8. Law and Ethics

The Twin Disciplines

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1. Introduction

There are three reasons that ethics is a highly productive discipline for legal research. First, its subject, morality, and the academic discipline itself share important characteristics with law and legal research, respectively. Both disciplines are hermeneutic, normative, argumentative, and interdisciplinary. Second, there is an overlap in content, and the disciplines have many central concepts in common, such as democracy, human rights, and justice. Third, as law is a normatively open practice, references to moral ideas and hence to exercises in ethics are often unavoidable. If lawyers or legal researchers want to explore the limits of the legal right to privacy or what a 'reasonable man' should do, they need to have recourse to ethics. Therefore, we may regard legal research and ethics as twin disciplines: closely related and in many respects similar.

In the academic literature, we may find many studies on law and morality. Is a moral criterion or moral argument required to identify law? Can law and morality be separated? Should morality be enforced by law? Do we have a moral obligation to obey the law? Themes like these are standard in legal philosophy, and studies in which the two disciplines cooperate in some way are ample. Many edited volumes exist on the ethical and legal aspects of, for instance, abortion, euthanasia, animal biotechnology, or ICT. As the subjects are so similar and the terminology is often identical, it may seem easy for a legal scholar to use ethical theories, and vice versa. It is surprising, however, how little reflection there has been on the methodological issues and on the disciplines themselves.[2] How should the disciplines be distinguished? Can legal scholars refer to trea-

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[2] The major exception is *Cane* 2002.

tises in ethics in the same way they refer to legal text books (or vice versa)? How can scholars incorporate ethical theories on privacy in their legal analyses?

In many studies, this lack of reflection leads to naïve views on the other discipline or subject. Ethicists often fail to understand the dual character of law as both an institutionalised system in which authority is essential, and as an argumentative practice in which the quality of normative arguments is important. Consequently, they take either a naïve idealist view of law (reducing it to its argumentative dimension, making it almost identical to morality) or a naïve positivist view of law (reducing it to black-letter law and authoritative decisions). Similarly, many lawyers fail to understand that morality is a field of both consensus and controversy – we agree on the immorality of murder but legitimately disagree on the moral evaluation of euthanasia. Consequently, in legal treatises we may find naïve positivist views of morality (e.g. in references to 'the' norms of professional ethics as if they can simply be identified by reading influential texts) or naïve relativistic views (holding that all moral views are inherently subjectivist, and that law therefore should not take such mere opinions seriously).

The close similarities of morality and law and of their respective disciplines can be misleading. A first lesson for anyone doing interdisciplinary research is always to avoid jumping to hasty conclusions that the other discipline or subject is in certain respects similar or even identical. When lawyers talk about privacy or autonomy, they usually have slightly different notions in mind than when ethicists use the same words. Nevertheless, it is precisely because both disciplines and subjects are in many respects similar but not completely so that we may expect interdisciplinary research to be inspiring and rewarding.

The perspective in this article is that of legal researchers with a background in law, and with an internal but open point of view with regard to legal practice. The openness of law makes it necessary to go beyond law, but the dominant perspective remains a legal one. I will call this 'interdisciplinary legal research', which may be defined as the use of a discipline within an open legal research project in which the legal perspective is dominant. Consequently, I will not discuss questions such as how law is relevant for an ethicist, or how a legal historian or a legal sociologist may profit from cooperation with ethics.

My focus is on research projects, not on individual researchers, as interdisciplinary projects are often carried out by teams of researchers with various disciplinary backgrounds. My question concerns in what ways legal research can be improved and enriched by including ethics. A different theme would be how may individual legal researchers benefit from participating in interdisciplinary research. As they learn to understand different perspectives and to switch between them, they may become more critically aware of the limitations and

specific advantages of the legal discipline, and they may learn new methods and obtain new ideas. All this could be useful when researchers return afterwards to monodisciplinary legal research. Nevertheless, although these formative influences of interdisciplinary research are important, they are not the focus of this article.

A discussion of legal research and ethics should start with an elementary introduction to ethics (Section 2). A major issue in ethics that merits a special discussion is the search for justification (Section 3). Hence, I will discuss the differences and similarities between both the subjects of law and morality and the respective disciplines as well as the intertwinement between them (Section 4). The article closes with a discussion of five types of interdisciplinary legal research using ethics (Section 5).

2. What is ethics?

Ethics may be defined as the systematic reflection on morality. As the name for a discipline, it is often used interchangeably with moral philosophy. However, 'ethics' is a broader title. It also encompasses a discipline of theology (theological ethics or moral theology), and there are certain forms of descriptive ethics that are not philosophical but, for example, sociological or psychological in nature. To add to the complexity, 'ethics' is also used as a term for morality, for the ethos of a certain group: for example, in 'professional ethics'. When lawyers use the phrase 'law and ethics', they often refer to legal ethics, the ethical standards of the legal professions. In this article, I will use 'ethics' as referring to the academic discipline that studies morality.

In most introductory texts in ethics, the discipline is divided into four subdisciplines:

1. Normative ethics
2. Applied ethics
3. Meta-ethics
4. Descriptive ethics[3]

I will introduce each of these four subdisciplines, and will suggest how they might be useful in interdisciplinary legal research.

