

## ARTICLES

### MORALITY, LAW AND CONFLICTING REASONS FOR ACTION

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*ABSTRACT.* In *The Concept of Law*, H.L.A. Hart suggested that four formal features of morality distinguish it from law: importance, immunity from deliberate change, the nature of moral offences and the form of moral pressure. On closer examination, none of these supposed features clearly distinguishes morality from law, at least in the broad sense of ‘morality’ that Hart adopted. However, a fifth feature of morality mentioned by Hart – namely the role that morality plays in practical reasoning as a source of ultimate standards for assessing human conduct – does illuminate the relationship between law as conceptualised by Hart and morality variously understood. Because morality has this feature, law is always subject to moral assessment, and moral reasons trump legal reasons. It does not follow, however, that law is irrelevant to moral reasoning.

*KEYWORDS:* Jurisprudence; morality and law; Hart; legal reasoning; reasons for action

This article is an expanded version of the 26<sup>th</sup> Maccabaeen Lecture in Jurisprudence delivered at the British Academy on 15 November 2011, which marked the fiftieth anniversary of the publication of what Brian Simpson has called “the most successful work of analytical jurisprudence ever to appear in the common law world”<sup>1</sup> – HLA Hart’s *The Concept of Law* (“CL”).<sup>2</sup> The anniversary provided a good

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<sup>1</sup> A.W.B. Simpson, *Reflections on The Concept of Law* (Oxford 2011), 1.

<sup>2</sup> H.L.A. Hart, *The Concept of Law* (Oxford 1961). References are to the 2<sup>nd</sup> edition, edited by P. Bulloch and J. Raz and published in 1994. The 2<sup>nd</sup> edition reprints the 1<sup>st</sup> edition with the addition of a posthumous Postscript based on material written but by Hart but not published in his lifetime. The book has been translated into 17 languages, and more than 50,000 copies of the 2<sup>nd</sup> edition have been sold since 1998.

excuse – if an excuse was needed – to revisit what Hart, at the very beginning of the book, identifies as one of three “persistent questions ... concerning human society” (CL 1–6) – namely, the relationship between law and morality. Hart described that relationship as “one of the principal recurrent issues in the long and complicated history of speculation about the nature of law” (CL 6). In various guises it has been a recurring theme of Maccabaeian Lectures since 1959 when Patrick Devlin delivered the second in the series, entitled “The Enforcement of Morality”, unwittingly launching one of the century’s most famous – and notorious – jurisprudential debates, commonly known as “the Hart/Devlin debate”. (I will say a little more about that exchange later.)

Law and morality are both concerned with practical reasoning – that is, with reasoning about what to do, what goals to aim for and what sort of person to be. In this sense, both law and morality are about right and wrong, good and bad, virtue and vice. These contrasts are “normative”: they express value judgments. Sometimes the terms “moral” and “morality” are used in contrast to “immoral” and “immorality” to distinguish normatively between right and wrong, good and bad, virtue and vice. In a similar way, what is “legal” may be contrasted with what is “illegal”, “legality” with “illegality”. On the other hand, the terms “morality” and “law” may also be used to distinguish between different aspects of social life and different domains of practical reasoning. Thus morality may be contrasted with tradition or etiquette or custom and, of course, with law. We may, that is, use the words descriptively, contrasting the moral not with the immoral but with the non-moral.

Concerning the relationship between law and morality in their normative senses, Hart’s view was that what is required or allowed by law may be prohibited by morality – in other words, that what is legal may be immoral. Conversely, what law prohibits, morality may require or permit – in other words, what is illegal may be morally acceptable or even required. This view is sometimes referred to as the “separation thesis”.<sup>3</sup> A corollary (or, perhaps, a different formulation) of the

<sup>3</sup> The separation thesis must be distinguished from the thesis that there is no necessary conceptual connection between law and morality. Hart did not subscribe to the “no necessary connection” thesis. Indeed, it is inconsistent with the separation thesis, which entails that state law is necessarily subject to moral evaluation. Hart also believed that there is a “naturally” necessary connection between law and morality, which is found in the minimum content of natural law (CL ch. 9). To mark the difference between the separation thesis and the “no necessary connection” thesis, some scholars now associate Hart with the “separability” thesis to the effect that law and morality are “separable” rather than separate. Concerning Hart’s motivation in adopting the separation thesis see CL 207–212; see also P. Soper, “Choosing a Legal Theory on Moral Grounds” (1986) 4 *Philosophy and Social Policy* 32; F. Schauer, “Fuller on the Ontological Status of Law” in W.J. Witteveen and W. van der Burg (eds.), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam 1999); L. Murphy, “The Political Question of the Concept of Law” in J. Coleman (ed.), *Hart’s Postscript: Essays on the Postscript to the Concept of Law* (Oxford 2001).

separation thesis is that what the law is and what it ought morally to be are two different questions. Of course, the separation thesis is consistent with the view that the law may be, and very often is, in agreement with morality; but, say separationists, it ain't necessarily so. The separation thesis can be distinguished from various other views about the normative relationship between law and morality. According to a thesis sometimes referred to as "hard natural law", an immoral (or an "unjust") law is not a valid law at all. By contrast, according to a position that may be called "soft natural law",<sup>4</sup> the moral status of law does not determine its existence or validity but it does affect its conformity with ideals of rightness, goodness and virtue that are intrinsic to the way we understand law<sup>5</sup> or that are presupposed by law's function.<sup>6</sup>

Underpinning the separation thesis are two assumptions: first, that a reasonably clear descriptive distinction can be drawn between the two normative phenomena; and secondly, that law is properly subject to assessment in moral terms.<sup>7</sup> These assumptions raise several questions. How is morality to be distinguished from law? Why is law subject to moral assessment? If law is subject to moral assessment, how, if at all, is law relevant to moral reasoning? In this article I address each of these questions using, as a point of departure, Hart's account in *The Concept of Law* of what morality is and how it differs from law. This aspect of Hart's work has received significantly less attention than his account of law and its normative relationship to morality.<sup>8</sup> My argument will be that of the various characteristics of morality identified by Hart, the one that most robustly distinguishes it from law is the function Hart attributed to it of providing ultimate standards for assessing human

<sup>4</sup> The leading modern exponent of this approach is John Finnis: J. Finnis, *Natural Law and Natural Rights*, 2<sup>nd</sup> edn. (Oxford 2011).

<sup>5</sup> E.g. N. Simmonds, *Law as a Moral Idea* (Oxford 2007); L.L. Fuller, *The Morality of Law* (New Haven 1964).

<sup>6</sup> E.g. R. Dworkin, *Law's Empire* (London 1986), 93: "the most abstract and fundamental point of legal practice is to guide and constrain the power of government. Law insists that force not be used or withheld ... except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified."

<sup>7</sup> According to Martin Stone, it is the first, rather than the second, of these assumptions that distinguishes the separation thesis from soft natural law: "Legal Positivism as an Idea about Morality" (2011) 61 *University of Toronto L.J.* 313. He argues that (to the extent that law and morality share common concerns) soft natural lawyers think of law as a "part of" (*ibid.*, p. 341) or, perhaps, an extension or realisation or concretisation of morality; whereas separationists conceive of it as an instrument or application of morality. See also R. Dworkin, *Justice for Hedgehogs* (Cambridge, Mass. 2011), ch.19; concerning Kant's similar view see A. Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, Mass. 2009), 223–5, 255–6. In Stone's account, for soft natural lawyers, morality is incomplete without law. By contrast, for separationists, morality is self-sufficient or, as he puts it, "self-standing" (*ibid.*, p. 319). Stone particularly associates the separationist view of morality with the development of utilitarianism as a comprehensive moral theory and decision-procedure. The idea that morality can be fully understood without taking account of law pervades modern moral philosophy.

<sup>8</sup> The topic falls between two stools: most philosophers who discuss the nature of morality are uninterested in law while legal theorists are typically more concerned with the normative relationship between law and morality than with the descriptive relationship.

conduct. Because of this feature, in cases of conflict, moral reasons trump legal reasons. I will also argue that the reason why morality trumps law depends on the view taken of the nature of morality. Finally, I will argue that it does not follow from the view that moral reasons trump legal reasons that law is irrelevant to moral reasoning.

