

10-16-2009

# The Legitimacy of International Human Rights

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## Recommended Citation

"The Legitimacy of International Human Rights" (2009). *Legal Philosophy between State and Transnationalism Seminar Series*. 31.  
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***Four Concepts of Validity:  
Reflections on Inclusive and Exclusive Positivism***

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**A. The State of Play**

In a well known passage from *The Concept of Law*, H.L.A Hart makes the following remark:

The law of every modern state shows at a thousand points the influence of both the accepted social morality and wider social ideals...In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values...<sup>1</sup>

How is one to interpret the provocative claim made in Hart's second sentence?

Providing a plausible answer to this question has been one of the main projects of modern positivism, and has led to the development of two different streams within that theory.

Those who defend versions of "Inclusive Legal Positivism" often point to the phenomenon Hart describes as illustrating a crucial fact which no viable legal theory can deny: that there is nothing in the nature of law which rules out the possibility that consistency with a moral norm might serve among the conditions for legal validity within a particular legal system. In Hartian terms, there is nothing in the very nature of law which rules out the conceptual possibility that a rule of recognition – whose existence and content are purely contingent matters of social fact – might, as a matter of further social fact, include conformity with one or more moral norms among its conditions for legal validity.<sup>2</sup>

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<sup>1</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994), 203-4.

<sup>2</sup> See, e.g., W.J. Waluchow, *Inclusive Legal Positivism* (Oxford: Oxford University Press, 1994); Jules Coleman, *The Practice of Principle* (Oxford: Oxford University Press, 2001); Matthew Kramer, *Where Law and Morality Meet* (Oxford University Press, 2004).

Defenders of Exclusive Positivism vehemently oppose all such readings of Hart's suggestion and of the practices it purports to describe. They argue that consistency with a moral norm simply cannot, as a conceptual matter, figure among the conditions for legal validity, and that Hart made a serious mistake in suggesting otherwise.<sup>3</sup> These "Exclusive Positivists" proclaim the "sources thesis," that the conditions for legal validity must focus exclusively on factors which have nothing at all to do with the merits (moral or otherwise) of the norm in question, else we end up mixing up questions of law and morality which it is the business of law to separate for us. The validity of a norm always depends exclusively on whether, e.g., it has the appropriate source in precedent or congressional legislation. To think otherwise – that is, to think that legal validity could in some way be tied to moral conditions – would force one to deny a number of key features of legal practice. Not the least of these is the law's claim to be a legitimate authority one of whose primary tasks is to regulate and guide our conduct in ways which allow us to avoid the controversial moral and political questions which dog modern political societies.<sup>4</sup>

So Exclusive Positivists thoroughly reject the inclusivist account of Hart's observation about the American rule of recognition. That rule *does not*, because it *cannot*, recognize consistency with moral norms specified in the American *Constitution* and its

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<sup>3</sup> See, e.g., Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979); Leslie Green, "Legal Positivism", *The Stanford Encyclopedia of Philosophy* (Spring 2003 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/spr2003/entries/legal-positivism/>; Scott Shapiro, "On Hart's Way Out, 4 *Legal Theory* (1998), 469 and "Law, Morality and the Guidance of Conduct" 6 *Legal Theory* (2000), 127; Andrei Marmor, *Positive Law and Objective Values* (Oxford: Clarendon Press, 2001); Michael Guidice, "Unconstitutionality, Invalidity, and Charter Challenges" 15 *Canadian Journal of Law and Jurisprudence* (2002), 69 and "The Regular Practice of Morality in Law" *Ratio Juris*. Vol. 21 No. 1 2008, (94–106) .

<sup>4</sup> See, e.g., Raz, and Shapiro, *ibid*. For an overview of the debates between Inclusivists and Exclusivists, see my "Legal positivism, Inclusive versus Exclusive" In E. Craig (Ed.), *Routledge Encyclopedia of Philosophy* (London: Routledge, 2001) <http://www.rep.routledge.com>.

constituent *Bill of Rights* as a condition of validity for American laws. But we seem to have a problem here. The American *Bills of Rights*, as it has been interpreted and applied over the years in adjudicating constitutional disputes, *does* seem to permit citizens to challenge legal validity on moral grounds. For example, the “due process clause,” is widely regarded as specifying a constitutional test of *fairness*. And it *does* seem as though these norms of fairness serve just the kind of role that Hart describes, as norms consistency with which is among the criteria for legal validity within the American legal system – just the kind of possibility contemplated by Hart and other Inclusive Positivists.

Now it might seem as though this seemingly undeniable fact is fatal to Exclusive Positivism. But appearances are said to be deceiving. And it is here that things get very tricky indeed. Contrary to what one might initially have thought, Exclusive Positivists are actually quite happy to acknowledge a thoroughly robust role for norms of political morality in the kinds of constitutional cases Hart mentions. They simply dispute the Inclusive Positivist’s *theoretical account* or *interpretation* of this feature of legal practice, and the consequences, for legal theory, which that account is said to entail. The American rule of recognition does not, via the due process clause, specify fairness as a condition of legal validity. Rather, it specifies a moral condition under which judges are legally required to exercise what Joseph Raz calls a “directed power,”<sup>5</sup> to *change* the law. On this reading, the *Bill of Rights* specifies moral conditions under which judges are obligated to invalidate what was, till the judicial act of striking it down, perfectly valid law – perfectly valid because, up till that particular point in time, the law satisfied all the

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<sup>5</sup> See Joseph Raz, “The Inner Logic of the Law” in *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, rev. ed. (Oxford Clarendon Press, 1996), 242.

relevant source-based criteria. It was, e.g., duly enacted by Congress, met with the requisite approval from the Executive branch, and so on. In other words, the American rule of recognition does not, by way of its *Bill of Rights*, establish consistency with the norms of fairness as a fundamental test for legal validity. On the contrary, the fundamental rules involved in these scenarios are examples of what Hart calls “rules of change.”<sup>6</sup> The *Bill of Rights* specifies moral conditions the application of which triggers the legal obligation of a judge to exercise her Hohfeldian power to *alter* the state of valid law. If an existing law violates due process, then the judges are mandated to change it, by invalidating it, reading it down, or otherwise restricting its application. The end result? The existence and content of valid laws still depend exclusively on their sources – including judicial acts of “striking down” – even though moral norms can and do figure prominently in legal decisions, via a system’s rules of change, to eliminate or otherwise change them.

Despite its undoubted appeal as a sophisticated theoretical account of an important aspect of legal practice, I remain troubled by the Exclusivist’s directed powers account of constitutional challenges.<sup>7</sup> The main source of my discomfort lies in its tendency to run up against key aspects of constitutional challenges – including how legal actors conceive what they are doing when they argue or decide constitutional cases.

These aspects of legal practice sit uncomfortably with the directed powers account. On

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<sup>6</sup> See *The Concept of Law*, 95-9.

