Wibren van der Burg, Rotterdam, the Netherlands

Essentially Ambiguous Concepts and the Fuller-Hart-Dworkin Debate

1. Introduction

When someone refers to "my religion," the reference may be ambiguous. Is it her set of beliefs (perhaps based on sacred texts) or is it the set of ritual practices in which she participates along with the way she conducts her life with an orientation to the eternal? In other words: does she refer to her religious doctrine or to her religious way of life? It seems that the concept of religion may refer to both practice *and* doctrine.

Similar questions arise with regard to other social concepts. For example, in legal sociology, a familiar distinction is drawn between law-in-the-books and law-in-action. These may seem to be two different entities, but if we talk about 'the law' it is unclear to which of the two we refer. Some authors focus on law in terms of a doctrine as a set of rules; others focus on law as an interpretative practice. Each approach offers valuable insights the other does not. The solution seems to be that we regard law as both a practice and a doctrine, because otherwise we do not get a complete image of law. But how can it be both at the same time?

I believe these conceptual puzzles may be clarified if we look at how the concept of an electron was regarded in the early days of quantum physics. In high school, most of us learned that an electron may be regarded as both a tiny particle and as a wave. Yet, it cannot be regarded as both at the same time, because a combined theory results in contradictions. Each model allows us to understand some aspects of the electron that the other model cannot explain. Even more curiously, the electron seems to behave as we want it to behave. In an experimental setting in which we treat it like a wave, it behaves like a wave. And in an experimental setting in which we treat it like a particle, it behaves like a particle. Consequently, the concept of an electron is a peculiar type of concept. On the one hand, it seems to stand for two different concepts, electron-as-wave, and electron-as-particle. On the other hand, it is a unitary concept as both models represent a single phenomenon.

Some readers may believe that this ambiguity is merely a peculiarity of the fancy world of quantum physics. But it is not. Conceptual ambiguity is in fact quite common. Examples include concepts such as religion, science, language, law, and ethics. Each may refer to both the practice, the activities, and the product of that practice. In ordinary language, we use “science” to refer to both the practice of ongoing research and the results of that practice, i.e., the knowledge and the scientific theories. And we use ‘religion’ to refer both to the practices of religious believers and to the doctrines held by believers or formulated by religious institutions.

This is not merely a matter of words having more than one meaning, as in homonyms, where a word has two unrelated meanings, or as in Wittgenstein's idea of family resemblance. The bank as a financial institution and the bank as something on which we sit are unrelated, separate phenomena. By contrast, the electron-as-wave and the electron-as-particle are not *different* phenomena; rather each model represents the *same* phenomenon perceived or modeled in two different ways. Similarly, law as an ongoing practice and law as a legal doctrine are, as I will argue below, not different phenomena; they are two models of the same complex phenomenon.

Concepts such as law, religion or science may be characterized as essentially ambiguous concepts (hereafter EACs). These are all concepts which refer to a dynamic phenomenon which can be modeled only incompletely in two partly incompatible ways. One model is more adequate to describe movements or actions; the other is more suited to describe objects, whether tangible or merely thought constructions. We need both models; they require and complement each other, but it seems they cannot be combined coherently into a single model.

In this article, I will explore the implications of understanding that some of our concepts are essentially ambiguous. I begin by suggesting a definition and illustrate the basic idea with the examples of social and customary rules (Sections 2 and 3). In disciplines such as law, practical philosophy, and the social sciences, the essential ambiguity of central concepts has so far mostly been overlooked. In Section 4, I suggest that the explanation

for this oversight is that many of the phenomena to which EACs refer are socially constructed concepts that emerge through human interaction. This element of social construction enables theories based on only one of the models to make themselves largely immune to criticism from critics arguing from an alternative model. In sections 5 and 6, I discuss the commonalities and differences between an EAC and the familiar idea of an essentially contested concept (ECC), then discuss some possible objections.

The idea that many of our social concepts are essentially ambiguous may provide valuable insights. It may make us understand why so many debates in philosophy and the social sciences are sterile, hardly making progress. For example, the debate between legal positivism and its opponents may be understood in terms of different interpretations of law as a socially constructed EAC. Both classical natural law and legal positivism have taken a defensible but incomplete model of law and for a long time largely have been able to ward off criticisms by influencing the social construction of law in their terms. This has made the debate often futile. Intermediate theories, such as those of Fuller and Dworkin, usually have tried to do justice to both models. However, they have also failed and were bound to fail, as every attempt to construct a complete theory of law is doomed to lead to internal contradictions or vagueness. In the last section of the paper, I will reconstruct the positions of three contributors to this debate, Fuller, Hart and Dworkin, with the help of the analytical framework of EACs. I will show that an EAC framework offers a better insight into each of these theories, highlights their deficiencies, and may

help to explain why their mutual debates were characterized by serious misunderstandings.

2. Definition

I begin with suggesting a definition of an EAC, then discuss its elements:

> *An essentially ambiguous concept (EAC) is a concept which refers to a dynamic phenomenon that may only be described and modeled in at least two different ways that are each essentially incomplete and which are partly incompatible with each other.*

The dynamic nature of the phenomenon is the central issue. That all examples I have mentioned so far are of dynamic phenomena is not a coincidence. The explanation for the ambiguity is that some models are better equipped to understand the dynamics of a phenomenon and others are better equipped to provide us with a detailed snapshot view. Not every phenomenon has such a complex nature. Objects like a table or a painting may be moved or changed and are the result of a creative activity, but are themselves not to be understood as a movement or an activity. Only dynamic phenomena may be connected with an EAC.

There are at least two partly incompatible ways to model the phenomenon.[1] One model describes the phenomenon in terms of process, i.e., movement or action, the other in terms of an object, i.e., a thought construct or

a product. In previous articles on law, ethics, and religion I have used the terms practice model versus product model, because these are adequate to refer to social phenomena.[2] But for natural phenomena other than actions and practices, terms like process and object may be more fitting. For instance, to return to the old models of the electron: we may regard an electron as a particle, as an object, and as a wave, as a process. Therefore I suggest the more general terms process/practice model versus object/product model. A process/practice model describes the phenomenon in terms of movements, processes, actions, or practices. An object/product model describes the phenomenon in terms of physical entities, texts, or thought constructions. The precise terminology in any one field of inquiry is not central to describing the EAC double-model framework. For example, in law and religion it may be better to use the word doctrine to refer to the object/product model. What matters is that each of the phenomena referred to can be studied in terms of actions, movements, or processes on the one hand, and in terms of objects, doctrines, or products on the other.

In my definition of EACs, I have deliberately used the phrase "described and modeled" to reflect the notion that the ambiguity is to be found at both the levels of single-sentence descriptions and elaborate models or theories. If the law is described by Fuller as a purposive enterprise and by Hart as a combination of primary and secondary rules, they offer shorthand descriptions which stand for more elaborate models or theories of the law.[3]

The broader term conception of law popularized by Ronald Dworkin may be used to refer to both short descriptions and more elaborate models.[4]

A model, even a very detailed one, is by definition a simplification of reality. So, in a trivial sense, every model is incomplete as it necessarily leaves out many details; usually however, the model can be elaborated in various ways to include more details if desirable.[5] By "essential incompleteness" I refer to a more substantive problem. A model is essentially incomplete if it leaves out important aspects or elements of the phenomenon which cannot easily be added to the model without distorting it, e.g., by making it incoherent. A model of law is not incomplete in this sense if it does not state in detail how many days in prison should be the punishment for a given crime. But it is essentially incomplete if (like Austin's theory of law as general commands) it cannot deal with international customary law at all because it is framed in such a way that all law must necessarily be declared by national legal authorities such as legislatures and judges. The definition of EACs implies that each of the two models is essentially incomplete.

