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The Need for Audacious Fully Armed Scholars: Concluding Reflections

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1. Introduction

This rich and diverse collection of essays attests to the variety and disorderliness that exists today with respect to legal research. Obviously, it is impossible to fully do justice to each of them, or to write an integrative chapter that combines all contributions in one coherent story. This final chapter can therefore consist only of tentative reflections from my own selective perspective.

This volume explores the different ways in which researchers from various disciplines at present conceptualize facts, values, and norms, and the relation between them. The editors of this book argue that the current differences comprise a significant obstacle with regard to interdisciplinary cooperation. Therefore, understanding these differences and the extent to which the various disciplinary perspectives can be integrated is an important step towards interdisciplinary research. In order to highlight some of the insights this book has provided and the questions it has raised, I will discuss four themes. With the first, I will try to take a neutral stance towards the various contributions in this book, but with the other three, my own position will more strongly colour my analysis.

The first theme involves situating the differences. This collection is highly diverse, and one might wonder whether these chapters can be accommodated within one unifying framework. I believe that a first step should be to look for perspectives that demonstrate how the various contributions relate to each other and how they are complementary. I will discuss various distinctions that may be helpful in understanding and situating the differences.

This leads to a second theme, the tension between law and social reality. Peter Cserne's contribution provides an excellent starting point for a discussion on this topic. Should law simply mirror reality, and − if so − how? Or is law completely autonomous, having

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its own conceptual framework? Certainly, no lawyer would say, as the philosopher Hegel famously quipped, 'so much the worse for the facts'. Nevertheless, I would argue that a certain tension between empirical and legal frames may be inevitable, and perhaps even desirable.

The third theme involves the need for normative research projects. Most contributions to this volume focus on descriptive projects, either strictly, in a positivist sense, or at least primarily, as in the pragmatist and hermeneutic senses. In some contributions, the normative and the descriptive are so strongly entangled that we cannot discern a primary focus. Strangely absent from among the authors, however, are researchers who focus on primarily normative projects. In my view, legal scholarship should also contribute to debates on legal reform and policy recommendations, and law schools should take up that challenge. Of course, this does not mean that *every* scholar should do so, but law schools would fail their responsibility if none of their members did.

The final theme concerns whether it is possible to integrate the various contributions. I will argue that perspectivism and selectivity are inevitable; in other words, there is no view from nowhere, nor is there a Herculean view that can integrate them all.[1] It depends on the purposes and central questions of the research, how an interdisciplinary project can and should be organised. I will distinguish various types of interdisciplinary research, and identify the problems regarding the facts-norms distinction in each of them.

2. Situating the differences and embracing pluralism

Can we integrate into one coherent theory the variety of approaches that abound in current legal scholarship and are reflected in the diversity of this volume? My own view is that a broad pluralism in methodologies and perspectives must be accepted as inevitable. Moreover, this pluralism is to be welcomed, because the various methodologies and

[1] Cf. Thomas Nagel, *The View from Nowhere* (Oxford University Press 1986); Ronald Dworkin, *Law's Empire* (Fontana 1986).

perspectives can be complementary.[2] This acceptance does not mean of course that anything goes. Nor does it mean that each disciplinary approach is completely unrelated to the others. Therefore, we should try to situate and perhaps explain the differences between the contributions and the relations between them. Various well-known distinctions can shed light on these differences, such as that between internal and external perspectives on law,[3] or the distinction between the actual and the ideal.[4] In this respect, I wish to focus here on three distinctions that may be particularly helpful.

Disciplinary differences

The most obvious distinction is that between disciplinary approaches. The articles have been written by economists, sociologists, philosophers, and of course by doctrinal and comparative lawyers. Each of these disciplines has its specific methodologies and ways of conceptualizing the relation between facts, values, and norms. These disciplines are not completely isolated, but need input from other disciplines as well as from common sense understandings and legal practice. For example, for sociological and economical studies, we cannot rely simply on a naïve understanding of positive law as rules in the Civil Code; we may need a more nuanced understanding of precisely what the doctrine entails. In contrast, doctrinal law needs input, both from hermeneutical disciplines such as history and philosophy, about the way legal doctrine should be understood in light of legal history and philosophical insights, and from the findings of empirical disciplines such as sociology, concerning how to understand social reality. Legal doctrinal scholarship is a relatively autonomous discipline, as are the other disciplines that study law.[5] The dominant econometric models are based on quantifiable phenomena, and thus will make a selection of

[2] I have argued for this position in Wibren van der Burg, *The Dynamics of Law and Morality. A Pluralist Account of Legal Interactionism* (Ashgate 2014), Chapter 5.
[3] Brian Z. Tamanaha, 'The Internal/External Distinction and the Notion of a "Practice" in Legal Theory and Sociolegal Studies' (1996) 30 *Law & Society Review* 163.
[4] See the contribution by Peter Cserne in this volume.
[5] Sanne Taekema, 'Relative Autonomy, A Characterisation of the Discipline of Law', in Bart van Klink and Sanne Taekema (eds), *Law and Method: Interdisciplinary Research into Law* (Mohr Siebeck 2011).

useful facts and relevant norms that is different than models involving doctrinal scholarship or philosophy. Moreover, they will also make a different selection than some competing economic schools would make. Pluralism exists not only between disciplines but also within them.

