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WIBREN VAN DER BURG

THE EXPRESSIVE AND COMMUNICATIVE FUNCTIONS OF LAW, ESPECIALLY WITH REGARD TO MORAL ISSUES ⋆

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ABSTRACT. In this article, I argue that law has two often neglected functions: the expressive and the communicative functions. They are especially important for legislation on moral issues, such as biomedical ethics and anti-discrimination law. The communicative function of law is a complex one: law may create a normative framework, a vocabulary to structure normative discussions, as well as institutions and procedures that promote further discussion. The expressive function of law is at stake when it expresses which fundamental standards, which values are regarded as important. The recognition of these functions is not only important for descriptive purposes; it is also fruitful for normative theory.

I. INTRODUCTION

In the Netherlands, like in many other Western countries, there is a growing number of issues on the legislative agenda with an explicit moral dimension. Many of these have to do with biomedical ethics. What should the law say with respect to euthanasia? Should we allow experiments with human embryos and promote the development of technologies that can transform early embryos into tissue banks, e.g., for brain tissue to be implanted into patients with Parkinson's disease? Should we permit the genetic modification of corn to make it resistant to pesticides? Should we allow hunting, fishing with live bait, animal experiments or the genetic modification of sheep in order to make them produce certain blood factors?

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Moral controversies on the legislative agenda are, however, not restricted to bioethical issues. The rise of modern information technology raises various questions with respect to privacy and freedom of speech. The development of a more pluralist, multicultural society confronts us with many problems as well, e.g., whether we should tolerate religious attitudes and practices that discriminate against women. Another issue is the struggle for equal rights for gays and lesbians; the most recent discussion in Dutch politics focuses on the question whether we should open up civil marriage to same-sex couples.

This list of examples can very easily be extended. Not everywhere in the Western world are these same issues on the legislative agenda; in other countries there are usually other moral issues at the centre of public debate, such as the death penalty or affirmative action.

These issues seem to have more in common than merely the fact that their moral dimension is more explicit than in other issues. They arouse much public attention, often accompanied with strong emotional feelings, and they are highly controversial. The controversies usually cut across party lines and are regarded as 'free' questions, on which every member of parliament is free to vote according to his or her own conscience. Moreover, it is often quite difficult to make good and adequate laws which really cover all relevant aspects of the issue and which are effectively supported by a majority in parliament, in society at large, and in the professional fields or practices involved. Consequently, these legislative processes often take substantially longer than those concerning issues with a financial or economic character.

Many of these issues involve a curious, almost paradoxical situation. On the one hand, there is a strong feeling that 'there should be a law' against certain practices; on the other hand, there are much vaguer views on the precise content of the law. Embryo regulation is an example. Almost everyone feels strongly that there should be a law which regulates experiments with embryos and which prohibits at least certain types of experiments, but there is no equally strong consensus on the limits to and the criteria for what is to be allowed and what is not. Apart from the more extreme religious views, most

opinions on the latter do not rest on very principled positions, and they often change substantially during the public debate.

This may seem to suggest that, after all, the law does not really have any business here. If we cannot explain in a principled way why we want a law and what it should contain, perhaps the conclusion should be that we had better leave it to the citizens to decide for themselves. However, this conclusion would be too hasty. It does not fit in very well with our strong intuitive feeling that there should be a law on many of these issues, and that a civilised society should have some form of legal control of euthanasia, animal and embryo experiments, and so on. So we must find another approach to the business of the law in issues like these. This leads to the central question of this paper: How should the law, and especially legislation, deal with these issues?

I will suggest that we develop a more sophisticated view of the various ways in which law can play a role in society. Many members of the public – but also many legislators and lawyers – still seem to have a quite simple view of law: legislation regulates human behaviour by making legal rules, specific action guides, which emanate from the authority of the legislature. Some naive version of a command theory – even if explicitly denounced by sophisticated legal theorists – often seems to be at the background: by officially declaring rules of behaviour, the legislature tells citizens what to do or not to do. In connection with this, there is a focus on the traditional protective and instrumental functions of law, which stress the role of law as protecting individuals and as an instrument for social policies, respectively.

This view is much too simple, even if it still largely suffices for many areas of the law. However, especially in fields where moral dimensions are more explicit, and where citizens' voluntary cooperation is necessary, it becomes inadequate. Therefore, we need to understand other ways in which the law can function in society in order to be able to deal with legislation on moral issues. This sociological understanding may help us to formulate new approaches to the way in which we should deal with those issues.

II. LAW AS PROTECTION AND AS AN INSTRUMENT

The distinction between the protective and the instrumental functions of the law is a standard one in legal theory (even though there are different interpretations of both functions).[1] On the one hand, the law is a protective shield for individual citizens, both against fellow-citizens and against the state; on the other hand, the law is an instrument for social policies. The basic idea can be found in many legal theories, for example, in Ronald Dworkin's distinction between principle and policy.[2]

The protective function can simply be formulated as follows: the law protects individual citizens. The central concept is that of rights – the law gives a citizen certain rights to protect himself and his interests. We need not only think here of the most fundamental constitutional rights, but also, at a more concrete level, of patients' rights or rights to damages. Some authors, such as Jürgen Habermas and Ronald Dworkin, focus strongly on the law as a system of (subjective) rights, thus overemphasising the protective function and neglecting other functions.[3]

The instrumental function is more strongly connected with public goals and interests. The law can serve as an instrument for realising certain policies. Examples of public goals and interests for which law has frequently been used are decent housing for all, a fair and efficient distribution of the limited resources in health care, a good system of education and a clean environment. In the decades after World War II, there has been a major increase in instrumental law in such fields.

Both functions are connected with the idea that the law regulates through strict rules. Rights must be protected by clear rules which imply obligations of third parties towards the persons holding

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[1] W.J. Witteveen, P. van Seters and G. van Roermund (1991), 'Wat maakt de wet symbolisch?' in: *id*. (eds.), *Wat maakt de wet symbolisch?* Zwolle: W.E.J. Tjeenk Willink, pp. 1–13, esp. at pp. 4–5, and R. Foqué and A.C. 't Hart (1990), *Instrumentaliteit en rechtsbescherming. Grondslagen van een strafrechtelijke waardendiscussie*, Arnhem/Antwerpen: Gouda Quint/Kluwer.

