, every normal person is prevented by such inhibitions from doing a great many things which are forbidden in the law. But *it would be entirely wrong to identify* the binding force with the existence of those inhibitions. The feeling of being bound and the resulting inhibition must be sharply distinguished from the binding force itself. *Nobody maintains* that the law does not bind people who do not feel bound by it. *This would mean saying* that the law is not binding on criminals but only on orderly citizens! What then is the binding force of the law? It is obviously not a fact. (Olivecrona 1939, 14; italics added)

As we can see, Hart is only paraphrasing Olivecrona here; there are no indications of any difference of systematic theoretical principle. In light of this, it is extremely perplexing when MacCormick, introducing a full rendering of the passage in Hart just quoted with a warning against identifying obligation with any kind of feeling, proceeds to cite Olivecrona as an example of an author who makes this mistake:

⁵⁴ Olivecrona 1939, 9–15, especially 12–4. Among the works by Scandinavian legal realists available in English, Hart deems Olivecrona's book “[t]he clearest statement of their views on the character of legal rules,” see Hart 1961, 233/ 1994, 278–9.

⁵⁵ Compare, e.g., Hart 1961, 84–6/ 1994, 86–8 and Olivecrona 1939, 12–4; a selection from both is rendered in the next two block quotations in the main text.

[S]ince “obligation” statements are “internal” ones, they are not to be confused with statements about feelings of psychological compulsion experienced by agents (as some of the earlier “Scandinavian Realist” writings [note with reference to Olivecrona 1939] suggested) [...]. (MacCormick 1981, 57; 2008, 75)⁵⁶

One thing is the issue of method, another is the conclusions reached. Combined with their theory of the elements of reality (their ontology), Hägerström, Olivecrona, and Ross by necessity conclude that our phenomenological experience of normative bindingness is an illusion *qua* theoretical proposition about the elements of reality.

This conclusion refers to the ultimate basis in reality of normativity as such; it represents non-cognitivism. However, as we shall see presently, there are good grounds for deeming Hart to be holding the same kind of view (sections IV.2.3 and IV.3.3 below).

The conclusion of non-cognitivism in *On Law and Justice* does not refer to the cognitive patterns of action in the norms.⁵⁷ The possibility of arguing about the interpretation of, and subsumption under, terms in norm formulations is not questioned *as long as* we are discussing logical aspects or empirical facts: “What do the wordings of the statutes, *travaux préparatoires*, or judgments say?” “what do these expressions mean in everyday language?” “what are the social problems sought to be amended?” “what are the attitudes of the population at large or of specific parts of the population to this kind of regulation?” “what customs are in existence?” “what are the consequences of the competing interpretations under discussion?” and so on. Ross was an academic lawyer, as well as a legal philosopher, and he wrote several distinguished treatises on the contents of positive law within the framework of such questions, attempting to distinguish as clearly as possible between the presentation of what he took to be more or less uncontested facts as regards the sources of law and their logics, on the one hand, and his own views of the normative goodness of the competing

⁵⁶ In the note with reference to Olivecrona, MacCormick refers the reader more specifically to Olivecrona 1939, “chap. 3,” and characterises this as “a classic statement of the ‘Scandinavian Realist’ view on obligation.” However, chap. 3 is on rights, not on obligation; and there is no separate chapter on obligation. There are some brief remarks on obligation by way of introduction in chap. 3, but these refer back to the discussion of “binding force” to which I refer in the previous two notes and from which I have quoted in the subsequent main text.

⁵⁷ In this respect, Ross’s way of putting it, when he defines directives as utterances “with no representative meaning but with intent to exert influence,” is unfortunate (Ross 1958, 8/ 1953, 18). For, on linguistic grounds, it is tempting to read “representative meaning” as synonymous with “cognitive patterns of action,” but then Ross’s definition seems perplexing: In order to influence action, see the second part of Ross’s definition, norms must represent cognitive patterns of action comprehensible to the addressees, something which he apparently denies in the first part of the definition. The perplexity is resolved, however, when we recognise that in Ross’s nomenclature “representative meaning” refers not only to cognitive patterns of action but also to the modality of description and the properties of truth and falsehood (*ibid.*, 7/ 17). Thus, what Ross denies is that directives may be said to be true or false, not their action-guiding capacity.

legal interpretations contemplated, on the other (Ross 1942; 1947; 1950b; 1959–60).

The conclusion as regards the ultimate basis of normativity in reality does not in itself, then, render the *method* of Hägerström, Olivecrona or Ross less “hermeneutical” than the method deployed by Hart. Our phenomenological experience is fully respected *qua* experience, and is seen, indeed, as the nub of any discussion of normativity (Eng 2007, 277–8 cf. 275–90). This should come as no surprise, given the fact that Hägerström, the main source of intellectual inspiration vis-à-vis both Olivecrona and Ross, was deeply involved in the Kantian problematic and given the fact, too, that one of the main themes within Kantian practical philosophy is how a non-empirical normativity may be seen as relating to our lives as empirical beings without being conflated with the psychology of the individual person. This thematic calls for, indeed requires, a “hermeneutics” of normativity in the highest degree.⁵⁸

In terms of *emphasis*, then, Hart may be correct in contrasting his own emphasis on the internal perspective, and its corresponding critical reflective attitude, with Ross’s external perspective, and its corresponding prediction analysis (Hart 1959, 236–40/ 1983, 164–9). This contrast does not, however, amount to a difference in principle between the two authors with regard to either the conceptual apparatus or methodology.

Let me elaborate on this contention and its grounds.

IV.2.3. Hart and Ross on the Ultimate Basis of Normativity in Reality. First Part

The difference in emphasis is illustrated by the following passage in Ross’s review of *The Concept of Law*:

I am unable to understand how it is possible that a person could have [a critical reflective attitude]—[could] criticize himself for breaking the rule, and acknowledge that criticism on the part of his fellows is justified—and still feel free to act as he likes. I believe that the attitude and reactions described by Hart are the overt manifestations of feelings [. . .]. (Ross 1961–62, 1188)

These statements illustrate how Hart and Ross to a certain extent talked past each other. Hart is focussing on the argumentative elements and structures of lawyers’ form of life. The quotation from Ross, by contrast, has as its backdrop a larger canvas. It indicates a basic philosophical position with respect to the family of issues at the core of practical philosophy: the basis of normative propositions in reality (ontological aspects), the meaning of terms used to express such propositions

⁵⁸ See, e.g., Hägerström 1902, 608 cf. 211ff. and 607 ff.; Ross 1933, chap. VIII cf. chap. VII; Olivecrona 1939, 15–6 cf. 9–15.

(semantic aspects), and the possibility of a specifically practical reason (moral cognition and knowledge, epistemological aspects).⁵⁹

While practical philosophy was always one of Ross's major concerns—always present if not necessarily in the foreground—this family of issues was not at the very core of *The Concept of Law* and not ingrained in Hart's thinking in the same way as in Ross.⁶⁰ Indeed, Hart took the position that it is possible and commendable to keep legal philosophy independent of the contentious issues of practical philosophy (Hart 1961, 164/ 1994, 168–9; cf. 1994, 253–4). Still, if we wish to avoid comparing statements that refer to different issues, we should search for corresponding statements in Hart.

