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# **An Epistemic Case for Legal Moralism<sup>\*</sup>**

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"Legal moralism" is the doctrine that law should track morality. Many high-minded defenses of that doctrine have been offered over the years. Here I shall offer a partial defense of the doctrine, couched purely in terms of low pragmatism: tracking morality enables the law to do what law is socially supposed to do, which is to guide people's behavior.<sup>1</sup>

The classically high-minded case for legal moralism is couched terms of "the priority of morality." In the boldest version of that doctrine, the natural lawyer claims that morality is literally constitutive of legality. Divine commands in the old days (or moral imperatives of a more secular sort in our own day) are what make laws law, on this account. The job of legislators is merely to copy those faithfully into the statute books. When they fail (as occasionally they inevitably must) and they write something contrary to natural law into a statute, it is not really law at all.

A more modest version regards morality not as constitutive of legality but rather as a critical standard for assessing laws. Moral considerations are the ultimate right-makers and wrong-makers. Stipulations of what is right and wrong at law ought correspond to (or anyway not contradict) the right-makers and wrong-makers of morality itself. Legal stipulations that are contrary to morality's dictates are nonetheless laws: they are merely "bad laws," criticizable from the standpoint of ethical standards that stand morally above the law.

Here I want to make a case for legal moralism that is far less lofty. It centers around the much more pragmatic question, "How can we know what

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<sup>1</sup> As Lon Fuller puts it, our aim "in making law is to lay down rules by which people may guide their conduct"; *Anatomy of the Law* (Harmondsworth, Mddx.: Penguin, 1971), p. 88. That is its social function anyway. Any particular lawmaker might have other aims of his own, which might sometimes conflict with that. Fuller goes on to contemplate an extreme case: "if you possess lawmaking power, and you wish to get rid of an enemy who has violated no law on the books, what expedient is more apt to occur to you than to enact a 'law' declaring what he did last week to be a capital offense?"

the law requires of us?" Various answers are possible. But the most plausible, at least for the central branch of wide-scope, duty-imposing laws, is to write the laws in such a way that they track broad moral principles.<sup>2</sup>

I.

Ignorantia juris non excusat: ignorance of the law is no excuse. So we are told by virtually every criminal code from Roman times forward.<sup>3</sup>

But why on earth not? After all, the US Code runs to some 364 bound volumes. How can I possibly know everything in it? Add to that all the state laws – Indiana's Burns Statutes runs to 43 volumes, which I suppose is probably pretty typical. Add to that all the city and county ordinances – I do not even know where to find those to count them. Add administrative regulations from scores of federal, state and municipal agencies. No one can possibly know all the laws that apply to him. Ignorance of the law is, to some greater or lesser extent, simply unavoidable.

Of course, there are all sorts of pragmatic reasons for insisting that "ignorance of the law is no excuse," regardless. We find one in John Selden's seventeenth-century Table Talk: 'Ignorance of the Law excuses no Man; not that all Men know the Law, but because 'tis an excuse every man will plead,

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<sup>2</sup> That the law tracks their sense of justice explains "why people obey the law"; Tom R. Tyler, Why People Obey the Law (New Haven, Conn.: Yale University Press, 1990). My concern here is with the separate question of "how people know the law."

<sup>3</sup> William Blackstone, Commentaries on the Laws of England (Oxford: Clarendon Press, 1769), vol. 4, ch. 2, sec. 6, p. 27. Edwin R. Keedy, "Ignorance and mistake in the criminal law," Harvard Law Review, 22 (1908), 75-96. Glanville Williams, Criminal Law, 2nd edn. (London: Stevens & Sons, 1961), ch. 8.

and no Man can tell how to confute him'.<sup>4</sup> In consequence, John Austin adds, the courts would be hopelessly congested if they had to explore all the claims that would inevitably be lodged, if ignorance of the law were to be accepted as an excuse.<sup>5</sup> Furthermore, as Holmes observed, admitting that excuse would perversely provide people with an incentive to remain ignorant of the law.<sup>6</sup>

Such purely pragmatic reasons loom large in underwriting the rule. Evidence of that is found in the fact that, in practice (and notwithstanding the general rule), ignorance often is taken to excuse conduct contrary to law. That can happen, for example, in cases involving a regulation rather than a statute, or an omission rather than an action, or where the accused has relied on an authoritative (but as it happens mistaken) source of information about the law, or where the subject matter is unlikely to have been regulated by law; or if the statute does not serve any important purpose. Of course, we do not generally tell people that ignorance of the law will probably be excused in such cases – instead, for the pragmatic reasons just given, we let them continue to believe ahead of time that "ignorance is no excuse."<sup>7</sup>

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<sup>4</sup> John Selden, Table Talk, ch. 77, sec. 2; in Table Talk from Ben Johnson to Leigh Hunt, ed. James Thornton (London: Dent, 1934), p. 60.