[2] R. Dworkin (1978), *Taking Rights Seriously*, Cambridge, MA: Harvard University Press, p. 22.

[3] R. Dworkin (1978); J. Habermas (1992), *Faktizität und Geltung*, Frankfurt am Main: Suhrkamp.

the rights. Policy goals are served by formulating detailed rules to which, for example, schools or health-care institutions should conform. The basic presupposition is that the law states clear rules which serve as direct action guides for its citizens and which are, if necessary, enforced by the state's coercive apparatus.

In recent years, this view of law has increasingly been criticised. Political scientists have called attention to the 'regulatory crisis', the diminishing effect of legal rules in regulating and controlling society.[4] Somehow, the law does not always succeed in really influencing people's behaviour, and if it does, it often has adverse side-effects. Usually, this criticism has been directed against instrumental law, but it can also be levelled at legislation aiming to protect the rights of individuals. In health law, for example, it has been argued that the protection of patients' rights has gone too far and negatively influences health-care practice.

Legislation on moral issues is particularly vulnerable to this type of criticism. As a result of individualisation processes throughout the Western world, the moral authority of the law has diminished. Autonomous citizens tend to base their moral views less on traditional views as brought forward by authorities such as churches or legislators; they increasingly decide for themselves which morality they wish to follow. Thus, they will more and more decide for themselves whether or not to obey the law, especially in those areas where the law deals with moral controversies. If abortion is illegal but doctors and women do not agree with the prohibition, they will usually find ways to circumvent the law. Moreover, many of the morally controversial activities cannot be easily controlled, either because they take place in private surroundings (sexuality, drugs use),[5] or because they are easily shielded from state intervention by medical professional secrecy (abortion, euthanasia[6] or medical experiments) or by our global society, which makes evasion to other

[4] Cf. various contributions to G. Teubner (ed.) (1986), *Dilemmas of Law in the Welfare State*, Berlin/New York: De Gruyter.

[5] Cf. J.H. Skolnick (1968), 'Coercion to Virtue', *Southern California Law Review* 41, pp. 588–641.

[6] For a good overview of the problems of effective control of medical practice with respect to euthanasia, see J. Griffiths, A. Bood and H. Weyers (1998), *Euthanasia and Law in the Netherlands*, Amsterdam: Amsterdam University Press. Analogous analyses might be made with respect to other medical actions.

countries with less strict regulation relatively easy (experimental research, abortion, biotechnology).

I do not want to elaborate on these well-known problems about the effectiveness of the law. I think there are another two substantive reasons why we should look for other functions of legislation. The focus on the protective and instrumental functions is simply not very helpful in trying to understand what the law's business is on moral issues. These issues can be better dealt with by means of other categories than those of rights and interests, and with other legal standards than rules.

1. We can talk about rights of individuals that the law should protect or the policies it should serve in a fairly neutral, non-committal way. The individuals and policies are in a sense external, independent of ourselves; their claims and interests can be discussed in an 'objective' way. Legislation on moral issues usually does not have such a non-committal character. It tells us something about ourselves, about us as a society and about us as members of that society. Our legislation on euthanasia expresses how we, as a society, look at human life. Legislation can express who we are, what our identity is and which values we hold dear. It may symbolise our identity, both as a collective and as the members of that collective.

This expressive dimension is also connected with legislation which serves the protection of individuals, but it cannot be reduced to this protection. The Dutch Constitution, for example, expresses that we are a democratic society which respects human rights.[7] The constitutional rights are important primarily, of course, because they guarantee the protection of individuals. Even so, the constitutional

[7] Cf. P. Noll (1972), 'Gründe für die soziale Unwirksamkeit von Gesetzen', in: M. Rehbinder and H. Schelski (eds.), *Jahrbuch für Rechtssoziologie und Rechtstheorie, Bd. 3: Zur Effektivität des Rechts*, Düsseldorf: Bertelsmann, pp. 259–269, at p. 262, who rightly remarks that constitutional clauses often have this symbolic function, as a "der Selbstdarstellung dienende Behauptung" but he regards it as a "reinen Symbolcharakter ohne Wirkleichheitsbezug". Below, I will argue that a symbolic function need not imply that a legal clause is ineffective or has no connection with reality. Cf. also W.J. Wittteveen (1991), 'De jacht op de wet', in: W.J. Witteveen et al. (eds.) (1991), pp. 115–136, esp. 120–121.

provisions also have a different dimension: they symbolise that the Netherlands is a civilised society.

In human-rights legislation, this expressive dimension is, usually, not the primary dimension (though in some human-rights treaties it may be relatively more important). Even if this expressive function is secondary or even tertiary, it should still not be ignored. In many of the moral issues now on the legislative agenda, however, this expressive dimension is relatively more important. For example, many of the problems about lifestyle diversity (alternative sexual behaviour, the use of drugs) are dealt with in the Netherlands on the basis of our self-image as a tolerant society.[8] Legislation on these issues can reinforce this identity but also change it, for example, when laws are introduced that are clearly more restrictive.

This means that we also need other concepts to analyse what the law can do. It is not only a matter of interests or rights, but also of values. It is not surprising that Ronald Dworkin, the most enthusiastic supporter of rights in recent legal theory, did not appeal to rights when he wrote a book on bioethical issues.[9] He even made it explicitly clear that a rights framework is insufficiently sensitive to all moral dimensions of those problems. According to Dworkin, abortion should not be reduced to a conflict between the right to free choice of the pregnant woman and the right to life of the unborn child. We should rather analyse which more fundamental values are at stake. We, therefore, need values as the central category rather than rights and interests.[10] I think a value perspective may also help in analysing issues concerning animals or concerning the environment. It seems quite an unproductive course to me to argue about the rights of animals or even the rights of trees and ecosystems. Analyses in terms of interests will only be of some use in dealing with higher animals, and even then it is inadequate to express those

[8] Cf. W. van der Burg (1998), 'Beliefs, Persons and Practices: Beyond Tolerance', *Ethical Theory and Moral Practice* 1, pp. 227–254.

[9] R. Dworkin (1993), *Life's Dominion*, New York: Alfred A. Knopf.

