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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 over-emphasise 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.

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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.

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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.

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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

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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

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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

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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]

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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.

Literature

Beauchamp, T.L. and J.F. Childress (1994). *Principles of Biomedical Ethics*. New York, Oxford University Press.

Brom, F.W.A. (1998). Developing Public Morality: Between Practical Agreement and Intersubjective Reflective Equilibrium, pp. 191–202 in W. van der Burg and T. van Willigenburg (eds.), *Reflective Equilibrium. Essays in Honour of Robert Heeger*. Dordrecht, Kluwer Academic Publishers.

Den Hartogh, G. (1996). Soziale und kritische Moral oder "Wie sich 'Protestantismus' in der Moralphilosophie und der Moralerziehung vermeiden lässt", pp. 53–73 in K. Golser and R. Heeger (eds.), *Moralerziehung im neuen Europa*. Brixen, Weger.

Dworkin, R. (1978). *Taking Rights Seriously*. Cambridge, MA, Harvard University Press.

— (1986). *Law's Empire*. London, Fontana.

Frankena, W.K. (1973). *Ethics*. Englewood Cliffs, Prentice-Hall.

Fuller, L.L. (1969). *The Morality of Law*. New Haven, Yale University Press.

Gert, B. (1988). *Morality: A New Justification of the Moral Rules*. New York, Oxford University Press.

Hart, H.L.A. (1961/1994). *The Concept of Law*. Oxford, Clarendon.

— (1975). *Law, Liberty and Morality*. Oxford, Oxford University Press.
— (1977). Positivism and the Separation of Law and Morals, pp. 17–65 in R. Dworkin (ed.), *The Philosophy of Law*. Oxford, Oxford University Press.
Lyons, D. (1993). *Moral Aspects of Legal Theory: Essays on Law, Justice, and Political Responsibility*. Cambridge, Cambridge University Press.
MacCormick, N. (1992). Natural Law and the Separation of Law and Morals, pp. 105–133 in R.P. George (ed.) (1992), *Natural Law Theory: Contemporary Essays*. Oxford, Clarendon Press.
MacIntyre, A. (1981). *After Virtue*. Notre Dame, University of Notre Dame Press.
Peters, A.A.G. (1986). Law as Critical Discussion, pp. 250–279 in G. Teubner (ed.), *Dilemmas of Law in the Welfare State*. Berlin, De Gruyter.
—(1993). *Recht als kritische discussie. Een selectie uit het werk van A.A.G. Peters*. Arnhem, Gouda Quint.
Selznick, P. (1969). *Law, Society and Industrial Justice*. New York, Russell Sage Foundation.
Shklar, J.N. (1964). *Legalism: Law, Morals, and Political Trials*. Cambridge, Harvard University Press.
Van der Burg, W. (1997). Bioethics and Health Law: A Developmental Approach. *Bioethics* 11 (2), pp. 91–114.
Williams, B. (1985). *Ethics and the Limits of Philosophy*. London, Fontana Press.
Witteveen, W. (1996). *De geordende wereld van het recht*. Amsterdam, Amsterdam University Press.