Each of these disciplinary approaches can provide insights that other approaches cannot, and therefore a legitimate plurality exists. In my view, there are various legitimate possible definitions of law, and each of them may be useful for specific research purposes.[6] Similarly, there are various different conceptualizations of the relationship between facts and norms, and each of them may also be useful for specific purposes. This acceptance of methodological pluralism still leaves the question as to how to integrate, or even combine, the different perspectives. The question will be discussed in the final section.

Levels of analysis

We can analyse the relation between facts and norms on three levels, the first of which is that of legal practice. Facts, norms, and values are connected in the activities of judging, lawyering, and legislating. The famous Hart-Dworkin debate focused on the practice of judging: when judges decide cases, can and do they refer merely to rules that can be known as a matter of social fact, or do they need to appeal inevitably, at least in hard cases, to the underlying values and principles of the legal and political order? The debate between Hart and Fuller focused on legislation: Is legislation a mere technical enterprise, or is it bound by the values and principles of legality?

In this volume, various contributions can be positioned primarily at this level. Cotterrell's contribution focuses chiefly on the use of social science in legal practice. In this context, the legal framework is dominant, but it can be enriched and corrected by sociological understandings, both of facts and of social values and cultural norms. Samuel argues convincingly that in legal practice, facts and legal norms are intertwined in various ways.

[6] Van der Burg (n 2), 84-89

Herdy discusses how judges have to rely on the words of others, and are therefore epistemically dependent, and then shows that the underlying notion of authoritative reasons is relevant both for understanding the reliance on others and the reliance by judges on rules.

The second level is that of scholarship. Is value-neutral scholarship possible – or even required – or is scholarship always guided by a certain value orientation: for example, by accepting the internal normative perspective of law? Can the scholar research her subject, law, without reference to the values embedded in the world of legal facts or not? For pragmatists such as Selznick and, in this volume, Del Mar, law must be understood contextually and in light of the values embedded in it. Others, like Mackor, vigorously defend the notion that doctrinal scholarship should be non-normative. Both views can be found in the positions of Jellinek and Kelsen, respectively, as Van Klink and Lembcke demonstrate. The distinction between purely normative and purely descriptive theories is not always clear-cut and rigid. Francot demonstrates that even a scientific tradition that is usually believed to be strictly descriptive − namely, systems theory − may have a critical or normative potential. Pacces argues that empirical economic insights may be used in normative law and economics, even though some major problems should be addressed in moving from descriptive to normative recommendations, even if the economist himself may point only to certain *prima facie* (or *pro tanto*) recommendations, since he is not able to provide a complete overview of all relevant considerations.

The third level is a meta-level or conceptual one. How should we understand and define norms, values, and facts? To which categories do statements about law belong: namely, are they factual or normative? Is there a strict difference between value statements and other kinds? Various contributions like those of Del Mar, Hage, and Mackor focus on this type of conceptual clarification, although their positions in the analysis diverge. Mackor defends a separation between fact and value, while Del Mar rejects a separation but accepts that making a distinction may be productive for certain purposes.

Practice versus product models

In my view, the most important distinction that renders impossible an integration of the various perspectives into one theoretical frame is the difference between practice and product models.[7] There are different ways in which we can model social phenomena such as law or research. On the one hand, we can study law in terms of a product, as a doctrine: that is, a collection of propositions. On the other hand, we can study law as a social practice, as a network of interactions. A similar point can be made with regard to research: namely, do we focus on the research activity or on its product, the scientific theories consisting of a set of propositions? I have argued that both models are incommensurable, even though most authors try to combine insights from both models in their theories.[8]

This distinction between the two models is especially relevant for the study of the relation between facts and norms. In a practice model, it is difficult to make separations between law and morality, and even difficult to apply the distinctions clearly. If lawyers argue a case in court proceedings, moral and legal arguments intertwine. If medical doctors discuss what they should do when a patient requests euthanasia, moral and legal considerations merge. Only if we model law as a product can we stipulate distinctions between law and morality as distinct sets of norms and values. A similar point can be made with regard to the distinction between facts, values, and norms. Only if we focus on law as a doctrine, a set of propositions, may we distinguish sharply between factual, evaluative, and normative statements.

However, these distinctions may not be so easily made if we study law and scholarship as a practice. This is nicely illustrated by various contributions in this volume. A famous example is Jellinek's notion of the normative force of the factual, discussed by Van Klink and Lembcke. Samuels highlights the important mediating role of institutions and narratives in legal practice: namely, the facts do not come to the law in a neutral manner – or *vice versa*. Other examples include Selznick's sociological jurisprudence as discussed by

[7] I have elaborated this distinction in Van der Burg (n 2), Chapter 2.
[8] Ibid.

Cotterrell, and Del Mar's argument that values and facts are entangled all the way down if we understand norms and values in terms of behaviour.

