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Two Models of Law and Morality[1]

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I. Introduction

The debate on the relation between law and morality has been going on in jurisprudence for such a long time that one may wonder whether anything new could be added to it. Yet, paradoxically, it is unclear what precisely is the issue in the debate. According to H.L.A. Hart, positivists hold (and their opponents dispute) that there is no necessary connection between law and morality; law and morality can be separated. At first glance, this seems a simple thesis. David Lyons has shown, however, that this thesis is very ambiguous and that, in a minimal interpretation of the separation thesis, almost every author, including Aquinas, Fuller and Dworkin, would support it.[2] Therefore, it may be a good idea to seek a new perspective on the debate between positivists and non-positivists.

A starting point for such a reorientation is formed by the idea that law and morality are essentially contested concepts. As the history of moral and legal philosophy shows, there are no neutral definitions of or uncontroversial criteria for the correct application of these terms. The stances on how to define law and morality are clearly connected with substantive philosophical positions. When we take the fact that law and morality are essentially contested concepts seriously, we will be able to get a better understanding of the debate between positivists and non-positivists (as well as an understanding of many other theoretical debates).

In this article, I will argue that there are at least two partly incompatible models of law and, correspondingly, two models of morality. Positivists have used one simple, static model of law and a similarly simple model of morality and, as a result, have been blind to those elements of the

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2 Lyons 1993, p. 70 f.

relation between law and morality that are best seen when using the other model. Positivism regards law and morality primarily as systems of norms, as bodies of rules and principles which can be formulated as propositions (I will call this the "product" model). The central question of the debate on law and morality from the perspective of positivism can be nicely formulated using positivist terms: Can we separate those two systems of norms?

The model of law or morality as a system of normative propositions is, however, not the only possible one. A second model of law and of morality focuses on the activities, the practices and the processes, in other words, on the dynamics of law and morality. If we take our point of departure in this practice model, the relations between law and morality will be seen in a different light. The separation thesis can then no longer be upheld.

This article will start with the construction of the two ideal-typical models of law (Sec. II) and their role in jurisprudential debates (Sec. III). Next, two analogous models of morality will be developed (Sec. IV). In the light of these models, the separation thesis can be reconstructed in two versions (Sec. V). After this analytical groundwork, I will show how, in each of the models, the relation between law and morality can be described (Sec. VI). Finally, I will point out how the distinction between the two models can be of use in various other debates in moral and legal philosophy.

II. Two models of law

Before elaborating the two models of law, it may be helpful to illustrate the idea behind the models with an example from a completely different field, physics. An electron can be modelled in at least two ways. We can construe it as a very small particle and we can construe it as a wave. Both models are helpful in understanding and explaining some phenomena with respect to electrons; with both models we also have problems in understanding certain phenomena which are better explained by using the other model. In other words, they are only partly compatible. It is possible to translate ideas from the wave model into the particle model and vice versa, but there is usually some loss of meaning and elegance. Some phenomena simply cannot be fully grasped in the particle model. So far, a unifying model is not available. Every attempt to try to do with only one model leads to partial and incomplete theories. To get a full theoretical understanding of electrons, we must alternate between the two models.

This is also the basic idea behind the two models of law. Each of them focuses on certain characteristics of law to which the other model is blind or has less than perfect sight. The first model focuses on statutes and judicial rulings, and on law systematised as a doctrinal body of rules and principles; the second model focuses on the practices by which law is constructed, changed and applied. Each model can partly incorporate the insights of the other model but not all; they are not fully compatible. The practice model should not be seen as replacing the product model completely, but as a second, alternative model that will enable us to study dimensions of law that remain hidden in the product model. Therefore, we must alternate between the models to get a full understanding of law.[3]

A. Law as a practice

The model of law as a practice starts with the basic role of law in society. When we buy bread or when we teach at a university, law makes sense of what we do and sometimes even creates the possibilities for us to do what we do. The interaction between the baker and myself when I buy bread can only be fully understood by someone who understands the legal meaning of this interaction; moreover, it can only take place because such an interaction has a legal meaning. In modern societies, law permeates social reality; almost every action has a legal dimension. In some activities, for example trading, the legal aspect is rather obvious, if only because these activities are based on legal concepts such as property and sale. In other activities, for example raising children, the legal aspect is less obvious, but there is still a legal dimension to these activities. They are legally permitted (or prohibited), there are certain legal limits to what we may do and there are legal consequences to certain actions.

The legal, in this sense, is not some distinct element that can be separated from social reality. It is not a specific characteristic or quality of actions, not even a supervenient quality. Rather, it is a way of looking at reality which guides both our actions and our constructive interpretation of those actions; sometimes the legal framework is even constituted by our actions. The term "aspect" is helpful here: the aspect cannot be isolated from the whole; it merely offers one way of seeing and under-

3 There may be other models, though I think these are the most important ones. Willem Witteveen (1996, p. 6) has recently suggested a third model that focuses on the ideals to which law aspires.

standing the whole.[4] We can reflect on the legal aspect of our activities and confront it with other aspects, as expressed in statements like: 'This is an illegal action, though it is morally (or aesthetically) good.' However, we cannot isolate "the legal" as some distinct entity or sphere or characteristic of our actions; the law is not something that is "there".[5]

To make the legal aspect of our actions explicit, we must take a 'legal point of view' or a legal attitude.[6] This legal point of view is at the core of law as a practice. In this practice, we abstract from the legal as an inherent aspect of social reality so that legal norms can be explicitly formulated and recognised as legal, and can be critically discussed, changed or applied. If we focus on the activities of judges, legislators, lawyers, legal scholars and so on, law can be fruitfully modelled as a practice, as a co-operative human activity. These actors co-operate to create law, they change it, interpret and reconstruct it, and apply it to concrete problems. However, law as a practice is not limited to the work of legal experts. Applying and interpreting law is something every ordinary citizen has to do when interpreting human interaction and when taking law as an action guide.[7]

It will be clear that "practice" is used here in a very broad sense. A practice can be defined as any coherent and complex form of socially established co-operative human activity.[8] In fact, we may distinguish a number of connected legal subpractices like legislation, court proceedings, legal advice and critical reflection, and creation of legal doctrine. These practices are partly institutionalised in distinct procedures but each of these practices is also partly embedded in daily human interaction, when ordinary citizens interpret the law and apply it to guide their own actions, when they settle conflicts among one another or with the

4 The term 'aspect' is only partly helpful, because it suggests a passive observer in relation to the object. Social reality is not only observed but also influenced and constituted by the participating observers; law is also a way in which we make our reality.

5 Cf. Shklar 1964, p. 33.

6 Compare the central role attributed to 'attitude' in the last paragraph of Dworkin (1986, p. 413): 'Law's empire is defined by attitude'.

7 Cf. Peters 1986, p. 251.

8 This definition is based on the first part of the definition in MacIntyre (1981, p. 187 f.). MacIntyre distinguishes between practices and institutions as oriented towards internal and external goods, respectively; by omitting the second part of MacIntyre's definition of practice, I have chosen a broader definition that includes what MacIntyre calls institutions.

help of informal mediators, or when they critically discuss the merits of the law on a subject like euthanasia.

The essential idea of law as a practice is that we do not focus on the products of these activities, for example the statutes and judicial decisions, but regard these activities themselves as the law. This may seem strange at first sight, but it is not. If we look at science, we can focus on the activities of scientists (the practice), or at the theories they construe (the product) – both are called "science". Moreover, in theoretical literature, the model of law as a practice, as a coherent activity, is quite common. Lon L. Fuller regards law as a purposive enterprise.[9] Antonie Peters suggests a model of law as critical discussion.[10] And the most influential author in jurisprudence since H.L.A. Hart, Ronald Dworkin, regards law as an interpretive enterprise and as an argumentative social practice.[11]

B. Law as a product

The model of law as a product is probably the most familiar among lawyers and the public alike. A question concerning the law of intellectual property will usually be answered with a reference to statutes and judgments by courts, or with the formulation of some rules and principles. In law schools, this certainly is the predominant model: students have to learn law from studying the substance of statutes and precedent. Most textbooks on subfields of law present legal doctrine on a subject as a coherent body of rules and principles. Law is thus either a collection of texts or a coherent body of norms.[12] Traditionally, this model has been referred to by phrases like 'positive law' or 'law in the books'.[13]

This model may be called law as a product.[14] Law as a collection of texts is the product of legislative and judicial activities. Law as a coherent

9 Fuller 1969, p. 145.

10 Peters 1986.

11 Dworkin 1986, p. 90 and p. 14.

12 Accordingly, we may further subdivide this model into two models, law as a collection of textual materials and law as a thought-construction, but this would serve no purpose in this article. In other contexts, the distinction might be useful.

13 However, law as practice should not be identified with law in action. This phrase suggests there is an entity, law, which acts. I would rather prefer to call it law-as-action.

14 I borrow this term from Peters (1993, p. 37), who confronts a product orientation in law with a process orientation (which is part of what I call law as a practice).

body of norms can be seen as a product as well. Legal doctrine is the product of constructive activity by scholars and legal officials, not in the "real" world of texts but in the world of thought. Legal doctrine does not "exist" as some kind of brooding omnipresence in the sky, of course, nor does it exist in the texts. It is merely a construction, a product of our minds.

The latter remark is not entirely an open door. There is a tendency to reify law as if it had an existence of its own and, as a result, an objective status. We use phrases such as 'The law states', which suggest an unequivocal, authoritative meaning.[15] We should always be sensitive to the fact that it rather reflects the subjective voices of its drafters and interpreters. Law as a doctrine is not something "out there", but is the product of human interaction, and is inherently controversial in nature. Reification conceals this controversial nature and the ambiguity of legal concepts and thus gives legal doctrine an unwarranted objective status.

In the philosophy of law, this model can be found in the work of positivist authors, especially those in the continental legal tradition where the great codification projects tried to formulate legal doctrine in statutes and codes as completely, authoritatively and unambiguously as possible. (Hans Kelsen is the clearest example.) It is even more prominent in the way many legal textbooks present their materials, as one glimpse in a law section of a bookshop will show.

III. Debates in jurisprudence as debates between these models

The two models are only ideal-typical models. They focus on two different sides of law: on how law can be construed as a coherent body of normative propositions and on how the specific practices function that create, change and interpret those norms and apply them to concrete problems. The models are connected and presuppose each other. Law as a practice results in (and is orientated towards) law as a product in the form of statutes, judicial decisions and other legal texts, but also in the form of legal doctrines formulated by legal scholars. Law as a product is not self-contained as if its only goal were to build a coherent system, but finds its point of orientation and justification in how it works in practice.