<sup>7</sup> Henceforth, I will use the phrase ‘constitutional challenge’ to refer to the kinds of cases to which Hart makes reference – cases in which norms of political morality are invoked in applying an instrument like the American *Bill of Rights* to address in some way the legal validity of some other norm, e.g., a statute. I say ‘in some way’ so as to remain neutral as to whether the judge is deciding whether the norm is already invalid or whether it is in need of invalidation.

the other hand, I am equally troubled by certain implications of the rival, inclusive account of constitutional challenges. It too sits uncomfortably with (different) key aspects of legal practice which seem equally undeniable. These conflicting sources of discomfort are nicely reflected in a recent exchange between Ken Himma and Matthew Kramer over the question whether modern legal systems actually do include rules of recognition containing moral criteria for legal validity. According to Himma, the following is how an Inclusive Positivist would have us understand the American or Canadian rule of recognition: “*A duly enacted... norm is law if and only if it conforms to the substantive norms of the Constitution (properly interpreted)*”<sup>8</sup> In Himma’s view, this is not, as a matter of empirical fact, the rule actually in play in American and Canadian judicial practice.<sup>9</sup> On the contrary, American and Canadian judges follow a rule of recognition more like the following: *A duly enacted norm “is law, other things being equal, until declared inconsistent with the best interpretation of the Constitution that comports with due regard for precedent by the highest court to consider the constitutionality of [the norm].”*<sup>10</sup> Himma takes it to be an empirical fact that American and Canadian legal actors engage in practices better described by this second rule. They have adopted a practice of always deferring to judicial *interpretations* of the moral norms cited in their *Bill (and Charter) of Rights*, and it is consistency with these precedents, not the specified

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<sup>8</sup> Ken Himma, “Final Authority to Bind with Moral Mistakes: On the Explanatory Potential of Inclusive Legal Positivism,” 24 *Law and Philosophy* (2005), 1-45, 18, emphasis added. Himma’s formulation is restricted to federal norms, but I have taken the liberty of widening it to encompass all laws within the American legal system, on the understanding that the American *Constitution* applies to all laws within the United States. I do not believe that this adversely affects any of the arguments made in this paper.

<sup>9</sup> Himma is happy to acknowledge the conceptual possibility of genuinely inclusivist criteria. He nevertheless insists that no contemporary society, in which there tend to be deep disagreement about the requirements of morality, actually includes any such criteria. According to Himma, there is insufficient convergence of belief and official action to sustain a conventional rule of recognition containing any such criteria.

<sup>10</sup> “Final Authority,” 24, emphasis added. Again, I have taken the liberty of widening the formulation so that it encompasses all laws within the American legal system.

moral norms themselves, which serves as a condition of legal validity. Of course the existence of such precedential interpretations is always a matter of social fact of the kind Exclusive Positivism points to as eligible sources of law. The result? One which will comfort a defender of that view. In all these legal systems, including the American one with its constitutional *Bill of Rights*, moral norms do not serve the role Hart and other Inclusive Positivists say they do. They do not serve as conditions for legal validity. Matthew Kramer, a card carrying Inclusive Positivist is unhappy with Himma's rendering of matters, and sets out to defend a distinctive role for the relevant moral norms – a role which is consistent with Himma's empirical observations. His claim is that the kind of deference Himma describes is fully compatible with an otherwise decisive role for the relevant norms of political morality (not the judges' interpretations of them) in constitutional challenges. The result? One which, if successful, will comfort the Inclusive Positivist. These legal systems remain as illustrations of the possibility Hart seemingly brought to our attention: that "In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values."

My principal aim in this paper, is not to explore the Himma-Kramer debate so as to determine which of the two has the better argument. Rather, I wish to use it as a spring board to what is, I hope, a richer understanding of the relevant conceptual landscape. As will become clear, I think that each of the two disputants has highlighted points of significance which no one concerned to understand the nature of law can safely ignore. My aim is to use their dispute as a means of bringing into relief something which is

becoming increasingly clear – at least to me: that each side of the Inclusive/Exclusive debate highlights and explains important aspects of legal practice for which no plausible theory of law can fail to account – *and does so reasonably well*. On the other hand, each side does a *less than stellar* job of highlighting and explaining other important aspects of legal practice for which no plausible theory can fail to account. This is a situation we should endeavor to avoid if at all possible. We can begin to do so, I shall argue, if we acknowledge that there are in fact crucially different notions of validity at play in these debates.– and that we need a (more inclusive?) theory of law which does finds room for all of them.

## **B. The Himma/Kramer Dispute**

As observed at the outset, Hart asserts that conformity with constitutionally recognized norms of justice counts among the conditions for validity within the American legal system. According to Himma, this claim is empirically false. What are in fact doing all the work in such constitutional cases are not the norms of justice, but the courts' decisions about them. "[A] moral norm *N* cannot function as a necessary or sufficient condition of legality if the rule of recognition grants a court general legal authority to bind officials with either of two conflicting decisions on whether a proposition is law in virtue of satisfying *N*."<sup>11</sup> The powers of courts to introduce precedent-setting – and hence law-determining – interpretations of the recognized moral norms renders the latter of no legal force or effect. Whether, in truth, a duly enacted law, *R*, violates *N* is legally irrelevant. Before the courts becomes involved (if they ever do) in the question of *R*'s

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<sup>11</sup> *Ibid.*, 2.



validity, *R* is valid because it was duly enacted; and its having been duly enacted means that it satisfies all the relevant source-based criteria of validity. Of course, once the courts become involved with the question whether *R* is consistent with *N*, their judgment about *R*'s conformity with *N* now determines its validity. What ultimately matters at that point is whether the highest court to have addressed the question of violation has ruled that *N* has been infringed. If it determines that *R* is inconsistent with *N*, then *R* is invalid; if it rules that *R* is consistent with *N*, then *R* is valid. The court's *decision* about *N*, not *N* itself, is what ultimately determines validity. Hence, sources continue to do all the work; moral merit plays no role at all.

Matthew Kramer is understandably unhappy with this result and sets out to show that the relevant moral norms can and do continue to play a decisive role in matters of legal validity arising in constitutional cases. Kramer's analysis is multi-faceted and subtle, but his main points seem to be the following. First, having the power to bind someone with a mistaken decision, does not mean that one is at liberty or has the authority to do so.

If someone is legally empowered to accomplish a certain alteration in legal relations but is not legally at liberty to do so [because, e.g., she must do so only when *N* is actually in conflict with a putatively valid legal norm, *R*, but there is, in fact, no such conflict between *N* and *R*], then she does not have the discretion or authority to do so. She *can* accomplish the alteration, but she *may* not; that is she cannot *permissibly* accomplish it. Yet, according to Himma, the Supreme Court is in precisely such a situation in connection with its erroneous law-ascertaining judgments.<sup>12</sup>

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<sup>12</sup> *Where Law and Morality Meet*, 127.

