

# The Separability of Law and Morality as an Intriguing Conundrum within Legal Positivism: Lessons from *The Concept of Law*

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## ABSTRACT

*This essay critically examines HLA Hart's conception of the relationship between law and morality as delineated in his most famous work, *The Concept of Law*. In evaluating his contention that there is no necessary conceptual connection between law and morality, Hart's conceptions of the 'minimum content of natural law' and difference between legal and moral obligations will be analysed. It will also examine the moral implications of his account of 'internal point of view', which is the view of individuals who see rules as standards of appraisal of their own and others' behaviour. This essay seeks to reveal the problematic nature of Hart's contention on both normative and methodological grounds. It will, however, also defend that his contention remains a jurisprudential conundrum in understanding the role of law in the social context.*

## INTRODUCTION

As one of the most prominent jurists of the twentieth century, Hart made an undeniable contribution to the philosophical clarification and development of legal positivism.<sup>1</sup> The aim of this essay, however, is not merely to sketch his account of legal positivism and the arguments against it. It focuses on his 'separability thesis'<sup>2</sup> (hereinafter, Hart's thesis) that 'it is in no sense a necessary

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<sup>1</sup> Klaus Füßler, 'Farewell to Legal Positivism' in Robert George (ed), *The Autonomy of Law: Essays on Legal Positivism* (OUP 1999) 119.

<sup>2</sup> Leslie Green, 'Positivism and the Inseparability of Law and Morals' (2008) 83 NYULR 1035, 1041. Hereafter, 'ST'.

truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so'.<sup>3</sup> More specifically, it seeks to analyse the claim on the general lack of necessary conceptual connection between law and morality. While Hart's account has gained considerable prominence in jurisprudence, it has been criticised for over-simplifying the institutional, political, and historical foundations of law.<sup>4</sup> This essay argues that Hart's thesis is unsustainable and provides an inadequate account in articulating the relationship between law and morality. Three arguments will be made. Firstly, by analysing the relationship between law and morality from a normative perspective, this paper will argue that his thesis fails to articulate adequately the role of morality in shaping law as a social instrument and its role in generating obligations. Secondly, this paper will explore the thesis from the perspective of a participant in a legal system, arguing that Hart's methodology of providing an account of adherence to rules from such perspective displays a necessary connection between law and morality. Thirdly, by discussing the nature of Hart's thesis as a platform to accommodate potential theoretical disagreements as to the nature of legal norms and social behaviour, this paper will defend the idea that the thesis still and should remain a central conundrum in contemporary legal philosophy. It will conclude that while it fails to recognise the necessary roles of morality in shaping legal norms and explaining people's adherence to rules, Hart's thesis still remains a central conundrum in contemporary jurisprudence and its value as a descriptive instrument should not be ignored in light of the criticisms raised against it.

### **The normative inadequacy of the separability thesis in explaining the relationship between law and morality**

Throughout *The Concept of Law*, Hart has maintained that while there are numerous *contingent* connections between law and morality, there are no *necessary* conceptual connections between law and morality.<sup>5</sup> For example, the claim that a law is legitimately passed by the legislature has no necessary conceptual connection with the requirement for laws to pursue particular moral ideals. The

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<sup>3</sup> HLA Hart, *The Concept of Law* (3<sup>rd</sup> edn, OUP 2012) 185-186.

<sup>4</sup> Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (OUP 2006) 232.

<sup>5</sup> Hart (n 3) 259, 268.

point of Hart's thesis is to emphasise that there are no necessary *substantive* moral constraints on a theory of law, and what content it may include. Hart contrasts this with the 'teleological conception of nature',<sup>6</sup> which suggests that what generally occurs can both be explained and evaluated as good or what ought to occur. He criticises that such conception minimises 'the differences between statements of what regularly happens and statements of what ought to happen'.<sup>7</sup> In the legal context, this means minimising the differences between statements of what law is and what law ought to be. What is necessary is the need to resist the inference from legality to legitimacy.<sup>8</sup>

While Hart subscribes to neither an ontological separation of law and morals nor a necessary conceptual connection between them, he admits that there must be a 'minimum content of natural law'<sup>9</sup> in a legal system which has 'survival'<sup>10</sup> as its minimum purpose. Without a specific content which both law and morals cater to, it would be impossible for both to forward the minimum purpose of survival. Such connection, Hart contends, is a 'natural necessity'.<sup>11</sup> While this claim *prima facie* contradicts Hart's thesis, such a view rests on a misunderstanding of the thesis itself. The minimum content maintained concerns the necessity in upholding the integrity of a legal *system*; and without such necessity, it would be impossible to ensure that the system operates in an orderly manner. They are unchangeable conditions which a legal system must cater to. Above this minimum content, however, Hart argues that any connection between law and morality is only a *contingent* matter. This gives rise to a 'two-system picture',<sup>12</sup> where law and morality are seen as separable systems that do not necessarily merge with one another.