[10] R. Dworkin (1993). I have elaborated the idea of how a value theory can offer fruitful perspectives for bioethical issues in W. van der Burg (1996), 'Legislation on Human Embryos: From Status Theories to Value Theories', *Archiv für Rechts- und Sozialphilosophie* 82, pp. 73–87.

moral intuitions which have so far found tentative expression in terms such as 'intrinsic value'.[11]

2. On many moral issues, we are far from reaching a consensus. The debates are characterised by strong pluralism and by still developing ideas. It is probable that, in twenty years time, we will have abandoned some of our now deeply held moral convictions. This is not only likely because our society changes very rapidly, but also because technology presents us continuously with new possibilities we have never imagined, and thus with new moral issues and new perspectives on older issues. We are still trying to find out what exactly is at stake in many moral issues and how to deal with them. We do not know what we should protect or what policies to serve, let alone how we could achieve this.

This indeterminacy has various implications. As we are still in a process of reflection, it is impossible to present conclusive arguments about the rules to be laid down in the law. Nevertheless, we often cannot avoid to legislate now, even if we might think it wise to do so because this process of reflection will probably not come to an end soon. We have to make provisional legislation, knowing that we may think differently about it several years hence. Legislation should therefore be regarded as one phase in that moral-reflection process rather than as simply the codification of consensual moral norms or goals. Moreover, if the legislature has not made up its mind conclusively and will probably change its mind in the future on some points, it cannot simply expect its citizens to abide uncritically by its rules. Many citizens will not even obey such a law if they are not convinced themselves that the norms it contains are morally justified.

[11] R. Heeger (1997), 'Respect for Animal Integrity?', in: A. Nordgren (ed.), *Science, Ethics, Sustainability: The Responsibility of Science in Attaining Sustainable Development*, Uppsala: Acta Universitatis Upsaliensis (Studies in Bioethics and Research Ethics 2), pp. 243–252. Cf. also F.W.A. Brom (1997), *Onherstelbaar verbeterd. Biotechnologie bij dieren als een moreel probleem* (diss. Utrecht University), Assen: Van Gorcum, chs. 4 and 10.

III. SYMBOLIC LEGISLATION

A fresh start should be made. What then is the business of the law on moral issues, if it is not (or not only) to protect individuals or to serve as an instrument for public policies? To find an answer to this question, I think we should take a closer look at what is often referred to as symbolic legislation. This may seem surprising. Symbolic legislation has a bad reputation in the socio-legal literature, and not without reason. Yet the work of two authors, Vilhelm Aubert and Joseph Gusfield, who are the most strongly connected with this negative evaluation, also offers insights for a more positive approach.

One classic text is that of Vilhelm Aubert, who analysed the Norwegian statute on domestic help.[12] He showed that this law had two sides. The statute aimed to protect housemaids. However, it had hardly any practical effect. It was thus merely a symbolic law, enacted to appease the housemaids, but construed in such a way that it could not be effectively enforced.

The other classic study is that of Joseph Gusfield on the American Temperance Movement.[13] This movement may be regarded as a symbolic crusade by the traditionally dominant cultural group in the United States against relative newcomers, such as the Irish and Italian Catholics and the urban industrial classes. It was a battle about the character of the American society and about the status of the rural white Anglo-Saxon Protestants and their style of living. Prohibition (and especially the Eighteenth Amendment) expressed the dominance of their value system. Anti-alcohol legislation was not so much regarded as an instrument to eradicate completely the drinking of alcohol but rather as a symbolic affirmation of the value of the dominant subculture.

At first sight, both studies present a very negative view of symbolic legislation. It is nice legislation which is simply ineffective, or it is the result of a symbolic crusade by a conservative dominant group that feels threatened by social developments. Their

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[12] V. Aubert (1969), *Sociology of Law: Selected Readings*, Harmondsworth: Penguin.

[13] J.R. Gusfield (1976), *Symbolic Crusade: Status Politics and the American Temperance Movement*, Urbana: University of Illinois Press.

basic insights, however, can be the starting point for a much broader and positive view on the symbolic functions of legislation.

Aubert suggests that the law was ineffective for various reasons. Domestic work has a special character as a combination of private life and working life; the legal language used was incomprehensible to the general public and the rules were too complex; there was no effective control mechanism. This criticism partly seems to refer to the old model of law as a system of rules backed by sanctions, but there is also a different perspective on law to be found in Aubert's article. Two factors determining the effectiveness of the statute are whether it effectively informs domestic workers and housewives about the legal norms and whether it is the basis of further communication about those norms. Law can thus be regarded as a form of communication and as a basis for further personal communication within society.

We can learn from this case study that there are various ways in which the law influences social reality. The type of influence I will discuss focuses on the idea of communication. Law can communicate certain normative standards to society, and it can provide a substantive and procedural framework in which communication can take place on these standards and on the way in which responsible citizens or organisations should interpret them and live up to them. I will call this the communicative function of the law.

While Aubert's study is mostly known because of its analysis of the implementation process, Gusfield's book focuses primarily on the legislative process. Gusfield shows how the law may express certain value systems and may symbolise the choice for one perspective on the nation's identity. This expressive function of the law need not always be restricted to the controversial values of a dominant group. Legislation may also express values that have a broader basis in the self-image of a political community. In many countries, the Constitution symbolises the democratic character of a society and expresses the acceptance of democratic values; it is thus a positive and non-contested symbol of the nation's democratic identity.

We may therefore develop a more positive view on symbolic legislation. The symbolic function of law is, in my view, a combination of two distinct functions: the communicative and the expressive

functions. The communicative function of law is a complex one: law may create a normative framework, a vocabulary to structure normative discussion, as well as institutions and procedures that promote further discussion. The expressive function of law is at stake when it expresses which fundamental standards, which values are regarded as important (values which are often regarded as connected with the political community's identity).[14]

I will discuss these two functions separately, but they are strongly connected: because legislation expresses certain values and communicates them effectively, these values can be taken as a common point of reference in interpretation and communication processes. In my definition of the expressive and communicative functions, I try to be neutral with regard to evaluation. If a law expresses and effectively communicates common or shared values and identities, it may have what might be called a positive symbolic function. If however, it expresses controversial values and identities or ineffectively communicates certain standards, this law is a form of negative symbolic legislation (which in most sociological literature so far has simply been characterised as symbolic legislation as such).[15] Analysing legislation with both functions in mind therefore need not prejudge evaluation but, as I will argue below, it may be a useful instrument in such an evaluation.

