**LEG I SLATIV E D UTY A ND TH E IN D EPE N D EN CE OF ·LAW**

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ABSTRACT. This essay considers the nature of duties incumbent on legislators in virtue of the office itself I argue that there is no duty for a legislator to enact a criminal law based on morality; there is no duty to incorporate substantive moral conditions into the criminal law; and there is therefore no duty derivable from the nature of the legislative office itself to make conditions of culpability depend on those of moral responsibility. Finally, I argue that the relation between morality and the criminal law is therefore much less direct than assumed in most theories of the criminal law.

I N TR O D U CT I ON

Are there *general* normative demands on legislators to conform the results of their legislative activity to the contours of morality? More particularly, does there exist a general duty of this kind which makes it obligatory to create criminal law such that responsibility is necessary for culpability?[[1]](#footnote-1) I take the claims of legislative duties, for the purposes of this essay at least, to be those entailed by the legislative office itself. The duties of interest are those one would have merely in virtue of occupying the office of legislator. The duties of interest here do not follow from a prior commitment to some *particular* moral school or theory, though I do not wish to be thought to be denying that there are those sorts of duties.[[2]](#footnote-2) If there are certain duties which are incumbent on the legislative activity in virtue of the nature of the office, then it is possible to provide grounding for ·what I elsewhere have termed the subordination thesis.[[3]](#footnote-3)

There are two contexts in which to advance the inquiry. These two contexts are markedly different. One concerns law and legislative activity in a homogeneous society where culture, folk morality, critical morality, religious views, etc., are widely shared and uniform in interpretation and application. That context is not the one in which I am interested. Instead, the context for this inquiry is a pluralistic society, one where cultural, religious, and moral views are neither necessarily widely shared nor uniform.[[4]](#footnote-4) Results may differ if the homogeneous society is the context of inquiry. But I will assume that a failure of legislative duties to ground the subordination thesis in a pluralist context is sufficient to show the thesis should be abandoned.[[5]](#footnote-5)

I should say something about the approach adopted here. It will appear even now to be an excessively general question I am raising. That doubt will not be alleviated by the arguments which follow. What I wish to discover is whether or not one is under an obligation to constrain law by morality in virtue of occupying a legislative office without regard for the particulars of one's moral beliefs or theories. Does the nature of law require in some way that it be understood within the sphere of morality? Is it a subordinate normative system? There is no doubt that many moral theories have that result, although not all. But then the subordination of law to morality depends on the success of establishing the particular moral views one holds, and so depends completely. However, if it is the case that legislative office itself requires some degree of subordination of law to morality, then the effort to instantiate in law one's moral views will not be so suspect.

What I am doing then is not the usual moral analysis of legal institutions. The line of argument advanced is not strictly normative in nature. This may need some explanation. I do not believe that normative theories, including moral theories, may be 'free floating'. A moral theory not developed from metaphysics and science is free floating. This does not mean that moral philosophy ought to begin by assuming the common intuitions of a particular group. The point is not to rationalize what is already believed, but to discover what it is that ought to be believed. It then matters how the moral or other normative claims come to be linked to the world. The conceptual foundations are what make the normative enterprises at all worthwhile. What is under investigation here is how morality and law are to be linked one to the other. And that is answered, I think, by looking to what is required of morality by law. That investigation will yield to us the grounding or means by which morality may come to have dominion over this other normative social system.

