# You'd better be committed: legal norms and normativity (unfinished, draft version)

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Of course there are those for whom the mere sight of the title would require more commitment than they're willing to give. 'Normativity' is an ugly word. It's also come to be associated with a frustratingly nebulous concept. Some would rather make do without it, though none of the alternative words they suggest ('obligation' or 'obligatory' is the most frequent suggestion) quite fits the bill.

As a concept that is central to our understanding of law, 'normativity' has come to acquire an important place in mainstream jurisprudence following Hart's and Kelsen's common 'conviction that a central task of legal philosophy is to explain the normative force of propositions of law'.[1] This re-

[1] 'I share with him [Kelsen] the conviction that a central task of legal philosophy is to explain the normative force of propositions of law [...] None the less [...] my main effort in these two essays is to show that references to both psychological and social facts, which Kelsen's theory in its excessive purity would exclude, are in fact quite indispensable' (Hart

markable communality of purpose[2] however concealed an equally remarkable disparity in both its scope[3] and its meaning. In a minimalist understanding, the normativity of law is trivial. If we take the sphere of normativity to include all objects or propositions (whether grammatically formulated in terms of 'ought' or not) that are somehow capable of being used for guidance, one may wonder why Hart and Kelsen even bothered to assert such a platitude.[4] To get a sense of what is at stake when upholding the normative dimension of law, one may start from what both Hart and Kelsen took to be implied by its negation: if law wasn't normative, all we could speak of would be mere habits (Hart) or raw power relations (Kelsen).

Unlike the idiosyncratic table manners of my hosts, unlike the injunction to hand over my cash at gunpoint[5], law's demands *have a claim* on my conduct. This need not mean that I endorse them. I may hold some, or all of

1983, p. 18).

[2]Indicating a common front against 'reductionist' accounts of law, i.e. those accounts which either condemn the very notion of a binding legal norm as confused or fictitious, or reduce the law to a set of predictive statements as to the behaviour of courts or officials (see Hart 1994, pp. 11-12).

[3]While for Kelsen the task of explaining the normative dimension necessarily entailed a *foundational* search for the *ground* of legal normativity, Hart stayed well away from any such foundational endeavour thanks to the deflationary effects of J.L. Austin's method, aimed at elucidating even the most complex concepts by reference to the 'things people do with words'.

[4]In this minimalist understanding, law is just as normative as, say, culinary recipes, and there's nothing more to it.

[5]Along with a myriad other such request etc., they all make a claim on my conduct / judgment.

them, to be repugnant. It need not mean, in fact, that I have formed any judgment whatsoever about their moral worthiness. I may be referring to them in a 'detached' way.[6]. It certainly does not mean that I will actually comply with them. So what does it mean, then, to state that the law is normative? Hart had a relatively easy answer to this question: it simply means that law is a social practice towards which some people at least hold a 'critically reflexive attitude' (they will criticize any deviation from its standards, and use those to justify their own actions).[7] While Hart's account left his critics craving for more[8], Kelsen's, for its part, left them puzzled. His acrobatic attempts to secure the *purity* of his theory (grounding law's normativity in a presupposed Basic Norm free of any factual or moral adulteration) nevertheless had the merit of highlighting, negatively, the challenge at stake. One cannot get anywhere, in one's understanding of legal normativity, without addressing its link with other normative domains (including, most importantly, that of morality[9]).

This may sound like too much to ask of legal theorists. Given the perva-

[6]I will not reproduce Raz's analysis here (see ...).

[7]Hart's Rule of Recognition merely plays a 'secondary role' in relation to Hart's explanation of normativity, being the object of the phenomenon of acceptance which alone grounds the normative dimension of law.

[8]As a 'downstream' account of law's normativity, Hart seeks to capture the normative status of law by describing how certain people *treat* it as normative, but never ventures into an explanation of what makes this normative dimension possible in the first place (see Delacroix 2006, pp. 63 ff.).