IV. THE EXPRESSIVE FUNCTION OF LAW

A statute may express certain shared values which are connected with the identity of a political community. This is not typical of statutes. There are many other symbols that can have such an

[14] If both functions are predominant and the protective and instrumental functions are weak or absent, we could speak of symbolic legislation. However, I prefer to speak of symbolic function rather than of symbolic legislation, because the latter expression suggests that this is a distinct type of legislation.

[15] Though my analysis of symbolic functions of legislation in various ways resembles that of B. van Klink (1998), *De wet als symbool. Over wettelijke communicatie en de Wet gelijke behandeling van mannen en vrouwen bij de arbeid* (diss. Tilburg University), Zwolle: W.E.J. Tjeenk Willink (and has been inspired by his work), I prefer a more neutral vocabulary rather than, as Van Klink does, accept the traditional negative connotation of symbolic legislation.

expressive function. A text such as the Declaration of Independence or an institution such as the Dutch House of Orange may symbolise the independence of a nation and the values assumed to have been at the basis of the struggle for independence. The crucifix in schools in Bavaria presents another, more controversial, example.[16] A symbolic role may also be fulfilled by stories such as those of the Exodus or, in more recent times, those of Rosa Parks, who with her refusal to yield her bus seat to a white man became a symbol of the Civil Rights Movement in the USA.

Authoritative texts, such as the Constitution or formal legislation, are particularly effective symbols in expressing certain values. They have been laid down by authorities which are supposed to represent us, the political community. We know that they can be changed if there is sufficient political will, and their continued existence may symbolise the fact that the community continues to subscribe to them. As texts, they are usually carefully formulated and therefore express certain ideas and values more clearly than material symbols or stories would. In addition, they usually have an abstract and general style, and are therefore more directly connected with fundamental values than case law.[17]

Legal texts with a strong expressive function need not be connected with claims about objectivity or universality. Some texts may have directly universalistic aspirations, for example when they aim to express universal rights; the Universal Declaration of Human Rights is a case in point. Most texts acquire their expressive meaning because they are connected with a particular national identity and a particular national history. As a result of historic processes and further interpretation, most of these will gradually become connected to claims about universal values as well, while other texts may retain their particularistic outlook. Examples of the latter may be the constitution of an official religion or state church, or the official recognition of a national language. Examples of the former are more common and illustrate clearly that the claim to

[16] W. van der Burg and F.W.A. Brom (1999), 'Die Neutralität des Staates', in: K.P. Rippe (ed.), *Angewandte Ethik in der pluralistischen Gesellschaft*, Freiburg, CH: Freiburger Universitätsverlag, pp. 53–81.

[17] Though in certain jurisdictions, for example the US Federal System, the broad style and supreme authority of a Supreme Court may give its cases a similarly general meaning.

universality may be quite controversial. To many Dutch citizens, the constitutional ban on the death penalty is a symbol of civilisation: it expresses that the value of human life is sacred to us. To most US citizens, the existence of the death penalty is not inhumane at all – they think it expresses a tough stand on serious crime. The freedom to carry arms in the US is another example of a constitutional clause with high expressive meaning: it is a symbol for many Americans that the US is a free country, while it is not only uncivilised but even irrational in the eyes of many outsiders. As these examples show, historical embeddedness and strong emotional meaning make it very difficult to discuss openly which of these two positions is more justified.

The concept of values which is central to this expressive function of law needs some clarification. Values are both subjective and objective. They are in a sense relational, because they are connected with the attitude of a person or a community towards itself and towards something in (social) reality. Freedom and tolerance are values in the sense that they are both valued and valuable; they are valued by a national community and, at the same time, they are valuable as such. The fact that they are held as values by a national community or by a person and the extent to which they are valued can be characteristic of that community or person. The expressive function of law can refer to both: the law can express an identity and it can express the values connected with that identity.

Perhaps it should be emphasised that this identity can be shared or controversial and that these values can be common values or merely those of a majority or even a minority. Whether the values or identity are controversial or not, the law can be an expression of them.

The recognition of the expressive function of law is not only important for descriptive purposes; it is also fruitful for normative theory: it can be the starting point both for critical analysis and for constructive suggestions for new legislation. A law should express the common values held by a political community; in case of deadlock in legislative debates, this insight can sometimes show a way out to find the consensus at a deeper level, that of values. The law can, however, also fail to express the common values, which can be

an argument for criticism and for reform. I will illustrate this with some examples.

Sometimes, attention for the expressive function can show a way out of political deadlock on moral issues. An example is the debate on embryo legislation. In my view, this has been structured and conceptualised inadequately as a debate on the moral status of the embryo in terms of rights or interests.[18] If we reconstruct it as a debate on the values held by the political community and on how these values should be interpreted and put into practice, we find a way which allows us to do more justice to the moral views of many citizens. Among the common values are those of personal autonomy and of respect for human life – also in its embryonic form. These common values should be expressed in legislation and be used as a common normative framework in its implementation, either by parliament itself or by self-regulating practice. If there is this fundamental agreement at a deeper level than that of concrete rules, we should start there and formulate the common standards in the law. To me, as a citizen of the Netherlands, it seems most important that our law somehow expresses that we are a civilised country which does not completely 'instrumentalise' human embryos. That is an important part of my own identity, as a member of a civilised nation which respects the value of human life. However, it is much less crucial to me what exactly the criteria and conditions will be for allowing experimentation – for example, whether the embryo should be no older than eight or fourteen days after conception. The basic values are more important than the precise rules.

A starting point for critical analysis may be found in the idea that the law should express *common* values connected with a *common* political identity. Perhaps this idea seems to justify a dubious legal moralism, but this depends on which normative political theory is in the background.[19] If connected with a sophisticated democratic theory (e.g. a Dworkinian liberalism), it is no more vulnerable to the usual objections to legal moralism than any form of protective or instrumental legislation. If we construe a normative position about instrumental or protective legislation, a basis for evaluating its limits and possibilities is the ideal of democracy. This same ideal

[18] For this example, cf. Van der Burg (1996).

[19] I want to thank Govert den Hartogh for drawing my attention to this problem.

can be used for normative analyses of the way in which the legislator should deal with the expressive meaning of law in cases of controversy.

Clearly not all statutes enjoy nation-wide consensus – although this is the ultimate democratic ideal. In a democracy, this need not be a serious problem; citizens must accept that the democratic majority can make decisions they do not like. However, democracy is more than simply majority rule. It demands also that a majority respect minorities and treat the members of these minorities with equal respect and concern. If laws do not express a common identity and common values, but only the values and identity of part of the population, this may conflict with this norm of equal respect.

