

# Law and morality

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



Title: “ The ultimate basis for adhering to the positive thesis of the conceptual differentiation of law and morals is itself a moral reason. The point is to make sure that it is always open to the theorist and the ordinary person to retain a critical moral stance in face of the law which is.”

(MacCormick)

Discuss.

## EXAM MODEL ANSWER

### Introduction

This discussion focuses on the relationship between law and morality and the conceptual differentiation of the two paradigms. It is appropriate to begin with a definition of terms. Law can be defined as a body of rules and principles of procedure and conduct established and enforced by a political authority. Morality can be defined as a code of conduct advanced by a society or religion or adopted by an individual to guide his or her own behaviour <sup>[1]</sup>. In essence, as Kant asserts in *Groundwork of the Metaphysics of Morals* <sup>[2]</sup>, morality is a personal concern, whereas law is a societal concern. There is a complex nexus between law and morality, the extent and depth of which has fluctuated over time and the appropriateness of which is the subject of considerable debate. The following commentary contains an analysis of the featured quote underpinned by observations from eminent authorities in the field.

### Law and Morality

Law can be distinguished from morality on the grounds that a legal system is comprised of specific, written principles and rules interpreted by officials who are charged with the duty of applying appropriate penalties and awarding appropriate remedies. In very broad terms, the law and morality have a common goal, being the lessening of social harm or evil. There is undoubtedly a substantial overlap between the conduct governed by law and that governed by morality and laws are inevitably often judged against a moral matrix. As, for example, the current debate concerning the age of criminal responsibility for children illustrates, moral criticism is commonly the catalyst for reform of the law and as Dworkin argues in *Law's Empire*, the interpretation of the law should delve beyond the black letter of the legal framework into the realm of morality <sup>[3]</sup>. This position is comparable to that of Raz in *Legal Principles and the Limits of Law* <sup>[4]</sup>.

It is often difficult to chart a neutral path between the substantive theories of legal positivism and legal moralism, as Koller illustrated in *The Concept of Law and Its Conceptions* <sup>[5]</sup>. Debate on the issues of 'natural law' and 'morality' has been plagued by vague definition and incongruous terminology. Even those positivists who might be characterised as 'soft' or 'inclusive' have conceded that there is no obligatory connection between morality and law, although they often contend that moral criteria are referenced in determining the validity of legal principles, such as constitutional rights as put forward by Waluchow in *The Weak Social Thesis* <sup>[6]</sup>.

The famous Hart/Devlin debate of the 1950s and 60s sparked by publication of the *Report of the Committee on Homosexual Offences and Prostitution* (the Wolfenden Report) <sup>[7]</sup> in 1957 concerned the proper relationship between morality and law. This debate eventually saw the arguments for the dislocation of law from private moral choices advanced by Hart win out over the conservative ideology of Lord Devlin, who was concerned to preserve the link for the ‘good’ of society. Hart put forward a theory of positive law, which has been considered in recent times by commentators such as Orts, who in *Positive Law and Systemic Legitimacy: A Comment on Hart and Habermas* <sup>[8]</sup>, has argued for exception from the thesis of the separation of morality and law along the lines of ‘systemic legitimacy’ drawn from the work of Habermas. It is certainly true that critical legality can be employed to contrast Hart’s own conception of “critical morality” and it is submitted that Orts is well founded in his central contention that modern positive legal systems must maintain systemic legitimacy.

MacCormick’s view is manifestly correct, although it is really stating little more than the obvious. A critical moral stance must always be retained in the face of the law and while the legal system is operated by human beings this will inevitably be the case. The law will always be guided, to some extent by a moral compass and morality will continue to influence decision-making and the day-to-day administration of justice in every corner of the legal system. Cases such as *Pretty v United Kingdom* (2002) <sup>[9]</sup> concerning the right to die and euthanasia, *R v R* (1991) <sup>[10]</sup> concerning rape in marriage, *Re A (Children)* (2000) <sup>[11]</sup> regarding the separation of conjoined twins and *R v*

*Brown* (1993) <sup>[12]</sup> dealing with consensual acts of homosexual sadomasochism, illustrate that *in practice* (which overrides the abstract) the relationship between law and morality is indivisible.