In other words, even when legal officials are bound by a superior court's mistaken interpretations of *N*, it remains true that the judges in that superior court – so long as they are not bound by an interpretation of *N* issued by a court superior to them – are required to apply *N* in making their decisions regarding the legal validity of *R*. *N* itself serves, at least for them, as a criterion of validity. The fact that they are in this way bound is evidenced by a number of factors, not least of which is that legal actors, including those who are bound by the superior court's decision on the relevant constitutional question, will nevertheless consider it quite appropriate to criticize (or praise) the court's decision on whether *R* is in conflict with *N* and is therefore unconstitutional. And, importantly, those who engage in criticism will do so on the ground that the court *got the law wrong*, that what the court *took to be valid* (or invalid) was in actual fact not valid (or invalid) at all. "Because the officials' denunciations and commendations of the Court's rulings share an underlying orientation toward that guiding principle [e.g. fairness], they sustain the existence of a duty on the Court to ascertain the law in accordance with that principle's requirements. Even when the denunciations and commendations are inapposite in their specific bearings, their justificatory foundations establish the standard which the Court is obligated to meet."<sup>13</sup> In short, criticism or condemnation of a Court's interpretation or application of *N* presuppose that conformity with *N* serves as the relevant criterion of validity. Otherwise, there would be no logical or legal basis for criticism, or praise for that matter.<sup>14</sup>

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<sup>13</sup> *Ibid.*, 130-1.

<sup>14</sup> One is reminded here of Leibniz's objection to the divine command theory of morality. Supposing that the standards of morality or perfection are determined by God's commands robs us of the ability to praise God for (necessarily) commanding the right things. How, Leibniz asks, can one praise an agent for making the right choices if there is no standard against which to measure those choices *save the choices that are in fact made by that agent*?

A second key point of criticism leveled by Kramer draws on the fact that criteria of validity within rules of recognition are often multiple in number and ranked in relation to one another. Certain doctrines of federal paramountcy supply one obvious example of this feature.<sup>15</sup> When a rule duly enacted by a state or provincial legislature requires a result which conflicts with another rule enacted by the federal legislature, legal systems often regard the latter as taking precedence over the former. When they do so, this is because enactment by federal legislatures is, in that system, taken to be a criterion of validity which overrides enactment by state or provincial legislatures. Much the same, Kramer suggests, can be true when one turns to the role of moral criteria of validity. Here judicial interpretations of a constitutionally recognized moral norm, *N*, can take precedence over *N* itself. In other words, if rule, *R*, *in fact* infringes moral norm *N*, but a court has *ruled* that *R* is in fact *consistent* with *N*, then the court's ruling on the question of consistency takes precedence. *R* is actually legal valid, despite its conflict with *N*. According to Kramer, this is exactly how the American rule of recognition works. "[T]he validating and invalidating effects of the Incorporationist criteria in the American Rule of Recognition are indeed [as Himma argues] superseded by any Supreme Court decisions that run contrary to those effects."<sup>16</sup> But importantly, for Kramer, "they are superseded only within the precedential purviews of the decisions. Beyond the precedential scope of each of those decisions, the moral principles [such as *N*] absorbed into the law by the Incorporationist criteria will have retained their force as legal standards to which the

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<sup>15</sup> This is my example, not Kramer's. But I think it provides a clear example of the kind of ranking he has in mind.

<sup>16</sup> *Where Law and Morality Meet*, 135.

conduct of everyone within the jurisdiction is subject.”<sup>17</sup> There is here, Kramer adds, “no across-the-board displacement; there are only piecemeal displacements.”<sup>18</sup> *R*’s actual conflict with *N* means that *R* is invalid but only till such time as the court rules to the contrary. After the ruling the superior criterion kicks in, rendering *R* no longer valid. But *N* continues to work as a criterion of validity on all other matters not subject to the court’s mistaken interpretation of it. In this respect, the legal force of *N* is analogous to the force that state or provincial rules often have when they run up against the requirements of a paramount federal statute. On some doctrines of federal paramountcy, the state or provincial rule remains valid and determines results in all cases in which there is no conflict with the federal law.<sup>19</sup>

So according to Kramer, one can retain a vital role for moral criteria for validity even after one has fully accommodated Himma’s insightful observations. That role may be more limited (or different) than initially contemplated by defenders of Inclusive Positivism, but it is an important one nevertheless. But is this in fact an accurate reading of Professor Kramer’s position? I must confess to a degree of puzzlement on this question. Consider the following scenario.

- (a) *R* is a “duly enacted” rule which satisfies all the relevant source-based criteria of validity;

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<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> This is precisely how the Canadian paramountcy doctrine operates. See Peter Hogg, *Constitutional Law of Canada* (2<sup>nd</sup> edn) (Toronto: Carswell, 1985), 113-114.

- (b) *R* is in fact inconsistent with moral norm, *N*, the norm of fairness to which the due process clause makes reference;
- (c) No court has ever ruled on whether *R* is consistent with *N*;
- (d) There have, therefore, been no erroneous court rulings on *N* which “displace” the effect of *N* on *R*.

Is *R* valid law on Kramer’s rendering of matters? In light of the quotations cited above (notes 16-18), it would seem that *R* is *not* valid, owing to its actual conflict with *N*. And this is precisely what one would expect an Inclusive Positivism to say. Kramer himself sums up this view nicely when he says:

Inclusive Legal Positivism, as understood throughout this book, consists in the following thesis: it can be the case, though it need not be the case, that a norm’s consistency with some or all of the requirements of morality is a precondition for the norm’s status as a law in this or that jurisdiction ...Insofar as a threshold criterion of that sort does prevail in any particular legal system, then, some degree of moral worthiness is a necessary condition for the legally authoritative force of each norm that is validated as a law within the system.<sup>20</sup>

According to Kramer’s interpretation of American law, it would seem, *R* can be duly enacted by Congress and yet be legally invalid owing to its actual conflict with a moral norm, *N*, which (a) has been incorporated into the law as a moral benchmark for validity, and (b) has not been subject to the “piecemeal displacement” brought about by erroneous judicial interpretations of *N*. To be sure, *R* will cease to be invalid should a court later rule erroneously in its favour – i.e. mistakenly rule that *R* is in fact consistent with *N*. But till such time as that ruling takes place, *R* is *in fact* legally invalid.

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<sup>20</sup> Kramer, *Where Law and Morality Meet*, 2.

Now it is at this point that the Inclusive account runs squarely up against apparent facts of legal practice to which defenders of Exclusive Positivism are apt to draw our attention: barring unusual circumstances, it is likely that rule, *R*, which is said to be invalid owing to its conflict with *N*, will nevertheless be *accepted and practiced as valid law* till such time as a court declares it to be invalid. And of course this is something that may never occur. A court may never in fact have the opportunity to issue a ruling on *R*'s validity because, e.g., no one has seen fit (for any number of reasons, perhaps financial) to issue a constitutional challenge. Even if such a challenge does eventually occur, and the court does in fact rule that *R* is invalid, the point remains: despite its objective inconsistency with *N*, *R* will likely be accepted and practiced as valid law, perhaps for decades, till such time as the court issues its ruling.<sup>21</sup> And if law is, as the positivists insist, ultimately a matter of social fact – of social practice – then there is a strong inclination to say that *R was* actually valid law till the point of the court's ruling, and that it would have remained valid law if no such ruling had ever occurred. In short, *R is* law if it is *accepted and practiced* as law. This important point is one to which Kramer seems rightly sensitive.