Most theories in jurisprudence accordingly combine elements from the different models. However, the models are not fully compatible. Another example from physics can illustrate this point. According to the quantum

15 Peters (1986, p. 250) argues that the focus on prevailing doctrines and official opinions 'congeal normative options as positive facts'.

theory, we can determine exactly either the place of an elementary particle or its speed, but not both at the same time. In other words: we can have a perfect static view on the particle or a perfect dynamic view, but we cannot have both. Law as a product presents a static model and law as a practice a dynamic one. We cannot completely cover both the dynamic and the static dimensions of law at the same time. If we focus on law as a coherent body of rules, the ambiguity and controversy, the processes of change and argument cannot be fully understood. If we focus on law as a practice, we will see how fraught with change and controversy law is. This makes it difficult for us to construct a coherent legal doctrine, because many norms that we try to construct are not yet or no longer settled, and good arguments can be brought both for and against many possible formulations. Only by abstracting from this controversy and dynamics (and thus selectively representing law) can we give a complete picture of law as a product.

The fact that the two models are not fully compatible, implies that every theory of jurisprudence has its blind spots, however sophisticated it is trying to combine elements from both. Moreover, most theories primarily focus on one model, which leads to a relative neglect of insights from the other model. This neglect can lead to well-recognisable extremes. If law as a product loses contact with the reality of law as a practice, we risk legal formalism or *Begriffsjurisprudenz*.[16] If we overemphasise law as a practice, we may fall prey to a ritualistic proceduralism (if we reduce the practice to the strict observance of certain specified procedures) or forget the importance of the fact that the law must not only be good but also certain and predictable.[17]

It seems to me that many debates in jurisprudence, like those between natural law and positivism, have remained futile because the opponents focus on different models. Each of the positions is defensible as a theory that can successfully elaborate the issues for which that specific model is most adequate, yet each of them is unable to deal adequately with those characteristics in which the other side in the debate has a special interest.

16 Lyons (1993, pp. 52–53) argues that both formalism and instrumentalism start from the questionable assumption that law is fundamentally a linguistic entity, which is exhausted by the formulations of authoritative texts and their implications.

17 The tension parallels the basic antinomy between *Rechtssicherheit* on the one hand and *Gerechtigkeit* and *Zweckmäßigkeit* on the other, which is central to Gustav Radbruch's theory of law (which he sometimes regards as an antinomy between two elements and sometimes as an antinomy between three elements). I owe the helpful comparison with Radbruch to Henrik Palmer Olsen.

I will illustrate this thesis with the debate between the two most important authors in jurisprudence in this century, H.L.A. Hart and Ronald Dworkin. Of course, their positions are much more sophisticated and complex than can be discussed in a few lines; I merely hope to show that the analytical framework of the two models can enhance our understanding of their positions in the debate.

By constructing law as a set of primary and secondary rules, Hart combines the two models in a very sophisticated way. His starting point is law as a practice, as a dimension of social reality: he analyses primary rules in terms of rule-following behaviour.[18] When he adds secondary rules of recognition, change and adjudication, these rules are, again, analysed in terms of rule-following behaviour, in other words, as embedded in practices.[19] When conceptualising this behaviour in terms of rules and subsequently focusing on the verbal formulation of these rules, he shifts to the second model. The system of primary and secondary rules consequently tends to obtain a linguistic life of its own, with doctrines and open-textured concepts that need interpretation. Rules are no longer regarded as regularities in behaviour, but as theoretical constructions. The legal concepts and legal rules then become almost reified and static; although Hart pleads for openness in the interpretation, the rule itself, once formulated, remains the starting point.[20] To take his famous example, it only makes sense to discuss whether an aeroplane is a vehicle after we have explicitly formulated a norm and recognised it as a legally valid norm that vehicles are not allowed in the park. The paradoxical result is that, whereas Hart starts his analysis with legal rules as grounded in social interaction and explicitly draws attention to the role of law as a practice, he ends up with the model of law as a product. The trigger in this transformation is the ambiguity of the central concept of rules. Rules can be analysed both in terms of regularities of behaviour (the practice model) and in terms of normative propositions (the product model). Both interpretations of rules, however, cannot be combined into one consistent view. As soon as Hart chooses for regarding rules in terms of normative propositions, he loses the possibility of doing full justice to the practice of law.

18 Hart 1961, p. 8 ff. In the Postscript to the 1994 edition (p. 255), he explicitly calls his theory a practice theory of social rules.

19 Hart 1961, p. 91 ff.

20 Hart 1961, p. 129 ff. Compare the criticism by Lyons (1993, p. 86) who argues that Hart 'conceives of the law essentially in linguistic terms – as a collection of rules with canonical formulations'.

Ronald Dworkin's initial criticism of Hart's positivism was twofold. In *Taking Rights Seriously*, the most famous line of criticism was that we should not construct law as a system of rules only, but also acknowledge the importance of principles. He thus tried to show that Hart's product model (the so-called 'model of rules') was inadequate in the terms of its own model; in other words, he attempted to present a decisive internal criticism. This proved too ambitious and his attack could therefore, within the framework of law as a product, easily be countered by sophisticated positivists who were willing to admit that law is a system of rules and principles.[21]

The second, neglected line of criticism started from the question what lawyers and judges do when arguing and deciding lawsuits and appealing to principles.[22] In other words, this line focused on law as an interpretative and argumentative practice, which Dworkin tried to develop as an alternative model. This important idea was lost in the ensuing discussion, as the result of Dworkin's first attempt to criticise the product model from within was something that can only be seen if we step outside the product model. It was the insight that law as a product is something we construe in an interpretative activity, and that this activity is as much law as is the product.[23] In his later work, especially in *Law's Empire*, this second line of argument has become increasingly prominent and explicit, but it can already be found in his early work.

IV. Two models of morality

In morality, a similar distinction between two models can be made. As the basic idea of the two models will now be clear, I will present only a brief description.

A. Morality as a practice

Morality is, often implicitly, embedded in social interaction and in our interpretations of this interaction. For example, medical practice is not merely a technical activity, but also orientated towards the patient's

21 This is also the reply by Hart in the Postscript (1994, p. 259 ff.).

22 Dworkin 1978, p. 46.

23 I would submit that many of the inconsistencies in Dworkin's theories correctly pointed out by his critics stem from the fact that neither he nor his critics acknowledge that there are two partly incompatible models at stake and that therefore every theory that tries to deal with both models adequately is bound to be inconsistent.

good. Therefore, it makes sense to understand and evaluate the medical professional's actions not only technically, but also morally. If we do so, we take a moral point of view or a moral attitude. Just like the legal point of view, the moral point of view offers a way of looking which guides both our actions and our constructive interpretation of those actions. In this moral point of view, we cannot isolate "the moral" as some distinct entity or characteristic of our action.

In morality, there are no institutionalised equivalents of legislation or adjudication. (If there are, especially in religious institutions, this is usually a reason to doubt whether these are really morality rather than law or some semi-legal institution.) But there is a systematic reflection on and critical discussion of the question whether suggested norms should be recognised as moral, how they should be interpreted, constructed and modified, and how they should be applied to old and new problems. A central part of this practice of reflection and discussion is the philosophical discipline of ethics, which is often defined as the systematic (or philosophical) reflection on morality. It is not limited to the scholarly discipline of ethics, however; it is not institutionalised or monopolised by specialised experts. It may flourish in the academic sphere but also in public debates. It can find a place not only in religious practices like sermons or pastoral counselling, but also in discussions among close friends. Ethical reflection can be found in many circumstances. It is not, as law usually is, an institutionally structured and, consequently, distinctly organised practice; it is rather a practice that pervades every other practice.[24]

I should perhaps add that morality as a practice need not take the form of explicit theoretical and critical discussion of moral norms and then applying them. It can also be the practice of a living tradition, in which traditional values are implicitly or explicitly endorsed, reinterpreted and passed on to next generations, simply through setting examples and telling stories. It can also be an internalised attitude, in which one does not (or does no longer) reflect on what to do, but simply does what should be done.

24 One may even wonder whether, if it is not distinctly organised, it is really a practice. Perhaps in the narrow sense of the term "practice" it is not; but in a broad sense, it is. Individual ethical reflection on separate actions is certainly possible (just like an individual can build a house without the help of others); but that does not mean that ethical reflection as such (or building as such) cannot be regarded as a practice.

B. Morality as a product

The most "tangible" model of morality is that of morality as a product. We can construct morality as a set of rules and principles or as a complete moral doctrine.[25] I think this is the most common way of looking at morality: it is a set of precepts that are supposed to form a coherent body of norms and values, a moral code. The Ten Commandments exemplify this type of morality.

It is also a very dominant approach in ethical theory.[26] The influential book by Beauchamp and Childress (1994) is a good example: they 'believe that for biomedical ethics, which has concentrated on guidelines for action, principles and rules are both indispensable and central to the enterprise.'[27] Rawls's theory of justice and utilitarianism are examples in the field of political ethics; both present general principles for the basic structures of society, elaborate the practical implications, and construct a coherent normative theory. Many articles by moral philosophers focus on morality as a product: they elaborate the implications of principles and rules and the meaning of central concepts; they test them against ingenuous (often fictitious) cases; they suggest new distinctions and offer conceptual clarification, and so on.

These two models of morality are ideal types as well. Most sophisticated ethical theories try to combine elements from both models; but every theory, in the end, neglects some elements because its primary focus is on one of the two. Many discussions in literature on ethics can – at least partly – be understood as debates between the different models, where one party (often correctly) claims that its opponents are blind to insights that are central to its own model. For instance, some critiques on Rawls, like those by Alasdair MacIntyre, imply that the Rawlsian

25 Cf. Frankena (1973, p. 8): '[M]orality starts as a set of culturally defined goals and of rules governing the achievement of the goals.'

26 Cf. Williams (1985, p. 93): 'The natural understanding of an ethical theory takes it as a structure of propositions.'

27 Beauchamp and Childress 1994, p. 40. It is interesting to see that they assert the centrality of principles and rules, at the same time they characterise biomedical ethics as an enterprise. This illustrates the fact that the two models are ideal-typical and that almost every interesting author, including those who clearly focus on morality as a product, tries to combine it with some insights from the other model. Cf. Gert (1988, p. 283), where he argues that the moral rules and moral ideals are the core of morality as a public system but must be supplemented with an attitude or a procedure.

primary focus on the product model of morality neglects the importance of morality as a lived practice. Rawls, especially in the third part of *A Theory of Justice*, but also in his idea of reflective equilibrium, certainly tries to accommodate many elements that are central to morality as a practice, such as virtues and intuitions. Nevertheless, the primary focus on selecting two basic principles for the political structure and on constructing a normative theory for an ideal society makes it impossible to do full justice to them.

V. Reconstruction of the separation thesis

After this analytical groundwork, it is time to make the models productive for descriptive analysis. How can these models help us to understand the relationship between law and morality? And more specifically, how can they help us to understand the debate on the separation thesis?