<sup>5</sup> "[T]he Courts would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impracticable. If ignorance of law were admitted as a ground of exemption, ignorance of law would always be alleged by the party, and the Court, in every case, would be bound to decide the point"; Austin, Lectures on Jurisprudence, p. 498, see more generally Lect. 25, vol. 1, pp. 496-501; quoted in Laurence D. Holgate, "Ignorantia juris: a plea for justice," Ethics, 78 (1967), 32-42 at p. 37.

<sup>6</sup> Oliver Wendell Holmes, Jr., The Common Law, ed. Mark DeWofle Howe (Boston: Little Brown, 1881/1963), p. 41. John Selden says similarly that the rule is "not that all men know the law, but because 'tis an excuse every man will plead, and no man can tell how to confute him"; Table Talk, quoted in Williams, Criminal Law, p. 290.

<sup>7</sup> We strive for something like an "acoustic separation" between the "conduct rules" by which the folk are supposed to behave and the "decision rules" by which the courts are supposed to assess their conduct, come to cases, in the words of Meir Dan-Cohen, "Decision rules and conduct rules: on acoustic separation in criminal law," Harvard Law Review, 97 (1984), 625-77 at pp. 645-8.

From the point of view of natural justice, it is only right that illegal acts be excused where people did not and could not know the law at the time they acted. It might be similarly good from the perspective of natural justice that illegalities be excused where people had no reason to suppose there might be a law on the matter, the details of which they should have ascertained.

As J.L. Austin said of "excuses" in general, however, they have a way of getting you out of the fire and into the frying pan.<sup>8</sup> Such circumstances obtaining is genuinely bad news, from the point of view of the social function of law. If people have no reason to suppose there might be a law on the matter, then it is highly unlikely that their conduct will be guided by that law. In that case, the law fails to fulfill its central social function to be action guiding.

I take it as axiomatic not only that law is supposed to be action-guiding but also that it is supposed to guide action relatively automatically. That is to say, people ought by and large be able to determine and apply the law to and for themselves, without constant interpretation and constant enforcement by courts and constables.<sup>9</sup> Laws that require constant interpretation and enforcement may still perform some useful social function. But they serve that function at considerably more social cost than ones that are more nearly self-interpreting and self-enforcing.

## II.

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<sup>8</sup> J.L. Austin, "A plea for excuses," Philosophical Papers, 3rd edn (Oxford: Clarendon Press, 1979), p. 177.

<sup>9</sup> That is implicit in Fuller's desideratum, Anatomy of the Law, p. 88, and explicit in Hart's statement of it quoted in full below.

In his attempt at teasing out the "minimal content of natural law," H.L.A. Hart invites us to consider

what is in fact involved in any method of social control – rules of games as well as law – which consists primarily of general standards of conduct communicated to classes of persons, who are then expected to understand and conform to the rules without further official direction. If social control of this sort is to function, the rules must satisfy certain conditions.<sup>10</sup>

Hart goes on to list some: the rules must be "intelligible"; they must ordinarily "not be retrospective"; and so on.<sup>11</sup>

But those are merely the limiting cases. Of course it is literally impossible for people to "understand and conform" to a rule that does not (yet) exist or that is literally "unintelligible." But the method of social control Hart has in mind does not merely require that it be possible for people "understand and conform to the rules without further official direction": it further requires that it actually be probable (common, likely) that they will do so.

In ordinary discussions of these topics, emphasis falls heavily upon "possibility conditions." It falls most especially on the requirement that a law must be promulgated to serve as law. If a law has not been promulgated, ordinary citizens will have no way of knowing it is a law, and it is therefore impossible for them to guide their behavior by it.<sup>12</sup>

Suppose, however, that a law has been promulgated but in only the most minimal of ways. Suppose it was announced in some official register only a few copies of which were printed, or in some courtly language the general populace does not understand. While it would no longer be literally

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<sup>10</sup> H.L.A. Hart, The Concept of Law (Oxford: Clarendon Press, 1961), p. 202.

<sup>11</sup> Borrowing from Fuller's Morality of the Law.

<sup>12</sup> They might do what the law requires without knowing that that is what the law requires: but that is something different.

impossible for people to come to know that law, in a way it would have been had the law not been promulgated at all, it is nonetheless highly unlikely that they would come to know the law or hence guide their behavior by it. A barely-promulgated law fails to perform the social function of law, to almost the same extent and for exactly the same reason as a law that has not been promulgated at all.