Legislative duties might support the legal subordination thesis if it were the case that legislators were under an obligation to create a legal structure which to some high degree successfully instantiated moral demands. That is, legislators ought to view their task as the institutionalization of morality in law. There are several ways of understanding such a duty. It is possible that whatever the legislators do could be described as the result of some moral theory, one cooked up for the occasion. Because of its triviality, that reading is obviously incapable of supporting the substantive demands of the subordination thesis. No more needs to be said about it. There are, however, four other ways of understanding the supposed duty.[[6]](#footnote-6) 1) The duty may be to instantiate consensus moral views. 2) The duty may be for each to instantiate her or his own moral views. 3) The duty may be to instantiate conventional moral views. (Consensus views are shared by all, or nearly all, of the members of a community. We can take the requirements of consensus lightly and only require a high degree of acceptance of the moral views in question. The conventional moral order need not involve such a high degree of acceptance. Indeed, conventional morality may be a distinct minority view within the community.) 4) The duty may be to instantiate some derivative normative order.[[7]](#footnote-7) In turn, these forms of the legislative duty may be seen as different ways of responding to and filling out a deeper claim. The deeper claim is that criminalization depends on an underlying moral wrong. It is as versions of this theory, the underlying wrong theory, that the four versions of legislative duty will be considered.[[8]](#footnote-8)

Consideration of the underlying wrong theory may seem to be a distraction. It will be thought by some that this involves consideration of either a thesis different from the legislative duties or the relation of legislative duties to the subordination thesis. But in fact consideration of the underlying wrong view is not a digression and does not involve one in substitution of targets. The underlying wrong theory has several features necessary to the success of the subordination thesis as founded on a legislative duty. The theory entails that legislative acts be directed at capturing the underlying wrong in the legislative enactments. With respect to the criminal law, the substantive law must reflect the nature of the wrongs which underlie the particular criminal statutes. That cannot succeed if the enactments determining culpability differ from the conditions of responsibility for the underlying wrong. Without meeting the conditions of responsibility, the underlying wrong cannot be a wrong. That is, responsibility is part of what underlies in the underlying wrong theory. If an agent is not responsible for some conduct, he cannot have done wrong. So if in law one aims at capturing the underlying wrong, one must include responsibility conditions. Thus, if the underlying wrong theory is right, responsibility will be a necessary condition for culpability.

Legislative duties, considered hypothetically, must include a duty to ground culpability on responsibility. That requirement is certainly comprehensible within the context of a duty to act on the underlying wrong theory. Indeed, the assumption of the underlying wrong theory adds plausibility to the possibility of a legislative duty. It seems bizarre to suppose that there may be a duty to found culpability on responsibility, but that it would nevertheless be perfectly acceptable to make what is not immoral or may even be morally required of an agent a crime. But if a point of the criminal law is to capture wrongs in legislative enactments, then a part of the success of that effort is measured by duplication of conditions which render offenders subject to sanction. If an act is wrong only if the agent met conditions of responsibility, then the legal formulation of that wrong in a criminal statute will necessarily fail if the formulation departs from conditions of responsibility in the conditions of culpability. Provided conditions of responsibility are, as the theory of responsibility would indicate, generalizable conditions, then there will be good reason to embed that theory in the conditions of culpability. As will be shown later, the responsibility requirement may be severed from an underlying wrong view which requires that the moral wrongs be prior wrongs. Therefore the responsibility condition on culpability would hold even where the wrongs derive from legal status (where, that is, the legal classification precedes the moral classification). So responsibility will remain a condition of culpability for those acts which are immoral precisely because they are illegal. So while it is possible to sever responsibility from a wider moral framework, it would not advance matters to do so here.

An important line of argument for the subordination thesis lies in the claim that the substantive criminal law derives legitimacy from underlying wrongs. Thus, legislative activity is properly directed at identifying and defining in the criminal law moral wrongs. For present purposes, the underlying wrong theory takes two important forms. The difference between the two forms lies in the treatment of underlying in the underlying wrong. In the first case, for the wrong to underlie the criminal law, the wrong must be prior to and independent of the legal classification. Call this the prior wrong view.

There are serious difficulties with the prior wrong view of the underlying wrong theory. There are a number of parts of criminal law which are illegitimate on this view. That reform of the law is in order is itself not a problem, of course. But the areas marked for abolition are not marginal areas of law. These offenses are not properly thought of as resting on moral wrongs which are prior to the social institution which defines the offense. This is true in a narrow sense. One cannot commit malfeasance of office if there is no office, and so if the offense is itself a creature of law so is the wrong. Some description of what is now at issue is in order. Examples of the sorts of crimes at issue fall into two principal groups, offenses of office and offenses of property. Offenses of office are offenses which are determined by the nature of an office. Thus, it is an offense of office when a police officer accepts compensation for exercise of discretionary powers of arrest. What is involved in these sorts of cases are such things as malfeasance of office and abuse of powers. Such offenses extend as well to such non-specialized offices as citizenship. Various forms of fraud or evasion of prescribed duties come up here.