We should first try to make out what the separation thesis entails. This is not easy because of its ambiguity. In a minimal interpretation, it has no distinguishing force at all. Lyons demonstrates this by formulating a Minimal Separation Thesis: 'Law is subject to moral appraisal and does not automatically satisfy whatever standards may properly be used in its appraisal.'[28] In brief: law is morally fallible. Tenets like this can be found in Austin, Hart and many other positivist authors.[29] The problem with this thesis is that it is too broad: everyone could subscribe to it, including anti-positivists such as Fuller and Dworkin. This interpretation of the separation thesis, therefore, cannot help us find a distinguishing criterion between positivism and its critics; we must construct a more substantive interpretation of the separation thesis. A similar remark can be made with respect to a second version, also to be found in Hart, stating that law and morality are distinct. This, again, is too weak, because almost everyone can agree with it.[30] We need a stronger idea than that of merely a distinction.

A further problem with the separation thesis is that it is quite unclear what is meant by "morality". Usually it is not made explicit, and authors

28 Lyons 1993, p. 68.

29 Compare Austin's phrase, 'The existence of law is one thing, its merit or demerit another', to which Hart refers as a central positivist tenet both in 1961, p. 203 and in 1977, p. 22.

30 Cf. Lyons 1993, p. 66.

seem to switch between different meanings. At least three interpretations of morality can be distinguished in the discussion:

– positive morality: the morality actually accepted and shared by a certain social group;

– normative ethical theory: the general moral standards used in the criticism of positive morality combined with a normative theory of morality as it ought to be;

– normative legal theory: the general standards used in the criticism of positive law combined with a normative theory of law as it ought to be.[31]

The distinction I suggest here is obviously inspired by H.L.A. Hart, but goes further in two respects.[32] First, it adds the idea of a normative theory to critical morality; thus it is made explicit that critical morality is not merely negative, but also offers a positive orientation. Second, it introduces a distinction between the critical standards used in evaluating morality, and the critical standards used in evaluating law. Not every moral standard can be translated into law, nor can every legal standard be translated into morality. The realm of love and care holds many moral issues that should not be translated into legal norms, and many criticisms of the instrumental (ab)use of law have nothing to do with morality as such.[33]

The distinction does, of course, not mean that the three senses of morality are separate. There are many connections and in our Western societies the three overlap substantially. There is, for example, a dialectical interplay between positive morality and normative ethical theory.[34] On the one hand, most positive moralities include mechanisms of self-criticism and self-improvement by reflection on normative ethical theory; on the other hand, the construction of a normative ethical theory usually starts from elements of positive morality, like moral intuitions or deeply held moral principles and values. There is also a strong connection between normative ethical theory and normative legal theory. In

31 For moral philosophers, it may seem strange to call the latter category a "morality". However, legal theorists have often identified 'law as it ought to be' as a morality or as "morals". The phrase "natural law" has a similar ambiguity; it has both been used to refer to what I call normative ethical theory and to normative legal theory.

32 Hart 1975, p. 20.

33 Clearly, it is an open question what we should regard as distinctive for critical legal and critical moral standards, respectively. This is not an empirical issue that can be determined with a neutral appeal to facts. I only want to claim that the distinction – however it is to be made or justified – is a useful one in discussions on the relations between law and morality.

34 Brom 1998; Den Hartogh 1996.

most theories, the aspirations of positive law and positive morality should be that the demands of both on the citizen coincide or, in other words, that moral and legal obligations do not conflict. This ideal of full legitimacy may be unrealisable, but even as an aspiration it leads to a strong cohesion and interaction between normative legal theory and normative ethical theory.

The failure to distinguish between these three senses of morality has caused much unnecessary confusion. An example is H.L.A. Hart's famous article *Positivism and the Separation of Law and Morals*. Hart discusses the relation between law and normative legal theory ('law as it ought to be'), and between law and normative ethical theory or even positive morality (all legal systems coincide with morality in respect of basic moral principles vetoing murder, violence and theft) without noticing that different senses of morality are the issue here.[35] As a result, his analysis of the relations between law and 'morals' remains unsystematic and unclear, because some remarks refer to positive morality, others to normative ethical or normative legal theory, and it is often uncertain which is meant.

We must be aware of the different senses of "morality", but we need not choose between them here. The question is whether any version of a separation thesis is valid. All we have to do for that purpose is to study the relations of law with morality, where "morality" can have any of the three meanings we distinguished. For a reconstruction of the separation thesis in this line, we may turn to the work of David Lyons.

Lyons suggests that at the core of positivism is the Explicit Moral Content Thesis: 'Law has no moral content or conditions save what has been explicitly laid down by law.'[36] When courts use moral arguments but do not simply deduce these from moral ideas already recognised as legally authoritative by legislative or judicial decisions, courts must be understood as making new law.[37] Lyons argues that if there is a distinctive positivist doctrine on the separation of law and morality, it is this thesis.[38]

35 Hart 1977, p. 34 and p. 36. In Hart (1961, p. 188 f.) he explicitly refers to conventional or accepted morality when discussing the minimum content of Natural Law.

36 Lyons 1993, p. 83; cf. also p. 101.

37 Lyons 1993, p. 80.

38 Similar formulations can be found in Hart's Postscript (1994, p. 269) and in MacCormick (1992, p. 107): 'Positivist theories of law [...] hold that law can be explained, analysed and accounted for in terms independent of any thesis about moral principles or values.'

A problem with this version is that it only fits into a product approach to law. Only if we regard law as a system of normative propositions, can we ask a question about its content. This is no objection as such; nevertheless, we should also try to formulate a version of the separation thesis that fits into the practice model. An initial formulation might be: In the practice of interpreting law, moral arguments are not valid interpretations of the law save those arguments that have explicitly been recognised by law.

This formulation is clearly too broad and therefore too implausible. In the practices of legislation and discussion between legal scholars, there is reference to morality in many ways. In the daily practice of ordinary citizens who try to apply law to concrete situations, there is also implicit or explicit reference to moral argument. If we want to give this version at least some initial credibility, we should make it more specific and restrict it to the practice of the courts. A better formulation is: 'In the practice of the judicial process, and especially in the practice of judging, moral arguments are not valid interpretations of the law save when they can be deduced from interpretations that have explicitly been recognised by law.' If courts nevertheless, as they sometimes do, recognise new moral arguments as valid, they must be understood as making new law, rather than as interpreting the law. I suggest that we call it the Explicit Moral Argument Thesis, because it holds that in the practice of legal argument only those moral arguments that have explicitly been recognised are valid.

VI. Describing the relationships between law and morality

So far, we have formulated two versions of the positivist separation thesis that have at least an initial plausibility without being so broad that everyone can subscribe to them. We can now use them as a framework to see whether in the practice and the product models they form an adequate description of the relations between law and morality.

A. Law and morality as practices

Before we can discuss a possible separation, we should determine whether law and morality are distinct practices. It is worth noting that this depends on the historical development of a society or of a societal sector. Primitive societies make no distinction between law, politics and morality – it is one of the characteristics of modern societies that they are differentiated and thus can be distinguished. This means that even the

mere distinction between law and morality has only a contingent historical character.

A crucial factor in the differentiation process is the emergence of what H.L.A. Hart called 'secondary rules'.[39] As long as the normative dimension of social reality is merely a matter of primary rules, it is impossible to distinguish law and morality. The distinctly legal only arises as soon as there are secondary rules that can identify the legal dimension in social reality. Even if there are such secondary legal rules, however, it is still difficult to distinguish the legal from the moral dimensions of reality, let alone separate them. There is much overlap; many moral obligations are legal obligations as well and vice versa. How should we determine, in such cases of overlap, what is law and what is morality?

Of course, in one sense, we do distinguish the legal and the moral aspects. We can say: 'You ought not drive faster than 50 miles per hour now' or 'You ought to give money to that beggar'. It is usually plausible that the first sentence refers to the legal aspect and the second to the moral aspect of reality; it is only certain, however, if we know more about the content of legislation, the moral opinions of the speaker and so on. From the utterance by itself, we cannot tell. It could well be that the first utterance was meant as moral or prudential (for instance, if the speaker thinks it is morally obligatory or wise to obey the law.) We can therefore only know for sure what the legal and moral aspects are if we take a legal or moral point of view, respectively; in other words, if we take our starting point in the secondary rules. As long as we remain merely at the level of primary rules, morality and law cannot be separated – in many cases they cannot even be distinguished.

If there is a basis for separating law and morality in the practice model, it should thus be found in the secondary rules, and especially in the practice of adjudication. This corresponds with the emphasis in the Explicit Moral Argument Thesis which we formulated as: 'In the practice of the judicial process, and especially in the practice of judging, moral arguments are not valid interpretations of the law save when they can be deduced from interpretations that have explicitly been recognised by law.' Is this a valid thesis?

The answer depends on the way the practice is structured. There can be highly formalised, almost ritualised court proceedings, in which there is no room for normative argument at all. Such practices would have a strict separation between law and morality. In our modern Western societies,

39 Hart 1961, p. 91; cf. also Selznick 1969, p. 5.

such ritualised proceedings are, however, uncommon. Actual judicial processes include normative argument, discussion, construction of coherent doctrine in the light of the available data, and so on. As Ronald Dworkin has convincingly argued, in such argumentation processes moral and legal arguments fuse. There is no clear demarcation criterion to determine when a principle is strictly legal or when an argument is strictly moral. Every argument – even if it is openly derived from ethics textbooks – could be recognised as legally relevant. We cannot determine *ex ante* whether an argument or the formulation of a principle is a legal one, or "merely" a moral one that is not legally relevant. Only after the decision has been made, can we judge that in this concrete case, it was or was not considered legally relevant by the judge – but that does not imply that in the next case it will have the same status.

The conclusion is that, at least for judicial practice in modern Western societies, the Explicit Moral Argument Thesis is invalid. A separation between legal argument and moral argument is impossible, regardless of which of the three senses of morality is involved. Arguments from ethics textbooks on normative ethical theory may be invoked as well as arguments referring to public opinion, in other words to positive morality. Only after the verdict can we try to determine whether these arguments have been accepted by the court, but even then it is often difficult to tell. Not every judicial opinion is as elaborately argued as those of the American Supreme Court.

With respect to the distinction between law and normative legal theory, we can even go further. The purpose of legal reasoning is to determine how the law ought to be (constructively) interpreted. Consequently, the dichotomy between law as it is and law as it ought to be disappears and they merge into one view on how the law ought to be interpreted. An attorney will never argue: 'This is the law, but it ought to be different. I urge the court to accept that view, which implies that my client should be acquitted.' Her argument will rather be: 'Even if some courts have mistakenly interpreted it differently, the law should really be interpreted as meaning what I tell you, and therefore my client should be acquitted.' If a court accepts the attorney's argument, it will seldom acknowledge that it changes the law; it will rather say that it now presents a better view of how the law ought to be interpreted.

B. The product models of law and morality

In the product models, the positivist case for a separation of law and morality is the strongest. The main body of law as a product is usually

easily identifiable by what Ronald Dworkin has called a test of pedigree: the fact that a text has been produced or a rule has been announced by a legal institution such as the legislature or a judge. There are some border problems, like the open texture problem described by Hart or the standard cases of customary law and "soft" international law. These border problems, however, can be considered mere demarcation problems; the large core of law is easily identifiable, or so it seems.