Notice also that maximizing promulgation is not necessarily the best way to maximize the extent to which people "know what the law is." Providing every US household with a copy of the US Code – all 364-volumes of it – might maximize promulgation.<sup>13</sup> Doing that would maximize the extent to which people could possibly access the law. But doing so would do little to increase the probability that they would actually know the law. There is simply too much law there for people to sift through.

### III.

Historically (going way back) the principal reason ignorance of the law was not accepted as an excuse was presumably that the law was deemed to be something that everyone knows – or anyway (more recently) that that was something that everyone could and should be presumed to know.<sup>14</sup>

The first formulation – that the law is something that everyone knows – might have been true, and virtually analytically so, in primitive legal systems where "customary law" was the only kind of law there was. In a

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<sup>13</sup> Or a computer with its url bookmarked: the problems are the same searching so much text electronically as working through the hard-copy index, when you do not know what exactly you are looking for.

system of customary law, something counts as a legal requirement if and only if it corresponds to the customary practice of a people. And, obviously, people know their own customs: they are "second nature" to them.<sup>15</sup> As Bentham puts it,

how a custom... is to be known, is a question, which upon the supposition that it is the custom of the people in general, ... seems neither very natural nor very material. How is it to be known? meaning by the people? Why, they know it, by the supposition; they even practice it, it is their custom. "How are the people to know what it is they do themselves?" God knows, unless they already know.<sup>16</sup>

It is not quite as analytic as that makes it sound that people necessarily know their own customary law. People might customarily do something unreflectively, so they might not consciously realize that it is customary practice. Even knowing that it is customary practice, they might still not know that that makes it law as well (they may never have heard of the concept of "customary law"). So it is not quite analytically follow that people in general must necessarily know what customary law requires. Still, it is highly likely that they will do so.

That almost-analytic guarantee disappears as we move away from purely customary law toward systems that include edicts, statutes,

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<sup>14</sup> In Blackstone's words, "a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence"; Commentaries on the Laws of England, vol. 4, p. 27.

<sup>15</sup> In Savigny's phrase, quoted in Jeremy Waldron in "Can there be a democratic jurisprudence?" (Mimeo, NYU Law School, 2004), p. 20; see also Donald R. Kelley, The Human Measure: Social Thought in the Western Legal Tradition (Cambridge, Mass.: Harvard University Press, 1990), chs 10-13. This gives rise to a view of "ideal community law," according to which "the law [is] the common way, the common tradition of the people.... According to it, the need to promulgate the law is no more than a requirement of clarifying its details. The law should be applied by people who rely not only on skills acquired by formal training but on sharing the traditions of the community. They belong to the same community, come from the same background as the litigants, and rely on local knowledge which cannot be proved in court and cannot even be fully articulated in a reasoned judgment"; Joseph Raz, "The politics of the rule of law," Ratio Juris, 3 (1990), reprinted in Ethics in the Public Domain (Oxford: Clarendon Press, 1994), pp. 370-8 at p. 371.

<sup>16</sup> Jeremy Bentham, A Comment on the Commentaries and a Fragment on Government, ed. J.H. Burns and H.L.A. Hart (London: Athlone Press, 1977), p. 92, quoted in Waldron, ibid.

administrative orders and judicial precedents. At that point, the proposition that everyone actually knows what the law requires becomes wildly implausible, and emphasis shifts toward the very different proposition that everyone could and should know what the law requires.<sup>17</sup>

Considerable scorn has been heaped on that proposition over the years. Austin was blistering:

That Law might be knowable by all those who are bound to obey it, or that Law ought to be knowable by all those who are bound to obey, ... is, I incline to think, true. That any actual system is so knowable, or that any actual system has ever been so knowable, is so notoriously and ridiculously false that I shall not occupy your time with proof of the contrary.<sup>18</sup>

Lord Mansfield wryly observed that "it would be very hard upon the [legal] profession, if the law was so certain, that everybody knew it": lawyers could not make any money that way.<sup>19</sup> Another jurist acidly remarked that "everybody is presumed to know the law except His Majesty's judges, who have a Court of Appeal set over them to put them right."<sup>20</sup> And today, of course, "the idea that the vast network of governmental controls can be known by everyone is... more ludicrous than ever."<sup>21</sup>

However, even in Roman times "the rule as to ignorantia juris did not apply to certain classes of individuals... because it was considered that these individuals, by reason of their status or condition, would not have knowledge

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<sup>17</sup> One of the most fanciful rationales for that comes from Blackstone: "every man in England is, in judgment of law, party to the making of an act of parliament, being present thereat by his representatives" (quoted in Fuller, Anatomy of the Law, p. 81).

<sup>18</sup> Austin, Lectures on Jurisprudence, Lect. 25, p. 497.

<sup>19</sup> Jones v. Randall (1774), Cowp. at 40, 98 E.R. at 956; quoted in Williams, Criminal Law, p. 290.