There is a significant variation in the seriousness of democratic deficiencies in this respect. If the rules of property law are not the rules I would prefer, I must simply accept my democratic loss. These rules as such are not characteristic of the common identity of the country to which I belong, and therefore they do not affect my self-image and self-respect. If I do not share the values behind my country's property law, this is already more problematic, because these values may be more directly connected with the identity of the community.[20] As collective values are more strongly connected with identity than mere rules, the risk is greater that I somehow feel alienated from that political community. The most important deficiency, however, exists if the property laws express certain values or principles I simply cannot accept without losing my self-respect as an equal being; then they are seriously flawed from a democratic point of view. If, for example, married women, Jews or blacks do not have equal property rights, they are thereby classified as second-class citizens. This symbolic message of the law may be as harmful as the actual harms suffered as a result of the discriminatory rules. Other examples may be the self-definition of a state as Protestant, Catholic, or Jewish. Such a self-definition of the national identity cannot be accepted by other religious groups without loss of self-esteem and should therefore be avoided.[21] The Prohibition clause

[20] This view on the relation between a political community and its members has close affinities with Dworkin's idea of a community of principle. Cf. R. Dworkin (1986), *Law's Empire*, London: Fontana, p. 211.

[21] In strongly divided countries, such as Israel, this may be a good reason to be extremely critical of laws with a strong expressive function, because they express

in Gusfield's study presents an example of such a controversial expression of values and identity which on this ground should be criticised.

One standard of criticism on laws with a strong expressive function is therefore that they only express the majority values or the majority view on the common identity. A much stronger criticism is warranted if they express values or identities which cannot be accepted by all citizens without loss of self-respect.

Discriminatory laws provide the best examples of laws which should be changed for that reason. The Georgia anti-sodomy statute which was at issue in *Bowers* v. *Hardwick* is a case in point.[22] This statute had not been enforced for many years; nevertheless, it was still in the books and as such had an important symbolic function. It expresse d that the political community of Georgia considered a gay lifestyle unacceptable. No gay person could consider himself a full member of the state of Georgia and at the same time accept the value judgement that his lifestyle, so strongly connecte d with his personal identity, was demeaning. Even if the anti-sodomy law had no practical effect at all, its symbolic meaning was highly discriminatory and, therefore, this law should have been abolished.

A similar debate is that about equal recognition of same-sex relationships. In the Netherlands, most legal differences between same-sex and married couples have been removed during the last decade. In the foreseeable future, many remaining differences will disappear as well. For example, under strict conditions, adoption will be open to same-sex couples. Nevertheless, until the 1998 elections, the former government still did not want to remove the last barrier to equality and give same-sex couples access to civil

values or identities that cannot be accepted by substantial groups in society. The official Zionist character of Israel is an example of such an expression that is both offensive to ultra-orthodox Jews and Palestinians. Cf. A. Harel (1997), *Liberalism versus Jewish Nationalism: A Case for the Separation of Zionism and State* (paper presented at the Academy Colloquium 'Nationalism, Multiculturalism and Liberal Democracy', Amsterdam, the Netherlands, 26–28 November 1997). In such divided societies, a focus on basic values may lead to divisive strife and, therefore, the liberal vocabulary of democratic rights should have predominance. I owe this point to Ruth Gavison.

[22] *Bowers* v. *Hardwick*, 478 U.S. 186 (1986).

marriage (even though a majority of parliament had voted in favour of this).[23]

The former government's argument was that, once officially registered gay and lesbian couples will have the same rights as married couples, there will be no discrimination left and that therefore there is no point in opening up marriage to them. I think this is a mistake, because it ignores the expressive function of the law. In the light of historical and social discrimination, denying gays and lesbians the highly valued status of marriage can only be interpreted as a symbol of continuing discrimination. We may compare this with the criticism on the separate but equal doctrine on segregated schools: even if the schools were equal, segregation still expressed that blacks were different and, under those specific historic circumstances, this implied that blacks had less status. An analogous criticism should lead to the conclusion that the only option the state has to end the discrimination of gays and lesbians is to open up marriage (or to abolish it altogether, but that would be a different story).[24]

V. THE COMMUNICATIVE FUNCTION OF LAW

Law can be regarded as a form of communication. A statute is an authoritative text with a normative meaning. Legislation is a form of communication which needs to be interpreted to serve as a point of orientation for responsible behaviour by citizens. Law can provide a normative framework, a set of more abstract values and concepts. It may express normative standards, communicating to the citizens that they are expected to be guided by them, but leaving to the citizens a scope of discretion as to how to interpret and apply the standards. In this interpretation and implementation process, we may discern three forms of communication. Though these forms are usually intertwined, discussing them separately will shed more light on the communicative function of the law.

[23] In the coalition negotiations after the 1998 elections, however, it has been agreed that in the next period the government will introduce legislation to open up marriage to same-sex partners.

[24] W. van der Burg (1997), 'Het huwelijk – een omstreden instituut', *NJB* 72 (1997) 29, pp. 1321–1325.

The first form is communication from the legislator to the citizens.[25] A statute is a normative framework which should be regarded by the citizens as authoritative. It expresses certain normative standards – values, principles, rules – which citizens should use as a guide for their behaviour. It may also contain central concepts, such as the right to self-determination or the care of a good caregiver, which structure the normative debate in a particular practice. All these normative standards and concepts need further interpretation. It is obvious, however, that the necessary extent of interpretation and discretion differs. More interpretation is needed and more discretion is given to the citizen if a law formulates vague standards than if it provides direct and simple rules.

The second form is communication among the citizens themselves. A legal text establishes a community of interpretation which must interpret and implement that text.[26] Usually, this interpretation and communication take place only implicitly, when people directly 'apply' the rules of the law, e.g., of traffic law. Rule-following (or deviant) behaviour can also be regarded as a form of communication. Sometimes, this interpretation takes place more explicitly, when people formulate their interpretations and even discuss them with other citizens. The explicit discussion within the community of interpretation can be supported by legal and non-legal institutions. We may think of court proceedings and parliaments, but also of lively public debates on moral issues.