First, the moderate external point of view in Hart comprises the perspective of prediction in Ross (section IV.2.2.1 above, in the text following note 45). Secondly, the internal point of view in Hart does not exclude Ross's non-cognitivism, that is, Ross's rejection of the possibility of moral knowledge. Where Ross speaks of, for example, "manifestations of feelings" and of a "coherent whole of meaning and motivation," "normative idea content," or "normative ideology," Hart speaks of, for example, "acceptance," "acknowledgement," or "acquiescence" and of our judgment that a rule exists as our "guide," "reason" or "justification" within the "internal point of view."⁶¹ Hart makes clear that his concept of acceptance is agnostic with respect to the moral status of the rules in question:

There is [...] no reason why those who accept the authority of the system should not examine their conscience and decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so. (Hart 1961, 198–9/ 1994, 203)

⁵⁹ In light of our previous analysis of Hart's usage of the term "acceptance" (note 44 above), we may explicate Ross's point in the quoted passage to be that regularity in behaviour combined with acceptance in the Hartian thin sense of a critical reflective attitude is *too* thin a basis from which to reconstruct our idea of normativity.

⁶⁰ For two divergent interpretations of this feature of Hart's work, see Gardner 2005, 332–3; Dworkin 2006, 290–1.

⁶¹ For "manifestations of feelings" in Ross, see the quotation at the beginning of the present section IV.2.3; for "coherent whole of meaning and motivation," see Ross 1958, 73–4/ 1953, 89; for "normative idea content," see *ibid.*, 68/ 82; and for "normative ideology," see, e.g., *ibid.*, 37, 73–4, 75–6 (quoted in section IV.3.3 below)/ 50, 89, 90–1. Unless otherwise stated, all the occurrences referred to in the previous sentence are found in the quotations in section IV.2.2.1 above. For "acceptance" in Hart, see, e.g., Hart 1961, 105–6, 113, 198–9/ 1994, 108–9, 116–17, 203; for "acknowledgement," see, e.g., Hart 1965, 1293/ 1983, 359 (quoted in section IV.3.3 below); for "acquiescence," see, e.g., Hart 1961, 60, 105, 114/ 1994, 61, 108, 117; and for "guide," "reason," or "justification," see, e.g., *ibid.*, 10/ 11, where he introduces the three terms together, with emphases. For our purposes, it is not necessary to sort out the various uses Hart makes of the term "acquiescence"; let it suffice to note that in some places he links it to acceptance, see *ibid.*, 60/ 61, in others, he contrasts the two, see *ibid.*, 197/ 201, and, in still others, the relation between the two is indeterminate, see *ibid.*, 114/ 117. For the substantive parallels between Hart and Ross, beneath the surface of differing nomenclatures, see section IV.2.2 above.

Is Hart a non-cognitivist? The answer obviously does not follow from the fact that Hart's internal point of view does not exclude the non-cognitivism in Ross.

Within the framework of this paper, it is neither possible nor called for that this question be addressed in full. It may be answered on the basis of several types of argument, and in answering we may need to distinguish it from several related questions. I have selected the arguments and delimitations that I consider most pertinent to illuminating the discussion between Hart and Ross. To give an overview and facilitate reference, I list the arguments here, and then discuss them in that order: There are arguments from within the Kantian context, from the concept and logic of Hart's internal point of view, from other parts of Hart's texts, and from what I shall call the "incompatibility claim."

First, an argument from within the Kantian context. The Kantian problematic in practical philosophy may be put pointedly, thus: Are we in possession of a specifically practical reason? An affirmative answer would represent a basic form of cognitivism, that is, a rejection of non-cognitivism.

The Kantian problematic is, expressly or by supposition, the central meta-ethical interlocutor in most of Ross's work in legal and practical philosophy. It is clear that Ross could never reconcile himself with a Kantian-based natural law. Nevertheless, Ross never lost sight of the challenge of the Kantian position, probably the only viable alternative to legal positivism that he ever seriously considered and deemed worthy of deep study. In Axel Hägerström, Ross had access to a highly qualified authority on Kant.⁶² Through Hans Kelsen he received further impulses. First and foremost, however, his intimate knowledge of the Kantian philosophical traditions was a result of his own studies, obviously driven by a felt necessity of taking the arguments very seriously (Ross 1933).⁶³

Hart, for his part, does not expressly relate his internal point of view to Kant's problematic and position, and there is no textual evidence I know of that would suggest he intended terms like "guide," "reason," or "justification" to refer to a reason-based normativity of the Kantian kind.

Here is a distinct difference between Ross and Hart. While Ross presented his meta-ethical views in explicit confrontation with authors in practical philosophy or norm theory in general, Hart's canvas is smaller and leaves more to the reader's interpretation. I shall return to this difference as a possible explanation of misperceptions of the relationship between Ross and Hart (section VI).

Secondly, an argument from the concept and logic of Hart's internal point of view. Going from the Rossian to the Hartian canvas, we may ask whether Hart's internal point of view excludes cognitivism due to the way it is

⁶² Hägerström 1902 is a seminal work, still relevant.

⁶³ The plural form "traditions" is no misprint; see Ross 1933, chaps. VII–XII.

expressly defined in Hart or due to its internal logic in some other way. Neither Hart's basic definitional formulations nor his discussions are in my opinion sufficiently clear and elaborated to warrant such a radical conclusion. Any argument along this line leads into the finer exegesis of *The Concept of Law*, and, in my experience, ends in indeterminacy.⁶⁴ By its nature of perennial contestedness, I find this kind of argument of less relevance here. Instead, the pertinent answer to our question is to point to the differences in the scope of investigations and the range of express standpoints in the corpus of the two authors (see immediately above), and to conclude that the same differences are seen in their methodological reflections. While Ross's reflections on prediction (forming a framework corresponding to the moderate external point of view) and his reflections on legal sources and method (made from both points of view, both the moderate external and the internal) are meticulously laid out and his conclusions authoritatively stated,⁶⁵ Hart's corresponding reflections are briefer, less systematic, and more tentative.⁶⁶

Thirdly, an argument from parts of Hart's texts other than those relating to the concept and logic of the internal point of view. We can find scattered evidence that Hart considered himself to represent a non-cognitivist position. This view of his is most clearly seen in his response to Raz, where he expressly categorises his own position as non-cognitivist (Hart 1982, 155–61, 265–6). Neither in these passages nor elsewhere, however, does he discuss how his non-cognitivism is to be understood in greater detail. Therefore I shall let it suffice to point to one main way of drawing the line against cognitivism. This consists in seeing the normative aspects of our language and argumentation not as describing anything, but as *expressing* the speaker's attitudes (emotivism) or will (prescriptivism). The attitude in question here is what Hart most often refers to as "acceptance," and which we may also refer to with terms like "adherence," "commitment," or "endorsement."

To paraphrase within the framework progressively conceptualised by J.L. Austin in the years in which Hart developed his main ideas and in which

⁶⁴ Raz interprets Hart's internal statements and internal point of view as representing non-cognitivism; see Raz 1981, 447–8, 454, 248–9; Raz 1998b, 252–3. In Raz 1998b, 253 note 13, he says: "My claim is not that Hart's analysis of legal statements and utterances is incompatible with belief in the objectivity of value and morality. It is that the plausibility of the analysis depends on the rejection of the objectivity of value and morality. Once their objectivity is admitted there is no reason for accepting Hart's analysis rather than the view that legal statements and utterances are just like all other statements." As I understand it, this is not an argument from the logic of Hart's position. See also note 68 below.

