

## From Ethical Analysis to Legal Reform: Methodological Reflections on Ethical Transplants in Pluralist Contexts

Wibren van der Burg

*Ethical analysis may result in recommendations for legal reform. This article discusses the problem of how academic researchers can go from ethical normative judgments to recommendations for law reform. It develops a methodological framework for what may be called 'ethical transplants': transplanting ethical normative judgments into legislation. It is an inventory of the issues that need to be addressed, but not a substantive normative theory. It may be especially helpful for Ph.D. students and beginning researchers working in interdisciplinary projects combining ethical and legal analysis.*

*I distinguish three stages in the process from ethics to law: translation, transformation, and incorporation. The latter stage can be divided into three clusters of issues, these being legal, empirical, and normative ones. Most of the philosophical literature on the legal enforcement of morals focuses on the normative issues. My aim is to broaden the perspective in two ways. First, I show that this is only one relevant issue and that we should address legal and empirical issues and the processes of translation and transformation as well. Second, I argue that we should pay more attention to pluralism and variation.*

### 1. Introduction

Applied ethics usually takes place in a legal context. Our society is strongly structured by law. For example, discussions in animal ethics about animal biotechnology can only be understood against the background of a legal framework that does not consider animals as legal subjects, but primarily as entities that can be owned. Our moral ideas about justice, rights, and personhood have been strongly influenced by the law – and vice versa. Law and ethics are at least partly intertwined and partly autonomous.<sup>1</sup>

Applied ethics often discusses legal themes explicitly. Ethical analysis may result in recommendations for legal reform. Should our tax system or the law on euthanasia be changed? Should we introduce a basic income? Most topics discussed in applied ethics

<sup>1</sup> Wibren van der Burg, 'Bioethics and Law. A Developmental Perspective', *Bioethics*, 11(1997)2: 91-115.

have a legal dimension, and ethicists are frequently members – or even chairs – of advisory committees on law reform.<sup>2</sup>

Though law and ethics look similar in many respects, they are also different. Therefore, the results of ethical analysis cannot simply be transplanted into a legal context. For example, let us assume that ethicists conclude that voluntary euthanasia at the request of a fully competent patient enduring unbearable suffering can be morally justified.<sup>3</sup> This is a normative judgment in a first-person perspective for a clearly defined category of particular cases. However, law enforcement officials can only take a more general third-person perspective, and this entails many complicated issues. There are major problems such as definition, proof, unwanted side-effects, and fittingness in the criminal law system. How, for example, can a prosecutor really ascertain the intention of patients, the severity of their suffering, and their competence? How can we prevent undue influence by patients' children? How can we prevent a murder being successfully disguised as an act of euthanasia? Because of these problems, we cannot simply transplant this moral norm into the criminal code.

There has been little methodological reflection on how ethical insights can be incorporated into law. Of course, there have been studies on whether and how moral norms should be incorporated into criminal law; examples are the continuing discussions inspired by the Hart-Devlin debate.<sup>4</sup> Similarly, there have been various sociological studies about the effects and side-effects of legally enforcing morality.<sup>5</sup> However, each of these provide only part of the story. Moreover, most of these approaches discuss morality – rather than ethical analysis – as their starting point, and criminal law as the subfield of law, rather than all subfields of law.

In this article, I will provide a systematic methodological framework involving how to go from ethical normative judgments to recommendations for law reform. I focus on ethical normative judgments; that is, judgments that certain types of acts are morally justified, permitted, or reprehensible. Of course, ethical analysis may also result in other output than normative judgments. Ethicists can contribute to legal discussions in various ways: for example, through value judgments, conceptual clarification, or argumentation analysis. The problems and possibilities of integration into law for these categories may be partly the same and partly different from those with regard to normative judgments. But

<sup>2</sup> Famous UK examples are the Warnock Committee on human embryology in 1978, and the Williams Committee on obscenity and film censorship in 1979. Mary Warnock, 'Moral Thinking and Government Policy: The Warnock Committee on Human Embryology', *The Milbank Memorial Fund Quarterly: Health and Society*, 63(1985)3: 504-522, provides interesting reflections on the process, and mentions many of the themes discussed in this article; for the latter report, see Bernard Williams (ed.), *Obscenity and film censorship: An abridgement of the Williams report*, Cambridge: Cambridge University Press 2015.

<sup>3</sup> In this article, I will abstain from taking substantive ethical positions myself: I just use familiar examples to illustrate my points. If readers do not agree with a particular example, they may simply reformulate the case: e.g. by adding the word 'not'.

<sup>4</sup> H.L.A. Hart, *Law, Liberty and Morality*, Oxford: Oxford University Press, 1963; Patrick Devlin, *The Enforcement of Morals*, Oxford: Oxford University Press, 1965. As an illustration of the influence of this debate, both reports mentioned in note 2 above were framed partly in terms of the two positions in this debate.

<sup>5</sup> For an overview, see Roger Cotterrell, *The Sociology of Law. An Introduction*, London: Butterworths 1992, Chapter 2.

for presentation purposes, I focus on normative judgments here. Of course, these judgments can only be understood against the background of the ethical theories in which they are embedded, the concepts used and the arguments supporting them, so I will refer to these too but they are not the focus. Moreover, I focus on a specific type of normative judgments, namely those that may provide a *prima facie* reason for law reform, because it seems to conflict with the current law. For example, the judgment that abortion is morally permissible under specific conditions is a reason for law reform if the current law completely prohibits abortion.

