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# A Straw Man Revisited: Resettling the Score between H.L.A. Hart and Scandinavian Legal Realism

Jakob v. H. Holtermann

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**A STRAW MAN REVISITED:  
RESETTLING THE SCORE BETWEEN H.L.A. HART AND  
SCANDINAVIAN LEGAL REALISM**

**Jakob v. H. Holtermann\***

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## INTRODUCTION

Introducing the new edition of Karl Llewellyn's *The Theory of Rules*, Fred Schauer writes that "[i]n Great Britain and much of the rest of the common law world, Legal Realism is taught mostly as a joke, or at least as a convenient foil for demonstrating the wisdom of H.L.A. Hart."<sup>1</sup> Schauer of course has *American* Legal Realism in mind when he thus objects to the failure to take Legal Realism seriously. It is often overlooked however that this particular brand of Legal Realism was not the only victim of Hart's critique to which Schauer is implicitly alluding.<sup>2</sup> In fact, the immediate target of some of the most celebrated remarks of Hart as the great English Legal Positivist of the 20th century was *Scandinavian* Legal Realism, a school of legal theory contemporary with and in many ways related to American Legal Realism but today unknown to most legal scholars in the United States. In particular, Hart's aim was the Dane Alf Ross whom he later described as "the most acute and best-equipped philosopher of this school".<sup>3</sup> Reviewing in 1959 the English translation of Alf Ross's *On Law and Justice* (1958, 1st Danish ed. 1953), Hart articulated the key elements of his famous critique that only later in *The Concept of Law* was broadened to include Legal Realism as such.<sup>4</sup>

This critique had a lasting negative effect on the Anglo-American reception of Ross's work reducing him too to the role as an extra in the great H.L.A. Hart show.<sup>5</sup> Thus, *e.g.* the *Stanford Encyclopedia of Philosophy* states, in reference to these works, that 'Hart famously demolished' Ross's analysis of normative statements and thereby strongly influenced the contemporary perception that Scandinavian Realism is "more a museum piece than a live contender in jurisprudential debate".<sup>6</sup>

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1. Frederick Schauer, *Introduction* to KARL N. LLEWELLYN, *THE THEORY OF RULES* 1, 4 (Karl N. Llewellyn & Frederick Schauer eds., 2011).

2. See *infra* Parts I & III for a detailed presentation of Hart's critique of Legal Realism.

3. See H. L. A. Hart, *Essays in Jurisprudence* 13 (1983).

4. See H. L. A. Hart, *Scandinavian Realism*, 17 *THE CAMBRIDGE L.J.* 233-40 (1959); See also H. L. A. HART, *THE CONCEPT OF LAW* 136-47 (2nd ed. 1994).

5. Another highly influential factor is Ross's heavy reliance on the tenets of logical positivism which not many modern philosophers consider viable today. For an attempt to overcome this challenge, see: Jakob v. H. Holtermann, *Naturalizing Alf Ross's Legal Realism: A Philosophical Reconstruction*, *REVUS. J. FOR CONST. THEORY AND PHIL. OF L.* 165-86 (2014); Jakob v. H. Holtermann, *Getting Real or Staying Positive: Legal Realism(s), Legal Positivism and the Prospects of Naturalism in Jurisprudence*, *RATIO JURIS: AN INT'L J. OF JURISPRUDENCE AND PHIL. OF L.* 535-55 (2015).

6. Brian Leiter, *Naturalism in Legal Philosophy*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed. 2014). It bears noting that Leiter emphasizes that he is referring only to the long-term *effects* of Hart's critique on the reception of Ross's theory,

Crucial to this alleged demolition was Hart's – in legal theory well-known and much celebrated – introduction of a distinction between internal and external aspects of social rules.<sup>7</sup> Indeed, Hart originally introduced this distinction in his work at least partly in order to demonstrate what he perceived to be fundamental inadequacies of legal realism in general and of Ross's legal theory in particular.<sup>8</sup>

In this Article, I argue that received opinion is mistaken. Or rather, since I do not discuss Scandinavian Realism as such but limit my discussion to Ross's legal philosophy as formulated in his main work *On Law and Justice*,<sup>9</sup> I make the more modest claim that received opinion is mistaken with regard to this particular theory. I am not the first to make this claim. Indeed, Ross himself made it already in his return review of *The Concept of Law*, where—being true to character—he had considerable problems hiding his hurt feelings over Hart's harsh judgement and expressed his “belief that in fundamentals the Oxford philosophy and the Scandinavian Approach have more in common than Hart has been able to see.”<sup>10</sup>

Maintaining a more coolheaded approach a small number of other authors have since followed suit.<sup>11</sup> Although the efforts of these authors are commendable, my claim in this paper is that, as a result of the way they have constructed the argument, they have predominantly

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and that Leiter makes certain reservations about the correctness of Hart's rendering of Ross's analysis and thereby also of the *soundness* of Hart's critique. For similar assessments without reservations for soundness, see, e.g., Thomas Mautner, *Some Myth about Realism*, 23 *RATIO JURIS* 422–25 (2010); Scott J. Shapiro, *What Is the Internal Point of View?*, 75 *FORDHAM L. REV.* 1157 (2006). For similar assessments of long-term effect which challenge Hart's argument more directly, see, e.g., Enrico Pattaro, *From Hågerström to Ross and Hart*, 22 *RATIO JURIS* 532 (2009); Svein Eng, *Lost in the System or Lost in Translation? The Exchanges between Hart and Ross*, 24 *RATIO JURIS* 194 (2011).

7. This internal/external distinction shall be elaborated on further below. See *infra* Part I. For now, the *external* aspect of legal rules can preliminarily be defined as the outwardly observable regularities of behaviour that the observance of rules has in common with a group that follows a social habit. The *internal* aspect, by contrast, refers to that element which singles out rule-governed social practices from mere group habits, and which, according to Hart, is characterized by the existence in members of the group of an outwardly unobservable so-called *critical reflective attitude* towards deviation from the standards of behaviour expressed by the rule.

8. See Hart, *Scandinavian Realism*, *supra* note 4, at 237–38; See also H. L. A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 13–14 (1983).

9. ALF ROSS, *ON LAW AND JUSTICE* (1958) (Original in Danish, *Om ret og retfærdighed : En indførelse i den analytiske retsfilosofi* (Nyt Nordisk Forlag, Arnold Busck A/S 1. ed. 1953)).

10. Alf Ross, *Review of H. L. A. Hart, The Concept of Law*, 71 *Yale L.J.* 1190 (1962); See also Alf Ross, *Validity and the Conflict Between Legal Positivism and Natural Law*, *REVISTA JURIDICA DE BUENOS AIRES* 84–88 (1961).

11. See MICHAEL MARTIN, *LEGAL REALISM: AMERICAN AND SCANDINAVIAN* (1997); See also Pattaro, *supra* note 6; See also Eng, *supra* note 6.

drawn the wrong conclusions. In particular, I disagree with the view initially championed by Ross himself that once we have the misunderstandings behind Hart's criticism sorted out we learn that they were actually in agreement. The latest argument to this effect was launched by the Norwegian legal philosopher and widely recognized Ross-scholar Svein Eng, whose otherwise very commendable study concludes that Hart's method was in fact also Ross's method and that any perception of a theoretical gulf between them is therefore wrong.<sup>12</sup>

I believe however that this conclusion is mistaken, first because it simultaneously *underestimates* and *overestimates* the theoretical sophistication of Ross's and Hart's theories respectively, and second because it blurs what I take to be the really important theoretical distinction between the two.

It is after all fairly easy to establish that Ross in fact predates Hart in introducing a distinction between internal and external aspects of social rules.<sup>13</sup> What is more interesting is that we find this distinction analysed and expressed with much greater clarity and consistency in Ross's writings. Thus, behind Hart's writings on internal and external aspects of social rules there lies not one but two important distinctions that are logically distinct, and Hart consistently confuses these two distinctions and their interrelations. Ross, on the other hand, is not only very well aware of their existence; his entire theory revolves around an acute appreciation of their jurisprudential significance. He expressly addresses issues connected with both of them, and, in contrast to Hart, he consistently observes both of them throughout his writings.

Setting the record straight on these issues holds the promise therefore not only of shedding light on the debates about internal and external aspects of social rules and law generally that have dominated large parts of legal philosophy for more than fifty years.

More importantly, by pinpointing exactly how Hart's and Ross's methods are *not* the same, this debate gives us a privileged opportunity to redraw the broader theoretical landscape of jurisprudence and in particular of identifying exactly where we could draw the line between legal positivism and legal realism in a clear and principled way.

In order to convincingly argue this point we need to go back and closely re-examine the debate between Ross and Hart. I shall therefore proceed as follows. *First*, I summarize Hart's motivation for

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12. See Eng, *supra* note 6, at 241–42.

13. For these purposes my focus is ON LAW AND JUSTICE to the exclusion of Ross's earlier works because his legal philosophy underwent a significant development on these crucial issues, and it is only in this latter work that we find the relevant distinctions worked out with sufficient clarity.

introducing the distinction between internal and external aspects of rules, and in so doing I make a first approximation of Hart's criticism of Ross's theory. *Second*, I show why the argument thus constructed misfires in so far that it overlooks both Ross's distinction between behaviourist and introspective methods and his explicit acceptance of the latter in legal science. *Third*, I consider a second and somewhat more convincing version of Hart's criticism which admits that Ross did not simply *overlook* the internal aspect of social rules, but claims instead that he *misinterpreted* it. *Fourth*, I show how this objection rests on a failure to appreciate the subtlety and richness of Ross's position by overlooking a second, logically distinct distinction which is crucially at play in Ross's theory, *i.e.* the distinction between norm-descriptive and norm-expressive propositions. *Fifth*, I summarise the main results of the discussion and try to locate what I believe to be the real disagreement between Ross and Hart.

#### I. HART'S OBJECTION # 1: HABITS AND SOCIAL RULES AND THE INTERNAL AND EXTERNAL ASPECTS OF SOCIAL RULES

Hart's introduction of the distinction between internal and external aspects is motivated by his discussion of what rules are, and of what it means to say that rules exist.<sup>14</sup> As a first candidate-answer, Hart famously considers the so-called predictive account which he finds unsatisfactory because it confounds two distinct social phenomena: *rule-governed* behaviour and mere *habit-based* convergent behaviour.<sup>15</sup> What is missing in the predictive account and what ultimately singles out rule-governed social practises from mere group habits, Hart finds, is the existence of a particular *critical reflective attitude* among members of the group:

What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgments that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought',

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14. This part of Hart's theory is well-rehearsed in the literature. However, part of the reason why the discussion has gone astray is insufficient attention to certain details. I shall therefore go to some length elaborating first Hart's and later Ross's line of reasoning on the relevant issues.

15. See Hart *supra* note 4, in particular chapters I, IV and V – although in chapter IV Hart's immediate object of discussion is so-called habit-based accounts of obedience but his argument is continuous and consistent with the arguments applied in his critique of the predictive account. For ease of expression I shall only refer to the predictive account.

‘must’, and ‘should’, ‘right’ and ‘wrong’.<sup>16</sup>

I shall get back to the details of this account later. What is important at this point is that this *attitude* according to Hart constitutes the internal aspect of rules, which differs from their *external aspect* consisting merely in the outwardly observable regularities of behaviour that rules have in common with social habits.<sup>17</sup>

It is not entirely clear whether Hart himself believed that these deficiencies in the so-called predictive account could also be ascribed to Ross’s legal theory as it is presented in *On Law and Justice*. On the one hand, it appears that the immediate object of Hart’s criticism is Austin’s “command-model” with its emphasis on the notion of habit.<sup>18</sup> But Hart elaborates at some length in his review of Ross the shortcomings of identifying statements about rules with predictions of behaviour, which in context makes it natural to assume that this view is attributed also to Ross. Also, Hart later wrote that his main objection to Ross’s legal philosophy was precisely the same as against the predictive account: that Ross failed “to mark and explain the crucial distinction that there is between mere regularities of human behaviour and rule-governed behaviour.”<sup>19</sup>

Thus there is at least some textual evidence supporting the reading of Hart’s criticism presented thus far as being directed not only against Austin’s command theory and “the predictive account” but also against Ross.

