

# Can law exist without morality philosophy essay

[Experience](#), [Human Nature](#)



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The doctrine of the “ separability of law and morality” is one that is distinctively associated with legal positivism. Amongst many of the jurisprudential analyses and contentions that legal positivists tend to engage with, their primary aim has been to establish that the “ essential properties of law do not include moral bearings”[2]. Essentially, legal positivists endeavour to uphold the claim that “ determining what the law is, does not necessarily, or conceptually, depend on moral or other evaluative considerations about what it ought to be in the relevant circumstances”[3]. Thus, they have often attempted to show their disapproval towards any number of seemingly necessary connections between law and morality, often in response to theorists such as Fuller and Dworkin. It is submitted that the doctrine of the separability of law and morality is a tenable one despite the criticisms that have been mounted on it by theorists from the anti-positivist camp. Hence, this paper will uphold the claim that the “ existence and content of the law can be identified by reference to the social sources of the law (e. g. legislation, judicial decisions) without reference to morality”[4]. In other words, it will be argued that law is capable of existing without morality and that the arguments presented by certain theorists, namely, Fuller and

Dworkin, in favour of the claim that there are necessary connections between law and morality are unsustainable.

### **Hart's test for identifying law**

The debate on whether there is a necessary logical or conceptual connection between law and morality is a perennial one. There are the legal positivists who tend to rally around Austin's claim that "the existence of law is one thing; its merit or demerit is another"[5] and there are the natural lawyers who tend to follow Augustine's claim that "a law which is unjust seems to be no law at all"[6]. [7] Amongst all of the sayings of Austin, this one makes a simple appeal to the plain fact of the matter. It is possible to express displeasure over the enactment of the Income Tax Acts or the Value Added Tax Acts, but despite the unjustness of those Acts, they are still in existence and validly in force. The existence of certain laws may be attacked for their injustice and even though there may be disagreement as to the requirements of justice, it is possible to agree as to what laws exist [8]. The objection here is that such laws do exist. Thus, there has to be a way to account for the existence of laws without depending on any theory of justice. As MacCormick has rightly asserted, "Laws don't exist by virtue of being just, and don't stop existing by virtue of being unjust"[9]. Justice is not the only moral value but it is asserted that all moral values seem to be contestable in the same way as in the case of justice. The point made here is that whether a certain entity is law, does not depend on its having moral properties. Consequently, it is possible to conclude that Austin's dictum on the existence of law not being dependent on its moral merit or demerit has "the clear ring of evident truth"[10].

In the Concept of Law, Hart also endeavoured to defend the claim that “ it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality”[11]thus, maintaining the claim that law is capable of existing without morality. He went on to elucidate an account of a test for identifying law. He asserted that the “ foundation of any legal system resides in an array of normative presuppositions that underlie and structure the behaviour of officials as they ascertain the existence and contents of the norms that belong to their system as laws”[12]. That array of presuppositions is what Hart calls the “ rule of recognition”[13]. Such a rule is a necessary condition for the existence of a legal system and its existence is “ a matter of fact”[14]seen in its acceptance by law applying institutions. It provides the criteria by which the validity or existence of rules as law is assessed and the officials are under a duty to apply laws satisfying the conditions set out in the criteria[15]. Any legal norm in the system can have its validity and in that sense existence traced back to the ultimate rule of recognition. It can be said that a particular legal norm is valid when “ it satisfies all the criteria provided by the rule of recognition.”[16]Therefore, certain norms exist as laws of the system because they are valid. It is through the elucidation of such a concept of law that Hart aimed to “ maintain the validity of the concept of law as a morally neutral entity, formally defined in terms of its source ... from which it derives its power and authority”[17].

However, in response to Dworkin’s criticism that the rule of recognition in any legal system can never include substantive moral tests among its criteria, Hart robustly proclaimed that “ the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or

substantive values”[18]. This “ soft”[19]positivist outlook has otherwise been characterised as “ inclusive legal positivism”[20]. Inclusive legal positivists espouse the following claim, that “ it can be the case, though it need not be the case, that a norm’s consistency with some or all of the requirements of morality is a precondition for the norm’s status as a law”[21]. Hence, morality can be applied as a threshold test under the rule of recognition although morality as a precondition for legal validity is not intrinsic in the concept of law. That test can be used by the officials as one of the criteria for determining the existence of law. Nevertheless it is to be emphasised that such tests are “ contingent features, rather than essential features, of the systems of law wherein they are applied”[22]. Essentially, inclusivists still uphold the view that morality need not be a necessary pre condition for the existence of law in every legal system thus upholding the claim that “ morally iniquitous provisions may be valid as legal rules”[23].

