Legal Validity

The Fabric of Justice

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Introduction: Why Legal Validity?

I. AN INTRIGUING FACT

Every day, in many parts of our world, human beings are deprived of their freedom and denied assistance, their plans and expectations are thwarted, their belongings are seized, they are forcefully torn out of their homes and separated from their loved ones, by appeal to one or more past decisions deemed to be *legally valid*: for example, a legally valid deportation order, a legally valid contract, or a legally valid criminal statute. Even when we are not thus subject to exertions of legal force, our lives are shaped in far-reaching ways by our own and other people's reliance on the fact that certain things are legally valid, including job appointments, pension grants, passports, marriages, tax returns, or airline tickets. Many important matters turn on what is and what is not valid. Correctly pinpointing valid decisions is a fundamental lawyerly skill, and much argument in courtrooms and legal scholarship turns precisely on this question.

There is something deeply intriguing about this reality. Despite the central place that the idea of validity occupies in these familiar forms of reasoning, they rarely engage with the question of what legal validity *is*. Plainly they need not. The fact that an English will must have three rather than two signatures, for example, does not follow from anybody's understanding of the English phrase 'legally valid'. It follows from relevant statutory provisions that provide, amongst other things, requirements of procedure and form. So if I have to assess whether the document in front of me is a legally valid will, I have to check what other persons have decided in the past on the question of what makes a will valid. And the way in which I identify their decisions as being relevant to my enquiry, in turn, is in virtue of the fact that those decisions, too, are legally valid. They, too, were made in accordance with criteria, including requirements of procedure and form, set out in yet further decisions. In an important sense, therefore, my judgement – here and now – that this is a legally valid will is a judgement at several steps' remove. And the steps it builds on, those past judgements I have not witnessed, by persons I do not even know, do not settle what validity is either. They only specify how to tell *whether* something is valid.

Most of us, however, intuitively feel that we *do* have a firm grasp of what 'legal validity' stands for. This adds to the puzzle. Try asking people – lawyers, laypeople, theorists – what it means to say that a contract, a statute, a will, a passport or a bus-ticket is legally valid. Chances are that you will be told that it is pretty obvious, but you will be given quite a range of different ('obvious') responses. You may be told, for example, that it was done 'according to law'. Now, it is true as a general matter that all that is legally valid has been done according to law. But we do not think of all that is according to law as being legally valid. When I stop at a red light, I act according to law (lawfully). And likewise when I refrain from stealing. Yet it would normally be contrived to describe these kinds of act or omission as 'legally valid' – or 'invalid', for that matter. Of course, those who operate cameras at traffic lights, for example, might employ jargon by which a stop completely behind the white line is 'legally valid', but this would be a highly context-specific use of the expression. Stoppings-at-red and omissions to steal are not legally valid in quite the same stable, widely acknowledged sense as are contracts, passports and wills. This is partly because, when I issue a valid passport or make a valid contract or will, unlike when I stop at red, I bring something into existence: I create an entity – the passport, the contract, the will – that somehow lives on beyond the moment of its creation, and sometimes for generations. Perhaps this is why, for many legal professionals, 'legally valid' stands for 'created by following the relevant steps'. But again, although this is true of all that is legally valid, it is similarly true of many other things, for example brownies baked according to a recipe. To be sure, contracts, unlike brownies, have legal consequences. This yields another popular explanation of 'legally valid', as whatever 'has the consequences established by law'. The problem, here as well, is that not only do contracts have consequences established by law, but so do thefts, childbirths, floods and earthquakes. And none of these sorts of action or event is for most purposes thought of as being legally valid.

