March 2012

Subrogation and Indemnity
TONY WEIR

Morality, Law and Conflicting Reasons for Action
PETER GANE

The Timing of Tortious and Criminal Actions for the Same Wrong
MATTHEW DYSON

Section 30(1)(g) of the Landlord and Tenant Act 1954
MICHAEL HALEY

Wills as Public Documents – Privacy and Property Rights
JOSEPH JACONELLI

The Public-Private Divide in English and Dutch Law
GERDY JURGENS AND FRANK VAN OMMEREN

How Law Protects Dignity
JEREMY WALDRON

For full contents see back cover

CAMBRIDGE UNIVERSITY PRESS
FOR THE FACULTY OF LAW, UNIVERSITY OF CAMBRIDGE
ARTICLES

MORALITY, LAW AND CONTRICTING REASONS FOR ACTION

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ABSTRACT: In The Concept of Law, H.L.A. Hart suggested that four moral 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 variably 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 26th Maccabean 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” – HLA Hart’s The Concept of Law (“CL”). The anniversary provided a good *

* Australian National University College of Law. I have benefitted greatly from invaluable conversations with Tony Caro, Wally and Nigel Finnemore, and insightful comments anonymous reviewers. I am grateful to Jeff Goldsmith and other participants in the Melbourne Law School Legal Theory Workshop, and participants in the Social and Political Theory Seminar at the ANU, for helpful feedback. Address for correspondence: Professor Peter Came, ANU College of Law, The Australian National University, Canberra ACT 2606, Australia. Email: peter.came@anu.edu.au

1 A.W.B. Simpson, Reflections on The Concept of Law (Oxford 2013). I

The Cambridge Law Journal

excuse -- if an excuse was needed -- to revisit what Hart, at the very beginning of the book, identifies as one of three "perensitive questions ... concerning human society" (CL.1-5 -- 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 Maccabean 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 "morality" and "law" 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 requested 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, that what is illegal may be morally acceptable or even required. This view is sometimes referred to as the "separation thesis". A corollary (or, perhaps, a different formulation) of the 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 a position that may be called "soft natural law", 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 or that are presupposed by law's function.

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. 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. 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 acts.

6. 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 time be not used or wasted ... except as licensed or engaged by individual rights and responsibilities flowing from past political decisions about what collective force is justified.'

According to Hart, the first, rather than the second, of these assumptions that distinguish the separation thesis from soft natural law: "Legal Prerequisites as an Idea about Morality" (1931) in 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 "law" (ibid., p. 340) in that it is not separate from or independent of morality -- it is part of a comprehensive conception of it as an instrument or application of morality. See also H. Hart, "Law and Justice" (1963) 4 J. Legal Studies 353. Hart's view is that the separation thesis is the result of "a common error in confusing the senses of 'law' and 'morality'" (ibid., p. 359). Hart's view has been adopted by a number of other authors including A. Dukas, "Law and Morality in Aristotle's Ethics" (1988) 21 J. Legal Studies 149.

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The leading modern exponent of this approach is John Finnis. J. Finnis, Natural Law and Natural Rights, 2nd edn. (Oxford 1986).


2. 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 time be not used or wasted ... except as licensed or engaged by individual rights and responsibilities flowing from past political decisions about what collective force is justified.'

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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. 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. 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.

6 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.

7 Of course, there are many types of social institutions in addition to those identified by Hart as characteristic of law. In this paper, the term "institutionalised" and "institution" will only refer to characteristically legal institutions and how they operate in practice. N. Lacey, "Analytical Jurisprudence versus Descriptive Sociology Revisited" (2006) 84 Texas Law Review 41. ("One is an "institution" in the "Cayley" Reinterpreting the Context and Reassessing the Significance of the Hart-Fuller Debate" in P. Cress (ed.), The Hart-Fulher Debate in the Twenty-First Century (Oxford 2010).

8 For a suggestive discussion of the relationship between habit, custom and law see J.B. Murphy, "Fable and Convention at the Foundation of Custom" in A. Pettit & N. Shue (eds), Virtue and the Virtues: Essays in Political Philosophy (Cambridge 2008), ch 9, paras 1-10.

9 Hartcontestidealssocials (CL 182) aspiration and supererogation with obligation. It is not clear why he thought it important to exclude 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. We do, however, understand why he excluded "idealistic, personal morality to ideals. As Professor Wigmore quotes from the late Lord Hewart, "The law has no room for the "development of conventional law."