1. *Normative ethics* is the core discipline. It is involved in constructing and criticising normative theories and their elements such as moral norms, values, and virtues.

[3] Cf. *Beauchamp* 1991, 33; I present them here in a different order.

Some theories discuss broad themes such as justice or fairness; others have a more limited focus and discuss issues such as tolerance, paternalism, or autonomy.

There is a broad range of competing normative theories. A basic distinction exists between consequentialist theories, which judge the morality of an action by its consequences, and deontological theories, which hold that special kinds of acts are good or wrong in themselves. For a deontologist, torture is always wrong; for a consequentialist, it depends on the balance between the positive and negative consequences.

Kantianism is currently the most influential deontological theory. Immanuel Kant constructs a universal law by focusing on man as a rational being[4], which leads to the famous Categorical Imperative: 'Act only on the maxim through which you can at the same time will that it be a universal law'. There are various slightly different versions of this complex notion, also in Kant's work, but the basic idea is that we may test moral rules by asking whether they can consistently be universalised.

The most important consequentialist theory is utilitarianism with its principle of utility, holding that we should aim to realise through our actions the greatest amount of utility.[5] There are many versions of utilitarianism, which differ mainly in what precisely is to be understood as utility (pleasure, happiness, or some more sophisticated criterion), and whether the principle is to apply to individual acts or to general principles or rules.

In recent decades, there has been a tendency in normative ethics to become less abstract and to pay more attention to context and to personal relationships. One of the standard criticisms of abstract theories is that they ask us to ignore the special attachments to our friends and family members, whereas in our moral experience such special ties are important. For example, feminists have argued that we should not focus on abstract gender-neutral persons disconnected from their relationships and contexts, but on concrete men and women, with their personal histories and special caring relationships with friends and family members. Similar criticisms have been voiced by neo-Aristotelians, who stress the importance of personal character, and have advocated virtue ethics as an alternative to both deontology and consequentialism.[6]

These remarks can only provide a general idea of the current debates in normative ethics. In the context of legal interdisciplinary research, it seems wise to take a pluralist stance and accept that each of these competing discussions may add valuable insights. When a legal scholar is interested in justice, it may be helpful to study a variety of theories and determine which of them are most productive for the specific purposes of the research project. A legal scholar should avoid taking a controversial stance in normative ethics by treating only one of them as the correct theory. In fact, this remark applies to all subdisciplines of ethics. Not being an expert in the debates herself, a legal scholar may be unable to justify adequately why she chose this specific theory.

With adequate caution about the inherent controversial nature of normative ethics, it may prove worthwhile to incorporate it into interdisciplinary legal research. The work done on principles such as respect for autonomy, toleration, justice, or privacy may provide inspiration for research on related legal principles. Moreover, as law is an open system, it may sometimes be directly incorporated into legal interpretation of positive law, especially if one has a hermeneutic view of law like that of Ronald Dworkin. Most importantly, normative ethics may help to understand, analyse, and evaluate arguments for positions on what the law should be: for example, with regard to a just income tax or social security system, or to the balancing of religious freedom against freedom of speech in controversial cases such as the Danish cartoons portraying Mohamed.

2. *Applied ethics* is the title of a collection of subdisciplines that deal with specific fields or practices and with concrete issues such as abortion, corruption, and animal biotechnology.[7] Fields in which much work has been done are biomedical ethics, animal ethics, business ethics, and legal ethics. Other subdisciplines are still emerging, such as sports ethics and international ethics.

Applied ethics has emerged and grown since the 1960s. Initially, many philosophers treated applied ethics as if it merely required the application of general normative theories. They soon discovered that this was too simple. Studying new issues such as animal biotechnology or genetic testing challenged general normative theories: they either did not provide relevant answers to these new issues, or the answers seemed intuitively unacceptable. Moreover, in these fields new concepts emerged such as animal integrity and informational privacy. The relation between applied and normative ethics changed from one of unidirectional application into a dialectical interplay.

The distinction between normative ethics and applied ethics should not be interpreted as a qualitative difference but as one in levels of generality and scope. Normative ethics develops theories and norms that are applicable in a wide

[4] For more on deontology and Kantianism, see *Davis* 1993; *Beauchamp* 1993, Ch. 5 and *O'Neill* 1993. The translation of the Categorical Imperative is that of *O'Neill* 1993, 177.

[5] For more on consequentialism and utilitarianism, see *Pettit* 1993; *Beauchamp* 1993, Ch. 4 and *Goodin* 1993.

[6] For both criticisms, see *Beauchamp* 1993, Chs. 6 and 7.

[7] There are many introductions in the various fields: for instance, a number of volumes in the Oxford/Blackwell *Companion* series (Applied ethics, Business ethics, Bioethics, Genethics). The most widely used introduction to bioethics is *Beauchamp/Childress* 2008.

range of fields of applied ethics, but they can only be understood and tested in light of how they are interpreted and reconstructed in these various fields. Normative ethics requires feedback from applied ethics and *vice versa*.

Applied ethics can be very useful for interdisciplinary legal research, since lawyers usually do not focus on general theories of justice but on specific fields such as health law or company law. The natural research partner in ethics is then the corresponding field of applied ethics. Such interdisciplinary cooperation is often even institutionalised: for example, in combined institutes for bioethics and health law.

