

# An Interactionist View on the Relation between Law and Morality

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## 1. Introduction

The claim of this book is that many issues may be put into a new light if we analyse them with explicit attention to the role of ideals. The relation between law and morality is one of these themes; indeed, my claim is that we will not only be able to understand the debate between natural law theory and legal positivism better, but also to construct a defensible third theory.

In recent decades, the debate between natural law theory and legal positivism has lost most of its sharp edges. Some authors, most notably Ronald Dworkin, construct intermediate positions, which are explicitly referred to as a third theory of law. Various authors have tried to modify positivism and include crucial insights from the Dworkinian criticisms, using phrases such as soft or inclusive positivism. Modern natural law theorists similarly present highly attenuated forms of the old strong positions. However, as critics are eager to point out, these intermediate positions and weaker forms of positivism and natural law also remain quite unsatisfactory, often even much more so than the traditional views. Moreover, as a result of these minor and major modifications, it becomes increasingly difficult to understand what the debate is all about – is there still a genuine disagreement?

It seems time for a fresh start. The debate has, in my view, been led onto the wrong track because neither side so far explicitly recognised that law is an essentially ambiguous concept. Once we understand the essential ambiguity, we may be able to comprehend not only some of the misunderstandings in the debate, but also why attempts to create a coherent third position have failed so far. The recognition of the essen-

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tial ambiguity of law is a first step out of the deadlock, but in itself it is not enough to construct a third theory of law. In order to do so, we must take a second step and recognise the crucial role of ideals in law as sources for both the autonomy and the openness of law.

I will start by elaborating the thesis of the essential ambiguity in the concept of law. We may distinguish two models of law, which cannot be reduced to each other and which are mutually incompatible, yet complementary. I call them the practice model and the product model (section 2). The practice model is the more dynamic model and the product model the more static one. Nevertheless, there is also potential for dynamics in the product model. This potential can primarily be found in ideals (section 3). The debate between natural law and legal positivism may be reconstructed in terms of the two models; if we do so, we see that both positions embody an important insight, but also have a blind spot for the most important insight of the other position (section 4). If we combine this with the role of ideals in law, we can develop a third, defensible though not coherent, interactionist position (section 5).

## **2. The Essential Ambiguity of Law**

That law is a controversial or even an essentially contested concept, is not a new insight. Many textbooks on legal philosophy or sociology begin with this remark. However, I want to make a claim which goes beyond this: law (and a similar point can be made with regard to morality) is an essentially ambiguous concept. It is not merely that we quarrel about the characteristics of law, the difference goes deeper: there are different perspectives on law, and different, partly incompatible, ways to model law.<sup>2</sup>

Law is a highly complex phenomenon which is difficult to get a good grip on. It does not exist separate from society; on the contrary, it is an intrinsic part thereof. Of course, there are clearly identifiable legal procedures and institutions, such as legislation and adjudication, and there are clearly identifiable products, such as statutes and verdicts, but these are merely the most visible parts of the law. Law is like a mushroom: the most important and enduring part of that organism is hardly visible as it is an underground network which may stretch beneath a large surface and which cannot be separated from the soil. The visible

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<sup>2</sup> For a more elaborate discussion of these two models, see my 'Two Models of Law and Morality', *Associations* 3 (1999), 61-82. Lon L. Fuller (*The Morality of Law*, New Haven, Conn., Yale University Press, 1969, pp. 106 and 118-122), makes a similar distinction between law as a purposive enterprise and the legal system as its product.

mushroom is the product of the organism and cannot live without it. A legal scholar who only studies the official law made by the legislature and the judiciary is like a biologist who only studies the visible mushroom and ignores everything underground.

To study law, we have two models at our disposal: the product model and the practice model. Each has its advantages and limitations; each makes it possible for us to understand phenomena that we cannot fully grasp in the other model. Because law is self-reflexive and the result of human interaction, these models are not merely descriptive – they are also models that structure law. In legal practices, we construe law in specific ways, implicitly using either of the two models or trying to combine elements of both. Consequently, the choice of either of the two models has not only academic, but also practical implications.

The product model can be called ‘law in books’ only in a metaphorical way, because it is common though not necessary that it is put on paper. In this model, we focus on law as a system of normative propositions such as ‘Thou shalt not steal’ (or as a collection of texts in which these propositions may be found). But these propositions *are* not the law (even though we often treat them as if they are); they are merely attempts to put the law into words. Legislators do this in statutes, judges in verdicts, legal scholars in their textbooks by constructing the law as a system of rules and principles, as a more or less coherent doctrine. And citizens do it too, for example, when they state that it is not allowed to park somewhere. I suggest the name ‘law as a product’ for this model. The propositions and texts are the product of human activity, and once produced, they get an existence of their own separate from the action from which they emerged and thus become more easily identifiable. We can go to the library to study legal texts, we may discuss whether a certain formulation of a legal rule is correct or whether it is unjust and perhaps should be changed. Even if we can find the law in statute books, in the end we must always remain aware that law is not something we find, but something we construct.