With respect to morality, a similar story seems possible. Of course, there is usually no test of pedigree with respect to morality (except in some religious moralities). Positive morality can, in principle, be described using sociological methods. Normative ethical theory and normative legal theory cannot be "found" but if we use further qualifications, critical theories are easy to describe as well. We can speak of the normative ethical theory as constructed in Rawls's *A Theory of Justice*, of the normative ethical theory of rule-utilitarianism or Kantianism, and so on. Similarly, we can speak of a Dworkinian or Posnerian normative legal theory with respect to abortion or with respect to constitutional rights.

This means that, in the product model, it is not only possible to distinguish morality and law as separate codes, but also to describe them without reference to each other. There is no essential connection between law and morality. This still leaves open the possibility that there are contingent connections. The crucial point, however, is that it is possible to describe what the law "is" without reference to morality. This has many theoretical and practical advantages. It promises to offer clear and objective criteria to determine what the law is; for the description of its content we need not refer to morality, save those moral standards that have been explicitly recognised by the law. It also enables us to pose evaluative questions about the law in a neutral way, such as: 'How should we evaluate the moral quality of positive law?,' or 'Do we have a moral obligation to obey immoral laws?'[40]

So far, the positivist story seems strong in connection with law as a product. There is a crucial caveat here, however. The uncertainty and ambiguity of law is not merely an issue of the penumbra. If we admit that law is more than a system of rules and that principles are also part of the law, we introduce a crucial element of controversy in the core of the law. Principles and vague normative phrases like 'good faith' are not just vague concepts with an open texture. The latter may be true of descriptive

40 Cf. the discussion in Hart (1961, p. 200 ff.) of the post-World War II discussions on Nazi crimes and resistance against the Nazis.

concepts like Hart's example of 'vehicle'; but normative concepts and legal principles are usually contested concepts. This means that controversy is in the heart of the law, and not merely in the penumbra. It is, therefore, not so easy to determine what the law "is" (and a similar argument might be made in connection with morality). And, if we cannot determine what the law or morality "are", *a fortiori*, it is no longer possible to determine that law and morality are separately identifiable. Determining the content of law is not "finding" it but constructing it, deciding in which way to remove the ambiguity, to make vague concepts more concrete and to solve conflicts between principles. It therefore depends on us, on how we construct law and morality, whether there will be a separation between law and morality. The separation is only in the eye of the constructor, because it is the result of his constructive work.

The implication for the separation thesis is that the truth of it is merely the result of our own constructive action and not a reflection of something in the world "out there". The Explicit Moral Content Thesis holds that law has no moral content or condition save what has been explicitly laid down by law, once we have constructively interpreted the law as a coherent system of rules and principles. This is true, but only in a trivial sense – because we have made it true. The Explicit Moral Content Thesis must therefore be rejected as a general thesis about law as it is.

My conclusion is that, in the end, even in law as a product the positivist separation thesis is invalid. Yet, it may play a useful, if limited role. For some analytical purposes, it may be helpful to stipulate that law and morality are regarded *as if* they were separately identifiable systems of norms. This stipulation is acceptable because there is at least a core of truth in it. It is not the full truth, but it is a partial truth. As long as we remain aware that it is merely a stipulation, we can use the separation thesis as a tool for analysis. What we should not do, however, is to go beyond the restrictions and make it a basic thesis rather than a stipulation for modelling purposes.

The fact that law and morality as a product cannot be separated does not preclude that they can be more or less differentiated. The role of principles and essentially contested concepts can be stronger or weaker and, consequently, the connection with morality can be stronger or weaker. Some fields of law have strong connections with morality, for instance modern Dutch tort law, where terms like reasonableness and fairness ('redelijkheid en billijkheid') play crucial roles. In other fields, like traffic law, the connection with morality is weaker or less obvious. There are no generalisations possible for law as such: we need detailed analyses of specific subfields at specific stages in their historical devel-

opment. Dutch tort law at the turn of this century was much less intertwined with morality than it is nowadays. The core of truth in the positivist separation thesis may be smaller or larger. But the important thing is to see that it is always only a partial truth.

The result of the analysis will be clear. In each of the two models, a strict separation of law and morality is hard to defend as a general thesis. If we focus on law as a product, the separation thesis has a strong core of truth, but in the end it should be rejected. Moreover, we only get a full picture of law if we take each of the two models into account, and in the other model the separation thesis cannot be upheld. Therefore, we can conclude that the positivist separation thesis is invalid. In both models, however, it makes sense to analyse to what degree law and morality are interconnected and to what degree their connections are loose. In modern societies, they are never fully separate and they are never fully identical, but there is a continuum between the two extremes that is worth investigating.

VII. Concluding remarks

This theoretical analysis is not only of importance for academic debates between legal positivists, natural lawyers and Dworkinian constructivists; it can also be of practical use. The introduction of the two models makes both descriptive and normative analysis more complex – and more interesting. The distinction between the two models can improve our understanding of concrete phenomena. It seems plausible that the distinction is particularly fruitful in those fields where technological, social and legal developments are rapid, because alternating between the two models will help us understand dynamic processes. The development of bioethics and health law since the 1960s offers such an example, which I have elaborated elsewhere.[41]

The two models may not only be important for understanding and describing the relationships between law and morality; I suspect that they are equally important for normative theory, even if the initial effect of the introduction of the two models will often be that simple views on many issues are seen as unconvincing and one-sided. I have suggested above that the debate between liberals and communitarians can be understood

41 The two models of law constitute only one of the factors that we need to understand the variation; for a fuller account of the development see Van der Burg (1997).

better if we regard it as an argument between authors like Rawls, whose primary perspective is that of the product model, and authors like MacIntyre, whose primary perspective is that of a practice model. Philosophical discussions of topics like civil disobedience and legal moralism, to mention just two other issues in normative theory, have so far usually taken a product-model view. I suspect that they also become more sophisticated if we alternate in the analysis between product and practice views.

These are only some tentative suggestions in which directions the two models might be made productive. The two central theses of this article have been more modest. First, I have shown that the two ideal-typical models are both helpful and necessary in understanding and describing law and morality and the relationships between the two. If I am right that they are partly incompatible, this means that we have to alternate between both models when we want to describe law and morality. Second, the positivist idea of a separation between law and morality can be a useful stipulative assumption at most, but never an empirically valid thesis. The falsity of the separation thesis, however, does not imply the truth of natural law. Whether natural law or some form of Dworkinian constructivism is to be preferred, is still open. My hope is that the distinction between the two models will also offer a new starting point for that debate.

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Rule-Following, Finitism, and the Law

By Ilkka Niiniluoto

I. Introduction

A lively debate on the nature of rules has been inspired by Ludwig Wittgenstein's later philosophy. The rule-sceptics argue that there is no coherent notion of a rule which both explains how rules can normatively guide our actions and be applied to an indefinite number of cases. An interesting but problematic version of this view is given in David Bloor's finitism: against 'individualistic' approaches, he stresses that rules are 'social institutions' but adds that rules are constructed 'as we move from case to case', and thus 'do not exist in advance of our following them'. The discussions about rule-following are usually associated with the philosophy of mathematics, the philosophy of language, the philosophy of mind, and the philosophy of the social sciences. But as legal norms can be understood as special kinds of social rules, I suggest that these debates are also highly relevant to issues in the philosophy of law.

II. The problem of rules and rule-following

According to Wittgenstein's *Philosophical Investigations* (1953), 'the meaning of a word is its use in the language' (§43), and language-games are activities governed by rules. But, in general, there has to be an external criterion for distinguishing cases where one obeys a rule, from cases in which one only thinks that one obeys a rule (§202). As one person alone cannot obey a rule, rule-following is a 'custom' or 'institution' (§199). Hence rules and language have a social character as institutions.

Wittgenstein also raised the question of how rules are 'present in the mind of a person' (§205). How are rules able to guide our actions and decisions? In his *Remarks on the Foundations of Mathematics* (1956), Wittgenstein considered this issue in connection with sequences of numbers, and compared them with rules of using simple predicates like "red" on different occasions.

The Morality of Aspiration: A Neglected Dimension of Law and Morality

Wibren van der Burg *

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1. Introduction

In *The Morality of Law*, Fuller introduces the distinction between the morality of duty and the morality of aspiration, and applies it to problems of jurisprudence.[1] In moral theory, both types of morality may be easily associated (though never completely identified) with major philosophical traditions such as utilitarianism and Kantianism on the one hand, and Aristotelianism on the other. While in the 1960s and 1970s the focus of moral philosophy was predominantly on duties and obligations, the recent neo-Aristotelian revival has led to renewed attention to concepts that belong to the sphere of aspiration, such as virtues and ideals. In legal theory, however, the sphere of aspiration has always been more marginal, as most jurists tend to focus on legal rules and duties. In my view, we should deplore this relative neglect because the idea of a morality of aspiration is very fruitful in legal theory and, as a result of developments in contemporary society, it is becoming even more relevant.

Although the basic idea of the distinction may be simple, we encounter a swamp of ambiguities when we try to elaborate it. What exactly is the relationship between the morality of aspiration and well-known notions such as principles and policies? Is Fuller's metaphor of a continuum between aspiration and duty correct, or should we rather think of them as completely distinct categories or spheres? And how precisely should we apply the distinction to law and legal theory? One of the problems here is

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1 Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven, Conn.: Yale University Press, 1969; hereafter referred to as *ML*), p. 5, n. 2. Fuller argues that the basic idea is not novel, but his nomenclature is; and in my view, his application of this idea to the field of jurisprudence is original and highly inspiring.

that Fuller's arguments may be very inspiring and thought provoking, but they are not very precise.

The purpose of this article is to analyze and elaborate the morality of aspiration and its connections with the morality of duty, and to show how it can help us better understand law and construct better legal theories. The article consists of three parts. Referring to the concrete example of professional role morality, I will first show how the distinction between the morality of duty and the morality of aspiration can help us understand law and morality. Next, I will engage in some conceptual clarification and analyze the notion of aspiration and its connection with related notions such as ideal, policy, and principle. The last step will be to connect this theoretical analysis with the debate on the functions and limits of law in modern society.

2. The practical importance of the distinction: Professional morality

There are many examples in law, ethics, and politics where the distinction between the two types of morality can be shown to be illuminating. An example in international law is Jackson's analysis of World Trade and the GATT. Jackson argues that there is a danger in mixing "norms of obligation" with "norms of aspiration" in the same instrument.[2] According to Jackson, states have an obligation to fulfil their treaty agreements, but if treaties contain norms of aspiration, there may be the risk that states treat their strict obligations following from those treaties as mere aspirations.

Moreover, the distinction between morality of duty and morality of aspiration is central to our sociological understanding of normative phenomena. It is a central theme in the magnum opus of Philip Selznick, *The Moral Commonwealth*. Time and again, Selznick stresses the importance to "distinguish what we can *rely on* from what we can *aspire to*."[3] Some theorists who are inspired by Selznick and the tradition of American

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2 J.H. Jackson, *World Trade and the Law of GATT* (Indianapolis/Kansas City/New York: Bobbs Merrill, 1969), pp. 761-62.