Against the 'two-system picture,' Ronald Dworkin argues that it provides no neutral standpoint from which connections between law and morality

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<sup>6</sup> *ibid* 189.

<sup>7</sup> *ibid* 190.

<sup>8</sup> Jules Coleman, 'Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence' (2007) 27(4) OJLS 581, 585.

<sup>9</sup> Hart (n 3) 193.

<sup>10</sup> *ibid*.

<sup>11</sup> *ibid* 199.

<sup>12</sup> Ronald Dworkin, *Justice for Hedgehogs* (HUP 2011) 402.

can be adjudicated.<sup>13</sup> An argument answering the question of whether positivism or interpretivism provides a better account of the relationship between the systems will be circular. By treating it as a legal question, one would have to first decide what role morality plays in fixing the law; by treating it as a moral question, one would have to assume the best theory of law depends on moral issues.<sup>14</sup> Dworkin's criticism is crucial to the debate over the relationship between law and morality as it shows that questions regarding the legal and moral contents of a legal rule, and in general a legal system, cannot be separated; there is a unified system of values. In insisting on the separability of law and morals when giving an account of law, Hart's picture is normatively inadequate. It fails to acknowledge that legal rules develop their content and normative values from the social concerns they respond to and the moral values which matter to members of the political community as human beings. A legal system is a constitutive element of the community it belongs to. The normative force of law, in reflecting the wider context of social concerns legal rules stem from, must be tangled with questions of acquisition of rights and duties. For example, it would be futile to construct an account of human rights and duties without considering the wider political context the account is situated in and the values underpinning such context. It would be very difficult to explain the role a legal rule plays in a political community if it can be construed in abstract without reference to any moral values or the political context. In treating legal theory as a 'political theory',<sup>15</sup> Dworkin successfully demonstrates that an account of law has to include moral values in order to appeal to the nature of law as responding to its wider social context. Answers to questions about the content of legal rules necessarily include the network of political and moral values the account belongs to.

This is not to say, however, that the one-system picture is without critics. Robert Rodes argues that the question of the part played by moral considerations in legal *decision-making* is a legal question, while the question of what moral obligations are created by legal *dispositions* is a moral question.<sup>16</sup> Separating the two questions would not prevent one from accepting Dworkin's view of the unity of values. It is submitted, however, that such a separation of questions is artificial.

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<sup>13</sup> *ibid* 403.

<sup>14</sup> *ibid*.

<sup>15</sup> Dworkin (n 12) 406.

<sup>16</sup> Robert Rodes, 'Justice for Hedgehogs' (2011) 56 *Am J Juris* 215, 221.

While moral considerations and obligations may play different roles in shaping the normative force of a legal rule, they are both manifested by the legal rule which its addressees are subject to. Morality is a necessary component of the normative force of a legal rule. Given the enactment of laws *itself* responds to wider social concerns of political rights and duties, which in turn shape people's behaviour, it would be unrealistic for an account of law to articulate its content without reflecting the concerns of its addressees and metaphysical moral values which may shape their behaviour.

The preceding analysis suggests that law must have recourse to moral considerations in elucidating its content. This gives rise to the question of the *manner* in which law conceives of its addressees. In particular, the question concerns the notion of 'obligation,' and whether it displays any necessary connection between law and morality. Hart recognises that compliance with moral and legal rules of obligation is regarded as the 'minimum contribution to social life.'<sup>17</sup> They recur constantly throughout social life. Immediately, however, he qualifies the claim by suggesting that morality can be distinguished from legal rules.<sup>18</sup> The difference can be reflected by the 'externality' of legal rules and 'internality' of morality, with the former focusing on the behaviour of their addressees only.<sup>19</sup> Such separability of moral and legal obligations is reflective of and central to Hart's thesis. However, this account misunderstands the role of morality in delineating legal obligations. Legal rules respond to the necessity to shape people's behaviour and *encourage* them to develop a sense of obligation towards rules. In doing so, legal rules shape their addressees' beliefs on moral values<sup>20</sup> by generating a sense of moral obligation in adhering to rules, eventually contributing to the well-being of the political community they belong to. Leslie Green suggests that even if the aim of collective survival is not prioritised in some legal systems, all legal systems share a common intent — they regulate things the community takes to be 'highly-stakes matters of social morality.'<sup>21</sup> It is submitted that this is an important observation in showing a necessary connection between law and morality, and that the connection focuses on *positive* morality in the sense

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<sup>17</sup> Hart (n 3) 172.