In contrast, anti-positivists seek to refute the doctrine of separability of law and morality by advancing the argument that the connection between law and morality is necessary rather than contingent. For example, Fuller, a natural law theorist, claimed that there are necessary moral dimensions to the making of legal rules and that law has its own internal morality. Thus, for this reason, law is not capable of existing without morality. Dworkin, on the other hand, aims to refute the positivist claim by showing that it does not adequately describe the activity and argumentation of judges by focusing on a theory of adjudication. The next two sections of this paper will focus on refuting the assertions advanced by Fuller and Dworkin respectively by exposing the flaws in their claims.

## **Fuller’s “ Internal Morality of Law”[24]**

Lon Fuller is well known for his significant contributions to contemporary natural law and for his efforts to demonstrate the inherently moral nature of law. Instead of adopting a substantive natural law approach, Fuller opted for a “ procedural natural law”[25]approach that focused mainly on the procedural aspects of law. Fuller maintained that besides the substantive purposes of a legal system, certain procedural purposes had to be acknowledged if the system were to qualify as a system of law, rather than a set of institutions using arbitrary force. In developing his procedural version of natural law, he argued that “ certain fundamental characteristics of any genuine regime of law are morally pregnant”[26]. Thus, for him, the connection between law and morality is a necessary one on “ largely content independent grounds”[27].

Fuller expounded eight requirements which he asserted that lawmakers should adhere to in order to successfully create laws. In other words, law does not exist in a particular society unless the following conditions are satisfied to some degree[28];

there should be general rules

they should be publicised so that citizens are aware of the rules they are expected to observe (promulgate)

rules should not be retroactive

rules should be understandable

rules should not be contradictory

rules should not require conduct beyond the powers of those affected

rules should not be frequently changed

there should be a congruence between rules as formulated and their implementation

Fuller described these principles as constituting the internal morality of law. In doing so, he claimed that these characteristics of law do not only confer it with its status as law but also bestow it with an “inherent moral worthiness”[29]. As a result, a legal system that conforms to Fuller’s principles of legality is not a morally neutral fact. However, this paper disputes the idea that these principles should be categorised as inherently moral or that they inevitably have moral significance. Instead, it is submitted that these conditions can have a moral significance but not necessarily so thus, maintaining the claim that there are no necessary connections between law and morality even on content - independent grounds. In order to assess whether Fuller was justified in arguing that his eight principles constitute an inner morality of law, it would be apt to consider some of the arguments that have been advanced in support of Fuller’s claim.

Ideal of Self - Determination

Firstly, it is argued that his eight principles advance the “ideal of self determination”[30], thus performing an inherently moral function. By ensuring the promulgations of laws and avoiding the enactment of secret

laws, citizens are aware of the standards to which they are being held. In effect, the government is telling the citizens that “ these are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct”[31]. Fuller explained that this ensures that citizens are aware of the kind of conduct that is permitted thus, allowing them to carry out their own activities with the assurance that they would not be punished by the government officials for violating a prohibition which they could not have been aware of. This sense of assurance against unpredictable punishment that is brought by Fuller’s eight principles advances the principle of self-determination. At first sight, the argument may seem to be a logical one but it is submitted that there are two difficulties with this argument.

The first difficulty, as proposed by Kramer, is that it “ overlooks the fact that uncertainty in the law can play a choice expanding role as well as a choice inhibiting role”[32]. For example, imagine that in a particular society, among many of the laws passed, one of them standardises the way in which neckties are to be tied. Also, take into consideration the fact that this law is seldom enforced despite the need for congruence between the formulation and implementation of laws[33]. One consequence is that there is uncertainty among citizens about the extent to which they are able to get to escape sanctions for tying their ties in a way that is not permitted. Such an uncertainty is seen as “ autonomy promotive” when the “ uncertainty about governmental intervention is contrasted with people’s confidence that the government will indeed intervene in some area(s) of their lives”[34]. It is only when the government decides to strictly implement the restriction,



perhaps after a few complaints are made about the poor enforcement of the law, that the citizens are unable to get away with tying their neckties in a prohibited way. Kramer rightly asserts that citizens still retain the “autonomy bolstering certainty” that they will not be penalised for tying their ties in a prohibited manner, but that some “autonomy-bolstering uncertainty”[35] about the extent to which they can get away with tying their ties in a prohibited manner is also lost thus, causing damage to each citizen’s scope for self-determination.

Furthermore, the second difficulty relates the fact that the argument presented by Fuller assumes that threats to a citizen’s autonomy solely emanate from governmental actions. However, it is arguable that citizens themselves are a potential source of threat to another citizen’s autonomy. Where citizens are certain that the government will not intervene in particular areas of life, they are open to disrupt the welfare and activities of one another. Hence, it may be concluded that the effect of non-intervention from the government in certain areas of life will be “generally promotive of autonomy”[36]. It is still possible for citizens to lose some of their liberty to carry on with their own activities.