### I. TYPES OF MORALITY

Hart conceived of moral norms as a category of non-legal norms. His account of legal norms focuses on what he called “legal systems of modern states” (*CL* 3) and “municipal legal systems” (*CL* 17) and is informed by his familiarity with the English legal system as it was in the middle of the twentieth century and, to a lesser extent, the US legal system. In Hart’s view, the characteristic features of municipal law and the “key” to understanding its nature are, first, a “rule of recognition”, which determines what the law is; and secondly, officials authorised to make and change the law, and to resolve disputes about what the law is and how it applies in individual cases.<sup>9</sup> He might have added that municipal legal systems are also characterised by officials authorised to implement the law, monitor compliance with the law, and detect and impose sanctions for non-compliance. Municipal law, in Hart’s conception, is characterised by particular types of social institutions.<sup>10</sup> To a greater or lesser extent, Hart argued, morality and other non-legal normative regimes lack such an institutional framework. Understood in this way, morality is a more-or-less non-institutionalised analogue of law.

Hart pictured a “pre-legal” society in which more-or-less non-institutionalised normative regimes played an important part in enabling people to live together successfully and well. He associated the development of legal institutions with growth of social groups beyond a certain size. In larger, less cohesive societies, more-or-less non-institutionalised normative regimes will continue to thrive amongst small, cohesive groups within society but at the level of the society as a whole, such practices will not be enough to enable the members of the society to live together successfully and well: hence the development of the sorts of institutions characteristic of municipal law.

<sup>9</sup> Hart actually refers to “secondary” rules that empower the officials rather than to officials. But the significance of secondary rules is that they create and empower the institutions that administer the regime of primary rules.

<sup>10</sup> Of course, there are many types of social institutions in addition to those identified by Hart as characteristic of law. In this paper, the terms “institutional” and “institutionalised” refer only to characteristically legal institutions. Ironically, Hart showed very little interest in actual legal institutions and how they operate in practice: N. Lacey, “Analytical Jurisprudence versus Descriptive Sociology Revisited” (2006) 84 *Texas Law Review* 945; “Out of the ‘Witches’ Cauldron? Reinterpreting the Context and Reassessing the Significance of the Hart-Fuller Debate” in P. Cane (ed.), *The Hart-Fuller Debate in the Twenty-First Century* (Oxford 2010).

In a pre-legal society, Hart says, there may be no clear distinction between morality and “custom” (CL 86–7). Hart distinguished customary normative practices from regular patterns of behaviour.<sup>11</sup> A regularity of conduct becomes a custom, according to Hart, when people start treating the behaviour in question as obligatory by demanding compliance and criticising non-compliance. The facts that particular conduct is demanded, that such demands are considered legitimate, and also that non-compliance with such demands is considered a legitimate basis for criticism, together provide a reason to comply independent of the content of the demand. Customary norms are norms that arise from such social practices. By saying that in a pre-legal society there may be no clear distinction between morality and custom, Hart implies that morality and custom are both “conventional” practices in the sense that they are based on shared patterns of behaviour consisting of demands for compliance, widespread compliance, and criticism of non-compliance, possibly accompanied by other sanctions.

This sort of conventional morality Hart called “social” or “positive”. Like law, he said, it “may include much that is peculiar to the real or fancied needs of a particular society” (CL 172) and may vary significantly from one society to another. In his discussion of the similarities and differences between morality and law in *The Concept of Law* Hart adopted what he called a “broad” view of morality (CL 181) that included such conventional social morality but also what he dubbed “personal” morality and “critical” morality. Personal morality he understood as consisting of “ideals”<sup>12</sup> of rightness, goodness and virtue that an individual might neither share with anyone else nor use as a basis for criticism of others. By contrast, he thought of critical morality as standards that are “used in the moral criticism of society itself” (CL 183) and which meet “conditions of rationality and generality” (ibid). Hart resisted adopting a narrow view of morality that would identify it solely with critical morality because he thought that all three

<sup>11</sup> For a suggestive discussion of the relationship between habit, custom and law see J.B. Murphy, “Habit and Convention at the Foundation of Custom” in A. Perreau-Saussine and J.B. Murphy, *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge 2007). For the criticism that Hart’s account of custom is purely structural see A.W.B. Simpson, *Reflections on The Concept of Law*, p. 175.

<sup>12</sup> Hart contrasted ideals with duties (CL 182), aspiration and supererogation with obligation. It is not clear why he thought it important to include personal ideals in his account of morality since they have no clear analogy in his account of law, which is social, not personal, and rooted in obligation, not aspiration. Nor is it clear why he limited idiosyncratic, personal morality to ideals. An individual might, for instance, consider vegetarianism an obligation for themselves but not for others. Perhaps more importantly for present purposes, it is not clear whether or to what extent personal morality shares with positive and critical morality the four characteristics listed later in this paragraph – more especially, the last two. Social ideals have an important place in some concepts of law and certain accounts of the normative relationship between law and morality. See, e.g., the work of Simmonds and Fuller cited note 5 above. See also C.A.J. Coady, *Messy Morality: The Challenge of Politics* (Oxford 2008), 67–70.

types of morality shared four characteristics that distinguished them from law, which he referred to as “importance”, “immunity from deliberate change”, “the voluntary character of moral offences” and “the form of moral pressure”. I will return to these suggested features of morality later.

Although *The Concept of Law* attracted a large body of commentary and criticism during his lifetime, Hart did not systematically address or answer the commentators and critics. However, after his death, Penelope Bulloch and Joseph Raz edited notes that Hart had made over the years, which were published in 1994 as a Postscript to the original text. In the Postscript, Hart radically revised the account of morality that I have outlined above. In response to criticisms of his ideas by Ronald Dworkin,<sup>13</sup> Hart accepted Dworkin’s claim that there is an important distinction between conventional social practices and concurrent social practices. Custom, he said, is a conventional social practice in the sense that the very fact that particular conduct is generally thought obligatory provides a non-conclusive, content-independent reason to engage in that conduct. By contrast, social morality – he now thought – is a concurrent social practice. It consists, he says, of an overlapping consensus of “conviction” amongst individual members of the society “who have and generally act on the same but independent reasons for behaving in certain specific ways” (CL 255–6).<sup>14</sup> In this new view, whereas custom is at least partly a matter of what people generally think is the right thing to do, morality is a matter of what the individual judges to be the right thing to do. In this sense, although there can be customary law, there can be no customary morality.

This change of mind by Hart is radical because it effectively collapses the distinction he had previously drawn between positive and critical morality. Understood as a concurrent practice, the morality of societies and social groups is simply an aggregate of the moral convictions of the individual members of the society or group. Whereas Hart’s original thought seems to have been that conventional social practice is the paradigm of morality (in one place he calls it “primordial” (CL 183)),<sup>15</sup> his revised view was that morality, properly

<sup>13</sup> R. Dworkin, *Taking Rights Seriously* (London 1977), 53–58. See also G.J. Warnock, *The Object of Morality* (London 1971), ch. 5.

<sup>14</sup> See also R.B. Brandt, *A Theory of the Right and the Good* (Oxford 1979), 172. It does not follow, of course, that social practices and institutions do not play a part – indeed, a very important part – in the formation of individuals’ convictions and even their “personal ideals” (see e.g. P.F. Strawson, “Social Morality and the Individual Ideal” in G. Wallace and A.D.M. Walker, *The Definition of Morality* (London 1970)).

<sup>15</sup> See also N. Cooper, “Two Concepts of Morality” in *The Definition of Morality*, esp. pp. 84–88. According to James Wallace, the philosopher John Dewey considered customary morality to be prior to critical morality: J.D. Wallace, *Moral Relevance and Moral Conflict* (Ithaca 1988), 73–6.

understood, is a matter of individual judgment and conviction and that social morality is derivative of morality in that central sense.<sup>16</sup>

At around the same time as Hart was formulating his original account of social morality, he made strategic use of the distinction between positive and critical morality in his debate with Patrick Devlin about the decriminalisation of private, consensual, male-homosexual activity.<sup>17</sup> In 1957 the Wolfenden Committee controversially recommended decriminalisation on the basis that private sexual behaviour is “none of the law’s business” unless it has a direct, adverse impact on identifiable individuals other than the consenting participants. Devlin originally agreed with this recommendation, having argued for reform in his submission to the Committee. However, in the course of preparing his 1959 British Academy Maccabaeian Lecture, Devlin came around to the view that there was no reason, in principle, to say that the law should *never* “track” moral judgments<sup>18</sup> that certain behaviour is wrong regardless of its tendency to harm third parties.<sup>19</sup> This put Hart in a difficult position partly because he preferred to avoid controversy concerning the contents of morality (*CL* 168)<sup>20</sup> – what morality is about and whether or not particular norms are part of morality.<sup>21</sup> Some people think that private consensual sexual behaviour is not a moral issue at all<sup>22</sup> – in other words, that private sexual behaviour is not only none of the law’s business but none of morality’s either. But Hart was prepared to treat sexual preference as a moral issue<sup>23</sup> and was even apparently willing, for the sake of the argument, to treat private male homosexual activity as immoral. His position was essentially that of the Wolfenden

<sup>16</sup> In Hart’s revised view, the “social rule” or “practice” account of norms fails to provide “a sound explanation of morality, either individual or social” (*CL* 256). The extent to which “morality” consists of “rules” is an ongoing topic of debate amongst philosophers that Hart does not address.