Some of the authors in this volume focus on law and scholarship as doctrine. Mackor talks consistently about law and doctrinal scholarship in terms of statements, and about the legal order as a normative story. In such a doctrinal approach, we can indeed argue that law and morality are and ought to be separated, but − in my view − only as the result of our construction, and not as a reflection of something in the world 'out there'[9]. Similarly, Hage makes various interesting distinctions between types of statements about facts and rules, which can only make sense in the study of law and reality as a product. He does not suggest that he finds these distinctions in linguistic practice; in fact, he admits that he 'impose[s] clear and unambiguous meanings on a linguistic practice that lacks this clarity and which is often ambiguous'. This confirms my point that distinctions and separations are not found in a practice model, but that they can be constructed or stipulated when we switch to a product model. Returning to the practice model, the use of these distinctions may sometimes prove useful – but only for specific purposes. And even then, we must always remember that they are simply the result of our construction.

I consider that the distinction between the two models is an important reason that the various disciplinary approaches can never be integrated into one coherent theoretical framework. Both models provide significant insights into the phenomenon of law, but they are incommensurable; hence, the partial insights cannot be fully integrated. However, it also suggests an interesting hypothesis, which I cannot explore here further. If two disciplines or two traditions within disciplines both focus on the same model, interdisciplinary cooperation and integration of the insights might be easier than if they focus on two different models. It might be that in those cases a high degree of integration is possible. Nevertheless, in my view it will usually only be a partial integration because the different disciplinary perspectives

[9] See Van der Burg (n 2), 73

still remain and the differences between those perspectives usually prevent a full integration.[10]

3. Accepting the tension between law and social reality

A second major reason that full integration is impossible can be found in Peter Cserne's contribution to this volume. He suggests that there may be an inevitable tension between the legal conceptual framework – or legal *episteme* – and empirical theories on human behaviour. Similar points are made by various other authors. Samuels, for example, argues that there are no 'pure' facts, as institutions and quasi-normative concepts are the means by which lawyers construct their own models of social reality in the form of virtual facts and competing narratives. Cserne's paper presents a number of important limits − epistemic, institutional, and normative − to the reduction of this tension between the legal framework and the findings of social sciences. Because both the law and legal scholarship are relatively autonomous, the law need not incorporate insights directly from the behavioural sciences.

Cserne argues that the legal conceptual frames and the underlying assumptions may vary not only between legal cultures but also within one legal order: for example, between family law and criminal law. He also suggests that there is not one typical norm addressee for legal norms. Legislators may focus on the perfectly rational selfish actor as well as on the morally motivated citizen. This variety, both in law and in human behaviour, is reinforced by the need to pay close attention to dynamic considerations concerning learning effects, and to differences between actual human behaviour and the aspirations of law. Law − if it is based on the assumption that people can be autonomous − may strive to change human behaviour by trying to make citizens more autonomous. However, this potential is not the same for every citizen. Thus, variation and change are important themes in discussions on how to

[10] See Wibren van der Burg, 'Law and Ethics. The Twin Disciplines', in Van Klink and Taekema, *Law and Method* (n 5), at 193, where I suggest that a new integrated perspective may incorporate most insights of the various disciplines, but will always miss some dimensions as well.

integrate social science findings into law – a point also emphasised by various other contributors to this book, for example by Cotterrell and Pacces.

Ultimately, the type of law that is selected to deal with certain fields or problems, and therefore the underlying assumptions that are taken for granted, is not an empirical choice but a normative one. Let me illustrate this with an obviously much simplified example. Recent reforms in the Netherlands have made it necessary for citizens to decide themselves which health care insurance package they want, and at what cost. In the past, most low-income households had no choice – they were insured for a standard package at a standard price. Moreover, for many types of care and support, citizens are now expected to organize it themselves, since they are able to choose between different providers rather than depend on one standard provider as was done previously. Thus, the system of 'one size fits all' has been partly replaced by a system that offers considerable freedom of choice and that calls for personal responsibility on the part of citizens.

These reforms were based in part on certain neo-liberal assumptions. We should address citizens as autonomous individuals capable of making rational choices between different types of health care insurance, and able to determine how they want to organize their health care if they need it. The underlying view of an individual is that of a well-educated, independent citizen with a good income – in effect, the same group of citizens to which almost all politicians belong. This type of person values choice and freedom, and knows how to exercise this freedom. However, for many people who are old, ill, or minimally educated, the choices offered to them prove far too complex. Moreover, they find it very difficult to deal with the responsibilities the new system gives them, and they lack the bureaucratic competence required to deal with these responsibilities. Manoeuvring through the health care system often requires a degree of literacy and organizational skills that many of those most in need of support simply do not have.

Even if this discussion is much simplified, it illustrates a central dilemma for policy- and lawmakers. It seems impossible to devise a system that caters adequately for all groups, because the underlying views of human nature and citizenship are so radically different. The

old system made free choice more difficult for those who wanted it; the new system is more difficult to deal with for those who lack the skills to profit from it. The choices made in health care law are thus not neutral, but are political choices based on underlying assumptions about human behaviour and how it may be influenced.