Himma...has repeatedly pointed out that norms duly adopted through legislative or judicial or administrative procedures are legal valid before any subsequent adjudicative pronouncements on their validity. Until those

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<sup>21</sup> I say only that it will *likely* be accepted and practiced as valid law because citizens and government actors, say administrative bodies charged with implementing *R*, may well refuse to accept or apply it in the firm belief that *R* violates *N* and is therefore constitutionally invalid. In fact, in some instances, courts and other government actors will continue to act in the belief that the law under which they act is valid (or invalid) even after a superior court has ruled otherwise. See, e.g., *Cooper v Aaron* 358 U.S. 1 (1958) where the state of Georgia refused to act on the belief, endorsed by the Georgia Court of Appeals and, ultimately, the American Supreme Court, that the American Constitution required the abandonment of segregated schools. Cases of "non-compliance" with a superior courts' rendering of a constitutional norm are highly controversial. But they do seem to occur, and they should give one pause in accepting Professor Himma's claim that mistaken judicial interpretations of validity criteria always trump those criteria themselves. On this broader issue, see Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999).

norms are challenged in the courts – if in fact they ever are challenged – they are routinely treated by officials as law *and are therefore properly classified as laws*.<sup>22</sup>

He later adds,

Himma rightly contends that the status of a norm as a law in the United States need not derive from the fact that the norm has been or would be deemed a law by the Supreme Court Justices in the event of a challenge to its constitutionality. A duly adopted norm's status as a law antecedes any such ruling by the Court, and continues until the norm is deemed unconstitutional by the Court or by an unappealed lower-court judgment – or until the norm is rescinded, of course.<sup>23</sup>

If I have him right, then, Kramer's position, as expressed in these particular passages, would appear to be this. Any rule, *R*, once duly adopted through appropriate legislative, judicial or administrative procedures and employed as a valid basis for asserting legal rights, claims and so on, is legally valid – at least till such time, if such a time ever comes about, that a court rules that *R* is inconsistent with *N*. And this is true even if, as an (objective) matter of fact, *R* is *not* consistent with *N*. In other words, if *R* is accepted and practiced as valid law, then it is in fact valid law – notwithstanding any inconsistency between *R* and moral validity criterion, *N*, and notwithstanding any future ruling a court might make as to *R*'s consistency with *N*. But how can this be, if, as Kramer also wants to insist, moral criteria can, and if the legal practices are right *do*, determine validity till such time as a court determines otherwise? If no paramount criterion of validity renders *R* invalid – which is supposed to happen only when a court (perhaps mistakenly) rules on whether *R* is consistent with *N* – then *N*, the subordinate criterion, is supposed to be the one in play. And if it is in play, then should not the legally correct answer be that, despite its being accepted and practiced as law, *R* is *in fact legally invalid*? Can a dyed-in-the-

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<sup>22</sup> *Where Law and Morality Meet*, 139, my emphasis.

<sup>23</sup> *Ibid.*

wool Inclusive Positivist accept anything else while remaining faithful to the main tenets of his theory?

Something has obviously gone wrong here. But what? Perhaps the most obvious answer is that I've simply misunderstood Professor Kramer's subtle arguments, a not altogether implausible hypothesis. In suggesting that "norms duly adopted through legislative or judicial or administrative procedures" are legally valid till a court decides otherwise, perhaps Kramer meant something quite different from what I took him to mean. I took him to mean that *R* is valid if it satisfies all the requisite *source-based* criteria, e.g. it received the requisite number of votes in Congress, was not vetoed by the Executive, and so on. These, of course, are exactly the kinds of criteria favoured by Exclusive Positivists as fully determinative of validity, and just the kinds of criteria which Inclusive Positivists deny are sufficient for validity in systems such as one finds in the United States. According to Inclusive Positivists, a "duly adopted" rule can be legally invalid in the United States if it in fact fails to comport with the substantive moral provisions of the American rule of recognition. And if one wants to add that this will be so only till a court rules otherwise, so be it. But one must, it would seem, at the very least have to insist that till such a ruling takes place, violation of the substantive moral provision renders the "duly adopted" rule legally invalid – a legal fact which courts are duty-bound to recognize when they consider a constitutional challenge. And so it is natural to read Kramer as denying what appears definitive of the kind of theory to which he purports allegiance. So I am led to suspect that perhaps I have got Kramer wrong. Perhaps we are to read the phrase "duly adopted through legislative or judicial or administrative procedures" as encompassing the fulfillment of more than source-based



criteria. On this alternative reading, a rule “*duly adopted*” is one which meets *all* the appropriate criteria for validity – both source-based and merit-based. If so, then Kramer will have remained faithful to his Inclusivist credentials, but at the cost of denying the truth of at least some of Himma’s empirical observations – and he does seem to want to grant Himma those observations about American legal practice.

As noted earlier, my principal aim is not to determine which of our two disputants, Himma or Kramer, is right or has the better argument. I’m more interested in using their dispute to bring to light some key lessons we might draw from their lively exchange. That a legal theorist of Professor Kramer’s talent should reach a point where he has either abandoned his Inclusive Positivism without being aware of it or has couched his defense in words which strongly suggest that this is in fact what he has done, may give one reason to pause and take stock. In particular it may lead one to suspect that current debates surrounding Inclusive and Exclusive Positivism have hit a brick wall, and that we need to find terms of engagement which better reflect the insights each side brings to the table. The remainder of this paper represents a tentative step in just such a direction.

### **C. Legal Practice – Some key observations**

Let’s begin with some observations about legal practice – many of which figure prominently in the Himma-Kramer exchange. First, some facts which appear to favour Exclusive Positivism.

1. Notwithstanding its actual conflict with a constitutionally recognized moral norm, *N*, a duly adopted rule, *R*, will routinely be *accepted and practiced as valid law* till such time, if such a time ever comes, as *R* is judged by a court to be inconsistent with *N*.
2. Notwithstanding its actual conflict with a constitutionally recognized moral norm, *N*, a duly adopted rule, *R*, will routinely (continue to) be *accepted and practiced as valid law* if the highest court to consider the issue rules that *R* does not in fact conflict with *N*.
3. Notwithstanding an *absence* of conflict with a constitutionally recognized moral norm, *N*, a duly adopted rule, *R*, will routinely *not* be *accepted and practiced as valid law* if a court rules that *R* actually conflicts with *N*.