[9]Given their skeptical misgivings about the possible objectivity of moral norms, neither Hart nor Kelsen were at all likely to take up that challenge.

sive and enduring difficulties underlying any account of morality's normative status, one may adduce fears for jurisprudence's analytical clarity in order to preserve it from the inevitable pit of meta-ethical questions that would flow from placing such a daunting task at the centre of the jurisprudential agenda. In this context, Gardner's recent paper —'Nearly Natural Law'[10]— cannot but be good news. Here is a flag-bearer of analytical clarity who starts his paper, head on, with an exploration of morality's specific normativity. Yet there's a catch. Gardner won't delve into what enables morality's 'inescapable' hold over us ('Korsgaard's problem'). Having established that morality inescapably binds us, he swiftly moves on to the puzzle ('Hart's problem') that interests him: 'how is it possible that the law is made up of norms [...] even though it is not the case that engagement with legal norms is rationally inescapable'?[11] This problem, Gardner claims, is not only distinct from Korsgaard's: it rivals it. 'One must treat one of the two problems of normativity as solved or dissolved in order to see the other as a problem'.[12]

Now I do not think that Hart deemed 'Korsgaard's problem' to be solved or dissolved.[13] Considered in itself, this is an intriguing claim. In an attempt

[10]Gardner 2007

[11]Gardner 2007, p. 8.

[12]Gardner 2007, p. 13.

[13]Far from that. I would argue that Hart's own silent struggle with 'Korsgaard's problem' (see Hart 1986 — for a detailed analysis of the dualist outlook informing Hart's misgivings, see 'Ethical objectivity without the trappings. A pragmatist answer to Hart's agnosticism',in progress) very much informed the limits he imposed upon his account of legal normativity. Reciprocally, Korsgaard certainly cannot be said to deem 'Hart's problem' to be solved or dissolved. I do not think she has ever considered it.

to understand it, this paper sets out to highlight what I take to be one of the most interesting issues associated with any account of normativity (whether moral or otherwise): the difficulty that consists in understanding the relationship between our contingent choices and the norms they may give rise to. I unpack this challenge in section 2, while section 1 aims at proposing a definition of norm that places the notion of commitment at its core.

# 1 What is a norm?

Gardner's argument depends in part on the contrast he draws between two different understandings of the notion of norm. According to Gardner, 'Hart's problem of normativity becomes a problem only when one tends to think of a norm as a kind of reason, and hence as inescapably engaging the attention of any rational being without further ado. Korsgaard's problem of normativity, by contrast, becomes a problem only when one thinks of a norm, not as a reason in itself, but as something which rational beings might or might not have a reason to use.'[14]

Now, let's start with the second definition, according to which a norm is something which rational beings might or might not have a reason to use. Clearly it needs some refining as, say, as spoon wouldn't count as a norm, even if rational beings might or might not have a reason to use it. One could try to refine this definition by saying that a norm is an ought statement which rational beings might or might not have a reason to use. But this definition

[14]Gardner 2007, p. 13.

doesn't quite work either, as an advert enjoining me to wear a pink hat would then have to be deemed a norm, and that's certainly not always the case. Of course I can become committed to wearing a pink hat, and hence make it a norm for myself. But then the advert only counts as a norm because I have *made* it count as a norm. Now it may be tempting, on this basis, to conclude that all norms necessarily owe their normative status to the kind of subjective response involved in making someone's say-so a norm for oneself.

Such a move would be exposed to a variety of objections. One such objection —in my sense, the decisive one— points at the aporetic character of any conception of normativity that would conceive of norms and values in general as emerging "ex-nihilo", out of the *fiat* of human will. When Sartre "remind[s] man that there is no legislator but himself; that he himself, thus *abandoned*, must decide for himself"[15], he contributes to caricaturing existentialism into an empty, non-viable form of voluntarism Yet one may wonder if even Sartre himself felt comfortable with the implications of this extreme voluntarism: if it really meant the possibility of doing whatever one pleases, if it meant choosing among various options from a situation of so called 'normative vacuum', where one is bound by nothing but one's own impulses, then it is hard to understand what exactly triggers the overwhelming feeling of anxiety, the *Nausea* which Sartre associates with the discovery of one's freedom. If, on the other hand, the freedom to be discovered is one where the dismissal of the classic meta-referents such as God or Nature actually confronts the individual with the silent demands of the society (past, present

[15]Sartre 1973, pp. 55-56 (emphasis mine).

and future) she inhabits, then the challenge that is at hand becomes apparent.