As illustrated by my example, I agree largely with Cserne's analysis, but I want to add one comment. He describes the tension between a broad concept of law in which techno-regulation and manipulative practices can be part of law, and a stricter concept in which law is seen to be linked to the ideal of normative guidance. The latter is associated with Fuller's *The Morality of Law*.[11] However, the former can also be connected to Fuller's work: namely, to his – unfinished – project of eunomics, as presented in his posthumously published collection of essays, *The Principles of Social Order*.[12] According to Ken Winston, in *Principles of Social Order*, Fuller argues that there are at least five main legal processes: contract, mediation, legislation, adjudication, and managerial direction.[13] Thus, whereas law in *The Morality of Law* is distinguished from managerial direction, in Fuller's other work managerial direction is merely a different type of law. The law discussed in *Morality of Law* refers only to legislation.[14] Each of these legal processes has a different leading ideal, and therefore a different internal morality. We could interpret managerial direction broadly to include phenomena such as techno-regulation and manipulative practices. But we might also argue that techno-regulation is a sixth type of legal process. Perhaps in the future, when techno-regulation has increased in importance, such a perspective might be the most productive one.

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[11] Lon L. Fuller, *The Morality of Law* (2nd edn, Yale University Press 1969).
[12] Lon L. Fuller, *The Principles of Social Order. Selected Essays of Lon L. Fuller* (edited by Kenneth I. Winston) (Hart 2001).
[13] Kenneth I. Winston, 'Introduction', in Fuller, *Principles of Social Order* (n 10). There is no constant set of processes, since in Fuller's work we may find different sets, and when he presents a list of nine processes (including the five mentioned here), he emphasises that other processes have been left out. See Fuller, *Principles of Social Order*, 188-9.
[14] Even so, it should be admitted that in *The Morality of Law* Fuller seems to suggest that he is not talking merely about legislation but about law in general. In light of his other work, however, it is a more defensible and coherent interpretation if we accept that the internal morality of law can vary, and that the eight principles apply only to legislation.

This is not merely a conceptual question. If we believe that law must be linked conceptually to the ideal of normative guidance, we may miss important insights. In *The Morality of Law*, law is associated with this idea of normative guidance, and hence needs to conform to the famous eight principles of legality. However, if we take a more pluralist approach, also a Fullerian one involving a variety of legal processes, each of these processes has its own distinct characteristics and distinct internal morality. I have argued that this pluralist interpretation is the most productive one.[15] Cserne's discussion of techno-regulation and the manipulative control of behaviour nicely illustrates why. It seems a more productive research strategy to uncover the internal morality of these new types or subtypes of law than merely to observe that there is a tension between these types and the internal morality of legislation because they do not provide normative guidance. After all, a similar point might be made about mediation or contract: both do not meet all eight principles either, yet they are valuable legal processes.[16]

In the pluralist approach that I advocate, there are different types of law, each with distinct internal moralities, and with distinct legal *epistemes*. A fruitful interdisciplinary research strategy might be to uncover these internal moralities and *epistemes*, confront them with empirical insights and, in this manner, arrive at an enriched typology. Such a typology might help lawmakers and policymakers decide which legal processes are best suited to deal with certain types of problems. In fact, this is precisely what Fuller's unfinished eunomics project was intended to achieve.[17]

4. The absence of normative research projects

[15] Van der Burg (n 2) 107.
[16] I have made a similar point about how Jutta Brunnée and Stephen Toope apply the eight principles of legality to international law. See Jutta Brunnée and Stephen John Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010). I believe it is more productive to treat international law as a distinct type of law with its own internal morality than to place it on the Procrustean bed of the morality of legislation. See Van der Burg (n 2) 110-116.
[17] Cf. Winston (n 11); Karol Soltan, 'A Social Science that Does not Exist' in Willem J. Witteveen and Wibren van der Burg (eds), *Rediscovering Fuller. Essays on Implicit Law and Institutional Design* (Amsterdam University Press 1999).

In a study of such a collection of essays, an interesting question always has to do with what is missing. Peter Cserne argues that legal theory in the distant past often began with metaphysics; however, this is no longer deemed acceptable. Indeed, it will not surprise many readers that in this volume there is no mention of metaphysics or of any natural law, as both notions are no longer popular in modern legal scholarship.

Even so, something else is strangely absent: namely, straightforwardly normative research. If normative research is discussed in this collection at all, it is usually as an extension of empirical or descriptive research. Examples are the careful analyses by Francot and Pacces, which explore how critical and normative research can be built upon the primarily descriptive approaches of systems theory and law and economics, respectively. In these authors' approaches, normative research always builds on the facts. However, it could also be the reverse: that is, begin with normative questions and answers and then go to the facts. I do not think it is simply coincidence that researchers involved in these types of projects are absent from this volume.[18]

Let me distinguish between two types of research projects. The first is descriptive or at least primarily descriptive, while the second is normative or at least primarily normative. Examples of descriptive projects are doctrinal projects that describe and reconstruct positive law, and empirical projects that study the economic efficiency of, or the popular support for, certain legislation. Such descriptive projects may have as extensions, or byproducts, some evaluations or recommendations, but these never form the core of the project. As discussed above, some authors hold that mere description is impossible because norms and facts are strongly intertwined, but even for these authors a critical reconstruction of legal doctrine is primarily a descriptive project rather than a project oriented towards law reform.

Normative research at the level of legal practice may focus on recommendations to judges or legislators to make certain decisions or to amend statutes. At the level of legal scholarship, the research may focus on the same type of concrete recommendations, but it

[18] In their conclusions, Van Klink and Lembcke merely mention the possibility of this kind of research, but their contribution itself is certainly not an example of primarily normative research.

may also include more abstract or encompassing projects, like devising a new code for administrative law or a new fundamental theory of constitutional rights.