The practice model focuses on law as an interaction or as a dimension of interaction.<sup>3</sup> Usually, law is merely an implicit dimension of our actions; it constitutes part of their meaning or makes them possible. When we buy something, it is the implicit legal dimension which makes this a meaningful exchange. Driving a car in heavy city traffic is only possible because of reasonable mutual expectations about the traffic

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<sup>3</sup> The perspective offered by this practice model makes it possible for legal scholars to study phenomena such as living law (Ehrlich), implicit law (Fuller) and emergent or incipient law (Selznick). In a product model, these phenomena are difficult to understand, and will at best be regarded as some deficient or underdeveloped form of law.

norms regulating our actions. Only in some specific practices such as adjudication we take a 'legal point of view': we formulate the implicit legal dimension explicitly and make it the subject of discussion, application and change. Again, these actions and practices *are* not the law but they cannot be understood without their legal dimension. The activities involved are diverse. They may be distinctively legal ones such as court room proceedings, but also activities such as buying (or stealing) a bread from the baker's. In some practices, the law is implicitly applied and (re)created as a matter of customary law, in others the content of the law is explicitly debated and may be changed, for example in legislation and adjudication. The model of law as a practice is, therefore, connected with the recognition that there may be many legal practices as well as practices with legal dimensions, in other words with the recognition of legal pluralism.<sup>4</sup> Hence, law as a dimension of our interaction is much less tangible than law as a product, and it is much more difficult to give a stipulative definition, let alone a demarcation of it.<sup>5</sup>

Law can thus be regarded both as a dimension of interaction and the product of that interaction. These two models are not separate realities. They refer to each other, presuppose each other and complement each other. Legal rules are the product of distinctively legal subpractices and of the broader interaction in society. Statutes and case law are the product of the legal practices of legislation and adjudication. Legal doctrine is (at least in some legal systems like the Netherlands) the product of the academic legal practice. Conversely, social reality is influenced in many ways by law as a product. Citizens' actions are partly determined by rules as they are formulated in statutes, by judgments which order them to do or endure something and by the ideas that citizens themselves construct about the demands 'the law' implies for them. Moreover, they are oriented towards law as a product because the production of statutes or judgments is the main purpose of some subpractices. A similar interdependence may be found in theories about law: as

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<sup>4</sup> On the connection between an interactionist approach to law and the recognition of legal pluralism, see Fuller, *Morality of Law*, pp. 123-129; Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law*, New York, Harper, 1978, pp. 95-103.

<sup>5</sup> I will not try to give a definition here, because the model as such is neutral and may be combined with a variety of definitions. Most of the available definitions based on a practice view focus primarily on one of the explicitly legal practices, such as legislation or adjudication, and ignore the implicit legal dimensions of other practices. Cf. Fuller for legislation: 'the enterprise of subjecting human conduct to the governance of rules'; and Dworkin for adjudication and academic legal practice: 'an argumentative and interpretative practice'.

I will discuss below, most sophisticated theorists have tried to combine insights from the two models.

But even if the two models are not separable, they cannot be reduced to each other either. It is like physical models of electrons. The latter may be modelled as small particles or as waves. Each model allows us to understand certain phenomena satisfactorily, which cannot be explained in the other model. We may translate many ideas from the wave model into the particle model and vice versa, but usually there will be some loss of meaning and elegance. Every attempt to understand electrons merely in terms of one of the two models will lead to partial and incomplete theories. To get a full understanding of electrons, we must alternate between the two models.

Analogously, there are different ways to understand law and to model it. Depending on the context and the purposes of our involvement with law, we should choose one or the other. For a full understanding of law, we should continuously switch between the two models. This is why law is not merely an essentially contested concept, but an essentially ambiguous one. It is not merely that every conception of law will always be contested as in the continuing debate on the conceptions suggested by authors like Fuller, Hart and Dworkin. We are forced to accept a more radical and perhaps disquieting thesis: Every attempt to construct one coherent conception is intrinsically flawed because the two models are not fully compatible, yet both hold parts of the truth.

### **3. The Dynamics of Law**

The distinction between the two models is especially illuminating when we focus on the phenomenon of change. Law is in a process of continuous change, just like society in general. Statutes are changed sometimes quite radically, sometimes only in minor ways; case law usually develops through smaller steps and so does the implicit law regulating commercial practice or medical practice. Changes in legislation and case law may be the most explicit, but are certainly not the only ones.

The question is: How can we understand and explain these changes? The obvious answer is to take an external point of view and analyse the way in which the law changes as a result of social, economic and political developments. But even if this is an important part of the answer, it is still only part thereof. We should also look for the potential for change inherent in law itself. If there were no such potential, it would be much more difficult for external forces to change the law, as law is at

least a partly autonomous institution, and is not merely a completely malleable instrument of social and political forces.<sup>6</sup>

The two models are clearly different with regard to change. Law as a practice is a dynamic model, whereas law as a product focuses on the static side of law. It is therefore not difficult to identify the potential for change when we take a practice perspective. It is obvious that law can be changed in processes of explicit lawmaking, such as legislation and adjudication. Similarly, the law changes when doctors discuss euthanasia and practise it, and gradually develop criteria for whether and when it may be considered part of good medical practice. In those practices where law is merely an implicit dimension of interaction, there is a potential for change in the fact that each new interaction implies a recreation of the implicit legal norms.<sup>7</sup> Even if this recreation usually is the mere application and reinforcement of these norms, application of norms is never purely mechanical and always involves a creative act in which these norms are slightly altered.

In the practice model, the potential for change is thus easy to identify. What exactly these changes involve, however, can be better understood within the context of the product model. In the practice model, we can discern changes in interaction patterns or observe that parliament has passed a new statute. To determine more in detail what these changes imply, we should discuss them in terms of legal texts, doctrines or statements of positive law. But positive law is not merely the passive result of changes in legal practices. It has a logic of its own, inherent possibilities and limitations. If there were no potential for change in law as a product, it would be much more difficult to change it. Therefore, we should also look at the legal doctrine, this supposedly more static dimension of law, and determine where its potential for further development lies. This may seem a curious idea. Legal doctrine is often presented in legal textbooks in an ahistorical way, as a coherent system of rules and concepts. Even if it is admitted that there are small gaps and

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<sup>6</sup> Alan Watson (*The Evolution of Law*, Baltimore, The Johns Hopkins University Press, 1985) argues that legal development is mainly determined by the resources and limitations inherent in the legal culture and tradition; societal needs and influences only play a minor role. His statement may be too strong, especially for the modern regulatory state, but he is certainly right in emphasising the importance of inherent resources for change.