Finally, the definition requires that the two models are at least partly incompatible. Of course, there will often be substantive overlap in the descriptions the models offer. Many aspects of the phenomenon may be equally well explained in terms of both models. However, combining both models in one supermodel or supertheory, in which the models as such are included, is not possible, because it leads to incoherence. Why this must be so is understood easily, because the models refer to the phenomenon in different

categories. If an electron is seen as a particle, it can have a mass, whereas a wave cannot have a mass. If an electron is a wave, it has an amplitude and a frequency, whereas a particle cannot have this. Similarly, if religion is seen as a doctrine, it would be a category mistake to state that it has a great musical variation and emotional appeal, which a liturgy like the Roman Catholic Mass may have. Perhaps the doctrine has an emotive appeal too, but that is not the same as the appeal of a musical liturgical experience. So we easily run into incomprehensible statements and contradictions if we want to combine the two models in one model while still using the same language.

The distinction between the two models is a theoretical construction of two ideal types. We may usually distinguish theories with a strong focus on the product and theories with a strong focus on the practice. However, actual theories are seldom (if ever) framed exclusively in terms of one model, because otherwise certain important aspects would be absent from the theory. For example, when I use the term practices here, it has a narrower meaning than in the work of MacIntyre.[6] Almost all moral and legal theories that discuss practices, even if they primarily focus on action, take a richer view than the ideal typical one presented here by including the intentions and beliefs connected with the actions. Thus, they include elements from the product model.

In sum, this definition has important implications for the scientific study of these phenomena. It means that we have to choose between either an incomplete description or an incoherent one. If we want to be complete, we

have to accept incoherence. If we want to be coherent, we have to accept incompleteness. For an adequate description we should use both models, but we cannot use them in one complete and coherent supertheory; we should regularly switch between the models to understand those aspects of the phenomena that can only be studied adequately in the other model.

3. Social and Customary Rules

Before moving to more theoretical discussions, it will be helpful to illustrate the basic idea of an EAC with some examples. In fields such as law, social sciences, and practical philosophy, the analytical framework that an EAC introduces is very useful for providing new insights. Various puzzles may be clarified (even if not solved!) with the help of the analytical framework that the idea of an EAC offers.

An example of an EAC is a social rule. Take the social rule of men taking off hats before entering a church. It is a famous example analyzed by both Hart and Dworkin, and the discussion illustrates their inability to really understand one another.[7] In Hart's analysis, this social rule may be determined easily with reference to observable facts, to a practice. We simply observe what men do when they enter a church. If they all take off their hats, cite the social rule as the reason why, and criticize others who do not take off their hats, we may conclude that there is a social rule to do so. The rule 'Take off

your hats when entering a church' seems an unambiguous rule for men. As this example is used by Hart to illuminate the concept of a social rule in general, we may conclude that social rules in general could be regarded as unambiguous concepts: they can be described in terms of observable behavior, in other words, in terms of a practice model.

Dworkin argues that this rule is not merely a matter of fact; as a normative rule, it can only be fully understood in light of its underlying moral purposes.[8] For example, it may be unclear whether male babies wearing bonnets fall under the rule. In order to interpret the rule, we must look to its purpose, its justification. This is not a very convincing example, because it can easily be discarded with an appeal to the "open texture" of language, as it is a case on which almost everyone would agree that it may be regarded as a penumbra case?. The vagueness can be settled easily by providing a more precise formulation. In terms as discussed earlier, the rule is incomplete, but it is not *essentially* incomplete; it is not, therefore, essential ambiguous.

A more interesting case would be the question as to what the social rule requires of a Jewish man when entering a church. According to his own religion, he should cover his head when participating in a religious service. Now we have to determine a core issue of the rule. We must choose, e.g., whether the social rule requires every man who enters this sacred building to take off his hat, or whether it merely requires every Christian to do so (in which case atheists need not bare their hats either), or whether every man should do so, unless his own religion obliges him to cover his head.[9] This is,

unlike the baby's bonnet, not an example of vague language; it is the central purpose behind the rule which is controversial. Is it respect for a sacred building, for religious devotion to God, or for both? Now we must explore issues that go beyond observable behavior and endeavor on a project of interpretation of what the practice is supposed to imply and of explicitly constructing a doctrine of the rule. Moreover, we need to understand the purpose of the rule, its justification; and for its justification, we cannot refer merely to the existence of the practice. When we dig beneath the superficial analysis, the seemingly unambiguous rule proves to be an ambiguous concept which requires us to switch between a practice perspective and a doctrine perspective in order to fully understand what has become only apparently a simple rule.

How precisely should such an analysis go? We have two options. If we regard the churchgoers rule as a merely social rule, we have to address the purpose of the rule. We must provide reasons for the rule, and these cannot be a mere reference to the existence of the rule. If we regard it as a religious obligation, we may also refer to the relevant biblical text or to authoritative statements by religious authorities.[10] In both cases we need to construct a doctrine about men taking off their hats in church and enter into an argument about the normative reasons that may justify why we should choose one interpretation as applied to Jews and atheists over the other.

Most likely, even after careful analysis and discussion views will differ. Some will hold that Jews and atheists have to respect the 'rules of the

house', whereas others will defend the position that each man has to serve God in his own way, so that the rule only holds for Christians. A third position is that the rules of the house should be respected, unless one's own religious tradition obliges one to behave differently (and perhaps unless they are offensive or discriminatory); in that case the Jew should cover his head, but the atheist should uncover it. Different interpretive principles may conflict here; there is no clear criterion which one should prevail, nor is there a suggestion that there is always the same hierarchy between them. For example, it seems to me that even those who hold the second position would be willing to take off their shoes when entering a mosque; in that context the rules of the house argument should obviously prevail. When a non-Muslim enters a mosque, it is only respectful if he takes off his shoes, even if his own religion does not require so.

Clearly, the type of argument appropriate for use in interpretation of social rules is a matter of controversy, and there is no easy or mechanistic interpretation. This implies that we are forced to enter an interpretative discussion in which we construct the best possible doctrine as an interpretation of the social rule. This example demonstrates that even for simple social rules we need both models for a complete understanding, that of practice and that of doctrine. Especially in controversial cases we may have to switch between both in order to get a full understanding of social rules or any other essentially ambiguous concept.

My second example addresses a subcategory of social rules: rules of customary law. That the concept of rules of customary law has an essentially ambiguous character may be easily understood, and I believe the ambiguity inherent in these rules may also account for the difficulties that customary law has presented for many positivist theories. In the Civil Law tradition, as well as in international law, a customary rule must meet two requirements in order to be recognized as a legal rule: *usus* and *opinio juris sive necessitatis*. There must be a practice, i.e., at least some actions in conformity with the rule; and there must be a belief that there is a legal obligation to act accordingly. The first element can be understood in terms of the practice model and the second in terms of the doctrine model as a conviction with a propositional content. At first sight, it may look as if both can be reduced easily to observable social facts and that in order to deal with the concept we may rely on a simple model in which descriptions of the observable actions and statements of the beliefs behind those actions are combined into one legal doctrine. Nevertheless, this will not do. Even if there are some statements as to why actors acted according to what they perceived to be an obligation, this may still leave us in doubt about the precise content and domain of application of the rule. Moreover, it may be unclear whether it is really a rule or, in Dworkin's terms, a principle that, in the cases presented so far, has not yet been overruled by a competing principle. For issues such as these, we cannot refer to the social facts alone. Neither the actions, nor the dispersed statements regarding why the actions were done will enable us to get a complete grasp of the rule of customary law.

We must construct the *opinio juris* in terms of a doctrine. What is the purpose behind the practice, and what should we do if this purpose conflicts with other valuable purposes? So again, we need both models to fully understand the concept of a rule of customary law.