## II. ROSS ON THE INTERNAL<sub>1</sub>-EXTERNAL<sub>1</sub> DISTINCTION

*Qua* criticism of Ross, however, the argument thus constructed misfires rather badly. If what we are after is a distinction which makes us capable of telling these two social phenomena apart, then such a

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16. HART, *supra* note 4, at 57.

17. In close connection with this distinction between internal and external aspects of rules Hart introduces two additional, philosophically important internal/external distinctions, viz. the twin distinctions between internal and external *points of view* and between internal and external (legal) *statements* respectively. See *Id.* at 291. These two distinctions map on to the first distinction in such a way that they would appear to be merely additional aspects of the same fundamental distinction: the distinction between internal and external points of view appears to describe the two different perspectives from which one can identify the internal and the external aspects of rules respectively. Correspondingly, statements made from either of these two points of view on the adhering aspect of social rules could be called internal and external (legal) statements respectively.

18. John Austin (1790-1859) is by many considered the founder of analytical jurisprudence and legal positivism. See J. AUSTIN, *AUSTIN: THE PROVINCE OF JURISPRUDENCE DETERMINED*, (Wilfred E. Rumble ed., Revised ed. 1995).

19. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY*, *supra* note 8, at 13. This is also how Hart’s argument has been read—at least occasionally. See, e.g., Leiter, *supra* note 6, at 191; See also Shapiro, *supra* note 6, at 1163.

distinction is clearly present in Ross's writings. In order to illustrate this point, we need to rehearse the core of Ross's legal philosophy as presented in *On Law and Justice*. Again, this may seem familiar to some readers but the exposition provides premises in an argument the conclusion of which has not been considered commonplace.

We can of course appreciate why the idea that Ross was unable to distinguish between these two social phenomena can have occurred in the first place. After first taking Hans Kelsen's pure theory of law and later Axel Hägerström's anti-metaphysical Uppsala-school as his main philosophical inspirations, the Alf Ross we encounter in *On Law and Justice* (1958, Danish original 1953) is inspired mainly by the philosophical tenets of logical positivism.<sup>20</sup> Crucial to this philosophical school is the possibility of establishing inter-subjective verifiability of any proposition claiming to be scientific—a criterion to be met either directly or derivatively from propositions that are thus verifiable.

Taking this starting point it does indeed seem that, among scientific disciplines, the study of law presents a particular challenge. Ross considers law to be a body of rules, *i.e.* of norms prescribing behaviour.<sup>21</sup> Linguistically Ross categorizes such norms as *directives*.<sup>22</sup> Directives are usually (but not always) identifiable by normative words like “shall be,” “may,” “must,” etc.<sup>23</sup> Furthermore, Ross observes that sentences traditionally found in scholarly legal doctrinal work appear linguistically to be no different from the directives of legal rules: they apparently prescribe behaviour frequently using the same kind of deontic markers.<sup>24</sup>

The epistemological challenge arises because it is not clear how such normative propositions can honour the strict criteria for being scientific adopted by logical positivism. In particular, we see why Ross must ban the epistemological strategy of natural law, which, in his interpretation, is *rationalist*: it attempts to derive the validity of normative legal statements from a foundation of self-evident truths of reason. More specifically, natural law tries to derive legal validity from one foundational, intuitively valid *idea of justice* which is constitutive of law, and to which all human beings, *qua* rational

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20. See Ross *supra* note 9.

21. ROSS, *supra* note 9, at 6-11.

22. See Ross, *supra* note 9 at 7.

23. As a random example of a directive, Ross mentions “the rule in the Uniform Negotiable Instruments Act, s. 62, which prescribes that the acceptor of a negotiable instrument engages that he will pay it according to the tenor of his acceptance.” *Id.* at 32–33.

24. *Id.* at 9.

creatures, have access and will assent.<sup>25</sup>

To the logical positivist, however, the problem with such intuitions is that they, in contrast to sense perceptions, are inextricably private. Intuitions can vary from person to person—and patently do so quite often. As Ross puts it in one of his most quoted passages:

Like a harlot, natural law is at the disposal of everyone. The ideology does not exist that cannot be defended by an appeal to the law of nature. And, indeed, how can it be otherwise, since the ultimate basis for every natural right lies in a private direct insight, an evident contemplation, an intuition. Cannot my intuition be just as good as yours? Evidence as a criterion of truth explains the utterly arbitrary character of the metaphysical assertions. It raises them up above any force of inter-subjective control and opens the door wide to unrestricted invention and dogmatics.<sup>26</sup>

It is often overlooked, however, that while striking a less hostile pose Ross is in fact equally dismissive of the legal positivists' attempts to justify statements of legal doctrine formally on the basis of a foundational norm regardless of its moral value (a *Grundnorm* or a *rule of recognition*).<sup>27</sup> Thus shunning the two traditional foundationalist strategies for the doctrinal study of law, Ross seems forced to take a wholly different tack. In particular, it seems that he, as a logical positivist, has no other option but to adopt a strictly behaviourist approach to law.<sup>28</sup> Banning private intuitions of justice we seem to be left with publicly observable regularities of human behaviour. But this way it seems we would be definitively barred, on pain of committing the naturalistic fallacy, from recognizing the normative element so characteristic of law.<sup>29</sup> And insofar that this is the case, it could seem

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25. See *Id.* at 65–66. As an example of such an idea of justice Ross mentions Kant's formulation of the highest principle of law: "A course of action is lawful if the liberty to pursue it is compatible with the liberty of every other person under a general rule." *Id.* at 276. Thus if the acceptor of a negotiable instrument has a duty to pay, it is ultimately because it would be incompatible with the liberty of every other person under a general rule if she did not have such a duty.

26. *Id.* at 261.

27. See Holtermann, *Getting Real or Staying Positive: Legal Realism(s), Legal Positivism and the Prospects of Naturalism in Jurisprudence*, *supra* note 5, at 543–44; See also ROSS, *supra* note 9, at 9–10; See also Ross's early criticism of Kelsen, Alf Ross, *The 25th Anniversary of the Pure Theory of Law*, 31 OXFORD J. OF LEGAL STUD. 248–49 (2011).

28. Loosely defined, behaviourism is the view that human phenomena can be accurately studied only through objectively observable behavioural events, as opposed to internal events like thinking or feeling.

29. Thus, in the Danish version of *On Law and Justice*, Ross writes on the epistemological difficulties presented by a parallel directive found in the Danish Bills of Exchange Act: ". . . what is a 'duty', and how do we ascertain empirically that it has been established? The acceptance which takes place by drawing some strokes of ink on a piece of

that Ross-style legal science had indeed failed “to mark and explain the crucial distinction between mere regularities of human behaviour and rule-governed behaviour” exactly as Hart claimed.<sup>30</sup>

I submit, however, that this reading of Ross’s considerations on the possibility of legal science is wrong. Looking carefully at the text, it is, as we shall see in the following, undeniable that Ross explicitly countenances the invocation of mental entities over and beyond observable behaviour. As we shall see, he does so through the adoption of an approach not only strikingly similar to the one later adopted by Hart (as outlined above) but also motivated by virtually the same considerations, *i.e.* the full recognition that austere behaviourism cannot distinguish rule bound behaviour from other kinds of regular behaviour.

In order to illustrate the problems facing behaviourism, Ross introduces a very rewarding chess analogy which Hart passes by in almost complete silence.<sup>31</sup> Ross asks us to imagine ourselves watching a game of chess and trying to understand the rules without any prior knowledge.<sup>32</sup> The pressing epistemological concern is how we should proceed in order to establish such knowledge. Or as Ross writes: “How is it possible then to establish which rules (directives) govern the game of chess?”<sup>33</sup> And he continues:

One could perhaps think of approaching the problem from the behaviourist angle—limiting oneself to what can be established by external observation of the actions and then finding certain regularities.<sup>34</sup>

The problem is, however, just as Hart observed, that any attempt to determine the rules from such an external point of view remains underdetermined by the data: we can never tell whether a regularity found in the game is determined by the rules of chess or merely the manifestation of custom.<sup>35</sup>

But in this way an insight into the rules of the game would never be achieved. *It would never be possible to distinguish actual custom, or even regularities conditioned by the theory of the game, from the*

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paper does not appear to count among its observable effects anything that can be termed ‘duty.’” Ross, *Om ret og retfærdighed : En indførelse i den analytiske retsfilosofi*, at 16. 1953, my translation.

30. See Hart, *supra* note 8 at 13.

31. In fact, Hart at one point applies the exact same analogy and for virtually the same purposes, *i.e.* in order to illustrate the insufficiency of the external perspective to the study of rules. HART, *supra* note 4, at 56–57.

32. See Ross, *supra* note 9, at 11.

33. ROSS, *supra* note 9, at 15.

34. *Id.* at 15.

35. *Custom* is used here as synonymous with *habit*, not as a source of law.

*rules of chess proper*. Even after watching a thousand games it would still be possible to believe that it is against the rules to open with a rook's pawn.<sup>36</sup>

From these considerations Ross's conclusion appears unmistakable: "Thus we *cannot but adopt an introspective method*."<sup>37</sup> Consequently the rules of chess are analysed as a two-sided phenomenon which at least looks quite similar to Hart's internal and external aspects of social rules:

Accordingly we can say: a rule of chess 'is valid' means that within a given fellowship [. . .] this rule is effectively adhered to, because the players *feel themselves to be socially bound* by the directive contained in the rule. The concept of validity (in chess) involves two elements. The one refers to the actual effectiveness of the rule which can be established by outside observation. The other refers to the way in which the rule is felt to be motivating, that is, socially binding.<sup>38</sup>

Transferred to the scientific study of law, Ross's conclusion regarding the insufficiency of austere behaviourism is equally clear:

What is valid law cannot be ascertained by purely behaviouristic means, that is, by external observation of regularities in the reactions (customs) of the judges. [. . .]

A behaviouristic interpretation, then, 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.

[. . .] [L]aw presupposes, not only regularity in the judge's mode of action, but also his experience of being bound by the rules. In the concept of validity two points are involved: partially the outward observable and regular compliance with a pattern of action, and partly the experience of this pattern of action as being a socially binding norm.<sup>39</sup>

One might object that in thus banning pure behaviourism Ross is in fact contradicting his own empiricist position. I shall get back to this point below (section IV.A). Suffice to say here that it is preferable, on account of charity, to opt for an interpretation of his general epistemological commitments that is compatible with key passages like those above from the opening chapters of his book. We cannot simply infer from Ross's programmatic allegiance to logical positivism that he

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36. ROSS, *supra* note 9, at 15 (emphasis added).

37. *Id.* (emphasis added).

38. *Id.* at 16 (emphasis added).

39. *Id.* at 37; *see, e.g., Id.* at 73.

must hold this or that view on the study of law. When it comes to a full determination of Ross's epistemological stance the proof of the pudding is in the eating.

On the basis of the account so far it would therefore appear fair to conclude that any failure regarding the issue of rule-governed vs. mere habitual behavioural regularities cannot be ascribed to Ross somehow *overlooking* the distinction between these two social phenomena. On the contrary, as we have seen, Ross is fully aware of that very distinction, and of its importance for legal science. And most importantly, he tries to capture this by means apparently similar to those later adopted by Hart; *i.e.* by supplementing the *external behaviourist* approach with an *internal*, or, in Ross's terminology, *introspective* method.