Now, the concern to avoid the pitfalls of the existentialist position does not warrant ruling out any reference to subjective responses in one's account of norms and normativity. Assuming that one entails the other would conform to a widely held meta-ethical picture, according to which there are but two options when it comes to accounting for the truth-aptitude of moral judgments: either the truth of our moral judgments is entirely dependent on our mental activities, or objective moral knowledge amounts to accurately tracking mind-independent moral facts. This dualist meta-ethical picture is itself dependent upon a Cartesian 'absolute conception of reality', which seeks to delineate an ontological dimension existing independently of the human mind: any element that is not part of that 'independent reality' is but a subjective projection. Hence, values must either be characterised as embodying, in some way or another, that independent reality or they cannot but be subjective projections / human creations. As the latter characterisation is typically associated with non-viable forms of voluntarism, one would have to succeed in characterising values (and norms, generally) in a way that does not depend at any point on subjective responses if one is to adhere to such a Cartesian conception and avoid the pitfalls exposed above.

This may seem way removed from the contrast drawn by Gardner between two different conceptions of norms, one according to which a norm is 'something which rational beings might or might not have a reason to use' while according to the other 'a norm is a kind of reason inescapably engaging the

attention of any rational being without further ado'.[16] After all, neither of them seems explicitly wedded to either an existentialist or a 'Platonic realist' understanding of norms and values. Yet it is the peculiar understanding of one element —the notion of commitment— which calls for the 'meta-ethical scene-setting' I have just ventured.

As discussed in relation to the definition associated with Korsgaard's problem, a definition of norm that does not make any reference to the notion of commitment is just too minimalist. It doesn't allow us to discriminate between 'mere' ought statements (we are all confronted, on a daily basis, with a myriad of injunctions, purported standards etc.) and norms. All these 'oughts'[17] may have the potential to be norms, but what we'll want to know is what *actualizes* this potential; and here, I venture, the notion of commitment is key.

[16]Gardner 2007, p. 13.

[17]Here I find it helpful to quote John Broome who, unlike Jonathan Dancy, 'does not treat "ought" as a heavyweight word'. 'I recently advised a guest that he ought to try a mangosteen, on the grounds that mangosteens taste delicious [...] I did not think my guest was obliged to try a mangosteen; "obliged" is more heavyweight. I did think he ought to try one, but I simultaneously thought it would be permissible for him not to' (Broome 2004, pp. 39-40). While this quote tackles the issue from the opposite perspective —in this case, that of the host stating that his guest 'ought to try a mangosteen' (the host is not reminding his guest of a norm requiring his guests to eat mangosteens —this may be the case if the host had said instead 'you ought to look after your elderly parents'; in that case the host would be expecting his guest to acknowledge that moral norm), one may reversely say that unless the guest commits himself to eating mangosteens whenever offered some, that ought statement is not a norm.

Now this notion does feature in the background Gardner's own favoured definition of norm[18]: 'a norm is a kind of reason inescapably engaging the attention of any rational being without further ado'.[19] This general definition is mapped onto morality's very specific normativity: its normative status is not the result of our somehow endorsing it, or getting committed to it. For we are all, just in virtue of being human, committed to morality.[20]

The commitment that underlies morality's normative status is non-optional. Similarly, the kind of commitment that features in the background of the 'Hartian'[21] definition of norm does not leave room for any choice (cf. 'a reason *inescapably* engaging the attention...'). While this definition may aptly capture the normative status of morality, it is far too sweeping to apply to norms in general, and in particular non-moral norms.

As Gardner himself acknowledges, 'law (unlike morality) is something that one needs (further) reasons to obey, or indeed to engage with. Legal norms answer to morality'.[22] This acknowledgement is at the root of what

[18]Despite his earlier reference to a norm as being 'the same thing as a standard' (p.1), Gardner explicitly endorses the 'heavyweight' definition of norm he associates with 'Hart's problem' on page 10.

[19]Gardner 2007, p. 13.