But that narrow sense is not enough, for it will be objected (properly) that there may well be a general wrong underlying the offenses. These offenses may be seen as specific forms of some more general duty which does not depend on the existence of law or social institutions of a particular form. These offenses may just be special forms of breaches of duty, of fair play, or of obligations to keep promises. If so, the logical requirement of the prior wrong view is met.

If this objection is to succeed, it must also explain a second category of cases. This category concerns offenses of property. The claim here is that property offenses depend on a system of property rights and attendant duties. This complex is not prior to legal and particular social institutions. This is so because property systems, and their complexes of duties and rights, are creatures of law and custom in just the way the prior wrong view denies. The claim here is that there are no prior general human or natural rights to property.[[9]](#footnote-9)

The claim is not that there is no moral question involved in involuntary, or voluntary, property transfers or acquisitions. The claim is that these are not moral questions in the sense required by the prior wrong view. That is just to claim that the concept of property is not available in the presocial world of the prior wrong view, and as a consequence of that fact, property offenses fail to meet the prior wrong view conditions. Property relations are determined by legal and similar institutions.

The objection posed to the first set of examples can be expanded to apply in this case as well. The objection then includes some claim, such as that property relations are themselves based on some substantive moral theory. The wrongs involved in property offenses may be described as special cases of violations of prior duties, perhaps here of such duties as keeping promises.

The reply to this objection involves a reconsideration of the sorts of offenses and their relation to the supposed prior wrongs though t to underlie the offenses. In the first case, for instance, the prior wrong was thought to be something like a duty of fair play in cooperative endeavors, or a duty to keep promises (made when entering office). So the offenses are thought to be no more than special cases under more general duties. This objection goes wrong in a subtle way, a result of losing sight of the actual sorts of cases involved. What is wrong about trespass or copyright infringement, to consider the second category of cases first, is not a special case of a more generally described duty. What is wrong in copyright infringement, for example, is determined just by the applicable social institution. It is the legal determination itself which leads to the classification as wrong. Similarly in trespass cases it is legal determinations which decide the wrong. Stealing is not an underlying wrong of the kind which can do real work in these cases. What it is to steal turns out to be defined by the social institutions, just as those institutions determine the nature and extent of property claims.

This is true not only in the very general sense that property relations require social determinations, but more concretely as well. Ownership of a song, and rights to compensation for the use of the song, are not matters which make any sense outside of a well-developed web of socially defined relations. The social institutions, which include legal institutions, determine the relations, duties, and rights which are involved in a discussion of the wrong. But then the wrong fails to underlie, to be prior to, for example, the legal determination of copyrights or patents. The wrongs are not special cases in the right sense. They are not special cases in the sense of being the result of applying prior principles to a new circumstance. Instead, what happens in these cases is that the result is itself defined by the social institutions and that result is taken over, as it were, by the principles.