3. *Meta-ethics* is the study of the central concepts, the presuppositions, and the methods of ethics; it is a philosophical reflection on the discipline of ethics itself. It deals with themes such as the justification of moral judgments and the ascription of responsibility. It asks questions such as: Can we be held responsible for acts committed while under the influence of alcohol? Can a moral statement be true, or is it merely a subjective preference? What is the meaning of concepts like autonomy, rights, and morality?

Many philosophers believe that meta-ethics is a normatively neutral discipline; we may analyse what a concept such as autonomy means without taking a stance on whether autonomy is valuable. Others, including the author, hold that the analysis of concepts or methods completely disconnected from normative ethics has only limited value; the full project of meta-ethics requires that we connect it with normative ethics. A similar debate can be found in legal philosophy, between positivists and non-positivists (e.g. with regard to concepts such as *mens rea*).[8]

Meta-ethics may be valuable for legal research in various ways. For example, meta-ethical analyses of moral concepts such as intention, autonomy, privacy, or rights may provide important insights for legal scholars studying the parallel legal concepts. And conversely, when ethicists explore the concept of responsibility, they often use court cases – if only because of the rich case descriptions they provide. The emerging discussion on legal methodology may also profit from similar discussions in ethics. For example, the ethical method of reflective equilibrium (discussed in Section 3) has strong parallels in legal reasoning; therefore, the extensive philosophical debate on this method may be inspiring for reflections on legal research.

4. *Descriptive ethics* is the descriptive analysis of moral beliefs and moral practices with the help of disciplines such as sociology, psychology, or biology. For example, a sociologist may describe the opinions of medical practitioners on euthanasia. The neutral observer should not take a normative position with regard to these beliefs and practices. He may endorse them or he may be highly critical of them – but that is irrelevant. This is not easy to do, because one's own views and implicit presuppositions often influence what one sees. Good methods to reduce such bias may be to study the field together with someone who has different normative views, or to submit the draft description for criticism to both members of the group studied and to outsiders.

[8] This debate is discussed in Chapter 9 of this book.

One of the oldest disciplines to be combined with ethics is economics. The founding father of economics, Adam Smith, also wrote extensively on moral sentiments and other ethical topics. Since the 1950s, insights from rational choice theory, game theory, and related approaches have been used by ethicists to discuss the plausibility of their normative theories. Another discipline that is increasingly combined with moral philosophy is psychology. The insights derived from psychology may be used as a critical perspective on what realistically may be expected from human beings so that normative theories do not require the humanly impossible. Moral psychologists have shown how unconscious processes influence our actions and, consequently, that the idea of humans as fully rational decision makers is empirically implausible. This is a critical perspective on many ethical theories that emphasise rationality, such as Kantianism.

In a strict sense, descriptive ethics is not part of moral philosophy but of the various social sciences or biology. However, in recent decades philosophers and other scholars have increasingly become involved in interdisciplinary cooperation in which the empirical insights are integrated into normative philosophical analysis or, *vice versa*, normative problems partly determine the social science research questions. Such a combined normative and descriptive approach is usually called *empirical ethics*.

This turn towards empirical ethics is often connected with a growing interest in pragmatism and hermeneutical philosophy. In these philosophies, there is no strict separation of fact and value; we can only understand social practices in light of the norms and values that they embody. Therefore, a strictly positivist social science is deemed impossible.

Descriptive ethics and especially empirical ethics can be relevant for interdisciplinary legal research in various ways. For instance, they can help us understand the inherent normativity of a practice that we may want to regulate, which is essential for effective regulation. Descriptive and empirical ethics may also be important sources if we want to determine how to interpret open legal norms and concepts that implicitly or explicitly refer to morality, such as reasonableness, fairness, and the standard of good care. It is a matter of controversy among legal philosophers as to what extent positive social morality (as studied by descriptive ethics) or a more reflective critical morality (as developed in nor-

mative ethics) should determine the interpretation of these norms.[9] Especially in Common Law systems, law is often regarded as the embodiment of morality and, consequently, reference to popular morality may be legally relevant in interpreting the law. Comparative moral sociology is therefore an essential part of comparative studies in legal culture.

The distinction between the four subdisciplines is not a sharp separation; authors usually combine them. An example is John Rawls' famous *A Theory of Justice*.[10] In this book, he develops a theory of justice (normative ethics) and illustrates its use by constructing a theory of civil disobedience (applied ethics). On both themes, his book is the most influential text. He also has made important contributions to meta-ethics by combining arguments based on rational choice and moral psychology with the method of reflective equilibrium and the idea of a social contract.

Ethics is closely related to a number of other disciplines; at times, the distinctions are arbitrary. This is especially true of the disciplines of political and legal philosophy. An illustration of the close affinity is that the same book by Rawls is widely discussed in classes in each of the three disciplines. To make a somewhat arbitrary but helpful distinction, we may say that ethics focuses on actions of individuals and groups, and political philosophy centres on political institutions such as the state or democracy. Legal philosophy is then the discipline that focuses on the institution of the law. It is the primary perspective, not the issue, which determines the discipline. We may, for example, study civil disobedience from the vantage point of each of the three disciplines. Ethics asks when individuals have a moral obligation to obey the law; political philosophy studies how the democratic state should react to civil disobedience; and legal philosophy analyses whether it is possible for legal institutions to take into account the specific character of civil disobedience in prosecution and punishment. Obviously, these analyses are related and partly refer to each other – yet they can be distinguished.