<sup>7</sup> Cf. Eugen Ehrlich's famous dictum in the Foreword to *Fundamental Principles of the Sociology of Law*, New Brunswick and London, Transaction Publishers, 2002; orig. English transl. 1936, orig. 1913, p. lix: 'The center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself.'

minor inconsistencies, these can be solved in line with this general system of rules. In such an approach, major changes seem impossible. Law may work itself pure, but it cannot transform itself in more radical ways.

Obviously, this image of limited change does not do justice to reality. Positive law changes in many ways, and not only via legislation. For example, the judiciary obviously changes the law – sometimes very radically – even if in most legal systems there is an ideology that tries to minimise the creative impact of their interventions. What are the sources that the judges can appeal to to change the existing view of law?

Usually, the reason to change the law is that new concrete problems or more general issues arise for which the legal doctrine either offers no clear solution or suggests a solution that is inadequate. This may be the reason why a change of law is required, but it is not a resource for the change. The resource is to be found rather at the other end of abstraction, at the level of purposes, principles and ideals.<sup>8</sup> When confronted with issues regarding HIV tests or information technology, basic notions such as privacy or autonomy provide guidance and inspiration. Not only that, however; we also see new dimensions of those old notions. That autonomy may also be relevant with respect to information connected with one's personality, such as HIV status or even consumer patterns is something new – a new dimension of the old concepts of autonomy and privacy. The ideals behind those concepts may provide inspiration for dealing with new cases.<sup>9</sup> Only in the light of new cases, we see the inadequacy of the current legal doctrine and find recourse to the potential for change implicit in the ideals with their surplus of meaning.

In this way, ideals provide a source of inspiration for change. The need for change lies elsewhere, outside the doctrine, in new cases and

<sup>8</sup> The idea that principles play a major role in legal development is not uncommon; the modern classic being R. Dworkin, *Taking Rights Seriously*, Cambridge, Mass., Harvard University Press, 1978. The idea, however, that ideals and purposes also play such a role is perhaps less standard, but has been suggested by various authors including Fuller, *Morality of Law*; Nonet and Selznick, *Law and Society in Transition*; Dworkin, *Law's Empire*, Cambridge, Mass., The Belknap Press of Harvard University Press, 1986; A.A.G. Peters, 'Law as Critical Discussion', in G. Teubner (ed.), *Dilemmas of Law in the Welfare State*, Berlin, De Gruyter, 1986, pp. 250-279. Cf. Nonet and Selznick, *Law and Society in Transition*, p. 81: 'When Fuller underscores the centrality of purpose in the legal enterprise or when Dworkin and Hughes look to principle and policy as foundations of legal reasoning, they express the modern aspiration for a legal order that is effective in dealing with change.'

<sup>9</sup> That abstract ideals need not always be the best possible guide, especially not when they are cut loose from their basis in legal and empirical reality, is nicely illustrated by Peter Blok's contribution to this volume.

issues. But the resources to develop new ideas which may help to deal with these new cases and issues are to be found in ideals. Ideals are, of course, not the only resource – imaginative thinking may, for example, also be inspired by moral theories or even by literature and art and may borrow from other legal systems.<sup>10</sup> But because ideals – and the connected principles and purposes – not only have a surplus of meaning, but (in any case the legal ideals I discuss here) are also part of the law itself and thus share its authority, they are the first resource to turn to when we need internal change.

These ideals may sometimes be codified, directly or indirectly but never completely. The ideals of legality, legal certainty or justice themselves are not codified in Dutch law, but some more specific implications in the form of the principle of legality (Article 1 Dutch Penal Code) and the principle of equality (Article 1 Dutch Constitution) have been laid down. Even if these slightly more specific principles are codified, it does not mean that their meaning is unambiguous and uncontroversial. On the contrary, these principles are essentially contested, and their interpretation is open to development. This is because their meaning can only be determined in the light of both the context and the underlying ideals with their surplus of meaning. A good example of the way in which the codification of ideals and principles may give rise to a continuous evolution of positive law can be found in the European Convention of Human Rights, discussed in the Introduction to this volume.

In the product model, ideals (and principles and purposes) thus provide a source for change in the legal doctrine.<sup>11</sup> When the provisional equilibrium of legal doctrine is disturbed by new problematic cases or more general issues, they may offer guidance and orientation for revision of the doctrine. However, because they do not offer clear and unambiguous answers and always need to be interpreted, when we do appeal to ideals we are forced to leave the safety and certainty of established legal doctrine and enter a practice of normative argument about

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<sup>10</sup> For the influence of ethical analysis on health law (and vice versa), see my 'Bioethics and Law: A Developmental Perspective', *Bioethics* (1997), 91-114; for inspiration by literature, see Martha Nussbaum, *Poetic Justice: The Literary Imagination and the Public Life*, Boston, Beacon Press, 1995; for influences by other legal systems, see Watson, *Evolution of Law*.