Of course, there are intermediate types. Some projects are moderately descriptive: that is, they do not exclude normative recommendations, but these are not their primary focus. Others are moderately normative: namely, they focus on reform, but include an analysis of the contents of positive law or of the effects of a statute.

What strikes me about this collection is that none of the authors argues for primarily normative projects. Some authors, for example, Mackor and Hage – and, of course, Kelsen as discussed by Van Klink and Lembcke – defend a strict separation between normative and descriptive research.[19] Most of the other authors are moderately descriptive: they allow for normative conclusions on the basis of empirical or doctrinal research, or argue that the normative and the descriptive are intertwined, with neither of them having priority.

This of course may be due to the selection of authors. If legal scholars with a background in political or moral philosophy had been invited to contribute, they might have been in favour of straightforwardly normative projects. For example, Kantians might have focused on how we can study values and norms from a normative perspective, and then evaluate positive law in light of their theories. It is also due to the structure of this book that some contributors may have been involved in normative projects leading to clear evaluations and recommendations, but did not consider that to be relevant in this context. However, when researchers studying law are invited to focus on methodological issues, it seems that they become more cautious with regard to normative research. For some, especially in a positivist tradition, this may be a clear methodological demarcation to protect the purity of scholarship, but the non-positivists also seem to display what may even be called a 'fear of the normative'.

[19] Of course, Kelsen then continues with the idea of a normative science, but this is clearly something other than the kind of normative research projects that I advocate.

I believe that this absence of primarily normative research projects is not simply an accident. One possible explanation[20] could be that in the past decades the social sciences have become a 'subconscious' point of reference for the methodology of legal scholars. Until recently, law was primarily regarded by most scholars as belonging to the group of hermeneutic disciplines such as theology, philosophy and literary studies, disciplines in which the normative and descriptive are strongly intertwined. In this hermeneutic context, it may have looked almost natural to legal scholars that they should not merely describe but also make normative statements. In the dominant traditions of the social sciences, however, there is a stricter separation between descriptive and normative research, and there is a general suspicion that straightforward normative research is subjective and methodologically dubious.

Perhaps I can illustrate this with a personal observation. Before moving to law schools, I worked for eight years in a philosophy department, in the field of applied ethics. I have done considerable straightforward normative research, also regarding legal issues. The core aim of these projects was usually to produce warranted normative recommendations, and of course everyone acknowledged that these were often tentative. Nevertheless, we believed that it was better to have at least some provisional recommendations by researchers in bioethics and health law who had studied the controversial issues than merely to rely on personal preferences or political whims. Since the beginning of the methodological debate in Dutch legal academia around the turn of the century, and since I have become more oriented towards socio-legal research in my own research, I have become more cautious in coming forward with clear normative positions. I have become more aware of the provisional and *prima facie* character of evaluations and recommendations, and of the lack of strict methods to substantiate these evaluations and recommendations.

Normative arguments are always provisional, and open to refutation by new arguments and new insights. And they are usually *prima facie* (or *pro tanto*) insofar as they

[20] Suggested by Sanne Taekema in a comment on a draft version of this paper.

can be overridden by other arguments, because they only identify a certain number of the normatively relevant aspects. This is true not only for normative disciplines like ethics or normative legal philosophy but, as Pacces argues, also for normative law and economics. In doctrinal research, a gap or an inconsistency in the doctrine, or a lack of enforceability, can be evaluated both as a minor and as a major flaw. More importantly, such a flaw can usually be dealt with in various ways, and there are often no conclusive arguments for preferring one way over the other. It seems doubtful whether legal scholars can provide any conclusive argument in cases like these. Some authors might therefore suggest that they should become more modest, and refrain altogether from making evaluative judgements and formulating normative recommendations – but I would think this would be the wrong conclusion.

On the one hand, this increasing methodological awareness may be valued positively. Law journals are full of articles containing normative conclusions that have no adequate justifications. Often the diagnosis that there is an inconsistency in the legal doctrine leads to the conclusion that it should be resolved in a specific way by a new statutory rule or judicial interpretation – without strong grounds to back up the specific solution chosen by the author over other alternatives. Using a variation on Pacces' allusion to Roosevelt's preference for one-armed economists, we might call these the naïve one-armed legal scholars. They provide the clear recommendations that politicians want, but base them on very limited grounds. Becoming more cautious in terms of whether our recommendations can be substantiated and justified is a necessary first step in making legal research more solid.

On the other hand, however, we risk losing something if we become too cautious. If legal researchers who have studied a subject thoroughly do not come up with at least reasonably grounded recommendations, the field is left open to those with less experience in and knowledge of the field. Of course, legislators and practitioners often make reasonably well-founded recommendations, and the practical knowledge (*metis*) they possess should not

be underestimated.[21] Nevertheless, it would be good if academic experts were also to venture into normative terrain and have the audacity to formulate evaluations and normative recommendations based on a thorough study of the field.