[20]Here I fully endorse Gardner's 'inescapable morality thesis' ('IM'): 'engagement with moral norms is an inescapable part of rational, and hence human, nature' (Gardner 2007, p.3).

[21]Quotation marks are necessary, as of course this 'Hartian' definition is entirely the product of Gardner's own reconstruction of the 'problem of normativity' Hart was facing.

[22]Gardner 2007, p. 15.

he calls 'Hart's problem of normativity': as there are quite a lot of people out there whose attention is not, as a matter of fact, 'inescapably engaged' by legal norms, these norms seem to challenge the 'sweeping' definition discussed above. Fortunately, Gardner tells us, 'there is a solution at hand. The simple solution, as I said, is that something is a norm if it can be used as a norm [...] one can use something as a norm by applying it as a norm, and since one can apply some norms in a detached way, there can be norms, the existence of which does not entail that we have reason enough to engage with them'.[23]

Personally, I do not find much relief in this 'solution'. Not that I do not fully endorse the significance of the fact that one may indeed adopt a detached point of view towards the law, one that refers to or applies the law in a non-committed way. It's more that, by definition, relief can only work where it is needed in the first place, and unless one adopts the 'sweeping' definition of norm mentioned above, it is not.

Now, at this stage, one may ponder why Gardner chooses to structure his discussion of normativity around two equally unsatisfactory definitions of norms (the first one, associated with Korsgaard, is so minimalist as to dissolve the notion of norm to the point of insignificance while the second is acknowledged by Gardner to be unable to capture the specific normativity of law). One could argue that it's all a matter of starting point: Gardner started from the 'inescapable morality thesis'. If one maintains that moral-

[23]Gardner 2007, pp. 13-14.

ity's normativity must of necessity be at the centre of any endeavour to understand normativity in general[24], it could make sense to provocatively adopt a definition of norms that faithfully reflects the specific normative status of morality, to better highlight the gap or differences that exist with other forms of normativity. Maybe that was Gardner's strategy. But this strategy allows him to leave aside the most interesting issue underlying the concept of normativity: the difficulty that consists in understanding the relationship between our contingent choices and the norms they may give rise to.

Here we are back to my earlier point, emphasising that a commitment to avoiding the pitfalls of an existentialist position does not warrant ruling out any reference to subjective responses in one's account of norms and normativity. I shall soon be able to clarify how this point relates to the difficulty I take to be lurking in the background of Gardner's analysis (see section 2).

Consider, for now, an attempt to improve upon the 'minimalist' definition associated with Korsgaard's problem. Once could venture the following proposition: 'a norm is something which one is committed to using as a guide to our actions and / or judgments'. This definition needs to be refined if it is to accommodate the fact that legal norms can be applied without there being any commitment to using them as a guide to action on the part of the subject applying them. In refining our definition, we would have to take into

[24]I would actually be sympathetic to that view —see below. What I do disagree with, however, is the proposition that morality's very specific normative status can somehow be deemed 'archetypical' of normativity in general.

account the fact that this detached perspective is logically parasitic upon there being a minimal level of commitment towards the system as a whole. A revised definition could work like this: a norm is something which *either* one is committed to using as a guide to one's judgments *or* one is referring to on the basis of the fact that it belongs to a wider system deemed normative in virtue of some people's commitment towards it.

Let's check, first, how this revised definition of norm would square with the rules of monopoly on one hand, and morality on the other. The rules of monopoly are norms for those committed to using them as their game's framework. They can also be referred to as norms by non-players, as long as there are at least some people out there committed to playing monopoly. The symmetry with law unfortunately stops there: it would be convenient if one could simply claim that law is normative as a system as long as there are 'some people out there' committed to organizing their lives on that basis.[25] While it is easy to imagine a world where nobody plays monopoly, it is a lot harder to imagine a world where there is no law. As law cannot but be normative (if it is not, then we are speaking of a set of 'sociological facts', to take Kelsen's words, or 'mere habits', to take Hart's), spelling out the conditions under which law, as a system, may appropriately be deemed normative is no pic-nic. My earlier effort to trace a genealogy of legal normativity attempted in part at least to do just that, specifically highlighting the importance of our[26] daily endeavour to confront and articulate law's requirements in the

[25]For further discussion on this point, see the end of section 2.