<sup>11</sup> I merely identify the potential for change in ideals in general terms here. The questions when and why participants in the legal practice will indeed appeal to ideals, to which ideals an appeal is made and whether this appeal to ideals is successful, cannot yet be discussed in such general terms because there are too many relevant variables. Some of the case studies in this volume shed light on these issues, but of course, they do not add up to a general theory yet.



the best possible solutions of the concrete cases or the legal approach to more general issues in the light of those ideals. To determine the implications of the general ideals and principles, to elaborate a revised legal doctrine and construct solutions to new cases, we have to participate in law as an argumentative practice.<sup>12</sup>

In discussions, ideals may provide a common frame of reference. They are a common starting point in a pluralist practice. They can be catalysts in promoting an open debate. Such a debate may lead to legal change, through judicial interpretation and legislative action, but also because it results in shifting interpretations by society or by specific sectors or professions. The surplus of meaning and the fact that they will never be completely realised even if they are at least partly realised in law, makes different interpretations possible of what the underlying ideals imply for the societal problems we are confronted with, and what would be the best way to realise them more fully.<sup>13</sup>

Ideals thus play a role in both models. In the product model, they are authoritative sources within the legal doctrine that provide inspiration and guidance for reconstructing the doctrine. In the practice model, they offer a frame of reference for discussion, reflection and action. They do not, however, only play a role in the separate models, but also in the continuous interaction between the two models in the social reality of law.

Once we appeal to them in order to provide answers for hard cases for which the present legal doctrine is inadequate, they promote a switch from the product to the practice model. We are forced to leave settled doctrine and reopen the debate about the construction of the doctrine, of law as a product. In fact, lawyers do this continuously when they apply statutes, construct contracts and wills, argue a case in court and so on. In all such cases, they participate in legal practices and reconstruct legal doctrine. However, the orientation towards ideals makes them do this more explicitly, because they bring a clear source of ambiguity and controversy into the practice which cannot be ignored. Whereas lawyers usually construct the doctrine and the various products based thereon as unambiguous and uncontroversial, as settled positive law, the appeal to ideals unsettles this and makes an open discussion about the content of the legal doctrine unavoidable. The openness of ideals leaves room for

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<sup>12</sup> Cf. Dworkin, *Law's Empire*, p. 14; Peters, 'Law as Critical Discussion'.

<sup>13</sup> We should beware of a simple instrumentalist view of the relation between these ideals and the means. For a good analysis of the dialectic relationship between means and ends, see Pauline Westerman, 'Means and Ends', in Willem J. Witteveen and Wibren van der Burg (eds.), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design*, Amsterdam, Amsterdam University Press, 1999, pp. 145-168.

multiple interpretations and these should be confronted in the discursive practices of law.<sup>14</sup>

When we participate in the various practices that creatively interpret, reconstruct and discuss the law, we cannot go on debating forever. It is essential that law also provides provisional closures. As Selznick has argued throughout his work, we cannot understand law unless we recognise the leading ideals of the practice. Among the leading ideals of law is legal certainty.<sup>15</sup> This ideal influences the practice of law. It reminds us that we cannot debate forever, and reorients us to law as a product. Law is most effective when it is clearly formulated, when there is a provisionally settled doctrine, or an authoritative judicial decision or a contract about our legal obligations. Only if we attempt to formulate rules and principles, law can help us orient our behaviour and offer solutions for concrete problematic cases. Therefore, we must try to reformulate the law, to reconstruct the doctrine, to make verdicts and contracts. There may be a continuous debate about the construction of the law, but this debate should also lead to provisional closures, by legislatures enacting a statute, by judges pronouncing a judgment and by legal scholars formulating a legal doctrine.

So, we switch continuously between the two models. The distinctively legal ideal of legal certainty forces us to reconstruct the legal doctrine and bring the debate to a provisional closure. On the other hand, the same ideals as well as other ideals open legal doctrine to internal criticism, and offer inspiration and guidance for revision. There is thus a dialectical relationship between the two models, which opens the way to legal change without destabilising the law completely. In this dialectical process, ideals provide a bridge between the two models. They force us to open and then again to provisionally close the legal doctrine, thus keeping the change within acceptable limits.

We may conclude that ideals promote the dynamics of law in various ways. First, they offer a potential for ideas, for new principles and practical solutions when the existing doctrine needs revision. Second, they force us to leave the certainty of legal doctrine and enter an explic-

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<sup>14</sup> Of course, sometimes the debate will end by an authoritative conclusion, e.g., by a judge, ignoring this pluralism, before the debate has really started.

<sup>15</sup> See Sanne Taekema, *The Concept of Ideals in Legal Theory*, The Hague, Kluwer Law International, 2003, pp. 158-166. Selznick suggests that there is only one master ideal in law, legality. Taekema, however, has argued convincingly in favour of a plurality of leading ideals or core ideals as well as a plurality of other ideals which are not distinctively legal. See G. Radbruch, *Rechtsphilosophie*, 8ste Aufl., Hrsg. von E. Wolf und H.-P. Schneider, Stuttgart, K.F. Koehler, 1973, for the suggestion that legal certainty is one of those ideals.

itly argumentative practice. Third, they provide a common frame of reference in the ensuing discussion. And finally, they stimulate us to reach at least provisional conclusions.

#### 4. The Debate between Natural Law and Legal Positivism

The distinction between the two models is helpful for a better understanding of the debate between natural law and legal positivism. This debate is quite confused; in fact, it is often not clear what exactly the debate is about. In its most general form, we can say that it is about the separation between law and morals. Positivists hold some version of the thesis that such a separation is possible, natural law theorists that it is not. However, there are many different versions of this thesis and its counterpart.<sup>16</sup> Taekema makes a distinction between the thesis that the concept of law is morally neutral and the thesis that the content of law need not necessarily meet certain demands.<sup>17</sup> If, for example, as external observers we define law as a system of rules that have been officially recognised by the sovereign, we use a positivist, morally neutral concept of law. If, as participants in judicial proceedings, we argue that a severely unjust statute that violates basic moral tenets is nevertheless valid law, we appeal to a positivist view of the content of law. I need not go into the details and merits of the various versions here, because my contention is a general one. The debate, and especially the numerous misunderstandings and the apparent futility of the attempts by parties in the debate to convince each other, can be better understood in terms of the two models.