Validity is elusive, *and yet* critical aspects of human well-being pervasively hang on whether something is or is not valid. We individually and collectively let valid decisions occupy a place in our arrangements and deliberations, in our plans, vindications, justifications and hopes, that, in the final analysis, only *just* decisions deserve to occupy. In the name of validity, human interests are affected in ways that would only be justifiable if warranted by a morally compelling reason. But a valid decision at best reflects somebody else's past *view* of what it would be morally appropriate to do in certain circumstances. It need not even be that person's present view, if it was an honestly held view in the first place. At any rate, the view may be wrong. In short: not only do we settle questions of justice by reference to something *other* than a fresh reflection on what justice demands, but the idea we replace justice with, the property we treat almost *as if* it were a mark of justice, is one on which we hardly have a grip – though we seem deceived into treating it as self-explanatory. Are we under a collective spell?

II. THE CODE IDEA

In a sense, we are under a spell. The purpose of this book is to explore the moral need for this spell, and in so doing unravel how it operates. The book explains how, and within what general limits, legal validity can help a large community to foster justice precisely by helping it *bypass* concerns about justice and other concomitant matters. It shows that a fascinating legal technique is associated with the idea of legal validity, spanning the domains of private and public law. And it demonstrates that this technique is a valuable, in some ways an irreplaceable, tool for individuals and groups, for persons and institutions, to forge commitments and allocate responsibilities in pursuit of reasonable self-direction, by rallying the resources and opportunities that only large-scale patterns of behavioural convergence can afford, thereby weaving a fabric of just relations between persons within the framework of the law.

In thus probing the *point* of legal validity, the book exposes and explains some remarkable puzzles this everyday notion harbours. These puzzles may be grouped into three broad sets, each of which follows on from the previous one.

One first set of puzzles concerns the very sort of thing validity is. We routinely refer to certain things as legally valid, but is there anything common to the things we thus refer to – something other than the fact that we so refer to them? Is there more to our accustomed appeal to legal validity than a haphazard or random linguistic habit? We shall not unravel validity's point by pondering what the *term* 'validity' means. Its use appears to preclude the very kind of enquiry we are pursuing. One does not crack the workings of a magical trick by looking up the words 'hocus pocus'. Therefore the book's initial task is to look beyond the way we speak, in search of an underlying similarity amongst the miscellaneous things we habitually call legally valid. The way we speak is, for our purposes, no more, though no less, than a potential clue. It is a potential clue to the existence of a deeper similarity amongst certain kinds of things, a similarity that might begin to explain why we are justified in assigning them such a central place in our dealings.

The quest for this similarity occupies chapters 2 and 3. It is a revealing task. Valid things accompany us in the most diverse walks of life. Some valid things can be touched; some cannot. A valid 30-page deed may record an investment company's valid incorporation. One may validly trade a minute share in the risk involved in a transaction that itself occurs in a global financial market. Valid ID cards increasingly give way to valid codes. Valid things originating in the past may seal the fate of individuals in the present. Valid action may occur under the auspices of state law or of an ever-growing set of supranational regulations. Despite these variegated manifestations, it is common to valid things that they are *made* and, crucially, that they are made through a distinct kind of *technique*: in essence, by someone saying so. Valid things, the book shows, embody choices to change legal duties, rights and powers incumbent on the agent himself or on others. Valid choices are choices of a special kind. They become true in

being expressed. Valid choices are self-fulfilling. One brings about what one says one intends to bring about – a feature rendered particularly conspicuous by the lawyerly 'hereby'. The technique of legal validity is a powerful tool to shape one's own and other people's legal relations. It is power exercised through a datable say-so. It is a technique fit to be deployed intentionally, but which may also curb the agent's intentions. It is a technique that manifests a present choice, but its binding force lasts over time. It is the technique whereby we exert what jurisprudential literature has insistently but imprecisely described as 'legal power'.