[26]'Our' may sound ambitious, or dangerously idealistic: this is not to deny that some people may never enter a process of active deliberation on the ends they wish law to serve

light of the demands of morality —what we want law for.

Now if we consider the revised definition proposed above in the light of morality's specific normative status, one simply has to drop the second branch of the alternative: as we are all, just in virtue of being human, committed to morality, there is no room for any of us referring to morality in a 'detached' way. Given that this does not invalidate the proposed definition, one could rejoice and conclude at this point that we have found a definition of norm which successfully dodges the difficulties associated with either of the definitions mentioned by Gardner. Instead of rejoicing, I would like to consider the sense in which one could argue that Gardner mapping his definition of norm onto the very specific normative nature of morality is a clever way of avoiding a tricky issue.

## 2 Response-dependence and the fear of contingency

Because the only notion of commitment Gardner makes room for in his definition of norm is one that is entirely independent of human choice, Gardner avoids altogether the issue of response-dependence and its relationship to our understanding of normativity. What do I mean by response-dependence? Widely defined, response-dependent[27]concepts have their 'tenure [...] tied to our interests and sensibilities' (as opposed to those which have a 'tenure in

etc.

[27]The term was first introduced by Johnston 1989.

nature'[28]). In this section, I shall consider the implications of an account of normativity that highlights the response-dependent character of norms in general (including moral ones).

In some respects, the response-dependent character of norms can smack of triviality. Take the example I gave earlier —the advert enjoining one to wear a pink hat, and the subjective response that consists in making it a norm for oneself. A wide variety of norms are in that sense rooted in our differing sensibilities, and this doesn't cause any philosophical sweat.

When one crosses over to the moral domain, however, two distinct issues present themselves. Circumstances may, on one hand, lead us to value differently. They may also lead us to value wrongly. While I deem the former scenario to raise a challenge that is distinct from the one I mean to highlight in this paper, it is nevertheless worth developing for the sake of clarity: take Paul and Joe's opposite responses to the incurable pain of their dying father. Paul may insist on preserving the dignity of their father and turning off the life-supporting machine, while Joe invokes the sanctity of life to make sure the machine is kept on. Despite their very similar upbringing, different circumstances[29] combined with different sensibilities lead Paul and Joe to value differently, i.e. to refer to contrasting values when tackling the same dilemma. Provided we establish the possibility for Paul and Joe to constructively unpack the various values and concerns that lead them to give salience

[28]Pettit 2002, p. 50.

[29]Paul may be a medical student accutely aware of the potential drifts of a medical science stubbornly bent on 'winning' its battle with the limits of life.

to human dignity and the sanctity of life respectively, there is no cause for panic. Theirs may be a lengthy discussion, spanning over years to come, yet as long as there is the confidence required to meaningfully enter such a discussion[30] one can ward off any concerns about the possible objectivity of moral values. But the objectivity of moral values is not the concern that is at stake here.

The issue that I have sought to encapsulate by referring to 'response-dependence and the fear of contingency' becomes salient when one considers a scenario that may be said to involve not just different, but *wrong* valuing. Female circumcision is neither a distant memory nor an exotic example, and the reasons invoked by its advocates are routinely dressed in 'moral' terms. Should we acknowledge that we 'value differently' from them, and leave it at that? Of course not. We'll want to voice our consternation. Unlike the disagreement between Paul and Joe, this one dismays us because a *mistake* must be at stake. 'They' don't just value differently: we'll want to say that they value wrongly.[31]

Now here lies the anxiety: what if we come to value like them? What if the moral landscape from which our present attitudes make sense got lost to us, and 'circumstances' led us to value then what we now deem contemptible? If we maintain that it is our valuing as we do that gives our evaluative world

[30] I would dismiss, by contrast, an invitation to join a conversation weighing the relative merits of chocolate eclairs over coffee eclairs as a total waste of time.