The resulting image is still too simple. In line with the usual scholarly explanations of customary law, I have treated *usus* and *opinio juris* as separate elements, even reified them as separate social facts. But, of course, they are not separate. They are two dimensions of the same phenomenon. The *opinio juris* is what gives meaning to the actions as instantiations of the customary rule. Each of the separate actions can only be completely described if the intention refers to the opinion that it was obligatory. If that intention was absent (e.g., because it was the most convenient action or merely a matter of courtesy) the action cannot be regarded as an instantiation of the rule of customary law. Conversely, the *opinio juris* is not some free-floating doctrine as a brooding omnipresence in the sky or a statement in the books. It only exists in the actions and in the mind of the actors, i.e., in their beliefs that they are obliged to act as they do. Scholarly books and texts such as preambles or court decisions do not constitute the *opinio juris*, they report that it was present in the practice, and they may provide additional proof for the notion that the customary rule should be seen as part of the law.[11] They may even contain a formulation of the rule that is widely regarded as authoritative. But in the end, the basis for the recognition of the customary rule is to be found in the repeated actions that embody the *opinio juris*.

Both the example of the churchgoers-rule and the example of customary law show that for most practical purposes we do not need a complete description. One model suffices: in the first case the practice model, in the second the doctrinal model. Observing behavior in a mosque will be enough for me to understand that I have to take off my shoes. We can usually stick to a simple practice conception in describing social rules. Only in some unusual situations will a practice conception prove inadequate, requiring us to switch between both models. It is only then that the ambiguity of the concept rises to the surface. Similarly, we can usually stick to a simple doctrinal model in order to describe the law. In the great majority of cases, judges may interpret the text of statutes almost mechanically. It is only an exception, in hard cases, that they really must engage in an explicit project of constructing the best possible interpretation. It is only then that we realize that law really is an interpretative practice as well.

4. Social Phenomena

Some phenomena are social in nature. Science, religion, language, law, morality – they all would simply not exist without humans and human action. These phenomena vary with cultures and societies. Each country has, e.g., its own legal system and its own legal culture. Religions vary greatly and develop

over time. Critical reflection may play a role in the way such phenomena are perceived, criticized, and then perhaps, changed. Although natural phenomena may be the result of human construction in one sense – think of the electron in experimental situations – social phenomena are the result of human construction in a more radical sense.

Our conceptions of social phenomena influence the phenomena themselves. For example, if I believe that in religion orthopraxis is much more important than orthodoxy, I will structure my religion accordingly. If I can convince my fellow-believers, our common religion will become one in which orthopraxis is central. Moreover, if such praxis-oriented religions become dominant in a society, this may determine the view of what religion is. The idea that religion is primarily a system of beliefs may consequently be hard to grasp in such a society.

A specific conception of a social EAC may make itself true. If, to take another example, all lawyers, legislators, and citizens in a certain jurisdiction are legal positivists, this will influence the phenomenon of law itself. The legal actors will try to mould law into their positivist image. Attorneys and judges will present legal arguments in such a way that no explicit reference to morality is made, and after a while it will be difficult to find any precedent that is not consistent with a positivist view. Legislators will focus on broad codifications in order to ensure that we can always construe the law as based, directly or indirectly, on authoritative statements by legal officials. For example, a Dutch statutory provision of 1828 stated that customary law is only

recognized as law if and only if it is explicitly recognized as law by statute.[12] Customary law does not fit easily in most positivist views; by this act the legislator simply validated a positivist view of customary law.

This general tendency that perceptions of social phenomena influence their own reality is especially significant for EACs. Usually, one of the two models will be dominant in a certain society. In the positivist Civil Law traditions, law is primarily seen as a collection of statutory texts and as a doctrine based on their contents and their interpretation by the courts. In a Calvinist tradition, religion is primarily seen as orthodoxy, a belief in a certain doctrine based on God's Word, the Bible. If most actors hold such a view, that concept will become self-reaffirming through their actions and statements.[13] In a sense, the model makes itself immune from criticism.

As a result, we may easily overlook that a concept such as law or religion is an EAC. That customary law does not fit into a source-based positivism can be ignored, because the positivist legislator has provided a seemingly clear criterion. Customary law that does not fit this criterion may be easily discarded as not really law. That judges implicitly rely in their arguments on moral values and principles may be easily overlooked if positivist judges try to exclude explicit appeals to morality from their written opinions.

This process of a self-fulfilling choice for one dominant model is reinforced by the social construction of restrictive definitions. For example, a positivist author may argue that custom is not law unless it is explicitly

recognized as such by statute. If she has enough authority, this view may lead to a generally held conception in her community, in which law is by definition restricted to rules that find their basis in statutes. Any person who nevertheless calls such a custom customary law then can be proven to be mistaken – he does not understand the concept of law.

Even so, some phenomena will remain that do not fit the dominant model. Even if customary law may not be central to our own legal system, we have to admit that it plays a role in some other legal systems. In some legal orders (e.g., international law regarding war crimes or the case law of the European Court of Human Rights) explicit appeals to moral arguments are made. The final line of defense for the dominant model is to regard such examples as atypical, as problems of the penumbra, in a sense not being 'really' law. It is the core that matters, and the critics simply have an obsession with a small minority of hard cases. In political debates on religion this phenomenon is well-known. Radical anti-Muslim authors in Europe argue that we must focus on the essential core of Islam, which is to be found in a literal interpretation of the Qur'an. This core is supposed to be violent, anti-women, anti-democratic and so on. References to the large majority of more moderate or even secularized Muslims are discarded by suggesting that they are not 'real' or 'true' Muslims, and that, in time, they will also become faithful to the real nature of Islam. A particular interpretation of the Qur'an is taken to be definitive of the character of the Islam and every possibility of re-interpretation in the light of modern society (which a more practice-oriented or

historical-contextual view would accommodate) is denied. Moderates or modernists are just atypical cases – even if they constitute an overwhelming majority.

A dominant model can, consequently, be reinforced in three ways: by acting upon it and thus making it a more adequate modeling of reality, by using restrictive definitions of concepts that conform to the model, and by discarding data inconsistent with the model as merely penumbra problems. These three mechanisms used to reinforce one-sided conceptions may work effectively for some time in certain conditions. Nevertheless, they can only offer temporary successes. The fact remains that the phenomenon thus conceived is modeled only incompletely, and there are still aspects of it which simply do not fit into the dominant model. In the end, this will likely force the debate open again about how precisely we should understand the phenomenon.

So far, I have only discussed descriptions and descriptive theory. In normative theory, it is even easier to stick to merely one model. We can simply say that those aspects of the phenomenon with which our conception cannot deal are historical relicts for which, in normative theory, there is therefore no need. Customary law can be proclaimed a historical relict which in a reliable modern legal system should not be accepted. Restrictive definition is even easier in normative theory.

My thesis is that some debates between normative theories can be better understood with the use of the framework of EACs. In these debates, both sides focus on one model and legitimately argue that the other side is blind to certain important aspects of the phenomenon. Because all the defensive mechanisms mentioned above are available, it is almost impossible to convince the other side. It seems to me, e.g., that in moral philosophy MacIntyre's work rightly drew attention to the importance of the practice model neglected by the predominant philosophical focus on abstract ideal-theoretical systems of principles and rules.[14] But as he was as one-sided as his opponents, he did not present an attractive alternative image to those who believed in the value of abstract theorizing and constructing general doctrines.

In politics, we may understand the valuable core of conservatism as pointing towards the value of the immanent wisdom embodied in our practices and traditions, a wisdom based on experience. This conservatism provides a valuable counterbalance against those who focus on utopian systems and abstract liberal theorizing. But when conservatives try to transform this immanent wisdom into an abstract theoretical system, it loses much of its initial attraction. Moreover, it becomes vulnerable to the same criticisms against theoretical overreaching that conservatives earlier successfully brought forward against liberal and utopian theories. The sad history of modern neoconservatives on issues such as Iraq only illustrates this point.