3. The search for justification

One of the most important questions in meta-ethics concerns how to justify normative judgments and theories.[11] Most sciences have certain methodologies at their disposal, such as systematic observation and controlled experiments,

[9] See the famous Hart-Devlin debate, excerpted in *Dworkin* 1977.

[10] *Rawls* 1971.

[11] Introductions to this issue: *LaFollette* 2000; *Beauchamp* 1993, ch. 3 and *Singer* 1993, part VI.

which provide data that may be generalised in theories. Legal scholars have collections of institutional facts such as statutes and court decisions on which they can build legal doctrines. Normative ethics, however, does not have such a relatively certain basis to start from, nor is there a generally accepted methodology. In my experience, many law students tend to regard moral judgments as merely subjective preferences and, consequently, miss opportunities to learn from ethics. Therefore, this issue merits extensive discussion here.

Prospects for ethics to reach agreement on judgments, theories, and methods may seem dim. Moral pluralism is a pervasive fact of our daily life, and ethical pluralism is just as pervasive: the various ethical traditions have been quarrelling for ages, and the only progress may seem that new ethical theories are added every century. Morality and ethics may therefore seem purely subjective, a matter of personal taste.

Certain ethicists indeed defend this sceptical or subjectivist position. In my view, this lapse into radical scepticism is not only unnecessary but also unwarranted. On many issues (theft, murder) there is quite a broad consensus regarding the core norms. We may disagree on some penumbra issues (such as illegal copying of music or the death penalty), but on the core we are pretty much in agreement. I am as strongly convinced of my belief that killing an innocent man just for fun is morally wrong as I am convinced that the earth revolves around the sun. We have a strong warrant for certain moral convictions. For example, despite all the quarrels on the moral foundations or justifications, no serious ethical theory holds that theft or murder is morally permissible. Thus, there seems to be not only reasonable pluralism but also reasonable consensus.

The same may be true with regard to methodology. Ethics has at its disposal various methods from philosophy and social sciences. It can test arguments with the help of logic, it can test the coherence of theories, and it may use philosophical methods of conceptual analysis. It can build on insights from the history of philosophy to understand how normative arguments were criticised and defended against criticism in the past. It may also include empirical studies, both on popular morality and moral practices, and on the effects of moral codes. Although these methods are only part of a full method for justification, they may at least help to sift arguments and theories and to dispense of the most obviously invalid ones. These methods may rarely be conclusive but they may contribute to a higher warrant, to a higher reliability of our claims.

For a good analysis of justification in ethics, we should start from the double fact of reasonable moral pluralism and reasonable moral consensus. There are some issues about which we feel uncertain or for which we accept that reasonable persons may hold different views; there are also views regarding which we cannot help but believe that they should be accepted by every reasonable person.

Ethics cannot provide absolute foundations for the latter views, let alone for the more controversial views. However, it can help to test and increase the reliability of both the intuitively convincing views and those that are more contested.

With regard to justification of moral views, we may distinguish three basic approaches. The first one, foundationalism, searches for indubitable foundations on which to build a normative theory. The second one, abstract constructivism, abstracts from our concrete situations, prejudices, and personal interests in order to correct for biases and construct a general theoretical account that can serve as the basis for normative ethical theories. The third one, mainly associated with the traditions of hermeneutics and pragmatism, starts from our concrete intuitions and shared values, and critically reconstructs them.

Traditionally, foundationalism has been the dominant approach. Divine revelation (directly in the Torah, the Bible, or the Qur'an, or mediated through priests and prophets) was considered to be the fundamental source for moral truth. For many believers, especially for fundamentalist Christians and Muslims, it still is. However, in light of religious pluralism in modern societies it does not provide a basis for morality that can be broadly accepted. Moreover, religious texts are usually silent about many moral issues that arise as the result of modern technology. Therefore, many authors have turned to Reason as the source for moral truth. For example, Plato and Kant have argued that with the help of human reason we can gain moral knowledge. However, their suggestions – and those of their successors – of what this would entail have been unable to convince more than a small minority in the philosophical forum.

There are two major objections against all versions of foundationalism. The first is that they do not provide an uncontroversial method to reach sound normative conclusions that may be accepted by everyone. The second is that the foundations are extremely abstract, and that even if we were to accept these foundations, it is difficult, if not impossible, to deduce concrete moral judgments on specific issues such as euthanasia or genetic modification. Usually these abstract foundations form the basis for arguments both for and against a certain issue, and so these theories often seem to have little practical relevance.