A few observations. First, it should be stressed that 1-3 represent only what is routine or typical. There are notable exceptions in each case. For instance, government bodies could, in the firm belief that it is constitutionally invalid, refuse to implement a rule, *R* (proposition 1). In respect of proposition 3, *Cooper v Aaron* illustrates the possibility that a government body can act (or at least propose or attempt to do so) in the firm belief that *R* is valid, despite a court's opinion to the contrary. Second, in calling a rule 'duly adopted' I mean that it meets all the requisite non-moral, source-based requirements for

validity.<sup>24</sup> Third, the practices described as routine in propositions 1-3 are fully consistent with the sources thesis because, in the scenarios described, what counts towards establishing the legal validity of a rule, *R*, are non-moral facts of legal practice, including the decisions of courts with respect to the validity of *R*. And finally, the described practices are fully consistent with the directed powers account of constitutional norms such as the due process provision. On this account, recall, a conflict between *R* and *N* does not mean that *R* is invalid; it means that judges are duty-bound to exercise their power to invalidate *R*, i.e. *make* it invalid.

Now some facts which appear to favour Inclusive Positivism.

4. Bills and charters of rights are generally taken to contain, and are expressed in terms which strongly suggest that they contain, paramount (moral) conditions of legal validity which have decisive legal force independently of, indeed even when in conflict with, court decisions.
5. In some legal systems, once a court has held that rule *R* infringes *N*, *R* will, for most legal purposes, be treated as though it never were valid law.
6. Constitutional instruments like the American *Bill of Rights* are generally understood to describe rights which no legitimate, i.e. valid, government action – including the

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<sup>24</sup> It is worth stressing that a rule can be *accepted* as having met all the requisite source-based requirements yet fail to do so, a fact highlighted by Adler and Dorf in “Constitutional Existence Conditions and Judicial Review” *Virginia Law Review*, Vol. 89, No. 6 (2003), 1106-1202. We will explore the significance of this point later.

actions of a court – may infringe. They are not taken to describe (mandatory) grounds for changing valid law.

A few observations. Propositions 4-6 reflect widespread beliefs regarding the nature of constitutions. One of the primary roles of a constitution is to specify legally recognized *limits* on the powers of government authorities with respect to the creation and/or recognition of valid law. Among other things, a constitution enshrines the thought that governments are *inherently fallible* – a thought which Les Green claims is integral to the positivist enterprise and upon which I will have more to say below.<sup>25</sup> It does this by specifying limitations on the powers of government to introduce or recognize legally binding rules. Failure to observe the prescribed limits is, in many systems, not just a ground for criticizing the government morally or politically, or a reason why the government should mend its ways by changing the law. On the contrary, failure to observe the prescribed limits – conditions on the valid exercise of the relevant Hohfeldian power – is routinely taken to result in a *nullity*. It is a failure on the part of the government to effect the desired change to the legal landscape by introducing a new valid legal norm into the system. This is arguably the case in the United States. As the American Supreme Court stated in *Norton v. Shelby County*, "[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been

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<sup>25</sup> See Leslie Green, "Positivism and the Inseparability of Law and Morals", *New York University Law Review* (forthcoming) Available at SSRN: <http://ssrn.com/abstract=1136374>

passed."<sup>26</sup> Adler and Dorf argue that many provisions of the American *Constitution* have just this effect because they contain “existence conditions” for valid law. For example,

...Article I, Section 7 sets forth existence conditions for legislation. If the piece of paper that Smith calls a statute is actually a bill that passed the House but not the Senate, or a bill that the President vetoed, or just a piece of paper on which Smith typed words seeming to grant him rights, then Judge Jones “enforces” Article I, Section 7 by refusing to treat Smith’s piece of paper as a statute.<sup>27</sup>

Some constitutions *explicitly* recognize this power-limiting, and hence existence determining, role of constitutionally recognized validity norms. They do so by explicitly stating that any product of an attempt to exercise valid government power which violates the relevant constitutional norm is for legal purposes a nullity. It is a failed attempt; an attempt which is, as the Canadian *Constitution* puts it, “of no force and effect.” Some systems give further concrete expression to this claim by requiring, in any case in which a ruling of nullity figures, further steps which presuppose that particular reading of the decision. For example, if the impugned rule, *R*, is a criminal code provision under which the appellant had earlier been charged and found guilty, the result will not be taken to be purely prospective. Rather, the decision will be that *the appellant* is not guilty of the alleged crime – he is not guilty because *R* was not a valid law establishing a legal duty to which he stood in breach.<sup>28</sup> Some constitutions go even further than this and provide legal remedies for those invalidly charged or held liable in such circumstances. The *Canadian Constitution Act*, Article 24 (1), specifies that “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate

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<sup>26</sup> 118 U.S. 425,442 (1886).

<sup>27</sup> “Constitutional Existence Conditions and Judicial Review” 1145.

<sup>28</sup> C.f., *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994), ch. 5, 142 ff.

and just in the circumstances.” Why, one might reasonably ask, would a legal remedy be thought appropriate in these circumstances if the Exclusive Positivist’s directed powers account of constitutional challenges is correct? After all, on that account *R*, because it was “duly adopted” did indeed exist as valid law before the court’s decision to invalidate it because of its conflict with a constitutional norm, *N*. Hence *R* presumably did determine valid legal obligations which the appellant would have to have violated when he did what he did. Recall again that on the directed powers account of constitutional challenges, a duly adopted rule, *R*, is legally valid until such time as the court exercises its directed power to invalidate it. So *R* existed as valid law between the time of its adoption and the time a court took the legal step of rescinding it because of its conflict with *N*. And so it did in fact impose the legal duties it claimed to impose.<sup>29</sup>

All these features of legal practice highlighted in 4-6 incline one towards thinking that constitutionally recognized moral norms determine validity in systems such as one finds in Canada and the United States.<sup>30</sup> And this leads one in the direction of Inclusive Positivism and the claim that more than sources count in establishing legal validity. The moral norms upon which the Courts draw in justifying their decisions regarding validity, appropriateness of remedy, and so on, is what really counts in constitutional cases, not what the courts *say* about those norms.

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<sup>29</sup> For further discussion, see *Ibid.*

<sup>30</sup> I say only that they “incline” towards this thought because there are, to be sure, other possible routes one might take in explaining why, for example, remedies might be thought appropriate, explanations which are consonant with Exclusive Positivism. For example it might be argued that remedies are appropriate because *R*, though legally valid, was inconsistent with the defendant’s *moral* right, say his moral right to due process. Whether such a reading does full justice to the thought that *legal* remedies are appropriate even though *illegal* acts on the part of the defendant took place is a question I will leave unaddressed.