The first category of cases, for example, which concern offenses of office, includes such offenses as treason, malfeasance of office, violations of immigration and draft laws, etc. On the prior wrong view, these must rely on some pre-existing moral wrong, or be the result of a special application of general principles of duty, fair play, or loyalty. The inadequacy of this view can be brought out by attending to two closely related lines of argument. The first concerns the relation of the crime to the general wrong thought to underlie it. Consider, for example, treason and disloyalty as cases respectively of crime and underlying wrong. Treason and disloyalty do seem to be part of some generic 'family'. But general moral claims, like those of loyalty, fail to account for the nature of treason. This can be seen in how one fleshes out the crime and the wrong. In treason, what matters is, to put matters simply, a changing of sides (including failing to adhere to any side or cause). In disloyalty (the moral wrong), what matters is an unjustified lapse of loyalty. Treason has nothing to do with justification of actions. One's being treasonous is not conditioned on the justification which may be offered for the change. Indeed, the conditions for treason are, in an important sense, formalistic. The question of loyalty to one's nation is not decided by whether or not one has acted treasonously. To see this, we need only consider the political contexts of treasonous action. Franco's attack on the Spanish Republic was surely treason, and so was the attempted assassination of Hitler by some of his generals. The ongoing guerrilla wars of Central America provide ample examples of the difficulty of identifying treason and disloyalty. The implication is problematic whichever way it may be thought to run. The general wrong (disloyalty) is significantly different in structure and application from the crime (treason) which it supposedly underlies and explains. So the grounding of the one on the other may be doubted.

The second line of argument serves to buttress and to generalize the preceding considerations. For what is important about the preceding goes beyond the particular cases discussed, and extends to the nature of the relation supposed between the crime and underlying wrong. That relation is one we may think of as quasi-historical. The relation of law to morality is taken to be one where law grows out of morality; that is, law is a sort of historical development of morality.

There is here a conception of society as fabricated in a particular order, which more or less follows our understanding of the history of our own society. The state and law are later arrivals on the scene and so dependent on earlier developments. So the development from common to code law is taken as important to the justification of legal activity. But the development of law from morality may be just like the development of morality from religion. These relations are historical, or genetic, and have no justificative value. The justificative function can be fulfilled only by some more conceptual relation.

The offenses fall under such duties as fair play only because the particular social institutions define the conduct in that way. The classification under the principle is derivative from the determination of duties by the institutions. These are offenses precisely because they are so determined by social institutions such as legal legislation, and the sense in which they represent general duties is too attenuated to support the prior wrong view.

If the prior wrong view is wrong, the underlying wrong theory is still tenable on a different basis. Underlying wrong theory need not make the priority claim of the prior wrong view. In this case the underlying wrong may or may not be prior to the institutional determination. What is necessary in those cases where the wrong is not prior is that there be collateral moral reasons supporting the institutional duty necessary for the offense.[[10]](#footnote-10) Under this view the four forms of the legislative duty can be sorted and assessed as sources for the subordination thesis.

The first form of the legislative duty requires the legislator to (attempt to) instantiate consensus moral views in law. Two objections to this form come immediately to mind. In the first place, this would limit legislative enactments to those matters about which there is consensus. But it is extremely unlikely that such a consensus would be available in the sort of society under consideration. The range of moral views in a pluralist society may, after all, be extremely wide.

The second objection runs to the very formulation of this position. For not only would the legislator be limited with respect to enactments, but the very existence of the legislative duty would have a similar source, or rather lack thereof. This form requires that there be a legislative duty (of the appropriate sort) just in case every morality represented in the society included such a duty for legislators to conform the law to morality. That condition we can be sure will not be met. This problem affects the formulation of the possible legislative duty itself. This, or a very similar, problem arises for other forms of the legislative duty as well.

Consider the second and third forms, that the legislator enact her or his own moral views and that the legislator enact conventional moral views. If we deny the consensus source for the legislative duty, then in these cases the duty must similarly derive from either the personal views of the legislator or from a conventional view to that effect. In the case of the personal form of the duty, even granting the duty will fail to support the subordination thesis in any usable form. This is because the duty is purely personal. It cannot therefore provide grounding for a general argument of the kind required for the subordination thesis. It may be that Alphonse is under an obligation to embed his moral views in the law as a result of the theory he adheres to, but that will provide no reason for anyone else to instantiate moral views in the law. Moreover, because the variety of moral views is unlimited and in any case not subject here to any standard, there is no reason to think that a theory of responsibility required for the subordination thesis would be available.

The problem in the third form of the duty (a duty to enact conventional moral views) is not markedly different. It too would require some high degree of agreement about the existence of such a duty. But that is a hurdle which could be met. The insurmountable hurdle is to be found in the derivation of the legislative duty itself. The difficulty is that the conventional morality cannot itself provide the justification for a duty to instantiate the conventional morality.