⁶⁵ Ross 1958, 38 ff., cf. chap. 2 passim/ 1953, 51 ff., cf. chap. 2 passim; 1958 chaps. 3–9/ 1953 chaps. 3–9.

⁶⁶ Hart 1961, 55–8, 86–8, 244/ 1994, 56–9, 88–91, 291. Again, a glance at the context of their intellectual growth may be illuminating. On the one hand, there is Oxford and Austin's fondness for English dictionaries (Austin 1961, 42–3, 49, 111–12, 134–5); on the other, there is Scandinavia and the Continent, and Kant as a frame of reference, e.g., in Hägerström and Kelsen, the two most formative influences on Ross's thinking (Hägerström 1902; Kelsen 1934, 20–5, 66–7; 1992, 22–6, 58). See further section VI below.

Austin and Hart often collaborated and influenced each other: (i) One illocutionary force of lawyers' propositions as to what the law is (their propositions *de lege lata*) is to *express* their adherence or will; (ii) there is no normative component of lawyers' propositions as to what the law is that transcends the appeal to premises thus adhered to or prescribed.⁶⁷

Hart's perception of his own position is one thing, the best interpretation of *The Concept of Law*, another. However, due to Hart's reserve in relating to general philosophy, there is little interpretative evidence in favour of seeing any discrepancy between the two in regard to the question under discussion, that is, whether Hart represents a non-cognitivist position.⁶⁸

I have now sketched three arguments on the question of whether Hart's position is one of non-cognitivism. The fourth type of argument to be discussed in this paper is most adequately addressed in the context of the rule of recognition; see section IV.3.3 below.

IV.3. *The Level of the Rule of Recognition*

IV.3.1. Introduction

Although neither Ross nor Hart frames his discussion in the terminology of the basic norm, this notion may be helpful in identifying an important common area in their discussions.⁶⁹

In what follows, I shall first establish that there *is* in fact common ground between Hart's rule of recognition and Ross's conception of the subject of the doctrine of the sources of law (section IV.3.2 below).

Then I shall submit that this common ground makes it possible for us to find and compare statements referring to the same issue, namely the issue

⁶⁷ The point is an ontological one. I take the term "illocutionary force" to be definitionally linked to the individual speaker's intention. Taken together, (i) and (ii) say, then, that the normativity in question has no ontological dimension transcending our psychological adherence or will. Further elaborations of Austin's usage, or engagements with nomenclatures derived from it, are not necessary here.

⁶⁸ For the same reason, I shall not discuss what kind of non-cognitivism Hart represents. If discussed, the answer would be our position, not Hart's, and would not illuminate the relationship between him and Ross. Raz 1993, 149, says: "[Hart] saw [ordinary normative statements] as simply expressing an endorsement of a standard in a sense which, though never fully analysed, was meant to differ both from the interpretation of normative statements as expressing emotions and exhorting to similar emotions and their interpretation as commands or prescriptions." I agree with Raz that Hart did not "fully analyze" what were to be the distinguishing characteristics of his view of norms and normativity. More specifically, I am not able to find evidence of a difference of principle between *The Concept of Law* and *On Law and Justice* on this point. By "evidence," I mean both textual and systematical evidence, mutually informing each other. Hart's intentions to the extent that they did not find expression in *The Concept of Law*, on the other hand, fall outside the perspective of this paper. For wide-ranging and exploratory discussions of Hart's non-cognitivism, see Postema 1998 and Toh 2005.

⁶⁹ As well as the discussions of Olivecrona, Eckhoff, and other adherents of the basic tenets of Scandinavian legal realism; see Eng 2007, 296–307.

of the ultimate basis of normativity in reality; and, further, that the common ground may be illuminated by seeing both discussions within the conceptual framework of a basic norm (section IV.3.3 below).

IV.3.2. Hart's Rule of Recognition and the Scandinavian Doctrine of the Sources of Law

Hart's use of the term "rule of recognition" is neither synonymous nor entirely co-extensive with the subject of the doctrine of the sources of law in its Scandinavian form. There is, however, a good bit of overlap.⁷⁰ This was also stressed by Ross in his review of *The Concept of Law* (Ross 1961–62, 1186).

As a heuristic device in presenting Hart's legal theory to Scandinavian lawyers, it is therefore well to ask them to substitute the Scandinavian conception of the subject of the doctrine of the sources of law for Hart's term.

Hart almost without exception speaks of "the rule of recognition," that is, he employs the singular form with the definite article.⁷¹ However, this form of expression does not reflect adequately the complexity of his conception of the basic elements of the legal system, and it represents a barrier to the understanding of his view of the law.⁷²

Hart gives the following reason for his use of the singular form with the definite article:

The reason for still speaking of "*a rule*" [...] is that, notwithstanding their multiplicity, these distinct criteria are unified by their hierarchical arrangement. (Hart 1965, 1293/ 1983, 360; Hart's italics)

Whether this is a tenable justification depends, of course, on what is meant by "criteria" in this quotation. Since Hart is speaking of a "hierarchical arrangement," one might think Hart is referring to categories like the constitution (written or unwritten), statutory law, case law, or other forms of customary law. For in most developed legal systems, a hierarchy will be found, at the very least between the constitution and the other norms of the system.

For two reasons, this seems however to be an implausible interpretation. First, on this interpretation most developed legal systems will have the *same* rule of recognition; it seems hard to find examples of developed legal

⁷⁰ See Ross 1958, chap. 3/ 1953, chap. 3.

⁷¹ For exceptions, see Hart 1961, 99, 113/ 1994, 102, 116. In full knowledge of Hart's insistence on the singular form with the definite article, Ross still employs the plural form in his review, see Ross 1961–62, 1186 (parts of which are quoted at the end of the present section IV.3.2).

⁷² For more or less clear indications of the complexity of the rule of recognition, see, e.g., Hart 1961, 92–3, 97, 98, 103–4/ 1994, 95, 100, 101, 106–7; 1965, 1293, 1294 note 11/ 1983, 360, 361 note 11.

systems without these broad categories and some very basic form of *lex superior*. Such identity does not match Hart's intention; he puts forward the rule of recognition as specific to each and every municipal legal system, taking account in each instance of the distinctness of the legal system in question.

Secondly, on this interpretation the rule of recognition could not fulfill the function accorded to it, namely to *identify* the norms of the individual systems, that is, identifying a norm as being part of, for example, English law as contrasted to Norwegian law.⁷³

Another option is to interpret Hart as referring to the norms on what are to count as source-of-law factors in the system and on how to interpret and apply these factors, that is to say, the norms that together make up the core subject of the doctrine of the sources of law of the system. By "source-of-law factor" I shall refer to the various types of argument that lawyers deem it proper to employ in their arguments *de lege lata*, that is, in their arguments on what the law is, be it in general, in a certain type of case, or in a particular case. Main examples of source-of-law factors are statutory texts, *travaux préparatoires*, arguments from previous judgments, policy arguments, and arguments from justice. Such lists are open-ended and the individuation of their items may be carried out in various ways. The difference from the first interpretation lies in the fact that neither the norms on what are to count as relevant source-of-law factors nor the norms on how to interpret and apply these factors qualify as substantive legal norms in themselves; instead, they serve as argumentative bases from which substantive legal norms are justified.⁷⁴

Under this interpretation, the two objections to the first interpretation no longer apply.