The second method, constructivism, is one in which we use fictitious thought constructions as methodological tools to abstract from our personal interests and biases. A well-known construction is the social contract: what would persons in a state of nature agree on if they had to make arrangements to ensure peaceful cooperation?[12] Some authors use the idea of a state of nature; others suggest the

[12] Cf. *Kymlicka* 1993. Many authors prefer the phrase 'ideal theory' rather than 'constructivism'; I prefer the latter because not all forms of abstract construction refer to an ideal society.

idea of a spaceship or of a group on an uninhabited island after a shipwreck. The most influential construction is that of the 'original position' by John Rawls.[13] He constructs a position in which we imagine ourselves entering into a social contract behind a veil of ignorance. We do not know who we are, whether we are rich or poor, talented or handicapped. Therefore, we cannot tailor the contract to our personal needs but have to find principles that would be acceptable to all in such a situation of uncertainty. His claim is that the principles we would agree on in such a situation are the best- justified principles. He does not claim any absolute truth – it is a relative justification.

The advantage of such abstract thought constructs is that we may be able to exclude most subjective biases from the argument and thus reach a higher degree of reliability. The disadvantage is that the method and the results do not match with our actual beliefs and actions. Why should we be guided by principles that we might agree on in such an unrealistic situation?[14] I am not identical to that fictitious 'me' abstracted from all the particulars that are essential to my identity, so why would I feel bound to those principles? In an ideal society we would probably agree on a principle of non-violence, but what force does such a principle have in real life with street violence, civil strife, wars, and terrorism?

The third approach takes context more seriously. It starts with our concrete intuitions and practices. Of course, we cannot take our current moral views and practices for granted; they may be the product of self-interest, prejudice, lack of empathy for others, and other biases. Nevertheless, in order to construct moral theories and principles we can actually follow, we should find our starting points with those views that we already hold, and try to revise them critically rather than leave them completely aside as in the two other approaches. Although they belong to different philosophical traditions, this is what pragmatism and hermeneutical philosophy have in common.

The most interesting suggestion, in my view, is that of a reflective equilibrium process also developed by John Rawls.[15] We start from those moral intuitions of which we are relatively certain. We then proceed to mix them with other considerations such as general principles and background theories about human nature and about societies in general. We may add various other elements: for ex-

[13] *Rawls* 1971.

[14] This criticism especially has been raised by feminist authors (cf. *Okin* 1989) and communitarians (cf. *MacIntyre* 1981).

[15] See *Rawls* 1971. Rawls combines it with various other methods that may be characterised as neo-Kantianism and constructivism. In my view, the method of reflective equilibrium can best be understood in a pragmatist way, but other authors have interpreted it in semi-foundationalist or constructivist terms. See also *Van der Burg/Van Willigenburg* 1998.

ample, general ideals, sociological and psychological insights, and concrete facts about our society. In principle, all relevant information should be added to the mix. If we try to combine this loose collection of elements into one theory, however, that theory is initially incoherent. Therefore, we must adjust them in a dialectical process, correct some of our intuitions as unsound after all, and refine some principles as inconsistent with deeply held intuitions or with sociological insights about how social cooperation is possible, and so on. In the end, the aim is to reach a situation of equilibrium, in which all elements cohere; we then have a justified moral theory. In fact, such a procedure may seem natural to lawyers, as it is similar to – and partly inspired by – the process lawyers use to construct a legal doctrine, with case law playing the role of moral intuitions.

The advantage of this approach is that it starts with what we already believe, and it is open for all relevant facts. It is more realistic. Moreover, it has a dynamic potential because new facts or new insights may disturb the equilibrium and force us to adjust our ethical views. The problem of such an approach, however, is that it is difficult, if not impossible, to transcend completely our biases and prejudices. Thus, the advantages and disadvantages of the method mirror those of the other two methods. The first two methods are very general and abstract, and thus may be less influenced by bias, but because they are not embedded in concrete societies they may be less acceptable as action guides for actual persons dealing with messy situations. Hermeneutic and pragmatist methods may lead to more directly relevant and acceptable theories, but they run the risk of merely systematising prejudice. Therefore, the best method in the end may be to do what in the social sciences is known as triangulation: the combination of various methods. If they all lead in the same direction, we may feel more certain that we have reached a justifiable judgment.

4. Similarities and differences and the intertwinement of law and morality

Law and morality have much in common, and the same holds for the respective disciplines studying them. The most important differences and similarities between the disciplines are all related to their subjects, so we have to begin with a comparison between these.[16]

Both law and morality are hermeneutic, normative, and argumentative systems or practices, their purpose being to guide human action. In both, argument is central; some legal theorists, notably Ronald Dworkin, even define law as an

[16] On the comparison and the relations between law and morality, see *Cane* 2002; *Shiner* 1996 and *Van der Burg* 2009.

argumentative practice.[17] Moreover, both are social in character; they purport to regulate behaviour in order to make our society and our lives better.