A second set of puzzles concerns the *moral* import of such *legal* power. Can the use of the legal technique of validity justify compromising sensitive human interests *as if* warranted by a compelling moral reason? In other words: Can validity bestow on one the power to change not only legal but also moral duties and rights, by so saying? In some respects it can. The basic logic that makes this possible is explained in chapter 4. It is the logic of *specific convergence*. Specific convergence is what it takes, across countless domains of social life, to foster human well-being as resources permit and justice demands. Many aspects of a person's well-being depend, for their protection and development, on the cooperation of other persons. In many regards, each of us is only able to make an effective contribution to the well-being of others when acting as part of a collective scheme. Only in the context of a fair redistributive system, for example, can my payment of a specified tax sum by a specified date make a duly apt and proportionate, and therefore necessary, contribution to the healthcare of others. Only in the context of an operative traffic order does my stopping here and now amount to a uniquely appropriate, and therefore necessary, means to safeguard the physical integrity of other drivers and pedestrians, compatibly with sustaining the amenities of swift transport. In each case, it is the presence of a scheme of *convergent* conduct that makes a difference to my own ability to foster justice, and thus to what it is necessary and morally obligatory for me to do. This is so even though the particulars of this scheme – eg how much to pay, when to stop – are *specific* enough that they could reasonably have been otherwise. In the absence of the relevant collective scheme, the same kind of conduct on my part would probably be ineffective to the same end, if not counterproductive. Specific convergence makes a standing difference to what persons ought in justice to do.

The kind of specific convergence required to foster justice, however, does not arise out of the blue. Valid choices are key to *generating* and sustaining it. Generating convergence involves publicly settling on determinate patterns of conduct, and seeing to their general compliance. The book speaks respectively of *marking* and *enforcing*. Marking and enforcing go, hand in hand, to ensure that specific provisions are convergently followed. It takes specific convergence to realise justice, and it takes marking and enforcing to realise specific convergence. Legal systems have a privileged tool for marking. It is the technique of legal

validity. Valid choices are distinctly salient. They can stand out to a potentially wide range of people, given the characteristics of validity's technique. It is a technique for expressing choices through a specified process, often recorded on a lasting physical support. Criteria for identifying valid decisions make central considerations of procedure and form, that is to say, features of the choosing act or its record that even persons with different skills and clashing ideological outlooks can convergently identify: signatures, stamps, seals, registry entries. Validity serves to mark specific conduct as due, even in the face of moral controversy. It serves to mark specific conduct as due, also in the face of rational under-determination of general requirements of justice. Valid choices provide a stable focus for expectations because they are able to circulate as deliberately introduced normative changes and yet also as entities in their own right, which one can refer to and rely on, for many purposes, relatively independently of their originating circumstances and of shifting views about their merits. Valid choices, in being able to generate needed convergence, can *render* conduct due by marking it as due. The technique of legal validity can bestow a power to craft requirements of justice.

But this power is not unlimited. In fact, justice requires that we *lack* an unconstrained power to shape legal duties and rights as we happen to choose. Herein lies the third set of puzzles about validity. The book shows that legal power can be all the greater precisely in being limited. Even as a matter of law, legal power is limited power. It cannot be other than limited. It is only by acting in accordance with what is provided in the relevant legal regime that one's say-so can succeed in changing legal relations. If you try to marry a person who is already married, to convey land on tissue paper, or to issue a resolution that is deeply ultra vires, you fail. You fail, no matter how clearly you express your intention to thereby change legal relations. Your say-so only succeeds if it is expressed in the legally specified way, and if the law otherwise provides for this possibility. Only by complying with these limits will your say-so become part of the legal fabric. Ultra vires acts are loose, indeed lost threads. Chapter 3 accounts for these legal limitations on legal power in canvassing validity's technique. Later chapters are able to spell out the moral point of these limitations.