First, under this interpretation the rule of recognition will be *specific* to a legal system, since the list of factors as well as the doctrine of their application vary from system to system. Some systems give much weight to the wording of the statute and more or less exclude arguments from the *travaux préparatoires*, other systems allow for a higher degree of "legislating through the *travaux préparatoires*," or some parts of them. Some systems

⁷³ On the theme of identification, see, e.g., Hart 1961, 97–107/ 1994, 100–10. Hart usually speaks of "identification," sometimes also of "ascertainment" (*ibid.*, 92/ 94) and "determination" (*ibid.*, 95/ 97). Throughout his discussions, the context-setting term is "recognition" as used in "the rule of recognition."

⁷⁴ It lies beyond the scope of this paper to explore further the distinction between the norms that constitute the subject of the doctrine of the sources of law and substantive legal norms; on the distinction, see Eng 2007, 512–7. My definition of the concept of "source-of-law factor" as also covering policy arguments and arguments from justice does not imply a stand on the discussion between inclusive and exclusive forms of legal positivism; the conceptualisation in the main text here relates to doctrines of the sources of law, the said discussion is part of legal philosophy. The reason we have to link up with both levels here is that Hart seems to run them together in his argument from "hierarchical arrangement"; see the main text of the present section IV.3.2 as a whole as well as the last paragraph in particular.

have a strict doctrine of precedent, other systems do not have a doctrine of precedent at all, and most systems situate themselves somewhere in between. And so on, for each and every source-of-law factor.

Secondly, on this interpretation the rule of recognition can plausibly shoulder the responsibility of *identifying* the norms of the individual systems.

Neither system-specificity nor the identifying function requires exhaustiveness. In particular, neither of these requires specification of necessary conditions or exhaustive and surveyable (sets of) sufficient conditions.⁷⁵

The system-specificity and identifying function of a rule of recognition do require, however, that the following two conditions be met:

- (i) The rule of recognition must represent a set having as its members criteria specific to the system in question;
- (ii) The criteria of this set must be capable, in practice, of doing the work of identification. As a matter of experience, this means that arguments from the criteria will enter into varying constellations from case to case, partly varying as to which criteria are relevant as argument bases in the case at hand, partly varying as to whether, and if so, to what degree, the arguments are treated as factors in a weighing and balancing or as conditions.⁷⁶

A set of criteria meeting these two conditions will represent a functional “rule of recognition.”

In brief, a rule of recognition cannot be just *that*, that is, an entity deployed in order to *recognise* what belongs and does not belong to a system, unless it represents a set *specific* to a legal system and this set has as its members a *multitude* of criteria—namely, criteria furnishing the arguments that in varying constellations are sufficient to reach the decisions integral to law as a going concern.

Hart never suggested any formulation of the rule of recognition of a modern legal system capable of shouldering the responsibility of identification with which he charged this rule. To my knowledge no one else has succeeded in formulating such a rule either. The suggestion by MacCormick is only a set of placeholders for criteria to be filled in

⁷⁵ When speaking of “conditions” I refer to the *ex ante* perspective, unless something else is explicitly stated or is clear from the context. That it is always possible to reconstruct any decision within the framework of conditions in an *ex post* perspective is trivial. This restriction concerning perspective pertains, too, to my use of “criterion” (see also the next note on this term). On the logic and epistemic import of forms of unity consisting neither in necessary conditions nor in exhaustive and surveyable (sets of) sufficient conditions, see Eng 1998, 96–9 cf. 81–101, 119–20, 226–33; 2003, 98–101 cf. 83–103, 120–1, 229–38.

⁷⁶ I use the term “criterion” in a neutral sense in regard to the dimension of weighings and balancings versus conditions; that is, a criterion may, in this conceptualisation, be a factor in a weighing and balancing or a condition (necessary or sufficient).

(MacCormick 1981, 110; 2008, 138–9). By nature of the task to be performed by this rule, it has to be, first, gargantuan in size; secondly, overly complex with respect to content, that is, types of argument; and, thirdly, open-endedly pluralistic as regards logics, incorporating, among other forms, guidelines for weighings and balancings.⁷⁷

Returning to the quotation from Hart above, we are now in a position to see that it expresses a false statement. In none of the Scandinavian legal systems is there any hierarchical ordering of the various types of source-of-law factor relevant in legal arguments. Instead, these factors relate to each other as factors in a *weighing and balancing*. We cannot say, for example, that a clear and precise statutory wording always takes precedence; it is a common occurrence within a modern legal system that the courts deviate from the wording of statutes. It is my distinct impression that legal arguments in English law have a structure similar to the structure of the Scandinavian legal systems (Eng 2000b): For one thing, there is the weighing and balancing structure at the level of the source-of-law factors, for another, there is the hierarchical structure and the *lex superior* principle at the level of legal norms.

Rendering problematic Hart's rule of recognition in this way suffices, I submit, to establish the existence of a common area between Hart's rule of recognition and Ross's conception of the subject of the doctrine of the sources of law.

True, Ross's conception is not identical with the outline I gave above of present-day Scandinavian doctrine. There are, however, significant similarities. Ross's conception, upon its publication, had a great impact; it was, indeed, the single most influential factor in the formation of the later doctrine. The resulting overlap in content is sufficient for our purpose. The following remarks by Ross may serve to highlight his view.

The reader will understand that Hart under the label of "rules of recognition" is concerned with what usually is called the sources of law. It is assumed that when a plurality of sources are recognized, they will be ranked in an order of relative subordination and primacy. [...] Because of this hierarchical structure, it is possible to consider the various rules of recognition as integrated logically in one and only one rule: *the* rule of recognition. In this way the logical unity of the system is guaranteed. Th[is] much cherished logical unity [...] is more a fiction or a postulate than a reality. The various sources in actual fact do not make out a logical hierarchy but a set of co-operating factors. Custom and precedents, says Hart, in the British system are subordinate to legislation. I believe that Hart, if he tried to verify this

⁷⁷ For an incisive discussion of some aspects of the complexity of a Hartian rule of recognition, see Munzer 1972, 54 ff. For a discussion of what a Hartian rule of recognition would look like in a particular legal system, see Greenawalt 1986–87 and 1988. Hart's rule of recognition has both what Coleman terms "semantic" or "validating" aspects and "epistemic" or "identifying" aspects, as I understand the use of these terms in Coleman 1982, 141, 145–8, 149, 157; 1996, 306–8, 319 in note 17; 1998, 416–20. For the purpose of comparing the positions of Hart and Ross, it is not necessary to take a stand on the criteria for these distinctions.

assertion, would find that it squares better with a confessed, official ideology than with facts. (Ross 1961–62, 1186, at and in note 8; Ross's italics)⁷⁸

The way in which Hart speaks of the “hierarchical arrangement” of the criteria of identification leaves his theory vulnerable on two counts. First, the theory is vulnerable to falsification, in that it is shown that not all or most legal systems have, or even any legal system has, a rule of recognition in this sense, that is, a set of identifying criteria arranged in a hierarchical manner; see the discussion above. Secondly, the theory runs the risk of a lack of clarity with regard to the level at which the concept of a rule of recognition belongs. We may say that propositions *de lege lata* are propositions of the first order (cf. the content of legal text-books); propositions about what criteria are employed in generating propositions *de lege lata* are propositions of the second order (cf. the content of a doctrine of the sources of law); and the problems and discussions of legal philosophy belong at more abstract levels.⁷⁹ When Hart speaks of the “hierarchical arrangement” of the criteria of identification, he apparently relates his concept of a rule of recognition to propositions of the second order, that is, to doctrines of the sources of law. Yet the main drift of his argument obviously seeks to relate the concept to issues in legal philosophy. In the latter respect, there is one part of the argument that stands out as particularly significant in a mapping of the relationship between *On Law and Justice* and *The Concept of Law*, and that is Hart's theory of the criteria for the existence of a rule of recognition; see the following discussion.