3 Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley, Calif.: University of California Press, 1992), p. 38. There may be a parallel or mutual influence here rather than a one-way influence from Fuller on Selznick because the distinction can already be found in Selznick's early work.

pragmatism have stressed the importance of aspiration in their work.[4] Kenneth Winston has even gone so far as to defend that we cannot define law unless we recognize that it is (partly) oriented toward ideals.[5] Similarly, one could argue that we cannot understand democracy unless we see that it is more than simply a set of rules and procedures and that it is oriented toward a democratic ideal.[6]

A more elaborate discussion of one concrete theme, medical professional morality, may illustrate the importance of the distinction. The application of this distinction to professional morality is not original at all; Fuller used it in his own work on the ethics code of lawyers.[7] My thesis is that we cannot fully understand a profession unless we acknowledge that it is not only characterized by minimum duties, but also by ideals and aspirations.[8] We cannot say what a good doctor is unless we refer both to elements of duty and to elements of aspiration. Some elements of professional morality can be formulated in codes and standards: in rules stating more or less strict duties, such as the duty to obtain a patient's informed consent before a treatment or experiment. But if we focus on these minimum rules only, we will get a very poor image of what a good doctor is. A good doctor aspires to achieve more: she strives toward excellence beyond the minimum. This "more," however, is greatly dependent on context and on the personalities of both doctor and patient and, therefore, cannot be formulated in general rules. Some doctors will seek excellence by devoting most of their attention to methods of effective treatment for breast cancer; others will strive to be warm, supportive, and caring persons taking much time for their patients. There may be one general ideal of the good doctor, but the way in which this ideal is interpreted and implemented in medical practice is varied and diverse.

The idea that it is characteristic of professions to be partly oriented toward ideals suggests interesting explanations for some phenomena.

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4 E.g. A.A.G. Peters, "Law as Critical Discussion," in *Dilemmas of Law in the Welfare State*, ed. G. Teubner (Berlin: De Gruyter, 1986), pp. 250-79.

5 Kenneth I. Winston, "The Ideal Element in a Definition of Law," *Law and Philosophy* 5 (1986): 89-111.

6 Wibren van der Burg, *Het democratisch perspectief: Een verkenning van de normatieve grondslagen der democratie* [The democratic point of view: An exploration of the normative basis of democracy] (Arnhem: Gouda Quint, 1991).

7 See Luban's contribution in this volume.

8 I have elaborated this thesis for the health-care professions in W. van der Burg, P. Ippel, A. Huibers, B. de Kanter-Loven, I. Smalbraak-Schieven, and L. van Veenendaal, "The Care of a Good Caregiver: Legal and Ethical Reflections on the Good Health Care Professional," *Cambridge Quarterly of Health Care Ethics* 3 (1994): 38-48.

Firstly, it offers an explanation for some characteristics of professions. Davis and Elliston[9] argue that three empirical characteristics of a profession are that there is a commitment to the social good, that it is based on special skills and knowledge, and that it usually has a certain autonomy and self-regulation. The connection between these three characteristics becomes clear once we understand that professions are not oriented toward one simple social good that allows an instrumentalist, let alone mechanic, conception of ends and means. The various aspects of the social good that professions aim to realize are very complex ones, which we can never describe or realize completely, like good health care or the rule of law. There are various ways to make these complex ideals more concrete and to try to realize them as much as possible. Professional autonomy allows professionals to choose how, using their specialized skills and knowledge, they can make the best of these ideals in each concrete situation. The ideal orientation thus makes a coherent sense of the empirical characteristics.

A second phenomenon which we can understand better if we see that a profession is ideal oriented is the common complaint of professionals that external circumstances (lack of time, financial and material resources, too heavy a workload) make it impossible for them to practice the "art" of the profession. It is inherent in professional practice that every professional sometimes feels frustrated and perhaps even guilty about the fact that she should have given more care to a patient, should have spent more time on literature research for a paper, and so on. In a sense, professionals can never say that they have finished their work, and they always meet limitations. In comparison with the ideal, they will always fail somehow. Of course, the feelings of frustration should be taken seriously, and external causes may be an important factor in this. Yet, every professional should understand that even if budgets were higher or the workload less heavy, she would still encounter similar problems because this is part and parcel of being a professional.

A professional morality should not only consist of a morality of aspiration but also of a morality of duty. The two should be balanced: "In the theory of social ordering . . . we should identify both what we can aspire to and what we must guard against."[10] Here, Fuller's metaphor of locating the pointer at the proper resting place on the scale between aspiration and

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9 M. Davis and F.A. Elliston, eds., *Ethics and the Legal Profession* (Buffalo, N.Y.: Prometheus Books, 1986), p. 15.

10 Selznick, *Moral Commonwealth*, p. 146.

duty is illuminating.[11] Fuller argues that the morality of aspiration and the morality of duty are not strictly distinct, but rather belong on a continuum. If someone's professional morality is too idealistic and the morality of duty is underdeveloped, the risk may be that she too easily violates essential minimum norms. A doctor devoted to finding a cure for cancer might thus sacrifice the interests and even the lives of individual patients. On the other hand, a doctor who only sticks to the minimum rules and protocols may miss the flexibility to give each patient what he really needs.

When we want to draft legislation on medical professional morality, the image of the pointer is helpful. The aspirational part of professional morality is usually better left to professional autonomy; we should not try to formulate strict legal rules for it.[12] The morality of duty better lends itself to legal regulation, to what Fuller has called the enterprise of "subjecting human conduct to the governance of rules."

It is important to find the right place, beyond which further regulation is useless or even counterproductive. If the pointer is too low on the scale (which means that we formulate too few standards and rules for the medical profession), this may lead to serious neglect of some of the patient's interests, just because the doctor sacrifices them to some higher aspiration such as the progress of medical science. The recent increasing role of health law in most Western countries can be seen as a reaction to a situation in which the pointer was too low: the legal regulation of medical practice was insufficient and patients' rights were almost nonexistent.[13] If, on the other hand, the pointer is placed too high, the doctor will feel handicapped and frustrated by strict regulations and protocols that prevent her from giving the best treatment in each case, with its particular characteristics and context.[14] Such a process of putting the pointer higher by introducing new regulations may, however, easily go too far, so that regulation distorts the sphere of aspiration. It seems to me that the Dutch fear of "American circumstances" in health care is partly related to the fact that the pointer in American health law is now placed too high,

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11 *ML*, p. 27 ff.

12 "A morality of aspiration is not easily captured or readily cabined by rules and systems." (Selznick, *Moral Commonwealth*, p. 260)

13 Cf. Wibren van der Burg, "Bioethics and Law: A Developmental Perspective," *Bioethics* 11 (1997): 91-114.

14 "If the pointer is set too high, the rigidities of duty may reach up to smother the urge toward excellence and substitute for truly effective action a routine of obligatory acts." (*ML*, p. 170)

with the result that doctors – in fear of being sued for violating patients' rights – have to practice bureaucratic and defensive medicine.

The Dutch Medical Treatment Contracts Act (*Wet geneeskundige behandelingsovereenkomst*) partly acknowledged this double nature of the profession by formulating both a number of strict rules and a general aspiration, the care of a good caregiver (*de zorg van een goed hulpverlener*). The latter implies that more than the minimum should be done and that this cannot be adequately formulated in strict legal rules; yet, this aspiration should be taken seriously as a point of orientation for medical practice and health law. Seen from this perspective, however, we should deplore the amendment added in the final phase of the parliamentary debate, stating that this general norm should be interpreted with reference to the professional standard. The result of this amendment is that what seemed to constitute a framework of aspiration is reduced to a norm of duty.

3. The morality of aspiration

It is now time to move to a more theoretical level. We should start by taking a closer look at what Fuller says on the morality of aspiration. He has a remarkably indirect way of describing this concept, for instance, through a comparison with aesthetics or economics, by illustrating it with concrete examples, or by contrasting it with the morality of duty. But a clear and direct description, let alone a definition, is lacking. This may be an indication that it is a concept that, though intuitively clear, is hard to define.

According to Fuller, it is the "morality of the Good Life, of excellence, of the fullest realization of human powers."[15] Partly quoting Adam Smith, he argues: "Like the principles of a morality of aspiration, the principles of good writing, 'are loose, vague, and indeterminate, and present us rather with a general idea of the perfection we ought to aim at, than afford us any certain and infallible directions of acquiring it.'"[16] In the light of this vagueness it is not surprising that a subjectivism is "appropriate to the higher reaches of human aspiration."[17] "It is said that the morality of aspiration implies some conception of the highest good of man, though it

15 *ML*, p. 5.
16 *ML*, p. 6.
17 *ML*, p. 13.

fails to tell us what this is."[18] Finally, "experiment, inspiration, and spontaneity" flourish in the sphere of aspiration.[19]

These quotations suffice to present an intuitive grasp of the morality of aspiration, yet they provoke more questions than they answer. The morality of aspiration differs in many qualitative respects from the morality of duty, but Fuller suggests that there is a continuum between the two moralities: How is this possible? How can the distinction between the two moralities be connected to common legal (or moral) standards like principles and policies, rules and virtues? And, finally, how can something as vague and indeterminate as the morality of aspiration help us in dealing with concrete problems?

To answer these questions, I will focus on moral theory in this section, and only at the end will I briefly illustrate how an analogous analysis is possible for law. In ethical theory, we can easily find various examples of positions that resemble Fuller's morality of aspiration, such as neo-Aristotelianism. But as soon as we perceive the analogy between neo-Aristotelianism and the morality of aspiration on the one hand, and rule-based ethical theories and the morality of duty on the other, the problem of the continuum becomes even more vividly clear. Should we regard the differences between, to mention just two authors, Alasdair MacIntyre and Bernard Gert as merely resulting from a focus on different spheres within one continuum?[20] Is there a higher harmony embracing the two?

Before concluding, however, that Fuller must have been mistaken in trying to reconcile the irreconcilable, we should try to find an interpretation that upholds the idea of a continuum; not only because we should avoid unfair criticism, but also because the idea of such a continuum is intuitively appealing and fits the way we look at our own morality. Usually, we have a broad variety of moral reasons, reaching from the strictest obligations to lofty aspirations. Near the bottom we find rules such as "Do not kill your neighbor"; on the highest level there are vague and open ideals such as "the just society" or "the good life." The idea of the two moralities does greater justice to this variation than approaches that try to reduce moral experience to one basic category such as principles or rules, or that suggest one fundamental law or principle as the foundation of all morality.

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18 *ML*, p. 17.

19 *ML*, p. 28.

20 Cf. Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame, Ind.: University of Notre Dame Press, 1981) and Bernard Gert, *Morality: A New Justification of the Moral Rules* (New York [etc.]: Oxford University Press, 1988).

