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THE ACTUAL VALIDITY OF LAW

MORTIMER SELLERS

INTRODUCTION

When, and in what sense, are laws ever “valid”? I shall argue that the validity of a law always depends on the law’s moral justification. To see why, one must first disentangle three senses of the word “valid.” I will distinguish “actual validity” from “legal validity,” and use “valid” (without an adjective) only of the former—those laws one actually ought to obey. “Legally valid” laws are laws a particular legal system claims we ought to obey, and “morally valid” laws are laws one could morally justify making legally valid.¹

The distinction between moral, legal and actual validity explains two well-known paradoxes of obligation under law. I will call these the “validity paradox” and the “validation paradox” of law. The validity paradox recognizes that we sometimes have a duty to obey the laws of unjustifiable regimes, when such laws are (actually) valid anyway.² The validation paradox binds us sometimes to obey the legally valid (“validated”) laws of justified regimes, even when the laws themselves are bad.³ Both paradoxes illustrate how law’s validity depends upon its moral justification, and illuminate the essential role law plays in determining the moral obligations of those subject to it.

MORAL VALIDITY

Each type of validity has a different connection with moral value which deserves separate treatment. Moral validity presents the most

1. The distinction between “validity” and “legal validity” is well established. See J. Raz, *The Authority of Law* (1979), p. 149. “Moral validity” has been used as a synonym for what I call “actual validity,” *ibid.*, p. 150; J. Finnis, *Natural Law and Natural Rights* (1980), p. 26. I use it as a useful shorthand for “the basic requirements of practical reasonableness” antecedent to legislation. *Ibid.*, p. 289. Raz also identifies “direct” validity (actual validity based on moral validity) and “systemic” validity (actual validity arising from legal validity), *The Authority of Law*, p. 152.

2. R. Ladenson, “In Defense of a Hobbesian Conception of Law,” 9 *Philosophy and Public Affairs* (1980), pp. 142-45.

3. See J. Raz, *The Morality of Freedom* (1986), p. 78; and *Natural Law and Natural Rights*, p. 357.

straightforward connection. Very simply, morally valid law exists to the extent that human reason can discover the moral principles to which man-made law ought to conform.⁴ Thus moral validity usually precedes legislation, and ought to guide legislators in their choice of laws.

Moral validity will not necessarily fully determine what laws should be passed, or which laws people ought to obey. The legislator's discretion may be compared to the discretion of architects, who are bound by natural laws, and existing foundations, but have wide scope to realize each edifice in their own way.⁵ But even if moral questions did admit of only one answer, there would remain the difficulty of finding it. Moral validity is not determinate enough to guide all particulars of individual decision-making. If we all knew in every instance what the one right thing to do was, and did it, there would be no need for law. But it does not seem that there always is *one* right thing to do, even in conditions of perfect knowledge.⁶ Legal decisions are needed to make moral values determinate.⁷

Among the situations for which such moral indeterminacy ought to be resolved are "coordination problems." A coordination problem exists when people ought to agree upon one of a number of equally or incommensurably morally valid cooperative arrangements.⁸ Such problems remain even after all questions of moral validity have been answered.

Some examples will illuminate the doctrine of coordination. Rules of the road are a simple case. There ought to be a rule to determine what to do when we approach each other at high speeds in our automobiles. Moral validity does not distinguish between passing on the right and passing on the left. We need another technique to determine which solution will be the salient one.⁹ Similarly, on a grander scale, there may be any number of complicated rules of social interaction which could establish morally valid arrangements

4. H.L.A. Hart equates moral validity (in this sense) with the doctrine of "Classical Theories of Natural Law." H.L.A. Hart, *The Concept of Law* (1961), p. 182; but see *Natural Law and Natural Rights*, p. 26.

5. See Thomas Aquinas, *Summa theologiae*, II-I, Q. 95, A. 2, with John Finnis' commentary, *Natural Law and Natural Rights*, p. 281-90.

