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Morality and Law

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The relationship between morality and law is perhaps *the* fundamental issue in modern Western legal theory. For centuries, legal philosophers have framed this issue in terms of a debate between natural lawyers and positivists. Natural law approaches have often been associated with religious belief. Secularization of intellectual discourse has led to increasing use of “morality” rather than natural law as the counterpoint to positive law.

H. L. A. Hart's Contribution

Perhaps the most influential twentieth-century positivist was H. L. A. Hart (1907–1992). In his seminal work,*The Concept of Law* (1961), Hart rejected views of the early English positivists John Austin (1790–1859) and Jeremy Bentham (1748–1832) that the law of the nation-state is a species of order or command backed by sanctions. He also distinguished his position from that of Hans Kelsen (1881–1973), who **[p. 1042 ↓]** understood law as a closed system of hierarchically arranged norms headed by a presupposed “basic norm” (*Grundnorm*) that confers validity on all the other norms of the system.

According to Hart, law is a product of institutional activity (of legislatures and courts), the force and authority of which derive from a “rule of recognition” supported by acquiescence or acceptance of citizens and legal officials. Although many aspects of Hart's account have sparked vigorous debate, his version of positivism has provided the point of departure for subsequent discussion by legal theorists of the relationship between law and morality.

Morality as a Concept

Legal theorists have less rigorously analyzed the concept of morality. A source of confusion is the risk of slippage between two different understandings of morality. According to one, morality embodies true or sound values that provide a “final test of conduct” (Hart 1958: 598). According to the other, morality consists of (a subset of) nonlegal norms of conduct defined independently of notions of truth or finality. Thus, Hart (following nineteenth-century utilitarians) distinguished between positive and critical

morality: positive morality meant morality actually practiced by a society or social group, and critical morality meant the standards by which one assesses positive morality. Ronald Dworkin distinguishes anthropological from discriminatory morality, the latter based on reason as opposed to emotion, prejudice, parroting, and so on.

Both Hart's and Dworkin's distinctions are problematic. In the face of intractable disagreement, not only about the content of critical morality but also about how one can identify it, the distinction between positive and critical morality marks only a difference of perspective. Critical morality consists of the standards that individuals use to assess other people's moral beliefs, and positive morality consists of other people's (but not one's own) critical morality. The force of Dworkin's distinction between anthropological and discriminatory morality is weakened by his acceptance that discriminatory moral positions may be held by their adherents as axiomatic or self-evident, and need not be supported or capable of being supported by (further) reasons. How, for instance, should we categorize foundational moral beliefs held as a matter of religious faith?

More important, perhaps, an account of the relationship between law and morality based on either one of these understandings is likely to differ in significant respects from an account based on the other understanding. It is worth noting that Hart adopted the former understanding in his debate with Patrick Devlin about the legal enforcement of morality, but that he adopted the latter in his suggestive analysis of the nature of morality in *The Concept of Law* (1994: 167–80).

Relationship between Law and Morality

Issues about the relationship between law and morality may be analytical (metaphysical) or normative (ethical). The basic analytical question is whether, by definition, (positive) law has some moral value; whether, in other words, the morally worthless can be law at all. As traditionally understood, natural law theory answered this question negatively: unjust law is not law. John Finnis has rejected this interpretation as a caricature. He argues that “principles of practical reasonableness” establish standards of excellence for positive law and that its normative force, but not its status as (positive) law, depends on the degree of its fidelity to those standards.

Other antipositivists argue, in effect, that although (positive) law is a human artifact, it serves certain purposes that are integral to its nature. For Lon Fuller (1902–1978), the basic function of law is to guide human conduct. Fulfillment of this function requires compliance with desiderata—such as clarity and nonretrospectivity—that constitute an "internal morality of law" and impose limits on what can qualify as law. Dworkin argues that the basic function of law is to constrain and justify coercion of citizens by the state. Since what the law is depends partly on what it is for, identifying the law requires constructive interpretation of legal materials (statutes, judicial decisions, and so on) that embody "past political decisions **[p. 1043 ↓]** about when collective force is justified" (Dworkin 1986: 93).

Failure to distinguish clearly enough between two questions—what *law* is and what *the law* is—sometimes mars analytical debates between positivists and antipositivists. On the other hand, modern antipositivist approaches accept the validity of the distinction (central to positivist thought) between what the law is and what it ought to be. However, they reject the positivist thesis that what the law is depends solely on acts and words of legal institutions and officials. Unlike exclusive positivists, inclusive positivists (including Hart) accept that ascertaining what the law is may require effect to be given to moral values such as equality or to moral criteria such as reasonableness. However, unlike antipositivists, they allow such recourse only when words or acts of legal officials and institutions require or permit it.

The relationship between law and morality may have ethical as well as metaphysical ramifications. For instance, Hart believed that maintaining a sharp distinction between what the law is and what it ought to be is the best way of empowering individuals to resist demands for compliance with "wicked" or bad laws. Others, reflecting on the experience of Nazi totalitarianism, have judged it necessary to equip individuals with a more potent weapon against tyranny than a personal sense of right and wrong, and have identified supralegal standards, for noncompliance with which laws can be pronounced not only bad but also invalid or void.

Judicial Lawmaking

Debates about the relationship between law and morals also have important implications for the obligations of judges. The positivist account of law applies most straightforwardly to legislation because legislation is canonically formulated and one can pinpoint the time of its making precisely. By contrast, common law, which is a by-product of the resolution of disputes, lacks canonical form and is, in theory at least, always provisional. One can better understand judicial lawmaking as a dialectical process of providing general reasons for resolving individual disputes in particular ways than as a process of establishing or announcing norms of conduct.