### Concluding Comments

Law governs conduct within our society. Morality influences personal decisions relating to individual conduct. The conceptual differentiation of law and morals is thus, at fundamental level, difficult to identify with precision. It is true to conclude that law can be divided into two components. Law consists of a body of basic concepts (its conceptual system) and of a body of general legal principles (its substantive system). The distinction between these two components is not easy to describe, but in essence the underlying conceptual system endeavours to distil the basic framework and superstructure of the paradigm of law, whereas the overarching substantive system lays down its morally-shaded, normative constituent parts.

It is submitted that in what is a highly subjective and often abstract field of theory, there are no right answers, but some that are clearly ‘better’ than others. Rational natural law theory clearly anchors the contents of law firmly in morality and equates legal principle with moral principle. Therefore, while conceptual legal dogma separates law from morality (although this need not discharge itself into positive law), natural law forges a coalescence. This commentator supports the line taken by Puchta in *Cursus der Institutionen* <sup>[13]</sup>, in drawing a distinction between law and morals which, in turn is in accord with the Kantian distinction between legality and morality. In this sense the law delineates the outer limits to be imposed on individual

freedom of choice, while morality is confined to an internal, personal choice which is influenced by a subjective sense of obligation, conduct and social duty. This suggests that the primary connection between law and morality is that the law provides individuals with the possibility to make moral choices with certain parameters.

THE END

EXACT WORD COUNT INCLUDING TEXT OF ANSWER ONLY : 1002

Question text, footnotes and bibliography not included.

#### BIBLIOGRAPHY

Case law as footnoted to standard citation

Dworkin R, *Law's Empire (Legal Theory)* , (1986) Belknap Press

Kant, I., *Groundwork of the Metaphysics of Morals* , (1967) Barnes & Noble

Koller, P., *The Concept of Law and Its Conceptions* , (2006) *Ratio Juris* Vol. 19 Issue 2, pp 180 -196

Orts, E., *Positive Law and Systemic Legitimacy: A Comment on Hart and Habermas* , (2007) *Ratio Juris*, Vol. 6 Issue 3, pp 245 – 278

Puchta, G., *Cursus der Institutionen* , (2002) (reprint of 1850 edition), Adamant Media Corporation

Raz, *Legal Principles and the Limits of Law*, (1972) 81 *Yale Law Journal* 823

*Report of the Committee on Homosexual Offences and Prostitution* 1957  
(London: HMSO) Cmnd 247

Wallace, G. and Walker, A. D. M., editors, *The Definition of Morality* , (1970)  
Methuen

Waluchow W., ' *The Weak Social Thesis* ' (1989) 9 *Oxford Journal of Legal Studies* 23

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### Footnotes

[1] See for insightful comment: Wallace, G. and Walker, A. D. M., editors, *The Definition of Morality* , (1970) Methuen.

[2] Kant, I., *Groundwork of the Metaphysics of Morals* , (1967) Barnes & Noble.

[3] Dworkin R, *Law's Empire (Legal Theory)* , (1986) Belknap Press

[4] Raz, ' *Legal Principles and the Limits of Law* ' (1972) 81 *Yale Law Journal* 823.

[5] Koller, P., *The Concept of Law and Its Conceptions* , (2006) *Ratio Juris* Vol. 19 Issue 2, pp 180 -196.

[6] Waluchow W., ' *The Weak Social Thesis* ' (1989) 9 *Oxford Journal of Legal Studies* 23.

[7] (1957) (London: HMSO) Cmnd 247.

[8] Orts, E., *Positive Law and Systemic Legitimacy: A Comment on Hart and Habermas*, (2007) *Ratio Juris*, Vol. 6 Issue 3, pp 245 – 278.

[9] (2002) 35 EHRR 1.

[10] (1991) 1 All ER 759.

[11] (2000) EWCA Civ 254.

[12] (1993) 2 WLR 556.

[13] Puchta, G., *Cursus der Institutionen*, (2002) (reprint of 1850 edition), Adamant Media Corporation.