[31] It may be, as is often the case, that they mistake their self-interest for moral values, or that some wider worldview / deeply internalized fears etc. clouds their moral judgment.

its shape, we seem to be lost at sea. To quote Philippa Foot: 'We are apt to panic at the thought that we ourselves, or other people, might stop caring about the things we care about, and we feel that the categorical imperative gives us some control over the situation'.[32]

So should we start running for the categorical imperative? If we can't stand the thought of *any* trace of contingency plaguing the respectable normativity of morality, perhaps we should. It's all very well to say that we are all, just in virtue of being human, committed to morality: if the morality we are committed to changes just as easily as our circumstances do, this does not sound like much of a commitment. For this commitment to be worth any ink, there must be some enduring core, some unalterable moral facts.[33] Concomitantly, for this commitment to engage our responsibility, there must be space for active choice on the part of the subject, hence some contingency. The greatest challenge, in accounting for the normative status of morality, consists in this balancing act. One may reject it as senseless: at both ends of the meta-ethical spectrum, one finds positions that describe the relationship between moral values and the subject as a relationship of unilateral influence. While the voluntarist position I have briefly mentioned above sees moral values as nothing but the subject's unilateral creation, a particularly

[32]Foot 1978, p. 167.

[33]I would suggest that the best way to go about identifying this 'core' is to reflect on what is entailed by the 'committed we': unpacking what our common humanity involves is likely to lead to pinpointing some key characteristics, among which rationality will inevitably feature. If our rational nature demands that no human being ever be treated as a means to an end, we have already earmarked some hard and fast moral content.

robust version of realism sees values as imposing themselves upon the subject who merely 'detects' them.

There is room for a wide variety of outlooks in the middle of the spectrum[34]. Korsgaard's project, drawing on the Kantian concept of autonomy (and mixing it with some Aristotelian elements), is one such attempt to draw a 'middle-way' between the pitfalls of a voluntarist position and the metaphysical presuppositions of a robust form of realism[35]. As for Hart, while he famously sought to keep meta-ethical questions at bay[36], his review of Williams' *Ethics and the limits of philosophy*[37] hints at an unresolved

[34]McDowell's 'anthropocentric realism' (to be contrasted with Pettit's 'cosmocentric realism' —see Pettit 2002, pp. 55-6), comparing moral values to secondary properties, is one instance of such an outlook: 'Values are not brutely there —not there independently of our sensibility— any more than colours are: though, as with colours, this does not prevent us from supposing that they are there independently of any particular experience of them' (McDowell 1998, p. 146).

[35]The third position she identifies —'reflective endorsement'— can be read as a prelude making way for the position she favours (based on the Kantian concept of autonomy). See notably Korsgaard 1996, pp. 18-9.

[36]'Legal theory should avoid commitment to controversial philosophical theories of the general status of moral judgments and should leave open, as I do in this book (p 168), the general question of whether they have "objective standing"' (Hart 1994, p. 253).

[37]'Why should anyone be disturbed if Williams is right in his claim that there is no independent rational foundation for ethical thought [...] In fact fears of two different kinds have been excited by such skeptical thought. The first is that if it becomes widespread we shall have nothing —or not enough— to say to the immoralist [...] The second kind of fear is more realistic [...] once it [a general acceptance of the view that there is no objective foundation for ethical thought] is accepted it will be no longer possible to interpret ethical experience, as many do, as a demand coming from outside. The sense of necessity (the

dilemma between some longing for an external, rational foundation for ethics and an underlying skeptical position.[38]

As for my own position, it would definitely seek to highlight the *inter-dependence* between the subject's volition and its moral landscape.To make do with a metaphor: one could argue that evaluative properties are illuminated by the agent's perspective, and that this illumination is constitutive of these properties to the same extent as the sun shining on the moon is constitutive of what the moon is for us —its aspect changes according to the light shone on it. If there was no sunlight we simply wouldn't have a 'moon'[39]

Now to land back on what got us started in the first place: I believe that the effort to understand the normative status of law necessarily involves a concomitant effort to understand the normative status of morality. Structurally at least, the challenge I identified as key to the latter replicates itself in the former. The terms of this challenge may sound less dramatic: we are all familiar with the fact that different circumstances lead to different legal systems, hence different legal norms. If there is nothing particularly

moral "I must") in which the recognition of moral obligation often terminates, will have to be seen as coming not from outside, but from what is most deeply inside us [...]. The fear is that this will not be enough [...].' (Hart 1986, section 4).