This article is an inventory of the issues that need to be addressed, but not a substantive normative theory. As such, it may be especially helpful for Ph.D. students and beginning researchers working in interdisciplinary projects in which ethical and legal analysis are combined. In comparative law, Alan Watson has discussed 'legal transplants': transplanting a legal construct from one legal order to another.<sup>6</sup> That does not always work out well, like with medical transplants where the receiving body may reject the transplanted organ. This article can be seen as discussing the problems and possibilities of *ethical transplants*: transplanting ethical normative judgments into legislation.<sup>7</sup>

An ethical transplant requires three steps or processes: translation, transformation, and incorporation. How the dialect of ethics can be translated into the legal dialect is discussed in Section 2. Transformation is the process in which ethical judgments, theories and categories are transformed into judgments, theories and categories that are relevant and useful in a legal context. The most complex step is that of incorporation: the ethical judgment has to be integrated into the legal order. We may divide the issues of incorporation into three clusters. The first cluster consists of legal issues to do with the distinct characteristics of a legal order or a specific legal subfield (Section 4). The second cluster concerns empirical issues that deal with concerns like side-effects, costs, and popular support (Section 5). The third cluster consists of normative issues, such as the limits of government power, the balancing of rights, and liberal democracy (Section 6).

The distinction between these three processes is somewhat artificial. Actual research projects are iterative, integrated processes in which we switch between these steps throughout. The distinction is not a proscription of three steps that have to be taken in a consecutive order, but an identification of elements and issues to be taken into account during the full research process. The three steps are merely a simplification necessary for structuring the presentation. A similar simplification is the assumption that we start from an ethical judgment and only then embark on the three processes. Of course, in ethical research practice, the process leading to the ethical judgment already takes into account the various contextual aspects including the legal ones. Moreover, the ethical problem is embedded in a legal background, so even at the start ethics is not isolated from law. Usually the reason to start an ethical analysis is that there are certain practical problems

<sup>6</sup> Alan Watson, *Legal Transplants. An Approach to Comparative Law*, Athens and London: University of Georgia Press 1993[1974]). We may transplant full codes (like the Napoleonic Codes introduced in many European countries) but also individual statutes or clauses (e.g. legislators may adopt certain statutory rules legalising euthanasia from other legal states). See also Mathias Siems, *Comparative Law*, Cambridge: Cambridge University Press 2014, Chapter 8.

<sup>7</sup> For simplicity reasons, I focus here on legislation, but most of my analysis can be relevant, *mutatis mutandis*, for, e.g. self-regulation, treaties, contracts, and adjudication.

that are broadly discussed in society. For example, ethical discussions of end-of-life decisions do not take place in a legal void; the ethical and broader societal debates have often even been triggered by actual legal cases. So the notion that we first start with a 'pure' ethical analysis and only then move to law, is a simplifying model. However, this model helps to clearly distinguish and identify the various processes and factors; it is up to the researchers at what stage they actual want to address them – as long as they address them somewhere during the process.

A recurrent theme in this essay is that we need to have an eye for variation and pluralism. Ethical theories often have universalist aims, and they abstract from concrete contexts. Examples are Rawls' original position and his theory for a nearly just society.<sup>8</sup> However, law is highly contextual and variable. For example, the meaning of property in the Common Law tradition differs from that in the Civil Law tradition. Even within one legal order there is variation: in criminal law, responsibility means something different than in tort law, and the burden of proof is also different in both fields. One cannot simply argue that because Rawls' theory would imply a normative judgment that a high minimum wage is warranted, we must introduce this into the legal order of the United States, let alone of Brazil. There is too much variation in context here, and therefore we need to analyse carefully the various steps that have to be taken. Variation and pluralism are not restricted to law; both moral pluralism in society and the ethical pluralism of competing ethical theories pose additional challenges for ethical transplants.

## 2. Translation

Law and morality are similar in many respects. They influence each other and partly overlap. The same holds for the corresponding academic disciplines: legal scholarship and ethics.<sup>9</sup> I will not go into similarities and differences here, let alone in the relations between law and morality or between legal scholarship and ethics.<sup>10</sup> According to some authors, law and morality are distinct and strongly differentiated; others suggest they are strongly connected; some even regard law as more or less a subcategory of morality.<sup>11</sup> I have defended an intermediate position: namely, that law and morality are neither strongly intertwined nor completely separate; there is overlap and mutual influence.<sup>12</sup> We could, of course, define law as conceptually distinct from morality, but then the distinction would merely be the result of our stipulative definition.<sup>13</sup> Even so, it is inconsequential whether anyone would defend a stronger differentiation, because it would merely magnify the differences between both, and therefore only amplify the problems that I discuss regarding translation, transformation, and incorporation.

<sup>8</sup> John Rawls, *A Theory of Justice*, Oxford: Oxford University Press 1999[1971].

<sup>9</sup> Wibren van der Burg, 'Law and Ethics: The Twin Disciplines' in: Bart van Klink and Sanne Taekema (eds.), *Law and Method. Interdisciplinary Research into Law* (Tübingen: Mohr Siebeck, 2011), 175-194.

<sup>10</sup> For an overview, see Roger A. Shiner, 'Law and Morality' in: Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, Oxford: Blackwell 1996, 436-449.

<sup>11</sup> Ronald Dworkin, *Justice for Hedgehogs*, Cambridge, Mass.: Belknap Press 2011.

<sup>12</sup> Van der Burg 1997 op. cit. and Wibren van der Burg, *The Dynamics of Law and Morality. A Pluralist Account of Legal Interactionism* (Farnham: Ashgate, 2014).

<sup>13</sup> Van der Burg 2014 op. cit.

Translation from ethics into legal scholarship is problematic because of the various differences between law and morality, and between the corresponding academic disciplines of legal scholarship and ethics.<sup>14</sup> One of these differences is that moral language and legal language, although sharing a common etymological background, have partly diverged. We may regard law and morality as different dialects. Both have much in common, and the differences are mostly variations within a broader common social context. However, although law and morality often use the same words and concepts,<sup>15</sup> it is in general a good methodological starting point to presume they are 'semantic false friends'. The linguistic notion of semantic false friends refers to two words in different languages that look similar but differ in meaning, and that have a common etymological origin.<sup>16</sup> Legal and moral discourse share general concepts like rights, responsibility, fairness, and discrimination as well as more specific concepts such as rape or theft. Some statutes also know open norms with terms that are shared with morality, such as equity, fairness, or the care of a good employer. These norms may provide a bridge between law and morality, but even in those cases, there are minor or even substantive differences between the legal and the moral meaning.