5. Essentially Contested Concepts

The idea and the term introduced remind, of course, of Gallie's essentially contested concepts (hereafter ECC).[15] EACs and ECCs have much in common, indeed, but they differ at one crucial point, as explained below. It may be helpful to explore the commonalities and differences to get a clearer understanding of EAC.

Both EACs and ECCs allow for different interpretations; one concept may give rise to conflicting conceptions. Their meaning is open for variation and change. The differences are not the result of intellectual confusion or yet incomplete understanding; they are essential and unavoidable. Moreover, the debate between the proponents of different conceptions is a productive one, because it may bring to light the defects of the different conceptions. Each conception highlights certain important aspects of the phenomenon but neglects or completely ignores certain other aspects.

However, there is a fundamental difference in the explanation for why the concept allows of conflicting conceptions. For an ECC the explanation lies in the evaluative character of the concept, for an EAC it lies in the dynamic character of the phenomenon. The evaluative character of an ECC is the first characteristic mentioned by Gallie.[16] Combined with the aspirational and complex character of an ECC, it results in a legitimate plurality of interpretations. Different conceptions focus on different values inherent in the concept or may rank them differently. For example, some theories of

democracy regard equality as the essential or defining characteristic, others focus on self-government. As the aspirational character makes it impossible to excel in all dimensions, these choices lead to different conceptions of democracy. The essential defect leading to the conflicting conceptions is the impossibility to make all valuable elements of the concept fundamental and to realize them all completely. In other words, different conceptions reflect different evaluative positions.

EACs are primarily descriptive concepts, although many have an evaluative dimension. The plurality of conceptions is explained by the dynamic character of the phenomenon described.[17] The essential defect leading to the conflicting conceptions is that we cannot model phenomena both as a dynamic process and as a static object or doctrine in a single theory. The conflicting conceptions reflect different descriptive positions.

The difference between ECCs and EACs is more than merely a distinction between normative and descriptive concepts. Certainly, a purely descriptive concept cannot be an ECC. Thus, electron may be an EAC, but not an ECC.[18] But, of course, many primarily descriptive concepts, especially those referring to social phenomena, also have a normative dimension. They cannot be fully understood if we do not know the point of the phenomenon, the purpose. Therefore, there can be EACs that also are essentially contested. Democracy is one of Gallie's favorite examples of an ECC, but it is also an EAC. We may describe democracy in terms of the practices and actions that

constitute a democratic polity, but also in terms of a set of rules, principles and characteristics, in other words as a normative political doctrine.

In other cases the relation may even be more complex. Legal positivists claim that law is a normatively neutral concept.[19] Therefore, by definition, law cannot be an ECC. Legal positivists usually focus on law as a doctrine based on objective facts. Anti-positivists, however, usually focus on law as a practice and argue that we cannot understand what is going on in that practice if we do not focus on the master ideal, the purpose, or the leading values of law.[20] Different conceptions of these ideals, purposes or values are legitimate. Consequently, law is an ECC. In the view of anti-positivists, positivists are merely blind for this unavoidable normative dimension of law, but their position would be understood and defended better if they would acknowledge it. An example is Ronald Dworkin's attempt to describe jurisprudential debates in terms of different conceptions of legality.[21] However, chances are slim that Dworkin will be able to convince his positivist opponents that this is the best way to reconstruct the debate. They will probably continue to deny the basic presupposition that law is essentially oriented towards a normative ideal or value. This brings us to an interesting second-order contestedness. Positivists regard law as a normatively neutral concept which therefore cannot be an ECC, anti-positivists regard it as an ECC. This means that it is contested whether or not law is an ECC.

Even leaving aside the controversy on the value-fact distinction, there is a further reason why we should not hold on to a simple dichotomy of ECC

as evaluative and EAC as descriptive. The choice for one descriptive model may have important normative implications. For example, choosing the product model of law will more easily allow us to uphold a separation between law and morality, whereas regarding law as an argumentative practice will easily lead to the insights that moral and legal arguments are intertwined and that law needs to meet some minimum moral standards in order to be effective.[22] Moreover, the choice for a descriptive model may be influenced by normative considerations. For example, someone who values legal certainty or systematic coherence may have a preference for the product model; someone who cherishes diversity and change may have a preference for the process model. That we can distinguish between a primarily evaluative ECC and a primarily descriptive EAC need not imply that the choices made for a descriptive model are normatively neutral.

Gallie's analysis of the ECC was an important contribution to understanding how concepts can give rise to different conceptions. But it only addressed one possible explanation of the pluralism of conceptions. Many concepts referring to complex social phenomena are both essentially contested and essentially ambiguous. The fact that social concepts are often essentially contested may be the reason why so far the other source of pluralism of conceptions has not been understood, let alone addressed explicitly. As EACs are often also ECCs, the existing pluralism of conceptions may easily be attributed to the concept's being essentially contested, and the essential ambiguity may be neglected or implicitly reduced to the essential

contestedness. However, it is important to recognize both sources of conceptual pluralism, and analyze them in their own right. There are two distinct, even if not completely separate explanations for why one concept may have different legitimate conceptions, and we can only get a deeper understanding of the pluralism of conceptions if we recognize them both.

6. Two Possible Objections

One possible objection to my view is that it may only be due to our current defective state of knowledge that we perceive a concept as ambiguous. With regard to ECCs, Arnold Heidenheimer has argued that on some concepts, debate may lead to a consensus. Such concepts he calls former essentially contested concepts.[23] Could it not be that for an EAC a similar development is possible, that concepts previously regarded as ambiguous will become unambiguous due to scientific progress? An example to support this objection would be the electron. I have used the models of the electron from the time of the debates between Einstein and Bohr. But since then, quantum theory has moved on and it now seems to have a unitary concept of an electron as a quantum mechanical particle.

I grant that there are no *a priori* knock-down arguments to deny that all EACs may in due course become disambiguated. My argument has been mostly based on generalization of a few examples, and therefore it may be that

some of the concepts that now seem essentially ambiguous, prove not to be so after all. But I think that there is a plausible argument that it is highly unlikely that all the concepts to which I have referred to so far can be proven to be unambiguous.

Let us start with the electron concept and assume that it is no longer ambiguous.[24] Even so, there has been a certain period in the evolution of quantum theory in which it could only be described as an EAC. When talking about electrons during that time, the best available option when referring to an electron would be to regard it for the time being as an EAC. We can make this point more general. The regulative ideal of philosophical analysis or scholarly practice may be that we reach one complete and coherent conception of a concept. As long as we have not realized that ideal, it may be inevitable to regard some concepts as an EAC. Perhaps a God's eye point of view or a Herculean perspective would be able to integrate the two models of religion or law in a higher-level theory. For the purposes of my analysis, however, it suffices that for ordinary human beings, with the current state of their theoretical knowledge, these conceptions are to be seen as partly incompatible. Completeness and coherence may be separate ideals, but it seems that the attempt to realize both ideals leads to serious problems.[25]

Thus, even with regard to quantum physics the idea of an essentially ambiguous concept still may make sense if only as a temporary stage in the evolution of the theory. However, let us leave physics aside and focus on social phenomena. The case for the inevitability of ambiguity is much stronger

there. The strategy used for solving the ambiguity in the case of the electron has been that of extremely abstract theorizing of a phenomenon which itself was already a theoretical abstraction from visible natural phenomena. This strategy does not seem available for concepts such as law or religion. We could try to employ it, but it is unlikely that the required abstract discussion will lead to really useful insights. What we might win in coherence, we would loose in descriptive and explanatory power. In the study of social phenomena, it seems likely that such highly abstract approaches will have to abstract from most of the practical insights and experiences that a useful theory should be able to address.

The reason we need the two models to describe one phenomenon is that one can do more justice to the dynamic aspects and the other to the static aspects. Therefore, we describe law or religion both as a practice and as a doctrine. Doing both in one theory leads to category mistakes, as I have argued above. In ordinary language, it is impossible to transcend this difference in categories without becoming extremely vague. Therefore, it is unlikely that a theory is possible that does justice to both models, without serious loss of meaning (and thus being seriously incomplete).