<sup>18</sup> *ibid* 173.

<sup>19</sup> *ibid*.

<sup>20</sup> John Finnis, 'The Truth in Legal Positivism' in (n 1) 204.

<sup>21</sup> Green (n 2) 1048.

that it contributes to the moral well-being of a political community. The connection does not only depend on social facts. It is the nature of law to respond to and reflect moral concerns which a political community considers to be important for its well-being. The obligations thus generated ensure that their addressees' behaviour contributes to the well-being of the community itself. In articulating the nature of obligations, however, Hart's thesis fails to recognise the importance of law in addressing concerns of social morality: it allows legal obligations to be detached from the political and moral concerns which may shape an individual's behaviour. To generate a *sense* of obligation on the part of its addressees, it is necessary for the obligations to accord with the wider contributions it makes to the well-being of the community as a whole. Without a comprehensive normative account of obligations based on political and moral concerns, a legal system cannot respond to the respective wider political context and its underlying moral values.

A theory of law which seeks to move beyond mere lexicography must draw upon at least some of the considerations of values which are the subject matter of 'ethics.'<sup>22</sup> Tony Honoré accurately recognises that while 'moral rights' and 'moral obligations' can exist independently, their meanings are parasitic on the legal model from which they are historically derived.<sup>23</sup> Without a necessary connection between law and morality, it would be difficult for moral rights and obligations to materialise in an individual's account of behaviour and influence his attitude to rules. Such connection is important as it is necessary to appeal to moral values that are *understandable* for the law's addressees, that they can understand as members of the political community they belong to. The norms underpinning the obligations which members of the community adhere to are permeated by the moral and philosophical values of the community.<sup>24</sup> At this point, it is clear that Hart's insistence on a lack of necessary conceptual connection between law and morality is unsustainable. It lacks a final authorising origin for the reasoning about binding humanly posited norms and rules.<sup>25</sup>

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<sup>22</sup> John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 358.

<sup>23</sup> Tony Honoré, 'The Necessary Connection between Law and Morality' (2002) 22(3) OJLS 489, 491.

<sup>24</sup> Finnis (n 22).

<sup>25</sup> William Conklin, *The Invisible Origins of Legal Positivism* (Kluwer Academic 2001), 313.

### **The inability of the separability thesis to explain the construction of the point of view of participants in a legal system**

So far it has been discussed that as a normative issue, Hart's thesis is inadequate in reflecting the complexities of the relationship between law and morality. This section changes the focus to the point of view of a participant in a legal system. In particular, it analyses Hart's conception of the 'internal point of view.' For Hart, the internal point of view is a methodological injunction to 'capture the way in which that action, practice or institution is understood by those whose patterns of behaviour and thought constitute that action, practice or institution.'<sup>26</sup> No explanation of human behaviour which omits subjective reasons for which it is performed can be an adequate one.<sup>27</sup> Such explanation would fail to explain the adherence to rules from the addressee's perspective. In the following analysis, it is argued that the selection of the internal point of view exemplifies a necessary conceptual connection between law and morality. In particular, John Finnis' criticism of the account deserves attention as it argues that the selection is a matter of moral evaluation, which clashes against Hart's thesis' claim that law and morality are separable.

Hart defines the internal point of view as 'the view of those who do not merely record and predict their behaviour conforming to rules but see the rules as standards for the appraisal of their own and others' behaviour.'<sup>28</sup> It is a 'hermeneutic concept'<sup>29</sup> in understanding people's behaviour and the reasons for their adherence to rules. There can be, Hart acknowledges, a wide variety of reasons as to why one decides to adopt the authority of a system; it is not a dichotomy of acceptance based on coercive power or moral reasons.<sup>30</sup> In order to attribute a central role to some particular feature in the description of a legal rule, it would be necessary to select a particular point of view. On Hart's account of the separability of law and morals, this appears logical; there can be both moral and non-moral considerations in people's adherence to a rule. However, Hart failed to elucidate the methodology and reason(s) in selecting a particular

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<sup>26</sup> William Lucy, *Philosophy of Private Law* (OUP 2006) 272.