Concepts are embedded in a web of meaning. The full meaning of a word cannot simply be found in a dictionary. The meaning, especially of value-laden words, is often associated with the meaning of other words. For example, the meaning of the term 'democracy' can only be fully understood when we understand the meaning of terms such as 'people', 'rule of law', 'human rights', and 'representation'. Normative concepts like these refer to a host of other norms and values. A word in the context of morality may evoke associations other than the same word in a legal context. For example, in moral discourse we may speak of animal rights, whereas most legal orders do not recognise animal rights, with the result that the word 'rights' in legal discourse is only associated with humans. Moreover, as Wittgenstein has said, meaning is in its use.<sup>17</sup> Legal orders connect legal obligations to words like 'promise' or 'declare'. Law has had to develop precise definitions in what counts as a promise or declaration; such specific definitions are usually lacking in moral discourse. As a result of this legal-technical elaboration, the legal dialect shields itself from developments in the general social discourse, and the divergence between the legal and moral dialects increases over time. Use of legal language is embedded in the practice of law, and this practice is oriented towards the ideal of integrity: namely, that law should be constructed as a coherent doctrine, a system.<sup>18</sup> This

<sup>14</sup> There is much more to be said about the linguistic character of law and the obstacles and possibilities for successful translation than I can offer here; for a more elaborate discussion, see Jeanne Gaakeer, 'Iudex Translator: the reign of finitude', in Pier Giuseppe Monateri (ed.), *Methods of Comparative Law*, Cheltenham UK: Edward Elgar 2012, 252-269.

<sup>15</sup> I use 'words' and 'concepts' here mostly interchangeably, as the difference in meaning between both is not always relevant in this context.

<sup>16</sup> Pedro J. Chamizo Domínguez, Brigitte Nerlich, 'False friends: their origin and semantics in some selected languages,' *Journal of Pragmatics*, 34(2002)12: 1833-1849, distinguish semantic false friends from chance ones, where it is just a coincidence that the same word exists in two languages and there is no common origin. Examples of semantic false friends are the German *Flanell* and the English flannel; examples of chances ones are the Spanish *burro* (ass, donkey) and the Italian *burro* (butter).

<sup>17</sup> Ludwig Wittgenstein, *Philosophical Investigations* (transl. G.E.M. Anscombe) Malden, Mass.: Blackwell 2001, §43.

<sup>18</sup> Ronald Dworkin, *Law's Empire*, London: Fontana 1986.

systematicity of law restricts the translation as well as the transformation and incorporation of isolated ethical judgments into law.

So far, I have focused on translation problems with regard to morality and law, but there are also specific difficulties associated with the respective academic disciplines of ethics and legal scholarship. Both disciplines do more than merely reflect language use in their objects of study. They provide their own conceptual analyses and suggest fine distinctions and new concepts and definitions, thereby contributing to further differentiation. Ethicists often use words or definitions that are uncommon in daily usage and law: think of 'supererogation' and 'capabilities'. For example, intersectional discrimination is a relatively novel concept frequently used by legal and philosophical scholars, but it is still mostly absent in national statutes or regulations.<sup>19</sup> If it were to be transplanted into legal texts, its meaning might gradually shift because it would become embedded in a different web of meaning and be used in specific institutional contexts.

A special challenge for translation is constituted by ethical pluralism. Different ethical theories often have their own conceptual frameworks and terminology. Core concepts like autonomy or justice in utilitarian ethics have a different meaning in Kantian ethics – and neither of these has the same meaning as the corresponding concepts in law or legal scholarship.<sup>20</sup>

### 3. Transformation

Transformation is the process in which the output of ethical analysis is transformed in order to make it directly relevant to the law. Ethical theories are often only indirectly relevant. For example, the claim that persons in a Rawlsian original position would choose an almost equal distribution of income is not a direct argument for the radical reform of current labour law. This example illustrates two issues that we should take into account in transformation: ethical pluralism and the focus on ideal theory. If ethicists want to go from normative judgments made in a Rawlsian original position to recommendations for legal reform, they should transform ideal theory to non-ideal theory in the context of our concrete society, and they should address the fact that competing ethical theories may lead to different judgments.

Ethical analysis is often based on some form of ideal theory. Examples are the nearly just society, the original position, the Kantian theory of autonomy, and the ideal observer. Ethicists also often abstract from concrete societies in order to provide general or even universal theories. Legal orders, however, are strongly contextual and contingent, so we need to transform theories and statements based on idealisation or abstraction into recommendations fitting the context of specific legal orders. This transformation is not a one-directional process from ideal or abstract theory to a concrete legal order; understanding the legal order may also lead to revisions of the ethical theory. For example, philosophical theories of free speech developed by American scholars are usually influenced by the US tradition, which interprets free speech very broadly. In Europe, many

<sup>19</sup> Sandra Fredman, *Intersectional discrimination in EU gender equality and non-discrimination law* Luxembourg: Publications Office of the European Union 2016, 51.

<sup>20</sup> A problem that may become even more complicated by additional losses and distortions as a result of linguistic translations: e.g. when Immanuel Kant's German terminology is translated into English.

countries have banned Nazi symbols and Holocaust denial, which can be understood and, in my view, justified in light of their history. In order to allow for these bans, I suggest that when confronted with these examples, and with their justifications, we should reconsider and revise the broad theories of free speech. Of course, most applied ethicists nowadays work mainly in non-ideal theory, so the transformation from ideal theory to non-ideal theory is not required for them, or was already included in the construction of their own preferred non-ideal theory.<sup>21</sup> Even so, even for non-ideal theorists, it is important to critically assess whether an indirect reliance on ideal theory or a use of abstract principles and concepts may lead to distortions in their ethical analysis that need to be addressed.