If we hold a product model of law, it seems easy to construct the concept of law in such a way that the separation is true – in either of its versions. We may, for example, define law as the complete set of normative propositions that are valid because of some institutional test, or because they have been stated authoritatively by some specified sources. We may claim that both in the concept of law and in the content of law there is no necessary connection to morality. In such a concept of law and in such a view of the way in which the content of the law can be determined, positivism is true. However, it is only true by stipulation, by construction, because we have constructed law in a specific way first.<sup>18</sup> Only because the constructive element in law as a product is so often

<sup>16</sup> For a discussion, see David Lyons, *Moral Aspects of Legal Theory*, Cambridge, Cambridge University Press, 1993, pp. 70 f.; Van der Burg, 'Two Models'; Taekema, *Concept of Ideals*, ch. 8.

<sup>17</sup> Taekema, *Concept of Ideals*, pp. 176-177.

<sup>18</sup> Dworkin, *Taking Rights Seriously*, p. 47.

neglected and because we act as if law is an objective social fact that can be found in social reality, independent of the way in which we constructed this reality in the first place, may we believe otherwise. Positivists often argue as if their thesis is a general truth corroborated by the facts of life, but this is an illusion. The separation of law and morals only exists in the eye of the beholder, who ignores that law is the product of our construction.

Still, this is not the death blow to legal positivism. Recognising that it is only the result of our human construction need not invalidate it. It can still be the best possible construction. And orthodox legal positivism has some obvious advantages, such as simplicity and offering a high degree of legal certainty (and thus, indirectly, freedom).<sup>19</sup>

On the other side of the debate, natural law theorists criticise the separation thesis.<sup>20</sup> In terms of the product model, they claim, first, that there is some objective morality and, second, that there is some necessary connection between objective moral truths and law. Both of these theses are problematic but need not be indefensible. The idea that there is some objective morality, a moral natural law, may be less popular than it used to be, but the project is, especially in some weaker forms, certainly not completely abandoned. Although I do not believe this project can be successful, I will focus on the strengths and flaws of the second thesis.

Just like in the case of positivism, we can easily construct our concept of law and our idea of how to determine the contents of law in such a way that the second thesis is true by stipulation. If we want to stipulate that some officially declared rules may only be considered law if they have some minimal content of moral natural law, ours is an easy victory if we henceforth conclude that there is some necessary connection between law and morality. In fact, most modern legal systems have partly included this as a criterion of the content of law, by the acceptance of human rights treaties and human rights clauses in their constitutions. But again, this is too easy a victory for natural law, as it wins only by stipulation.

It seems, therefore, that both parties can easily defend their positions by holding on to their implicit stipulations and then accuse the other of not meeting the criteria stipulated. The way out of this deadlock is, I

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<sup>19</sup> For a similar point see Dworkin's reply to 'Soper-Lyons positivism' in which he states that this type of positivism loses the traditional advantages claimed by positivism; Dworkin, *Taking Rights Seriously*, pp. 346-349.

<sup>20</sup> With 'natural law' I refer to the classical natural law thinkers and modern authors such as Finnis, not to authors such as Dworkin, Radbruch, Selznick or Fuller.

suggest, to leave the product model. We should accept that the concept of law and the conception of how to determine its content are constructed ideas, constructed in the practice that we call law in the more general sense and in the more restricted practice of legal scholarship. As long as we restrict ourselves to the model of law as a product without acknowledging its constructive character, the debate will never be won or lost, as both parties can continue to defend their views successfully. In order to go beyond this stalemate, we need to enter the field of legal practice, and acknowledge the element of construction both in the law itself and in our theories of law.

We should therefore try to rephrase the debate between natural law and legal positivism in constructivist terms. How are we going to decide which party has the better argument? I suggest we should choose that position which fits best with what we do in legal practice and which is also the best defensible one from a philosophical point of view.<sup>21</sup>

If we look at law as a practice, the conclusion can only be that both sides fail. Positivism fails, as both Fuller and Dworkin have convincingly argued, because law as a practice cannot be separated from morality. I take the critical edge of both Fuller and Dworkin to be that they focus on law as a practice rather than on law as a product. Dworkin's main point is that law is an interpretative and argumentative practice, and that in this practice we cannot separate moral and political arguments. (In fact, Dworkin focuses only on one legal practice, that of adjudication, but a similar point may be made with regard to various other legal practices, such as legal scholarship and implicit law.) Fuller, focusing on law-making, regards law as the enterprise of subjecting human conduct to the governance of rules, and holds that if we want to do this successfully, we need to respect the internal morality of law. These two theses can be generalised to conclude that in legal practice a full separation of law and its internal morality is impossible. In general practices where the legal is merely a dimension of interaction, an even stronger point can be made, namely that the moral and legal dimensions are intertwined. In the implicit understandings of our contractual obligations, the meaning of contractual terms and legal rules regulating them will usually be infused with moral notions of fairness and equity.