IV.3.3. Hart and Ross on the Ultimate Basis of Normativity in Reality. Second Part

I submit that Ross's claim that he and Hart were in complete agreement “as to what is involved in the question of the existence of a legal system” is best interpreted as referring to their respective views of the nature and status of *the basic norm*—where the term “basic norm” is treated as a placeholder. This placeholder may signify a more or less complex set of criteria, like Hart's rule of recognition or like the subject of the doctrine of the sources of law according to Ross. The dimensions, forms, and degrees of this complexity are not an issue inherent to the issue of the basis of normativity in reality.⁸⁰

⁷⁸ In this quotation, Ross deploys the term “ideology” in a sense different from the one he gives it in his discussions of valid law; for the latter sense, see section II.2.3 above and, e.g., the second quotation in section IV.2.2.1 above and the first quotation in section IV.3.3 below.

⁷⁹ The formulation “more abstract levels” will suffice, for the emphasis here is on the negative: The scope of theories within the philosophy of law is not limited to particular jurisdictions, as propositions *de lege lata* or doctrines of the sources of law would be.

⁸⁰ Whether Hart and Ross themselves deployed the term “basic norm,” and, if so, in what sense, is not at issue here; I shall be using the term in the sense indicated simply for the sake of economy of expression in the following discussion.

The question, then, is whether Ross is right in claiming complete agreement “as to what is involved in the question of the existence of a legal system.” In my view, Ross is indeed right in this respect.

We have already seen agreement at the level of normative entities other than the rule of recognition and its constituent parts (section IV.2.3 above). We shall now see agreement at the level of the rule of recognition itself:

[T]he mental process by which the judge decides to base his decision on one rule rather than another is not a capricious and arbitrary matter, varying from one judge to another, but a process determined by attitudes and concepts, a *common normative ideology*, present and active in the minds of judges [...] This ideology is *the subject of the doctrine of the sources of law*. It constitutes *the foundation of the legal system* and consists of directives which [...] indicate the way in which a judge shall proceed in order to discover the [...] directives decisive for the question at issue. [...] This ideology is the basis for the predictions of the doctrinal study of law [...] The *ideology* of the sources of law is the ideology which in fact animates the courts [...] The *doctrine* of the sources of law, like any other doctrine concerning valid law, is norm-descriptive, not norm-expressive [...]. (Ross 1958, 75–6/ 1953, 91; italics added, trans. amended)

The question whether a rule of recognition exists and what its content is, i.e. what the criteria of validity in any given legal system are, is regarded throughout this book as an empirical, though complex, question of fact. [...] It is a factual question though it is one *about* the existence and content of a rule. (Hart 1961, 245/ 1994, 292–3; Hart’s italics)

The existence of [the rule of recognition] is manifested in the acknowledgement and use of the same set of criteria of legal validity by the law-making, law-applying, and law-enforcing officials and in the general conformity to law so identified. (Hart 1965, 1293/ 1983, 359; cf. 1961, 54–6, 108–14/ 1994, 55–7, 112–17)

In these quotations, we see the following similarity: *In terms of content* the basic norm is not considered as furnishing any criterion beyond positive law; that is, the basic norm does *not* furnish any basis for evaluation and criticism of positive law. This is a consequence of the fact that one sees the content of the basic norm as precisely what lawyers take as a basis in their practice.⁸¹

Now we can return to the question posed earlier (section IV.2.3 above): Is Hart a non-cognitivist? I discussed three arguments and reserved the last argument for discussion here, in the context of the rule of recognition.

⁸¹ We may note that when, in the posthumously published Postscript, Hart expresses a wish to reconsider the concept of acceptance, he does so partly on the basis of an argument put forward by Kelsen in his criticism of *On Law and Justice*; see Hart 1994, 256, and Kelsen 1959–60, 10, 19, 20–1. While the Postscript *qua* argument falls outside the scope of this paper, Hart’s remarks are pertinent here for two reasons. First, the similarity between Hart’s second thoughts and Kelsen’s argument against Ross illustrates and lends support to the main submission of this paper, namely that the views of norms and normativity put forward in *On Law and Justice* and *The Concept of Law* are very close in essential respects. Secondly, Hart expressly states that with respect to the nature and role of acceptance at the level of the rule of recognition he still defends the view put forward in *The Concept of Law* (ibid.).

The point of departure of the argument is the claim that there is no necessary connection between, on the one hand, the view of the basic norm just presented, and, on the other, one's view on the issue of whether we have a specifically practical reason. That is to say, we can choose to take the content of the basic norm as precisely what lawyers take as a basis in their practice while also holding that we are beings with a specifically practical reason. Both Ross and Hart adhered to this view (Ross 1961, 60–8/ 1998, 152–5; Hart 1961, 205–7/ 1994, 209–12).

The incompatibility claim denies this possibility. In stylised form the incompatibility claim argues: *If* we take the view that in our acting and co-acting we cannot but see ourselves as invested with a specifically practical reason, *then* we cannot help but take the view that there is a necessary connection between law and a normativity based on reason. Given this connection, we cannot identify questions of what the law is with any question of empirical fact, also not with facts in the form of our own or other people's "acceptance" or "normative ideology."

From this, again, it follows that *if* we identify questions of what the law is with any question of empirical fact, including facts in the form of our own or other people's "acceptance" or "normative ideology," *then* we cannot be cognitivists in the sense of holding that we have a specifically practical reason.

Finally, the argument submits, we do not have to pursue further in general terms whether there is any alternative to non-cognitivism if the antecedent in the last conditional is satisfied, that is, if the argumentative context is one of identifying questions of what the law is with questions of empirical fact.⁸² The argument from incompatibility asserts that the above is sufficient to warrant a conclusion that Hart, like Ross, is a non-cognitivist.⁸³

As I have concluded on other grounds that Hart represents a non-cognitivist position (section IV.2.3 above), I shall not take a stand on the argument sketched here. In line with the overall objective of the paper, what is of interest here is the following: first, the similarities in the conceptions of the basic norm in Ross and Hart; secondly, their agreement on the compatibility view; and thirdly, to recognise the issue of whether it is possible to argue from the incompatibility view to metaphysical premises in Hart.

⁸² For example, we do not have to pursue further whether in this context it is possible to give argumentative sense to a cognitivist natural law based on religion but not in any part on a specifically practical reason.

⁸³ The emphasis here is on the argumentative structure outlined. The argument is unrelated to any argument claiming a necessary link between law, on the one hand, and political or other forms of social normativity, on the other. For this would just raise anew the question of the basis in reality and the cognisability of *that* form of normativity. Parts of the discussion between Dworkin and Hart may serve to illustrate this, see Hart 1982, 148–51, with further references.