A second issue that has to be addressed is ethical pluralism. Most ethicists work within a certain tradition, such as Kantianism, utilitarianism, or some form of religious ethics. Legal orders, however, are usually based on an overlapping majority consensus or a compromise between different ideological positions. Even in those cases where a legal order was originally predominantly influenced by only one ideological position, say Communism or Catholicism, we cannot assume that this position should still provide the normative standards for legal reform. After all, recommendations may focus precisely on removing the remnants of ideological positions that are no longer widely accepted. Ethicists often present their view as one that every reasonable person should accept. This is only natural; if they did not believe that their view was the best, they would not publish it. From a broader perspective, however, we cannot ignore ethical pluralism. A philosopher-queen might simply rely on what she thinks is the best theory, but in a democracy, we need to accept the fact of reasonable pluralism. Every ethical judgment seems to have an implicit qualifier, such as 'according to my Kantian (or utilitarian, Catholic, etc.) theory'. There is nothing wrong with that. It still might lead to partial, *prima facie* arguments for legal reform. For example, an argument could be that obligatory vaccination would be justified if we made a utilitarian calculus. However, in order for an ethical analysis to be fully incorporated into a legal order, it must be presented without a qualifier such as 'according to philosophical tradition X'.

This may require a process of *ethical triangulation*. This implies that a certain topic is analysed from the perspective of various traditions.<sup>22</sup> If a certain bill were to be justified in a utilitarian, a Kantian, and a Christian perspective, that might provide a presumption that it is ethically justified. This presumption is based on an overlapping consensus

<sup>21</sup> Whether, and if so how, applied ethicists should rely on ideal theory at all, is a different debate. See for example Ingrid Robeyns, 'Ideal Theory in Theory and Practice', *Social Theory and Practice*, 34(2008)3, 341–362. <http://www.jstor.org/stable/23558712>. I have suggested that the transformation process from ideal to non-ideal theory involves so many problems that an appeal to ideal theory is rarely valid; see my 'Ideals and Ideal Theory: The Problem of Methodological Conservatism', in Wibren van der Burg and Theo van Willigenburg (eds.), *Reflective Equilibrium. Essays in Honour of Robert Heeger*, Dordrecht: Kluwer Academic Publishers 1998, 89-99.

<sup>22</sup> In social sciences, triangulation is the use of different methods to study one topic. David A. Fennell and David C. Malloy, 'Ethics and Ecotourism: A Comprehensive Ethical Model', *Journal of Applied Recreation Research*, 20(1995)3: 163-183, suggest ethical triangulation as a practical method in the context of governance. Deane-Peter Baker, 'Making Good Better: A Proposal for Teaching Ethics at the Service Academies', *Journal of Military Ethics* 11(2012)3: 208-222, suggests ethical triangulation as a pedagogical method.

between the major ethical traditions. Even so, it will usually not be possible to include all traditions.

Often, triangulation will not lead to an overlapping consensus. A more modest result could be that it narrows down the choice by excluding some alternatives that are deemed unacceptable by the major traditions. Triangulation may also demonstrate that there is an unbridgeable diversity; even then, it may clarify each of the defensible positions, or present an overview of all relevant arguments pro and con. Sometimes, clarification is all we can get, but even that may help. After all, legislation is not based merely on reasonable argument and compromise; it is sometimes simply a political decision.<sup>23</sup> Narrowing down the range of alternatives, clarifying each of them, and listing their pros and cons may help to make a reasonable decision, without uniquely determining one best solution.

Of course, triangulation is a familiar process in applied ethics. The influential ‘Georgetown mantra’ of four principles of biomedical ethics was developed on the basis of an overlapping consensus between the authors.<sup>24</sup> Ethics committees and governmental advisory commissions usually include members with different theoretical backgrounds. The deliberation in such commissions can be seen as a form of triangulation, aiming at an overlapping consensus or, as a second-best option, at a reasonable compromise.

A final observation is that not all ethical theories and categories can be easily transformed into legal ones. For instance, the category of virtues is mostly absent in law, and therefore virtue ethics cannot be easily transplanted. The same holds for ethical judgments about supererogatory actions: these can rarely be directly incorporated into legal orders. In most cases, however, ethical categories reasonably match legal ones. For example, ethical categories such as duties, rights, rules and principles have equivalents in legal discourse.<sup>25</sup>

#### **4. Incorporation: Characteristics of Legal Orders**

The third and most difficult step from ethical analysis to legal reform is that of incorporation. After translation and transformation, the ethical judgment has to be integrated into the legal order. In order to fully justify recommendations, we need to factor in at least three clusters of issues. The first concerns the general and contingent characteristics of law; the second concerns the social effects of law and its embedding in society; and the third is a cluster of straightforward normative issues. I will deal with these in this and the next two sections.

Many legal philosophers have tried to find the essential or universal characteristics of law. According to some, it is the core task of jurisprudence,<sup>26</sup> while to others, including

<sup>23</sup> See the discussion in Section 4 below on law as fiat and reason.

<sup>24</sup> Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics*, New York: Oxford University Press 1979; one author was a utilitarian, the other a deontologist.

<sup>25</sup> In Van der Burg 1997 op. cit., I have discussed how, for some time, bioethics and health law used the same conceptual categories and the same liberal normative theory, which enabled an intensive cooperation and convergence.

<sup>26</sup> Julie Dickson, *Evaluation and Legal Theory*, Oxford: Hart Publishing 2001, 17.



the author, this search project is fundamentally mistaken.<sup>27</sup> For this article, the debate is inconsequential. We are not interested in the incorporation of ethical analysis into law as such, but into specific legal orders. The suggestions for distinctively legal characteristics may not be universally valid, but they have resulted in valuable insights involving general characteristics that legal orders often – though not always – have. When these characteristics apply to our legal order, we should take note of them. Therefore, I will discuss the most important suggestions.