This seems to me one of the most important challenges facing interdisciplinary legal research, and Pacces' reference to the one-armed economist may give food for thought. Roosevelt preferred a one-armed economist, because he could provide clear normative advice rather than saying 'on the one hand A, on the other hand B'. I suggest that we do not need simply two-armed scholars but fully armed interdisciplinary scholars. We need researchers or research groups that are fully equipped with a wide range of disciplinary expertise. At the same time, however, they should also have the audacity to formulate normative recommendations – even if they are fully aware of recommendations' provisional and tentative character. The fact that we cannot be fully certain of our proposals should not block us from making any at all.

In an interdisciplinary context, therefore, the central question becomes this: how can research groups be fully armed, equipped with all the relevant disciplines, and yet have the audacity to defend a clear normative position? I consider this to be a major challenge for legal research, and an important agenda for future research into its methodology.

5. The fact-value distinction in an interdisciplinary context

The introduction to this volume argues that views on the relation between facts and norms vary, and that this variation hinders cooperation in interdisciplinary research on law. Different disciplines look at this relation in diverse ways. Nevertheless, interdisciplinary research is often necessary and useful. Therefore, we need to address the theme in order to be able to undertake interdisciplinary research.

[21] James C. Scott, *Seeing Like a State. How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press 1988).

This volume has certainly helped to clarify the extent of the differences. However, the question remains as to whether a common conclusion is possible. In my view, no and yes. If we expect some general, neutral answer that everyone can accept, the answer is no. Of course, the editors – representing the disciplinary and theoretical pluralism amongst themselves – have tried to write a neutral introduction. They do not take a position in the debate between Putnam and Leiter or in other debates. In my opinion, however, this attempt at neutrality is precisely why the introduction does not, and cannot, provide suggestions for an integrated perspective. There can be no view from nowhere in which all the perspectives are integrated. Integration is only possible from a distinct perspective. Integration in a normative perspective will take a form different than that of integration in a doctrinal perspective or in a purely descriptive one.

In interdisciplinary projects, the question of how to integrate the various disciplines can only be tackled from the perspective of the specific purposes and research questions of the projects. Moreover, this specific perspective should also be leading in how to understand the relation between facts and norms and in how to understand law. In this concluding section, I will analyze how this works out in different types of interdisciplinary research.

Elsewhere I have distinguished between five types of interdisciplinary research[22]:

1. The use of a second discipline as a heuristic
2. The use of a second discipline as an auxiliary discipline
3. Comparative disciplinary research
4. Dialectical cooperation
5. Integrated research.[23]

[22] I use interdisciplinary here in a broad sense. Some authors might prefer to call the first two or three types merely multidisciplinary, and to call only the last two types interdisciplinary in a narrow sense. See Sanne Taekema and Bart van Klink, 'On the Border. Limits and Possibilities of Interdisciplinary Research', in Van Klink and Taekema, *Law and Method* (n 5), 7, 12. This terminological discussion is not relevant here.

[23] Van der Burg, 'Law and Ethics' (note 10). Taekema and Van Klink have adopted this typology in their introductory chapter (see previous note), but modified it in one respect, by calling the fourth type perspectivist. In my view, all research is perspectivist.

For the purposes of this chapter, we can ignore the first and third types. The specific problems with regard to facts and norms arise primarily in the other three types of interdisciplinary project.

Sub 2. The use of auxiliary disciplines

The use of other disciplines as auxiliary projects is a modest form of interdisciplinary research. Some might not even call it interdisciplinary, because there is no integration of the methods. For example, a legal doctrinal scholar or a political scientist studies statutory changes, and needs the results of other disciplines to provide certain insights into or data regarding costs, compliance, historical backgrounds, philosophical justification, and so on. The core project and the other projects are executed separately, with only the results of the auxiliary projects used in the core project.[24] They merely provide input − for example, by providing insights into how frequently citizens do not comply with a rule, the costs of enforcing a rule, and the goals of the rule according to the legislative history. The other disciplines are supposed simply to provide relevant facts. The core project may also require the use of normative auxiliary disciplines. For example, moral philosophers may be invited to report on the generally accepted norms of medical ethics on a concrete issue, or on the implications of the principle of justice. Of course, such a simple appeal to other disciplines may sometimes sound naïve. There is frequently no consensus and no conclusive evidence in the social sciences, and the available data are often valid only for specific case studies in specific contexts, and cannot be easily generalised to more general findings. With regard to normative disciplines, the controversial character is even more devastating. Even so, the interdisciplinary character as such does not give rise to special problems, because the different disciplinary frames need not clash. Of course, we should be aware that a sociologist

[24] As these projects can be completely separate, it will often suffice merely to refer to publications by researchers from those other disciplines − for example, to an empirical study about the results of a statutory change. There may be problems of translation and transformation, but no special difficulties regarding facts and norms apart from those in the separate disciplines. An example is the use of social science in Supreme Court cases as discussed by Cotterrell in this volume.

might use a different terminology. There are problems of how to translate and transform the data and insights into the legal *episteme*. But in principle, the difficulties with regard to the relation between norms and facts are no different than those that exist separately in the respective disciplines.

In this research strategy, the core discipline takes the lead, and fully determines the questions to be asked of the auxiliary disciplines. The core project can be descriptive research, describing how the law works, or depicting its doctrinal contents. In such a model, definition projects such as that of Jaap Hage and the clear distinctions of Anne Ruth Mackor may play a role. After all, at least according to some authors taking such an approach, it is mere description, and the normative dimensions can therefore be excluded.