Returning now to the earlier conclusion that Hart is a non-cognitivist, we may sum up: Hart shares with Scandinavian legal realism the basic tenet concerning the ultimate basis of normativity in reality, namely, that this basis must consist in an *empirical fact, more precisely, a psychological fact*.⁸⁴

I deploy the term “psychological fact” to make the point that the normativity in question has no ontological dimension transcending our psychological adherence or will. The term “adherence or will” is used here as a placeholder for a range of terms deployed in the literature, partly by Ross and Hart, partly by their commentators; see section IV.2.3 above for some of the terminological variety. In Ross and Hart the various terms ultimately acquire their meanings from the philosophical premises that they share.

Ross, while defining himself in opposition to Kant when it comes to arguments and conclusions, is committed to central parts of the Kantian conceptual framework. Occurrences of the term “psychological” in Ross are often best understood from within this framework—where psychology is empirical and is contrasted with a reason-based normativity that is valid regardless of whether the individuals in question internalise it in psychological terms. Within this framework, “psychology” does not have any connotation of naturalism or behaviourism. It refers to the motives that people have in fact internalised—be they part of a Rossian “coherent whole of meaning and motivation” or “normative ideology,” be they part of a Hartian “internal point of view” and in that capacity objects of “acceptance,” “acknowledgement,” or “acquiescence.” This is the context of my use of “psychological fact.”⁸⁵

We do not know in detail how far Hart had progressed in his work on *The Concept of Law* when he read *On Law and Justice*. The indications are,

⁸⁴ Eng 2007, 296–302. The term “basis in reality” signifies that our problematic is one in the epistemology and ontology of normativity. I am not speaking of a formal-logical basis, that is, the possibility that a proposition describing an empirical and social fact might serve as the sole premise from which to infer normative meaning-content. Neither Ross nor Hart asserts the possibility of inferring “ought” from “is” in this sense.

⁸⁵ In the literature, it is usual to speak of “social fact.” I prefer “psychological fact” in the context of this paper since the concept of a fact is already a problematic one in philosophical terms and “psychological” communicates the additional information necessary for our purposes while avoiding some potentially confusing connotations of “social.” If “social” is taken to mean more than one, it is misleading; for we may imagine the limiting case of a legal system in which there is one official and only one official. If it is taken to refer to society in contrast to the state, it is wrong in the Hartian context since Hart makes room for cases in which the internal point of view of the law is confined to the representatives of the state (Hart 1961, 113–14/ 1994, 116–17). If it is intended to leave open the possibility of a strictly behavioural approach, it is unnecessarily broad, for that approach was explicitly rejected by both Ross and Hart. And if “social” is taken to contest methodological individualism, it again adds complexities that are not called for by the nature of their exchanges. The term “psychological fact” also has the benefit of pointing to the overarching methodological issue of what place there is for such facts in legal and moral philosophy; see Eng 2007, 53–62, 247–487, where I discuss some prototypical approaches to this issue.

however, that at that point in time he had in all essential respects thought through the main ideas and decided upon the main structure of his own book.⁸⁶

On Law and Justice presented Hart with a mirror image of his own views on the basis of normativity in reality, an image, however, that Hart must have felt to be gravely distorted, distilled, as it were, through the filters of logical empiricist tenets. These tenets were not in vogue when *The Concept of Law* came off the press; Wittgenstein's Cambridge and Austin's Oxford—each in its own way, but much to the same effect—made *On Law and Justice* look like a strange beast. My main contention in this paper is that whatever strangeness is perceived does not go deep when the object of comparison is *The Concept of Law*.⁸⁷

V. Some General Conclusions

Hart's review of *On Law and Justice* bears witness to the fact that he felt a strong urge to distance himself from Ross's *magnum opus*. His arguments in the review to the effect that there is a theoretical gulf are not, however, convincing (section IV.2 above). Nor have I been able to find convincing arguments elsewhere in Hart's works, be it in his express reasoning or by inference from the logic of his position (sections III–IV throughout).

In the end, the realm of validity and reasons and the realm of psychology meet in Hart as well. And the way in which they meet is not significantly different from the end result in Ross: The basis of normativity in reality is seen as an empirical fact; more precisely, as an item in the realm of the psychology of the individual person.

Ross and Hart may deploy different terms in their presentation of this view, and their respective main works may begin with a different emphasis: *On Law and Justice* with the motivational aspect of rules and *The Concept of Law* with the reason-giving aspect of rules. Any appearance of a logical gulf caused by such differences is deceptive, however, since, on the one hand, Ross proceeds to map the internal aspect of the justificatory practices of lawyers, and, on the other, Hart adds that rules are important as motives and argues that this is their sole basis in reality, be it directly

⁸⁶ "Since he had been delivering lectures on the book's main ideas since 1952, it is likely that writing the final draft was a reasonably straightforward business. But the process of working out and refining his ideas was lengthy and laborious" (Lacey 2004, 222). Add to this the fact that in 1959 Hart was immersed in the completion of *Causation in the Law*, together with his co-author Tony Honoré, and that immediately after the finalising of this manuscript other tasks, unrelated to the completion of his manuscript for *The Concept of Law*, diverted his attention (Lacey 2004, 219–22, cf. 209 ff.).

⁸⁷ For similar conclusions concerning the status of Hart's analyses, see Perry 1998, 457, cf. 448–9 and 454–5, and for a similar conclusion concerning the relationship between Hart and Ross in particular, see Pattaro 2007, 144.

(as with the rule of recognition) or indirectly (as with the rules generated on the basis of the rule of recognition).

Thus, penetrating beneath the surface of differences in nomenclature and points of departure, this paper has demonstrated that Ross and Hart are in agreement as to the basis of normativity in reality; and, in consequence, that they are in agreement that no further pieces of ontological furniture are required to understand and explain law and any distinction pertaining to it that might make a difference to us.

VI. The Discussion between Hart and Ross in Context

Ross may be said to have written a legal philosophy from the standpoint of practical philosophy. “Practical” may, with Kant, be said to point to “everything that is possible through freedom” (Kant 1996a, A 800/ B 828). This definitional statement refers to the problematic of freedom in a sense transcending the empirical. Are we free in the sense of self-legislating beings, that is, beings who in the consciousness of our own acting and co-acting cannot but see ourselves as bound by an inescapable normativity of reason? (Eng 2007, chap. IV B 4)

This Kantian problematic was ingrained in Ross and he was persistent and dedicated in arguing against the Kantian solution.

I would argue for conclusions very different from those of Ross concerning the ontological status of normativity and the existence of a specifically practical reason. I agree with him, however, that he and Hart are in agreement on these issues: They agree—*pace* a Kantian-inspired natural law—that the basis of normativity in reality in the last instance is to be found in the facts of psychology and that we do not have any specifically practical reason (sections IV.2.3, 3.3; V).

I submit that many of the claimed differences of theoretical principle between Hart and Ross are non-existent. Closer analyses reveal that what is at stake are mostly surface differences stemming from the fact that they approached the issue of the validity of law from *two very different sets of circumstances*.

Hart lived and worked within the Benthamite tradition. He was preoccupied with finding an alternative position to the gunman theory of Bentham’s follower, John Austin (1790–1859)—without pledging adherence to natural law.

Ross lived and worked at the other end of the spectrum. He was dedicated to arguing against natural law—without pledging adherence to any Austin-like gunman theory.