### The conventional morality considered here is not the result of a moral theory. Its demands are not discovered by attending to what some theory requires in being applied to some set of circumstances. The conventional morality is merely an aggregation of opinions or views. It is that in which the conventionality consists. Without the theoretical foundation, the views are rendered mere opinions, no doubt popular, but not anything more. The conventional morality is not a genuine morality in that it lacks self-justification and hence normative force. If one fails to adopt the views, one does not thereby do wrong. One does not do wrong unless there are other reasons, of a moral or normative kind, which require adhering to the conventional morality. So while it will be possible to instantiate a conventional morality, the duty to do so must have some other source.

It may be that by conventional morality what is meant is a suitably critical morality. This would yield a consistent and more rational moral system, but would it remedy the problem of normative grounding? Why would such a morality be compelling? Why adhere to it? Although there are grounds to prefer this version to the unpurged conventional morality, it has the same source. It is just a reconstruction of opinions, a reconstruction that improves by rationalizing the opinions, but no more than a reconstruction. If the original material cannot generate a general moral claim, neither can a reorganized and purged version of the material.

The fourth form of the legislative duty takes the duty to be to instantiate some other sort of derivative normative order. I hope the oddity of the phrasing will dissipate as the exposition progresses. The problems of the preceding forms were in the lack of grounding for the duty. Because the duty could not be got off the ground, so to speak, it could not be filled out in a way that would support the subordination thesis. So the first problem here is to develop a justification for· the legislative duty. The justification for a legislative duty of at least the right kind may be found, I think, in a sort of conceptual analysis of legal legislative activity. That is because law is partially a functional concept, and an account of its functional nature will lend life to the possibility of a legislative duty.

Law fulfills a number of primary and secondary functions. Among the primary functions are (a) preventing undesirable behavior and securing desirable behavior; (b) providing facilities for private arrangements among individuals (including 'artificial' persons); (c) provision of services and redistribution of goods; and (d) settling disputes.[[11]](#footnote-11) These functions are related in complex ways to indirect functions, such as encouraging adherence to particular moral views; encouraging social solidarity, and so on. These functions should be considered in light of the demands of a pluralistic society and the creation of a legislative duty in such a society. The main interest now is in the first function, which is the one most relevant to the criminal law. But the legislative duty must not, of course, be tied to just that one function. It must grow out of the confluence of functions of law, even if the particular focus at present is on the criminal law.

Desirable and undesirable conduct are not definable without recourse to a value theory. These are plainly normatively charged terms. Legislation with respect to such conduct must itself be deeply involved in normative choices of import to moral and other normative theories. It might then be thought that the immediate task was to decipher the nature of the normative content of the two terms. To pursue that task, however, would be to lose sight of both the overall problem being considered and the more local problem of legislative duty. For we have not yet found a way of detailing that legislative duty. Remember that the main interest in the legislative duty is as a source for the claim that responsibility is a necessary condition for culpability. That claim follows only if the legislative duty is such as to require that legislators attempt to instantiate that relation between responsibility and culpability in law. So we need to consider the fourth form of the legislative duty only insofar as it is relevant to that question, and not in any more general way.

It is not necessary, therefore, actually to provide the normative theory which gives rise to the legislative duty, or even, in fact, to determine if there is such a duty aside from the requirements of particular moral theories. What is necessary is to determine whether or not the form the legislative duty must now take will or will not guarantee the duty in a form that will support the subordination thesis. If it cannot guarantee a source for the subordination thesis, then a divergence between culpability and responsibility cannot itself be a demerit in a legal system.

The failure of the guarantee can be shown if two other theses can be shown not to hold. If it can be shown (1) that the normative theory cannot be identical with a moral theory, and (2) that the normative theory must have direct recourse to extra-moral determinations of undesirable conduct, then it will follow that the guarantee of the subordination thesis cannot be given, and consequently neither can a guarantee of the relation between responsibility and culpability. It will also then be possible to make clearer the sense of describing this normative theory as derivative.