So, we seem to be in a bit of a fix. We seem to have a serious tension between apparent facts favouring the Exclusive side (1-3, which henceforth I will call *Exclusive Facts*) and apparent facts favouring the Inclusive side (4-6, which, not surprisingly, I will call *Inclusive Facts*). One way round the difficulties surrounding this tension is to continue to deny one set of facts and insist that belief in them stems from misunderstanding, conceptual confusion, or the effects of misleading language. To be sure, an Exclusive Positivist might say, the law often expresses itself very loosely and misleadingly in ways which support Inclusive Facts. But none of this can be taken literally. What must be going on is better understood in terms of the directed powers account. One inclined towards Inclusive Positivism might, on the other hand, argue that her opponent would have us buy into a theory which misstates, indeed misconceives, the crucial role played by constitutions in limiting the valid exercise of government power. He has failed to account for the fact that failure to observe a condition for the valid exercise of a Hohfeldian power of law creation must, as a sheer conceptual matter, be a nullity. Consider this parallel, the Inclusive Positivist might suggest. When I fail to observe the conditions for the valid exercise of my legal power to create a will, I will not, despite my efforts, have succeeded in creating a valid will. The change in the legal landscape of rights, duties, etc., which I had attempted to bring about will not have occurred. In short, my efforts will have resulted in a nullity. The same must be true when we turn to the exercise of public powers of law creation. When a legislature fails to observe a condition for the valid exercise of its power to create valid law, it will have failed in doing what it set out to do – failed to create new valid law. The attempt to bring about a change in the legal status quo will not have occurred, resulting, once again, in

nullity. As Hart recognized long ago, “nothing which legislators do makes law unless they comply with fundamentally accepted rules specifying the essential law-making procedures.”<sup>31</sup>

Each of the two strategies outlined in the preceding paragraph is of course possible. Indeed, they are the ones which positivists have tended to pursue when debating among themselves. But both are, I suggest, ultimately unsatisfying. And the reason is one to which I have already drawn attention: each side in these debates has highlighted facts of importance which any plausible theory of law should be prepared to accommodate, but has done so only at the cost of underplaying, or distorting our understanding of, the important facts stressed by the other side. So my question is this: Can we somehow fashion a theory which does not leave us with the sense that something of importance has been ignored, downplayed or mischaracterized? Can we fashion a theory which does justice to both sides? Perhaps we can, but only, I suspect, if we acknowledge different notions of *existence* and *validity* at play in these long-standing debates. Those who stress Exclusive facts have one set of ideas in mind, while those who highlight Inclusive Facts have something else in mind. Each, however, is on to something of importance.

#### **D: Four Concepts of Validity**

In an early discussion of the topic, Joseph Raz introduces us to some important notions which are often at play in disputes concerning the existence and validity of laws.

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<sup>31</sup> H.L.A. Hart, “Positivism and the Separation of Law and Morals,” reprinted in Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 48 at 59.



If we pay close attention to these notions, we might begin to see a way round the current impasse between Inclusive and Exclusive Positivism. Let's begin by noting that Raz, following Kelsen, identifies the existence of law with its validity.<sup>32</sup> To say that a law *is valid* is to say that it *exists* – and *vice versa*. A law is valid, however, only if it “conforms to tests of validity laid down by some other rules of the system which can be called rules of recognition.”<sup>33</sup> If it does not conform to these tests – which for an Exclusive Positivist like Raz will all be source-based – then it is not legally valid and hence does not exist. Furthermore, to say that a rule is legally valid is to say that it is *systemically valid* – that is, that it ought to be obeyed because it is part of an effective legal system and because of “the need to have effective law and the justified authority of those who make it.”<sup>34</sup> So a law is legally valid – that is, exists – only if it systemically valid and is for that reason something to which I am *justified* in conforming my behaviour – if it actually has the normative consequences for me that it purports to have and hence “ought to be obeyed.” And it is crucial to observe that the ‘ought’ here is a full-blooded moral ought. “In following Kelsen [Raz writes] we have adopted the natural law view on the meaning of ‘validity.’”<sup>35</sup> Of course, to say that any such law is legally, hence, systemically valid, and morally ought, therefore, to be obeyed, is not to say that it is *morally* valid in virtue of its content. “Moral validity is presumably established by argument and the way to argue that a rule is morally binding or valid is to show that it is justified, that the requirements

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<sup>32</sup> Raz, *The Authority of Law*, 146.

<sup>33</sup> *Ibid.*, 150-1.

<sup>34</sup> *Ibid.*, 152.

<sup>35</sup> *Ibid.*, 150.

and restraints it imposes ought to be observed. Here validity and justification seem particularly close.”<sup>36</sup>

So (for our purposes at least) the bottom line for Raz appears to be this: if I morally ought not to obey a rule, *R*, then it cannot be legally valid. And if *R* is not legally valid, then it is not systemically valid and does not *exist*. It does not exist *even when it is accepted and practiced as valid law* within the particular legal system in question – i.e. is “in fact followed.” But can this be right? A law which is accepted and practiced as valid law does seem to *exist* even if I ought not to obey it. To deny this seems to flout the positivist’s social thesis, the claim that the existence of law depends, ultimately, on facts of social practice. If a rule, *R*, is accepted and practiced as law, then regardless of whether that acceptance is misguided or misplaced and, morally, I ought not to obey *R*, the fact remains that we do seem to have law here. We do seem to have the existence of valid law despite its lack of merit.

Or do we? So far I have been stressing Raz’s “natural law” understanding of legal validity according to which to say that *R* is legally valid is to commit to the claim that it ought morally to be obeyed for the reasons Raz outlines. But let’s turn our attention now to another of Raz’s claims – one which card-carrying positivists since at least Hart have embraced: “the legal validity of a rule is established not by arguments concerning its value and justification but rather by showing that it conforms to tests of validity laid down by some other rules of the system which can be called rules of recognition.”<sup>37</sup> As

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<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, 150-1.

Raz notes, “normally” these tests concern a rule’s source, that is, they have to do with, e.g., legislative enactment or laying down of the rule by judges. But what he does not note at this juncture, and which I think needs to be stressed at this point, is this: these source-based tests of validity are, *in their very nature as criteria or tests of validity*, such that one can attempt but fail to satisfy them.<sup>38</sup> Should any such failure occur, then, as a sheer conceptual matter, the result must be invalidity. In the case of something like legislative enactment, invalidity must amount to a nullity. These kinds of failures to observe source-based conditions are perhaps not an everyday occurrence, but they do occur.<sup>39</sup> One particularly striking example is to be found in the *Manitoba Language Case*, where the Canadian Supreme Court determined that over a century’s worth of Manitoba legislation was legally invalid. It was invalid because the legislature had failed to meet a constitutionally recognized condition of legal validity – passage of laws in both official languages. Though the Court ruled that Manitoba legislation was legally invalid, it drew on rule of law values to justify a temporary suspension of invalidity. The purpose of the suspension was to give the legislature enough time to translate all existing statutes into French.<sup>40</sup> What this case illustrates – and what those who point to Inclusive Facts are keen to stress – is that rules can be accepted and practiced as valid law, and yet *fail actually to be valid* because they fail to comport with relevant tests of validity. And this point is not restricted to *moral* criteria of validity; it applies to source-based criteria just as well – a fact so nicely illustrated in the *Manitoba Language Case*, and the many other cases in American law canvassed by Adler and Dorf. Such cases all seem to illustrate an

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<sup>38</sup> Otherwise, we are left with something analogous to what Hart, in his discussion of rule skepticism, called “scorer’s discretion.” See *The Concept of Law*, 141-7.