The third form is communication from citizens to legislature. By conforming to the rules set by the law or by ignoring them, citizens may express their opinions about these rules. By interpreting value standards and by continuously reconstructing these interpretations, citizens also send a message to the legislature. Again, this may sometimes be explicitly formulated but most often it is merely a matter of practice. If the standards are strict rules, the message of the citizens will usually be a simple one: they accept the rules or they do not. But if the standards leave a broader scope for

[25] For reasons of simplicity and style, I will simply refer to those involved as citizens. However, the community of interpretation need not only consist of individual citizens but may also include organisations, companies and officials.

[26] This view on communication has been inspired by Witteveen (1991), pp. 128–129.

interpretation and for developing new norms, communication may be more complex. Sometimes the practice's message will imply that the law should be changed, in response to changes in the practice and in the moral and legal views of the citizens.

In a basic sense, legislation always involves the first form of communication because it uses language as a means. But with the communicative function of law, I focus on a more specific phenomenon, connected with the second form. The law may formulate vague standards, which invite active interpretation and discussion on those interpretations, both among citizens and between citizens and the various legal authorities. And the law may explicitly create institutions that stimulate and organise these communication processes. The communicative function of law is connected with both this substantive and this procedural side of the communication processes. It means that the law may create a normative framework, a vocabulary and a set of open concepts to structure normative discussion as well as institutions and procedures that promote further discussion, in order to let the citizens freely take their own responsibility as citizens. From this formulation it will be clear that this communicative function is a gradual one: it can be stronger and weaker, but it is never completely absent. Even very rigid rules still have an open texture, and even very authoritarian legal institutions still allow possibilities of (implicit) communication.

In legislation on moral issues, the communicative function seems relatively important. Often, there is no consensus on detailed norms. What the legislature can hope for, however, is to start a process of reflection and discussion in which those norms may emerge.[27] By formulating a broad normative framework in which at least the basic values and principles are expressed the law may offer a point of orientation for this reflection. Rather than prescribing strict rules which they probably will not follow, the law requests

[27] Cf. Brom (1997) and F.W.A. Brom (1998), 'Developing Public Morality: Between Practical Agreement and Intersubjective Reflective Equilibrium', in: W. van der Burg and T. van Willigenburg (eds.), *Reflective Equilibrium*, Dordrecht/Boston/London: Kluwer Academic Publishers, pp. 191–202.

citizens to participate in this reflection process and take their own responsibility.

Legislation can deliberately stimulate this continuous process of interpretation, reflection and discussion. In order to provide a normative framework that is open to further interpretation and supports the emergence of new norms, it should focus on expressing basic values and principles. An inflexible and rigid system of rules would soon be outdated because of changing social and technological contexts and because of further developments in social opinion. Therefore, it need not surprise us that such a focus on general standards is typical of much legislation on moral issues. Statutes formulate vague norms such as 'the care of the good caregiver', basic values such as 'the intrinsic value of animals', or very open standards such as the so-called 'no, unless …' criterion used in Dutch legislation.[28]

A further method to support the ongoing process of reflection and discussion is to create specific institutions that play a leading role in such debates. This explains the explosion of ethics committees in the professions, in research institutions, and in health care. It is also connected with recent developments in legal theory and in society towards more reflexive forms such as self-regulation and autopoiesis,[29] and towards more communicative styles of control.[30]

This process of reflection and discussion may lead to the emergence of new norms, to a consensus on central values and their meaning or on more concrete principles and rules. They may also lead to new insights into the way the practice[31] should be controlled; for example, how ethics committees could be made to function more adequately. This may then lead to new legislation.[32] Suggestions for new legal standards (or for new procedures) may emerge from

[28] For example, biotechnological experiments are prohibited, unless an independent committee considers them justified.

[29] Cf. G. Teubner (1993), *Law as an Autopoietic System*, Oxford: Blackwell.

[30] Cf. M.L.M. Hertogh (1997), *Consequenties van controle* (diss. Leiden University), 's-Gravenhage: VUGA.

[31] I use 'practice' here in a very broad sense, as referring to every activity in which legal standards are interpreted and implemented.

[32] Although certainly not all moral norms emerging in practice should be codified in legislation. In my view, the law should take a quite modest view on its empire.

the practice and lead to draft legislation. Conversely, draft legislation can also be a point of orientation for the practice. Suggested legal standards can cast their shadows and be applied, tested, and refined (or rejected). This again may lead to changes in those drafts, whereas at the same time, practice may gradually change in response to those new standards that do pass the test of practice. Draft legislation may thus, on the one hand, stimulate the process of reflection and, on the other hand, be the result of this process.

In this perspective, the implementation process is part of a legislative process. Perhaps it should be put differently: the implementation and the legislative processes merge into one continuous interactive process of norm development in which lawmakers and practice co-operate. Long legislative processes, which are not uncommon in the case of moral issues, therefore should not always be deplored.[33] If they are an interactive process in which, on the one hand, the practice changes its norms in the light of draft legislation and, on the other hand, draft legislation is modified in order to do justice to the internal morality of the practice, this is only to be considered positive. This will not only result in better legislation, but also in more effective implementation.

Embryo legislation provides an illustration of how the communicative function is to be taken seriously. In my view, such legislation should not consist of a set of very specific rules. There is not enough consensus and, moreover, the technological developments are so rapid and the variety of possible experiments is so diverse that it is impossible to make a set of concrete rules that adequately cover the whole range of issues. Legislation should rather express the central values at stake and, only when it is really possible and useful, supplement this with some basic guidelines (for example, that no embryos should be used beyond fourteen days after their conception). By avoiding too many detailed rules and expressing only the basic values, the legislator urges experimental and medical practice to take these values seriously.

A mere request to do so would probably not be very effective; the scientific, medical and financial interests involved are too great.

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[33] Cf. J. Vorstenbosch and P. Ippel (1994), 'De weg naar de wet', in: W. van der Burg and P. Ippel (eds.), *De Siamese tweeling. Recht en moraal in de biomedische praktijk*, Assen: Van Gorcum, pp. 49–71.

Therefore, the setting of general standards should be accompanied by institutionalised procedures in which ethical reflection on those standards is guaranteed. One way to achieve this is to demand that all experiments with human embryos should be approved by an independent ethics committee. All researchers should then be requested to submit a research protocol in which they clearly explain why they consider their experiments morally acceptable in light of the standards expressed in the law. Thus, they are obliged to consider their own moral responsibility seriously.