[38]Wiggins reports Hart's 'strenuous defense' of Mackie's theory in Wiggins 2005, footnote 1.

[39]There are limits to this metaphor, as of course we are not actively involved in producing the sunlight 'constitutive' of the moon, and in the absence of sunlight the presence of the moon would still lend itself to the kind of empirical verification that is not available for moral values.

threatening in that contingency, it is because none of us are 'inescapably' committed to the claims law makes upon us. Were we to face legal norms that are too far removed from what we take their moral purpose to be we are all expected[40] to voice our concerns and defeat those claims.[41]

In an attempt to unpack this underlying intuition, one may formulate the challenge specific to legal normativity by reference to the 'balancing act' associated with an account of morality. While the enduring core of our commitment to morality had to involve some unalterable moral facts, in the legal sphere one may argue that this enduring core consists in the fact that, in its central case, law serves a moral objective, and does so in a very distinctive way.[42] Concomitantly, for our commitment to morality to engage our responsibility, there had to be space for active choice on the part of the subject; in the legal sphere, the space of our responsibility is delineated by the active role the subject has to play in articulating the moral project law is to serve, and holding it to that particular project.

In contemporary accounts of legal normativity, this latter aspect has not been given the prominence it deserves. Hart's theory associates the normative dimension of law with the officials' 'acceptance' of the Rule of Recognition, i.e. the critical reflexive attitude that needs to be adopted by at least the 'official' part of the population. While there must indeed be such minimal

[40] In virtue of our 'inescapable' commitment to morality.

[41] Far from compromising the normative...

[42] See Finnis 1980.

commitment[43] in order for law to feature as a normative system, this aspect alone cannot begin to account for law's normativity.[44] If one is to account for law's specific moral ambitions, one has to build the daily endeavour to critically articulate the moral project law is to serve *into* one's explanation.

From this perspective, the normative dimension of law cannot ever be taken as a 'given' established once and for all, provided the officials' minimal commitment condition is verified. Understood dynamically, law's normativity may be said to be *brought about* everyday. Each time an individual is led to assess law's normative claims in the light of morality's demands, each time a judge is led to re-articulate what we want law for: these cases contribute to shaping the 'fabric' enabling law's normativity. These efforts of assessment and articulation depend, in turn, on our conception of normative agency: assert the need to track the truth of ethical judgments to some independent

[43]For an illuminating analysis of the underlying Weberian themes and their impact on Hart's endeavour to conceptualise the normative dimension of law, see Wilkinson : 'The Janus-face of Hartian legal order in modernity gazes towards obedience by ordinary persons and acceptance by officials. The likelihood is that in this modern order there is not even legal normativity for the citizens, since we are told that in all probability they will not accept the law in the relevant sense, being unaware of the master rule(s) of recognition of the system as a whole. But even if they did, we know that by acceptance, Hart has in mind something rather thin, and in any case something that falls far short of moral endorsement or even proper critical reflection' (p.26).

[44]As I have discussed in detail elsewhere the difficulties underlying Hart's account of legal normativity (see Delacroix 2006, chapter 3), I won't duplicate this analysis here. Note that such a minimal commitment may, by contrast, suffice to account for the normative dimension of monopoly etc., given that, unlike law, it does not have a specific moral ambition.

moral 'entities' conditioning their objectivity, and you will get a different understanding of what it is we are doing when we dispute law's authority in the name of moral values. Tracing the truth of moral judgments back to our own social practices rather than conditioning it to their accurately tracking some independent entities not only affects the *nature* of disagreement; it also dramatically increases our responsibility when, as lawmakers, judges, or citizens we 'take the law into our own hands' and confront it with our moral expectations.

If it weren't for this notion of responsibility, it would be easier to side with those legal theorists inclined to strictly demarcate the domain of legal theory so as to leave the 'pit' of meta-ethical questions to those who enjoy them. Yet the answers we give to these questions fundamentally affect the way we are to understand our role as normative agents, and hence the way we conceive of both moral and legal normativity.

...[unfinished]

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