If we go upward along the continuum, our moral reasons become weaker in three ways: their obligatory force decreases, they become vaguer and more ambiguous, and (as a corollary of the latter) their interpretation becomes more subjective. Of some reasons we can clearly say to which part of the scale they belong. Prohibitions against killing and stealing are minimum ones, whereas perfectionist ideals such as "the good life" belong to the sphere of aspiration. But there is a large gray zone in between, which is best exemplified by the norm that we should give money to the poor. We certainly have good moral reasons to do so, but they have less force than the prohibition against killing. Moreover, it is more vague and indeterminate (How much exactly should we give?), and it is also open to subjective interpretation (Shall I give the money to the beggar on the corner of the street or shall I use an intermediary, such as a religious charity?). It is also subjective in the sense that the interpretation and force depend on the subjective circumstances of the actor: his personal income, his view of life, or other obligations he tries to honor.

The gray zone between the two spheres need not be the domain of arbitrariness. When we better understand the nature of the two spheres and their elements, we can perhaps find good grounds to determine where to set the pointer that divides the two spheres – if not at specific points, then at least within a more restricted range. In order to do so, we must "map" the two spheres in more detail, look for characteristic elements, and analyze the connections between them. Fuller is of little help in this respect; he gives only a few hints about how to make such a map. Therefore, any attempt to map and structure the morality of aspiration cannot claim to be a mere interpretation of Fuller's thought. Below I will develop a constructive theory of how to fill in the two spheres in more detail, in order to make Fuller's idea of the two moralities work in practice. In the course of doing so, I will have to go beyond Fuller in some respects; nevertheless I claim that this critical reconstruction is still basically loyal to Fuller's most important ideas.

A first attempt to structure the broad sphere of aspiration is to introduce a distinction between three categories within that sphere: principles, policies, and ideals. As a definition for ideals I suggest:

> Ideals are values that are implicit or latent in the law, or the public and moral culture of a society or group, which usually cannot be fully realized and which partly transcend

contingent, historical formulations and implementations in terms of rules, principles, and policies.[21]

Ideals are, thus, quite vague, indeterminate, and ambiguous.

Principles and policies, on the other hand, are more determinate in content and less vague, though still much less determinate and precise than rules formulating duties. The distinction between policy and principle is a familiar one in the early work of Ronald Dworkin.[22] To put it in simple terms: A principle is a direct norm for action, such as "do this or do not do that." A policy is a pursuit of certain goals and thus sets an indirect standard for action; there may be many ways to reach these goals.

Examples of ideals are respect for autonomy and economic prosperity. An example of a principle is: "Patients should give their full informed consent to each medical treatment." This is a principle and not a rule, because there may be circumstances in which it is impossible or undesirable to conform to the principle. An example of a policy is: "Try to realize maximum efficiency in the treatment of patients." Clearly, both this principle and this policy cannot be fully realized now – if only because they often conflict – but both can be good grounds for more specific rules and offer a normative framework for making concrete decisions.

Ideals, principles, and policies are connected. Ideals can be transformed, in two steps, into more specific action guides such as principles and policies and, then again, one further step is needed to transform these into rules. The first step is from concept to conception.[23] The concept of justice can be made more concrete and less ambiguous if we interpret it to mean, for instance, that everyone should have sufficient means to live a decent life. It is only one of the possible interpretations of the ideal of justice as such. The step from concept to conception involves an unavoidable choice; the choice is unavoidable because otherwise we cannot connect

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21 I elaborated the concept of ideals in Wibren van der Burg, "The Importance of Ideals," *Journal of Value Inquiry* 31 (1997): 23-37, at p. 25 ff. My definition here is slightly different because I explicitly mention "policies," whereas in my earlier definition I used Dworkin's broader concept of principles, which includes both principles in a narrower sense and policies.

22 Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978), p. 22. Dworkin distinguishes between arguments of principle and arguments of policy. Here I suggest a slightly different view of a principle than Dworkin; in my opinion, a principle need not be connected with individual rights. This view fits in better with Dworkin's more recent work.

23 Cf. John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971), p. 10; Dworkin, *Taking Rights Seriously*, pp. 134-36.

the ideal with concrete action guides and it will remain a vague Utopia. Yet this choice does not imply that other conceptions cannot be valid. Because an ideal transcends every attempt to grasp it in formulations, we must accept that other attempts to formulate it, i.e. other conceptions, can be valid interpretations as well.

A second step is to go from this, still highly abstract, conception of the ideal to less abstract principles and policies. One approach is based on the idea that, as much as possible, we ought to realize the ideal here and now. The result of such a deontological approach is a principle. For example, if someone is in material need, give her the money she needs. Such a principle still belongs to the sphere of aspiration because it is impossible to act accordingly all the time. We can also take a different, teleological approach. Rather than focusing on the here and now, we can see the ideal as a goal, as a just society toward which we should try to move. The result of such an approach is a policy. We must direct our efforts so that we will help to bring that future just society nearer; for instance, by supporting political parties that promise reforms or by giving money to organizations that support structural improvements in Third World countries. This policy is part of the sphere of aspiration because it sets a limitless task – we will never have done enough to reach the goal; there is always more that can be done.

Both principles and policies usually cannot be fully realized. They are different ways of interpreting and implementing the more fundamental ideal and of trying to realize that ideal partly, in actions here and now, or in future states of affairs, respectively. This means that principle and policy still belong to the sphere of aspiration; they are not clear duties. But they can give rise to duties and concrete rules in various ways.

A further step of transformation downward brings us to the field of the morality of duty. For example, I can specify the principle that I should help the poor by making it a rule to give 10 percent of my income to (organizations that aid) the poor. This means that my moral rule is principle based. In an analogous way, I can also specify a policy, for example by making it a rule that I will always give 10 percent of my income to organizations that support structural reforms in Third World countries.

A final step of transformation would be that of concrete decision-making. On the basis of my rule to give 10 percent of my income to certain organizations, I can decide to give 500 guilders to a specific religious charity and 1,000 guilders to a different charity, and so on. Concrete decisions need not always be rule based; they can also be based on princi-

ples, or even ideals. For instance, my decision to give some change to a beggar may reflect my basic principle to help the poor.[24]

So far I have, for reasons of simplicity, presented the scheme as if it were a one-way transformation, from the highest aspirations down to the most concrete decisions. This is only a matter of presentation. A foundationalist approach in which the ideals form the basis of all normative judgments would not only be in contradiction with Fuller's explicit remarks on this issue,[25] I think that there are also good grounds to prefer a coherentist approach. We should go both ways, and thus also go from concrete decisions to rules, and then to principles and policies up to ideals. Between the various levels of abstraction there is a continuous process of mutual adjustment. In my opinion, a reflective-equilibrium model, in which all elements can enrich and correct each other, fits best – both descriptively and normatively – what people do all the time when they make moral (or legal) judgments.[26]

A more general remark should be made here. The distinction between categories such as ideals and principles is not a very clear-cut one; it is more like a continuum along the three dimensions of abstraction, ambiguity and vagueness, and obligatory force. There can be quite abstract principles and concrete ideals, and sometimes it will be hard to categorize them. This lack of precision would be a problem if there were something like an ontological structure underlying the categories mentioned, but for legal or moral categories we need not make that assumption. It is sufficient for our purposes to see that within the sphere of aspiration it makes sense to make two distinctions. Firstly, we should distinguish between ideals, on the one hand, as the most abstract, vague level that has only little obligatory force and principles and policies, on the other, which are more concrete, more specific in content, and have a more binding character. Secondly, we should distinguish between two ways to connect ideals with less abstract notions: a deontological approach leading from ideals to principles and a teleological approach leading to policies.

In law, a similar story can be constructed concerning the relation

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24 This simple model needs to be supplemented and made more complex in various ways, for instance by allowing that lower-order principles be derived from higher-order principles or that one rule can be supported by both principles and policies. For the basic structure, however, these modifications do not have major implications, so I will leave them aside here.

25 *ML*, p. 10.

26 Cf. Rawls, *Theory of Justice*, and Wibren van der Burg and Theo van Willigenburg, eds., *Reflective Equilibrium: Essays in Honour of Robert Heeger* (Dordrecht [etc.]: Kluwer Academic Publishers, 1998).

between ideals, principles, policies, rules, and concrete decisions. As a theoretical exposition would largely be a repetition of the above, I will illustrate this with an example. One of the leading legal ideals in Western culture is the ideal of respect for the autonomous person. This is a very broad ideal, which can give rise to many more specific norms. A more concrete way to formulate a part of the ideal is to say that we should protect and enhance autonomous decision-making with respect to medical treatment. A deontological interpretation of this ideal might lead to a principle holding that the patient's informed consent should be obtained before performing any treatment. A teleological interpretation of the ideal might lead to policies that foster conditions for autonomous decision-making such as easy access to information and counseling services. Both could give rise to concrete rules. A principle-based rule would be that a doctor must always obtain the informed consent from her patient, unless the patient is unconscious or there is some other kind of emergency. A policy-based rule would be that every hospital must have leaflets available containing information about common diseases and treatments, in every language that is frequently spoken in the hospital's area.

4. Law: The protective and the instrumental functions

Fuller's theory can be put to practical use in many themes. One of the most interesting themes, which would have fitted nicely into Fuller's larger, unfinished project of a grand theory of "eunomics," is that of the functions and limits of law in modern society. I think that the distinction between the two moralities is especially illuminating here, because each of the two spheres is connected with specific functions of law. To see which functions are involved, it may be helpful to consider briefly two authors who also connected this distinction with the functions of law, but who, in my opinion, took the wrong track.

Kamiel Mortelmans and, particularly, Willem Salet apply Fuller's theory very straightforwardly to the debate on instrumental legislation in the modern interventionist state.[27] They identify aspirations with pur

27 K.J.M. Mortelmans, *De invloed van het Europees gemeenschapsrecht op het Belgisch economisch recht* [The influence of European Community law on Belgium's economic law] (Deventer: Kluwer, 1978) and *Ordenend en sturend beleid en economisch publiekrecht* [Regulating and goal-oriented policy and economic public law] (Deventer: Kluwer, 1985); W.G.M. Salet, *Om recht en staat: Een sociologische verkenning van sociale, politieke en rechtsbetrekkingen* [On law and state: A sociological exploration of social,

poses and policy goals, and regard the morality of aspiration as the basis for instrumental legislation. The morality of duty is connected with more traditional forms of law, such as criminal law, which formulate citizens' rights and duties. This is the sphere in which the protective function of autonomous law is dominant.[28] Consequently, Fuller's metaphor of the pointer seems to lead to a simple conclusion. The modern interventionist state has gone too far with legislation as an instrument for public policy because it has tried to legislate on the basis of a morality of aspiration, whereas Fuller argued that a morality of aspiration is not a good basis for regulation. The solution Mortelmans and Salet suggest is obvious: We should return to the core business of law, the sphere of the morality of duty, which is connected with the protective function. We should have less instrumental legislation in order to move the pointer to a lower point on the scale between aspiration and duty.[29]

This position should be rejected for various reasons. Firstly, because it offers a reductionist and highly distorted conception of the morality of aspiration. Aspirations are reduced to simple policy goals and lose their moral character.[30] But this is something completely different from the way in which Fuller describes the morality of aspiration and connects it with the idea of excellence, of the Good Life, with the broad ideals of legality and democracy – in fact, it is no morality at all. Secondly, this flawed reading of Fuller makes no sense of the idea behind the pointer. Willem Salet suggests that the basic idea is that of a distinction between moral principles and policy purposes – which is clearly not Fuller's idea. Moreover, Salet gives no good arguments why we should make such a strong demarcation. If this were really the idea behind the pointer, it would be of

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political, and legal relations] ('s-Gravenhage: Sdu, 1994).