This requires understanding that the legal regime that places these constraints is itself the result of valid decisions of other persons and institutions, typically including legislatures and judges. There are stringent considerations of justice, as chapter 5 explains, why the many social affairs that fall to be settled through law ought to be settled by the valid decisions of a variety of agents acting at different times – rather than by a small set of agents choosing once and for all. These considerations speak to the need for, amongst other things, a separation of powers, institutional deference, relative freedom of contract, prosecutorial discretion, democratic self-government, and an appropriate balance between common law and legislative modes of law-making. In other words: the question of *who* should take the lead in generating specific convergence is itself a question

of justice. In a just political community, the responsibility to bring about specific convergence will be shared. It will be shared amongst those who are in the best position to decide on each relevant matter, in light of requirements of expertise, impartiality, proximity, self-direction and the Rule of Law. Across private and public law, across the fields of official acts and individual arrangements, persons and institutions will have a correspondingly circumscribed decision-making power. Decisions may justifiably be ultra vires, in law, if someone else ought, in justice, to have pronounced instead. Bargained clauses may justifiably be superseded by statutory terms if the latter can better protect weaker parties to the relevant kind of deal. Legal limits on legal power are devices to allocate the responsibility to choose to those who, in justice, ought to bear it. Those legal limits are what we call criteria of legal validity.

It follows that the technique of legal validity can confer on persons an ability to craft moral duties and rights precisely by delimiting who can validly decide about what, and how. Validity's delimiting role has a familiar manifestation in legal reasoning. It is portrayed in chapter 6, through a contrast with the domain of ordinary communication. Valid choices are focally the agent's, but they have a crucial *systemic* dimension that ordinary communication lacks. The *legal meaning* of your valid choice – the legal relations it changes – may be co-determined by the valid choices of others. This happens, for instance, when statutes 'imply' clauses into your agreement, or judicial interpretation elaborates key statutory terms. Law students quickly learn to figure out 'what the law is' on some matter by reading together a miscellaneous range of legal materials. The technique of validity makes it possible *both* for valid decisions jointly to weave a relatively coherent normative fabric, *and* to focus on individual contributions to that fabric, isolated for some purposes as discrete valid contracts, statutes, passports, licences and so forth. Properly deployed, the technique of validity can empower persons to valuably exercise their autonomy in a way compatible with, and responsive to, the autonomy and well-being of others. To properly deploy this technique is to subject it to such limits as justice demands.

This is why, in the final analysis, it is paramount to use this technique with keen awareness of its point. Hence the importance of probing the moral need for, and lure of, its looming spell.

III. A NEGLECTED QUESTION

Legal philosophy has all but neglected this important task. It has certainly not neglected legal validity. But, bafflingly, it has neglected the enquiry about validity that this book vindicates and pursues. Largely mirroring ordinary legal thought, in recent years legal philosophy has focused on the strategy for establishing *whether* something is legally valid. It has sought to generalise about the nature of *criteria* of legal validity. And the things of which validity is at issue

it has assumed to be primarily legal *rules* or *norms*.[1] Legal rules or norms, however, are units into which we divide up the content of legal materials to aid our reasoning.[2] There is no theory-independent individuation of legal rules or norms. Legal rules or norms do not enter legal reasoning complete with labels attached. Understandably, therefore, on the few occasions on which recent legal theorists have turned their minds to the question of *what* validity is, their answers have not substantially added to the theory's own conception of what legal rules or norms are in the first place.

For Kelsen, for example, a norm 'is the expression of the idea that something ought to occur'.[3] And in turn, to say that norms are valid is to say that 'men ought to behave as the … norms prescribe'.[4] Kelsen adds that 'validity' is 'the specific existence of norms',[5] and that valid legal norms exist as part of a legal system.[6] This latter consideration partly matches Hart's understanding of legal validity, chiefly as a rule's membership in a system of law. 'To say that a given rule is valid', Hart writes, 'is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system'.[7] Raz's account echoes other aspects of Kelsen's. That a rule is valid, says Raz, means that it has the 'normative consequences' it 'purports' to have.[8] And '[a] rule which is not legally valid is not a legal rule at all'.[9]

For all their significance in contributing to pioneering accounts of law, these conceptions of validity consistently pass over the question that is the object of this book: the question *why*, if at all, it can be sound to settle questions of justice by pointing to a miscellaneous range of 'valid' artefacts, including legal norms. Contemporary jurisprudence errs in treating the validity of wills, licences, marriages, appointments or mortgage assignments as a matter of residual theoretical concern. It is worth noting, in this connection, that the present theoretical focus on the validity of norms is a relatively novel phenomenon in the nearly 2,000-year-old history of the technique of legal validity. When the