Of course, many EACs have been described in terms that at first sight do not seem ambiguous. But on closer analysis, it may turn out that they are ambiguous after all. Hart's analysis of law in terms of rules provides an example that will be discussed below. Another example is David Lewis' theory of language as a convention.[26] Lewis makes a similar distinction

between a language as a semantic system and language as a human social activity and argues that both belong to rival schools in philosophy of language. He regards his theory of conventions as a synthesis between both. However, this "synthesis" is merely the explanation of an EAC in terms of a different concept which is itself essentially ambiguous. The concept convention can be analysed along similar lines as the concept of a social rule, and therefore must be regarded as an EAC.

Another objection would be that although the word law is ambiguous, it does not refer to one concept law, but rather to two different concepts: legal doctrine and legal practice. It seems, therefore, quite easy to solve the ambiguity by henceforth consequently distinguishing between the two models of law. Or put more generally: we can solve the superficial ambiguity of every EAC by always distinguishing between the practice and the product. We stipulate two separate definitions for two separate, if closely related, phenomena, and the problem is solved. We no longer speak of law, but only of legal doctrine and legal practice.

As a research strategy, this will often be very productive. For research purposes, we need clear working definitions that can be applied to reality. For example, the sociologist Philip Selznick, who certainly is not a positivist, uses Hart's positivist analysis of law in terms of a union of primary and secondary rules to construct a weak definition that is useful for doing sociological

research on law.[27] And similarly we may define a legal doctrine in terms of a collection of statutes, judicial opinions, and other texts.

However, as a strategy to solve the ambiguity, this will not work for two reasons. The first one is that in almost every meaningful stipulative definition the same ambiguity returns in essential elements of that definition. If we define law as a practice (or institution) in terms of rules, we introduce again an EAC. If we define law as a doctrine not as the collection of texts themselves but as the largely coherent body composed of the meaning of the texts, we will have to engage in a practice of interpretative construction about their meaning. The doctrine does not exist out there in the theoretical stratosphere of ideas, but has to be constructed. If we construct it, we have the choice between either making it incomplete (by leaving out all the controversial and undecided parts), or complete but arbitrary (by including only one interpretation on those controversial parts and leaving out the competing interpretations).[28] So a conception of a legal doctrine will itself be either incomplete or incoherent. Consequently, our attempt would fail, because the problem of ambiguity would not have been solved, but merely removed to a different level.

Secondly, this strategy does not do justice to the phenomenon itself. It would mean that many central concepts of our social discourse would have to be completely skipped and replaced by new pairs of concepts. Such an artificial language might perhaps work in scholarly analysis, but outside of academia it would not. And for good reasons. We are not dealing with

separate phenomena, but with one complex phenomenon. Law can only be understood fully if we see it as the union of practice and doctrine. We would lose that understanding of law as a union of practice and doctrine if we were to artificially separate both. They are not two distinct phenomena, but two distinct aspects of the same phenomenon.

7. The Concept of Law

A field where the ambiguity of the central concept has given rise to many controversies and mutual misunderstandings is law. The broad variety of definitions is just an illustration, as is the fact that many authors have resisted presenting a strict definition, preferring a more general approach of conceptual analysis instead. Some authors have described law in terms of a practice model: 'the enterprise of subjecting human conduct to the governance of rules' (Fuller), an argumentative practice and an interpretative enterprise (Dworkin), a practice oriented towards legality (Selznick).[29] Others have described it in terms of a product or doctrine, or in terms of objective sources and texts, e.g., as a hierarchical or institutionalized system of norms (Kelsen and Raz).[30] Some definitions are in fact ambiguous because they use terms that are essentially ambiguous themselves, such as rules or institution, e.g., in Hart's concept of law as the union of primary and secondary rules.[31]

Three authors have been highly influential in the recent Anglo-American discussion on this issue: Lon L. Fuller, H.L.A. Hart, and Ronald Dworkin. The struggle of these three authors with the concept of law illustrates the ambiguity of the concept and the problems that arise when we try to develop a theory that is both complete and coherent. I will discuss each of the three in more detail and show how they all struggled with it and how this struggle can be understood better if we regard law as an EAC.

Lon Fuller sees law in a way that many European law students find counterintuitive; it is a purposive enterprise. In his book, *The Morality of Law* (1964), he focuses on the legislative enterprise. Usually in legal theory the focus is on the product, legislation, but Fuller describes the failure to make law in terms of various attempts made by a fictitious king Rex. How can a legislator effectively guide society? How can legal rules really govern human conduct? He shows how the legislator can fail in at least eight ways, for example, by making unclear, contradictory or retroactive rules. From these failures he derives eight criteria that legislation should meet in order to produce law at all. This internal morality of law he calls procedural natural law. He contrasts this with substantive natural law, which formulates substantive norms about the contents of the law, whereas his eight injunctions are primarily directed at the process of lawmaking.

The two forms of natural law correspond with the two models I have distinguished. Most older forms of natural law, usually with a reference to the

Bible or to timeless precepts of Reason, present a substantive moral doctrine and argue that this is in some way part of the law. Fuller focuses on the enterprise, the practice, of law and argues that there are certain procedural criteria we must meet if we want to make any law at all that can serve as guidelines for human conduct. Much of the misunderstandings and the relative neglect of Fuller's important insights are due to the fact that most of his positivist opponents misinterpreted his eight criteria as a normative doctrine of natural law. Transformed into a normative doctrine, however, his theory becomes vague and gradualist: it does not provide any strict formulas or substantive criteria. Thus it may have seemed, in the heyday of analytical philosophy, hardly worth taking seriously.

Most of the problems which King Rex encounters point to defects in the text or contents of the statutes, such as unclear formulations or contradictions. These are defects that at first sight can be adequately described in terms of a doctrine model. But Fuller elaborately shows that in order to establish that these defects are present, we need to interpret the text in light of reality, and this interpretative activity requires us to consider law as a practice. Moreover, some of the eight requirements can only be discussed in terms of actions or practices, e.g., the congruence between the rules and official action and the relative constancy through time. Therefore, even though in some respects we could analyze the deficiencies of legislation in terms of the texts produced, such an analysis would be incomplete.

Looking at law as an enterprise easily leads to a gradualist and pluralist approach. If law is a purposive enterprise it can succeed more or less. It is thus a gradual phenomenon, which makes it more difficult to create a clear-cut criterion of when a legal system exists. Moreover, if law is simply a purposive enterprise, this enterprise can take place in various contexts. A school, even a group of friends on a camping tour, may develop some internal legal rules and thus create a legal order. A broad version of legal pluralism seems not only unavoidable but is explicitly endorsed by Fuller.[32]

Both inevitable consequences of the law as practice model, however, seem to undermine central purposes of law. If law should guide with rules, it is important that the rules can easily be determined, that conflicting interpretations are settled, in other words that we know what precisely the law requires of us. But if we cannot be sure whether law exists and which legal order or interpretation of that order should prevail, this makes guidance by rules problematic. We would need a mechanism to authoritatively determine those rules and to settle conflicts. In other words, we need a way to model law as a set of easily applicable rules, as a public doctrine of non-retroactive and clear rules. And so the internal logic of Fuller's analysis forces us to return to the product model and, in fact, to precisely those aspects of law which are central to Hart's analysis.

Even if he has some room for law as a doctrine, Fuller's focus is on law as a practice, that is, as emerging from the interaction between citizens. He refers to his position as an interactional view of law.[33] But the content of

law in a practice conception does not lend itself to very precise formulations, because of its dynamic, gradualist, and pluralistic character. In practice, there are often no neat distinctions; rather phenomena merge and are intertwined. Fuller repeatedly criticizes the shortcomings of a linguistic philosophy that attempts to create artificial distinctions that are not based in the reality of our ordinary language. However, his approach results in an analysis which remains often frustratingly vague.