### III. HART'S OBJECTION # 2: THE PROBLEM WITH "FEELINGS"; OR HOW ROSS FUNDAMENTALLY MISINTERPRETS THE INTERNAL ASPECTS OF SOCIAL RULES

From this it seems that any charge of failure against Ross must take instead the shape of an argument that *in spite* of his explicit recognition of the problem and his attempt to develop the necessary methodological tools to manage it, he—unlike Hart—nevertheless fails. And in so far that this is the real claim we should expect a demonstration how, in spite of the apparent similarities found so far, there are in fact substantial differences between Ross and Hart. Furthermore, we should expect those differences to be sufficiently important to justify not only the claim that Hart's adoption of the distinction between internal and external aspects "famously demolished" Ross's research program in legal philosophy but also the common perception that legal philosophy owes any important insights captured by that distinction to Hart.

Indeed, on closer inspection this appears to better capture Hart's argument. Thus, Hart admits elsewhere that Ross in fact did not commit the simple error sometimes ascribed to him of *overlooking* the distinction between rule-governed and habitual behaviour and of equating legal rules with regular behaviour:

Ross is right in thinking that we must distinguish an *internal* as well as an external aspect of the phenomenon presented by the existence of social rules. This is true and very important for the understanding of any kind of rule.<sup>40</sup>

The problem is rather that Ross gives an *inaccurate* picture of the

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40. Hart, *Scandinavian Realism*, *supra* note 4, at 237.

internal aspect of social rules: “[U]nfortunately he draws the line between these aspects in the wrong places.”<sup>41</sup> In particular, he “misrepresents the internal aspect of rules as a matter of ‘emotion’ or ‘feeling’—as a special psychological ‘experience.’”<sup>42</sup> And in this light, it seems reasonable that Hart later described his review of Ross’s *On Law and Justice* as being primarily an attempt to explain “the important differences between ‘mere feelings of being bound’ which Ross includes in his analysis, and the internal point of view of one who accepts a rule.”<sup>43</sup>

In explaining these differences, Hart stresses the importance of full recognition of the normative uses of legal language for a proper understanding of the internal aspect of legal rules:

They [members of a group that has rules] [. . .] treat deviations as a reason for such reaction and demands for conformity as *justified*.

When a pattern of behaviour is thus taken as a standard the criticism of conduct in terms of it and the claims and justifications based on it are expressed by the distinctive normative vocabulary of ‘ought,’ ‘must,’ ‘should,’ ‘may,’ ‘right,’ ‘wrong,’ and special variants like ‘duty’ and ‘obligation.’ The forms ‘I (you, he, they) ought to do that’ and ‘I (you, etc.) ought not to have done that’ are the most general ones used to discharge these critical normative functions which indeed constitute their meaning.<sup>44</sup>

In Hart’s view, however, Ross’s talk of “feelings of compulsion” fails to track this kind of normative discourse:

[T]he internal character of these statements is not a mere matter of the speaker having certain ‘feelings of compulsion’; for though these may indeed often accompany the making of such statements they are neither necessary nor sufficient conditions of their normative use in criticising conduct, making claims, and justifying hostile reactions by reference to the accepted standard.<sup>45</sup>

As we shall see further below (IV.E), much depends for this line of reasoning on what exactly is meant by the elusive term “feelings,” and in particular on whether Ross by using it intended to exclude anything like the normative uses of language alluded to by Hart. Suffice to note here, that Hart seems simply to take for granted that Ross’s professed empiricist starting point implies that he cannot “allow for the internal non-factual, non-predictive uses of language

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41. *Id.*

42. *Id.*

43. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY*, *supra* note 8, at 14.

44. Hart, *Scandinavian Realism*, *supra* note 4, at 238; *See also* HART, *supra* note 4, at 57.

45. Hart, *Scandinavian Realism*, *supra* note 4, at 238.

inseparable from the use of rules,”<sup>46</sup> (*i.e.* the uses of language which according to Hart in the above quote is characterized by “the distinctive normative vocabulary of ‘ought,’ ‘must,’ ‘should,’ ‘may,’ ‘right,’ ‘wrong,’ and special variants like ‘duty’ and ‘obligation.’”) And correspondingly, he accuses Ross of creating, with his talk of feelings, “the impression that what Kelsen terms ‘ought-propositions’ may be dispensed with in the analysis of legal thinking.”<sup>47</sup>

Again, this interpretation of Ross may not be entirely unmotivated. Taking into account what Hart refers to as Ross’s “misplaced affection for the battle cry of ‘meaningless’”<sup>48</sup> and recalling Ross’s fierce attack on natural law,<sup>49</sup> it would seem that by adopting an introspective method in addition to behaviourism he has already come dangerously close to “metaphysics.” Any acceptance, in addition, of “ought-propositions,” *i.e.* of normative statements asserting what behaviour is legal required of us, it seems, would irretrievably betray his epistemological starting point in logical positivism. For that reason it would seem that the only analysis of the internal aspect compatible with Ross’s empiricism is one that, under the heading “judges’ normative ideology,” dissolves this entire aspect into one massive blob of blind “feelings of compulsion”—impermeable to analysis and impossible to sketch out in phenomenological depth or detail.

And we can also understand why on this interpretation of Ross Hart can take his own version of the internal aspect to be fundamentally different. Given Hart’s background in the (epistemologically speaking) more liberal Austinian ordinary language philosophy he can simply declare that “[t]he dimensions of legal language are far richer than this allows. . . . ‘[O]ught-propositions’ and other forms of normative internal statements are both necessary and harmless in the analysis of legal thinking . . . .”<sup>50</sup>

#### IV. ROSS ON THE INTERNAL<sub>2</sub>-EXTERNAL<sub>2</sub>: NORM-EXPRESSIVE AND NORM-DESCRIPTIVE PROPOSITIONS

While we can perhaps follow Hart’s reasons for interpreting Ross this way, and while we may even find the criticism well founded with regard to the quite rigid behaviourist position which Ross held in the early years of his career,<sup>51</sup> Hart’s reading nevertheless fails to properly appreciate the richness and subtlety of Ross’s position from 1953

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46. *Id.* at 238.

47. *Id.* at 237.

48. *Id.* at 235.

49. See Ross, *supra* note 9, at 261.

50. *Id.* at 239.

51. See, e.g., Ross, *The 25th Anniversary of the Pure Theory of Law*, *supra* note 24.

onwards. As it turns out, there is in fact nothing in Ross's mature legal philosophy to keep him from acknowledging such "ought-propositions" or admitting other forms of normative internal statements in his analysis of legal thinking. And the widespread failure to observe this is arguably illustrative of the dangers of performing exegesis of individual thinkers on the broad level of general "isms" instead of paying close attention to the distinctiveness of their actual writings.<sup>52</sup>

More precisely, Ross can include these aspects because of his acute appreciation of a different kind of "internal" and "external" distinction than the one Hart points to. This distinction is too often overlooked or at least only partly comprehended even though its significance can hardly be overestimated in the study of Ross's legal philosophy—or in legal philosophy generally. And, as we shall see, Hart's failure to observe that particular distinction in Ross's writings bears witness to his own general failure to appreciate it, at least in 1961, when in *The Concept of Law* he repeatedly conflates this distinction with the one he invoked in order to tell the difference between regular and rule-based behaviour.<sup>53</sup>

In Ross's terminology this second internal-external distinction (in addition to the one already considered between the application of behaviourist and introspective method) is the distinction between norm-*descriptive* and norm-*expressive* propositions. In a key passage Ross outlines the basic idea thus:

Since the doctrinal study [of law] is concerned with norms it can be called normative. But the term must not be misunderstood. . . . [C]ognitive propositions can naturally not be made up of norms (directives). They have to consist of assertions—assertions concerning norms, which again means assertions to the effect that certain norms are of the nature of 'valid law.' The normative character of the doctrinal study of law signifies, therefore, that it is a doctrine *concerning* norms, and not *of* norms. It does not aim at 'setting up' or expressing norms, but at establishing their character of 'valid law.' *The doctrinal study of law is normative in the sense of norm descriptive and not in the sense of norm expressive.*<sup>54</sup>

It may not be immediately clear what is captured by a distinction between two such kinds or modes of normativity-talk, or how propositions of legal science could suddenly be transformed into

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52. Alternatively, one could say that the problem is one of ignoring or over-simplifying the various isms. In Ross's case it is presumably a combination of both since logical positivism was not completely uniform as a movement. I shall get back to this point below.

53. See in particular Hart, *supra* note 4, at 84-88 and associated endnote at 291. The endnote mentions the relevant distinction but Hart's general argument proceeds in apparent disregard thereof.

54. ROSS, *supra* note 9, at 19 (last emphasis added).

epistemologically safe assertions if they only stay on the ‘norm-descriptive’ side of the gap.

For illustration, imagine six-year-old Ellen has been exposed to Norse folklore, and one day around Christmas says to her father: “We *ought* to leave some rice pudding in the attic for the pixie.” In spite of Ellen’s sincerity, we may safely assume that her claim is not true. We do not as a matter of fact have any duties toward imaginary creatures like pixies. However, imagine that later the same day Ellen’s father tells his wife: “*Ellen believes that* we ought to leave some rice pudding in the attic for the pixie.” In virtue of this small addition, the case is completely changed. This is so because, in contrast to the first statement, the truth value of the latter is entirely independent of the existence or not of duties toward imaginary creatures. It depends solely upon whether or not Ellen *actually believes* in the existence of such a duty. And this is ultimately a psychological question regarding her beliefs, not a normative (*i.e.* norm expressive) question about the existence of duties toward pixies.



**Figure 1. The relation between Ellen’s own *norm-expressive* and her father’s *norm-descriptive* statement.**

This analogy illustrates an insight traditionally attributed to Gottlob Frege<sup>55</sup>: if a given proposition P (where P can be both an

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55. Gottlob Frege (1848–1925) was a German philosopher, logician, and mathematician who is often accredited with having provided the foundations for modern logic. See, e.g., Edward N. Zalta, *Gottlob Frege*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed. 2016).

assertion and a directive) is embedded in a so-called *propositional attitude report* (i.e. in a sentence stating that an agent A *believes that, claims that, feels that, etc.* P), the truth value of that particular proposition has no bearing on the truth value of the compound proposition, i.e. the propositional attitude report.<sup>56</sup> Whether or not things actually *are* the way A believes, claims, feels, etc., is irrelevant to the truth of the whole propositional attitude report. In such contexts the question is instead whether or not A in fact bears the kind of attitude toward P asserted in the report, i.e. whether or not she actually *believes, claims, feels, etc.* that things are/ought to be in the way stated in the proposition.

And it is precisely this shift in truth values following the introduction of a propositional attitude context which Ross refers to when he insists that legal science should be *norm-descriptive* and not *norm-expressive*.<sup>57</sup> A norm-expressive statement, then, is a statement that directly expresses acceptance or endorsement (if only hypothetically) of a given legal norm. A norm-descriptive statement, by contrast, inserts a propositional attitude context *around* this legal norm and thus renders the truth-value of it (or lack thereof) immaterial to the truth value of the compound norm-descriptive proposition. Or, to use Ross's linguistic categories: the latter is a *directive* while the former is an *assertion* stating that a particular attitudinal relation exists between an agent and that directive.

In order to comprehend the full implications of this paraphrasing of the propositions of *legal doctrine* into norm-descriptive propositions, i.e. into propositional attitude reports, we should observe how Ross answers three questions that are pertinent whenever such reports are made: *To whom* are we ascribing the attitude? *What kind of attitude* are we ascribing? And *toward which proposition* are we ascribing it?