<sup>39</sup> Once again, see Adler and Dorf, “Constitutional Existence Conditions and Judicial Review.”

<sup>40</sup> *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721

absolutely crucial point which is too often overlooked: the fact that *R* is accepted and practiced as valid law, and can in that sense be correctly said to *exist*, does *not* entail that *R* actually satisfies all the relevant criteria of validity and is therefore *valid* law. Yet if we are happy to accept this point as it applies to source-based criteria of validity, then what possible reason could one have for denying that the same might be true when we turn to non-source based criteria like conformity with the norms of fairness contemplated in the due process clause of the American *Constitution*? Why must failure to meet this type of condition for validity be ruled out as conceptually impossible?<sup>41</sup>

We are now in a position to consider some – I hope, helpful – distinctions. They stem from and reflect (though not completely) the Razian thoughts summarized above, and from my earlier analyses of the dispute between Kramer and Himma.

#### *Four Concepts of Legal Validity*

##### *Legal Validity as Existence(or Acceptance)*

1. *R* is officially accepted and practiced in legal system, *L*, as a norm which fully satisfies all systemic criteria of legal validity (both pedigree and merit based) included within *L*'s rule(s) of recognition.

##### *Systemic Validity*

2. *R* is officially accepted and practiced in legal system, *L*, as a norm which fully satisfies all systemic criteria of legal validity (both pedigree and merit based) included within *L*'s rule(s) of recognition; and does, as a matter of (objective) fact, satisfy all such systemic criteria of validity.

##### *Systemic Moral Validity*

3. *R* is officially accepted and practiced in legal system, *L*, as a norm which fully satisfies all systemic criteria of legal validity (both pedigree and merit based) included within *L*'s rule(s) of recognition; does, as a matter of (objective) fact, satisfy all such systemic criteria of validity; and “has the normative consequences

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<sup>41</sup> I am assuming here that arguments like Raz's authority argument and Shapiro's guidance argument can be satisfactorily answered, as I think they can.

[it] purport[s] to have”<sup>42</sup> because it is the product of a legal system which (a) fulfils “the need to have effective law”; and (b) issues from “a justified authority.”<sup>43</sup>

*Moral Validity*

4. *R* is morally justified on its own terms, i.e., independently of its membership in *L*.<sup>44</sup>

A few words of explanation, beginning with legal validity as existence. It’s probably fair to say that most modern positivists have, without giving it much thought, simply followed the lead of Kelsen and Raz in treating validity and existence as equivalent notions when applied to law. To say that a law exists, is to say that it is valid – and vice versa. And if, in light of our Exclusive facts, one is inclined to say any rule, *R*, which is accepted and practiced as law undeniably exists as law, then one will be led to say that *R* must be legally valid so long as it is accepted and practiced as valid law. This will be one’s interpretation of the social thesis – that in the end, law is a social institution, that, as Raz puts it, “regulates its own validity.”<sup>45</sup> But if one takes these initial steps, then one will be led to deny that a legal system, *L*, could treat *R* as though it satisfied *L*’s very own criteria of validity and yet be wrong about that fact. And then one will be led to a conception of validity which reduces law to little more than scorer’s discretion, to treat the law as though it were, on this score at least, *infallible or incorrigible*. Just as a goal is, in Hart’s imaginary game of scorer’s discretion, whatever the scorer *says* it is, a valid law

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<sup>42</sup> Raz, *The Authority of Law*, 150.

<sup>43</sup> *Ibid.*, 152.

<sup>44</sup> It is, in other words, the morally ideal or best rule for the particular circumstances in question – the one which we would choose to adopt if we were unconstrained by prior legal/political practice. A rule which has been duly chosen in accordance with democratic procedures might, e.g., not be the optimal rule from the point of view of ideal morality. But it may, because of its democratic pedigree and because it is morally tolerable, nevertheless have systemic moral validity. I suspect that many if not most statutory laws fall into this category. Legislators tend not to be Platonic Guardians, nor do they labour under conditions and procedures which lead to the same decisions as would be made by Plato’s ideal legislators.

<sup>45</sup> Raz, *The Authority of Law*, 150-1.

will be whatever legal officials *say* is valid. And this will be so even in those cases where the law fails to fulfill *its very own criteria of validity* – even when, to use the second of our four concepts of validity, its laws are not, in actual fact, *systemically valid*. But if we separate validity as existence (or acceptance) from systemic validity, then we can intelligibly say that such laws, though they *exist* because they are accepted as a valid basis for asserting legal rights, claims and so on (and are, in that very special sense of the term, legally valid) are not, in another very important sense of the term, *really valid at all*. Because they fail to meet the system's very own internal criteria of validity, they cannot be *systemically* valid. And one can add, for good measure, that because they lack systemic validity, it cannot be true that they ought to be obeyed because of their status as valid law. A law which fails to meet the system's own criteria for legal validity ought not to be obeyed on the ground that it is valid law if it is not really valid at all. This is not, of course, to say that, morally speaking, one is therefore at liberty to disobey the law in question. There might be good moral reasons – e.g. reasons resting on the rule of law values cited by the Canadian Court in *The Manitoba Languages Case* – for conforming with an existing but systemically invalid law. But the important point to stress at this juncture is that these moral reasons do not rest on the fact that the law in question is one which is systemically valid – one which derives its moral justification and call upon our behaviour from its place within a system which meets the needs invoked in our third concept of validity – systemic *moral* validity. Any law which fails to be systemically valid, is automatically disqualified from having any such status. This last point is an important one which natural lawyers have long been keen to stress. Aquinas tells us that laws which are unjust are not really laws at all; they are acts of violence which no one is

bound to obey. But Bentham's talk of terrorist language notwithstanding, Aquinas is keen to add that we may, nevertheless, be required (in his view, by the natural law itself) to conform our behaviour to the unjust law anyway if such conformity is the only way to avoid "scandal and disturbance." The same point can easily be made in the terms introduced here: a law, *R*, which exists but is systemically invalid may be such that we ought, morally, to conform our behaviour to it nevertheless. But our reasons for conforming with *R* will *not* lie in its possession of systemic moral validity. If it's not systemically valid because, e.g., it was not enacted in both official languages, then our reasons for behaving in accordance with *R* cannot stem from its being a systemically valid law, because it's not. Our reasons will stem, as the Canadian Supreme Court recognized, from other factors, such as the rule of law values upon which the court relied in justifying its suspension of (systemic) validity.