In his later work, *The Anatomy of Law* (1968), Fuller tries to do justice to legal positivism.[34] The central distinction in this book is the one between made law and implicit law. Made law is the law that is purposively created by legal authorities such as legislators and, up to a point, judges and parties to a contract. Implicit law is the law that is implicit in our daily activities, that sometimes emerges as a custom in our interaction. Most positivist authors treat custom as a historical relict and consider implicit law as merely non-legal norms. It is one of the great accomplishments of Fuller that he takes both equally seriously.[35]

Although implicit and made law may be distinguished, they are not two separate types of law. Fuller shows that each presupposes the other. Made law has implicit law dimensions and implicit law has made law dimensions. Both are intertwined with each other.[36] In the end he advances what is now called a modest version of natural law, but he does not deny the legitimacy of the positivist perspective which focuses on made law.[37] According to Fuller, we must pay attention to both forms of law.

Fuller thus seems to suggest, in the framework developed in this article, that we need both a practice approach (a focus on implicit law) and a doctrinal approach (a focus on made law). It remains unclear, however, how precisely we could form one unified theory based on the two approaches which are clearly at odds with each other. The result of his struggle to deal with the richness of the phenomenon of law is, consequently, a vague and incoherent theory. He gains, compared to *The Morality of Law*, a broader perspective doing more justice to the product model. The price for this attempt to achieve completeness is two theories uncomfortably sitting together in one incoherent framework.

H.L.A. Hart is in many ways the opposite of Fuller, and not only because they have been each other's opponents in various debates on natural law and positivism. Whereas Fuller has an informal essayistic style, Hart is an analytical philosopher with an extremely precise use of language. Although Hart calls his famous book *The Concept of Law* an exercise in descriptive sociology, it is almost devoid of empirical insights, whereas Fuller's eunomics project is strongly inspired by sociological studies.

Hart repeatedly calls his theory a practice theory of law. He starts with a description of the practice of primary social rules. For him, the existence of social rules involves the "combination of regular conduct with a distinctive attitude to that conduct as a standard".[38] Such a system of primary rules is defective because the rules are often uncertain, they are too static, and social

control is inefficient as an enforcement mechanism. In order to remedy these defects, we need secondary rules of recognition, change and adjudication. The introduction of these remedies is the transition from the pre-legal into the legal world.

The introduction of the secondary rules in the book marks a different transition as well, which is not explicitly noticed. It is the transition from the model of practice to the model of doctrine. After introducing secondary rules, from that point on, Hart talks about primary rules no longer in terms of behavior, but in terms of lists and texts. The first stage in the step from the pre-legal to the legal "is the mere reduction to writing of hitherto unwritten rules".[39] This is, however, not a mere reduction, it is a transformation from rules conceived as patterns of conduct to rules conceived as propositions that can be written down. This transformation is a radical one that substantially changes the way how Hart analyses the law. For example, the main criterion for the existence of a rule is no longer the pattern of behavior, but a reference to authoritative writing or inscription. The discrete unconnected rules of action become a unified system, a coherent doctrine, and the concept of validity (which is difficult to understand exclusively in terms of practices) is introduced. It is this doctrinal conception of rules that is elaborated in the chapters after the introduction of the secondary rules. The famous open texture problem, for example, can only be discussed if we regard rules as linguistic propositions; it makes no sense to discuss the open texture of a practice.

Thus, although Hart starts with rules in a practice model, he ends up with rules in what Dworkin later calls a textbook model.[40] This results in a highly attractive and largely consistent theory. Because Hart has started from within a practice model, he can also claim to be relatively complete. He has done justice to the practice dimension of law, transforming and reducing it to the doctrinal model, but without noticing the fundamental importance of the transformation from practice to doctrine.

Moreover, his focus on the concept of law rather than on a strict definition of law (which could be shown inadequate because it does not cover important examples) makes his theory more complete and more immune to criticism.[41] It enables Hart to give a satisfactory analysis of international law, a phenomenon with which his positivist predecessor Austin could not adequately deal, given the absence of an international sovereign. Thus his theory of law is more complete than Austin's. Elements that do not fit his theory can be dismissed as matters of the penumbra or as an unhealthy focus on hard cases (against Dworkin) and purpose (against Fuller), which are not relevant to the core of the concept.

Hart's theory in *The Concept of Law* can be regarded as a choice for a highly consistent model, which can claim to be largely complete by ignoring the fundamental transformation in the analysis. The history of the debate with Dworkin thereafter painfully shows the limitations of this choice. Hart struggled until the end of his life with understanding and replying to Dworkin's criticisms.[42]

The idea that law is an essentially ambiguous concept can provide at least a part of the explanation for this struggle. It was difficult for Hart to understand Dworkin's criticisms and relate them to his own theory because most of the criticisms were formulated in terms of a practice model. Therefore, he could not perceive them otherwise than as missing the mark. In as far as he did understand Dworkin's criticisms, he could not address them adequately without giving up his choice for the positivist theory and the doctrinal model. Yet, he was painfully aware that Dworkin had made some very important points that could not be discarded as lightly as many other positivists did. This illustrates that a one-sided choice for one model may be defensible up to a certain height but that in the end, it will be impossible to ward off all attacks.

The work of the third author, Ronald Dworkin, has given rise to much confusion and misunderstandings of and by his opponents. His theories are notably difficult to interpret. There are various reasons for this, one being that he started with a number of only loosely connected critical essays, published in *Taking Rights Seriously*. Only after some time he tried to construct a coherent theory in *Law's Empire*.[43] Moreover, many of his articles and books use the strategy of developing his own theory partly by criticizing the work of others, and this inevitably results in texts that are colored by the conceptual framework of opponents, which in combination does not always provide for a coherent presentation.

The main reason for the confusion, however, is that in his early work he continuously switches between the model of doctrine and that of practice. In *Taking Rights Seriously*, he uses a double tactic to attack Hart's position. On the one hand, he argues within Hart's model of doctrine and presents an internal critique. When lawyers argue hard cases, he holds, they appeal not only to rules but to rules as well as to more open standards such as principles. The appeal to these open standards forces the lawyer to go beyond the model of law as a settled doctrine consisting of rules based on authoritative sources. The purposes and principles implicit in the law and in the public morality of his society cannot be found in a statutory text or other sources but must be continuously debated and reconstructed. Therefore, the lawyer has to engage in an interpretative and discursive practice. In this argumentative practice, no sharp distinction is possible between legal and non-legal arguments, because of the open and controversial nature of principles. This is an attack on the model of doctrinal rules from within, showing that it is seriously incomplete in a way that not merely requires amending it to a model of rules and principles (the way many positivists, including Hart, thought the attack could be countered) but ultimately requires leaving the model altogether. In presenting his internal critique, Dworkin necessarily uses the terminology of the model of doctrine, thus suggesting to many readers that he is committed to ideas of existing law and merely argues for some minor modifications. For example, his famous Right Answer Thesis is often misinterpreted by positivists as implying that somewhere in the doctrine of law the right answer is already

there, merely waiting to be discovered by the judge. However, such an interpretation (consistently denied by Dworkin in his later work[44]) misses the point Dworkin wants to make. In order to construct – rather than find – the right answer, we cannot rely on the social sources of law as authoritative doctrine, but must engage in normative interpretation and argumentative discourse.

His other line of attack is an external one. Sometimes Dworkin boldly states in a very direct way that law should not be regarded as a collection of rules (whether or not supplemented by principles) but that we should put aside the idea of an existing law and replace it by law as an interpretative enterprise.[45] The critique is presented using the practice model, showing that the positivist model cannot do justice to important characteristics of law as understood in that model. For example, the positivist model cannot explain (other than regarding it as an illusion) why both attorneys and judges, when arguing a hard case in court, act as if there is one answer that has more legal merits than the other. This enables Dworkin to present more clearly his own views within the framework of a practice model. Within such a practice model, the Right Answer Thesis is not about an 'existing' answer, but about a regulative ideal that structures the argumentative practice of court disputes and the reflective practice of judicial decision-making.