As to the first of these questions, Ross holds that the bearer of the relevant propositional attitude is the judiciary in the jurisdiction under scrutiny.<sup>58</sup> It is *the judges'* beliefs or feelings regarding legal directives that should be studied by the legal scholar and not, e.g., those of lawyers generally or of ordinary citizens for that matter.<sup>59</sup>

As to the third question, Ross, unlike Hart but like Kelsen, believes that the legal norms relevant to the doctrinal study of law are those that are directed to the judges, and which prescribe how they

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56. See GOTTLIB FREGE, ON SENSE AND REFERENCE, IN BASIC TOPICS IN THE PHILOSOPHY OF LANGUAGE 149 (Robert M. Harnish ed., Revised Edition, 1994).

57. See Ross, *supra* note 9, at 19.

58. It should be emphasized that groups can also be bearers of propositional attitudes.

59. See, e.g., ROSS, *supra* note 9, at 35.

should exercise their authority in cases falling under these norms.<sup>60</sup>

Answering the second of these questions is more difficult, especially in the context of Hart's criticism. As we have seen, Ross believes that besides the actual behavioural effectiveness (which a legal rule shares with a habit), its validity consists in 'the way in which the rule is felt to be motivating, that is, socially binding.'<sup>61</sup> In other words, the propositional attitude attributed to the judges seems to be something like: "[judge A] feels that [rule X] is motivating/socially binding." As we also saw, Hart believed that this attitude differs crucially from the *critical reflective attitude* which he ascribed to the internal perspective, and which could be stated along these lines: "[judge A] accepts as a standard of behaviour that [rule X]."<sup>62</sup> In section IV.E I shall get back to whether Hart is right about this, but this has no bearing on the fact that we should read Ross's norm-descriptive propositions as *propositional attitude reports on judges' attitudes towards legal norms*.

Following Ross's paraphrasing from norm-expressive to norm-descriptive propositions, then, the doctrinal study of law is no longer a study of how judges *ought* to behave in their capacity as judges (let alone how ordinary citizens ought to behave). Just like Ellen's father who only speaks about how *Ellen believes* they ought to behave vis-à-vis pixies, the Rossian legal realist only speaks about how *judges* believe they ought to behave *qua* judges; about which rights and duties *they believe* that they have (and hence, but only indirectly, which rights and duties *they believe* that the citizens have). In Ross's words:

A national law system, considered as a valid system of norms, can accordingly be defined as the norms which actually are operative in the mind of the judge, because they are felt by him to be socially binding and therefore obeyed.<sup>63</sup>

In his examples Ross is consistently careful to emphasise this paraphrasing terminologically. Thus he writes "that every proposition occurring in the doctrinal study of law contains as an integral part the concept 'valid (Illinois, California, common, etc.) law.'"<sup>64</sup> This phrasing emphasises that propositions of legal science must be *indexicalised*: they must be propositions about the beliefs of a *particular group of people* regarding a particular field; *i.e.*, about the

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60. See, e.g., *Id.* at 33, 52–53. Ross stresses that an additional aspect of these norms is to "give rise to a reflex effect" in the general public and thus that they can also be said to be (indirectly) directed at them. See, e.g., *Id.* at 52–54.

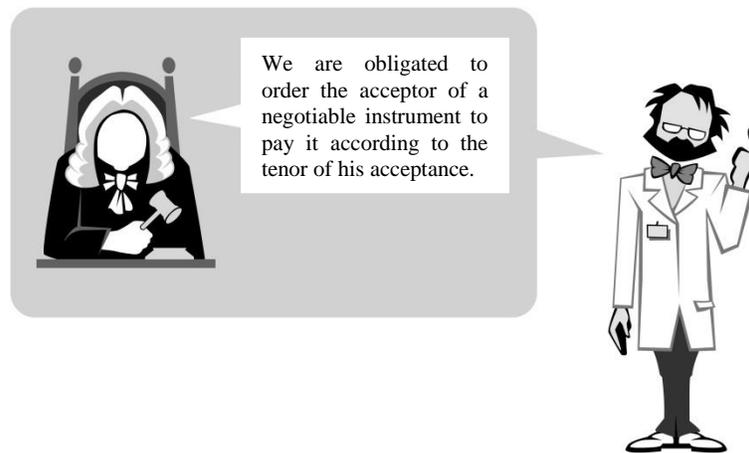
61. *Id.* at 16.

62. See Hart, *Scandinavian Realism*, *supra* note 4, at 238.

63. ROSS, *supra* note 9, at 35.

64. *Id.* at 11.

beliefs of (Illinois, Californian, common, etc.) judges regarding (Illinois, Californian, common, etc.) law. This addition may occasionally be tacitly implied but it can never be thought away entirely—lest the propositional attitude context and hence the actual possibility condition of legal knowledge disappear entirely. In other words, adding “. . . is valid (Illinois, Californian, common, etc.) law” is a way for the legal scholar to say “not my words” about the epistemologically problematic directives. Instead, these words (plus adhering beliefs/feelings) are carefully placed in the mouths (and minds) of judges.<sup>65</sup>



**Figure 2. The relation between the judge’s norm-expressive and the legal scientist’s norm-descriptive statement.**

#### *A. Sacrificing Empiricism?*

Returning to the earlier mentioned worry as to the compatibility of Ross’s general epistemological commitments with the details of his theory, it might be objected that such propositions about judges’ convictions about rights and duties (in Ross’s words: about “the ideology of the sources of law which in fact animates the courts”<sup>66</sup>) run

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65. Ross does not refer to Frege on these issues but his writings are consistent throughout with a full appreciation of Frege’s discovery. On the importance of reading Ross’s work in this light and his statements of valid law as propositional attitude reports, see Jakob v.H. Holtermann, *Introduktion*, in *Om ret og retfærdighed : En indførelse i den analytiske retsfilosofi* (A. Ross ed. 2013); See also Holtermann, *Naturalizing Alf Ross’s Legal Realism: A Philosophical Reconstruction*, *supra* note 5.

66. ROSS, *supra* note 9, at 76.

into exactly the same kind of epistemological difficulties which crippled natural law. After all, how do we know what people actually believe or feel? This, it seems, is private too.

Ross does not deny the existence of epistemological difficulties in this area. But in contrast to the difficulties facing natural law he does not consider them fatal—for reasons that bear witness to the balanced and moderate version of empiricism which he subscribes to at the end of the day. Thus, Ross writes:

If, in spite of all, prediction is possible, it must be because the 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 when they act in their capacity as judges. *It is true that we cannot observe directly what takes place in the mind of the judge, but it is possible to construct hypotheses concerning it, and their value can be tested simply by observing whether predictions based on them have come true.*<sup>67</sup>

Returning to the analogy, if Ellen believes in the existence of duties toward Christmas pixies she will presumably behave accordingly around Christmas: she will remind her father to buy rice in the super market, to prepare it when they get home etc. And if a judge feels that the Uniform Negotiable Instruments Act, s. 62 is socially binding she will behave accordingly if a case fulfilling the conditions specified in that act is brought before her court: she will order the acceptor to pay.<sup>68</sup>

It is in view of these considerations that Ross's theory of valid law becomes a predictive theory: it becomes a set of predictions of judges' behaviour under certain specified conditions based on their beliefs about rules. Thus, in Ross's final analysis an assertion A made in the doctrinal study of law that a given directive D is valid (Illinois, California, common, etc.) law, becomes:

... a prediction to the effect that if an action in which the conditioning facts given in the section 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 A, the directive to the judge contained in the section will form an

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67. *Id.* at 75 (emphasis added). The Danish version contains an additional analogous passage which is omitted from the English translation. See Ross, Om ret og retfærdighed : En indførelse i den analytiske retsfilosofi, at 50. 1953.

68. This is also why Aarnio is wrong when he claims that “[t]his very element in the Rossian prediction theory [that his theory is both behaviourist as well as idealist] necessarily leads to a non-positivist final conclusion: The doctrinal study of law is interpretative, or if preferred, hermeneutic, and not empirical as to its nature.” Aulis Aarnio, *Legal Realism Reinterpreted*, in *ESSAYS ON THE DOCTRINAL STUDY OF LAW* 94 (Aulis Aarnio ed. 2011).

integral part of the reasoning underlying the judgment.<sup>69</sup>

And more generally, the entire doctrinal study of law becomes a theory about “the aggregate of factors which exercise influence on the judge’s formulation of the rule on which he bases his decision.”<sup>70</sup> Ultimately, these factors can be subsumed under four sources of law: legislation, precedent, custom, and the tradition of culture (“reason”).<sup>71</sup>

*B. Dispensing with “Ought-Propositions” in the Analysis of Legal Thinking?*

Consider if we read Ross’s distinction between norm-expressive and norm-descriptive utterances as covering the distinction between (hypothetically) endorsing/accepting a given directive and making a propositional attitude report concerning the cognitive relations certain people (*i.e.* Illinois, California, common, etc. judges) hold to that directive. Then, we see clearly why it is wrong when Hart claims that Ross creates “the impression that what Kelsen terms ‘ought-propositions’ may be dispensed with in the analysis of legal thinking,”<sup>72</sup> and when he claims that Ross does not “allow for the internal non-factual, non-predictive uses of language inseparable from the use of rules.”<sup>73</sup> Properly understood, such propositions are not dispensed with, nor are the non-predictive uses of such language not allowed for. On the contrary, they survive wholly intact. In fact, Ross’s analysis illustrates very clearly why such propositions are literally *indispensable* in the analysis of legal thinking: without them there would be no propositional attitude to report precisely because such a report presupposes full awareness of the existence of “the internal non-factual, non-predictive uses of language inseparable from the use of rules,” *viz. in the minds and mouths of the judges.*

So Ross has no problem agreeing with Hart that “‘ought-propositions’ and other forms of normative internal statements are both

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69. ROSS, *supra* note 9, at 42.

70. *Id.* at 77.

71. *See Id.* at 75-107. This is also why validity, to Ross, becomes a matter of degree, *i.e.* varying with the degree of probability with which it can be predicted that a given directive will influence the judge’s reasoning process and hence her decision. *See Id.* At 44-45. So also on this issue does Ross’s model for legal science imitate that of natural science, where uncertainty and probability are widely recognized as the modalities of scientific propositions. This is unlike Kelsen, who found this particular idea in Ross’s work preposterous. *Cf.* Hans Kelsen, *Eine ‘Realistische’ und die Reine Rechtslehre. Bemerkungen zu Alf Ross: On Law and Justice*, 10 *Österreichische Zeitschrift für Öffentliches Recht* (1959-60).

72. Hart, *Scandinavian Realism*, *supra* note 4, at 237.

73. *Id.* at 238.

necessary and harmless in the analysis of legal thinking.”<sup>74</sup> They are *necessary* because without them Ross’s model for expressions of valid law simply would not make sense. Without the “ought-proposition”/directive there would be nothing for the propositional attitude report to be about! And they are *harmless* because they are embedded in the epistemologically safe propositional attitude context which renders their alleged lack of truth value unproblematic.<sup>75</sup>

### C. Misrepresenting “Valid Law” in the Mouths of Judges?

By the same token we see why Hart’s perhaps best known objection to Ross is equally mistaken. Hart insists that “even 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.”<sup>76</sup>

First, we should notice that Ross does not claim that the above analysis of the meaning of “valid law” matches perfectly with the meaning of that term *in ordinary usage*—not among legal scholars, judges or lawyers, nor among ordinary citizens. But unlike Hart, Ross is clearly not interested in ordinary usage of this or any other legal terms *per se*. His goal is epistemological, *i.e.* to show how the doctrinal study of law can be possible as a science.<sup>77</sup> Following this precept, Ross’s definition of “valid law” is rather *explicative* in Carnap’s sense<sup>78</sup>; it is a technical term serving the philosophical goals which Ross is pursuing. And for that purpose, ordinary usage is no guide, and the mere possibility of different meanings of the same term cannot *per se* constitute a challenge.<sup>79</sup>

74. *Id.* at 239.