The first prong can be established on the basis of arguments already advanced. Among the possible forms of the duty were conventional and consensus. As noted, the difficulty with these two forms is related. The difficulty with the consensus form is that it requires the relevant duty to be imposed by all the moral theories and views adhered to in the society. This possibility was dismissed as not only being extremely unlikely, but actually requiring certain well known moral positions to be excluded. The difficulty for the conventional approach was that it could not itself provide the duty, although it might nevertheless be the case that the duty required implementing the conventional morality. This was because the conventional morality failed to have justificative force. It was an aggregate and so lacked any theoretical foundation which could suffice to impose a duty for its own instantiation.

These considerations are important here because they show the impossibility of identifying the normative theory which would justify the legislative duty with a moral theory. There cannot be a general moral duty in virtue of the beliefs of some particular individual. The duty cannot derive from a moral theory constructed by looking to conventional moral views because that theory is necessarily first order, a mere adoption, unless it is just a part of the conventional view. But if it is, it still will not suffice, for such conventional aggregates are not genuine moral theories at all. They are not genuine moral theories because they lack any fundamental normative force or content. All that speaks in favor of such views is that they are widespread, and that certainly cannot itself create the normative force required for a moral theory. So the first thesis is established.

The second thesis holds that the normative theory must have direct recourse to extra-moral determinations of undesirable conduct. That thesis too can be shown to follow from the consideration of consensus and conventional forms of the legislative duty. The argument here turns on the necessity for adjudicating among competing moral theories regarding the definitions of the key terms. Unless these are determined in a common way, the problems noted above recur in new form here. If there is not a common determination of content of the terms, then there is not a neutral moral determination of content. If there is not a moral determination, the normative theory must have recourse to some other means of evaluation. It must therefore have direct recourse to an extra-moral determination of the terms. What direct recourse means here is that recourse is not had only in cases where directed by some moral theory. If, for example, a moral theory directed one to maximize some value in a set of circumstances where the value's measure required extra-moral determination (say economic measures), then the recourse is indirect. It is indirect because it is conditional on moral theory. What must happen in this case is something different, for the extra-moral theory does not come into play only at the direction of moral theory, but independently. In effect it supersedes the moral theories, and here the moral theories are recurred to indirectly.

The legislative duty, whatever its actual content, cannot guarantee the requirement that responsibility be a necessary condition for culpability. It therefore cannot guarantee the subordination thesis. Indeed, the legislative duty itself is doubtful, and certainly so in any form of possible help to the subordination thesis. It may be objected that it is a long way from the lack of a guarantee to a showing of a definite lack. The latter has not been shown, so the legislative duty may still serve to support the subordination thesis. This, however, is incorrect.

The failure of the guarantee is sufficient to remove legislative duty as a source for the subordination thesis. On the assumption that the arguments intended to show there was no such guarantee succeeded, a number of consequences follow which together destroy the possibility of founding the subordination thesis on the basis of legislative duty. If there is no guarantee, then there cannot be a duty of this kind which is an unconditional duty or which is necessarily attached to the legislative office. Without the guarantee, therefore, there can at most be a contingent or conditional duty of the office which might lead to requiring that responsibility be a necessary component of culpability. Call this a possible duty. If there is such a possible duty, it will be determined or conditioned by one of two factors: (a) the nature or function of the office (understood widely so as to include the functions of the legal system as well); or (b) the moral views of the office­holder. We may eliminate (b) from consideration for reasons discussed above. Can enough flesh be put on (a) for it to perform this task?