28 Mortelmans, *Ordenend en sturend beleid*, p. 1, n. 2, regards the morality of duty as the equivalent of *Ordnungspolitik* or, in Dutch, *ordenend beleid* (regulating policy) and the morality of aspiration as the equivalent of *Ablaufspolitik* or, in Dutch, *sturend beleid* (goal-oriented policy).

29 Thus, Salet, *Om recht en staat*, p. 18, argues that Fuller "was of the opinion that the overwhelming growth in aspirational legislation is inconsistent with the classic legal principles that focus on rights and duties" (my translation). However, he does not refer to any passage in Fuller's work where such a suggestion can be found.

30 Salet even seems to suggest that only the sphere of duty may be seen as morality proper, and that the morality of aspiration has a political and economic character (Salet, *Om recht en staat*, p. 39). This can most clearly be seen in the way Salet sets the two spheres against each other as that of the *beginselvaste principes van waarden en normen* (literally: principled principles of values and norms – it seems that he tries to combine all words with a moral connotation in one phrase) and that of the *doelgerichte beleidsaspiraties* (purposive policy aspirations; Salet, *Om recht en staat*, p. 135).

little help because no one can seriously defend that all statutes motivated by policy considerations should be banned. So we would still need a second pointer, demarcating within the sphere of "aspiration" that part of policy-based law which is acceptable and that part of policy-based law which is not.

I think that the idea of the pointer in Fuller's theory is a different one. It is rather that moral aspirations cannot be caught in strict rules and duties, because that would stifle creativity and allow too little space for legitimate plurality. The way in which a morality of aspiration should be realized depends on the context and on the subject, and is in that sense subjective and indeterminate.[31] But this does not mean that aspirations are not moral, and that there is no role for law at all in the sphere of aspiration.

Salet's interpretation of Fuller's theory may be faulty, but it is an interpretation that arises quite easily. If one wants to connect the morality of aspiration with a specific function of law, the idea of associating it with instrumental legislation that explicitly aims to realize certain goals and aspirations, arises quite naturally. It is therefore necessary to analyze where the two standard functions of law fit into this scheme before we try to develop a theory about any other functions which fit into each of the two moralities as such.

A different approach to the two functions may start from the distinction between principles and policies discussed in the previous section. The protective function of law is dominant when law aims to realize certain ideals here and now. When we discuss the protective function of law, we therefore speak of principles, and principle-based rules and rights.[32] The instrumental function of law is dominant when law is used to realize certain goals in the future, through policies and policy-based rules. Thus, instrumentality and protection are not two separate spheres but rather correspond with different types of argument. Protection and instrumentality should be seen as two dimensions that permeate morality and law from the most basic duties up to the highest aspirations. These functions attach both to the very simple rules at the level of theft and tax laws and to the more abstract levels of human rights and long-term environmental goals.

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31 Cf. *ML*, p. 12.

32 This is the core of truth in Dworkin's initial identification of principles and rights; most principles are indeed connected with rights. Some principles, however, like those of good governance or the rule of law, are primarily meant to protect the integrity of law and state, without directly being connected with individual rights.

The problem of too much regulation is not specific to the instrumental function of law, although this has recently drawn most attention in theoretical debates. In the case of rules connected with the protective function of law, we may find similar problems in that sometimes regulation has gone too far, has stifled creativity and spontaneity, and has blocked due attention to context-specific and subjective fine-tuning. Mary Ann Glendon's book *Rights Talk*[33] contains many examples of which we could say that law has gone too far in regulating on the basis of arguments of principle and in structuring the legal debate in terms of rights. Recent criticism of labor regulations has been that too strict regulations protecting workers' rights have frustrated flexibility and productivity. In other words, the criticism was that the pointer between aspiration and duty was placed too high; less regulation was desirable to move the pointer to a lower place.

The controversy about the role and limits of law in modern society does not turn on the question whether or not certain statutes are instrumentally motivated and are therefore categorically unacceptable. It rather turns on the issue whether what is required from the citizen is a reasonable demand; the criticism of modern "over"regulation is that the pointer demarcating the sphere of legal duty is set too high. This can be illustrated with two examples, one concerning instrumental legislation and the other concerning the legislation protecting patients' rights.

The purpose of protecting nature against pollution caused by too much animal manure is not controversial, nor is the fact that we use legislation as a means for this purpose. Criticism on environmental legislation rather focuses on questions such as whether we can reasonably require that farmers conform to a great number of expensive and complex rules, whether this is an effective way of influencing human conduct, and so on. In other words, it is not legislation as such, but the precise content of the law that is at stake. The suggestion is that law has crossed its boundaries by implementing a legitimate purpose through a too detailed and burdensome system of rules. Here, so the criticism goes, the pointer is set too high, which results in even averse reactions from farmers. Perhaps, if we had fewer rules (and especially less detailed and complex ones), they would be willing not only to follow these rules but also to cooperate voluntarily toward the common purpose of preventing pollution.

In that part of the law where the protective function is dominant,

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33 Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: MacMillan, 1991).

similar discussions can be found with respect to the protection of patients' rights. The recognition of patients' rights is clearly a matter of principle. To a certain extent, we can formulate them as rules, as strict rights, but beyond a certain point, we may go too far, which may be counterproductive. Many health-care professionals claim that legislation aimed at protecting patients' rights has indeed gone too far. In the Netherlands, even patients organizations now admit that strict regulations stating that only if psychiatric patients constitute a real danger to themselves or to others is it legally permitted to give them involuntary treatment, frustrate the good care for some categories of schizophrenic patients. Legal recognition of patients' rights with the purpose of protecting patients might lead to more defensive and bureaucratic medicine, and would thus, in the end, go against patients' interests. In order to prevent this, we should have less strict regulation and we should place more trust in the professional autonomy of health-care professionals. I do not want to go into the details of the discussion here;[34] I only want to show that the discussion can be seen as one about the place of the pointer as a criterion of demarcation between strict regulation and forms of law that leave more room for flexibility and variation.

The debate on the role and limits of law is, of course, much broader than merely a debate on the demarcation between the strict rules of the morality of duty and the general principles and policies of the morality of aspiration. In Fuller's theory, we can find inspiration for another approach that I will only mention here.[35] It is debatable whether some forms of instrumental regulation are to be regarded as law, or rather are a mixture of "law" and a different mechanism of social order, namely "managerial direction." One possible criticism of instrumental legislation is that, though it uses the means of law, it is also partly a form of managerial direction. A basis for critical analysis of this phenomenon can then be found in the idea that each mechanism of social ordering has its own internal morality, and that if instrumental legislation is indeed a mixture of both, this may lead both to overlap and to tensions between the internal moralities of both mechanisms. Some forms of instrumental legislation obviously conflict with the internal morality of law as sketched by Fuller in the eight principles of legality. These eight principles and analogous principles of the internal morality of managerial direction can then be used as criteria for the evaluation of instrumental legislation. For exam-

34 For a more extensive discussion, see Van der Burg, "Bioethics and Law."
35 Cf. his discussion in *ML*, p. 209 ff.

ple, one of the problems of instrumental legislation is that it has to be changed too frequently, to adapt it to changing circumstances, which conflicts with Fuller's criterion of constancy over time.[36]

5. Law: The communicative and the regulatory functions

The conclusion is that the protective and instrumental functions of law can be seen as two dimensions that permeate morality and law in the spheres of both duty and aspiration. The question remains whether there are also functions of law typically connected with the morality of duty and with the morality of aspiration.

The function of law that is typically connected with the morality of duty is the most obvious one. It is what is usually called the regulatory function, the regulation of human behavior. In fact, only for that part of law that is connected with the morality of duty can we say that it is the "enterprise of subjecting human conduct to the governance of rules."[37] Fuller uses this formulation as a general description of law but I think that this, if taken literally, is too restricted a view of what law is. It certainly is an important part of law, and the part to which we are most accustomed, but it is not all there is to law. Highlighting the defects of this formulation may help us see which other function is neglected if one concentrates only on the regulatory function.

It should be noted that Fuller himself has a much broader perspective than his formulation suggests. His formulation is helpful in highlighting the differences with a positivist stance, but it is certainly too restricted if perceived as shorthand for Fuller's own interactional perspective on law. The criticism of this formulation that I will present below is therefore one to which, in my view, Fuller might have consented.

Fuller's formulation of what law is, is too restricted. There are other ways in which law can govern human conduct than by subjecting it to rules. Law may offer general points of orientation, ideals, principles, and policies without determining precisely how they are to be interpreted and implemented. Ronald Dworkin, for example, argues that law should not be seen as merely a system of rules, and illustrates this with standards like

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36 This second line of thought can also be found in Mortelmans, *Invloed van het Europees gemeenschapsrecht*. It leads to interesting criticisms and recommendations; cf. Mortelmans, *Invloed van het Europees gemeenschapsrecht*, p. 589 ff.

37 *ML*, passim.

principles and policies.[38] Philip Selznick stresses the importance of ideals and implicit values.[39]

Law can authoritatively lay down these standards of aspiration as action guides and points of orientation for citizens.[40] Legislation communicates those standards – values or ideals, principles, and policies – to the members of society, expecting that they will accept them as guidelines. We can call this the communicative function of law: it provides a common point of orientation for citizens, and sets a common normative framework for moral discourse.[41]

This communicative function is most clearly at home (though not exclusively) within the sphere of aspiration. If legislation tries to formulate some ideals, or principles and policies directly, then the communicative function is central. In the legal norm of the "care of a good caregiver," in the preambles of many statutes and, particularly, treaties, we find formulations that can be seen as formulations of ideals. Laying down principles or policies at a less abstract level can also communicate to the citizens or other norm subjects that they are expected to be guided by those principles and policies. The formulation of basic values in a statute can therefore be a good legislative strategy, for example in legislation concerning embryo research.[42]

The communicative function is the least prominent function of legislation, and only seldom is it the most dominant function of a statute. It is especially important for those issues which have a strong moral dimension to it. Examples are constitutions or laws on bioethical issues, such as abortion and euthanasia. Usually a statutory text has various functions at

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38 Dworkin, *Taking Rights Seriously*, chapters 2 and 3.