The lead project can also be normative legal doctrinal research, focused for example on the question as to how the statutory text on euthanasia should be amended. For that purpose, the auxiliary disciplines will need to provide data about the costs of the law, the legitimacy of the law, the degree of compliance, and so on. The normative legal perspective then has to determine what meaning these data have in light of the central values of the law. How important is it that ten percent of the medical profession does not comply with the law, or that there is strong opposition to it? How much does enforcement of the law cost, and do we assess the benefits as being worth the costs? The empirical data are then necessary in order to provide a list of arguments for and against certain changes in the law. Again, in such a view, there is no problem regarding a relation between norms and facts − both are distinguished neatly, and some disciplines provide the facts. Other disciplines, such as legal philosophy, provide a normative evaluation of values such as efficiency, legitimacy, internal consistency, and legality. In the end, the leading discipline calls the shots, and the other disciplines are merely subservient. For example, normative doctrinal scholarship as the core discipline decides how to evaluate and combine these facts and normative insights, and how to construct and justify certain recommendations.

On this interpretation, the use of auxiliary disciplines by a core project poses no special difficulties with regard to facts and norms. Such an interdisciplinary project

encounters the same problems concerning the relationship between facts and norms that are already present in the core discipline itself; in other words, the inclusion of other disciplines as providers of facts or normative arguments does not add to the complexity. In each of these auxiliary disciplines, there may also be problems with regard to the relation between facts and norms, but these are internal to the disciplinary auxiliary projects themselves. Of course, the relationship of norms and facts is still a serious issue, especially if one of the disciplines is a hermeneutic one such as doctrinal research or philosophy. But this problem is not made more complex by the inclusion of other disciplines. The disciplines are not integrated, and nor are the problems with regard to the relation between facts and norms.

For many policy-oriented projects, this is a simple and feasible model of research. Nevertheless, I believe it has serious disadvantages. One drawback is that one discipline, such as doctrinal research, is usurping the others, and reducing them to simple providers of empirical data or interpretive and normative arguments. The legal structure is so dominant that all the other insights are placed on the Procrustean bed in order to fit the framework of the legal discipline. Cotterrell's contribution provides an insightful analysis of this risk. This may not always be satisfying for researchers from other disciplines, but, more importantly, it may ignore important insights because they do not fit the model. For this reason, it is only a partial and biased integration. A more fundamental problem is that it presupposes that facts and norms can be so neatly separated, and that they can be analysed singly by separate disciplines. As indicated in the introductory chapter, such a separation must be seriously questioned.

Sub 4. Dialectical cooperation

In light of the above, I suggest that the fourth model is more interesting. In this model, the various participating disciplines interact continuously with each other in mutually adjusting problem definitions, research questions, evaluations, and conclusions. No particular discipline is in the lead, nor is there an assumption that all disciplines or insights can be neatly integrated. Perhaps the various disciplines have different definitions of central

terms, and good reasons for adhering to their own definitions. Of course, they may try to accommodate and to adjust where possible, but there is no assumption that this is always feasible. Perhaps one discipline can convince the other to adapt its terminology and method, or perhaps not. It is an approach that aims to realize coherence as much as possible: that is, searching for coherence, but knowing that it will often be unattainable. Cotterrell argues that such ‘mid-spectrum’ approaches 'indicate a need for genuine interaction on a basis of equality between jurists and legal sociologists'.

Let us look again at a project involving a proposed statutory change regarding euthanasia. The doctrinal scholar can determine whether this fits into the system of the law, is in accordance with the fundamental principles of legality, and is technically correct. However, for a full picture, we also need to know whether the law will be considered legitimate by the population and by the health care professions, whether it will be efficient, and whether it will be morally justifiable. For each of these questions, different additional disciplines are necessary: namely, sociology, economics, and philosophy, respectively.

A philosopher will say that there is no easy answer to the question of moral justification − there are only a number of theories, and they may be in conflict. However, he could suggest studying the theory that seems, in his view, the best reconstruction of the dominant liberal social morality. Or he could suggest a triangulation of the three most influential theories, and see whether there is an overlapping consensus. In this way, he does not answer the general question that really should be resolved − namely, what is morally justified – because in our pluralist societies that question has no clear answers. Instead, he translates it into something that can be answered. So far, this is merely perspectivist, since he offers his own viewpoint, as does the doctrinal scholar. However, the dialectic process may enrich both the doctrinal and the philosophical perspective. For example, the philosopher may point to theories on ethics of care, and ask the lawyer whether the current doctrine is focused too strongly on rights and autonomous decision making: in other words, would it be possible to find elements in positive law that could do justice to the importance of

caring relations? [25] The lawyer may then search actively for relations concerning care in positive law, and discover that he has missed a potential aspect in the doctrine that does account for them. Conversely, the lawyer may point to the central role of professional autonomy in health law, and question the philosopher as to whether the theories he studies have taken this role adequately into account. The philosopher may then turn to specific theories of role morality, and try to include them in his triangulation.

Similar dialectical processes may occur with social scientists and economists. Pacces' contribution demonstrates nicely a similar need to translate and transform the more general questions into tangible ones. We may not know how to study efficiency as such, but we are able to find a yardstick that can be studied. Again, a dialectical process may occur – the lawyer might ask whether the economist could also examine the costs of increased fear of abuse, and the economist may – or may not − find a way to study these. The economist might adapt the abstract definition of euthanasia in his model to one that better fits the legal terminology of the country in question (the Dutch legal system has a very specific definition).