75. The same error is committed in MICHAEL D. A. FREEMAN, LLOYD’S INTRODUCTION TO JURISPRUDENCE 1044 (8th ed. 2008); *See also* Joseph Raz, *The Purity of the Pure Theory of Law*, in *NORMATIVITY AND NORMS: CRITICAL PERSPECTIVES ON KELSENIAN THEMES* 239 (Stanley L. Paulson & Bonnie Litschewski Paulson eds., Revised Edition, 1998). Speaking, as Raz does, of “legal statements,” they can be both normative and descriptive—or more accurately, they can be both norm-expressive and norm-descriptive according to Ross. It is only the statements of *legal science* that have to be non-normative, *i.e.* norm-descriptive.

76. Hart, *Scandinavian Realism*, *supra* note 4, at 237.

77. *See* Ross, *supra* note 9.

78. RUDOLF CARNAP, *MEANING AND NECESSITY: A STUDY IN SEMANTICS AND MODAL LOGIC*, 7–8 (1947).

79. Unfortunately, this programmatic ambition on the part of Ross is completely obscured in the current English translation. To illustrate, the following passage which in the Danish edition states this ambition clearly lacks entirely the central words in the English version (which I have added in brackets and underlined):

The foregoing analysis [of the concept of ‘valid Danish law’] has aimed at interpreting the real content of propositions which [according to their meaning and

But this does not mean that Ross cannot simultaneously recognise the actual occurrence of other meanings in ordinary use—which he in fact does.<sup>80</sup> In particular, he acknowledges the widespread usage of ‘valid law’ in a meaning wholly different from the technical portmanteau way of making propositional attitude reports elaborated above.<sup>81</sup> And in such contexts (for ease of expression we could call this meaning “valid<sub>2</sub>”—as distinguished from “valid<sub>1</sub>” referring to the specific kind of propositional attitude report described above) “valid law” is used roughly as an analogue of “true” or “correct” and serves to express the speakers endorsement or acceptance of a given legal directive.

Of course, *qua* logical positivist Ross takes any such usage to be ill-founded and unscientific but he unquestionably does recognise its existence as a real legal phenomenon (reservations being made for what Hart rightly describes as Ross’s “misplaced affection for the battle-cry ‘meaningless’”, to which I shall return in the next section). In fact, throughout *On Law and Justice* Ross repeatedly uses “valid law” in this meaning of the word in order to characterise precisely the (in his view) mistaken perception on the part of natural lawyers and legal positivists as to the epistemological status of their propositions of law.<sup>82</sup>

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intention] have the character of [scientific] assertions that a certain rule is valid Danish law.

Another question is the extent to which the doctrinal study of law in the form in which it exists in current expositions of national law systems does in fact consist of assertions of this kind. It is the question of the extent to which the doctrinal study is and will be a cognition of [a science about] valid law in the sense in which it has been defined in the foregoing analysis.’ ROSS, *supra* note 9, at 45–46.

For discussion of the unfortunate role played by the original English translation of ON LAW AND JUSTICE and for a correct appreciation of this aspect of Ross’s theory, see JAKOB V. H. HOLTERMANN, “THIS CANNOT BE ITS MEANING IN THE MOUTH OF THE JUDGE”: THE CASE FOR THE NEW ENGLISH LANGUAGE TRANSLATION OF ALF ROSS’S ON LAW AND JUSTICE FORTHCOMING ON OXFORD UNIVERSITY PRESS., 20 Utopía y praxis latinoamericana : revista internacional de filosofía iberoamericana y teoría social (2015).

80. Ross’s appreciation of the discrepancy between ordinary usage and his own technical suggestion is also clearly expressed in Alf Ross, Book Review, 45 CAL. L. REV. 564, 568 (1957) (reviewing Hans Kelsen, WHAT IS JUSTICE? JUSTICE, LAW AND POLITICS IN THE MIRROR OF SCIENCE: COLLECTED ESSAYS (1957)); and in Danish in Alf Ross, Om begrebet ‘gældende ret’ hos Theodor Geiger, 63 TIDSSKRIFT FOR RETTSVITENSKAP, at 247–48 (1950).

81. See Ross, *supra*, at ix, 3, 18, 31, 38, 45, 52–70, 92, 95, 105, 155–156, 158, 160, 179, 229, 234, 238–239, 243, 248–249, 252, 263–264, 267, 275, 289, 291, 297–298, 300, 308, 311, 313, 316, 347, 352, 354, 366.

82. “He [the judge] wishes to find a decision that shall not be the fortuitous result of mechanical manipulation of facts and paragraphs, but [. . .] something which is ‘valid.’” ROSS, *supra* note 9, at 99; See also *Id.* at 53–54, 68, 274–75, 366–67.

Admittedly, the presence of this second kind of validity is more easily overlooked in the English translation than in the Danish original, because two related though different words are naturally available in Danish to express this difference in meanings. Thus, in the English edition the same term “valid law” is used as a translation both of “*gyldig ret*” which connotes “correct”/ “true law,” and of “*gældende ret*” which is closer in meaning to “law in effect”/ “law in force,” and which Ross reserves for the particular kind of propositional attitude report described above.<sup>83</sup>

In spite of linguistic shortcomings, it is nevertheless understandable why Ross sounds somewhat nettled that Hart seems to have read Ross as if only valid<sub>1</sub> were recognised and present to the exclusion of valid<sub>2</sub>. Thus, throughout *On Law and Justice* Ross consistently places valid inside inverted commas when it is used in the non-technical meaning of valid<sub>2</sub>, *i.e.* when it connotes “true”/ “correct.”<sup>84</sup> And when the inverted commas are absent it is always fairly obvious from the context which of the two is at play. Thus, valid<sub>2</sub> is reserved for contexts where the (according to Ross) mistaken cognitivist interpretations of the “legal consciousness” are discussed. Valid<sub>1</sub>, on the other hand, is consistently embedded in the formula: “. . . is valid (Illinois, California, common, etc.) law,” indicating that Ross is referring to the specific kind of propositional attitude report characteristic (ideally) of the scientific study of law.

This clarification allows us to return to Hart’s objection that Ross’s predictive definition of valid law “cannot be its meaning in the mouth of a judge who is not engaged in predicting his own or others’ behaviour or feelings.”<sup>85</sup> In *The Concept of Law* Hart specifies that the challenge occurs precisely with regard to “how the judge’s own

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83. The lack of clarity on this point is part of the motivation for the new translation and second critical edition of ON LAW AND JUSTICE that is currently under preparation at Oxford University Press (forthcoming 2017); *See also* Holtermann, *Utopía y praxis latinoamericana : revista internacional de filosofía iberoamericana y teoría social*, (2015). For useful general linguistic clarification, *see* Eng, *supra* note 6, at 198206. Interestingly, Weber emphasized virtually the same distinction between two kinds of validity in R. Stammler’s ‘Überwindung’ der materialistischen Geschichtsauffassung, in *Gesammelte Aufsätze zur Wissenschaftslehre* (Max Weber & Johannes Winkelmann eds., 1988/1907), and in the English translation of that book *Critique of Stammler* (1977), one finds this distinction aptly expressed with the two terms *empirical* and *axiological* validity for validity<sub>1</sub> and validity<sub>2</sub> respectively. *See* Jakob v. H. Holtermann & Mikael Rask Madsen, *European New Legal Realism and International Law: How to Make International Law Intelligible*, 28 LEIDEN J. OF INT’L L. 211, 216–20 (2015).

84. *See* Ross, *supra* note 9, at ix, 3, 18, 31, 53, 55, 57, 65, 68, 70, 92, 105, 158, 160, 179, 229, 263, 298, 308, 313, 366, 368, 370.

85. *See* Hart, *Scandinavian Realism*, *supra* note 4, at 237.

statement that a particular rule is valid *functions in judicial decision*,<sup>86</sup> and in that particular situation it undeniably seems true that the judge is not stating a prediction. Hart overlooks, however, that Ross does not have to claim this. On the contrary, Ross can simply claim that the meaning of “valid law” in the mouth of the judge who finds herself in the specific situation Hart is referring to, is simply valid<sub>2</sub>, *i.e.* “correct” or “true.”

In fact, Ross’s analysis of statements of valid law in terms of propositional attitude reports can be said not only to leave conceptual room for the use of valid<sub>2</sub> but even to *presuppose* such usage. For, as we have seen, this construction presupposes precisely *a difference in meaning* between the embedded proposition and the full propositional attitude report. In order for the legal scholar to “mean” (*i.e.* assert) that: *somebody (i.e. Illinois, California, common, etc. judges) feel that D is socially binding* (alternatively: accepts as a standard of behaviour that D), which is the scientific meaning of “valid<sub>1</sub>,” she must presuppose that there is *somebody (i.e. Illinois, California, common, etc. judges) that feels (and in that sense means) only that: D is thus binding*. Indeed, this is the very meaning of the propositional attitude report! And one natural way for those judges to express that kind of attitude toward D would be to say that “D is valid” in the meaning valid<sub>2</sub> “gyldig” *i.e.* is “true”/“correct.”

In other words, instead of this second meaning of valid law *contradicting* Ross’s analysis as Hart claims it does, we see how it fits perfectly into his analysis of valid law as part of the propositional attitude report in the following way: a statement that: *a given directive D is valid<sub>1</sub> (Illinois, Californian, common, etc.) law is*, in effect, a claim that: *(Illinois, Californian, common, etc.) judges believe that D is valid<sub>2</sub>, i.e. “correct” or “true” (and hence binding)*. In practice, of course, Ross wishes to avoid this formulation and use of valid<sub>2</sub> because, *qua* logical positivist, he believes that judges are wrong in so believing but this is a different issue.

#### *D. On Ross’s “Misplaced Affection for the Battle-Cry ‘Meaningless’”*

Admittedly, this interpretation of Ross’s position is open to one serious objection. Hart was undeniably right that Ross had a “misplaced affection for the battle-cry ‘meaningless.’” Several places in *On Law and Justice* (as elsewhere in Ross’s writings) expressions like “valid” (*i.e.* valid<sub>2</sub>) and other normative words like “justice,” “duty,” “right,” “promise,” etc. and directives more generally are

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86. HART, *supra* note 4, at 105 (emphasis added).

triumphantly denounced as *meaningless*.<sup>87</sup> And this fact seems not only to contradict any claim that there is a second, more inclusive meaning of validity at play in his work; it also seems to pinpoint an inconsistency in his more technical use of the word validity because it is not entirely clear how it is possible to hold *any* propositional attitude (except perhaps bafflement!) towards a literally meaningless proposition.<sup>88</sup>

In other words, by insisting to use the word meaningless to describe all these traditional normative uses of language it does indeed seem that Ross has *de facto* barred himself from the use of “ought-propositions” in the analysis of legal thinking, and thus from the possibility of sketching out in any real depth the phenomenology of the internal aspect of legal rules.<sup>89</sup> All that can be assigned to the judge’s ideology, it seems, is indeed the abovementioned amorphous blob of feelings of compulsion.

Again, however, I submit that the problem is only superficial; it disappears once we recognise the presence also of two meanings of *meaning* in his text. On the one hand, Ross obviously adopts the austere logico-positivist usage where meaningful/meaningless mean simply verifiable/unverifiable respectively. And this is undoubtedly the meaning (correspondingly, we could call this *meaning<sub>1</sub>*) which Ross applies whenever he invokes “the battle-cry of “meaningless.””