<sup>20</sup> Justice Maule, quoted in Williams, Criminal Law, p. 290.

<sup>21</sup> Williams, Criminal Law, p. 290. Erwin N. Griswold, "Government in ignorance of the law: a plea for better publication of executive legislation," Harvard Law Review, 48 (1934), 198-215.

of the law."<sup>22</sup> Among people thus exempted were those under age 25, women, soldiers, peasants and the mentally infirm. Note significantly, however, that they were exempt only in respect of the jus civile, not the jus gentium. The rationale was that, while their condition or status might be such that they could not be expected to know the details of the particular jus civile, "the jus gentium is knowable naturali ratione" by everyone whatever their status or condition.<sup>23</sup>

Glanville Williams proposes we resurrect that ancient practice and adapt it to the circumstances of the modern regulatory state. "A distinction should be drawn," Williams suggests,

between crimes resting upon immemorial ideas of right and wrong, where it is the business of the citizen to know what he may legally do, and modern regulatory offences of which the citizen would not normally know unless there is something to put him on enquiry. .... Moreover, the principle of German jurisprudence could be adopted that the defendant is required to have exerted his conscience properly, making enquiry as to the law where a conscientious person would have done so.<sup>24</sup>

#### IV.

I agree with the old Roman law and with the principle of German jurisprudence that Glanville Williams commends on the basis of it. There are certain sorts of people and certain sorts of activities that are governed by

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<sup>22</sup> Keedy, "Ignorance and mistake in the criminal law," p. 80.

<sup>23</sup> John Austin, Lectures on Jurisprudence, Lect. 25, p. 501; quoted in Keedy, "Ignorance and mistake in the criminal law," p. 80. Neither are people quite generally expected to know the jus civile of foreign jurisdictions: "Ignorance of law, within the meaning of the rule that ignorance of law will not excuse, is to be construed as meaning ignorance of the laws of one's own country or state, not laws of foreign countries or states, which are regarded as mistakes of fact" (Marshall v. Coleman, 58 NE 628, 637, 187 Ill. 556 [ \*\* YEAR]).

<sup>24</sup> Williams, Criminal Law, p. 292.

very specific laws, details of which the people concerned could and should be expected to ascertain for themselves.

Here are two large classes of such cases:

- 1) Many rules of law are power-conferring rather than duty-imposing. Hart's examples are "rules such as those prescribing the procedures, formalities and conditions for the making of marriages, wills, or contracts."<sup>25</sup> When you set about invoking powers under law – writing a will that will be enforceable in court, for example – you must know that there is some law that you are trying to manipulate, and you should know that you need to check the details of that law to ensure that you invoke it efficaciously.<sup>26</sup>
- 2) Many rules of law are not wide-scope, applying to people in general, but rather narrow-scope, applying only to people who occupy very specific roles. Lon Fuller agrees with my initial observation about the vast array of laws on the books: "an expectation that the dutiful citizen will sit down and read them all" would be "an absurdity." But Fuller thinks that that absurdity is mitigated by the fact that "the great bulk of modern laws relate to specific forms of activity, such as carrying on particular professions or businesses; [and] it is therefore quite immaterial that they are not known to the average citizen."<sup>27</sup> Anyone who is occupying a very specific social role could and should imagine that there might be specific legal powers and duties attaching to that role, and could and should take steps to ascertain what they might be.

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<sup>25</sup> Hart, Concept of Law, p. 9, discussed more fully in ch. 3.

<sup>26</sup> As Austin observes, "A Common Law lawyer, if he were making a will or a settlement of real property, would, if he acted rationally, surmise that there must be provisions of the law of real property which were not known to him, and would accordingly have recourse to a conveyancer, rather than foolishly attempt to draw the instrument for himself"; Austin, Lectures on Jurisprudence, Lect. 25, p. 501.

In the old Roman model, those cases concern people who need to know, and can reasonably be expected to know they need to know, the ius civile: the particular laws that apply to them in their particular roles or that govern the particular legal powers that they are trying to invoke.

I am unconcerned with those people for two reasons. First, as just stated: given their special situations, it should be obvious to them that there is indeed some particular law applying to them that they need to ascertain.<sup>28</sup> Second, and more related to what I shall go on to say: the content of the law that governs such special situations is likely to be correspondingly special, and often inevitably somewhat arbitrary. There is no obviously correct way to write a will, derivable from first principles. The exact form of words required to make a will legally effective around here is simply something you have to look up rather than surmise.

V.