6. H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (1983), p. 140.

7. *Natural Law and Natural Rights*, p. 380.

8. E. Ullman-Margalit, *The Emergence of Norms* (1977), p. 74 ff., esp. pp. 78, 96.

9. See J. Finnis, "The Authority of Law," 1 *N.D. J. of Law, Ethics and Public Policy* (1984), p. 136.

of social cooperation. We know that compromise and self-sacrifice will promote the common good, and that sometimes each of us ought to give way to others to achieve morally valid social arrangements. But when? To answer such questions is to solve coordination problems.¹⁰

Moral validity and the associated concept of coordination help to unravel the validity paradox of law. The validity paradox binds the subjects of an unjustifiable regime to obey those of its laws that are valid anyway. There are two senses in which this might be true. First, a uniquely morally valid rule deserves obedience whether or not a legal regime validated it, and whether or not that legal regime was itself justifiable. Second (and more interestingly), an unjustifiable regime might legislate a solution to a coordination problem, making one of several morally valid alternatives the salient one. One would then be obligated to obey the law, even though its source was the edict of an unjustifiable regime.¹¹

The difficulty in allowing moral validity to pose questions for morally unjustified regimes to solve lies in determining which possible solutions are morally valid. The same problem arises in identifying instances of unique moral validity. How can one be sure?¹² We need a technique to determine when a legal system has made a specific solution the legally salient one. These are the problems the concept of legal validity was developed to solve.

LEGAL VALIDITY

“Legally valid” laws are laws that a particular legal system claims that its subjects are bound to obey. H.L.A. Hart thought that “[w]e 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.”¹³ Nevertheless Hart, and those like Joseph Raz who have adopted his vocabulary,¹⁴ usually scrupulously refer to “legally” binding rules or “legal” validity, in

10. *The Authority of Law*, pp. 233-49, esp. pp. 247-48.

11. Unless the very involvement of the regime created worse problems than it solved.

12. For a suggestion, see Sellers, “Republican Impartiality,” 11 *Ox. J. Legal Studies* (1991).

13. *The Concept of Law*, p. 100.

14. See J. Raz, “Authority, Law and Morality,” 68 *The Monist* (1985), p. 295; *The Authority of Law*, p. 148, for “legal validity.”

order to preserve other senses of the word for situations in which they are appropriate.¹⁵

The term "legal validity" has such currency that it would only be confusing to abandon it here, but it is not a happy usage, because it carries with it the implication that Hart's "internal" perspective is the only legitimate viewpoint on law's validity, which it is not. Law may also be valid in an objective sense—actually binding.¹⁶ "Technical" validity would have been a better term for laws that are only technically binding. This sort of validity is parasitic on the actual validity of the legal system which "validates" it, and it would have been better to identify such laws as merely "validated" or "technically valid." Remember, as we use the term, that "legally valid" means no more than valid in the eyes of this legal system.

Some lawyers suppose that statements of legal validity are distinct from statements of value.¹⁷ H.L.A. Hart developed the vocabulary of legal validity in order to distinguish the invalidity of law from its immorality.¹⁸ This would solve the validation paradox, by showing that laws may be immoral yet valid.¹⁹ One might suppose it follows that legal validity itself can be determined "in an objective and value-neutral way."²⁰

Attempts to divide questions of legal validity from statements of moral value often rely on Hart's "rules of recognition" to establish legal validity.²¹ Joseph Raz calls this the "sources thesis."²² If the validity of law depends on its source, and the source can be identified in an action or a series of actions, then "doubts and discussions about the [legal] validity of laws revolve on factual questions" and are susceptible to an objective determination "to which one's moral or political views are essentially irrelevant."²³

However, the process by which legal validity creates actual validity undermines the fact/value distinction that the sources thesis sought to impose.²⁴ This constitutes the "validation paradox" of law. The validation paradox can require obedience to the legally valid

15. *The Authority of Law*, p. 149: "A valid rule is one which has normative effects. A legally valid rule is one which has legal effects."