Where Hart argued against a behaviourist position and emerged as a “soft” philosopher in his emphasis on our understanding and use of rules as arguments, Ross was up against a belief in a non-empirical aspect of reality and emerged as a “hard” philosopher in his emphasis on sense

experience as the sole arbiter of truth. The stage was set for the all-too-common phenomena of name-dropping and introducing of labels: “hermeneutic method” versus “prognosticism” and the like (section IV.2.2 above).

I submit that at the level of argument Hart and Ross are very close in their theories of valid law, despite eye-catching differences on the surface—relating to traditions of nomenclature, points of departure, approaches, and authors referred to.

Right up to the end, each of them had a profound respect for the main *persona* to whom they devoted their intellectual capacities of analysis and criticism. Hart’s admiration of Bentham is clear from his corpus.⁸⁸ Ross’s attachment to Kant is less obvious. As I pointed out earlier, however, the Kantian problematic is, expressly or by supposition, the central meta-ethical interlocutor in most of Ross’s work in legal and practical philosophy (see section IV.2.3 above). In his last major work in legal philosophy, Ross did not shroud his debt: “No one has given a more penetrating analysis of [the experience or awareness of duty and obligation] than Kant” (Ross 1968, 85).

Given the differences between the respective antagonists whom Hart and Ross saw themselves facing, and given the differences between the Benthamite and the Kantian traditions, it is hardly surprising that Hart and Ross may seem to be more at variance than they in fact are.

University of Oslo
Department of Public and International Law
Karl Johans gt. 47
N-0162 Oslo
Norway
E-mail: svein.eng@jus.uio.no

References

- Alexy, Robert. 2008. Alf Ross’ Begriff der Kompetenz. In *Gedächtnisschrift für Jörn Eckert*. Ed. A. Hoyer, H. Hattenhauer, R. Meyer-Pritzl, and W. Schubert, 43–64. Baden-Baden: Nomos.
- Austin, J.L. 1961. *Philosophical Papers*. Oxford: Clarendon.
- Bix, Brian. 1999. H.L.A. Hart and the Hermeneutic Turn in Legal Theory. *SMU Law Review* 52: 167–99.
- Bulygin, Eugenio. 1965. Der Begriff der Wirksamkeit. *Archiv für Rechts- und Sozialphilosophie* 41: 39–58.
- Bulygin, Eugenio. 1999. Existence of Norms. In *Actions, Norms, Values: Discussions with Georg Henrik von Wright*. Ed. G. Meggle, 237–44. Berlin: Walter de Gruyter.
- Coleman, Jules L. 1982. Negative and Positive Positivism. *Journal of Legal Studies* 11: 139–64.

⁸⁸ Hart 1982; Lacey 2004, 220: “one of his most constant sources of inspiration—Bentham.”

- Coleman, Jules L. 1996. Authority and Reason. In *The Autonomy of Law: Essays on Legal Positivism*. Ed. R.P. George, 287–319. Oxford: Clarendon.
- Coleman, Jules L. 1998. Incorporationism, Conventionality, and the Practical Difference Thesis. *Legal Theory* 4: 381–425.
- Coleman, Jules L., ed. 2001. *Hart's Postscript. Essays on the Postscript to The Concept of Law*. Oxford: Oxford University Press.
- Dworkin, Ronald. 2006. *Justice in Robes*. Cambridge, Mass.: Harvard University Press.
- Eng, Svein. 1990. Begrepene “kompetanse” og “gyldighet” i juridisk argumentasjon [The Concepts of “Competence” and “Validity” in Legal Argumentation]. *Tidsskrift for Rettsvitenskap* 103: 625–71.
- Eng, Svein. 1998. *U/enighetsanalyse—med særlig sikte på jus og allmenn rettsteori* [Analysis of Dis/agreement—with Particular Reference to Law and Legal Theory]. Oslo: Universitetsforlaget.
- Eng, Svein. 2000a. Fusion of Descriptive and Normative Propositions. The Concepts of “Descriptive Proposition” and “Normative Proposition” as Concepts of Degree. *Ratio Juris* 13: 236–60.
- Eng, Svein. 2000b. The Doctrine of Precedent in English and Norwegian Law—Some Common and Specific Features. *Scandinavian Studies in Law* 39: 275–324.
- Eng, Svein. 2003. *Analysis of Dis/agreement—with Particular Reference to Law and Legal Theory*. Dordrecht: Kluwer. (1st ed. in Norwegian 1998.)
- Eng, Svein. 2007. *Rettsfilosofi* [Philosophy of Law]. Oslo: Universitetsforlaget.
- Gardner, John. 2005. Review of Nicola Lacey, *A Life of H.L.A. Hart*. *Law Quarterly Review* 121: 329–34.
- Green, Leslie. 1995–96. The Concept of Law Revisited. *Michigan Law Review* 94: 1687–717.
- Greenawalt, Kent. 1986–87. The Rule of Recognition and the Constitution. *Michigan Law Review* 85: 621–71.
- Greenawalt, Kent. 1988. Hart's Rule of Recognition and the United States. *Ratio Juris* 1: 40–57.
- Hacker, P.M.S. 1977. Hart's Philosophy of Law. In *Law, Morality and Society: Essays in Honour of H.L.A. Hart*. Ed. P.M.S. Hacker and J. Raz, 1–25. Oxford: Clarendon.
- Hart, H.L.A. 1959. Scandinavian Realism. *Cambridge Law Journal* 17: 233–40.
- Hart, H.L.A. 1961. *The Concept of Law*. Oxford: Clarendon.
- Hart, H.L.A. 1965. Lon Fuller: The Morality of Law. *Harvard Law Review* 78: 1281–96.
- Hart, H.L.A. 1982. *Essays on Bentham*. Oxford: Clarendon.
- Hart, H.L.A. 1983. *Essays in Jurisprudence and Philosophy*. Oxford: Clarendon.
- Hart, H.L.A. 1994. *The Concept of Law*. 2nd ed., with a Postscript edited by Penelope A. Bulloch and Joseph Raz. Oxford: Clarendon.
- Hägerström, Axel. 1902. *Kants Ethik*. Upsala: Almqvist & Wiksell.
- Kant, Immanuel. 1996a. *Critique of Pure Reason*. Trans. W.S. Pluhar. Indianapolis, Ind.: Hackett. (1st ed. in German 1781.)
- Kant, Immanuel. 1996b. Groundwork of the Metaphysics of Morals. In *The Cambridge Edition of the Works of Immanuel Kant. Practical Philosophy*. Ed. and trans. M.J. Gregor, 41–108. Cambridge: Cambridge University Press. (1st ed. in German 1785.)
- Kant, Immanuel. 1996c. The Metaphysics of Morals. In *The Cambridge Edition of the Works of Immanuel Kant. Practical Philosophy*. Ed. and trans. M.J. Gregor, 353–603. Cambridge: Cambridge University Press. (1st ed. in German 1797.)
- Kelsen, Hans. 1934. *Reine Rechtslehre*. Leipzig & Vienna: Franz Deuticke.