<sup>17</sup> See P. Devlin, *The Enforcement of Morals* (Oxford 1965) (the Maccabaeian Lecture is reproduced in Chapter 1); H.L.A. Hart, *Law, Liberty and Morality* (Oxford 1963).

<sup>18</sup> As Bob Goodin neatly puts it: R.E. Goodin, “An Epistemic Case for Legal Moralism” (2010) 30 *Oxford Journal of Legal Studies* 615.

<sup>19</sup> According to Hart, Devlin later reverted to the view that “the law [on homosexuality] ought to be altered”: D. Sugarman, “Hart Interviewed: HLA Hart in Conversation with David Sugarman” (2005) 32 *Journal of Law and Society* 267, 285.

<sup>20</sup> Following Hart’s lead, in most jurisprudential discussions of the concept of law, morality is identified by its “form” as opposed to its “substance”. The substance of morality plays a larger role in theoretical discussions of particular areas of the law, such as criminal law and contract law.

<sup>21</sup> Hart said much about what he called “the minimum content of natural law” (*CL* ch 9). He argued that as a matter of “natural necessity”, both morality and law address certain obstacles to successful social life. The claim that morality is partly a function of human physical and mental characteristics and the natural environment in which we live is, no doubt, relatively uncontroversial; but how much of morality can be explained in this way certainly is not. For an expansive view see J. Finnis, *Natural Law and Natural Rights*, 2<sup>nd</sup> edn (Oxford 2011). This is a key question in contemporary evolutionary and cognitive science. See e.g. R.A. Hinde, *Why Good is Good: The Sources of Morality* (London 2002); J. Mikhail, “Plucking the Mask of Mystery from Its Face: Jurisprudence and HLA Hart” (2007) 95 *Georgetown Law Journal* 733.

<sup>22</sup> E.g. T.M. Scanlon, *What We Owe to Each Other* (Cambridge, Mass. 1998), 171–2.

<sup>23</sup> “[I]t would be absurd to deny the title of morality to emphatic social vetoes” such as sexual taboos: *CL* 175. See also *CL* 182.

Committee – namely that the law should not concern itself with “harmless” immorality – immorality “as such”, as both Hart and the Committee called it.

One of the claims that Hart made in support of this position was that when law-makers track morality, it is critical morality, not positive morality that they should follow; and that certain (unidentified) opponents of reform<sup>24</sup> recommended the legal enforcement of positive morality whereas those who supported reform had critical morality on their side.<sup>25</sup> This argument has two major weaknesses. First, even assuming that positive morality is conventional, it ignores the fact that at the time, British public opinion, about homosexuality and the law’s proper role in relation to it, was deeply divided. It puts in the mouth of Hart’s opponents advice to the legislature that was, regardless of its acceptability, impossible to follow. Secondly, however, if social morality is understood to be a concurrent practice, the only possible question for the law-maker who wishes to track morality in circumstances where opinion in society is significantly divided is which of two (or more) critical, moral positions to track. Devlin offered highly controversial content-independent advice to the legislature about how to make this choice, whereas Hart’s strategy was to argue for the substantive superiority of his own critical judgment, namely that the law should not proscribe harmless immorality. As a result, the protagonists were, in a significant respect, arguing at cross-purposes. For Hart, the fact that public opinion was divided was irrelevant to the task of the legislature whereas for Devlin, it was of central importance.

Ronald Dworkin also joined in the debate against Devlin but, of course, did not deploy the distinction between positive and critical morality. In his view, what was “shocking and wrong” about Devlin’s position was “not the idea that the community’s morality counts, but his idea of what counts as community morality”.<sup>26</sup> Dworkin distinguished between moral convictions in an “anthropological sense”, referring to “whatever attitudes [a] group displays about the propriety of human conduct, qualities or goals”,<sup>27</sup> and moral positions in a “discriminatory sense” which contrasts them with “prejudices, rationalizations, matters of personal aversion or taste, arbitrary standards, mere emotional reaction and parroting”.<sup>28</sup> In Dworkin’s opinion, law should only track morality in the discriminatory sense. This advice might help in cases of unreasoned moral disagreement but not where disagreement is accepted on all sides to be reasonable in the sense that

<sup>24</sup> But not Devlin: *Law, Liberty and Morality* (note 17 above), pp. 19–20.

<sup>25</sup> *Ibid.*, pp. 22–4.

<sup>26</sup> *Taking Rights Seriously* (note 13 above), p. 255.

<sup>27</sup> *Ibid.*, p. 248.

<sup>28</sup> *Ibid.*, pp. 248, 250.



although each side thinks the other mistaken, the disagreement “has survived shared deliberation conducted in good faith over an extended period of time”.<sup>29</sup>

Hart’s change of mind about the nature of morality had other ramifications, too. One of the reasons why he originally adopted a broad understanding of morality was in order to avoid controversy about its content and “status” – what morality is about and what sort of thing it is. His aim was to identify features that were common to diverse accounts of morality and that served to distinguish morality, broadly understood, from law (*CL* 168–9). In this respect, Hart adopted a different strategy in relation to morality than in relation to law. As we have seen, in constructing a concept of law he focused on municipal law. So, for example, instead of developing a broader concept that accommodated international law as well as municipal law, in the last chapter of *The Concept of Law* he discussed at length whether the international phenomenon is properly called “law” understood in terms of the concept he had developed in the rest of the book. As a result of this restrictive approach, Hart’s concept of law has become increasingly controversial, attracting criticism from sociologically minded legal pluralists. They point to a rich diversity of practised understandings of what law is, to the fact that there may be more than one legal system within a single social space, to the fact that municipal law is not the only type of highly institutionalised normative system, and to the development in recent decades of various more-or-less institutionalised trans-national and supra-national normative regimes that further destabilise the paradigm of municipal law. Hart has also been criticised for failing to consider the possibility that different legal traditions or families of legal systems might be based on significantly different concepts of law.<sup>30</sup>

Avoidance of distracting controversy about the nature of morality is precisely what Hart sought by adopting a broad and eclectic approach to that concept and precisely what he inevitably invites by opting for a narrower concept of morality as individual conviction, which is only one of a diverse array of understandings of the phenomenon. For the purposes of illuminating the relationship of morality to law, what reason is there for ignoring, for instance, accounts of morality in terms of convention, or accounts that ground morality in the authority of God or a sacred text or religious officials, or “realist” accounts that liken moral truth to scientific truth? Putting the point somewhat differently, perhaps we should entertain the thought that

<sup>29</sup> C. McMahon, *Reasonable Disagreement: A Theory of Political Morality* (Cambridge 2009), 9.

<sup>30</sup> E.g. Simpson, *Reflections*, note 1 above, pp. 157–60.

there are as many relationships between law and morality as there are understandings of the two phenomena.

A possible advantage of narrower accounts is that, although sociologically less satisfying, they may be analytically more powerful. For instance, in his path-breaking book, *A General Jurisprudence of Law and Society*,<sup>31</sup> Brian Tamanaha sets out to develop a concept of law designed to accommodate a large body of empirical data about law and legal systems. He comes up with the idea that law is whatever people call law. What this broad concept of law gains in sociological fidelity it loses in analytical power. Hart's sociologically narrower concept is analytically powerful because it deploys a set of relatively clear criteria that can be used to identify specific similarities and differences between various normative regimes.<sup>32</sup> It is very easy to spot fundamental differences between municipal law on the one hand, and social morality understood narrowly in terms of individual conviction on the other. It may be more difficult to identify clear differences between municipal law and morality broadly understood, and even more difficult to identify clear differences between morality broadly understood and law broadly understood.<sup>33</sup> Indeed, legal pluralists have tended to shift their attention away from attempting to categorise social normative regimes, instead devoting their energies to understanding how various normative regimes interact. Nevertheless, a significant aspect of Hart's project in *The Concept of Law* was to identify similarities and differences between morality broadly understood and municipal law.