Finally, we come to the fourth concept of validity – moral validity. That a law exists does not mean that it is morally valid or justified. In other words, that a law is accepted and practiced as valid law in no way entails that it is morally good or justified on its own terms. In this sense, its existence is indeed one thing; its merit or demerit another. So existence does not entail moral validity.<sup>46</sup> Neither does *systemic* validity. That a rule, *R*, satisfies all recognized tests of systemic validity in no way entails that *R* is morally good or justified. This can, of course, very easily happen if the system in question contains no moral criteria whatsoever. But even when it does, moral validity does not necessarily follow. The demands of morality are often much wider (and more stringent) than the moral conditions recognized in a rule of recognition. This is especially

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<sup>46</sup> As we have just seen, it does not entail systemic validity either.

so when those moral conditions have been subject to the kind of piecemeal displacement Kramer describes. *R* might therefore meet all the legally acknowledged moral tests of systemic validity and yet flagrantly violate another of morality's demands. Finally, that a law possesses *systemic moral* validity does not entail its moral validity. A system of law can be fully justifiable, *as a system*, that is, it can meet the moral need to have effective law and possess the justified moral authority it necessarily claims to have,<sup>47</sup> and yet bring into existence systemically valid laws which are highly deficient morally. To be sure, a system most of whose laws were seriously lacking in this regard would not, Hobbes withstanding, be likely to possess systemic moral validity. But it is clear, I take it, that the existence of some number of morally deficient laws is fully compatible with the systemic moral validity of each and every law within the system. Allegiance to a legal system need not depend on its moral perfection.

### **E: A Return to Kramer and Himma**

So how does all this help us understand the debate between Professors Kramer and Himma – and more broadly the disputes between Inclusive and Exclusive Positivists? Very briefly, it helps as follows.

Himma (rightly) points out that American and Canadian legal practice routinely recognize judicial interpretations of recognized moral conditions of validity as overriding those moral conditions themselves. From this he concludes that these systems are not

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<sup>47</sup> I am here following Raz's lead once again in endorsing the view that a legal system necessarily claims justified moral authority. For Raz's views on this, see *The Authority of Law*, ch. 1 & 2. For a contrary view, see Kramer, *Where Law and Morality Meet*, *passim*, but especially pp. 216-222.



ones in which actual conformity with moral provisions such as we find in the due process clause functions as a necessary condition of legal validity. We can now see, I hope, the respects in which Himma's inference may be warranted – as well as the respects in which it may not. A rule, *R*, which conflicts with a recognized moral condition, *N*, can no doubt *exist* as valid law (validity as existence or acceptance) till such time as a court determines that the conflict exists. But this in no way entails that *R* will be valid in the sense of satisfying the system's very own conditions of validity – i.e., it is not to say that *R* will be systemically valid. What Himma's analysis fails to accommodate fully, is the law's *fallibility*. It fails fully to appreciate that the failure of *R* to meet the system's very own tests of validity (moral or otherwise, I might add) must mean that *R* is, in one very important sense of the term 'validity,' not valid at all. And it's invalid not because it violates some independent, free-floating requirement of morality. It's invalid because it fails to meet the legal system's very own tests of validity – tests which the system, perhaps fully aware of its own moral fallibility, has decided to adopt as a condition of systemic validity. The test is not whether *R* is *accepted* as meeting the system's test; the test is whether *R* actually *does* meet that test. Otherwise, as Kramer correctly notes, and as I have stressed in my references to scorer's discretion, Himma's analysis leads to a very unpalatable version of extreme rule skepticism – a version according to which our legal rules are valid just in case their judicial interpreters say they are. If we are to avoid this kind of rule skepticism, then we are going to have to acknowledge the point upon which Hart and Green insist – that the law is inherently fallible. Whatever one thinks of the various distinctions discussed above, they do serve to highlight a crucial point which has hitherto been underappreciated: the fallibility of law is not limited to its moral

shortcomings. Law can go wrong in any number of ways, not the least of which is its failure to observe its very own conditions for systemic validity. Finding a place for systemic validity as well as existence, moral validity and systemic moral validity allows us to keep this crucial point front and centre.

Turning now to Kramer, we can see how his identification of existence and validity, an identification inherited from his positivist predecessors Kelsen and Raz, may have led him to the tensions evident in his reply to Himma.<sup>48</sup> On the one hand, Kramer is keen to maintain a significant role for moral conditions of validity of the kind stressed by Hart and other proponents of Inclusive Positivism, a position to which he seemingly continues to be committed. In light of this element of his thinking, Kramer is led to agree with Hart that a condition of validity can include consistency with moral norms. On the other hand, he is equally keen to accommodate Himma's empirical claims about the (typically) decisive force, within systems such as one encounters in Canada and the United States, of judicial determinations under such moral norms. This wish to accommodate leads Kramer to focus on the role of multiple criteria of validity and on the ways in which these can be ranked against each other in a way which allows consistency with a non-displaced moral norm to function as a decisive criterion of validity. So far so good. Such accommodation seems perfectly compatible with Inclusive Positivism and with Hart's claims about the role of moral criteria. It's when Kramer takes his next step that trouble looms large. As observed earlier, Kramer is happy to concede Himma's claim that, despite its actual conflict with a constitutionally recognized moral norm, *N*, a "duly

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<sup>48</sup> It must be added that Kramer is by no means alone in presupposing this identification. I myself have consistently done so in the past. See, e.g., *Inclusive Legal Positivism*, *passim*.

adopted” rule, *R*, can, because it is “routinely treated by officials as law” be “*properly classifiable as [a] law*.”<sup>49</sup> But how can this be, we were led to ask, if Inclusive Positivism is true? How can *R* be valid law if, in truth, it fails to satisfy a moral condition of its validity and that condition has not been “displaced” by a paramount judicial decision regarding its content? We are now, I hope, in a better position to solve this puzzle. *R*, if it is indeed accepted and practiced as valid law does, as Kramer and Himma agree, seem to *exist* as law and can in that limited sense of the term be said to have legal validity. And it does so even though it lacks *systemic* validity, that is, even though it fails, in fact, to meet a still dispositive condition of its validity recognized by the legal system – still dispositive because that condition has not been displaced by a mistaken judicial decision. *R* will, of course, also lack systemic *moral* validity because it lacks systemic validity, and because possessing systemic validity is a necessary condition of possessing that further property. It will not be a rule that one ought to obey because it’s systemic valid *and* because it is the product of an existing system of law which meets the further moral conditions specified by Raz. One can say all these things so long as one is careful to recognize that different concepts of validity are at play in these descriptions, and so long as one is careful not to let them run into one another.<sup>50</sup>

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<sup>49</sup> Kramer, *Where Law and Morality Meet*, 139, once again emphasis added.

<sup>50</sup> I wish to acknowledge a debt of gratitude to the members of my 2008 McMaster graduate seminar in legal theory. Helping them to work their way through contemporary debates surrounding the forms and limits of modern legal positivism has helped me sort out my own thinking on these matters. I need to acknowledge a special debt of gratitude to Matthew Grellette who persuaded me of the usefulness of distinguishing between what he calls “existence” and “validity” conditions of law, and of the need to develop a theory which does justice to the insights of both Inclusive and Exclusive Legal Positivism. My distinction between *validity as existence* and *systemic legal validity* owes a great deal to Matt’s thoughts on these matters. In many ways, this paper is but a footnote to his initial insight.