[1] In this book I speak interchangeably of 'rules' and 'norms' (and 'provisions', 'standards' …), except when focusing on the generality of rules (ie the fact that they apply to more than one person on more than one occasion: ch 5.IV–VI); cf Hart's specialised conception of a (social) rule: HLA Hart, *The Concept of Law*, 2nd edn (Oxford, Clarendon Press, 1994) 54–57.

[2] As Raz puts it, talk of norms 'facilitate[s] reference to considerations guiding human behaviour' (J Raz, *Practical Reason and Norms* (London, Hutchinson, 1975) 104).

[3] H Kelsen, *General Theory of Law and State*, A Wedberg (tr) (New York, Russell, 1945) 36.

[4] ibid 39, 30.

[5] ibid 30; in the same vein, H Kelsen, *General Theory of Norms*, M Hartney (tr) (Oxford, Clarendon Press, 1991) 28.

[6] Kelsen, *General Theory of Law and State*, n 3, 110ff.

[7] Hart, *The Concept of Law*, n 1, 103. This passage appears in the course of a discussion (102–09) which otherwise interdefines the ideas 'internal statement' and 'legal validity'.

[8] Or 'claims' to have, Raz says synonymously (!): J Raz, *The Authority of Law: Essays on Law and Morality* (Oxford, Oxford University Press, 1979) 149–50, 153.

[9] ibid 146.

technique of validity begins to be forged, to be devised as a tool to effect far-reaching social and political transformations, validity is first and foremost a property of *acts*, chiefly of acts arranging personal relations in the sphere of private life and business, such as contracts, wills, marriages or gifts. Eventually, in the Middle Ages, validity comes to be predicated, by extension, of particular official acts such as appointments or judgments, until, around 200 years ago, it starts to gain currency as a property of *general* enactments and their abstracted products, legal norms – once, that is, juristic consciousness has embraced the possibility that even the legislature's say-so may be legally constrained by a legally binding body of constitutional law. In an important sense, focus on valid norms and their criteria of validity is an offshoot, perhaps a creature, of modern constitutionalism.[10]

Although the question of validity's point has not been the focus of jurisprudential writings, at some junctures such writings provide reflections that inchoately broach this enquiry while falling short of doing so. We consider some of Hart's insights in chapter 2. From their different standpoints, Kelsen, Dworkin and Raz are further telling instances.

Kelsen's portrait of the systemic structure of legal orders vividly illustrates the *bypassing* role that legal validity discharges in legal reasoning. Kelsen appreciates, perhaps better than any other theorist, that the ability to make law, the power to act validly, is inherently vicarious: it is conferred on one by someone or something else. And he appreciates that legal reasoning systematically postpones or holds off the answer to the question about the ultimate basis of that power. I can act validly *if* A, who sought to empower me, could validly do so; and A could validly empower me *if* B, who sought to empower A, could validly do so; and so on. Logically speaking, the chain of conditionals must have a beginning. Someone or something must hold the master power, the power from which everyone else's power derives. Otherwise the chain collapses into an infinite regress. But, as Kelsen sees, legal thought does not articulate an answer. Rather it *presupposes* that there is one. It *assumes* that the chain has a beginning. Inasmuch as one engages in legal reasoning, says Kelsen, one acts *as if* the makers of the first positive link in the chain – the 'historically first' constitution – had the power to make it.[11] That is the content of the 'basic norm'.[12] It is the master conditional. *If* the makers of the first constitution had power (to make it), then so did everyone empowered by them. *If* one ought to obey the first constitution, then one ought to obey any norms made in accordance with it. Kelsen's stated 'basic norm' captures and formalises the assumption that

[10] For a historical journey tracing validity's roots in Western legal thought, see M Köpcke, *A Short History of Validity and Invalidity: Foundations of Private and Public Law* (Cambridge, Intersentia, forthcoming).