However, this failure of positivism in the light of the facts does not imply that natural law wins. In law as a practice, we aim at the best

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<sup>21</sup> Cf. Dworkin's criteria of fit and political morality for acceptance of a legal theory; see *Matter of Principle*, p. 143. Although he develops these criteria for the question whether we should accept a theory as an interpretation of the law of a certain jurisdiction at a certain time, similar criteria may also be used for the question whether we should accept a theory as an interpretation of the phenomenon of law in general.

political morality, but we also know that this aim can never be fully achieved. Even if we could uphold the ontological claim that there is an objective morality, there is still the unsurmountable problem of how to know it. Pervasive moral pluralism is a fact of life in our modern societies. The core of truth in natural law is that a legal practice is inherently connected with morality, with underlying values and normative ideas about what the law should be. Law has a partly moral character. But this does not imply that this moral character is connected with some objective morality. It does not even imply that it is connected with one right answer. We should aim at the best possible answer, but a realistic analysis of our practices shows that there are usually strong conflicts between the values at stake and their interpretations. Moreover, even if Dworkin is right in arguing that each individual participant aims at the best possible answer, this does not imply that the practice as such also aims at the best possible answer. Pluralism in the legal practice is so pervasive and deep that the best a practice can hope for is a plurality of legitimate answers from which may be chosen in many legitimate ways, both by judges and by other participants in the practice.<sup>22</sup>

The conclusion is that the debate between legal positivism and natural law is a debate within the context of law as a product, in which both sides defend positions which at least *prima facie* may seem defensible within that context as long as one makes the correct stipulations. However, it is mainly a non-debate because – at least when entering the discussion – both parties tend to ignore the constructive element and present it as a debate about what the law is rather than as a debate about how it can best be constructed.

If we reconstruct the two views as competing claims about the best possible construction of law, both prove to have fatal flaws. Both theories have one weakness in common: they cannot adequately cope with legal change. Roger Cotterrell presents this as a criticism of positivism, but it can equally be brought forward against natural law theories.<sup>23</sup> This weakness is the result of a one-sided focus on the product model that is characteristic of (at least the orthodox versions of) both theories. Moreover, legal positivism is unable to do justice to the idea that our legal practice is inherently connected with morality in various ways.<sup>24</sup> Natural

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<sup>22</sup> See also Taekema, *Concept of Ideals*, pp. 189-190; Jeremy Waldron, *Law and Disagreement*, Oxford, Clarendon Press, 1999, pp. 164-187.

<sup>23</sup> Cf. Roger Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*, London and Edinburgh, Butterworths, 1989, p. 127.

<sup>24</sup> Except for forms of soft positivism or inclusive positivism. However, these versions have flaws of their own into which I cannot go here. See Taekema, *Concept of Ideals*, pp. 188-189, for the argument that these positions are internally inconsistent and

law has two flaws connected with its two central theses. It has proven difficult, if not impossible, to establish convincing arguments in favour of an objective ethical theory – just like the law, our morality is a product of our own construction.<sup>25</sup> As a consequence, there are no convincing arguments about the necessary objective moral basis of the law. Even if this philosophical problem of establishing an objective ethical theory could be tackled, an empirical problem would still remain: it does not do justice to the fact of pluralism. Our legal practice is partly moral in character, yet this morality is not connected with one right answer or with some objective morality, but rather with a plurality of moralities. Natural law seems unaware of the essentially contested character of the moral dimension of our legal practice.

The distinction between the two models of law can thus clarify the debate between natural law and legal positivism.<sup>26</sup> It illuminates both why the positions can be successfully defended in the context of the product model and why they fall short in the practice model. This leaves us with the question how to construct a third alternative, a theory of law which can do justice to both models. In order to construct such an alternative, we should return to the role of ideals in law.

## 5. An Interactionist Perspective

Partly in line with Ronald Dworkin's view, I have argued that in as far as ideals and principles are part of legal doctrine, they force us to question settled legal doctrine and open it for normative discussion. In such a normative discussion, political, moral and legal arguments cannot

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Dworkin, *Taking Rights Seriously*, pp. 345-350, for the argument that they have lost most of the attractiveness of orthodox positivism.

<sup>25</sup> See Taekema, *Concept of Ideals*, p. 189. This criticism does not imply a relativist position, but is consistent with a pragmatist view. See my 'Dynamic Ethics', *Journal of Value Inquiry* 37 (2003), 13-34.

<sup>26</sup> I have greatly simplified the positions of natural law and legal positivism. Every sophisticated legal theory has tried to combine insights from both models. Even if the focus of both natural law and legal positivism is on the product model, they have also tried to integrate elements from the practice model. For example, H.L.A. Hart called his own theory a 'practice theory of law' (in the Postscript to *The Concept of Law*, Oxford, Clarendon Press, 1994, p. 255); his theory starts with the practice model, by analysing rules in terms of rule-following behaviour. However, when it comes to defending his views against those of Fuller or Dworkin, the focus is on rules as linguistic expressions, as normative propositions needing interpretation. For a more extensive analysis of Hart's position and that of other authors in the debate, see my 'Two Models'.

be separated. Ronald Dworkin even speaks of a fusion of moral and legal theory, at least in the context of constitutional issues.<sup>27</sup>

I believe this is overstating the point. There certainly is no complete merger of law and morals. (In fact, Dworkin himself does not support such a view either.) That we cannot separate them does not mean that they cannot be distinguished. That the construction of legal doctrine is a continuous process in which political and moral arguments are integrated into the legal argument does not mean that there is no distinctively legal point of view, distinctively legal practices or distinctively legal doctrine.

In modern Western societies, law has relative autonomy. It is not fully separate from morality and society, neither is it completely integrated in them. This relative autonomy has its primary basis in the institutional dimension of law; an additional basis may be found at the level of ideals. Law involves a connected set of subpractices such as legislation and adjudication. Each of these subpractices has relative autonomy as a result of its specific function, its procedural and substantive norms which shield it from being completely submerged in the larger social context and the larger moral and political arguments. Adjudication, for example, may be open to moral arguments, but this certainly does not lead to a complete fusion of moral and legal arguments. On the contrary, in most Western countries, the institution is highly, though not completely shielded from a direct influence by political and moral beliefs that may dominate society. Even the legislative process does not allow a complete fusion of legal and political arguments, as the discretionary space of the political institutions is regulated by constitutional constraints, international law, by consistency with the system of existing legislation or, in more general terms, by the rule of law. So the institutional setting of legal practices prevents a complete fusion of law, politics and morality, even if it allows substantial intertwining.