Nevertheless, the differences between law and morality are less easy to pinpoint. Every attempt to construct a distinctive criterion seems to fail because there are always exceptions.[18] Various criteria have been suggested, and most of them have a core of plausibility; however, none of them is universally valid. We may always find legal phenomena or moral views that do not fit. Criteria that have been suggested are the association of law with sanctions (but then much international and soft law would not count as law), with sovereignty (customary and international law constitute a problem), or with the control of external behaviour, whereas morality would focus on the internal, intentional side of behaviour (*mens rea* on the legal side and utilitarianism on the moral side are problematic). Although these characteristics are often somehow associated with law, and we need to understand them if we want to understand most of the law, they will not provide us with a universal criterion of distinction, let alone separation, between law and morality.[19]

Most of the suggested distinctions are associated with the fact that a fully developed legal system is institutionalised, with legal authorities and authoritative procedures for recognising, interpreting, and applying legal norms, as well as for changing them. In the terminology of H. L. A. Hart there are secondary rules of recognition, adjudication, and change.[20] However, in most legal systems many norms are open to moral argument.[21] In such an open system, law and morality are intertwined. Therefore, although the criterion of secondary rules may help to identify a legal system, it will not serve as a useful criterion to distinguish law let alone separate it from morality.

A similar point should be made with regard to the concept of morality. It is difficult to construct general criteria that may distinguish morality from similar institutions such as law or etiquette. In the literature, we may find four criteria, but none of them is universally valid. First, morality is supremely authoritative (but this is what law claims as well); second, it is prescriptive or normative (but not all elements of morality are normative in the sense of action-guiding: for instance, we may also attribute responsibility or blame); third, moral statements should be universalisable: that is, apply universally to everyone in similar situations (but there are also moral obligations connected with specific contexts and personal commitments); and fourth, morality should consider the good of oth-

[17] *Dworkin* 1978.
[18] *Shklar* 1964.
[19] *Van der Burg* 2009; see also Chapter 9 in this book.
[20] *Hart* 1961.
[21] *Dworkin* 1978.

ers (but so does law and, moreover, there are also ethical theories that focus on personal virtue and excellence). Beauchamp therefore concludes that none of the four criteria is a necessary condition of morality (nor is it a distinctive criterion), but they may all be relevant in understanding morality.[22]

The distinctively legal is inherent not only in the legal system but also in the attitudes of lawyers, including legal scholars.[23] The culture of lawyers differs from that of ethicists. Lawyers tend to have a formal and indirect argumentative style, and use words that no ordinary person would use. Even when legal theorists and ethicists use the same words and similar methods, it does not imply that they mean and do the same thing. The institutional context and professional attitudes colour the meaning of the words and the methods.

A crucial difference is the attitude towards authority. Even if not all law is created by courts and legislatures, their decisions and rules constitute an enormous body of texts with authoritative status. Such deference to authority has no parallel in ethics. There may be authoritative authors, but their authority is based on the quality of their analysis and arguments. Another difference is that lawyers have been trained to focus on procedure. Although concepts such as procedural fairness are not completely foreign to ethicists, they do not have the pride of place for them that exists in legal thinking. A connected difference is that law is oriented towards a closure. Legal procedures are designed to reduce the complexity of the conflict, to restrict, neutralise, and end it. This focus on a peaceable closure is an attitude that many lawyers have internalised, whereas for ethicists it often seems the reverse. Philosophical discussions may continue endlessly, until one of the parties no longer bothers to respond, or has died. The basic attitude of many philosophers seems to be to add new complexities, hypothetical cases, and relevant dimensions. In too simple words: after one has consulted a lawyer, the problem may seem simpler because the lawyer has focused on only a few relevant aspects; after a philosopher has been consulted, the problem will only seem more complex.

If we look at the academic disciplines rather than at the subjects, we may encounter similar differences in style and attitude. The typical legal orientation towards authority, procedure, and closure has no parallel among ethicists. Nevertheless, the disciplines have much in common: they are hermeneutic, argumentative, and normative. Moreover, as they are open and study the moral and legal dimensions of social phenomena, they need to take into account insights about these phenomena from other disciplines; therefore, they are inherently interdisciplinary.

[22] *Beauchamp* 1993.

[23] See also Chapter 17 in this book.

As there is much diversity within each of the disciplines, the differences within one discipline may sometimes be more important than those between two scholars with different disciplinary backgrounds. A legal researcher with a Dworkinian or natural law background may find cooperation with ethicists more rewarding than with positivistic lawyers. A law and economics professor may find much inspiration in utilitarian ethics but regard as incomprehensible the work of his direct colleague who has a law and literature perspective.

The conclusion is that between the subjects of law and morality, and between the disciplines of law and ethics, the differences are only gradual and contextual. They are real, but we cannot make general statements about them. We can only learn to understand them in specific contexts. There are no general distinctions, even if each specific legal system and specific morality has distinctive characteristics. Law is a semi-autonomous institution that is – depending on the specific legal culture – more or less open to morality.[24]

We cannot strictly separate law and morality or the respective disciplines of legal research and ethics, because law and morality are partly intertwined.[25] A legal researcher cannot avoid engaging in ethics to a certain extent. If she tries to do so, she does it at a loss – she will simply miss part of what law is. For example, health law and biotechnology law are still evolving strongly in close interaction with the moral views on those fields; hence, a good researcher in these legal disciplines must be aware of the moral dimensions and be able to integrate ethics in her own research.

On the one hand, the partial intertwinement of law and morality forces the legal researcher to undertake interdisciplinary research incorporating ethics. On the other hand, the relative autonomy of law and the distinctiveness of law and legal attitudes force him to avoid the trap of doing this as if it were merely monodisciplinary by nature. It is this double character of relative intertwinement and relative distinctiveness that makes interdisciplinary research both possible and tricky.