16. See my discussion, *infra*, of "Actual Validity."

17. *The Concept of Law*, pp. 104-05.

18. *Ibid.*, p. 207.

19. See my discussion, *infra*, of "Legal Validity."

20. *The Authority of Law*, p. 152.

21. *Ibid.*, pp. 150-52. See Hart's "rules of recognition."

22. *Authority, Law and Morality*, p. 315 ff.

23. *The Authority of Law*, p. 152; cf. *Authority, Law and Morality*, pp. 296-305.

24. See Sellers, "Republican Authority," 5 *Can. J. of Law and Juris.* (1991), p. 257.

("validated") laws of justified regimes, even when (but for the regime's intervention) the laws themselves would have been morally invalid.²⁵ Mere legal validity can create a real moral obligation (actual validity).

Legal institutions generally claim that their own moral validity validates the laws they promulgate. The argument is that whether or not there are other possible morally valid legal systems, the legal system we have is the salient one. This makes it (actually) valid. Because it is actually valid, all its legally valid laws are valid. Therefore we ought to obey them, whether or not they are intrinsically morally valid. If a legal system has the legitimate authority to promulgate laws, even its bad laws are (actually) valid.²⁶

Problems of moral validity re-emerge when actual validity is made to depend on legal validity in this way. It matters whether or not the legal system has the moral authority it claims. Some deny that anyone is ever actually bound by legal validity.²⁷ All actual validity would then arise from moral validity, and legal validity would be one of several factual circumstances that help to determine in particular situations which of several morally valid rules to obey.²⁸ But if one accepts that legal validity may sometimes (actually) validate morally invalid laws, then legal validity will need a moral basis strong enough to overcome moral invalidity. The legal system itself must have moral value.

The moral justification legal validity needs (to have moral force) restricts law's ability to be amorally determinate. It may in principle be possible to know what law is legally valid without knowing whether it is justified,²⁹ but in practice law purports to be justified, and finds it difficult to dispense with references to morality.³⁰ Law cannot simply be a matter of referring back up a sequence of rules of recognition to the single invalidated ultimate norm,³¹ because if it

25. See the "Introduction" to this article.

26. *The Morality of Freedom*, p. 78.

27. *The Authority of Law*, p. 233 ff.

28. This was the position of Joseph Raz. See *The Authority of Law*, p. 153; Raz, "The Obligation to Obey: Revision and Tradition," *N.D. J. of Law, Ethics, and Public Policy* (1984), pp. 140-43. Now Raz would seem to hold that legal validity is decisive within the scope of legitimate state authority. See *The Morality of Freedom*, p. 74. When states mistake the limits of their jurisdiction their decisions lose actual validity. *Ibid.*, p. 62.

29. *Authority, Law and Morality*, p. 304.

30. See J. Coleman, "Negative and Positive Positivism," 11 *J. of Leg. Stud.* (1982), p. 161 ff.

31. See R. Dworkin, *Taking Rights Seriously* (1977), pp. 43, 44, 64 ff, 349-50. *Natural Law and Natural Rights*, p. 356.

were, law would have no moral claim to its subjects' obedience. Moral justification will be sought in the laws themselves. For example, an official legally entitled to make a decision may be legally barred from making it on the wrong grounds.³² The moral element of legal validity overwhelms positivism when officials act in ways out of keeping with the moral justification for the legal system they administer.³³

The necessary element of moral justification in legal validity constitutes a corollary to the validation paradox the concept of legal validity was developed to solve. The validation paradox stated that morally invalid laws may still be actually valid if they have been validated by a valid legal system. However, the moral justification of the legal system will limit the categories of rule for which such technical (legal) validity can be conferred. Legal systems are morally licensed to make mistakes only to the extent that they are more likely to get things morally right than available alternative arrangements. Legally valid acts confer actual validity on morally invalid rules only to the extent that this is justified by the moral justification of the system as a whole.