First, according to Lon L. Fuller, law may be regarded as based on both fiat and reason.<sup>28</sup> On the one hand, legal orders are oriented towards the ideal that they are coherent and reasonably justified.<sup>29</sup> On the other hand, many norms are the result of political decision-making, and may be arbitrary or even unreasonable. Or, although once accepted, they are now seen as unreasonable because of developments in our moral views; think of various forms of gender discrimination. Every legal order is a mixture of both dimensions, but there is significant variation in the mix. Some countries are more open than others to including ethical analysis in legislative debates or in the implementation of legislation. This characteristic is especially important for ethicists. The ideal of reasonable justification makes ethical analysis relevant, whereas the decisionist dimension not only limits the role of ethical input but also makes it possible to set norms when normative analysis is inconclusive – as it often is. There are frequently no conclusive grounds for a controversial decision, yet a decision must be made.<sup>30</sup> Philosophers should beware of ignoring any of these dimensions. If they focus too much on reasonable or even rational argumentation, they may set unrealistic demands, as we should accept that law cannot always be fully justified.<sup>31</sup> If they focus too much on law as power, they risk the opposite bias by ignoring that legal norms are not always the result of arbitrary decision-making by those in power, thereby denying the relevance of ethical contributions for legal reform.

Second, law is often associated with sanctions.<sup>32</sup> This is certainly not true for all law, as demonstrated by private law norms regulating contracts and wills.<sup>33</sup> Nevertheless, in many cases, legal norms are indeed associated with sanctions, and the negative consequences of sanctions – and the variation in possible sanctions – should be included in the balance of whether and how we should legally enforce moral norms. Moreover, to prevent abuse and arbitrariness, the application of sanctions requires procedural safeguards, and therefore implies additional costs.

<sup>27</sup> See Van der Burg 2014 op. cit., 78ff, for further references.

<sup>28</sup> Lon L. Fuller, 'Reason and Fiat in Case Law', *Harvard Law Review* 59(1946): 376-395; Robert Alexy, 'The Dual Nature of Law', *Ratio Juris* 23(2010): 167-182; cf. Roger Cotterrell, *Law's Community. Legal Theory in Sociological Perspective*, Oxford: Clarendon 1995, 319.

<sup>29</sup> Dworkin 1986 op. cit.

<sup>30</sup> Cf. Ruth Mampuy, *The deadlock in European GM Crop Authorisations as a Wicked Problem by Design. A Need for Repoliticisation of the Decision-Making Process* (diss. Erasmus University Rotterdam 2021).

<sup>31</sup> Such an approach may be associated with a natural law position, but also with a liberal conception of political legitimacy, which is sometimes taken to imply that not only political authority in general but also concrete legal norms must be justifiable to everyone.

<sup>32</sup> This position is usually associated with John Austin's command theory of law, which in a simple form states that laws are general commands by the sovereign enforced with sanctions; see John Austin, *Lectures on Jurisprudence*, (ed. R. Campbell) London: John Murray 1885[1863]. For a critical analysis, see H.L.A. Hart, *The Concept of Law*, Oxford: Clarendon 1994[1961]), Chapter II.

<sup>33</sup> Hart 1994 op cit., 27.

Third, according to the influential theory of H.L.A. Hart, law may be seen as the union of primary and secondary rules.<sup>34</sup> Even though this need not be true of all law – customary law is an example – most legal orders do have secondary norms that regulate the recognition, application, and change of primary norms. Whereas ethical normative judgments usually focus on primary rules (e.g. should euthanasia be permitted?), the presence of procedural rules that recognise, interpret, and apply them has important implications. For instance, in ethics we often simply construct the case at hand by specifying that someone has requested euthanasia, but judges need proof – based on testimonies or written declarations – that it was a voluntary request.

Fourth, rules are central in most legal orders, and usually they are written.<sup>35</sup> Although other elements such as principles, values, and ideals are also part of the law,<sup>36</sup> law's focus on general written rules has important consequences. Legislators must simplify and bring diverse cases under one general rule. This results in a crucial tension between ethics and law. There will always be individual cases where the application of general rules has morally unacceptable effects. Although these effects can sometimes be mitigated by references to equity or by hardship clauses, they can never be fully prevented.

Fifth, the neo-Kantian Gustav Radbruch has suggested that law concerns the external side of behaviour, whereas morality focuses on the internal side.<sup>37</sup> Again, this is not completely true, as law often makes differentiations based on intentions as well, and utilitarian morality looks at external consequences.<sup>38</sup> Even so, the problem that judges cannot always determine the intentions of actors is highly relevant for enforcement. How can a judge be sure that the euthanasia request was not made under the undue influence of greedy heirs? The internal dimension is crucial here for ethical and legal assessment, but it is not easy to design legal rules that can effectively protect patient autonomy in such situations.

Sixth, law is often seen as intrinsically connected to the sovereign state.<sup>39</sup> In an era of global legal pluralism, this claim cannot be accepted as universal, even though many legal norms are embedded in state legal orders.<sup>40</sup> Counterexamples here are, again, customary and international law as well as self-regulation. At the international level, many environmental norms have been developed in covenants between businesses, NGOs, and other non-state actors. Similarly, many norms with regard to medical experiments, biotechnology, and information technology were developed initially as internal ethics codes, and gradually acquired a stronger legal status, even without formal recognition by

<sup>34</sup> Hart 1994 op. cit.

<sup>35</sup> For this focus on rules, see, e.g. Hart 1994 op. cit. and Lon L. Fuller, *The Morality of Law*, New Haven: Yale University Press 1969[1964].

<sup>36</sup> For this critique, see Ronald Dworkin, *Taking Rights Seriously*, Cambridge, Mass.: Harvard University Press 1978.

<sup>37</sup> Gustav Radbruch, *Rechtsphilosophie*, (hrsg. Erik Wolf und Hans-Peter Schneider) Stuttgart: K.F. Koehler 1973[1932], 127-137.

<sup>38</sup> Judith N. Shklar, *Legalism. Law, Morals, and Political Trials*, Cambridge, Mass.: Harvard University Press 1964, 39v.

<sup>39</sup> For example, by Austin 1885[1863] op. cit., 85 and 510.

<sup>40</sup> See Paul Schiff Berman (ed.), *Oxford Handbook on Global Legal Pluralism*, Oxford: Oxford University Press 2020.

the state. If ethicists look only at state law, they may miss important opportunities to implement the results of their analysis.