## II. THE STATUS OF MORAL JUDGMENTS

Just as Hart sought to avoid controversy by adopting a broader rather than a narrower account of morality, he also looked for points of distinction between law and morality that side-stepped disagreements about what he called the "status" of moral judgments. By "status" he refers to the issue of whether morality is "part of the fabric of the Universe not made by man, but awaiting discovery by the human intellect" (*CL* 168) or whether, by contrast, it consists of "expressions of changing human attitudes, choices, demands or feelings" (*ibid.*). The former view is sometimes referred to as "realism" and the latter as

<sup>31</sup> B.Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford 2001).

<sup>32</sup> For a suggestive comment by Hart along similar lines see Sugarman, "Hart Interviewed" (n 19 above), 291. For a related point see M. Krygier, "The Concept of Law and Social Theory" (1982) 2 *Oxford Journal of Legal Studies* 155, 159–61. By adopting a concept of morality as autonomous judgment, Neil MacCormick is able to establish a "conceptual" distinction between law and morality: N. MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford 2007), ch. 14.

<sup>33</sup> For an extended argument along these lines see J. Shklar, *Legalism: Law, Morals and Political Trials* (Cambridge, Mass. 1986), 39–64.

“constructivism”.<sup>34</sup> At first sight, Hart’s later revised view of morality as personal conviction (unlike his earlier eclectic approach) might seem to commit him to some version of constructivism; but in the Postscript to *The Concept of Law* he reiterates the opinion that “legal theory should avoid commitment to controversial philosophical views of the general status of moral judgments” (CL 253–4).

Hart made this declaration of philosophical agnosticism not in the context of his revised view of the nature of morality but in his discussion of what is called “soft” or “inclusive” positivism (CL 250–4). This somewhat arcane and technical topic deserves our attention because of the light it sheds on Hart’s understanding of morality and its normative relationship to law. Hart’s general approach to law is known as “legal positivism”. Post-Hartian positivists divide themselves into two camps: “soft” (or “inclusive”) positivists and “hard” (or “exclusive”) positivists. Hart, by his own admission, was a soft positivist. Soft positivists and hard positivists disagree about whether the validity of a law can ever depend on its conformity with “moral principles or substantive values” (CL 250).<sup>35</sup> Soft positivists say that it can, provided the rule of recognition so provides. According to soft positivists, the effect of a constitutional provision that empowered a court to strike down parliamentary legislation on the ground that it infringed principles of freedom of speech or equality before the law or due process (for instance) would be to make the very existence of the legislation as valid law depend on its conformity with certain moral principles.<sup>36</sup> By contrast, hard positivists would interpret such provisions as empowering judges to invalidate the legislation and in that way change the existing law to bring it into conformity with morality.<sup>37</sup>

<sup>34</sup> There are many versions and varieties of both moral realism and moral constructivism. My only concern here is with Hart’s unwillingness to commit himself to any version of either. Christopher McMahon develops a view he calls “moral nominalism”, “intermediate” between realism and constructivism, to explain the important phenomenon of reasonable moral disagreement, to which Hart paid little or no attention and which, McMahon says, neither realism nor constructivism can adequately explain: McMahon, *Reasonable Disagreement* (note 29 above). Central to nominalism is the idea that moral ideas evolve and can change.

<sup>35</sup> Because this phrase appears in the Postscript to *The Concept of Law*, I assume that by “moral principles” Hart means personal moral convictions as opposed to conventional morality. Hard positivists need not and do not reject Hart’s view that conventional norms can be part of the law if the rule of recognition so provides: CL 44–8.

<sup>36</sup> I assume for the sake of the argument that freedom of speech, equality, due process and so on are “moral” issues. However, it is arguable that framing the debate between hard and soft positivists in terms of the relevance of “morality” to the validity of law raises the stakes unnecessarily. Instead, the difference between the two positions might be said to concern whether the content of a law (as opposed to its source) can affect its validity. This reading of the debate is consistent with the argument made in the next paragraph below. In this light, a provision of the type we are considering would authorise judges, in assessing its validity, to take account of the content as well as the source of a law without raising any issue about the “status” of the relevant “substantive values”, for conformity with which the law is to be tested.

<sup>37</sup> Hart may have been attracted to soft positivism because it seems descriptively superior to hard positivism. As a matter of legal doctrine, when legislation is held unconstitutional it is invalidated with retrospective effect, not deprived of effect prospectively. On the other hand, hard positivism is

On the surface, at least, soft positivism may seem inconsistent with the separation thesis I described earlier, a plausible interpretation of which is that the validity of a law does not depend on its conformity with substantive moral principles. However, since Hart unwaveringly espoused the separation thesis, we should look for an interpretation of soft positivism consistent with that thesis. The view that morality is a matter of personal conviction may provide such an interpretation. The idea would be that legal provisions imposing substantive limitations on what can count as law authorise legal officials to give effect to what Hart calls their “best moral judgment” (CL 254) about what such limitations prohibit, require or permit in particular cases. According to this interpretation, such provisions do not make the existence and validity of law depend on what moral principles prohibit, require or permit but on what particular legal officials in particular cases believe particular moral principles prohibit, require or permit. Because the personal convictions of judges are open to moral assessment, this approach preserves the distinction between asking what the law is and what the law ought to be even in cases where what the law is depends on substantive moral principles. This interpretation also has the advantage, from Hart’s perspective, of being neutral as between realist and constructivist views about the status of moral judgments.<sup>38</sup> This is because even if realism provides the correct or best account of morality, there is no widely accepted method for discovering moral truth. It follows that the best that even a realist judge can do is to give effect to his or her own personal moral convictions about what the moral truth is.<sup>39</sup>

Of course, regardless of the theory, in practice many judges think that they should not give effect to their own personal moral convictions in deciding what the law is or ought to be.<sup>40</sup> They worry that the legitimacy of the judicial role depends on finding some external source

likely to be normatively attractive to those who distrust judicial power or who think that citizens should be able to identify what the law is without recourse to substantive moral reasoning.

<sup>38</sup> Matthew Kramer is a soft positivist who commits himself to the view that there are objective moral truths and that it is such truths that the sort of provision we have been discussing incorporates into the law: M.H. Kramer, *Where Law and Morality Meet* (Oxford 2004), ch 2. However, he also accepts, of course, that judges are morally fallible. His view is that a judge who makes a mistake about what morality requires changes the pre-existing law while a judge who correctly identifies what morality requires applies the pre-existing law. Kramer argues that the interpretation of soft positivism I suggest here “can very easily be extended into an audacious form of rule-scepticism” in relation to the application as opposed to the ascertainment of law (*ibid.*, 119). This conclusion seems to me to confuse moral reasoning with textual interpretation or, at least, to rest on a highly formal, rule-based understanding of morality.

<sup>39</sup> J. Waldron, “The Irrelevance of Moral Objectivity” in *Law and Disagreement* (Oxford 1999). MacCormick apparently makes a similar point when he argues that for realists, autonomy is morally rather than metaphysically relevant to their moral lives (MacCormick, note 32 above, p. 250). Unlike Hart, MacCormick appears to have committed himself to some version of constructivism.

<sup>40</sup> See e.g. Lord Justice Balcombe, “Judicial Decisions and Social Attitudes” (1994) 84 *Proceedings of the British Academy* 209, 229; Lord Bingham of Cornhill, “The Judges: Active or Passive” (2006) 139 *Proceedings of the British Academy* 55, 70. For an extended scholarly argument to this effect see M.A. Eisenberg, *The Nature of the Common Law* (Cambridge, Mass. 1988).

of norms in cases where the extant legal materials provide no determinate answer to the issue they have to decide. However, at least in cases where the relevant issue is the subject of genuine, reasonable and intractable moral disagreement, the most appropriate course of action for the judge is to follow his or her own best moral judgment. Typically, in principle at least, the moral views of an individual judge will not determine what the law is, and the legitimacy of the input of the individual judge to the law-making process must be assessed in terms of the broad institutional environment in which cases are decided including, for instance, majority voting in multi-member appeal courts and the possibility of reversal by a legislature.<sup>41</sup>

### III. FOUR FEATURES OF MORALITY

So far we have seen that Hart's descriptive account of morality was eclectic. It included various types of morality (conventional, concurrent, personal and so on) and was neutral as between realist and constructivist views of the status of moral judgments. It is against this descriptive background that Hart identified four main features of morality that, in his opinion, differentiated it from municipal law: "importance", "immunity from deliberate change", "the voluntary nature of moral offences" and "the form of moral pressure". On closer scrutiny, none of these features provides a straightforward contrast between morality broadly understood and municipal law. I will look at each in turn.