<sup>27</sup> Neil MacCormick, *Legal Reasoning and Legal Theory* (OUP 1994) 6.

<sup>28</sup> Hart (n 3) 98.

<sup>29</sup> Brian Leiter, 'Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence' (2003) 48 *Am J Juris* 17, 41.

<sup>30</sup> Hart (n 3) 203.

viewpoint. Finnis argues that Hart does not attribute significance to the differences that any participant would count as practically significant; his focus on the selected viewpoint is 'arbitrary.'<sup>31</sup> This reveals an important problem within the account: the selection of viewpoint is an *evaluative* exercise. The fact that a theorist chooses a particular viewpoint over another suggests that the former matters more than the latter. This threatens the moral neutrality Hart believes his account can sustain as it is possible for the evaluation to be based only on moral grounds.

However, the flaw of the internal point of view runs deeper than an issue of arbitrariness. The fundamental problem with the account is that the *methodology* of selection displays a necessary conceptual connection between law and morality. Finnis, in criticising Hart for failing to clarify the basis of selection of the internal point of view, argues that the central case viewpoint a legal theorist adopts necessarily treats legal obligation as 'presumptively a moral obligation.'<sup>32</sup> The selection of *the* viewpoint is necessarily a kind of moral evaluation. The viewpoint of participants of 'practical reasonableness'<sup>33</sup> should be adopted in constructing a *central viewpoint* and case of adherence to a legal rule. The central viewpoint is, together with practical reasonableness, also the viewpoint of those that are practically reasonable: people who are attentive to 'all aspects of human opportunity and flourishing, and aware of their limited commensurability.'<sup>34</sup> This criticism is detrimental to the sustainability of Hart's thesis as Hart's construction of the internal point of view is not meant to be morally evaluative. If we select a viewpoint that does not matter to human practice, it would make no sense for a legal theorist to provide such account in the first place. In articulating an account of adherence to a rule, it is necessary to ensure its integrity by selecting *the* viewpoint which relates to its enactment in the first place. For example, it would make no sense for a theorist to explain a driver's attitude in stopping in front of a red traffic light by using the viewpoint 'because I like the colour red and therefore, I stop my vehicle to appreciate it'. In order to provide an adequate account of people's adherence to a legal rule in a political community, the theorist

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<sup>31</sup> Finnis (n 22) 13.

<sup>32</sup> *ibid* 14.

<sup>33</sup> Finnis (n 22) 11. 'Practical reasonableness' is defined by Finnis as: 'Reasonableness in deciding, in adopting commitments, in choosing and executing projects, and general in acting.'

<sup>34</sup> *ibid* 15.



would select an account that is relevant to the original intention of the rule, for example 'because if I drive through the red light, I might harm other road users'. This attitude is different from the former because it displays respect from one to another in adhering to rules. This is, of course, only one of the many moral reasons a theorist may select. If a rule, as Hart believes, is to govern people's behaviour, the viewpoint selected should reflect the reasons why the rule exists in the first place. The reasons themselves, moreover, have to be reasons that *matter*. The selection of the viewpoint, in light of the given context of the rule and its nature, is thus a moral approval of attitude.

While Finnis' methodological criticism of Hart's account reveals that the formation of the internal point of view is moral evaluation in disguise, it is challengeable whether it is a matter of judgement in the first place. Following that, it is also questionable whether law and morals are necessarily connected in the aforementioned selection process. In dissecting Finnis' challenge against Hart's methodological account, Julie Dickson argues that a proposition concerning law, for example 'X is an important feature of the law'<sup>35</sup> does not necessarily have to engage in moral evaluation in marking out an issue as morally good or bad. It is only 'indirectly evaluative' of the law.<sup>36</sup> A legal theorist is only 'picking out'<sup>37</sup> the existence of the law's claim, *as perceived by its addressees*, as important. Dickson's indirectly evaluative theory thus seeks a 'conceptual space'<sup>38</sup> between Hart's and Finnis' methodological accounts. However, Dickson failed to recognise that in 'picking out' the existence of such a claim and labelling it as 'important' to a rule, the legal theorist is refusing to acknowledge that non-selected claims about other features of law may also be important. In Dickson's account, the theorist is also not providing any reason as to why such a claim is 'important' and is thus selected. Thus, her account suffers from a similar mistake which Hart is accused of: the 'picking out' of a claim about law as important is an evaluative, but not descriptive, exercise.