[11] Kelsen, *General Theory of Law and State*, n 3, 115–19 (the 'historically first' constitution is the first constitution after the last revolution).

[12] ibid 110ff, 115ff, 395–96.

legal reasoning leaves unstated. It closes the chain of 'ifs' by bracketing out the answer. The 'basic norm' does, in essence, what legal validity does.

Ironically, Kelsen's narrow view about the proper remit of legal theory bars him from searching for a non-question-begging answer to the question that legal reasoning so relentlessly postpones. Kelsen himself, like the legal reasoning he describes, pictures an upward-looking explanatory need but does not supply the needed explanation. His self-imposed methodological restrictions hinder him, in particular, from querying what it would take for the makers of the first constitution (and those acting under it) to have the power to craft, by so saying, what anyone *morally* ought to do. All this is ironic because, as this book shows, a key part of the answer lies in the very systematic bypassing that his 'basic norm' doctrine brings out. The currency of legal validity is largely undiscussed, and therefore robust. It can serve as a common denominator wherein to cast and vindicate clashing and incommensurable concerns – not unlike a currency, which facilitates trade, including fierce competition, in terms of a shared magnitude. Validity's grammar is able to render salient specific conduct descriptions – do's and don'ts – that, in a context of operative enforcement, can become appropriate strategies to meet just demands. Morally speaking, the master power, as it were, is held by the community whose legal system it is, and by those able to act on its behalf and in other ways within the framework of a sustained, large-scale effort of specific convergence that can help persons realise justice in ways otherwise beyond their reach. The book's defence of the moral need for positive law, given moral under-determination, moral disagreement and the moral value of self-directing choice, is articulated in the first section of chapter 6.

In contrast to Kelsen, Dworkin does resolutely enquire about the point of legal practice. His is a body of work comprehensively geared towards answering why it can be warranted, in justice, to settle questions of justice through legal technique. Dworkin's primary theoretical perspective is that of an appellate judge. Adjudication of controversial cases, which may require courts to revisit and reconsider principled foundations of whole areas of legal practice, engages modes of legal reasoning that openly grapple with law's systemic character. Dworkin's adjudicative focus sharply brings to light the systemic dimension of legal reasoning. The 'interpretive judgement', Dworkin's recommended strategy for identifying law, closely mirrors central features of adjudicative argument.[13] Judicial reasoning will typically, and not unsoundly, read down legal gaps, especially in jurisdictions whose legal culture expects judges not to 'make law'. And higher judges with legal power to review and even change settled law on moral grounds will often find themselves, for good reason, engaging head-on with the very kinds of moral consideration that, for most ordinary purposes, legal reasoning sidesteps. Even our normally useful, because simplifying, talk of discrete legal norms or rules, not to mention of discrete transactions

[13] R Dworkin, *Law's Empire* (Oxford, Hart Publishing, 1998) especially ch 7.

or proofs thereof, may well remain in an unfocused background as appellate judges enquire about the moral credentials of legal requirements in the process of reshaping them.

But just this judge-centred approach steers attention away from the pervasive need for law outside the courtroom. Dworkin's work on the whole underplays the extent to which legally valid decisions need to be able to circulate as such, that is, as bundles of legal duties and rights deliberately introduced by agents empowered to do so. It underplays the extent to which even *after* competent and conscientious lawyers have worked out legal requirements, the law may evince extant conflicts, injustices and gaps. Valid decisions are next to dissolved within the pool of miscellaneous facts – attitudes, events, 'past political decisions' – that provide the raw input for Dworkin's 'interpretive judgement'.[14] This not only obscures validity's remarkable contribution to legal reasoning, including judicial reasoning, by facilitating an alternative focus on datable choices and propositions of law. It also fails to do justice to the idea of legal power, a power exercised by validly crafting duties and rights that are legal and so far forth not moral – and which *therefore* can morally warrant what they claim in law.