My concern is instead with the great bulk of people in general, and how best to give them epistemic access to the content of the wide-scope duty-imposing rules of law under which they live. By "wide-scope" I mean "outside any specific role" which give rise to special "narrow-scope" rules of its own. By "duty-imposing" I mean rules of law that are not "power-conferring," thus bracketing situations in which people are knowingly trying to manipulate legal instruments themselves. By "epistemic access" I mean "enabling them to know to the content" of the rules of law governing them. My argument is

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<sup>27</sup> Lon L. Fuller, The Morality of Law, rev. edn (New Haven, Conn.: Yale University Press, 1969; originally pub 1964), p. 51. See similarly Williams, Criminal Law, p. 292.

<sup>28</sup> *Pace* the Supreme Court's ruling in Lambert v. California, 355 U.S. 225 (1957), nowadays anyway even a convicted felon ought realize that that is itself a "special role" and special duties, such as registering with the police, might attach to it; they had better check.

that law's tracking morality is the best practical means for giving people in general epistemic access to what wide-scope duty-imposing law requires of them.

The classic (although far from only) case of wide-scope duty-imposing law is of course the criminal law. How do we know what is against the criminal law? Well, sometimes it comes up in the course of ordinary conversation; sometimes we know or read about someone who has been prosecuted for breach of some law. But by and large we simply surmise what is a crime, at law, from what we know about what is wrong, morally.

Crimes, Glanville Williams remarks, rest "upon immemorial ideas of right and wrong." Those function as the modern equivalent of the Roman ius gentium. Everyone has access to them, and "it is the business of the citizen to know what he may legally do," in consequence.<sup>29</sup>

Indeed, reflecting upon the moral is our ordinary way of surmising the criminal. That is so obvious that it is often overlooked.<sup>30</sup> Notice this passage in Fuller's Anatomy of the Law:

Suppose a citizen wants to know whether some act he proposes to do is criminal. We are assuming that the question arises in an area of conduct where ordinary standards of moral behavior are an insufficient guide.<sup>31</sup>

Fuller goes on to discuss the case of an owner of a newspaper stand trying to decide if it is legal to keep his stand open on some public holiday.<sup>32</sup> But for present purposes, focus just upon the passage quoted.

How it could be that the citizen is puzzled as to what the criminal law requires? Well, as Fuller says, "We are assuming that ... ordinary standards of

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<sup>29</sup> Williams Criminal Law, p. 292.

<sup>30</sup>For example, Jerome Hall, General Principles of Criminal Law, 2nd edn (Indianapolis: Bobbs-Merrill, 1960), p. 278 remarks in passing "the criminal law represents certain moral principles."

<sup>31</sup> Fuller, Anatomy of the Law, p. 17.

<sup>32</sup> That example, notice, concerns a narrow-scope law, applying to him in that very particular role, rather than wide-scope, applying to everyone in general.

moral behavior are an insufficient guide" in the case at hand. But that implies what is here my main point: that our first recourse, in trying to decide what the criminal law requires, is to "ordinary standards of moral behavior." That is our first, best guide. Only when that is an insufficient guide – only when morality is silent or unclear or confused or contested – do we make further enquiries as to what the criminal law actually requires.

The criminal law is just the most dramatic example of wide-scope duty-imposing law, however. The same thing that is true of it is true, to a lesser extent, of all other instances of that type of law. Among them is tort law. Of course complex situations arise even within criminal law, such that reflecting upon what is morally appropriate provides no clear guidance as to what might be legally required. Such complexities might arise even more frequently in tort law. But the fact that we cannot morally intuit what is legally required in some highly complex situations ought not obscure the fact that, in much the most common cases in both criminal and tort law, law could (and for maximum epistemic advantage should) be written around simple moral principles that can provide people with clear guidance as to what the law is likely to be.

Law might fail to track morality in ways that are epistemically costly in two respects:

- 1) Laws might require things that morality does not. Of course this is inevitable with wide swathes of narrow-scope or power-conferring rules of law. And sometimes it is necessary even in the case of wide-scope duty-imposing rules of law: many are responses to coordination problems, where there is no morally right answer and legislators must simply stipulate one or the other equally-good coordination point as being legally required. But popular catalogues of "ludicrous laws" are

full of ones about which people are rightly incredulous, precisely because there is no moral reason to suppose that there ought be any such law on the statute books.<sup>33</sup>

2) Laws might fail to require things that morality does. It is immoral – but in a great many jurisdictions not illegal – to walk past a drowning child you could easily have rescued. Of course the moral code governs our personal conduct in private as well as public, whereas the legal code should arguably govern the latter alone (more of which shortly); in that case, law should track only the public-regarding portion of the moral code. But failing to outlaw obvious public wrongs – torture, cruelty to animals, etc. – would epistemically wrong-foot people who had every right to assume that obvious public wrongs would be as illegal as they are immoral.