More problematically, Dickson's account also displays a necessary conceptual connection between law and morality. This is caused by her selection of a claim,

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<sup>35</sup> Julie Dickson, *Evaluation and Legal Theory* (Hart 2001) 53.

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid.* 55.

<sup>38</sup> Leiter (n 29) 43.

as perceived by participants when explaining their adherence to a legal rule, as 'important.' The selection of a claim about a feature of the rule in question as 'important' implies that the legal theorist is choosing that claim, together with the reason(s) underlying it, as material for giving an account of people's adherence towards the rule. It is because it would be futile for the legal theorist to pick a view arbitrarily and claim it is 'important.' The selected point of view is suggestive of what constitutes as 'important' reason(s) to the rule's addressees when they adhere towards it. The selected feature of the rule is thus important, as perceived by the participants and *approved* by the legal theorist, to the participants' political community in terms of its well-being. The theorist's account is representative of the material reason from which people justify their adherence to the rule in question. Therefore, Dickson's methodology is only moral evaluation in disguise. In providing an adequate account of attitude to rules based on participants' point of view, the methodological process necessarily involves moral approval in selecting an 'important' viewpoint. It selects the feature that matters to the rule's addressees as participants of the legal system and the wider political community. The selection of the point of view which is constitutive of the account of adherence to the rule thus displays a necessary conceptual connection between law and morality.

### Why the separability thesis is still important

While Hart's thesis is inadequate in both normative and methodological aspects, any judgements as to its wholesale invalidity would be 'premature.'<sup>39</sup> Questions surrounding law are not necessarily always associated with morality. In light of the criticisms above, one question remains: is Hart's thesis still a central conundrum of contemporary legal philosophy? Yes, it is, and it should be. Hart's thesis allows legal theorists to explore the scope of potential theoretical disagreement about, *inter alia*, the nature and source of legal obligation, and the nature of legal norms as illustrated by descriptive jurisprudence. Such flexibility is important because jurisprudence, as a branch of social science, should allow legal theorists to uncover and provide accounts of patterns of social behaviour and normative forces underlying the operation of a legal system. It is not necessarily true that one can only defend a descriptive jurisprudence if he has a view about

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<sup>39</sup> Füßer (n 1) 118.

law that is morally neutral or indifferent.

As a matter of engaging in ‘descriptive sociology,’<sup>40</sup> a legal theorist can understand more about people’s adherence to rules and the variety of concerns they may have. It also allows one to explore the potential non-moral concerns a political community may have in maintaining its existence and well-being, and the law’s responses to them. The background of a descriptive theory about the nature of law, for example a moral or political background emphasising the need to uphold moral values, while assisting a theorist to get a better sense of the content of the theory, does not necessarily bear on its truth.<sup>41</sup> In order to provide a fecund conceptual space where law can freely engage with different social and philosophical concerns, it is desirable for legal philosophy to maintain law as an independent philosophical enterprise. Hart’s thesis, it is submitted, provides such a platform. To completely disavow the thesis would mean ignoring its appeal in succinctly treating law as a self-contained and logical discipline.<sup>42</sup>

### Conclusion

Although a comprehensive review of the criticisms against Hart’s separability thesis cannot be carried out in the limited space of this essay, it has shown that the thesis is erroneous on both normative and methodological grounds regarding the relationship between law and morality. In claiming there is no necessary conceptual connection between law and morality beyond the ‘minimum content of natural law,’ the thesis has failed to recognise the nature of law as an instrument for shaping people’s conduct and responding to social and political concerns. It also fails to recognise the necessary connection between law and morality when a theorist gives an account of people’s behaviour under a legal rule from their perspective. That being said, one should not deny completely its importance in contemporary jurisprudence. As a matter of elucidating the relationship between law and different social and philosophical concerns, Hart’s thesis remains a fecund concept in understanding people’s behaviour in adherence to rules and the norms of a legal system.

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<sup>40</sup> Hart (n 3) vi.

<sup>41</sup> Andrei Marmor, ‘Legal Positivism: Still Descriptive and Morally Neutral’ (2006) 26(4) OJLS 683, 692.

<sup>42</sup> (n 4) 352.