That law is *made* or 'source-based', and that this is critical to law's ability to realise justice, is a central tenet of Raz's work.[15] Law can have authority over us, Raz argues, because legal requirements are presented as someone's view on how we ought to act, a view capable of being identified without revisiting the moral questions the authority is there to settle. For the job of an authority, says Raz, is to improve the subject's compliance with right reason. A legitimate authority can change, through its say-so, what the subject morally ought to do. Because law is source-based, it is in principle capable of holding legitimate authority.

Raz's account, however, pays comparatively little heed to what *else* it takes for a legal system to hold legitimate authority. Raz's beneficially simple and abstract model is chiefly concerned with the nature of authorities in general, and with the nature of law's claims to be one. Other than through generic appeals to law's 'expertise' and ability to 'coordinate',[16] Raz does not purport to show whether, and if so why, law may be *better* than other source-based standards at addressing problems of community-wide concern, given some distinct characteristics of law and legal technique.[17] Raz's account envisages an *individual*

[14] He jointly dubs these 'law in the preinterpretive sense' (ibid 65ff, 91ff).

[15] eg J Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, rev edn (Oxford, Clarendon Press, 1995) ch 10; Raz, *The Authority of Law*, n 8, chs 2–4.

[16] eg J Raz, 'Introduction' in J Raz (ed), *Authority*, Readings in Social and Political Theory (New York, New York University Press, 1990) 6ff; J Raz, *The Morality of Freedom* (Oxford, Clarendon Press, 1986) 30–31, 74–76; Raz, *Ethics in the Public Domain*, n 14, 347ff.

[17] Some elaborations of the Razian apparatus, eg by Marmor (*Social Conventions: From Language to Law* (Princeton, NJ, Princeton University Press, 2009) especially chs 6 and 7) or Shapiro (*Legality* (Cambridge, MA, Harvard University Press, 2009) especially chs 5 et seq), place greater emphasis on the *manner* in which law can go about solving problems of community-wide concern, but remain circumspect on what these problems are and how the technique of validity helps address them; for an argument, see M Köpcke, 'Positive Law's Moral Purpose(s): Towards a New Consensus?' (2011) 56 *American Journal of Jurisprudence* 186.

person as the holder of authority, as opposed to a set of institutions sharing limited power in the framework of a legal system. It envisages authoritative directives as *communications* addressed by that one person to its subjects, as opposed to canvassing the irreducibly systemic character of legal meaning. It portrays the authority of legal requirements as inherently *fading with time*, hand in hand with the authority of their human author, as opposed to seeing in the continued relevance of valid choices an expression of their ability to generate salience through time amongst members of a subsisting group. And it insists that law cannot perform its morally needed task unless legal requirements can be discerned *thoroughly* without resort to moral argument, thereby overstating the important truth that law can only forge and sustain patterns of convergence if validity does not *predominantly* turn on moral considerations. These arguments are developed in chapter 6.

Pursuing a neglected concern, therefore, this book shows why, and subject to what limits, the valid say-so of countless different persons and institutions can craft moral duties and rights precisely because expressed in the grammar of legal validity. Key to the law's capacity to realise justice, in other words, is not only that law is something made, but that it is made, invoked and brought to bear on our lives *through the technique of legal validity*, even though there is more to law than validity, and even though there is more to justice than law.

NOTES

Section III: A Neglected Question

Kelsen on Legal Validity

On Kelsen's interdefinition of validity, existence and/or binding force, see, eg, E Garzón Valdés, 'Two Models of Legal Validity: Hans Kelsen and Francisco Suárez' in SL Paulson and B Litschewski-Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Oxford, Clarendon Press, 1998) 263–66; A Ross, 'Book Review: Kelsen, "What is Justice?"' (1957) 45 *California Law Review* 564, 567. Kelsen not only interdefines validity and ought, but also ought and norm: 'The norm is the expression of the idea that something ought to occur'; 'the "ought" simply expresses the specific sense in which human behaviour is determined by a norm' (Kelsen, *General Theory of Law and State*, n 3, 36–37). In later work, Kelsen defines 'ought' to encompass command, permission and empowerment (H Kelsen, *The Pure Theory of Law*, 2nd edn, Max Knight (tr) (Berkeley, CA, University of California Press, 1967) 4–5).