The role of such an ethics committee is crucial. If it regards itself as a semi-judicial institution which authoritatively says 'yes' or 'no' without much further argument, it would frustrate ethical reflection and open discussion. Its role should rather be that of a catalyst in a reflection process. Its style should therefore be highly communicative, both towards the research and medical practice and towards the general public. This means that its procedures should be informal, admitting direct discussion with everyone involved. Its decisions (which, of course, in the end have to be made) should be well argued, with explicit discussion of possible counter-arguments. And these decisions should be made public in such a way that they invite and stimulate further critical discussion.[34]

VI. SOME GENERAL REMARKS

So far, I have argued that an adequate understanding of the expressive and communicative functions of the law offers fruitful new perspectives for both descriptive and normative analysis. It shows the rationale for some peculiar characteristics of legislation on moral issues (some of which, at first sight, seem even irrational) and provides insight into the various ways such legislation may be of importance to society. It also offers a critical and constructive perspective on (draft) legislation, because we can learn how to structure legislation and processes of legislation and implementation.

[34] Brom (1997), pp. 256–264, elaborates on this role of ethics committees.

Legislation on moral issues often has specific characteristics which can now be understood better. Some of these have already been mentioned, but they should be discussed more explicitly.

1. In some cases, the feeling that there should be a law on a certain subject is very strong, while the ideas about the precise content of such a law are diverse and vague. This seems irrational: if one focuses on the protective and instrumental functions, the reasons for wanting a law usually largely involve the content of that law. However, the expressive function of law is central here. It is important for our identity as a civilised nation that we do not treat human life, even in its embryonic form, as mere tissue and that this is expressed in our legislation and respected by those doing research. How this basic value should be elaborated is, however, less central to our self-understanding. In other words: *that* there is a law may be much more important than *what* the law is.

A similar idea may also be central to other issues, such as aid to the Third World or to the unemployed. To a civilised country, it is essential for its self-understanding that it supports those who cannot support themselves. The extent of this aid, however, is a secondary, more technical issue (even if it is very important to those concerned).

2. Vague standards are often criticised by lawyers because of their lack of content and guidance.[35] Yet, they are abundant in legislation on moral issues, and rightly so. They express the common values and provide a common normative framework. These basic values should not only guide us in interpreting other, more concrete clauses in the law, but especially in reflecting on how to act in those situations where the concrete rules do not give guidance. Professional practice (which gives rise to many moral issues) must be sensitive to variations in context and to differences between individual persons, and, therefore, can never be fully captured in rules of conduct.[36] For other moral issues, a similar impossibility

[35] Cf. J.M. Barendrecht (1992), *Recht als model van rechtvaardigheid. Beschouwingen over vage en scherpe normen, over binding aan het recht en over rechtsvorming* (diss. Tilburg University) Deventer: Kluwer.

[36] We have elaborated this idea for the medical professional practice in W. van der Burg, P. Ippel et al. (1994), 'The Care of a Good Caregiver: Legal and

to construct a set of clear rules exists, for example, because of rapid technological and social developments. Laws containing vague and open norms provide a common point of reference by which the norm addressees can be guided without presenting too much detailed and overly restrictive rules. This function is one of the reasons why codification of such values and principles should be welcomed.

3. One of these vague standards in Dutch law is the so-called 'no, unless …' clause. Either explicitly or implicitly, it is a frequent norm in legislation on moral issues, such as animal experiments or biotechnology. Animal rights activists have often criticised these standards as a sham which presents no obstacle for animal experiments or biotechnology whatsoever. This criticism fails to notice the expressive and communicative functions of such standards. They express very effectively that we regard each form of instrumental use of animals as an evil which requires explicit justification. And they demand that researchers they take this basic idea seriously, and present convincing arguments that justify the proposed experiment. The burden of proof is thus placed where it belongs, with the researcher. Therefore, 'no, unless …' standards can be fully justifiable.[37]

4. Many statutes on moral issues do not regulate in detail but give discretionary freedom to the citizens. This is not to be deplored; it fits well into a communicative approach. If someone looks at those statutes with the idea that a law should directly protect certain values, they seem deficient because they give too much license. However, if one takes into account the idea of an interactive process, they are not deficient at all. They simply leave the primary responsibility where it should be: with the citizens. They are better situated to see what, in their specific situation and context, is the best thing to do to realise certain values. This form of self-regulation can be more efficient in realising those values and, moreover, it does more justice to the democratic ideal of respect for individual moral autonomy.

Ethical Reflections on the Good Health Care Professional', *Cambridge Quarterly of Health Care Ethics* 3, pp. 38–48.

[37] Cf. Brom (1997).

5. In ordinary law, control is usually carried out by the judicial system or by administrative agencies; in legislation on moral issues, we often encounter institutions such as an ethics committee or a review board. The latter may seem to be a different name for similar institutions, but they need not be. Most of the committees and boards have a different role than that of a judge or an administrative agency, and rightly so. Their primary function is to decide – or rather advise, a significant difference[38] – in individual cases, indeed, but they do this in connection with other roles. Their role is also to stimulate moral reflection and discussion, in close interaction with the practice. Their strategy to implement the law is to discuss and to convince rather than to enforce.

This institution of ethics committees with a communicative style is a necessary complement to the fact that citizens are urged to take their own responsibility in interpreting the law. If there is not much room for interpretation, control can be much more direct and repressive. However, if there is more room for interpretation, repressive control is not very effective because there will be too much discussion on whether a certain interpretation is acceptable or not. An ethics committee in continuous discussion with the practice is thus a more effective way of implementing communicative laws than a judge with a repressive style of law enforcement.

6. Symbolic legislation requires a different attitude, both of citizens in general and of lawyers and legal scholars. Citizens should take a non-strategic attitude towards the law. They should not regard the legal rules as external side-constraints, as they might do with instrumental or protective rules that merely must be observed (or not, if the citizens are prepared to pay the penalty in case they are caught). They should regard symbolic legislation as an invitation to take their own responsibility in realising the values at issue. In other words, they are invited to internalise the values behind the law.