Seventh, various authors have suggested that law is oriented towards certain values or ideals.<sup>41</sup> Philip Selznick has argued that law is oriented towards the ideal of legality,<sup>42</sup> while Gustav Radbruch contends that it is oriented towards justice.<sup>43</sup> Although we may question whether these specific statements are universally true, most legal orders consist not merely of a set of rules but also include values or ideals. These values, and especially the ideal of legality, influence and restrict the interpretation of the rules by judges and other legal officials. At the same time, they often provide a bridge to ethical analysis, as most values are shared by law and morality – even if they may have a slightly different meaning in both contexts.

A final general characteristic of law that has frequently been suggested is that it aims to guide action. According to Lon Fuller, in order to guide actions, rules must be general, public, non-retroactive, clear, consistent, and relatively constant; they should also not demand the impossible, and there should be congruence between the rules and their implementation.<sup>44</sup> If rules fail in these respects, they cannot be relied upon to guide actions. These eight principles apply only to legislation; as regards contract law, for example, there may be other principles.<sup>45</sup> However, Fuller's work suggests an important broader insight. Making law is an enterprise with its own internal norms that must be taken into account in the attempt to legislate morality.

Apart from these general but not universal characteristics, there are also many characteristics that are specific for a legal order, or even for a specific subfield within a legal order. Therefore, we must also understand those specific characteristics. Two important sources of variation should be mentioned in particular. First, every country has its own legal tradition, whereas much of the philosophical literature aims at universal analysis – but usually implicitly presupposes the country of the author. One important divide between legal traditions is that between Common Law – basically the English-speaking countries – and Civil Law – most continental European countries.<sup>46</sup> In the Civil Law tradition, the focus is on codes and statutes as the primary source of law. In Common Law, most law is not made by legislation but develops organically through evolving case law, based partly on customary law and, indirectly, on social morality. Although the distinction between these traditions is certainly not strict – and they are converging, partly as a result of European integration and globalisation – the basic attitude of lawyers, and especially of judges, in both traditions is still different. When discussing the legal enforcement of morality, many legal philosophers in the Common Law world still focus more on the judge than their counterparts in the Civil Law world do.

<sup>41</sup> See Sanne Taekema, *The Concept of Ideals in Legal Theory*, The Hague: Kluwer Law International 2003; Dworkin 1986 op. cit.

<sup>42</sup> Philip Selznick, 'Sociology and Natural Law', *Natural Law Forum*, 6(1961): 84-108.

<sup>43</sup> Radbruch 1973 op. cit.

<sup>44</sup> Fuller 1969 op. cit. See also Joseph Raz, 'The Rule of Law and its Virtue', in *The Authority of Law: Essays on Law and Morality*, Oxford: Clarendon Press 1979, 210-229.

<sup>45</sup> Lon L. Fuller, *The Principles of Social Order. Selected Essays of Lon L. Fuller*, (ed. Kenneth I. Winston) Oxford: Hart Publishing 2001[1981].

<sup>46</sup> For the distinction between Civil and Common Law, and a critical discussion of the notion of legal traditions in general, see Siems 2014 op. cit.

A second source of considerable variation is that within a legal order.<sup>47</sup> Here a general divide is whether the subfield is one in which individual citizens confront the state, as in criminal, administrative, and constitutional law, or one in which two citizens confront each other, as in tort and contract law. Traditionally, this distinction is labelled as public law versus private law. In public law, there is a fundamental inequality between the parties, whereas private law presupposes equality – and often compensates for inequalities, as in labour and tenancy law. This difference has many implications. For example, the burden of proof is different in criminal law, where the powerful state can severely sanction citizens, than in tort law, where the question is which of the two parties has to bear certain costs. In criminal law, the standard of proof is that of beyond a reasonable doubt, whereas in tort law the standard is basically that of the most plausible narrative. Some fields have a mixed character. For instance, health law combines the legal culture of criminal law with those of professional disciplinary law – a form of self-regulation – and contract law. Most of the philosophical literature focuses on criminal and constitutional law, and private law is neglected.<sup>48</sup> This is regrettable, because ethicists therefore tend to overlook major areas where they could provide relevant recommendations. For example, we could combat alcohol abuse in many ways other than outright or partial prohibition in criminal law. Actions could include using tax law to increase the price; administrative law for a permission system for sales with conditions such as prohibiting open display and advertisements; traffic law to institute stricter alcohol limits and more frequent and effective controls; and labour law to allow tests in the workplace. Another illustration is medical malpractice, which is hardly ever litigated in criminal law. More frequently it is dealt with by medical disciplinary law, internal regulations of hospitals, and tort and insurance law. The sanctions can sometimes be more severe than those of criminal law. For most doctors, the withdrawal of their license to practice is more consequential than a fine.

## 5. Incorporation: Empirical Issues

The second cluster of issues with regard to incorporation concerns the relations between law and society. For these issues, ethicists may need some basic understanding of legal sociology and related empirical disciplines such as law and economics, legal psychology, and political sciences.

One empirical issue is the degree of popular support and support of relevant stakeholders. For two reasons, researchers should try to assess social norms, popular opinion, and the views of relevant stakeholders. The first reason is one of effectiveness; if legal norms conflict with social norms, they will likely be less effective because many people will be less inclined to voluntarily comply. This is even more problematic if

<sup>47</sup> Apart from different subfields of law, there are also differences in types of legal processes. For example, Roger B. Dworkin distinguishes constitutional adjudication, legislation, common law, and administrative law as possible mechanisms, and discusses the limitations and possibilities of each process in dealing with the rapid developments in bioethics. Roger B. Dworkin, *Limits. The Role of Law in Bioethical Decision Making*, Bloomington and Indianapolis: Indiana University Press 1996.