- Kelsen, Hans. 1959–60. Eine “Realistische” und die Reine Rechtslehre. Bemerkungen zu Alf Ross: On Law and Justice. *Österreichische Zeitschrift für Öffentliches Recht* 10: 1–25.
- Kelsen, Hans. 1992. *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law*. Trans. B. Litschewski Paulson and S.L. Paulson. Oxford: Clarendon. (1st ed. in German 1934.)
- Lacey, Nicola. 2004. *A Life of H.L.A. Hart*. Oxford: Oxford University Press.
- MacCormick, Neil. 1981. *H.L.A. Hart*. London: Edward Arnold.
- MacCormick, Neil. 2008. *H.L.A. Hart*. Stanford: Stanford University Press. (1st ed. 1981.)
- Mumford, Stephen. 2003. *Dispositions*. Oxford: Oxford University Press. (1st ed. 1998.)
- Munzer, Stephen. 1972. *Legal Validity*. The Hague: Martinus Nijhoff.
- Murphy, Liam. 2001. The Political Question of the Concept of Law. In *Hart’s Postscript. Essays on the Postscript to The Concept of Law*. Ed. J.L. Coleman, 371–409. Oxford: Oxford University Press.
- Olivecrona, Karl. 1939. *Law as Fact*. London: Milford.
- Pattaro, Enrico. 2007. The Law and the Right: A Reappraisal of the Reality that Ought to Be. In *A Treatise of Legal Philosophy and General Jurisprudence*. Ed. E. Pattaro, Vol. 1. Dordrecht: Springer. (1st ed. 2005.)
- Perry, Stephen R. 1998. Hart’s Methodological Positivism. *Legal Theory* 4: 427–67.
- Postema, Gerald J. 1998. Norms, Reasons, and Law. *Current Legal Problems* 51: 149–79.
- Raz, Joseph. 1979. *The Authority of Law*. Oxford: Clarendon.
- Raz, Joseph. 1980. *The Concept of a Legal System*. 2nd ed. Oxford: Clarendon. (1st ed. 1970.)
- Raz, Joseph. 1981. The Purity of the Pure Theory. *Revue Internationale de Philosophie* 138: 441–59.
- Raz, Joseph. 1990. *Practical Reason and Norms*. 2nd ed., with a Postscript. Oxford: Clarendon. (1st ed. 1975.)
- Raz, Joseph. 1993. H.L.A. Hart (1907–1992). *Utilitas* 5: 145–56.
- Raz, Joseph. 1996. On the Nature of Law. *Archiv für Rechts- und Sozialphilosophie* 82: 1–25.
- Raz, Joseph. 1998a. Postema on Law’s Autonomy and Public Practical Reasons: A Critical Comment. *Legal Theory* 4: 1–20.
- Raz, Joseph. 1998b. Two Views of the Nature of the Theory of Law: A Partial Comparison. *Legal Theory* 4: 249–82.
- Raz, Joseph. 2005. Can There Be a Theory of Law? In *The Blackwell Guide to the Philosophy of Law and Legal Theory*. Ed. M.P. Golding and W.A. Edmundson, 324–42. Oxford: Blackwell.
- Raz, Joseph. 2009. *Between Authority and Interpretation*. Oxford: Oxford University Press.
- Ross, Alf. 1929. *Theorie der Rechtsquellen*. Leipzig and Vienna: Franz Deuticke.
- Ross, Alf. 1933. *Kritik der sogenannten praktischen Erkenntnis*. Kopenhagen: Levin & Munksgaard–Leipzig; Felix Meiner.
- Ross, Alf. 1934. *Virkelighed og gyldighed i retslæren. En kritik af den teoretiske retsvidenskabs grundbegreber* [Reality and Validity in Jurisprudence. A Critique of the Basic Concepts of Theoretical Legal Science]. Copenhagen: Levin & Munksgaard.
- Ross, Alf. 1940. *Vinding Kruses Bidrag til Retskildelæren* [Vinding Kruse’s Contribution to the Doctrine of the Sources of Law]. *Ugeskrift for Retsvæsen* 74: 149–71.
- Ross, Alf. 1942. *Lærebog i folkeret. Almindelig del* [Textbook in International Law. General Part]. Copenhagen: Ejnar Munksgaard.

- Ross, Alf. 1946. *Towards a Realistic Jurisprudence. A Criticism of the Dualism in Law*. Trans. A.I. Fausbøll. Copenhagen: Ejnar Munksgaard. (1st ed. in Danish 1934.)
- Ross, Alf. 1947. *A Textbook of International Law. General Part*. London: Longmans, Green. (1st ed. in Danish 1942.)
- Ross, Alf. 1950a. Om begrebet "gældende ret" hos Theodor Geiger [On the Concept of "Valid Law" in Theodor Geiger]. *Tidsskrift for Rettsvitenskap* 63: 242–72.
- Ross, Alf. 1950b. *Constitution of the United Nations. Analysis of Structure and Function*. Copenhagen: Ejnar Munksgaard.
- Ross, Alf. 1953. *Om ret og retfærdighed. En indførelse i den analytiske retsfilosofi* [On Law and Justice. An Introduction to the Analytical Philosophy of Law]. Copenhagen: Nyt Nordisk Forlag.
- Ross, Alf. 1958. *On Law and Justice*. Trans. M. Dutton. London: Stevens & Sons. (1st ed. in Danish 1953.)
- Ross, Alf. 1959–60. *Dansk statsforfatningsret, bd. 1–2* [Danish Constitutional Law, vols. 1–2]. Copenhagen: Nyt Nordisk Forlag.
- Ross, Alf. 1961. Validity and the Conflict between Legal Positivism and Natural Law. *Revista Jurídica de Buenos Aires*: 46–93.
- Ross, Alf. 1961–62. Review of H.L.A. Hart, *The Concept of Law*. *Yale Law Journal* 71: 1185–90.
- Ross, Alf. 1968. *Directives and Norms*. London: Routledge and Kegan Paul.
- Ross, Alf. 1970. Author's Response. Existence and Validity of a Norm. In Reply to Two Critics. *The Philosophy Forum* 3: 87–93.
- Ross, Alf. 1998. Validity and the Conflict between Legal Positivism and Natural Law. In *Normativity and Norms*. Ed. S.L. Paulson and B. Litschewski Paulson, 147–63. Oxford: Clarendon.
- Schauer, Frederick and Wise, Virginia J. 1996–97. Legal Positivism as Legal Information. *Cornell Law Review* 82: 1080–110.
- Spaak, Torben. 1994. *The Concept of Legal Competence*. Aldershot: Dartmouth.
- Toh, Kevin. 2005. Hart's Expressivism and His Benthamite Project. *Legal Theory* 11: 75–123.
- Twining, William. 1984. Some Scepticism About Some Scepticisms. *Journal of Law and Society* 11: 137–71 and 285–316.
- von Wright, Georg Henrik. 1963. *Norm and Action*. London: Routledge and Kegan Paul.
- Waluchow, W.J. 1994. *Inclusive Legal Positivism*. Oxford: Clarendon.
- Weber, Max. 1964. *The Theory of Social and Economic Organization. A Translation of Wirtschaft und Gesellschaft Part I*. Trans. A.M. Henderson and T. Parsons. New York: The Free Press.
- Weber, Max. 1973. *Gesammelte Aufsätze zur Wissenschaftslehre*. Tübingen: J.C.B Mohr. (1st ed. 1922.)
- Wittgenstein, Ludwig. 1958. *Philosophical Investigations*. Trans. G.E.M. Anscombe. Oxford: Blackwell. (1st ed. 1953.)