But on the other hand there is simultaneously a much more commonsensical concept of meaning at play in his writings; a meaning (*~meaning<sub>2</sub>*) that is much broader and more inclusive and which accepts as meaningful the same kinds of propositions as would almost any competent language user. And this is precisely the meaning of meaning which Ross applies whenever he describes the phenomenology of the “internal aspect,” *i.e.* of the judicial ideology which is found when the legal scholar applies the introspective method. Because this entire ideology *is* indeed one of *meaning*:

Thus the norms of chess are the abstract idea content (of a directive nature) which makes it possible, as a scheme of interpretation, to understand the phenomena of chess (the actions of the moves and the experienced patterns of action) *as a coherent whole of meaning*

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87. See, e.g., Ross *supra* note 9, at 172, 174, 220, 249, 286. See also, e.g., Ross, *Tû-Tû*, 70 Harvard Law Review 812 (1957).

88. This challenge could be considered a version of the so-called Frege-Geach problem. See P.T. Geach, *Assertion*, THE PHIL. REV. 74 (1965). In ongoing work I am looking more closely at this aspect.

89. *Phenomenology* is used here in the sense of the study/theory of structures of consciousness as experienced from the first-person perspective. See, e.g., David Woodruff Smith, *Gottlob Frege*, in The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed. 2016).

*and motivation, a game of chess . . .*<sup>90</sup>

Correspondingly, Ross manifestly ascribes meaning *even to directives* that are not actually expressed (much less placed in propositional attitude contexts) but considered purely in abstraction:

It is possible to abstract the meaning of an assertion purely as a thought content ('2 and 2 make 4') from the apprehension of the same by a given person at a given time; and *in just the same way it is possible to abstract the meaning of a directive* ('the king has the power of moving one square in any direction') from the concrete experience of the directive. The concept 'rule of chess' must therefore in accurate analysis be divided into two: the experienced ideas of certain patterns of behaviour (with the accompanying emotions) and the *abstract content of those ideas*, the norms of chess.<sup>91</sup>

If only the narrow 'logical positivist'<sup>92</sup> conception of meaning (meaning<sub>1</sub>) was at play, these claims would be senseless. Their overt presence is a sign therefore not of a contradiction at the heart of Ross's theory, but rather of the undogmatic character of his epistemological and semantic theory which leaves ample room also for a less technical concept of meaning alongside the more technical logico-positivist one.<sup>93</sup> It is indeed true that he uses meaningless exactly as a battle-cry. And his affection for this battle-cry is indeed misplaced. But this is not because Ross unjustly tries to define what is thus rendered "meaningless" out of existence.<sup>94</sup> It is misplaced rather because in using it as a technical term signifying simply unjustifiability (more accurately: the lacking of truth value), Ross confounds things that ought to be kept apart, and in so doing, he gives sceptical readers an excuse to overlook the presence of a considerably less austere and fairly commonsensical concept of meaning and, hence, for misconstruing his theory.

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90. ROSS, *supra* note 9, at 16 (emphasis added). Numerous passages to the same effect, *see, e.g., Id.* at 12–13, 32, 74.

91. *Id.* at 16 (emphasis added). This simultaneously illustrates the substantive movement in Ross's thinking, because in 1936 he took the exact opposite view and flatly denied that any abstract meaningfulness could be ascribed to normative propositions. *See* Ross, *The 25th Anniversary of the Pure Theory of Law*, *supra* note 24, at 249. In other words, his earlier (anti-)semantics for normative propositions rendered conceptually impossible the Fregean move we find in *On Law and Justice*.

92. I place logical positivist in inverted commas here for reasons that will be clear immediately below.

93. Ross's awareness of the technical or artificial character of the narrow concept of meaning as verification criteria is further emphasized by the fact that he sometimes refers to this kind of meaning as *representative* or *logical meaning*. *See, e.g.,* ROSS, *supra* note 9, at 8.

94. *See* HART, *supra* note 4, at 91.

One might object to this interpretation that it makes Ross emerge as a confused and self-contradictory writer. To state that he operated with two meanings of “meaning” could make him appear like someone who, when push comes to shove, cannot stick to his logical positivist principles—or just as someone who is not philosophically rigorous.<sup>95</sup> We should, however, remind ourselves that logical positivism as a movement was never completely uniform. Especially from the early 1930s onwards, the circle was divided precisely over the conception of meaning.<sup>96</sup> Thus, a “conservative camp” organized around Moritz Schlick insisted on an uncompromising line sticking to a strict empiricist verificationist conception of meaning thus expelling everything unverifiable from the realm of meaning.<sup>97</sup> However, a so-called left wing organized around Otto Neurath and Rudolph Carnap took a more liberal approach. Not only did they relax the verification principle in order to include so-called laws of nature (by definition extending beyond empirical observation) among statements that are verifiable and thus meaningful and potentially scientific. They also admitted that statements that notoriously cannot honor even this relaxed notion of meaningful statements (so-called “metaphysical” statements, including normative—norm-expressive—statements), were not strictly speaking *meaningless*.<sup>98</sup> They were only *cognitively* or *empirically meaningless*. In other words, these left-wing members would, just like Ross, accept a distinction within the realm of the meaningful between the empirically or cognitively meaningful and other kinds of meaningful—although they would still banish the latter group from science and assign them to “metaphysics”. (Liberal/left wing or not, they were after all still logical positivists.)<sup>99</sup>

These considerations make clear what the unfortunate combination of Ross’s belligerent rhetoric and Hart’s uncharitable reading has managed to keep hidden for half a century: it is one thing to claim that normative and more generally metaphysical beliefs cannot be true or false; it is another thing altogether to claim that such beliefs are literally meaningless, and that we therefore live in a universe devoid of people holding them. Ross obviously held the former view,

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95. I am grateful to Dan Priel for pushing me on this point.

96. For a first-hand description of this debate, see Rudolf Carnap, *Intellectual Autobiography*, in *The Philosophy of Rudolf Carnap* 3–86 (Paul Arthur Schilpp, ed. 1963).

97. *Id.* at 57–58.

98. *Id.* at 57–59.

99. Placing Ross within logical positivism’s left wing on this issue is further justified by the fact that Ross from 1934 onwards had an extensive correspondence with Neurath. The contents of this correspondence confirms that Neurath’s specific interpretation of logical positivism had a very substantive impact on Ross’s legal realism. Jens Evald, *Alf Ross - a life* (DJØF Publishing. 2014).

but we now see that he did not hold the latter.

*E. Accepting Social Rules vs. Feeling that they are Socially Binding*

One remaining question is whether Hart was nevertheless right that theoretical differences remain between his critical reflective attitude characteristic of the internal aspect of rules and Ross's "feelings of being bound."

We should note that unless Hart has some highly technical notions in mind he cannot consistently deny the existence of a necessary connection between the internal aspect and *some kind* of "feelings" or "experiences." As is clear from his criticism of the identification of rules with habits Hart is certainly no behaviourist. A group of zombies cannot have rules on his account, no matter how well versed in normative lingo. We see this, *e.g.*, from the core passage of *The Concept of Law* where Hart discusses the relationship between the internal aspect of rules and feelings. Here, he specifically does not *identify* this aspect with "criticism (including self-criticism), demands for conformity, [and with] acknowledgement that such criticism and demands are justified."<sup>100</sup> Instead, Hart states how this necessary attitudinal element of the internal aspect *displays* itself thus. Correspondingly, the critical reflective attitude does not *consist in* the use of "the normative terminology of 'ought,' 'must,' and 'should,' 'right' and 'wrong,'" but *finds its characteristic expression* thus.<sup>101</sup>

It is hard to see what it could possibly be that *displays itself*, or *finds its characteristic expression* thus, if not *some kind* of psychological states among the members of the group. Any attempt at an anti-mentalistic definition of acceptance and of the critical reflective attitude strictly in terms of use would arguably jeopardise Hart's entire attempt to distinguish between following social rules and merely having convergent behaviour. Verbal behaviour is also a kind of behaviour, and as such it can be studied purely from the outside. We would therefore find no use for a distinct *internal* point of view. So it seems that Hart after all is no Wittgenstein on matters of the mental. His internal aspect *has* to have an "inside," there has to be a way that it "feels."<sup>102</sup>

This allows us to restate Hart's objection more precisely: the problem with Ross's account cannot simply be that it is *phenomenological*; it has to be that it is *phenomenologically incorrect*.

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100. HART, *supra* note 4, at 57.

101. *Id.* The same point can be seen indirectly from the fact that Hart acknowledges the theoretical possibility that otherwise perfect normative linguistic behaviour may in fact be "pretence" or "window dressing." *Id.* at 140.

102. At least for the majority. *Id.* at 56.

So we have to look more specifically for a principled difference between Hart's critical reflective attitude and *the particular kind of feeling* which Ross assigns to the judge. And on this approach, Hart's critical reflective attitude has at least three key features which might distinguish it from Ross's "binding feelings."

*First*, the critical reflective attitude is *social* in that the attitudinist holds that the rule as a common public standard binds *all* members of the social group and herself merely *qua* such member. This contrasts with the merely individual "psychological experiences analogues to those of restriction or compulsion"<sup>103</sup> to which group members might refer "when they say they 'feel bound' to behave in certain ways."<sup>104</sup>

*Second*, instead of "feeling compelled" by the rule the attitudinist's acceptance of it is in some sense a matter of free deliberation. This is also what MacCormick refers to as the *volitional* element of the internal aspect.<sup>105</sup>

*Third*, the critical reflective attitude is a *cognizance*. That is to say, the attitudinist takes this social character to consist in or stem from the intersubjective verifiability or justifiability of the rule in question. Hart consistently casts his descriptions of the critical reflective attitude in epistemic terms. He emphasises how the attitudinist "treat[s] deviations as a *reason* for such [adverse] reaction and demands for conformity as *justified*,"<sup>106</sup> and how the attitudinist has to "think of his conforming behaviour as 'right,' 'correct,' or 'obligatory.'"<sup>107</sup> The attitudinist does not merely irrationally "feel" that one should conform to the standard; he "knows" it, or "has the right to be certain."

We may appreciate the contrast Hart is making here. The problem is again, however, that the account with which he contrasts his own has very little in common with the view actually propounded by Ross. On the contrary, in terms of characterising the phenomenology of following rules, Ross was substantially in agreement with and thus effectively preceded Hart on all three points.

As to *the first of these points* (*i.e.* the social character of the critical reflective attitude) it is quite clear from Ross's central chess analogy that he does not consider the internal, or in his terminology the ideological aspect of legal rules, to be merely a matter of *individual*

103. *Id.* at 57.

104. *Id.*; *See also* Hart, *Scandinavian Realism*, *supra* note 4, at 238. Relatedly, Hart warns against regarding the rule of recognition not as a public, common standard of correct judicial decision, but as something which each judge merely obeys for his part only. HART, *supra* note 4, at 115–16.

105. NEIL MACCORMICK, H.L.A. HART, 47–48 (2d ed. 2008).

106. HART, *supra* note 4, at 238.

107. *Id.* at 115; *See also Id.* at 11, 55, 84, 90, 105, 140.

feelings which just happen to coincide among a majority of judges in a given jurisdiction. Instead, he emphasises precisely the constitutive character of the social element:

[F]ellowship is an essential factor in a game of chess. [. . .] [T]he aims and interests pursued and the actions conditioned by these can only be conceived of as a link in a greater whole which include the actions of another person. [. . .]