### Individual Responsibility

Secondly, Fuller asserted that in a particular society, when a government passes laws, citizens are expected to comply with those laws. They are held responsible for their own deeds or misdeeds. As each sane citizen is capable of autonomous decision making, they are capable of controlling their own behaviour to conform to the mandates that have been passed by the

government. As Fuller explained, “ to embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults”[37]. Accordingly, the law “ pays tribute to each sane adult’s status as an agent who is capable of deliberation and choice”[38]. Consequently, the constitutive characteristics of law as encapsulated by Fuller’s eight principles form a system that intrinsically acknowledges the responsibility and dignity of the citizens who are subjected to the laws of the system. Thus, law’s constitutive characteristics should be classified as an inner morality.

However, such an argument is not without its difficulties. Imagine a scenario where a thief has placed a knife against his victim’s throat and has threatened to take her life if the victim does not hand over her jewellery and wallet. The reasoning offered by Fuller in this instance will mean that the thief’s command to his victim will have “ paid tribute in a morally laden way to the agency of the victim”[39]by allowing her ultimately choose whether to obey the order or have her throat slit. He is relying upon the victim’s ability to make rational decisions and the victim will be held responsible if she makes a wrong decision. In such a scenario, the thief has “ attested to his belief in the rational agency of his victim which he sees as the vehicle for the achievement of his ends”[40]but it would be absurd to assert that the command issued by the thief entails moral respect for the victim.

It is argued that the command issued here does not have any moral force. Kramer insists that to assert otherwise would diminish the distinction

between the concept of “ autonomy qua cognitive fact” that relates to the pure ability of an individual to make choices and the concept of “ autonomy qua moral ideal” that relates to an individual having to make a choice in a situation where his will is not coerced. Thus, it may be logically concluded that legal rules “ do normally trade on each citizen’s agency or autonomy in the cognitive sense” since the rules present requirements that are to be followed by individuals capable of choosing to heed them but this does not “ entail a commitment to the moral ideal of autonomy”[41]. The characterisation of norms as legal norms does not change just because they restrict the civil liberties of citizens to a large extent or because they establish harsh sanctions for those who choose not to follow the norms. It may be asserted that the connection between legality and concept of “ autonomy qua moral ideal” is not intrinsic but contingent. Kramer logically suggests that unless an acknowledgement of an individual’s capability to make decisions is “ combined with a substantive policy of extending broad leeway to individuals for the making of their various choices”, the law’s recognition of the autonomy of individuals in itself is “ no more admirable than a bank robber’s or kidnapper’s similar acknowledgement of the agency of his victims”[42]. As a result, it may be concluded that the law’s general recognition of an individual’s capability to make decisions does not contain any inherent moral value.

#### Fair Opportunity and Fair Warning

The final argument made in favour of Fuller’s claim concerns the role of his eight principles in ensuring that the citizens are able to follow the laws that

they are subject to. It is argued that once the eight conditions for the existence of a legal system are satisfied, the regime has done all it can towards offering the citizens a fair opportunity to obey the laws that they are subject to. Fair notice of the kind of conduct required from the citizens is given and it does not require them to fulfil duties and obligations that they cannot possibly fulfil. As a result, if a citizen has failed to comply with the laws, it is his own responsibility or fault. Thus, Fuller's eight precepts of legality " encapsulates the values of fair warning and fair opportunity"[43]and also ensures that unfair punishments is minimised as citizens cannot possibility be punished for laws that they are unaware of. Therefore, a regime that adheres to Fuller's conditions attains the moral posture that has just been outlined.

Kramer proposes that the " status of normative propositions"[44]should be considered in order to fully understand why compliance with Fuller's principles does not have any inherent moral connotation. An example of a normative statement would be, ' I ought to stop drinking alcohol'. In order to decipher whether the normativity is " prudential or moral"[45], the reasons as to why such a statement was made needs to be considered. Drinking alcohol on a regular basis is injurious to health, thus, he could have made this statement because he wishes to improve his health. Since the reason for making such a statement is based on the person's own interests, the normative statement is prudential. However, it is possible that the person made this statement in the interests of others such as his family members as he would be in a better position to care for them when he is sober.

Consequently, if the statement was made for this reason, then the normative

statement is fundamentally moral. Accordingly, Kramer rightly asserts that “ the normativity of an assertion does not in itself endow the assertion with any moral standing”[46]and only if the statement was made in the interests of other people does it have any moral significance.