#### *A. Importance*

"In contrast to morals", Hart says, "some, though not all, rules of law, occupy a relatively low place in the scale of serious importance" (*CL* 174). On the other hand, moral rules, he asserts, are necessarily important (*CL* 175). We can easily agree with Hart that law and morality both deal with issues of great human and social importance. However, as Hart himself admits, the statement that morality deals with serious matters is "both truistic and vague" (*CL* 173). We would need to know much more about the content of morality (a topic that Hart largely avoids – except in his discussion of what he calls "the minimum content of natural law") before we could assess in what ways and to what extent law and morality differ along the dimension of importance.<sup>42</sup>

<sup>41</sup> P. Cane, "Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law" (2005) 25 *Oxford Journal of Legal Studies* 393.

<sup>42</sup> C.D. Johnson, "Moral and Legal Obligation" (1975) 72 *Journal of Philosophy* 315, 329–31 argues, with particular reference to promising, that in both law and morality importance is related to the level of abstraction and, conversely, specificity, at which their respective "requirements" are stated – the more abstract the more important, the more specific the less important.

We would also need to know much more about the idea of importance. Here, Hart is more forthcoming, and he fills out the concept in three different ways (CL 173–4). First, he says, “[m]oral standards are maintained against the drive of strong passions which they restrict and at the cost of sacrificing considerable personal interest”. Secondly, “serious forms of social pressure [are] exerted not only to obtain conformity ... but to secure that moral standards are taught or communicated as a matter of course to all in society”. Thirdly, “if moral standards were not generally accepted, far-reaching and distasteful changes in the life of individuals would occur”.

### *1. Curbing the Passions and Sacrificing Personal Interest*

As a psychological generalisation, the claim that moral standards restrict strong passions seems false even in relation to fundamental moral standards, such as the prohibition on murder. Under normal circumstances, very few people have to struggle mightily against the desire to kill or injure others, for instance, or even to steal or defraud. In fact, it is a reasonable hypothesis that the strength of the desire to breach a moral standard is typically inversely proportional to its perceived importance, whether in the abstract or in particular circumstances. In this regard, it may be significant that the *Concept of Law* was written around the time Hart was also debating with Patrick Devlin about the decriminalisation of male homosexual activity. “[L]aws enforcing sexual morality”, Hart said in *Law, Liberty and Morality*,<sup>43</sup> “create misery of a quite special degree. For the difficulties involved in the repression of sexual impulses ... are quite different from those involved in abstention from ‘ordinary’ crime”. Indeed, Hart goes on to say that “the impulse to steal or to wound or even to kill is not, except in a minority of mentally abnormal cases, a recurrent or insistent part of daily life”.<sup>44</sup>

Hart’s related claim that morality conflicts with personal interest reflects an association, common in jurisprudential literature, between morality and regard for others, and a corresponding contrast between morality and “prudence” or “self-regard”. By contrast, there is a long philosophical tradition that considers self-interest, one’s personal projects, aspirations and life-plans, as being integral to morality.<sup>45</sup> One of the standard objections to utilitarianism as a moral theory is that it is too demanding and allows too little place for self-interest.<sup>46</sup> The

<sup>43</sup> Note 17 above, p. 22.

<sup>44</sup> *Ibid.*

<sup>45</sup> “Throughout the history of philosophy, by far the most popular candidate for the position of the moral point of view has been self interest”: K. Baier, *The Moral Point of View: A Rational Basis of Ethics* (Ithaca, NY 1958), p. 187. See also, e.g., S. Scheffler, *Human Morality* (New York 1992), ch. 2; B. Leiter, “Nietzsche and the Morality Critics” (1997) 107 *Ethics* 250, esp. pp. 259–60, 272.

<sup>46</sup> See, e.g., M. Timmons, *Moral Theory: An Introduction* (Lanham, MD 2002), 134–5.

degree to which morality is other-regarding is a matter of complex and continuing debate and disagreement amongst moral philosophers. Of course, we should not mistake philosophical moral theory for morality; but disagreement amongst philosophers about the moral status of self-interest should at least cause us to pause before accepting Hart's position.

At all events, even if we agree with Hart about the relationships between morality, the passions and self-interest, it is surely the case that law, too, may conflict with what we want and what we perceive to be in our own interest. Even assuming that it makes sense to assess the relative importance law and morality in the aggregate as opposed to comparing particular legal rules and moral standards, there is no obvious reason to think that the contrast between morality and law in this regard is any more than a matter of degree; and it would be no easy task to determine the relative positions of law and morality along the dimensions of curbing the passions and frustrating the pursuit of self-interest.

## 2. *Serious Social Pressure*

Hart's second criterion of importance – that morality is characterised by “serious” forms of social pressure – is extremely vague.<sup>47</sup> Moral sanctions vary in severity, and the least severe (a mild expression of disapproval, perhaps) might not deserve to be called “serious”. Unless one subscribes to the implausible view that all moral rules, principles, standards, reasons and judgments are of equal importance and force, not all immoralities would or should be met by equally serious forms of social pressure. Moreover, by comparison with some legal sanctions – for instance, the death penalty, long-term imprisonment, and large monetary fines and compensation awards – even very serious moral sanctions (such as scape-goating and social ostracism) may be experienced as relatively mild. Amongst the resources that municipal law can put at the disposal of morality are stronger forms of coercion than a non-institutionalised normative regime can effectively provide without risking social disorder. An important consideration to be taken into account when deciding whether or not to “legalise” a particular non-legal norm is whether any of the various forms of coercion that the law has at its disposal would appropriately be made available to reinforce the norm in question. This may help to explain why, for instance, many legal systems impose no “general duty to rescue” even though many people believe that there is such a moral

<sup>47</sup> Hart treats this criterion inconsistently, in one place offering it as a point of similarity between law and morality, not difference: *CL* 172, where he summarises five “striking similarities between moral and legal rules of obligation”.

duty. It is one thing to disapprove of and criticise failure to rescue but another to impose legal liability and to award monetary compensation for failing to rescue.

### *3. The Consequences of Immorality*

Hart's third criterion of importance – relating to the serious, negative consequences for individuals of widespread rejection of moral standards – is ambiguous. If it refers to any and every moral standard, the claim seems as implausible as it would if it were made in relation to any and every legal rule. Widespread failure to comply with a moral or legal requirement of trivial social importance may have only trivial social consequences. On the other hand, if the criterion refers to morality in the aggregate, it seems equally true of law. A general failure of voluntary conformity to law would destabilize society and potentially have a negative impact on its members just as much as would general rejection of prevailing moral standards. Perhaps the clearest difference between municipal law and morality so far as the consequences of widespread non-conformity are concerned is that an individual legal rule may be entirely a dead letter, neither complied with nor enforced by anyone, but still exist as a law of the system; whereas the death of compliance and enforcement would spell the end of existence for moral standards. But even this conclusion might be questionable in relation to understandings of morality that find a significant place for authority.

## *B. Immunity from deliberate change*

### *1. Moral Legislation*

Hart formulates this supposed feature of morality in various significantly different ways: that morality cannot be deliberately made or changed,<sup>48</sup> that it is “something ‘there’ to be recognised”, and that the idea of a moral legislator with authority to make and change morality is “repugnant to the whole idea of morality” (*CL* 175–8). In considering these claims, it is important to remember that at the time he made them, Hart took a broad view of morality and professed neutrality as between moral realism and moral constructivism. So the question is not whether there is any particular understanding of morality of which these claims are true, but whether they are true of a broad range of understandings of morality, whether realist or constructivist,

<sup>48</sup> For the suggestion that the legal principle that promises should be kept is just as immune to deliberate change as its moral analogue see Johnson, “Moral and Legal Obligation” (note 42 above), pp. 322–4. In Johnson's view, the important distinction is not between law (changeable) and morality (immune to change) but between fundamental principles (immune to change) and specific rules and obligations (changeable).



whether conventional, critical or personal, and whether based on authority or individual conviction.