Which of those two types of errors is worse? Well, from a moral point of view, clearly the former is worse. In that case, people who have done nothing morally wrong can incur legal liabilities without having any way of knowing they were doing so. From a moral point of view, it may be less bad for the law to fail to require what morality does. People still end up doing the morally right thing, even if they do so on the (as it happens false) assumption that it is also legally required.

From a pragmatic point of view, however, it is not clear that the one is any worse – more or less costly – than the other, necessarily. It can be as costly to do something that is moral but (unbeknownst to you) illegal as it is

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<sup>33</sup> Among my favorites are a law that prohibits people dying while in the UK Houses of Parliament, an Ohio law that makes it illegal to get fish drunk and a French law making it illegal to name a pig Napoleon. See "UK chooses 'most ludicrous laws,'" BBC News 6 Nov. 2007 (available at: [news.bbc.co.uk/go/fr/-/2/hi/uk\\_news/7081038.stm](http://news.bbc.co.uk/go/fr/-/2/hi/uk_news/7081038.stm))

to forebear from doing something that is immoral but (unbeknownst to you) legal. The costs of both types of epistemic error might be pretty similar.

## VI.

For people to have good epistemic access to the content of the law, what is needed is:

- 1) A way for people to intuit, without detailed investigation, what the law is for most common and most important cases of their conduct;
- 2) A way for people to intuit when their intuitions are likely to be unreliable, and hence that they need to investigate further what the law actually is.

Letting the wide-scope duty-imposing rules of law track morality is, I suggest, a good way of accomplishing both.

It is easy to see that this is true, as regards the first desideratum. If law tracks morality, in cases where moral sentiments are univocal and strong people do not need to look up the law in some big book. They need simply ask themselves, "What should the law be on this subject?" If law tracks morality, they can just assume that that is what the law is on that subject. Furthermore, insofar as the same moral sentiments are widely shared across the community, it will be "common knowledge" across the community: I know that you know that that is what the law is; you know that I know that you know; and so on.

This crucially assumes that people generally know what is morally right and wrong – or at least that they have better epistemic access to that than they do to what is legally required. That is an empirical speculation, to be sure. Like all empirical claims, it might turn out to be false – in which case

my epistemic argument for law to track morality will fail. But empirically, that claim surely is highly likely to be true. After all, it is as Hart says

an essential feature of any moral rule or standard that it is regarded as something of great importance to maintain.... [This] is manifested in [among other things]... the serious forms of social pressure exerted not only to obtain conformity in individual cases, but to secure that moral standards are taught or communicated as a matter of course to all in society.<sup>34</sup>

By tracking morality, law can piggyback on all that apparatus already in place for promulgating the moral code.

Of course, knowing what morality requires is one thing, doing what morality requires is quite another. People often know what is morally the right thing to do but just cannot bring themselves to do it, for one reason or another. That explains why there might be some practical point in superimposing a legal requirement over and above the moral one. Far from merely telling people to do something they would have done anyway, backing morality with the force of law gives people extra incentives (legal rewards and punishments) to do the morally appropriate thing when they might not otherwise have done so. From the point of view of the high moralist, it would be a very good thing if people were encouraged to do the morally proper thing more often; but that is another matter. From the point of view of the epistemic argument I have here been developing, I merely want to emphasize that legalizing morality is not necessarily redundant. Doing so does not merely require people to do things they would be doing anyway, necessarily.

The second desideratum is that there should be a way for people to intuit when their intuitions are likely to be unreliable, as regards the content of the law. I have already discussed two such cases: when they are dealing

with power-conferring rules of law, or with narrow-scope rules of law applying to them in some very particular role. Now I want to move beyond that, to cases where people need to be able to intuit when their intuitions are likely to be unreliable, even as regards duty-imposing wide-scope rules of law, like the criminal code.

Here is one way. Suppose law tracks morality. But suppose that morality is (and is known to be) unclear or contested on the point in question. Joseph Raz thinks this is a problem for the thesis that law should track morality, and in one sense that is clearly so: there is no single, settled moral judgment for it to track.<sup>35</sup> But looking at it from an epistemic angle, and thinking of morality as merely an indicator of what the law is likely to be, things look different. If there is no clear moral ruling on the situation, then neither can there be any strong inference from morality to what the legal rule is likely to be. As with someone occupying a special role or undertaking a special activity like making a will, someone wanting to know what the law is on that point will simply have to go look at the statute books. Furthermore, and more importantly, someone in that position should know – from the fact that morality is unclear or contested on that point – that s/he will need to go look at the statute books.