Perhaps we could imagine a legal practice in which the secondary rules exclude all reference to morality or politics and in which legal obligations are determined purely by a mechanistic appeal to formal rules or (when they do not apply) by procedures such as pure chance. Such a practice might approximate the ideal type of a complete separation between law and morality. It is, however, obvious that such practices are uncommon in modern societies. As soon as legal practices allow a normative discussion about the interpretation of rules and concepts in order to make them fit complex situations, a strict separation

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<sup>27</sup> Cf. Dworkin, *Taking Rights Seriously*, p. 149.



between law and morality is impossible. That is, in my view, the central insight we may learn from Ronald Dworkin.<sup>28</sup> So the reality of those practices, especially of the official law-making institutions, is that of relative autonomy.<sup>29</sup> Moreover, legal practices are rarely separate from society in another way: their aim is usually to regulate non-legal practices, such as those of medicine or trade and, as a consequence, they have to be open to those practices and to the normative dimensions inherent in those dimensions.<sup>30</sup>

This relative autonomy is reflected in legal doctrine. Dworkin is right in arguing that we should not regard legal doctrine as something out there, as a 'brooding omnipresence in the sky', as 'existing law'; it is the product of our construction.<sup>31</sup> Nevertheless, in our construction we distinguish between legal doctrine and moral or political views – even if we accept the anti-positivist truth that a strict separation is not possible. The legal doctrine in most modern societies includes many normative standards with an openness to societal views such as fairness and equity, it includes principles and ideals with an openness to moral theory, and we may have to interpret statutes in the light of the political purposes behind them. However, this openness is not complete; a distinctively legal perspective still remains from which we should try to construct a legal doctrine.

Both the autonomy of law and its relative character may also be understood in terms of ideals.<sup>32</sup> On the one hand, ideals and principles may form a bridge between the moral, legal and political discourses, because many ideals and principles are common to these discourses. If we could speak of a fusion of moral, legal and political theory, it would be expected at this level. Nevertheless, ideals are open to interpretation and get part of their meaning from the network of meanings in which they are embedded: the other ideals with which they are connected, the more specific rules and principles which can be regarded as their implementations and the institutional context in which their meaning is con-

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<sup>28</sup> Other authors have made similar points before. One of the reasons why Ronald Dworkin did not cause much debate in Dutch legal philosophy is that the still highly influential Dutch jurist Scholten already developed a similar theory of judicial interpretation in 1931. See Paul Scholten, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht: Algemeen deel*, Zwolle, W.E.J. Tjeenk Willink, 1974, orig. 1931.

<sup>29</sup> For a more elaborate discussion see my 'Two Models', pp. 75 f.

<sup>30</sup> See Taekema, *Concept of Ideals*, pp. 167-168, for a similar argument.

<sup>31</sup> Dworkin, *Taking Rights Seriously*, pp. 293 and 344.

<sup>32</sup> The following analysis is based on Taekema, *Concept of Ideals*, pp. 167-173.

structured.<sup>33</sup> This means that ideals of solidarity or privacy get a specific colouring depending on the context – legal, political or moral – in which they are discussed. There may be one common concept, but the conceptions differ. Although it is especially through ideals and principles that the legal doctrine is connected with moral and political argument, and although this is mainly because the same ideals are used in each of these contexts, the meaning of the ideals in each of the contexts is not identical. In this way, the ideals common to law, morals and politics embody a strong tendency to open up law to politics and morals, even if they allow some autonomy of law.

On the other hand, the autonomy of law is supported by distinctively legal ideals. Philip Selznick's idea of master ideals is illuminating here. According to Selznick, every practice is oriented towards some master ideal, which accounts for its distinctive character.<sup>34</sup> In this way, law is oriented towards the master ideal of legality, which Selznick interprets as the progressive reduction of arbitrariness. Sanne Taekema argues convincingly that Selznick's idea of one and only one master ideal for each practice is not adequate and does not do justice to the complex character of practices.<sup>35</sup> Nevertheless, it is possible to distinguish some ideals which have a more important role for specific practices. We may call them the core values or central ideals of that practice. Legality (including legal certainty) and justice are such core values for law, and in this sense may be regarded as distinctively legal ideals. They are not exclusive to law (justice is the first virtue of social institutions in general, according to Rawls), nor are they the only ideals of law. Yet, they have a special role in the practice of law, just as the democratic ideal has a special role in the context of political institutions without being meaningless in other institutions such as universities or companies. Apart from these ideals which are common to all legal subpractices, there may also be more specific legal ideals for specific subpractices or subfields of law. Democracy and human rights are central to constitutional law, and good governance to administrative law. The ideal of due process is just as central to the practice of adjudication as the ideal of intellectual integrity is central to legal scholarship.

The orientation towards distinctively legal ideals is another ground for the relative autonomy of law. They are not exclusive to law, nor is

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<sup>33</sup> Cf. Anton Vedder, 'Waarden en het web van zin en betekenis', in Wibren van der Burg and Frans W.A. Brom (eds.), *Over idealen: Het belang van idealen in recht, moraal en politiek*, Deventer, W.E.J. Tjeenk Willink, 1998, pp. 39-54.

<sup>34</sup> Cf. Philip Selznick, 'Sociology and Natural Law', *Natural Law Forum* 6 (1961), 84-108.