In that light, consider first the claim that the concept of a legislator is repugnant to the very idea of morality. The force of this claim depends significantly on how the concepts of a legislator and legislation are filled out. If the paradigm legislator resembles the UK Parliament, for instance, or the US Congress, and if paradigm legislation resembles a statute, the distinction between morality, however broadly understood, and law might seem quite clear. There are no formal moral parliaments or congresses and no moral statutes. On the other hand, if one's image of a legislator and of legislation is looser and less formal, the ideas of a moral legislator and moral legislation may not be repugnant to an understanding of morality that, for instance, finds a significant place for authority.<sup>49</sup> From a completely different perspective, in the words of Gilbert Harman, "Kant argued that we must think of the principles of morality as principles that each of us legislates for himself and for others".<sup>50</sup>

Anyway, even the absence of moral parliaments and moral statutes may not be quite as decisive as it first appears. One of the important social functions of legislation is to reinforce and supplement morality in various ways; and to the extent that such legislation is morally acceptable, it can generate new moral reasons for action as well as legal reasons. Nor is legislation the only mechanism by which law is made. For instance, during the first 800 years of the English legal system, courts were the main source of law and parliament played only a subsidiary role. In England, courts pre-dated parliament, and it is not clear that we would want to deny the title of "legal" even to a system in which *all* law was made as a by-product of adjudicating disputes. When they make law, judges commonly justify their decisions by reasoning in ways that are structurally similar to formalised models of moral reasoning and judgment such as John Rawls's reflective equilibrium method.<sup>51</sup> The common law treats every principle as revisable at the point of application and provides a working model of how change can occur in a normative regime, like morality, that puts high value on stability and in which change is typically gradual and incremental.

<sup>49</sup> Indeed, G.E.M. Anscombe famously argued that the concept of morality only makes sense within a religious framework: *Ethics, Religion and Politics: The Collected Philosophical Papers of G.E.M. Anscombe, Volume Three* (Oxford 1981, ch 4 ("Modern Moral Philosophy"). For a discussion of the role that authority might play in secular morality see S. Fleischacker, *The Ethics of Culture* (Ithaca, NY 1994), esp. chs. 3 and 4.

<sup>50</sup> G. Harman, *The Nature of Morality: An Introduction to Ethics* (New York 1977), 112.

<sup>51</sup> Of course, judicial reasoning is substantively constrained by institutional factors in a way that the moral reasoning of individuals is not.

## 2. *Morality “there” to be recognised*

Contrary to Hart’s professed agnosticism about the status of moral judgments, on its face the claim that morality is something “there” to be recognised apparently assumes the truth of some version of moral realism. However, in context, it seems that this is not what Hart intended because he says that morality shares this feature with traditions, which, in his view, are conventional social practices. Traditions, Hart says, acquire and lose their status as such “by growing, being practised, ceasing to be practised, and decaying ... by ... slow, involuntary processes” (CL 176). The idea that traditions and other conventional practices are involuntary is bizarre and quite at odds with Hart’s account of how social rules come into existence and are sustained, which involves not only voluntary but also deliberate conduct.<sup>52</sup> In fact, it seems that Hart meant only to restate the claim that traditions, like morality, are not the product of legislation in a quite formal sense. As he goes on to say, immunity from legislative change “must not be mistaken for immunity from other forms of change” (CL 176).

Of course, Hart’s revised view was that social morality is not analogous to tradition because, unlike tradition, it is not conventional. Although Hart did not revisit his discussion of the amenability of morality to deliberate change in the light of his revised view, the ideas of personal morality and individual ideals that he included in his original catalogue of types of morality are analogous to his later concept of individual conviction. About personal morality he says that “though conversions are possible, the notion that such ideals could be adopted, changed, or eliminated by deliberate choice is chimerical” (CL 184). This statement might seem to take us well beyond the idea that morality cannot be formally legislated in the direction of some version of realism. Once again, however, given Hart’s desire to avoid commitment to any particular view about the status of moral judgments, we should try to interpret his position consistently with that stance. A possibility is to say that when people adopt moral positions for the first time or change their existing moral views they treat those new positions and views as always having been the right ones independently of their having espoused them. This might be thought to provide evidence for the objectivity of morality. However, of course, it does not follow from the fact that we treat our moral views as timeless and pre-existent that they actually are. We might explain such an attitude in functional terms as providing a psychological basis for treating morality as “the ultimate standard by which human actions ... are evaluated”, as Hart puts it (CL 230).

<sup>52</sup> To similar effect: Warnock, *The Object of Morality* (note 13 above), pp. 49–50.

At all events, Hart gives us no good reason to accept that immunity from deliberate change is a necessary feature of morality unless, perhaps, we understand “deliberate change” in a very narrow way.

### *C. The Nature of Moral Offences*

In law, Hart says, liability regardless of fault may be open to criticism, but in morality it “comes as close to being a contradiction in terms as anything in this sphere” (CL 173). Moral obligations, he adds, are “within the capacity of any normal adult” (CL 171). “In morals” he continues, “‘I could not help it’ is always an excuse, and moral obligation would be altogether different from what it is if the moral ‘ought’ did not in this sense imply ‘can’” (CL 179). If these statements are understood as referring to morality as commonly practised, the claim that morality, unlike law, does not recognise strict liability seems quite obviously false. Hart’s view to the contrary may be the result of failing to distinguish clearly enough between responsibility and liability. It is one thing to say that a person is not “morally responsible” for the adverse consequences of their conduct unless that conduct was blameworthy, but quite another to say that a person can have no moral obligation to make some sort of amends for the adverse consequences of their conduct unless that conduct was blameworthy. In neither legal nor non-legal normative regimes is liability necessarily responsibility-based. The conduct required to discharge a moral obligation to make amends may be much less onerous than that required by the law in similar circumstances – perhaps an apology would be all that is needed or an expression of sympathy or regret. And, of course, people may reasonably disagree about the content, and even the existence, of such an obligation outside the law. However, there is no reason to think that moral strict liability is “a contradiction in terms” or even close to it.

Hart may have been led to this view by his tendency to associate morality with criminal law – a tendency shown by his description of moral wrongs as “offences”.<sup>53</sup> People who would be prepared to accept that strict legal liability to compensate victims of harm is morally acceptable or required might feel much less comfortable about criminalizing, and punishing people for, faultless conduct. A judgment that moral punishment for blameless behaviour would be unacceptable does not lead to the conclusion that a moral obligation to make amends for the consequences of such conduct would be equally unacceptable.

<sup>53</sup> More generally, this tendency may explain why philosophers deny the possibility of strict moral liability: J. Watkins, “Responsibility in Context” (2006) 26 *Oxford Journal of Legal Studies* 593, 606.

The claim that moral obligations are necessarily within the capacity of normal adults also seems problematic, at least on the assumption that there can be “conflicts between irreducibly moral considerations”.<sup>54</sup> Suppose that a Good Samaritan can provide vital assistance at a crash scene only by breaking a long-standing promise to meet a disabled relative off a long-haul flight. The Good Samaritan cannot comply with both the obligation to assist and the obligation to keep the promise. In this sense, “ought” does not imply can.<sup>55</sup> Leaving aside normative conflicts, it is at least plausible to think that in the way most people understand morality, it does not impose obligations that are beyond the capacity of normal people to perform or prohibitions that are beyond the capacity of normal people to observe – albeit, for some people and in some circumstances, only by dint of considerable effort. However, the same, in general, could also be said about law. What is more, just as particular individuals may lack the capacity for moral responsibility, so people may lack the capacity for legal responsibility. In morality, “normal capacity” is commonly treated – as in law – as a threshold above which differences in capacity amongst “normal” people are more or less irrelevant to responsibility, if not to liability. It is widely accepted that in morality as much as in law, the relevant responsibility question is not whether a person who fails to behave as law or morality requires on a particular occasion and in particular circumstances could have conformed to the relevant legal or moral norm on that occasion and in those circumstances – even assuming that this question makes sense. Rather, the question is whether, on such occasions and in such circumstances, the person is generally able to behave as law or morality requires.<sup>56</sup> Requiring people to do the impossible is not a characteristic feature either of legal or moral ideas of responsibility.<sup>57</sup>

#### *D. The Form of Moral Pressure*

Securing compliance with morality, Hart claims, involves “appeals to the respect for the rules, as things important in themselves, which is presumed to be shared by those addressed” and never involves

<sup>54</sup> Wallace, *Moral Relevance and Moral Conflict* (note 15 above), p. 12. Wallace argues that solving moral conflicts requires active interpretation and adaptation of moral rules and principles in a way that changes existing rules and principles and generates new ones. Morality, he asserts, is “an intellectual and cultural achievement” (ibid., 53) and a matter of “learned dispositions” (ibid., p. 55).