10 However, it is not clear whether to what extent personal moralists define legal institutions and their characterisations matter in this paragraph—more especially, the last two. Social ideals have an important place in some contexts of law and certain accounts of the characterisation of law and morality. See, e.g., the work of Furniss and Fuller cited note 1 above. See also S.A. Calvert, "Moral Morality: The Challenge of Politics" (Oxford 2008), 87-90.
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, 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, context-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). 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)), his revised view was that morality, properly understood, is a matter of individual judgment and conviction and that social morality is derivative of morality in that central sense. 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. 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 MacCabean lecture, Devlin came around to the view that there was no reason, in principle, to say that the law should never "track" moral judgments that certain behaviour is wrong regardless of its tendency to harm third parties. This put Hart in a difficult position partly because he preferred to avoid controversy concerning the contents of morality (CL 183) - what morality is about and whether or not particular norms are part of morality. Some people think that private consensual sexual behaviour is not a moral issue at all - 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 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 Committee, as it understood the matter of individual judgment and conviction and that social morality is derivative of morality in that central sense.
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 recommended the legal enforcement of positive morality whereas those who supported reform had critical morality on their side.5 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 prescribe 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”.6 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”;7 and moral positions in a “discriminatory sense” which contrast them with “prejudices, rationalizations, matters of personal aversion or taste, arbitrary standards, mere emotional reaction and parroting”.8 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

5 But not Devlin, Law, Liberty and Morality (note 17 above), pp. 19-20.
6 Ibid., pp. 25-4.
8 Ibid., p. 248.
9 Ibid., pp. 248, 250.

CLJ. Morality, Law and Conflicting Reasons for Action

Although each side thinks the other mistaken, the disagreement “has survived shared deliberation conducted in good faith over an extended period of time”.9

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 (CLJ. 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-nationals 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.10

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

10 E.g. Simpson, Reflections (note 3 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*, Beam 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. It is very easy to spot fundamental differences between municipal law and moral 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. 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 “constructivism.” 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*). 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. 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.

There are many variations 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 nonrealism,” “intermediate” between realism and constructivism, to explain the important phenomena of reasonable moral disagreement, to which Hart paid little or no attention at all. McMahon says, neither realism nor constructivism can adequately explain McMahon, Reconciling Disagreement (note 29 above). Central to nonrealism is the idea that moral ideas evolve and can change. 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 role of recognition so provides: *CL 44–5*.

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 positivism is in terms of the relevance of “moral” to the validity of laws raises the stakes excessively. 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 shifting 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 authorize 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 “subjective values,” for conformity with which the law is to be tested.

Hart may have been attracted to soft positional because it seems descriptively superior to hard positivism. As a matter of legal doctrine, when legislation is held unconstitutional it is invalid 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 unambiguously 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 authorize 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. 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.

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. They worry that the legitimacy of the judicial role depends on finding some external source

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of norms in cases where the extant legal materials provide no determinate answer to the issue they have to decide. However, 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.41

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, current, 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 trusitic 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.42

42 C. D. Johnson, “Moral and Legal Obligations” (1975) 72 Journal of Philosophy 315, 329–331 argues, with particular reference to poisoning, that in both law and morality important 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” 40. 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, “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.”

Hart’s related claim that morality conflicts with personal interest reflects a common, common in jurisprudential literature, between morality and regard for others, and a corresponding contrast between morality and “prudential” or “self-regard”. For example, there is a long philosophical tradition that considers self-interest, one’s personal projects, aspirations and life-plans, as being integral to morality. 41 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. 42 The

40 Note 11 above, p. 22.
41 Ibid.
42 “Throughout the history of philosophy, by far the more popular candidate for the position of the moral point of view has been self-interest.” K. Bay, The Moral Point of View: A Reassessent of Bentham. 287. See also, e.g., J. S. Mill, Human Morality (New York 1952). 87. See also, e.g., M. Timmons, Moral Theory: An Introduction (Lanham, MD 2000), 134–5.
43 Hart treats this criteria inconsistently, in one place offering it as a point of affinity between law and morality, in another (CL 172), he summarises that “we speak ambiguously between moral and legal rules of obligation”.

C.L.J. - Morality, Law and Conflicting Reasons for Action

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. 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 scaring 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