<sup>48</sup> An exception is Peter Cane, *Responsibility in Law and Morality*, Oxford: Hart Publishing 2002.

significant stakeholders, such as the medical profession on issues of euthanasia, do not support the reform proposals. Of course, social beliefs can change, but they do not change overnight. Therefore, if a significant discrepancy exists, a broader public debate and communication strategy may be required, to explain the new legislation and convince people to comply. Or we may have to accept that the effectiveness of the legislation will be significantly compromised, and then assess whether the weaker effectiveness is still good enough. The second reason has to do with democracy; the democratic aspiration is that legislation is, as much as possible, supported by the people and their representatives. The question is broader than that of whether there is a majority; democracy should also take into account the perspectives of minorities. In the end, it is a normative issue as to how important we deem popular and stakeholder support or its lack thereof. It may sometimes be completely justified to recommend unpopular measures, simply because justice or public health requires them.

Additional empirical factors are the various costs, which should be taken into account. Is the problem really worth the costs and the scarce time of legislative advisors, legislators, and civil servants? Even more important are the costs of implementation and enforcement. Police and prosecution time is limited, and we should question whether it would be a prosecution priority. An example is the negligible number of prosecutions for recent bans on niqabs and burqas in some European countries; these bans are rarely a priority for overburdened police departments and prosecutors.

The most important issue is the effect of legislation. Passing a statute is not a guarantee for practical effect. Numerous studies have shown that, especially in moral issues, the power of the law to change behaviour is limited.<sup>49</sup> One reason is that people often feel strongly about their moral views, or about activities that are an important part of their lifestyle. This has been frequently demonstrated as regards sexual behaviour like prostitution and homosexuality, and the use of drugs and alcohol. A similar conclusion holds for doctors practicing euthanasia.<sup>50</sup> This ineffectiveness is associated with the fact that these actions usually do not know victims – so there are no complaints – and that they are often protected by privacy rights or by medical confidentiality. Therefore, detection and proof may be problematic. Especially in morally sensitive issues, enforcement without the substantive support of stakeholders is difficult, which is one reason that in many such fields we find alternative legislation strategies, such as communicative or symbolic legislation.<sup>51</sup>

<sup>49</sup> For example, Jerome H. Skolnick, 'Coercion to Virtue', *Southern California Law Review*, 41(1968)3: 588-641; Douglas N. Husak, 'Drugs: Moral and Legal Issues' in Ruth Chadwick (ed.), *Encyclopaedia of Applied Ethics, Volume 1*, San Diego: Academic Press 1998, pp. 849-858; Cotterrell 1992 op. cit.; Jennifer Barton-Crosby, 'The nature and role of morality in situational action theory', *European Journal of Criminology*, (2020) DOI: 10.1177/1477370820977099.

<sup>50</sup> For example, Helga Kuhse et al., 'End-of-life decisions in Australian medical practice', *Medical Journal of Australia*, 166(1997)4: 191-196, concluded that "Australian law has not prevented the practice of euthanasia or the intentional ending of life without the patient's consent." Actually, Australia, where euthanasia was illegal, had the same rate of euthanasia as the Netherlands, where euthanasia was under certain conditions legal, but a significantly higher rate of intentional ending of life without an explicit request.

<sup>51</sup> See Wibren van der Burg, 'The Expressive and the Communicative Functions of Law', *Law and Philosophy*, 20(2001)1: 31-59; Bart van Klink, Britta van Beers and Lonke Poort (eds.), *Symbolic Legislation: Theory and Developments in Biolaw*, Dordrecht: Springer 2016.

Here again, we need to take variation into account and be wary of implicit bias. Being, in general, well educated, rationalist, relatively prosperous, independent, self-confident, and disproportionately white, ethicists as well as legislators may tend to project their own personal characteristics and preferences onto the population at large. Their implicit view of human psychology may be unrealistic with regard to some groups of the population, like citizens with minority ethnic backgrounds or those who live around the poverty line and perhaps may be functionally illiterate. What would seem a desirable effect for legislators and ethicists – e.g. having more freedom of choice with regard to medical insurance – might be merely an additional burden to many citizens who cannot oversee their choices and may not be able to bear the financial consequences of wrong choices.

## 6. Incorporation: Normative Issues

Even if ethical analysis results in the clear conclusion that a certain type of behaviour is morally unacceptable, that is not yet reason enough to make such behaviour criminal. For example, though lying and cheating are widely considered immoral, most legal orders refrain from sanctioning them, except in specific situations such as lying under oath. This is not particular to morality; there are many legitimate policy aims that are not enacted in law. We should not try to regulate all immoral behaviour; it would not only be impossible but also result in a police state.

The first normative issue is therefore whether a specific category of immoral behaviour should be prohibited. This is the central issue in the famous Hart-Devlin debate on the legal enforcement of morals.<sup>52</sup> Obviously, the scene has changed since the time of that debate. As a result of the increasingly diversifying character of Western societies, the traditional presupposition of authors like Devlin that there is one dominant morality has become even more problematic than in the 1960s.<sup>53</sup> But Hart's alternative is certainly not without problems as well. He suggested as a criterion for legal intervention the harm principle, referring to John Stuart Mill. Harm to others is certainly one criterion, but it cannot be a sufficient one – not every harm can be regulated. It is also not a necessary one. For example, paternalism or preventing offensive actions may sometimes – but certainly not always – also be a ground for prohibition.<sup>54</sup> Moreover, many policy issues cannot be discussed so easily in terms of the traditional harm principle: for example, nature conservation and sustainability issues.

<sup>52</sup> Hart 1963 op. cit.; Devlin 1965 op. cit. For an overview, see Kent Greenawalt, 'Legal Enforcement of Morality' in: Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, Oxford: Blackwell 1996, 475-487.

<sup>53</sup> Cf. Christian Joppke, 'Islam and the Legal Enforcement of Morality', *Theory and Society*, 43(2014)6: 589-615; Kate Moss and Rowland Hughes, 'Hart-Devlin revisited: law, morality and consent in parenthood', *Medicine, Science and the Law*, 51(2011)2: 68-75. Hans Boutellier, *A Criminology of Moral Order*, Bristol: Bristol University Press 2020.