<sup>35</sup> Taekema, *Concept of Ideals*, pp. 162-166.

their meaning only determined in legal discourse. Yet, the prime importance of these ideals is distinctive for law and is one reason why we may discern relative autonomy for the law.<sup>36</sup>

This relative autonomy of the law is the central thesis of a third theory of law, distinct from natural law and legal positivism. It is distinct from legal positivism because it holds that in law as a practice law and morality cannot be separated, whereas in law as a product a separation may be a choice we make in our construction but is not an essential characteristic of law as such. It is distinct from natural law because it denies that there is any inherent moral quality in law as a practice, whereas in law as a product we can stipulate that law must meet certain moral standards, but this would make the necessary connection between law and morality merely true by stipulation.

This third theory may be named interactionist, because interaction is central to it in various respects. It regards law both as a practice of human interaction (and as a dimension of practices) and as a product of human interaction.<sup>37</sup> Moreover, it accepts that law, with its relative autonomy, can only exist in a continuing process of interaction with morality and politics, and with society at large. Law cannot be separated from morality, nor can it be completely fused with morality. The content of the law cannot be determined without any appeal to moral or political arguments, yet it maintains relative autonomy as regards those arguments by only selectively incorporating them in the law and by transforming them during the process.

The claim of a third theory of law is, of course, not new. Many legal theorists have claimed to provide such a third theory of law or have been classified by others as doing so. It is helpful to analyse why their attempts to construct a coherent third theory of law have failed, and especially why these have often led to such obvious inconsistencies or vagueness. Both Fuller and Dworkin, to mention only two authors whose work has been characterised as a third theory of law (and whose work obviously is a source of inspiration for the approach I propose), have often been accused, and rightly so, that their theories contain many inconsistencies and unsolved ambiguities. Whereas the two traditional parties, natural law and legal positivism, can, in different versions, be

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<sup>36</sup> Taekema, *Concept of Ideals*, pp. 203-204.

<sup>37</sup> Interactionism in a minimal sense might be interpreted as the idea that law is a practice of human interaction. I defend a richer form of interactionism here, because I add that it may also be regarded as the product of that interaction, and that we cannot separate practice and product.

presented as relatively consistent and defensible theories, this has proven to be much more problematic with third theories of law.<sup>38</sup>

My suggestion is that the reason why all these third theories fail is that they try to do justice to the valuable insights we can gain by combining the two models, yet fail to recognise their incommensurability. The example of Dworkin is illustrative. In *Taking Rights Seriously*, he developed convincing arguments against various versions of legal positivism. In this early work, he switched between two lines of argument. One was internal to the product model, arguing that law was more than a body of rules, and that the inclusion of principles in legal doctrine, with their open and contested character, made a simple pedigree test impossible. The other was based on the idea of law as an argumentative practice, in which we should explicitly recognise the constructive character of legal doctrine. As his many critics were eager to point out, the combination of the two lines led to many inconsistencies and ambiguities. In subsequent books, especially *Law's Empire*, Dworkin tried to respond to these critics and elaborate a coherent theory of law. However, what he won in consistency in this book, he lost in convincingness, because he was forced to skip insights which did not fit into this one coherent theory, yet were initially crucial to his critical project.

If my suggestion is correct that we need both models but that they are incommensurable, we have to accept that one coherent theory is impossible. We are bound to end up with theories in which inconsistencies and ambiguities are unavoidable. Of course, this idea seems, at least at first sight, unacceptable to most legal scholars, especially in as far as they have undergone the influence of analytical philosophy. Weeding out inconsistencies and ambiguities seems one of the central methodological requirements of good scholarship. Openly accepting them seems like declaring the breakdown of academic research.

Therefore it is quite understandable that, in the end, almost every author aiming at a third theory of law presented his theory in such a way that it was either easily reducible to one of the traditional alternatives or easily criticisable by both parties as not doing justice to reality. If they wanted to be consistent, they paid the price of not doing justice to the complexities of reality. If they wanted to do justice to reality, they ended up with a theory full of fatal inconsistencies and ambiguities or with a theory which only consisted in a programme and some loosely connected fragments. It seems to me that Ronald Dworkin's development

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<sup>38</sup> The internal inconsistency of inclusive positivism, an attempt to integrate some insights of anti-positivist authors such as Dworkin into positivism, is another example. See note 24 above.

took the first road towards consistency, ending up with a theory that fails to address legal reality adequately, whereas Lon Fuller took the second road of trying to do justice to the complexity of reality, ending up with an inchoate theory with many ambiguities.

Is there a way out for proponents of a third theory? I think that the only possibility is to accept the incommensurability of the two models and defend this fact as such. Within each of the models, separate theories can be developed as well as possible, but we must always openly acknowledge that, then, each of the two theories has fatal problems when taken in isolation. Only continuously switching between the two models, with all the inconsistencies and ambiguities resulting from such switching, may give us the best possible insight in the phenomenon of law. In order to understand this continuous switching between the two models, we need to focus our attention on the role ideals play as a catalyst in this interaction. The focus on ideals also opens a fresh perspective on the relation between law and morality. This leads to the thesis of the relative autonomy of law, which justifies the claim that the interactionist theory can be regarded neither as natural law nor as legal positivism and thus constitutes a third theory.

The interactionist theory does not focus on one model of law, but continually switches between two models. It is a combined theory, in which two theories continuously interact, without ever reaching the ideal of one grand theory. Intellectually, this may not be very satisfying, particularly not for authors (including myself) with a strong background in analytical philosophy. We will never be able to reach one complete and internally coherent theory of law. But this is the price we have to pay for doing justice to the complexity of reality.

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