This is a dialectical process. It will not always be possible to truly integrate the different contributions. The philosopher may object that the economic model is only half the story needed for a full political evaluation, and the economist may argue that it is all we are able to obtain. The philosopher may argue that it is crucial to focus on the intentions of the doctors performing euthanasia, and the lawyer will contend that for legal rules of evidence, we can only do this in part.

For the relation between facts and norms, this dialectical model implies that there is neither one clear distinction nor clearly distinct roles for the various disciplines. The question as to what facts are relevant depends on the underlying norms and values, and the question as to what values and norms are relevant must be discerned in light of the facts. Usually the relevant values, norms, and facts are identified by different disciplines. Hence, the search for

[25] For an integrated study of care relationships in law and ethics, see Eric Tjong Tjin Tai, 'Duties of Care and Ethics of Care: A Case Study in Law and Ethics', in Van Klink and Taekema, *Law and Method* (n 5).

relevant facts and values is also a dialectical process between disciplines. In such a dialectical process, attention should be paid to the normative force of the factual (Jellinek), to the latent ideals in the world of facts (Selznick), and to the leading ideals of the legal order, such as legality, justice, and purposiveness (cf. Fuller and Radbruch). Fuller's eunomics project was an attempt to integrate normative and empirical research. He tried to determine which legal processes were best suited for which tasks, and which normative implications would be involved in the choice for one process over the other. Clearly, in such a project, empirical researchers should have a discerning eye for the latent values and norms in the world of facts, and normative researchers should have a sharp eye for normatively relevant facts.

Sub 5. Integrated research

In my view, a full integration between the different perspectives is for the most part impossible. By 'full integration', I mean one in which each of the contributions is included in such a way that the participating researchers will recognise it as doing their discipline full justice. Integration is only possible from a distinct disciplinary perspective; therefore, it is this perspective that ultimately determines how the contributions are translated and transformed into a unifying framework. Because translation and transformation imply a loss of meaning, however, such an integration can never fully do justice to all the contributing disciplines.[26]

Nevertheless, a partial integration is often desirable, especially in projects involving a normative research question. Even if we cannot fully assimilate every contribution, we may still come up with a partial integration that is second best, in which combined scholarly work provides us with the best justifiable recommendations. In such a partial integration, a dialectical process of mutual adjustment should be the starting point, as in type 4 discussed above. In the end, the contributions should be integrated – and not in a view from nowhere, but in a distinct perspective. If the perspective is that of legal practice, the research question

[26] Van der Burg, 'Law and Ethics' (n 18).

may concern how to interpret legal doctrine and apply it within certain contexts. The appeal to other disciplines may sometimes be merely to provide factual evidence and contextual understanding. However, as Cotterrell argues, it may also go beyond that. In the interpretation of thick concepts such as reasonableness, for instance, social science may actually be part of juristic normative understanding. Therefore, juristic interpretation ultimately controls the normative meaning of such thick concepts in law. Both Cotterrrell and Del Mar argue that in the interpretation of thick concepts, facts and values are inseparable.

In research, the integrated perspective will sometimes be that of a purely academic project, such as that of law and humanities. However, more frequently it will be that of a specific policy or law reform. It is constructed by the central research question such as whether the proposed statutory change is a good one, all things considered, or how law enforcement agencies should optimally realize the aims of the new statute. In such a context, the problems of the fact value-distinction break down to become a combination of those in the two types previously discussed. During the dialectical process, the problems involve a mutual adaptation between the disciplines, where each discipline has its own standards, but tries to adjust to the other disciplines as well. In the final integration, it is the core discipline that calls the shots, just as with the second type, where the other disciplines are merely auxiliary.

6. No conclusions, but food for reflection

In my introduction, I announced that this chapter could not be a concluding one in which everything would be nicely integrated. Today's legal research is too diverse for that; more importantly, however, pluralism and perspectivism are unavoidable, and should even be valued in a positive manner. We need an eye for variation to do justice to the variety of legal cultures and legal fields, and to the range of disciplinary approaches that may help us to understand them. Therefore, I was simply able to provide, under four headings, tentative reflections from my own selective perspective.

First, I began by situating the various contributions, and suggested some distinctions that might be helpful to understand the differences. Second, I discussed Peter Cserne's suggestion of a tension between legal *episteme* and the *episteme* of the empirical sciences, and argued that we should adopt a more pluralist understanding of Lon Fuller to enrich his analysis. I then argued that we need to pay closer attention to normative research projects that are oriented towards evaluation and normative recommendation. I concluded by distinguishing different types of interdisciplinary research, and examined how the relation between facts and norms does play a role in each of these types.

Perspectivism holds for the reader as well. I hope that every reader will discover something of interest in this book, and perhaps also in this chapter, but I am certain that each reader will find something different that is of interest to him or her. Although this book does not provide conclusive answers, it does offer abundant food for reflection.[27]

[27] I would like to thank the editors for their helpful comments on an earlier draft of this paper and Donna Devine for her meticulous editing of the text. The usual disclaimer applies.