Fellowship is also revealed in the intersubjective character of the rules of chess. It is essential that they should be given the same interpretation, at least by the two players in a given game. Otherwise there would be no game, and the separate moves would remain in isolation with no coherent meaning.<sup>108</sup>

Furthermore, Ross is quite eager to emphasise that the relevant “binding feeling” is precisely *not* a merely individual feeling of compulsion—and for virtually the same reasons as Hart:

These directives are felt by each player to be socially binding; that is to say, a player *not only feels himself spontaneously motivated* (*‘bound’*) to a certain method of action but is at the same time certain that a breach of the rules will call forth a reaction (protest) on the part of his opponent.<sup>109</sup>

This essentially social character of the relevant attitude also has a bearing *on the second alleged point of contrast* (*i.e.* on the distinction between compulsion and free deliberation), because it makes clear that Ross is not dealing with *immediate* feelings of compulsion but with only *mediately* binding feelings. Furthermore, we should note that Ross rarely speaks literally of *compulsion* and only in contexts where he is stressing the emotional and hence irrational and unverifiable character of judges’ beliefs.<sup>110</sup> Elsewhere, he writes *e.g.* “the legal consciousness is, like the sense of morality, *a disinterested attitude of approval or disapproval* toward a social norm.”<sup>111</sup> The judge is “motivated by disinterested impulses”<sup>112</sup> or by “a normative ideology of a known content,”<sup>113</sup> and he describes the judge as a “a human being who will carefully attend to his social task by *making decisions* which he feels to be ‘right’ in the spirit of the legal and cultural tradition.”<sup>114</sup>

These passages are considerably closer to the terminology

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108. ROSS, *supra* note 9, at 131.

109. *Id.* at 14 (emphasis added).

110. *Id.* at 16 – where Ross speaks only indirectly about judges through the analogy of chess players.

111. *Id.* at 369 (emphasis added).

112. *Id.* at 53.

113. *Id.* at 74.

114. ROSS, *supra* note 9, at 131 (emphasis added).

preferred by Hart, and they arguably make it more difficult to uphold the image of the relevant Rossian feelings as unconditional all-or-nothing compulsive states which obsessively dominate the judge's mind and force her to reach a particular decision. On the contrary, Ross explicitly states in his canonical formulation of the predictive theory that a given rule's being valid (*i.e.* that judges "feel bound" by it) means only that if the relevant pattern of behaviour is considered to exist in a case brought before the court, that rule "will form *an integral part of the reasoning underlying the judgment.*"<sup>115</sup> In other words, the relevant feeling, the propositional attitude toward the individual legal rule, is one which allows of degrees: the attitude manifests itself in a pull in the judge's comprehensive motivational structure but this pull may in individual cases be counterweighed or deflected by stronger pulls exerted by other rules which the judge also feels socially bound by, *i.e.* thinks are valid.<sup>116</sup>

Finally, on this second alleged point of contrast it seems that Hart too has to include *some kind* of bindingness in the rules. If the critical reflective attitude is characterised by the attitudinist thinking "of his conforming behaviour as 'right,' 'correct,' or 'obligatory,'"<sup>117</sup> it is arguably hard to see how anyone can have such an attitude and still consider herself absolutely free to decide whether to conform or not.<sup>118</sup> To be sure, this force that binds the attitudinist is not literally compelling, but neither was, as we saw, the force which Ross countenanced (hence also inverted commas: "bound").

This brings us to *the third of the alleged points of difference* (*i.e.* the epistemic aspect of Hart's critical reflective attitude). For as it turns out, the kind of binding force which Hart thus has to admit the existence of (and which—together with the more relaxed understanding of Ross's bindingness—undermines the picture of a sharp contrast between free and compulsive accounts of the internal aspect), stems precisely from this epistemic aspect. The attitudinist feels "forced" to conform, *i.e.* considers a certain pattern of behaviour obligatory, precisely because she accepts a certain set of *reasons* which *justify* the rule. In other words, she considers the rule "binding" in the same rather puzzling way in which we generally consider binding the

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115. *Id.* at 42 (emphasis added).

116. In this respect (though of course not in others), Rossian rules are a lot like Dworkinian principles.

117. HART, *supra* note 4, at 115.

118. In fact, Ross already stressed this exact point in his review of Hart. See Ross, *Review of H. L. A. Hart, The Concept of Law*, *supra* note 10, at 1188; See also MACCORMICK, *supra* note 105, at 48; See also Brian Leiter, *The Demarcation Problem in Jurisprudence: A New Case for Scepticism*, 31 OXFORD J. OF LEGAL STUD. 663, 672 (2011).

conclusion of a valid argument with true premises.

Mindful of Ross's criticism of natural law style cognitivism we might try, then, to restate the difference between the two relevant attitudes: they may both be social and they may both be considered binding only in a guarded or metaphorical sense, but could it be that Ross, unlike Hart, cannot countenance for the epistemic aspect characteristic of the internal aspect of rules?

Thus stated, however, the objection overlooks *that in spite of Ross's norm-skepticism* he actually also characterises the judicial propositional attitude as a kind of cognizance. We already saw that Ross too thinks that the judge will try to make "decisions which he feels to be 'right' in the spirit of the legal and cultural tradition."<sup>119</sup> He too thinks that the judge "wishes to find a decision ... which is 'valid' [valid<sub>2</sub>]."<sup>120</sup> And just like Hart, Ross thinks that if a judge considers a legal rule valid (valid<sub>2</sub>) it implies that the judge apply the rule "as an integral part of the reasoning underlying the judgement,"<sup>121</sup> *i.e.*, as a premise in an argument claiming to justify a particular legal decision!<sup>122</sup>

In other words, there can be little doubt that Ross considers the relevant propositional attitude *epistemic* in more or less the same way Hart does, *i.e.* as a cognizance. It might be objected that this contradicts Ross's more general norm-skepticism, but this confounds epistemological and phenomenological levels of the discussion. A gambler who holds that the preceding series of ten consecutive blacks on the roulette has increased her chances of winning the next bet on red obviously takes this belief to be *correct*. If challenged she will presumably cite the preceding series as her reason for holding it, as its *justification*. *Qua attitude*, then, this belief is indistinguishable from that of the gambler next to her who unlike her thinks that the probability of red winning next is left unaffected by the preceding series. She too will take her particular belief to be *correct*, and if challenged she too will cite particular beliefs as her *reason* for holding it; as its *justification*. To be sure, she will cite different (and presumably better) reasons, but this has no bearing on her attitude *qua attitude*. Both gamblers, it seems, take their respective beliefs to be correct and "socially binding" in the same way; that is, they consider its correctness a matter not of their individual thoughts or feelings but of its intersubjective justifiability. The difference, then, is a fact, *not* of

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119. ROSS, *supra* note 9, at 138.

120. *Id.* at 99.

121. *See Id.* at 42.

122. *See Id.* at 62, 283-84.

the attitude but of its *actual justifiability*. The difference is not *phenomenological* but *epistemological*.

This example illustrates more generally the importance of separating questions regarding *perceived* justifiability from questions regarding *actual* justifiability. It tells us that we do not, in order to determine whether a given propositional attitude is epistemic, *i.e.* whether the person who holds it takes the proposition to be justifiable, have to establish that that proposition is in fact also justifiable. On the contrary, it is perfectly possible to express scepticism with regard to the actual justifiability of given beliefs while simultaneously fully recognising the presence of contrary beliefs in other people. This was precisely what Ross did when he described how the judge tries to make “decisions which he feels to be ‘right’ . . .”<sup>123</sup>

In fact, this last point is just to repeat and reapply the distinction between norm-expression and norm-description, and thus to show that Frege’s insight described above as to the truth-condition transforming capabilities of propositional attitude reports holds good also with regard to epistemic attitudes.

#### CONCLUSION—AND BEYOND: ON THE REAL DIFFERENCE BETWEEN ROSS’S LEGAL REALISM AND HART’S LEGAL POSITIVISM

By now it should be clear that Ross did not make any of the mistakes Hart accused him of. First of all, Ross did not *overlook* the internal aspect of legal rules. On the contrary, under the heading “a coherent whole of meaning and motivation,” Ross was completely aware of its existence and repeatedly stressed the need for an “introspective method” in order to capture it. And in spite of Hart’s claim to the opposite Ross did not *misconstrue* this internal aspect either. On the contrary, he gave a full and, if anything, even richer phenomenological analysis of it than did Hart.<sup>124</sup> In other words, by portraying the rich phenomenology of Ross’s account of the judge’s normative ideology as just one big un-analysable blob of “feelings of compulsion,” Hart in effect committed a straw man fallacy.

But this raises a final question as to the more general upshot of this entire discussion. What are the broader implications of these conclusions for our understanding of the theoretical relationship between the legal philosophies espoused by Ross and Hart respectively? And what are or what should be the implications more generally for our understanding of the theoretical relationship between legal realism and legal positivism?

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123. *Id.* at 138.

124. Eng, *supra* note 6, at 231.

One natural option, perhaps, would be to conclude that Ross and Hart were actually in agreement on fundamentals. If Ross did not make any of the mistakes Hart accused him of, it could seem natural to conclude that they were really in agreement. In effect, this was the conclusion drawn by Eng in his recent study of the exchanges between Ross and Hart. Here Eng concluded that “*Hart’s method . . . is also Ross’s method . . .*,”<sup>125</sup> that any perception of a “theoretical gulf” between the two “is deceptive.”<sup>126</sup>

On this reading, then, the primary result of setting the record straight is a minor correction to that long chapter in the history of 20th century legal philosophy dealing with Hart’s enormous influence. This chapter currently hails Hart for accomplishing a substantial methodological breakthrough to jurisprudence precisely through his introduction of the distinction between the internal and external aspects of social rules. To the extent the general conclusion to the foregoing discussion is that Ross and Hart were actually in agreement, the only upshot of it, then, would seem to be that contrary to widespread belief we in fact have a *dual* starting point for this important invention. The discussion would not, however, have any deeper theoretical impact. Legal philosophy would be able to proceed undisturbed down the path it had already been moving since it (or some significant subset of it) decided to follow “Hart’s method.” Only it would of course now in all decency have to admit that it was in fact following “Ross’s and Hart’s method”—and that it could have begun its journey a few years earlier had it not misunderstood Ross.

Correspondingly in the broader theoretical landscape, if we take Ross and Hart as paradigmatic proponents of legal realism and legal positivism respectively, we would seem to end up with a blurring of any sharp boundary between legal realism and legal positivism. By revealing these actual theoretical alignments, we would of course have to redraw our general theoretical map quite considerably, but besides a regained access to the more detailed insights of Ross’s work the rehabilitation of him (and potentially of other Scandinavians) would not imply any genuinely new jurisprudential insights.

I believe however that this conclusion would be wrong. Indeed I submit that we should draw the opposite conclusion: setting the record straight regarding Ross’s actual position makes us realize how he and Hart in fact remain in profound disagreement—primarily because even though Hart did to a great extent misrepresent Ross’s theory and in fact overtook or repeated central parts of it, he never fully appreciated

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125. *Id.* at 222.

126. *Id.* at 241.

Ross's most valuable and important insights.

To be sure, any such fundamental disagreement lies not in their respective phenomenological descriptions of the internal aspect *per se*. In terms of phenomenology I see no crucial differences between them—as witnessed by the whole argument so far. But Hart's importance is usually ascribed, not so much to his alleged discovery of the internal aspect, but to the methodological conclusions he has been taken to draw on that background. And the crucial difference between Hart and Ross lies precisely in the methodological conclusions they each draw from this. Or fail to draw. One of the benefits of exposing the deficiencies of Hart's criticism of Ross is that it allows us to see the shortcomings of Hart's theory more clearly. Through the prism of Hart's mistaken criticism and against the backdrop of the clear and principled position actually held by Ross we see first of all how *underdeveloped* Hart's theory really is in terms of method. Secondly, insofar that a coherent position on method can be reconstructed, we see also how *unoriginal* it comes out and how closely it resembles Kelsen's version of legal positivism. In other words—and contra Eng—the preceding study of Hart's mistaken criticism of Ross allows us to *reassert* more clearly the categorical difference between legal realism and legal positivism.

To see this we should first recapitulate the two key methodological insights of Ross's theory, and then compare where Hart stands on each of these issues. As we have seen Ross consistently observed two logically distinct theoretical distinctions. First of all he urged us to abandon behaviourism and to apply an introspective method. The scientific study of legal rules is possible, Ross claimed, only “through ideological interpretation, that is, by means of the hypothesis of a certain ideology which animates the judge and motivates his actions.”<sup>127</sup> In this literal sense legal science has to be *internal* (*~internal*<sub>1</sub>).