39 Philip Selznick, "Sociology and Natural Law," *Natural Law Forum* 6 (1961): 84-108.

40 At various places, Fuller explicitly acknowledges the importance of these standards, but it seems to me that this acknowledgment can be found throughout the book, with its stress on purpose, aims, ideals, and so on.

41 A second line of criticism on Fuller's formulation of what law is, is that it neglects the interactional process through which law comes into existence. If we take this into account, we might focus on a fifth function, the expressive function: Law expresses that certain standards are important to the political community. I have discussed this function in Wibren van der Burg, "Legislation on Human Embryos: From Status Theories to Value Theories," *Archiv für Rechts- und Sozialphilosophie* 82 (1996): 73-87. A discussion here would take us too far from my main line of argument. If we take the expressive and communicative functions – which are strongly connected – under one heading, we might call them the symbolic function; cf. W.J. Witteveen, P. van Seters, and G. van Roermund, *Wat maakt de wet symbolisch?* [Symbolic laws?] (Zwolle: W.E.J. Tjeenk Willink, 1991).

42 Van der Burg, "Legislation on Human Embryos."

the same time, which support each other. A good example is the constitutional freedom of expression (article 7 of the Dutch Constitution). The protective function, guaranteeing a fundamental right of citizens, is central, but is only effective because the text also has a regulatory character, creating clear rights and correlating duties. We may also regard this article as having an instrumental function because a free public debate and a free press facilitate the functioning of a lively democracy. It also has a communicative function, because it formulates fundamental values as points of orientation for both citizens and public institutions.

Let us return to Fuller's two moralities. The connection of the two functions with the two spheres is a matter of degree, just like the distinction between the two moralities is a matter of degree. Going up the scale from duty to aspiration, our standards become more abstract, vaguer, and less binding. If we want to regulate human conduct, it is necessary that we set concrete, unambiguous rules that have a strong obligatory character. Traffic rules such as the obligation to drive one's car on the right-hand side of the road, would not be very effective if they needed much interpretation, were vague, and if we could not trust others to act accordingly. For such rules, the regulatory function is dominant, and this requires that rules are clear, concrete, and binding; in other words, that they meet Fuller's eight criteria of legality. Even here, however, the communicative function is never completely absent.

The farther we go up along the scale – legal standards becoming more abstract, ambiguous, and vague, and becoming less obligatory in character – the less these standards are apt to perform a regulatory function, and the more we need to reflect on them. Standards like the ideal of democracy or the principle of free speech are highly important for law, but they do not directly and unambiguously determine human conduct in the way traffic rules do. There is a legitimate plurality of interpretations. In order to avoid pure subjectivity in the sense of arbitrariness in that interpretation, discussion with others is essential. The communication involved is thus not only that between the legislature and the citizen, but also among citizens themselves.

Going up along the scale is not merely a deplorable weakening of standards. I suppose that many lawyers still tend to think of principles (let alone ideals) as rules *manqués*. As long as we look at them in this way, the communicative function can only be a defective function.[43] Then

43 This has usually been the attitude toward so-called symbolic legislation, as merely an ineffective form of legislation.

there will always be a tendency to transform principles and ideals to rules, because rules are simply considered to be the perfect type of legal standard.

A more positive approach to the morality of aspiration and the communicative function is, however, possible. For some categories of simple situations we can easily frame general rules. But there are many situations for which such simple rules are not possible or not desirable. If we tried to frame simple rules, we would oversimplify the situations and the rules would be inadequate. This is, for example, the case in dynamic and variable situations that demand flexibility or that are characterized by a broad variation in relevant parameters. In such situations, regulation will often not work, yet some form of normative guidance may be desirable. Saying that we cannot grasp the complexities of medical practice in simple rules does not imply that the law has no business in the way in which doctors perform their tasks. We simply have to look at different ways to influence and control their behavior.

Standards of aspiration may be the solution for such situations,[44] but only if they are combined with a different attitude than the attitude usually taken toward rules. If legal rules are well framed, all we need to expect from citizens is rule conformity. There is no need for them to reflect on the content or purpose of the rule as long as they consider the rule an authoritative action guide. A similar attitude toward ideals or principles is inadequate. Guidance by ideals, principles, and policies requires that citizens internalize these standards and try to realize them as well as they can. They must try to understand what the point is of these standards, what their implications are for different situations, and even how they should be adapted to respond to new exigencies. They have to take part in a process of constructive interpretation, together with those who framed these standards and together with their fellow citizens who also try to live up to those standards. To do so, we need to reflect on them and to discuss them with others. If reflection and discussion are lacking, the standards will become ossified, and the necessary dynamics and flexibility of the legal system will give way to a rigid and static system which will soon be out of touch with reality.

It may seem that I am now completely out of touch with Fuller. I admit that, in my attempt to construct a coherent theory about the two moralities, I have introduced various ideas and distinctions that have no explicit

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44 Cf. Fuller's repeated emphasis on experiment, inspiration, and spontaneity as characteristic of the sphere of aspiration.

basis in *The Morality of Law*, and in this respect I have gone beyond this work.[45] But at this point, we can return to his work to give one of his ideas the central place it deserves. I have always been puzzled by the last pages of *The Morality of Law*, where Fuller suggests one central, indisputable principle of what may be called substantive natural law: "Open up, maintain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel, and desire."[46] Fuller argues that it is this principle that supports and infuses all human aspiration, but "speaks with the imperious voice we are accustomed to hear from the morality of duty."[47] Clearly, it is an important insight, to be found in authors as different as Wittgenstein and Habermas, yet it somehow did not seem to fit into Fuller's theory. Moreover, the argument Fuller presents is extremely brief and unconvincing, occupying barely more than one page. It almost looks like an isolated confession of faith.

I will leave aside the foundations of the principle in social theory and anthropology. The important point is that we can now see that it should indeed have a central place in a theory of law, more precisely in that part of law which is connected with the sphere of aspiration. Without open channels of communication, law in this sphere is ineffective. Law can only fulfil its communicative function if communication is possible. Once we understand this point, Fuller's principle of substantive natural law is no longer a curiosity. It is a principle which is essential for an effective functioning of law in the sphere of aspiration.[48]

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45 I submit, however, that I remain fully loyal to the spirit of his project of an interactional view of law. Moreover, in other works by Fuller, especially those brought together in *The Principles of Social Order: Selected Essays of Lon L. Fuller* (ed. K.I. Winston, Durham, N.C.: Duke University Press, 1981), we can find more explicit support for some of the ideas suggested here; however, I will limit myself here to *The Morality of Law*.

46 *ML*, p. 186. I suppose I am not the only one who was puzzled by this principle; it is an element in Fuller's theory to which references in the literature are scarce and which is often even omitted in summaries of his theory. For instance, in the seven pages Harris devotes to *The Morality of Law*, it is completely neglected (J.W. Harris, *Legal Philosophies*, London: Butterworths, 1980).

47 *ML*, p. 186.

48 In a more trivial sense, it is essential for regulatory law as well, if only because rules have to be conveyed to citizens through some form of communication and because law will ossify and become dysfunctional in the long run if it is never made the object of critical reflection and discussion.

6. Conclusion: The role and limits of law in modern society

I think the distinction between the four functions of law may bring more sophistication into the debate on the role and limits of law. As such, it does not offer direct solutions, but rather a better way of structuring the problems. So far, the debate has predominantly been focused on instrumental regulation, and this bias should be corrected. The important thing is to understand which functions of law can help us to deal with a certain problem area; usually it is not only one function: we should try to establish a balanced combination.[49] This means that we should carefully consider which combination of functions and, thus, which types of law and which attitudes toward law we need in order to deal adequately with a problem or field. From this perspective, we have a framework both for a critical evaluation of existing law and for constructive guidance in new legislation projects. None of the functions should dominate the others, and we must thus find a balance in two dimensions.

1. There should be a balance between the protective and the instrumental functions, between principle and policy. Law can err both ways. The dominance of an instrumentalist attitude toward law (and particularly criminal law) can easily lead to an erosion of traditional constitutional freedoms. The most ardent defender of the protective function of law, Ronald Dworkin, makes a good point when arguing in *Taking Rights Seriously* that rights present trumps over mere policy arguments. Here the metaphor of balance can even be misleading, because it suggests that policy arguments and rights can be balanced on one simple scale.

   Law can also go too far in stressing the protective function, thus leaving too little room for administrative discretion. The most fervent critic of rights talk, Mary Ann Glendon, gives many examples of the way in which an overemphasis on rights and on the protective function may lead to excesses. If, on the basis of policy arguments, we regulate in such a way that the resulting rules provide rights for individual citizens, this may block the necessary flexibility in public administration. In order to have responsible policies, the government should be able to adapt its rules and policies in a flexible and creative way. If the protective function enters too far into the sphere of instrumental legislation, this may lead to unworkable situations. It seems to me that,

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49 *ML*, p. 18, argues convincingly for a nontrivial interpretation of the notion of balance, as something which is necessary if we recognize that a plurality of ends is legitimate.

in the Netherlands, the very strong legal protection which workers and, especially, government employees used to have, has in some situations (for example at universities) been the cause of insufficient flexibility. Here the protective function of workers' rights has sometimes frustrated highly desirable policy changes.

It is not only an issue of a balance of functions or of rights-based regulations versus policy-based regulations; it is also a matter of legal attitude. Connected with an emphasis on the protective function of law is an adversarial, conflict-oriented attitude and even, in its extreme form, an antigovernment attitude, which might be detrimental to policies oriented toward the common good. The reverse is connected with an emphasis on public policies: an attitude which too easily neglects legitimate differences and legitimate claims of individuals and minorities with an appeal to communal interest.

2. There should be a balance between the communicative and the regulatory functions.[50] I think that here Fuller offers us important inspiration with the two moralities and the image of the pointer. In contemporary Western societies, there is no need to warn against too little regulation; overregulation is the more common vice.

Here again, it is not only a balance between different functions, or between different types of law, it is also a matter of attitude. The communicative function of law requires a different attitude both in legislators and in the public. It requires a stronger interactional approach to legislation. If we treat ideals, principles, or policies as rules, we reduce their guidance and critical potential and stifle creativity in practice.

One last remark on the importance of the communicative function of law. I would suggest that, owing to developments in recent times, this function is becoming more important. In traditional, relatively simple societies, regulation is the standard form of law, and may suffice to guarantee a well-ordered society. But in our complex and strongly pluralist society, in which the state must place its trust in the autonomous action of highly educated citizens, mere regulation is no longer sufficiently effective. A more interactional perspective on law and its communicative function may help us to solve part of the problems. In fact, such a communicative approach is central to various alternatives

50 Cf. *ML*, p. 29: "A pervasive problem of social design is therefore that of maintaining a balance between supporting structure and adaptive fluidity."

to traditional regulatory law that have been suggested in the last decades, like responsive or reflexive law. This suggests that Fuller is now even more topical than he may have been when he wrote *The Morality of Law*.