Lawyers and legal scholars should take a non-legalistic and non-doctrinal attitude. They should avoid treating vague, open standards as if they were some form of rules *manqués*. They should resist the

[38] Most ethics committees do not decide themselves but give advice to those who have to make the formal decision of giving permission, for example, the board of the research institute or the Minister.

temptation (which may seem second nature to many lawyers) to try to build a complete and consistent legal doctrine on the basis of these standards. If they were to do this, the law would become a rigid and inflexible system of rules again, which would soon be outdated. Only if they avoid this legalistic attitude, the law can remain open and responsive towards a rapidly changing society.

VII. IS THIS APPROACH NAIVE ABOUT CONSENSUS?

One possible objection should be addressed here. Does the communicative perspective suppose that discussions on fundamental values will always lead to consensus? Is it not more likely that such a principled discussion will often lead to an insurmountable dissensus and even to divisive civil strife? Perhaps we should be more pragmatic and focus on concrete decisions and rules for which consensus can be reached more easily.[39]

Of course, it would be naive to assume that discussion always leads to consensus. Nevertheless, I think that continuous discussion is at least more likely to lead to consensus. Through open communication, people will learn from each other, understand how others perceive a problem, and will more easily find ways to accommodate competing claims. Discussion may also lead to a better understanding of the facts of a problem because mistakes can be critically exposed. At least some of the factors that block consensus will thus be removed.

Moreover, a discussion which focuses, on the one hand, on fundamental values as expressed or to be expressed in the law and, on the other hand, on what to do in concrete situations has a better chance to lead to consensus than a discussion which focuses on the intermediate level of rules. In my experience as a participant in bioethical discussions, it usually was easiest to establish consensus at the levels of fundamental values and of concrete decisions. However, as soon as we tried to construct rules and guidelines, it was much more difficult to reach agreement. That consensus on concrete problems may

[39] I owe this point to Kenneth Winston.

be more easily reached is perhaps not so surprising.[40] My suggestion that, at the level of basic values, a similar consensus is probable, may however, raise more suspicion. Is it not precisely at this level that the fact of pluralism creates real problems? In a sense, it does indeed, because fundamental outlooks may diverge radically here.[41] So, for some value issues a discussion on or in light of fundamental values may lead to dissensus – at least in the first stage of discussion.

However, it seems to me that the fact of pluralism has to be addressed at the levels where people are really involved personally. That is primarily at the level of very concrete cases (the poor seal pups beaten to death shown on television, the individual lesbian couple next door being discriminated at work). But it is also at the level of fundamental values, because they are connected much more directly with our common and personal identity and basic outlook than rules and guidelines. Only if we have a discussion on those two levels, a more than superficial change in personal outlook and therefore in personal behaviour is likely to occur.

Apart from these probabilistic arguments, there is a more principled reason why this communicative approach is valuable, even if no consensus is reached. The democratic ideal involves more than simple majority rule.[42] It also implies that decisions ought to be made on the basis of a discussion on merits, in which all relevant opinions and perspectives have at least had the chance to be heard. Moreover, it implies respect for individual autonomy. The first idea is honoured in the interactive legislative and implementation processes which I have described above. The second idea is honoured in the discretion given to individual citizens to decide

[40] This has been noted before in the bioethical literature, e.g., in A.R. Jonsen and S. Toulmin (1988), *The Abuse of Casuistry*, Berkeley: University of California Press, p. 18.

[41] This fact of pluralism therefore leads Jonsen and Toulmin and other moral philosophers to a conclusion, quite opposite to mine, that we should avoid appeals to broader ethical theories and fundamental principles and ideals. Cf. T. van Willigenburg (1991), *Inside the Ethical Expert. Problem Solving in Applied Ethics* (diss. Utrecht University), Kampen: Kok Pharos. I think the recognition of this pluralism should be the beginning of our analysis but it is certainly not the end.

[42] W. van der Burg, (1991), *Het democratisch perspectief. Een verkenning van de normatieve grondslagen der democratie* (diss. Utrecht University), Arnhem: Gouda Quint.

how to implement the fundamental values of the law. Therefore, a communicative approach is not only to be defended as a good legislative strategy but also as a democratic requirement.

VIII. CONCLUSION

In this article, I have argued that law has two often neglected functions: the expressive and the communicative functions. These are especially important for legislation on moral issues. Of course, a focus on these functions of the law is not always fruitful; it certainly should not be regarded as replacing the two traditional functions of protection and instrumentality – it is only meant as a supplementary approach. Only rarely are the expressive or communicative functions the most important ones. However, even if they are only secondary functions, they should still be taken into account.

Equal-rights legislation presents an example of legislation where the protective and symbolic functions combine. On the one hand, women, ethnic minorities, gays and lesbians cannot be expected to wait patiently until the last person in a society has become convinced of their equal standing. On the other hand, an attempt to enforce their rights by sanctions may not be very effective. Prejudices are strongly rooted in a person's identity and fundamental moral outlook. The mere use of sanctions will usually not help very much in changing these prejudices – the chances are that they will even be reinforced and entrenched. Prejudices also have to be addressed in a more open sphere of discussion in the hope that they will be revised in the light of convincing counter-arguments. Therefore, it is not surprising that the implementation of equal-rights legislation is often not the task of the judiciary (at least not primarily), but that of committees, such as the Dutch Equal Employment Opportunities Committee, which, both in its procedures and its judgements, has a more communicative style.[43]

I do not claim that the expressive and symbolic functions of the law are dominant. My claim is a more modest one: they should be taken seriously. I have shown that they are especially important with respect to issues with a strong moral dimension. This implies that

[43] On this Committee, see Van Klink (1998).

their importance may be increasing. Throughout the Western world, a process of individualisation can be found: more and more, citizens develop autonomously their own moral opinions. Moral authorities such as the churches and public authorities such as the law tend to have less automatic authority than they used to have. This need not only apply to statutes with an explicit moral dimension. The tendency towards stronger individual autonomy may have practical implications for compliance with every law. Civil obedience can no longer be taken for granted. In the words of Nonet and Selznick: we need legitimacy in depth.[44] Understanding the expressive and communicative functions of the law may help the legislative authorities in their continuing quest for this democratic legitimation of the law.

Schoordijk Institute for Jurisprudence and Comparative Law
Tilburg University
P.O. Box 90153
5000 LE Tilburg
The Netherlands
E-mail: w.burg@kub.nl

[44] Ph. Nonet and Ph. Selznick (1978), *Law and Society in Transition: Toward Responsive Law*, New York: Harper & Row.