5. Five ways to combine legal research and ethics

Legal research and ethics may be combined in various ways.[26]

[24] *Taekema* 2003.

[25] *Cane* 2002 calls it a symbiotic relationship; see also *Van der Burg* 2009.

[26] I leave aside the mere multidisciplinary combination of completely separate projects, which may often be seen in edited volumes when contributors from different disciplines were asked to write only on a common theme. I regard all five types as interdisciplinary in a broad sense: they combine insights from different disciplines in one research project. This distinc-

5.1 Ethics as heuristics

The easiest type of interdisciplinary research merely uses the second discipline to stimulate creativity and to obtain new ideas. Because of the many similarities with law, ethics can be quite inspiring for lawyers. This will be true especially in newly developing fields of law, where intellectual and textual resources are scarce. An example is the initial criticism from the ethics of care regarding the predominance of justice and personal autonomy in liberal ethics; this criticism has helped me as a legal researcher to assess critically the strong focus on autonomy in Dutch health law.[27]

As the primary purpose is to stimulate creativity, there can be no methodological orthodoxy. In fact, the legal researcher may have completely misunderstood the ethical texts or ideas he uses; this is not a problem as long as it offers original perspectives. The mirror side of this methodological anarchism in the context of discovery is that ethics can play no justificatory role at all. The new idea must be tested and justified in the context of law. In the presentation of the research results, the fact that the author obtained an idea by studying ethics is largely irrelevant and may be mentioned merely in a footnote.

5.2 Ethics as an auxiliary discipline

An auxiliary discipline may provide input for legal research. For example, descriptive ethics may provide insights into both the actual practices regarding euthanasia and the views of doctors and patients. Philosophical ethics may provide an analysis of core concepts such as 'suffering', or theories on the moral justifiability of euthanasia.

Lawyers often have to interpret open terms such as the standard of good care, fairness, or equity. In order to determine the meaning of such terms (and especially in order to suggest new interpretations), a legal researcher may have to go beyond legal texts and turn to ethics. For example, in the European Convention on Human Rights, most rights may be abridged in the interest of public morals. For an interpretation of these clauses, information may be essential about the moral views in a specific country. Moreover, a researcher must be able to assess those views critically – if these moral views are blatantly discriminatory they can provide no good legal justification. Thus, the legal researcher needs insights into positive social morality, and should also be able to engage in a process of critical assessment and reconstruction.

tion into five types was originally developed in Dutch, and was adapted and refined in discussions with the editors.

[27] See also Chapter 17 in this book.

If legal research wants to uses ethical insights as input, they must be reliable. Therefore, methodological criteria pertinent to ethics must be respected – it makes this type of research more exacting than the previous one. When descriptive ethics is used, the methods used to gather data about practices and views must be accepted in the social sciences. When philosophical ethics is used, the legal researcher has to present sound philosophical arguments and use accepted philosophical methods.

5.3 Comparative research

The third type of legal research involves two parallel but separate projects being undertaken on the same issues, with parallel questions and methods, making it possible to combine the two projects at the end, and highlighting the differences and similarities.[28] As law and morality are so strongly similar, this is a highly productive type of research. The mirror such comparisons allow for legal researchers will enable them to reflect critically on positive law, and the differences found may show them new methods of legal research. Examples from my own experience where such a comparative perspective was successful concern studies that focused on a specific issue (the moral and legal status of the embryo), on a specific type of argument (the slippery slope argument), on a specific method (reflective equilibrium), or on a specific conceptual category (ideals and principles).

This type of comparative research may be regarded as a third type of comparative law. It does not compare one legal field with a different legal field (e.g. responsibility in criminal law versus tort law) or with a different jurisdiction (e.g. liability in Britain and the Netherlands), but with morality (e.g. autonomy in health law and bioethics). The main methodological problem is the same as in other types of comparative research: how can we compare what is partly but not completely similar? This requires that researchers be critically reflective of their own disciplinary biases and do not jump to easy conclusions based on a superficial impression of familiarity. In order to make comparison possible, it is essential to adjust and refine the research questions and methods used in both disciplines. Such comparisons require researchers who are fully embedded in each discipline, which usually requires cooperation between ethicists and lawyers.

[28] In my view (in this respect I differ with the editors), good comparative research is always interdisciplinary even in a narrow sense. In order to compare methods, concepts, and outcome, they must be comparable. This requires that at the start of the project the research questions, concepts, and methods are made comparable, and thus that both disciplinary projects are attuned to each other.

5.4 Dialectical cooperation[29]

A more intensive type of cooperation is constituted by dialectical interdisciplinary research. There are two separate disciplinary projects, but they interact throughout the process. This continuous interaction enables researchers to adjust and refine their research. Take a legal researcher who studies ethical methods of reflective equilibrium. He might learn about methodological constraints in ethics and try to translate them into legal methods. Conversely, he might comment that if this method were thus used in law, an essential element is still lacking. This in turn may lead the ethicist to refine her method, and so on. The ethicist and the lawyer remain in charge of their own project but each is open to input from the other. A team project on organ donation I was involved in took this form. The ethical debates on consent (and especially on the role of relatives) were confronted with the legal debates, and in our own legal and ethical analyses we continued to adjust until we had the feeling that both analyses had been enriched as much as possible from the exchange. Such a set-up is especially productive in situations in which both the law and the morality with regard to a special issue or field are still developing, such as biotechnology or ICT, and where the law is strongly open to moral argument.