<sup>55</sup> To similar effect: C.E. Larmore, *Patterns of Moral Complexity* (Cambridge 1987), 149–50.

<sup>56</sup> T. Honoré, “Can and Can’t” (1964) 73 *Mind* 463; reprinted in T. Honoré, *Responsibility and Fault* (Oxford 1999). I am leaving aside the issue of causal determinism. Whatever the truth may be at the micro-level of physical processes, at the meso-level of practical reasoning and action there is no good reason to ignore the lived experience of freedom and control.

<sup>57</sup> Fuller’s famous list of pathologies of rules includes “requiring conduct beyond the powers of the affected party”: L.L. Fuller, *The Morality of Law*, revised edn. (New Haven 1969), 39.

“only threats of physical punishment or unpleasant consequences” (CL 180–1; see also 86, 228). Hart apparently intends this as a conceptual claim, but I think it is better understood as an empirical hypothesis about what Hart calls the “typical forms” of legal and moral pressure respectively: “physical” in the case of law and “non-physical” in the case of morality. Empirically, Hart’s claim strikes me as being far from obviously true either in relation to morality or law. We might hypothesise with equal plausibility that those who seek the compliance of others with either morality or law typically use whatever mix of hard treatment and appeals to legitimacy they think most likely to achieve the desired result. Moreover, if, with Hart (CL 38–9), one believes that law’s prime function is to guide the law-abiding rather than to control law-breakers, and that general conformity with moral and legal norms is a precondition of social life and human flourishing, it seems better to think of physical sanctions as pathological rather than as characteristic of law.

We may conclude this discussion of Hart’s four points of distinction between morality and law by saying that it suggests that the two phenomena – or, at least, particular legal rules and moral standards – can usefully be contrasted along various dimensions, but not that they occupy categorically distinct social and conceptual spaces.

#### IV. MORALITY AND CONFLICTING REASONS FOR ACTION

Although Hart took a quite narrow approach to law focused on municipal legal systems, he approached morality more broadly; and this is one reason why he was not successful in identifying crisp distinctions between law and morality. Success would probably have been even more elusive if he had adopted a broader approach to law. Nevertheless, there is one characteristic of morality identified by Hart, almost in passing and without much elaboration, which does feature in most accounts of morality of which I am aware,<sup>58</sup> and which also explains why law is subject to moral assessment. In Hart’s words, it is “the part played by morality in the lives of individuals” (CL 176) “as the ultimate standard by which human actions ... are evaluated”

<sup>58</sup> At any rate, accounts of the morality of obligation as opposed to the morality of aspiration: see n 12 above. One exception that I know of is Bernard Gert’s account of “common morality”, which he defines as “the moral system that most thoughtful people use, usually implicitly, when they make moral decisions and judgments”: B. Gert, *Common Morality: Deciding What to Do* (Oxford 2004), v. In Gert’s scheme, the ultimate normative standard is “rationality” (ibid., pp. 91–5); and (he says) while it is never irrational to act morally, it may be rational to act immorally. Gert’s view is explained by the fact that “common morality” is a substantive, not a formal concept. According to Gert, the basic principle of common morality is to “do no harm”. This understanding of morality also leads him to draw a distinction between religious principles about right and wrong, good and bad, virtue and vice on the one hand, and moral principles on the other (ibid., p. 4).

(CL 230).<sup>59</sup> This feature differs from the others discussed by Hart in two significant ways. First, it refers to the function of morality as opposed to what we might call its “form” or “structure”. Secondly, it refers to individuals’ reasoning about what do to and what sort of person to be, about their own conduct and that of others. By contrast, in Hart’s main discussion of the distinctive features of morality, both morality and law are treated as things in the world – they are, if you like, reified or personified. Lawyers and legal theorists often make statements about “the law” – that it has aims and functions, for instance, and that it makes “claims” (of being morally justified, for instance)<sup>60</sup> – rather than talk about the aims and purposes that people pursue through law and the claims they make about it. Similarly, it is not only moral realists who reify morality and think of it as a subject rather than a product of human reasoning. The shift, from reifying morality and law to thinking about them in terms of individuals’ practical reasoning, opens up fruitful ways of understanding their inter-relationship.

The function of providing individuals with ultimate standards for assessing human conduct is not only common to diverse understandings of morality; it also distinguishes morality from municipal law and from other social normative regimes whether or not they are understood to be legal.<sup>61</sup> In practical deliberation about the right, the good and the virtuous, when a moral reason for action conflicts with a reason derived from another normative regime,<sup>62</sup> the moral reason trumps the non-moral reason. More particularly, when a moral reason for action conflicts with a reason for action derived from the law, the moral reason trumps the legal reason because one of the functions of morality in practical deliberation is to provide ultimate standards for the assessment of law.<sup>63</sup>

<sup>59</sup> Cf Scheffler, *Human Morality* (note 45 above), p. 12: “a shared reference point for the formulation and adjudication of challenges to existing institutions and practices more generally”.

<sup>60</sup> Or even that it is male or female: G. Criscuoli, “Is the Common Law Masculine or Feminine?” (1981) 1 *Oxford Journal of Legal Studies* 305.

<sup>61</sup> For this reason, amongst others, Hart resisted classification of international “law” as (international) morality: CL 227–32.

<sup>62</sup> In the philosophical literature there is much discussion of a different question of whether and the extent to which moral reasons for action override or, on the contrary, accommodate reasons of self-interest (and, perhaps, some other types of “non-moral” reasons). See note 45 above. There is a similar debate about the relationship between moral reasons and reasons of public interest: P. Cane, *Responsibility in Law and Morality* (Oxford 2002), 276–7; see also Hart’s discussion of the relationship between “justice” and “social/public/common good” (CL 166–7). The point I am making in the text assumes that the question of what reasons are moral reasons has already been answered. Under a theory that allows reasons of self-interest to trump moral reasons, legal reasons would presumably trump reasons of self-interest. One view of moral reasons for action is that they are “all-things-considered” reasons. So understood, morality would trump law as a matter of definition: L. Alexander and F. Schauer, “Law’s Limited Domain Confronts Morality’s Universal Empire” (2007) 48 *William and Mary Law Review* 1579.

<sup>63</sup> This way of presenting the issue will not appeal to those who think that all genuine reasons for action are moral. They might prefer a formulation in terms of a conflict of the moral reasons provided by the law and moral reasons apart from the law. See note 6 above.

This is not to say, of course, that law does not claim to trump morality. Understood as a reified or personified entity, law may be said to *claim* supremacy over morality just as morality can be said to claim supremacy over law. Acting in accordance with a moral reason and contrary to a legal reason may attract legal sanctions just as the imposition of sanctions in response to such conduct may be judged morally unjustified. However, because morality provides ultimate standards for assessing human conduct in a way that law does not, moral reasons trump legal reasons in the deliberations not only of subjects of the law but also of legal officials who administer the law. Even while submitting to law's claim of supremacy and its superior force, individuals may assess its claim and its application of force to be morally unjustified; and even while enforcing law's claim to supremacy and applying its force, legal officials may assess that claim and that force to be morally unjustified – at the retail level, anyway, if not wholesale.

Although this feature of providing ultimate standards is common to very many, if not all, accounts of morality, the diversity of those accounts is reflected in the variety of explanations they suggest of the role of morality as the source of ultimate standards of conduct. For instance, if morality is understood as a matter of authority, moral reasons will trump non-moral reasons in normative conflicts because they are thought to derive from an authority higher than any other norm-making authority. According to realism, moral reasons trump legal reasons because, unlike law and other social normative regimes, morality is not a human creation but in some sense part of the natural order and so, timelessly, unchangeably and objectively “true”. Understood conventionally, morality may provide civil society and, more particularly, social groups with a normative bulwark against the exercise of power through law,<sup>64</sup> while understood as a matter of individual conviction, it can function to protect individual freedom of thought and conscience against the demands of society and the state. The general point is that there are many, diverse accounts of morality which share the feature of trumping law and many, diverse explanations of why morality has this feature.