But by insisting that the propositions of legal science be *norm-descriptive*, not *norm-expressive*, Ross also issued a methodological imperative with regard to a completely different internal-external divide, *i.e.* the one between directly expressing normative propositions (*~internal*<sub>2</sub>) and making propositional attitude reports about such propositions (*~external*<sub>2</sub>). *Introspection* does not imply or necessitate *adoption* of the introspected point of view. The legal scientist's propositions about the existence of legal rules have to be propositional attitude reports (although the propositions of judges and lawyers obviously need not). In this metaphorical sense, Ross's method is

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127. ROSS, *supra* note 9, at 37.

*external* because the legal scientist has to stay on the ‘outside’ of the propositional attitude context. *Qua* scientist she is prohibited—for epistemological reasons—from adopting those same attitudes and from making (in whatever guarded/hypothetical way) those same statements. Instead, her job consists entirely of observing and stating the fact that somebody else (*i.e.* California, Illinois, common law etc. judges) have adopted the relevant kind of propositional attitude toward certain rules.

So to sum up, Ross’s dual methodological advice in *On Law and Justice* is that legal science should be simultaneously *internal*<sub>1</sub> and *external*<sub>2</sub>. By contrast, and this is my critical claim, the sum of methodological wisdom found in Hart’s work amounts only to one explicit advice: don’t be behaviourist! In other words: be *internal*<sub>1</sub>! Beyond correctly replicating (and oft repeating) this valuable insight, it is simply very hard to find an indication in *The Concept of Law* of Hart’s awareness of the existence—let alone the methodological importance—of an additional internal-external distinction along the lines observed by Ross. And, insofar that it is possible to reconstruct a view indirectly from the scarce textual evidence, I submit that Hart’s methodological stance is that legal science should stay on the internal side also of this particular second kind of the internal-external divide, *i.e.* stay *internal*<sub>2</sub>!

This may sound somewhat surprising considering the legacy of Hart’s legal philosophy. After all, his version of legal positivism has been hailed by several theorists precisely for showing a “third way” between austere behaviourism and natural law. MacCormick expresses this sentiment well:

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,’ because 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

[. . .].<sup>128</sup>

It is first and foremost this *hermeneutic* or *non-extreme external point of view* which has earned Hart his reputation for methodological sophistication. Several legal philosophers emphasise not merely Hart's renunciation of behaviourism but rather his outlining of such a third point of view, which is external and yet distinct from the "extreme external point of view."<sup>129</sup> And when Eng claimed that "*Hart's method* [. . .] is also *Ross's method*"<sup>130</sup> he referred precisely to this passage from MacCormick.

Carving out such a moderate or non-extreme external point of view is attractive because it holds the promise of saving modern legal positivism from the scientific excesses of its earlier versions without simultaneously losing the school's distinctiveness from natural law. And judging from MacCormick's description cited above one might find that Hart's non-extreme external point of view has sufficient similarities with Ross's dual *internal*<sub>1</sub> & *external*<sub>2</sub> approach to make at least *prima facie* plausible Eng's claim that Hart's method is also Ross's method.

To be sure, most theorists admit that Hart was in fact rather vague on this issue. But they nevertheless assert that the third point of view must somehow be present as a tacit premise and they infer this more generally from Hart's adherence to legal positivism and to meta-ethical non-cognitivism.<sup>131</sup> In a characteristic passage, MacCormick thus writes:

If there is any point which seems to capture that which the Hartian legal theorist as such must hold, it is surely this 'nonextreme external point of view' [. . .] *He does, after all, describe himself as a legal positivist*, taking as his ground for that the proposition that understanding a law or a legal system in its character as such is a matter quite independent of one's own moral or other commitment to upholding that law or legal system.<sup>132</sup>

Correspondingly Eng maintains that Hart's mistaken reading of Ross is explained by Hart's "being lost *in the Hartian system*,"<sup>133</sup> *i.e.* that the whole structure including the "third point of view" must have

128. MACCORMICK, *supra* note 105, at 59 (first emphasis added).

129. In addition to MacCormick as quoted immediately above and Eng as quoted immediately below, this tendency is exemplified, *e.g.*, in Shapiro, *supra* note 6, at 1158-1160, and Kevin Toh, *Hart's Expressivism and his Benthamite Project*, 11 *Legal Theory* 85 (2005).

130. Eng, *supra* note 6, at 222.

131. Besides MacCormick and Eng as illustrated immediately below, *see, e.g.*, Toh, *supra* note 129, at 82.

132. MACCORMICK, *supra* note 105, at 52 (emphasis added).

133. Eng, *supra* note 6, at 196 (emphasis added).

been tacitly present in *The Concept of Law* all along.

However, three points render this reading problematic. *First*, it is simply very hard to find solid textual evidence for a third non-extreme external point of view in *The Concept of Law*. In fact, Hart admitted later in his career that he had *not* originally thought of any further distinctions besides internal<sub>1</sub>/external<sub>1</sub> points of view, and he even expressed regret that he had overlooked the important, related distinction the between *committed* and *detached* normative statements later developed by Joseph Raz.<sup>134</sup> Furthermore, Hart applauded this theoretical invention as a welcome opportunity to clarify his own theory praising the detached normative statements for creating the logical space to make sense of the difference between legal positivism and natural law.<sup>135</sup>

*Second*, in terms of methodological innovation this seems to merely bring Hart right back into mainstream legal positivism! Raz originally developed this distinction to make sense of Kelsen's somewhat enigmatic claims about "ought-statements" in legal science.<sup>136</sup> Hart was in fact very well aware of this link to Kelsen, and he emphasised how the concept of detached normative statements was for him the key to finally making sense of Kelsen's theory about "ought-statements" and to see the deep commonalities with his own theory.<sup>137</sup> In other words, if we equate Hart's method with the making, from a non-extreme external point of view, of such detached normative statements it turns out that *Hart's method* is for all practical purposes also *Kelsen's method*.

*Third*, whereas Hart is probably right in thinking that the distinction between *detached* and *committed* normative statements can consistently be added to his analysis of valid law, it should be strongly emphasised that detached statements nevertheless remain categorically different from the so-called norm-descriptive statements which Ross insists should be the cornerstone of legal science—and hence, that a deep theoretical gulf between Hart's/Kelsen's legal positivist method and Ross's legal realist method remain.

This is so because detached normative statements about valid law—as defined by Raz and later adopted by Hart—simply are not

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134. See, H. L. A. Hart, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 154-155 (1982), and Hart, *supra* note 8, at 14-15, both places referring to JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 146-62 (1979).

135. See H. L. A. HART, *ESSAYS ON BENTHAM*, *supra* note 134, 154-55 (1982); See also HART, *supra* note 8, at 14-15.

136. Raz, *supra* note 134, at 146-62.

137. Hart, *supra* note 8, at 15.

statements about *any* social-psychological fact! In Raz's words:

It is important not to confuse such statements from a point of view with statements about other people's beliefs. One reason is that there may be no one who has such a belief. The friend in our example may be expressing a very uncommon view on an obscure point of Rabbinical law. Indeed Rabbinical law may never have been endorsed or practiced by anybody, not even the enquiring Jew.<sup>138</sup>

On the contrary, such detached normative statements are immediately norm-expressive in Ross's sense:

Nor can such statements be interpreted as conditionals: 'If you accept this point of view then you should etc.' *Rather they assert what is the case from the relevant point of view as if it is valid or on the hypothesis that it is—as Kelsen expresses the point—but without actually endorsing it.*<sup>139</sup>

This immediately *norm-expressive* and hence clearly *non-propositional attitude reporting* character of the detached normative statements coincides very well with the analysis of validity generally offered in *The Concept of Law*. First of all, Hart's truth conditions for statements about valid law are plainly very different from propositional attitude reports: "it is plain that there is no necessary connection between the validity of any particular rule and *its* efficacy . . ."<sup>140</sup> Instead they rely on a verification procedure where valid law is conceived as any normative conclusion arrived at through a valid chain of inter-normative reasoning from a given foundational norm:

To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system. We can indeed simply say that the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition.<sup>141</sup>

At the same time this of course reminds us that there is one very well-known exception to this claim that Hart's theory does not contain propositional attitude reports in the Rossian sense. And this exception has to do with the validity of the foundational legal rule of a given legal system; the rule of recognition. To Hart the validity of *this particular rule* can only be established in the following kind of propositional attitude report: "In England they recognize as law . . . whatever the Queen in parliament enacts."<sup>142</sup>

138. Raz, *supra* note 134, at 156–57.

139. *Id.* at 157 (emphasis added).

140. Hart, *supra* note 4, at 103.

141. *Id.* at 103.

142. *Id.* at 102.

It would however be a grave mistake to think that this particular similarity could somehow bridge the theoretical divide between Ross and Hart. First of all, even Kelsen in his own way agrees that the validity of the basic norm of a legal system cannot be determined completely in ought-terms.<sup>143</sup> He too insists that it presupposes at the very least the effectiveness of that norm.<sup>144</sup> And not many legal philosophers would for that reason claim that Kelsen and Ross were ultimately in agreement.<sup>145</sup> Second, Hart's particular example ("In England they. . .") is not a detached normative statement simply because it is not *a statement from a point of view* in the sense defined by Raz.<sup>146</sup> Finally, we would do well to remember that Hart's rule of recognition is exceptional in *his* comprehensive theory of valid law (like Kelsen's basic norm is in his theory). The rule of recognition is thus the *only* rule whose validity can be established thus. For all other legal rules (all the primary rules) they can simply not, as we have seen, be construed as Rossian style statements about anybody's beliefs; *their* validity is determined in a completely different, non-empirical manner, *i.e.* through a complex inter-normative chain of reasoning. As Hart states: "It is of course common for a jurist expounding the law of some system to do so in the form of detached normative statements."<sup>147</sup> Thus, more or less all propositions produced at ordinary law faculties—in tort law, EU-law, contract law, etc.—should, according to Hart, have the character of such detached normative statements. The legal scientist's statements should in all these areas be (detached) norm-expressive; not norm-descriptive.

Based on these considerations, I think it is fair to conclude that Eng is wrong when he claims that Hart's method is also Ross's method. On the contrary, the fundamental difference between their respective methods is clear: For Hart (as for Kelsen), once the rule of recognition (/the basic norm) has been identified empirically, legal science proceeds by making (detached) norm-expressive statements about valid primary rules. It is thus a discipline *in* norms, *i.e.* a discipline that expresses normative conclusions on the basis of complex inter-normative inferences.

This in contrast with Ross according to whom legal science shall

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143. See, Hans Kelsen, *General Theory of Law and State*, 118-121 (3d ed. 2009).

144. *Id.*

145. Indeed, both Kelsen and Ross vehemently denied this. See Kelsen, *Österreichische Zeitschrift für Öffentliches Recht*, (1959-60); see, *e.g.*, Ross, *Validity and the Conflict Between Legal Positivism and Natural Law*, *supra* note 10.

146. One such detached statement can in fact also be made about the rule of recognition: "Whatever the parliament enacts is law."

147. Hart, *Essays on Bentham*, *supra* note 134, at 154.

only make norm-descriptive assertions, *i.e.* propositional attitude reports about the totality of judges' actual normative beliefs. On this account legal science becomes a purely empirical study, *i.e.* a socio-psychological study of the beliefs commonly held by judges, and of their likely judicial actions on the basis thereof.

More generally, emerging from the study of the exchanges between Hart and Ross we see in these differences a simple, clear, and principled way of finally making sense of the notoriously elusive theoretical distinction between legal positivism and legal realism.