My proposal, then, takes the form of two pieces of advice, one for legislators and the other for citizens:

- From the point of view of legislators, the question is "what should be legally prescribed or proscribed?" My recommendation there would be that law should insofar as possible track morality in its most general form. It should track what lies in the "overlapping consensus" among

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<sup>34</sup> Hart, *Concept of Law*, p 169.

<sup>35</sup> Raz, "The politics of the rule of law," p. 373.

the many more specific moral codes that might be afoot within the community.<sup>36</sup> It should do that, in order to give maximal epistemic access to the content of the law to people living within that community, under that body of law.

- From the point of view of citizens, the question is "what might be legally prescribed or proscribed?" My recommendation there would be to apply a two-fold test. Firstly ask yourself, "What do you think is immoral?" That might well have been made illegal as well. Secondly ask yourself, "What do others around here think is immoral?" That too might well have been made illegal as well. At the very least, a citizen is on warning to check its legal status before performing an act in either category.

Of course, if legislators faithfully enact only the content of the overlapping consensus within their community, no citizen would need to ask herself the second of those questions. The answer to the first alone would, in that case, be fully determinative. In an ideal world that may be so. But pragmatically, a prudent citizen would not assume the world to be completely ideal in that respect, or any other.

## VII.

Does this just amount to a suggestion that we revert to customary law? Well, it does, if the morality you write into the law code is purely positive morality, the conventional rules of society as you find them. It does not, if the morality you write into the law code is critical normative morality, what is "really right

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<sup>36</sup>John Rawls, Political Liberalism (New York: Columbia University Press, 1993), Lecture 4; Justice as Fairness: A Restatement (Cambridge, Mass.: Harvard University Press, 2001), § 11.

and good" independently of what people at any particular time or place say that to be.

The epistemic argument I have been developing most naturally seems to incline toward writing purely positive morality rather than critical normative morality into the law. After all, it is the positive morality to which everyone in the community has most immediate epistemic access.

But here Hart's question pulls us up short: "Does the morality with which law must conform... [really] mean the accepted morality of the group whose law it is, even though this may rest on superstition or may withhold its benefits and protection from slaves or subject classes?"<sup>37</sup> That ought to make us deeply uncomfortable.

One response would be to say that different arguments for legal moralism simply pull in different directions. The pragmatics of maximizing epistemic access to the law would indeed recommend letting law track positive morality, however wicked. There would be epistemic costs in deviating from that. But from the perspective of the more high-minded forms of legal moralism, those epistemic costs would be well worth bearing. High-minded legal moralists would insist that law ought track the requirements of true normative morality, however unfamiliar people might find them. Those laws would then have to be promulgated and well-publicized; people there could not easily intuit them. But so much the better, the high-minded legal moralist would say: the law would then be giving people a moral education.

This first response might go on to say that, while perhaps high-minded considerations should trump lowly pragmatic epistemic ones in cases of conflict, such cases of conflict are relatively uncommon. Much more often

than not, we can allow law to track positive morality without great moral cost. In so doing we will greatly enhance epistemic access to the law, thereby helping law do what it is supposed to, which is to guide our behavior.

I think that that is the right response. But let me add a second response that tips the scales of that tradeoff a little more toward critical normative morality, for purely epistemic reasons.

Letting law track critical normative morality rather than purely positive morality is to be also preferred, for the same reason that the common law is to be preferred to customary law. Common law is really just "the customary law among judges." But what makes the customary law of judges superior to the customary law among the folk is that the judiciary feels obliged to bring its practice under some principles, to treat similar cases similarly and to treat different cases differently only in proportion to the extent in which they differ in ways that matter to the principles underlying the rule.

Of course, the principles that common law judges elaborate quickly become quite complex. There is no little chance that any citizen could know everything in the 30-odd volumes of the Restatement of the Law than there is that s/he could know everything in the 364 volumes of the US Code. If citizens are to surmise the law for themselves, they need something far simpler and more straightforward than the plethora of principles that judges have written into the common law.

Still, it is easier to work out common law from first principles than it is to work out statutory law from first principles. (There is simply no telling what might get into the heads of legislators some late-night sitting.) In similar fashion, it is easier to work out normative morality from first

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<sup>37</sup> Hart, Concept of Law, p. 201.

principles than it is to work out positive morality from first principles. The customary moral practices in any particular place have a long history of assorted accretions. There is little rhyme or reason to many of them. Like statutory law, you simply have to learn them off by heart. If there are gaps in your knowledge of them, there is little you can do to fill in the missing elements by adducing them from what all else you know about customary moral practices.

Critical normative morality, in contrast, is arguably organized around a small set of fundamental principles, precisely so people can work out for themselves what morality requires of them. After all, there are no moral courts to issue authorized interpretations of morality's edicts. Critical normative morality must be structured in such a way by and large that people are able to work its edicts out for themselves.