What are the implications of the ultimacy of moral reasons? In particular, what does it tell us about the relevance of law to moral reasoning? The argument I want to make here is that the belief that the law is always subject to moral evaluation and that moral reasons trump legal reasons does not lead to the conclusion that the law is irrelevant to

<sup>64</sup> Remember that this statement refers to the function of morality in individuals' practical reasoning. In a moral theory that distinguishes between conventional, positive morality on the one hand and individual, critical morality on the other, critical morality provides ultimate standards for assessing positive morality as much as other conventional normative systems.

moral reasoning and deliberation. In particular, I suggest that a person who accepts either or both of the following two propositions about morality may have good cause to take account of the law in their moral reasoning. The first proposition is that the requirements of morality in particular situations and circumstances may be indeterminate because moral rules and principles tend to be more-or-less abstract. The second proposition is that people can genuinely, reasonably and intractably disagree about what is morally right, good and virtuous.

Consider, first, the indeterminacy of morality. By dint of its institutional, norm-generating, resources – legislatures, courts and so on – law can supplement morality by giving it a degree of determinacy that it would otherwise lack and that may be essential for successful social life.<sup>65</sup> For instance, law can supplement a moral injunction to respect other people's property by establishing a detailed regime of property rights; it can supplement a moral injunction to contribute financially to the support of social life by establishing a detailed tax regime; it can supplement a moral injunction to do no harm by establishing rules of the road; and it can supplement a moral injunction to promote social good by conferring specific powers and imposing specific obligations on public officials.

Next, consider disagreement. Because human beings are social animals, successful social life is a fundamental human value the maintenance and promotion of which can provide good reasons for acting in certain ways and refraining from acting in certain other ways. In situations where moral disagreement about the right thing to do creates a risk of dysfunctional social instability and conflict, the institutional, norm-generating resources that law possesses and morality lacks can be used to manage such disagreement by giving people reasons to act or to refrain from acting in particular ways, for the sake of maintaining and promoting successful social life, even if they consider that in requiring or forbidding such action, the law conflicts with some standard of right conduct to which they subscribe independently of the law and of the disagreement which the law addresses. In some situations, a reason to act generated by the law for the sake of maintaining and promoting successful social life may outweigh a reason for action recognised independently of the law and of the fact of disagreement. In this way, law can promote social good by enabling people to live together successfully and well despite significant and serious differences of moral opinion and outlook.

A person who accepts that the legitimate functions of legal institutions include supplementing morality and managing potentially disruptive moral disagreement has good cause to take account of the law

<sup>65</sup> T. Honoré, "The Dependence of Morality on Law" (1993) 13 *Oxford Journal of Legal Studies* 1.



in their moral reasoning because the law possesses institutional resources that enable it to generate reasons for action that could not be generated easily or at all without those resources.<sup>66</sup> Of course, on the assumption that it is the function of morality, not law, to provide ultimate standards for judging human conduct, the reasons for action that law supplies are always subject to assessment against the ultimate standards that individuals recognise independently of the law. In particular, even assuming acceptance of the propositions about indeterminacy and disagreement, law can provide reasons for action only to those who accept the moral legitimacy of legal institutions and legal processes for making law, enforcing compliance, adjudicating disputes and so on. However, a person who accepts that morality is not self-sufficient but is dependent on law in the ways I have outlined, and who accepts the legitimacy of that dependence, has good reason to take account of law in their reasoning about ultimate standards of rightness, goodness and virtue.

Acceptance of the propositions about indeterminacy and disagreement would also give philosophers good cause to take account of law in analysis of and normative theorising about morality. My point here is not that the literature of the law may provide a richer source of raw material for philosophical moral reasoning than thought experiments can offer – although I believe this to be true; and it is an argument that philosophers are, in my experience, quite willing to accept when it is put to them. The point, rather, is that if the propositions about indeterminacy and disagreement are accepted, it is a philosophical mistake to think that morality can be properly and fully understood without reference to law. Some philosophers (and ordinary practical reasoners) may be inclined to reject this conclusion on the ground that there are many legal systems; that law is a local and culturally relative phenomenon, tied to particular communities; and that legal systems can and do render morality determinate and resolve moral disagreements in various different ways. For some people, moral standards are, necessarily rather than contingently, not only ultimate but also universally valid. However, while universality provides a reason, additional to that provided by ultimacy, for treating the law of any particular legal system only as a source of provisional standards, it provides no good reason to ignore law, in the sense of a set of institutionalised social practices, as a potential source of non-provisional

<sup>66</sup> Even legal norms that are morally “arbitrary” in the sense that the norm chosen (e.g. drive on the left) is no more or less acceptable than some alternative (e.g. drive on the right) so that the choice between them is of “no intrinsic importance” (CL 229–30) may provide moral reasons for action. Hart believed that morality “logically” cannot be arbitrary in this sense (CL 229). However, if morality is understood not only to require and prohibit conduct but also to permit conduct that it neither requires nor prohibits, it is logically possible that in any particular situation several courses of conduct may be of equal moral value so that none is morally preferable to any alternative.

standards given law's capacity, by reason of its institutional resources, to make a distinctive contribution to practical reasoning.<sup>67</sup>

Another way of making this point is to adopt, for the sake of argument, the common view that a moral reason for action tells us what we should do, all things considered. A person who accepts (1) the indeterminacy of morality and the fact of moral disagreement; (2) that law has institutional resources that enable it to make a distinctive and valuable contribution to practical reasoning by rendering morality more determinate and managing moral disagreement; and (3) that these facts are relevant to practical reasoning, also has cause to accept that a legal reason for action may, in principle at least, be an all-things-considered reason.<sup>68</sup>

On the other hand, in order to have good cause to take account of law in moral reasoning it is not necessary to believe that "the establishment of legal order as distinct from discretionary or statically customary order is ... a moral ideal if not a compelling demand of justice";<sup>69</sup> or that law provides "the only possible set of conditions within which one can inhabit a human community and yet enjoy a degree of freedom as independence from the power of others".<sup>70</sup> It is necessary only to accept that law has institutional resources that enable it to make a distinctive contribution to answering practical questions about what one ought to do or what sort of person one should aim to be.

## V. CONCLUSION

In this paper, using Hart's discussion in *The Concept of Law* as a starting point, I have addressed three questions about the relationship between law and morality: How is morality distinguishable from law? Why – as the separation thesis assumes – should moral reasons for action trump legal reasons? And, given that moral reasons trump legal reasons, what is the relevance of law to moral reasoning? Concerning the first question, we have seen that Hart originally took a broad and eclectic approach to morality but later re-conceptualised it more narrowly in terms of individual judgment and personal conviction. It was in the context of the earlier approach that Hart identified four supposedly distinctive features of morality. I have argued that none of these features clearly distinguishes morality from law, and I have

<sup>67</sup> I hope that this account of the relationship between law and moral reasoning, both "everyday" and "philosophical", is an improvement on the account I gave in *Responsibility in Law and Morality*, which was fairly criticised by Jeremy Watkins, "Responsibility in Context" (2006) 26 *Oxford Journal of Legal Studies* 593.

<sup>68</sup> I am not sure whether Alexander and Schauer (note 62 above) go quite as far as this.

<sup>69</sup> Finnis, *op. cit.* note 4 above, p. 14.

<sup>70</sup> Simmonds, *op. cit.* note 5 above.

suggested that Hart's lack of success in this regard is the analytical price of his sociologically catholic approach to the concept of morality. His later, narrower, understanding of morality is much more easily distinguishable from law.

Hart also identified a fifth feature of morality, namely that of providing individuals with ultimate standards for the assessment of human conduct. This feature differs significantly from the other four in that it relates to the function of morality as opposed to its form or structure, and it shifts the focus of attention from morality as a reified social phenomenon to its place in practical reasoning. I have argued that because this feature is shared by many, diverse understandings of the form and structure of morality and the status of moral judgments it provides a robust point of distinction between morality and law. It also explains, in answer to the second question, why moral reasons trump legal reasons, although the details of the explanation vary amongst different understandings of the form and structure of morality and the status of moral judgments. Addressing the third question, I have argued that it does not follow from the fact that moral reasons trump legal reasons that law is irrelevant to moral reasoning. Law deserves to be taken seriously in reasoning about what is ultimately right, good and virtuous by people who accept that morality is dependent on law in certain ways.

An attractive aspect of this analysis is that it links the separation thesis, which encapsulates Hart's view about the normative relationship between law and morality, with a descriptive account of their relationship in terms of their respective places in practical reasoning. The separation thesis rests on the assumption that moral reasons trump legal reasons, and the function of morality as a source of ultimate standards for assessing human conduct explains why this is so.