So in the same book and sometimes even in the same article, Dworkin uses both the practice model and the product model. However, as law is an EAC, the combination of both models in one theory leads to inconsistencies.

The many critics who claim that Dworkin's early position is incoherent are therefore correct. The lack of coherence is the inevitable result of his attempt to criticize Hart's doctrinal model of rules with an internal critique as well as to present a different model of law as an interpretative practice.

In his later work, Dworkin predominantly chooses a practice model, repeatedly arguing against doctrinal law as a brooding omnipresence in the sky. His latest collection of essays, *Justice in Robes* (2006), makes this unambiguously clear. I believe this emphasis on practice has led to a more coherent position. Whereas his initial ambition was to be complete and cover the full phenomenon of law, his theory of the concept of law now has become more consistent but less complete.

However, to make the issues even more complex, in many publications Dworkin does not restrict himself to a theory about the concept of law as an observer. He is also a participant in the debate about how to interpret the (U.S.) law in concrete controversies, e.g., on abortion or affirmative action. And as a participant in that practice, he has to discuss law in terms of a coherent legal doctrine, because this is the regulative ideal which structures argumentative legal practice. This shows how, from an internal point of view, we are often forced to construct law in terms of doctrine. In order to enable us to discuss critically competing interpretations of the law, we need to formulate them as precisely as possible into a coherent doctrine.[46] Both models are not merely each incomplete, they refer to each other. This double-role of Dworkin as philosophical observer and as participant in a specific legal discourse is an

additional source of confusion. As an observer, he emphasizes law as a practice; as a participant in that practice he focuses on constructing law as a doctrine. It is often difficult to distinguish in his work which role he takes. The accusation of incoherence will therefore always linger on.

The work of these three authors demonstrates vividly the struggle with the ambiguity of the concept of law. Hart, as a highly skilled analytical philosopher, opted for consistency and clarity; in order to achieve this he had to focus on the doctrinal model even though he started with a practice theory. He had to admit, consequently, that he had no fully convincing answers against the criticisms of Dworkin – even more, he was at a loss to understand them.

Fuller, with his interest in the reality of law as interaction and as a purposive enterprise, initially opted for the model of practice, but this left him with vagueness and lack of precision. Moreover, just like Hart, he could not realize his ambition of constructing a complete and coherent theory. His explicit acknowledgement in his later work of the intertwinement of made law and implicit law is an important step forward. Whereas Hart focuses only on the product model, Fuller does justice to both models. In this respect, his theory is the most promising and the most complete of the three – even if it comes at the price of incoherence and vagueness.

Dworkin's position has rightly been described as a third theory, as initially he did not want to opt for either of the two models, but oscillated

between them. This resulted inevitably in justified accusations of inconsistency and incoherence. His choice in his later work to focus on a practice theory brought him gains in coherence but losses in completeness and precision. Moreover, his criticisms against various positivists became even less effective as those scholars really did not understand his criticisms once they were phrased mainly in terms of the practice model.

It is a telling characteristic of the debate between these authors and their affiliates that they often simply do not understand each other. In his review of Fuller's *The Morality of Law*, Hart writes that they seem fated never to understand each other's work, and the Dworkin-Hart debate is replete with inadequate representations of the opponent's views.[47] Clearly, this mutual misunderstanding cannot be the result of a lack of intellectual skills, of personal animosity, or of intellectual dishonesty in deliberately misrepresenting the opponent's view. There must have been something very fundamental which made it impossible for them to really understand the other. With the help of the framework offered by the EAC, we may understand why. Whereas both Fuller and Dworkin focus on law as based on human interaction, Hart focuses on law as a set of rules with a determinate content.

It seems to me that Dworkin was in his early work on the right track, but took the wrong turn in *Law's Empire* and his later work. He tried to make his theory more consistent by putting more focus on the practice model. The analysis of law as an EAC shows that this choice led to a stronger degree of incompleteness and some loss of precision. I believe that a better solution

would have been to accept that law is an essentially ambiguous concept and that therefore we cannot but alternate between the two models, which is the alternative Fuller chose in his later work. Rather than trying to ignore incoherence, we might openly recognize it. That could well be the only way to contain it.

8. Conclusion

In this article, I have argued that many of the central concepts in fields like philosophy, law and social sciences are essentially ambiguous. Essentially ambiguous concepts can be defined as concepts which refer to dynamic phenomena that may only be described and modeled in at least two different ways which are each essentially incomplete and which are partly incompatible with each other. The most interesting implications of the explicit recognition of EACs are to be found with regard to social phenomena. The social construction of social phenomena makes it possible to disguise the essential ambiguity. Understanding that the related concepts are essentially ambiguous may therefore offer many fresh insights in concrete problems as well as in theoretical debates.

The essential ambiguity of these concepts can explain many puzzling characteristics of the phenomena they refer to. I have illustrated this with the examples of social and customary rules, but there are many other examples

where the framework of EACs may lead to a better understanding of the phenomena. Debates on multiculturalism, for example, are often frustrated by reification of minority cultures in terms of certain core beliefs and a restrictive interpretation of religions such as the Islam in terms of their dogmatic content. Especially for the analysis of the dynamics of phenomena and for the understanding of how different phenomena are connected, switching between both models may be very productive. The product model offers sharp distinctions and clear descriptions as to the phenomenon at a specific time; the practice model offers more insight in how the phenomena are connected to and influence each other.[48]

The framework of EACs may be illuminating not only for practical issues, but also for more theoretical debates. The debate between Fuller, Hart, and Dworkin provides an illustration. Various other debates seem to be in a continuous gridlock because involved parties do not understand that they focus on different models that are both legitimate and partial. Methodological debates in the social sciences, the debate between natural law and legal positivism, or the debate between MacIntyre and his opponents, can all be better understood from this perspective. Of course, I do not claim that these problems and debates will be history once we analyze them from within the framework of EACs. Nevertheless, the recognition that central concepts in these debates are essentially ambiguous will at least provide part of the explanation of why they seem so intractable.

I have only suggested some implications so far, but we may need to rethink other issues as well. For example, the notion of coherence as a methodological ideal or criterion needs to be elaborated. If completeness and coherence are incompatible, what does this mean for academic research and for coherentist methods such as reflective equilibrium? How can we accept that some incoherence is often inevitable without succumbing to a postmodern everything goes? These are all issues that need yet to be addressed once we have understood how central essential ambiguity is to our social world.[49]

Prof. Wibren van der Burg

Professor of Legal Philosophy and Jurisprudence

Faculty of Law

Erasmus University Rotterdam

PO Box 1738

3000 DR Rotterdam

The Netherlands

[1] I discuss EACs in this article in terms of only two models. However, there can be more models, as there are other sources of ambiguity. For example, the two models with regard to physics only refer to the four dimensions of space and time, for other dimensions additional models may be required. The tension between the potential and the actual and between the real and the ideal are two other plausible sources of ambiguity. Therefore, models describing the potential or ideal state of a phenomenon seem plausible candidates for additional types of

model. For example, Witteveen constructs a third model of law, referring to its ideals. (Willem Witteveen, Great Webs and Tapestries and Fabrications, in: *New Approaches to Semiotics and the Human Sciences*, eds. William Pencak and J. Ralph Lindgren, 1998, 265-277) In Radbruch's theory of law as a reality oriented towards a *Rechtsidee*, we may also find elements of such a third type. (Gustav Radbruch, *Rechtsphilosophie*, 8th edn., eds. Erik Wolf und Hans-Peter Schneider, 1973). These examples notwithstanding, the most important source of ambiguity is the dynamic character of phenomena, so I will ignore these other models here for the sake of simplicity.