<sup>54</sup> See Joel Feinberg, *Harm to Others. The Moral Limits of the Criminal Law. Volume One*, New York: Oxford University Press 1984; Joel Feinberg, *Offence to Others. The Moral Limits of the Criminal Law. Volume Two*, New York: Oxford University Press 1985; Joel Feinberg, *Harm to Self. The Moral Limits of the Criminal Law. Volume Three*, New York: Oxford University Press 1986; Joel Feinberg, *Harmless Wrongdoing. The Moral Limits of the Criminal Law. Volume Four*, New York: Oxford University Press 1990.

This issue therefore leads to the heart of fundamental debates in political philosophy about the limits of the liberal-democratic state and the role of law in society. When – and, if so, how – should the law legislate moral norms? When – and, if so, how – should the state use legislation to realise morally desirable purposes? What role should rights and the rule of law play as limits on state power – and on the power of private actors such as large companies? Normative political theory is at the core of the issues at stake here. Even a simple overview of the competing normative theories would warrant a separate article.<sup>55</sup>

An important issue is whether there are alternatives to legislation. Let us take abortion as an illustration. Most ethicists will agree with the policy aim to reduce the number of abortions. Some effective strategies do not include legislation.<sup>56</sup> For example, we might promote better sex education or make prophylactic preservatives more easily accessible to reduce the number of unwanted pregnancies. We could make preimplantation diagnostics more easily accessible to reduce the number of abortions on genetic grounds. We could also turn to nudges as alternative modes of influencing behaviour.<sup>57</sup> Nudges change the choice architecture, by making the morally preferred option more attractive or accessible than the alternative. A controversial nudge to reduce the number of abortions is allowing abortion in only a few specialised clinics so that many women would have to travel long distances to have an abortion, with the result that some would choose not to do so.<sup>58</sup> Each of these alternative policies is obviously contentious, but not because of the morality of abortion itself – it is because other controversial values are at stake. To address these, we have to refer to general normative political theories.

A full normative analysis should include not only the directly normative issues discussed in this section but also the issues discussed in previous sections. The insights derived from the legal, empirical, and normative studies can be combined into a list of arguments pro and con.<sup>59</sup> Some of these reasons may be what Joseph Raz calls exclusionary: they are enough to exclude all other reasons from the balance altogether.<sup>60</sup> For example, if a proposed bill violated the Constitution or human right treaties, that would usually be enough to bin the proposal. Lack of effectiveness or very high enforcement costs will usually not be exclusionary in the Razian sense, but they can

<sup>55</sup> The most important texts on the specific issue of legislation on morality are Feinberg's four volumes *The Moral Limits of the Criminal Law*, see previous footnote. See also Robert P. George, *Making Men Moral. Civil Liberties and Public Morality*, Oxford: Oxford University Press 1993 (defending a natural law position).

<sup>56</sup> At least not directly. In modern societies, most policy measures, including many nudges, require some form of regulation: e.g. by providing subsidies, setting quality standards, requiring permissions, and so on.

<sup>57</sup> Richard H. Thaler and Cass R. Sunstein, *Nudge. Improving Decisions about Health, Wealth and Happiness*, London: Penguin 2009.

<sup>58</sup> Thaler and Sunstein mostly discuss examples that liberals, or libertarian paternalists, could support, but there are numerous examples of non-liberal nudges. The Dutch mandatory five-day waiting period after a request for abortion is another non-liberal example of a nudge.

<sup>59</sup> For an elaborate discussion of how such insights can be combined in order to justify recommendations for legal reform in general, see Wibren van der Burg, 'The Merits of Law. An Argumentative Framework for Evaluative Judgments and Normative Recommendations in Legal Research', *Archiv für Rechts- und Sozialphilosophie*, 105(2019)1: 11-43

<sup>60</sup> Joseph Raz, *Practical Reason and Norms*, London: Hutchinson 1975.

provide very strong arguments against a proposal. The balance between pros and cons is sometimes quite obvious: for instance, if an adequate detection and prosecution of relatively minor transgressions were to require serious infractions of fundamental rights such as privacy or the attorney-client privilege. But apart from these clear cases, the balance may not always be easy to achieve. In legislation, as in ethics, many situations do not have a uniquely right answer. Even so, an inventory of all relevant considerations may still help to restrict the range of options and elucidate what exactly is at stake.

## 7. Conclusion

This article has discussed the problem of how in academic research we can go from ethical normative judgments to recommendations for law reform. I have not discussed substantive theories, but have developed a methodological framework for ethical transplants. There can never be a direct appeal to ethical views, as a number of steps must be taken before ethical judgments can be integrated into law. This article has identified and elaborated the various processes and issues that have to be taken into account. I have distinguished three steps or processes:

1. *Translation*: the process in which the dialect of ethics is translated into the legal dialect;
2. *Transformation*: the process in which ethical judgments, theories and categories are transformed into judgments, theories and categories that are relevant and useful in a legal context;
3. *Incorporation*: the process in which the ethical judgment is integrated into the legal order. This can be further divided into three clusters of issues: A. legal, B. empirical, and C. normative.

Most literature on the legal enforcement of morals focuses on normative issues. My aim in this article has been to broaden the perspective in two ways. First, I have shown that this is only one relevant issue and that we should address legal and empirical issues as well, and moreover, that we should pay attention to the problems of translation and transformation. Second, I argue that we should pay more attention to pluralism and variation in many respects: in morality, in ethical theories, and among and within societies as well as among and within legal orders.

Some readers may think I demand too much. Taking all these factors into account is impossible for someone who has only been trained as a moral philosopher. To an extent, that may be true. However, apart from receiving elementary training in other disciplines, ethicists have two alternatives: the first is modesty, whereby they should acknowledge explicitly that their ethical analysis is only part of the story; the second is perspective, in which they view their work as part of an interdisciplinary enterprise. Of course, this is already common practice in many ethics' institutes and advisory committees, since applied ethics cannot be undertaken in the isolation of the ivory tower. In that respect, this article provides a methodological framework for those who want to have a broader perspective.

Wibren van der Burg, Erasmus University Rotterdam, Netherlands  
vanderburg@law.eur.nl



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