The functions of the legislative office (understood as described above) do not themselves necessitate the adoption of any particular moral view or theory, and so do not necessitate the adoption of any particular view with respect to responsibility and culpability. They might nevertheless necessitate the adoption of some view or other, and so necessitate the adoption of some stance regarding the relation of responsibility and culpability. This would be the case if the analysis of the functions led to a narrowing of the range of acceptable normative theories or views, and more particularly limited the range to moral theories and views. But the analysis will not even yield that much. There is nothing about the legislative office which limits the normative theories of the legislators to moral theories. As a consequence, there is no need to adopt a moralized account of action, and so no need to adopt a moral theory of responsibility, and so no need to hold that responsibility is a necessary condition for culpability. It therefore follows that legislative duty will not provide an adequate support for the subordination thesis, and without the subordination thesis there is no necessary normative link between responsibility and culpability.

1. “Responsibility” means moral responsibility, and “culpability” means answerability under law, unless otherwise indicated. [↑](#footnote-ref-1)
2. It is obvious that at least some schools of moral thought do insist on such duties to enact the views of the particular school into law. Theological schools have a particularly notable history on this score. But not every moral theory provides for coercive enforcement, and so not every theory is compatible with such legislative duties as are under consideration here. [↑](#footnote-ref-2)
3. The subordination thesis is roughly the thesis that the criminal law is normatively subordinate to morality in the sense that the contours and content of the criminal law are determined by the demands of morality. Criminal law is seen as a kind of institutionalization of moral order. If the justification for criminalization is a moral justification, the subordination thesis holds. See also my “Punishment and the Subordination of Law to Morality”, *Oxford Journal of Legal Studies* 3: 421-43. [↑](#footnote-ref-3)
4. There are two reasons for confining myself to a consideration of pluralistic societies. The first reason is that it is a condition of the results of the present work having any application. The society in which I find myself is one which claims to be pluralistic (which is not to suggest doubts about that self­description), and so for this work to have practical merit, the theorizing must reflect that fact, if it is salient. The second reason is that the difference between pluralistic and homogeneous societies is large. In a homogeneous society, there are a number of factors at work which are not present in a pluralistic society, including maintaining the integrity of the society as a homogeneous society. These factors make it difficult to determine in advance whether any normative theorizing about the law in one context will carry over to the other context. I have argued against assuming transferability across variations in circumstances in “Lockean Provisos and State of Nature Theory”, *Ethics* 95 (1985): 828-36. [↑](#footnote-ref-4)
5. It might, however, be the case that the thesis can be supported by legislative duties in a homogeneous society. Then it becomes very important to decide how, if at all, one may go about homogenizing a pluralistic society. This is a problem which has not received much attention recently, although it is a variant of problems raised by processes of colonization, decolonization, and nationalism, and in problems of social integration in the U.S.A. [↑](#footnote-ref-5)
6. Actually there are more than four. I shall consider only two variants of the requirement regarding morality: immorality is a necessary condition for criminalization, and responsibility is a necessary condition for culpability. The first is obviously a stronger claim, but it is necessary to discuss it in order to get clear the nature of the duties under consideration. [↑](#footnote-ref-6)
7. What is meant by this last phrase is discussed below, pp. [198] et seq. [↑](#footnote-ref-7)
8. Theory of responsibility may be an independent requirement on criminalization decisions. That possibility is considered later in this essay. [↑](#footnote-ref-8)
9. I have argued for this in “Lockean Provisos and State of Nature Theories”, *Ethics* 95 (1985): 828-36. See also P. S. Atiyah, *Promises, Morals, and Law* (New York: Oxford University Press, 1981) pp. 9-28, 123-37; L.W. Sumner, “Rights Denaturalized” in *Utility and Rights*, ed. Frey (Minneapolis: University of Minnesota Press, 1984) pp. 20-41; D. Hume, *A Treatise of Human Nature* (New York: Oxford University Press) pp. 477-539; J.L. Mackie, *Ethics: Inventing Right and Wrong* (New York: Penguin Books, 1977) pp. 80-82, 105-24. [↑](#footnote-ref-9)
10. This view docs not entail natural rights, and m ay be compatible with a radically conventionalist view of morality. [↑](#footnote-ref-10)
11. See J. Raz, *The Authority of Law* (New York: Oxford University Press, 1979) pp. 163-79. [↑](#footnote-ref-11)