Similarly, should the officials in a particular society adhere to Fuller’s principles for purely prudential reasons, “ the conformity of their regime to those principles does not endow the regime with any moral worthiness”[47]. It is arguable that it is not only possible for governments to act for purely prudential reasons in opting to conform to Fuller’s precepts of legality but that their adherence to his principles is not based on their supposed moral worth. In order to coordinate the political, economic and social life, the use of general norms is very important. Karter asserts that because “ the sway of a government is typically quite extensive in its spatial and temporal scope”[48]and because “ a government must deal with a multitude of problems in a wide variety of circumstances”[49], the government usually employs general norms. This is one possible prudential reason for which the government conforms to Fuller’s eight principles. Therefore, it is possible for benevolent regimes to give effect to their aims by abiding by Fuller’s precepts of legality and they can do so for purely prudential reasons. As a result, it may be concluded that adherence to Fuller’s principles is devoid of intrinsic moral significance. Similar to the proposition, of ‘ I ought to stop drinking alcohol’, Fuller’s principles are not of intrinsic moral value and that their moral status varies with the situations in which they operate.

## **Dworkin's Interpretative Theory**

This section of the paper will consider some of the criticisms mounted by Dworkin on the doctrine of the separability of law and morality. Unlike the inclusive legal positivists who assert that the connection between law and morality is a contingent one, Dworkin asserts that legality and morality are inextricably connected. In *Laws Empire*, Dworkin insists that law is to be treated as a moral issue and that law is necessarily an enterprise of moral justification. Dworkin illustrates his own theory concerning the identification of the law. Unlike Hart, Dworkin's interpretative theory suggests that every proposition of law stating what the law on some subject is, necessarily involves a moral judgment. According to Dworkin's interpretative theory, judges are required to "construe the object of interpretation in the most favourable way that satisfies the criterion of fit"[50]. In other words, they aim to provide the best possible interpretation according to the criterion of fit. For Dworkin, propositions of law are true only if with other premises they follow from that set of principles which both best fit all the settled law identified by reference to the social sources of the law and provide the best moral justification for it. Thus, Dworkin asserts that "judicial decision making is a practice of moral justification"[51].

In *Laws Empire*, Dworkin advocates the idea that the criterion of moral soundness is needed to complement the criterion of fit[52]. Dworkin reasons out that in hard cases, there will be more than one interpretation that will fit the legal materials fairly well. As a result, judges will have to rely on some standard that will "select among the competing interpretations which have satisfied the requirement of fit"[53]. For that purpose, judges resort to the

criteria of moral attractiveness. It is submitted that Dworkin's complementary criterion is required only in difficult cases which constitute a small proportion of lawsuits. It is not required in easy cases and in various situations where the operative legal norms are not objects of contention at all. Thus, taking into account Dworkin's account of the role of moral criterion for adjudication, it may be concluded that such a criterion is only required in hard cases and it is redundant in other circumstances, where the criterion of fit is sufficient to determine results. In other words, Dworkin's account suggests that officials rarely have to make moral judgments where giving effect to the law. As a result, it may be shown that Dworkin's claim on an inherently moral tenor of law is unsustainable.

However, in *Law's Empire*, Dworkin firmly asserted that officials invoke moral principles in easy cases as well as in hard cases. Furthermore, he has also argued that even though moral principles are not invoked in easy cases, the criterion of fit is itself a moral criterion. Consequently, it emphasises his claim on the legal decisions are a result of moral justifications or that they are morally significant. He refuses to accept the argument that "law as integrity...is at best a conception for hard cases alone" and asserts that "law as integrity explains and justifies easy cases as well as hard ones"[54]. It may be conceded that Dworkin's interpretive model is able to account for easy cases but Kramer insists that such a model is "wholly unnecessary for understanding or resolving such cases"[55]. With Dworkin stating that the moral criterion is only invoked when the criterion of fit itself is unable to reach a conclusion, it may be argued that the criterion of fit is redundant in a majority of cases where legal norms are applied. As a result Kramer rightly

concludes that in the vast array of situations where there are no legal disputes, “ the law’s bearing on a particular set of facts can be determined without recourse to the standard of moral attractiveness”[56].

Despite that, Dworkin further asserts that the criterion of fit is “ profoundly moral in its basis and implications”[57]. For Dworkin, integrity requires that adjudication follows the ideal of consistency in principle and integrity consists of a coherent scheme of justice and fairness in the right relation.

However Kramer contends that Dworkin’s “ view of fit as a morally pregnant criterion is untenable when applied to heinous regimes of law”[58]. Wicked rulers, who do not have their citizens’ best interests at heart, do have ample reasons for complying with Dworkin’s criterion of fit. One of the reasons could be attributed to the fact that compliance with the criterion of fit entices citizens to obey the evil rules. For example, when citizens are well aware that they will not receive sanctions for failing to follow the rules and that they will receive punishment for failing to do so, they have very good reasons for obedience. In addition, if officials in a wicked regime adhere to the provisions of the legal norms which they have implemented, they are in a better position to carry out their evil activities more successfully.

Therefore, Kramer has rightly argued that the criterion of fit does not only serve to recognise the equality and dignity of people but that “ the requirement of fit can amount to a key vehicle for the adept perpetration of evils”[