The primary purpose of such a dialectical project is to improve the disciplinary analysis, and to reach a fuller understanding by adding the mirror and more critical input from various perspectives. In the end, the disciplinary perspectives do not merge; it is still the legal researcher who determines which input of the ethicist can be integrated into the legal perspective and which cannot. The methodological criteria are therefore those of the separate disciplines. A crucial issue is the problem of translation and transformation. Ethical analyses have to be translated carefully into legal categories and *vice versa* – and someone has to be aware of possible misunderstandings, because lawyers and ethicists may attach a slightly different meaning to the same words. In my experience, such a project requires at least one person in the team who can switch between the two disciplinary perspectives because he is both a lawyer and an ethicist by training.

5.5 Integrated research

The most intensive type of cooperation is one integrated research project, which requires an encompassing perspective. Such a perspective is usually constituted by the research question: for example: 'Should the law on X (e.g. equal treatment, organ transplants, euthanasia) be changed and, if so, precisely how?' The integrating perspective is usually a policy perspective (involving what should be changed) or an interdisciplinary academic perspective.[30]

Whether a full integration is deemed possible depends on the theoretical outlook of the reader. Some pragmatists believe it is. The same holds for theorists who regard legal discourse as merely a subclass of moral discourse. My personal view is that a fully integrated perspective is impossible. We may sometimes aspire to full integration, but must be aware that even then we cannot avoid perspectivism. The new integrated approach is just a new perspective, incorporating most of the insights of the various disciplines, but always missing some dimensions as well.

As the editors rightly remark, these five types of interdisciplinary research may evolve into each other. The dynamics could go both ways. Sometimes a modest cooperation intensifies and an integrated project emerges. The ambition of an integrated perspective may also prove to be too high, and the researchers may have to settle for a merely comparative study. An important cautionary remark is that these types of investigation should not be placed in a hierarchical order. The type of interdisciplinary research that is best depends on the purposes of the research project. Each purpose and each type brings with it specific methodological requirements as well as both advantages and disadvantages. I believe that if they take these into account, legal researchers will often find the use of ethics highly rewarding and inspiring.

[29] The editors call this fourth type 'perspectivist'. However, in my view, all research is perspectivist, including the fifth type. Therefore, I prefer a different name.

[30] The best example of such an integrated perspective is probably *Cane* 2002, who develops a theory of responsibility that includes both moral and legal responsibility practices.

Literature

General Introductions to Ethics

Beauchamp, Tom L. (1991): Philosophical Ethics. An Introduction to Moral Philosophy. New York.

LaFolette, Hugh (ed.) (2000): The Blackwell Guide to Ethical Theory. Oxford.

Singer, Peter (ed.) (1993): A Companion to Ethics. Oxford.

Other References

Beauchamp, Tom L./James F. Childress (2008): Principles of Biomedical Ethics. Oxford.

Cane, Peter (2002): Responsibility in Law and Morality. Oxford.

Davis, Nancy A. (1993): Contemporary Deontology. In: Peter Singer (ed.): A Companion to Ethics. Oxford, 205–218.

Dworkin, Ronald M. (ed.) (1977): The Philosophy of Law. Oxford.

Dworkin, Ronald (1978): Taking Rights Seriously. Cambridge.

Goodin, Robert E. (1993): Utility and the Good. In: Peter Singer (ed.): A Companion to Ethics. Oxford, 241–248.
Hart, Herbert L. A. (1961): The Concept of Law. Oxford (revised edition in 1994).
Kymlicka, Will (1993): The Social Contract Tradition. In: Peter Singer (ed.): A Companion to Ethics. Oxford, 186–196.
Macintyre, Alasdair (1981): After Virtue. Notre Dame.
Okin, Susan M. (1989): Justice, Gender and the Family. New York.
O'Neill, Onora (1993): Kantian Ethics. In: Peter Singer (ed.): A Companion to Ethics. Oxford, 175–185.
Pettit, Philip (1993): Consequentialism. In: Peter Singer (ed.): A Companion to Ethics. Oxford, 230–240.
Rawls, John (1971): A Theory of Justice. Cambridge (revised edition in 1999).
Shiner, Roger A. (1996): Law and Morality. In: Dennis Patterson (ed.): A Companion to Philosophy of Law and Legal Theory. Oxford.
Shklar, Judith N. (1964): Legalism. Law, Morals, and Political Trials. Cambridge.
Taekema, Sanne (2003): The Concept of Ideals in Legal Theory. The Hague.
Van der Burg, Wibren (2009): Law and Bioethics. In: Peter Singer/Helga Kuhse (eds.) (2009): A Companion to Bioethics. Oxford, 56–64.
Van der Burg, Wibren/Theo van Willigenburg (eds.) (1998): Reflective Equilibrium. Essays in Honour of Robert Heeger. Dordrecht.