Hart on Legal Validity

On Hart's interdefinition of legal validity and (derivability from the) 'rule of recognition', NE Simmonds, *Law as a Moral Idea* (Oxford, Oxford University Press, 2007) 126ff.

Raz on Legal Validity

Raz rejects validity as membership on grounds of a stipulative understanding (i) of contracts, regulations of associations, etc, as not being 'part of the legal system' (Raz, *Practical Reason and Norms*, n 2, 152–54), and (ii) of 'legally valid rule' as including legally recognised standards of foreign law (ibid 152–54; Raz, *The Authority of Law*, n 8, 148–49).

Other Accounts of Legal Validity

Most other accounts of the validity of legal norms are essentially variations of Kelsen's, Hart's and/or Raz's: see, eg, S Munzer, *Legal Validity* (The Hague, Martinus Nijhoff, 1972); JW Harris, *Legal Philosophies* (London, Butterworths, 1980) ch 6; CS Nino, *Introducción al Análisis del Derecho* (Barcelona, Ariel, 1983) 132ff; J Finnis, *Natural Law and Natural Rights*, 2nd edn (Oxford, Oxford University Press, 2011) 25ff and 266ff; E Bulygin, 'Tiempo y Validez' in CE Alchourrón and E Bulygin, *Análisis lógico y Derecho* (Madrid, Centro de Estudios Constitucionales, 1991) 195ff; N MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford, Oxford University Press, 2007) 161; G Sartor, 'Legal Validity: An Inferential Analysis' (2008) 21 *Ratio Juris* 212; but cf an inchoate concern with validity's point in D von der Pfordten, 'Validity in Positive Law – A Mere Summary Concept' in P Westerman et al (eds), *Legal Validity and Soft Law* (Dortrecht, Springer, 2018); P Sandro, 'Unlocking Legal Validity: Some Remarks on the Artificial Ontology of Law' in P Westerman et al (eds), *Legal Validity and Soft Law* (Dortrecht, Springer, 2018).

Contemporary Jurisprudence Treats the Validity of Transactions as a Matter of Residual Theoretical Concern

On validity as being primarily a property of norms, see, eg, Raz, *The Authority of Law*, n 8, 150; T Spaak, *The Concept of Legal Competence: An Essay in Conceptual Analysis*, R Carroll (tr) (Brookfield, VT, Dartmouth, 1994) 50; J Ferrer, *Las normas de competencia: Un aspecto de la dinámica jurídica* (Madrid, BOE/Centro de Estudios Políticos y Constitucionales, 2000) 155. Exceptions to this trend include DWP Ruiter, *Institutional Legal Facts: Legal Powers and Their Effects* (Dortrecht, Kluwer, 1993); R Guastini, 'Rules, Validity and Statutory Construction' in A Pintore and M Jori (eds), *Law and Language: The Italian Analytical School*, S Stirling, A Pirrie and Z Bankowski (tr) (Liverpool, Deborah Charles Publications, 1997); and RS Summers, 'Toward a Better General Theory of Legal Validity' (1985) 16 *Rechtstheorie* 65, 67–68. Ross goes as far as to deny the intelligibility of predicating validity of norms, which he says can only be 'in force' (*gœldende*, in Danish; *geltend*, in German; *vigentes*, in Spanish): see A Ross, 'Validity and the Conflict between Legal Positivism and Natural Law' in SL Paulson and B Litschewski-Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Oxford, Clarendon Press, 1998) 158–63; A Ross, *On Law and Justice* (London, Stevens & Sons Limited, 1958) 29–50.