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 Immanuality

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 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, 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, 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 broader 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. 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.”

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. 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.

81 For the suggestion that the legal principle that positions should be kept just as irrevocable to deliberate change as its moral analogue see Johnson, “Moral and Legal Obligation” (see above), pp. 322–4. In Johnson’s view, the important distinction is not between law (unchangeable) and morality (immutable to change), but between fundamental principles (immutable to change) and specific rules and obligations (changeable).


84 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.32 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 convictions 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 part of the people 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 236).

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". 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. 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.88 Requiring people to do the impossible is not a characteristic feature either of legal or moral ideas of responsibility.89

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

86 Wallace, "Moral Relevance and Moral Conflict" (note 15 above), p. 12. Wallace argues that solving moral conflict requires some minimization 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. 59) and a matter of "learned dispositions" (ibid. p. 55).

87 To make an effort C.S. Hempel, "Patterns of Moral Complexity" (Cambridge 1987), 169.

88 T. Hare, "Can and Can't" (1967) 7 Mind 463, mentioned in T. Hare, Responsibility and Fault (Oxford 1991) 1, having aside the issue of moral determinism. Whether this is true that at the micro-level of physical processes, at the macro-level of practical reasoning and action there is no good reason.

89 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, (revd ed.) (New Haven 1969), 39.

C.L.I. Morality, Law and Conflicting Reasons for Action

"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 hypothesize 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, 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".90

90 At any rate, accounts of the morality of obligations as opposed to the morality of aspirations; see n. 12 above. One recognizes that a correct view of the Heart's account of "common morality", which he defines as "the moral system that most thoughtful people pretty generally, ... (ibid. p. 91-93) or the saying about a "world in which it is considered as morally indefensible, it may be rational to act morally. Gott's view is explained by the fact that "common morality" is a substantive, not a formal concept. According to two, the basic principle of common morality is to "do no harm". But understanding of morality also leads him to draw a distinction between religious principles about right and wrong, good and bad, virtue and vice and the one hand, and moral principles or the other (ibid. p. 9).
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. 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.


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. 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 recognize 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—at least 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 system.

16 Even legal norms that are morally “arbitrary” (in the sense that the norms 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 226). 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.16 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 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 considered reason.17

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 existentially justice”18 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”.19 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

16 I hope that this account of the relationship between law and moral reasoning, both “everyday” and its philosophical, is an improvement on the account I give in Responsibility in Law and Morality, Journal of Legal Studies 1992.
17 I am not sure whether the absence of argument and Schauer (note 23 above) go quite as far as this.
19 Finnis, op. cit. note 3 above.
NOTES FOR CONTRIBUTORS

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