According to Hart's account, courts resolve disputes by applying existing law, and when the law “runs out,” judges must necessarily make new law to fill the gap. Because common law operates retrospectively and is revisable at the point of application and because courts typically lack the democratic credentials of political lawmaking institutions, some have rejected, as both wrong and unacceptable, this characterization of courts as interstitial legislators. Dworkin, for instance, describes the role of the judge in terms of “constructive interpretation” of existing legal materials and in terms of an obligation to reach the decision that best fits those materials. Tom Campbell argues that restriction of judicial power is the core ethical commitment of positivism, which promotes the political ideal that identification and application of the law should be divorced from the sorts of moral concerns that are relevant to lawmaking.

Ethical Theory about Law

Hart made his most significant contribution to ethical theory about law in a debate with Devlin concerning legal “moralism” and the limits of the criminal law. Hart maintains (following John Stuart Mill, 1806–1873) that only harmfulness justifies criminalization of particular types of conduct and that moral wrongfulness is not enough. Devlin, by contrast, argued that providing one observes certain safeguards to protect individual liberty, there is no reason in principle why harmless but wrongful conduct should not be the subject of criminal liability. To an extent, Hart and Devlin were at cross-purposes.

Devlin was addressing, in part at least, how to manage socially divisive disagreements about values in pluralistic, democratic societies; Hart's main aim was to expound what he considered the proper scope of the criminal law.

The significance of (practical) disagreement about how to behave is this: as modern jurisprudential debates typically understand it, morality provides content-dependent reasons for action. A person who does not agree with a particular moral norm has no good reason to comply with it and, indeed, has reason **[p. 1044 ↓]** not to comply. By contrast, a key insight of Hartian positivism is that by virtue of its institutional nature and resources, law can provide people who respect legal institutions and value the legal system with content-independent reasons for action. Such people may be prepared to comply with the law even if it conflicts with their own practical beliefs and inclinations.

Because of its institutional poverty (relative to law), morality may be less able to provide such content-independent reasons for action. Certain types and levels of practical disagreement are not inimical to realization of the benefits of social life. Nevertheless, at some point, lack of agreement and coordination may pose an unacceptable threat to social stability and cohesion. By virtue of its ability to generate content-independent reasons for action, law can make a contribution to managing potentially damaging practical disagreements.

This is what Tony Honoré has called the “dependence of morality on law.” Law's norm-generating resources enable it to provide a degree of detail in its guidance about how to behave that morality may not be able to provide. Law's dispute-settling resources enable it to manage, if not to resolve, socially disruptive interpersonal conflict. Authorities can use law's norm-enforcing resources to regulate the use of socially destructive forms of coercion, such as forceful deprivation of liberty and taking of possessions. In short, law's institutional resources enable it to promote social coordination and harmony under conditions of moral diversity and disagreement.

Conclusion

Of course, law is not the only available technique for underwriting value-pluralism and managing moral disagreement, and its resources for doing so (although substantial) are

finite. However, in societies that not only tolerate but also encourage moral diversity, theories about the nature, functions, and limits of law and its claim on our allegiance must take account of such diversity. One way of doing this may be to think of morality and its relationship to law not in terms of normative content but in terms of the functions that law and morality each perform in the lives of individuals and societies, and their respective institutional and other resources. Such an approach may yield a richer and more subtle account of the place of law in the normative universe than do approaches that conceive of law and morality as engaging in some sort of competition for people's allegiance or that assume that although law needs the legitimacy that only moral support and endorsement can provide, morality has no need of law in realizing the ends for which we value it.

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See also

- Bentham, Jeremy
- Conflict
- Courts, Lawmaking by
- Fuller, Lon L.
- Functions of Law
- Interpretation and Reasoning, Legal
- Kelsen, Hans
- Legislatures and Lawmaking
- Legitimacy
- Positive Law
- Positivism and Legal Science
- Social Conflict

Further Readings

Campbell, Tom. (1996). The Legal Theory of Ethical Positivism . Aldershot, UK: Dartmouth.

Devlin, Patrick. (1965). The Enforcement of Morals . Oxford: Oxford University Press.

Dworkin, Ronald. (1977). Taking Rights Seriously . London: Duckworth, 240–58.

Dworkin, Ronald. (1986). Law's Empire . London: Fontana Press.

Finnis, John. (1980). Natural Law and Natural Rights . Oxford: Clarendon Press.

Fuller, Lon L. “Positivism and Fidelity to Law: A Reply to Professor Hart.” Harvard Law Review 17 (1958). 630–72.

Fuller, Lon L. (1964). The Morality of Law . New Haven, CT: Yale University Press.

Hart, H. L. A. “Positivism and the Separation of Law and Morals.” Harvard Law Review 71 (1958). 593–629. http://dx.doi.org/10.2307/1338225

Hart, H. L. A. (1963). Law, Liberty and Morality . Oxford: Oxford University Press.

Hart, H. L. A. (1994). The Concept of Law , 2d ed. with Postscript. Oxford: Clarendon Press.

Honoré, Tony. “The Dependence of Morality on Law.” Oxford Journal of Legal Studies 13 (1993). 1–17.

Kelsen, Hans. (1967). The Pure Theory of Law . Berkeley: University of California Press.