If we think law should track morality, purely for the pragmatic reason that in that way citizens will be given better epistemic access to the content of the law, then it is those simpler and more readily accessible principles of critical normative morality that it should track. Purely positive morality is less predictable, less straightforwardly derivative from any first principles. It is less epistemically accessible to people in consequence, and less epistemically suitable as a basis for the law for that reason.

## VIII.

So far I have been mounting a case for law (in its wide-scope duty-imposing aspects anyway) to track morality, and for it to track critical normative morality rather than purely positive morality. The reasons I have offered are purely pragmatic ones: that is the best way to give people in general

epistemic access to the content of the law which is supposed to guide their conduct. That is an important pragmatic consideration. But of course there may be other countervailing considerations, pragmatic or principled, pointing even more powerfully in the other direction. So the reasons I have been giving should certainly be regarded as purely pro tanto reasons.

To say that law should "track morality" is, strictly speaking, to suggest that the law should prescribe or proscribe an act if and only if morality (by which I mean critical normative morality) prescribes or proscribes that act. The epistemic considerations I have raised so far provide grounds for the "only if" part of that bi-conditional. They provide epistemic grounds for thinking that law (in its wide-scope duty-imposing form, anyway) should instantiate only morality. The question I now want to raise is whether anything I have said implies that law should instantiate all of morality, even just morality in its critical normative (rather than purely positive) form?

That question is of course the one that lies nearer the heart of the conventional debate over the legal enforcement of morality. What Hart and Devlin were debating, after all, was whether homosexuality should be illegal just because – as both supposed – it is immoral.<sup>38</sup>

The first thing to say is, of course, that that is itself a judgment of conventional 1950s morality that might not withstand scrutiny of critical normative morality. But let us set that issue to one side to try to get at the larger structure of the argument in play.

Notice that Hart and Devlin were conducting a debate within critical normative morality. Whether there should be some purely private-regarding sphere within which acts, however immoral, should be immune from public prosecution is a substantive moral proposition lying at the center of the dispute.

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<sup>38</sup> H.L.A. Hart, Law, Liberty and Morality (Stanford, Calif.: Stanford University Press, 1963). Patrick Devlin, Enforcement of Morals (Oxford: Oxford University Press, 1965).

So law need not enact every aspect of critical normative morality. There might be good reason, within critical normative morality itself, for leaving some of that off of the statute book. But that an act is arguably immoral gives everyone fair notice that they had better check the letter of the law. And telling everyone that they had better think twice before behaving in ways that are arguably immoral is no bad thing, surely.

## IX.

To suggest that there are epistemic advantages in law tracking morality is not a wholly novel thought. Nineteenth-century jurist John Austin observed similarly:

Some laws are so obviously suggested by utility [his standard of morality], that any person not insane would naturally surmise or guess their existence... And most men's knowledge of the law is mostly of this kind. They see that a particular act would be mischievous, and they conclude that it must be prohibited. The conduct of nineteen men out of twenty, in nineteen cases out of twenty, is rather guided by a surmise as to the law, than by a knowledge of it.<sup>39</sup>

A century later, when discussing the "integrity" of law Ronald Dworkin said:

If people... are governed not only by explicit rules laid down in past political decisions but by whatever other standards flow from the principles these decisions assume, then the set of recognized public standards can expand and contract organically, as people become more sophisticated in sensing and exploring what these principles require in

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<sup>39</sup> John Austin, Lectures on Jurisprudence (London: John Murray, 1879), Lect. 25, p. 501.

Notice that this question of "what is the law on this matter?" – even where that question is answered (as Austin and I would do) in terms of "what is the pronouncement of morality on this matter?" – is a very separate from "what social order would have emerged on this matter in the absence of law?" The answer to the latter question requires consideration of what extra-legal sanctions can be brought to bear, whereas the answer to the first two questions requires consideration only of what (moral) order legal sanctions ought get behind. Robert C. Ellickson, Order without Law (Cambridge, Mass.: Harvard University Press, 1991).

new circumstances, without the need for detailed legislation or adjudication on each possible point of conflict.<sup>40</sup>

Like Austin, however, Dworkin passes over this point quickly, dismissing it as merely "practical."<sup>41</sup>

To my mind, however, practicalities actually matter. For law to serve its social function – for it to be action-guiding – people have to have some good way of finding out what the law actually requires of them. One good way of enabling them to do so is for law, in its most general wide-scope, duty imposing aspects anyway, to track broad general principles of critical morality. It may be the lowliest rather than loftiest reason for law to track morality. Such low-level considerations, however, are often the most practically decisive.

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<sup>40</sup> Ronald Dworkin, Law's Empire (London: Fontana, 1986), p. 188.

<sup>41</sup> ibid., p. 189.