Legal validity solves the problem moral validity could not by providing a system for determining which of several morally valid solutions to a coordination problem is the salient one. Even when there is only one morally valid solution to a social problem, legal technique may provide the best method for determining what it is, to the extent that mistakes must be risked to find the truth. Yet legal validity must be morally justified to fulfill this role, which inserts an element of value into what was meant to have been a factual inquiry. Moral justification is an inescapable element of legal validity in a conscientious legal system.

ACTUAL VALIDITY

Laws are actually valid only to the extent that their subjects are morally obligated to obey them. Laws "valid" in this sense are laws one is morally bound to obey. Moral obligation requires moral justification, so the actual validity of law depends on its moral justification.

For the purposes of a discussion of the dependence of law's validity on its moral justification there is little more to be said. By definition,

32. *The Morality of Freedom*, p. 62.

33. For a more detailed discussion of the conflict between legal legitimacy and law's factual determinacy, see "Republican Authority."

to be valid, actually valid laws require a moral justification. Whether they obligate their subjects to obedience is a separate question.³⁴ There are those who deny that law can obligate at all.³⁵ To show that law sometimes can, it will be worthwhile briefly to review how a legal system can create actually valid laws by conforming to the moral justification of law.

Moral justifications of law claim that law makes situations morally better than they would be without law. Possible alternative determinations may be morally incommensurable, but to be morally justified law must promote the good when it can. Particular laws and legal systems are only valid to the extent that they advance justice, all things considered. Laws can only be actually valid when the legal technique is the best available method for determining and implementing moral good.

This will not always be the case, which is why the rule of law has limited validity, even when governments desire to implement it. By rule of law, I mean the "enterprise of subjecting human conduct to the governance of known rules."³⁶ Sometimes it is better that legal deliberations not be bound by explicit rules, and in such situations overly specific laws are not actually valid, although judicial or administrative determinations may be, so long as they are restricted to the parties.³⁷

Any legal system claiming to be actually valid will have to abandon factual determinacy in areas where this hinders law's moral purpose. Such areas will be areas of discretion, either for officials or individuals. To the extent that legal systems purport to legislate in such areas they are not actually valid. They may be legally valid, but even legal validity will often be vitiated by the legal system's underlying moral justification— its constitution or first principles.

CONCLUSION

Law's validity depends on its moral justification in two ways. To express these two routes to validity, one must distinguish "actual

34. *Ibid.*

35. R.P. Wolff, *In Defense of Anarchism* (1970). Cf. *The Authority of Law*, p. 233 ff.; "The Obligation to Obey: Revision and Tradition," p. 139 ff.

36. Cf. L. Fuller, *The Morality of Law* (revised, 1969), pp. 79, 106, 150.

37. Cf. "Republican Authority." Fuller is right that the law must "be viewed as a purposeful enterprise, dependent for its success on the energy, insight, intelligence and conscientiousness of those who conduct it, and fated, because of this dependence, to fall always somewhat short of full attainment of its goals." *The Morality of Law*, p. 145. But the aim of law's enterprise is not to subject human conduct to the governance of rules, but to establish justice.

validity” from “legal” and “moral” validity. Legal validity can generate moral justification, and so actual validity, both when the laws concerned are the product of a justified legal system (which validated them) and when they are generated by a (possibly unjustified) legal system, which made salient one of several morally valid possible solutions to the society’s coordination problems. This explains the validity paradox, which lets bad legal systems make valid laws, and the validation paradox, which lets good legal systems make bad laws valid. Either a law is valid in itself, or it is valid as part of a valid system. In both cases the validity of law depends on its moral justification. Theories which seek to divorce a law’s validity from its moral justification are pointless, because all legal systems claim to be morally justified. In such circumstances even positivistic “legal validity” will be influenced by the legal system’s self-justifying assertions. Legal validity and moral value cannot be separated without abandoning law’s characteristic claim of legitimacy. To make such a separation would defeat the purpose of law.