[2] See Wibren van der Burg, Two Models of Law and Morality, *Associations* 3 (1999), 61-82; Wibren van der Burg, An Interactionist View on the Relation between Law and Morality, in: *The Importance of Ideals: Debating Their Relevance in Law, Morality, and Politics*, eds. Wibren van der Burg and Sanne Taekema, 2004, 197-218; Wibren van der Burg, Pour une éthique protestante libérale dans un monde changeant et pluriel, *Revue de Theologie et de Philosophie* 2005, 193-209.

[3] Lon L. Fuller, *The Morality of Law*, 1964/1969 rev. edn.; H.L.A. Hart, *The Concept of Law*, 1961/1994 rev. edn.

[4] Ronald Dworkin, *Taking Rights Seriously*, 1978, 34-36

[5] The model can be incomplete for two reasons: either because further elaboration has not been done but easily could have been (e.g., by adding a few more details that had been left out for simplicity's sake) or because it could not have been done. Only in the latter case, if inconsistency or other distortions result from making the model more complete, we may call it essentially incomplete.

[6] Alasdair MacIntyre, *After Virtue*, 1981.

[7] In the 'Postscript', Hart complains that he finds Dworkin's words "tantalizingly obscure." Cf. Hart (note 3), 124-25 and in the Postscript at p. 257; cf. Dworkin (note 4), 50-58.

[8] Although I agree with Dworkin's argument about the inherently normative character of social rules, I am not interested in the relationship between facts and norms here. My use of

the example serves a different purpose: to point out that we cannot understand a rule merely in terms of actions and practices, but also need to understand it in terms of a doctrine. Whether the construction and interpretation of such a doctrine is a morally neutral enterprise, as a positivist might hold, or an inherently normative enterprise, as Dworkin would hold, is irrelevant for my purposes.

[9] Other variations are also possible: perhaps it should be done so only during the church service, perhaps priests or ministers are exempt, etc.

[10] It is remarkable that both authors treat it as a merely conventional rule, thus ignoring its biblical basis in 1 Corinthians 11: 7-10. If a social rule has a connection with a religious or legal authoritative text, it becomes even more problematic to analyze it merely in terms of a practice.

[11] In international law, the relevant actions may, however, also exist in statements by state officials to the effect that they uphold a rule. Especially if a practice involves omissions, not taking certain actions where it would be possible, it will often be difficult to identify a practice without heavy reliance on such statements.

[12] Sanne Taekema (ed.), *Understanding Dutch Law*, 2004, 23. Taekema reports that, of course, it had little effect. There is even a famous decision in which the Dutch supreme court relied on a trade custom that contravened statutory law (HR 3 maart 1972, NJ 1972, 339, Maring/Assuradeuren). The provision was repealed only in 1992.

[13] A curious example of such an influence on broader society and even the legal system is provided by a Dutch lower court case on the Hindu ritual of spreading the ashes of a deceased in a river, in violation of environmental regulations (Ktr. Zevenbergen, 3 februari 1982). The court held that this could not be regarded as a religious obligation because there is no authoritative religious text in which the obligation is formulated. Thus the Judeo-Christian conception of a text-based religion was uncritically used, even though in Hinduism texts do not have such a central and authoritative status.

[14] MacIntyre (note 6).

[15] W.B. Gallie, Essentially contested concepts, *Proceedings of the Aristotelian Society* (1956), 167-198.

[16] Gallie (note 15) uses the term "appraisive".

[17] In those cases where a third or fourth model is at stake, the explanation is found in the impossibility to coherently combine in one descriptive theory models of the ideal and the real or of the actual and the potential.

[18] Conversely, there may also be ECCs that are not an EAC, for example, evaluative terms such as beautiful.

[19] E.g., Hart (note 3), 240.

[20] Cf. Philip Selznick, Sociology and Natural Law, *Natural Law Forum* 6 (1961), 84-108; Fuller (note 3); Ronald Dworkin, *Justice in Robes*, 2006

[21] Dworkin (note 30), 168-183

[22] I have elaborated the implications of alternating between two models of law for the relationship between law and morality in Van der Burg (note 2), Two Models.

[23] Arnold Heidenheimer, Disjunctions between corruption and democracy? A qualitative exploration, *Crime, Law and Social Change* (2004), 99-109. Although I agree that some concepts could become uncontested or at least less strongly contested, the example he uses, democracy, is not really a convincing one. Even if we were to accept that it may no longer be strongly contested that democracy is valuable (in light of the rise of fundamentalist political Islam a highly questionable thesis), it is still strongly contested what precisely it means. The Dutch system of democracy differs in important respects from the U.S. system (e.g., constitutional monarchy, proportional representation, no federal system, no judicial review, a fully appointed judiciary and prosecution, and no juries); yet both systems can claim to be democratic.

[24] It may be doubted, nevertheless, whether in the current highly abstract theory of an electron the ambiguity of the earlier two models is really completely solved or merely removed to a different level. We may either accurately determine the speed of a tiny particle or accurately

determine its position. An increase in accuracy in one dimension leads to a decrease in precision in the other. This fits the idea that we may not be able to describe adequately both the static dimension and the dynamics of a phenomenon. So it seems the ambiguity is still there at a different level. However, it is not in quantum physics that I am interested here, so I will simply grant that the concept of electron may no longer be ambiguous for the sake of argument.

[25] There is an interesting parallel here with Gustav Radbruch's idea that the tension between the three ideals constituting the *Rechtsidee* leads to antinomies.

[26] David Lewis, Languages and Language, *Philosophical Papers*, 1983, 163-188, at 188

[27] Philip Selznick, Law, *Society and Industrial Justice*, 1969, p. 5-7.

[28] An interesting view on pluralism is offered by the Islamic legal tradition, where the four main schools of Sunni law are deemed equally valid and their conflicting interpretations are all viewed as law by the state. See Sherman Jackson, *Islamic Law and the State*, 1996, 147. This does not lead to incoherence in the doctrine of law, as there are four equally legitimate doctrines of law and conflict rules for cases of conflict between the schools.

[29] Fuller (note 3), 145; Ronald Dworkin, *Law's Empire*, 1986, 13 and 91; Selznick (note 20).

[30] 'Norm' is itself an EAC, but both authors analyse it in terms of a sentence or as an abstract entity that can be individuated, that is, in terms of an object model. Cf. Michael Hartney, Introduction, in: Hans Kelsen, *General Theory of Norms*, 1991, pp. xxiii-xxiv, for a discussion of how Kelsen regards norms both as sentences and as existing entities; see also Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System*, 1970.

[31] Hart (note 3)

[32] See Fuller (note 3), 125, where he indirectly accepts, as an implication of his view, that there may be hundreds of thousands legal orders in his country alone.

[33] Fuller (note 3), at 221 and 237

[34] Lon L. Fuller, *Anatomy of the Law*, 1968

[35] Perhaps Fuller is better able to understand the importance of implicit law because in his fields of expertise, labor and contract law, informal norms often play a major role. Classics such as the sociological studies of Sally Falk Moore on labor law and of Stewart Macaulay on contract law are illustrations of the importance of social norms that have emerged in such contexts, often even in contradiction to official law made by the state or by standard contracts. Cf. Sally Falk Moore, *Law As Process: An Anthropological Approach*, 1978; Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, *American Sociological Review* 28 (1963), 1-19

[36] This idea is also clear in the 1969 'Reply to Critics', in *The Morality of Law* (note 3), 154. There is, of course, much more continuity between both books than this short sketch can show.

[37] Fuller (note 34), 119

[38] Hart (note 3), 85

[39] Hart (note 3), 95

[40] With the exception of the ultimate rule of recognition which is the only rule that should be analyzed in terms of a practice. This illustrates the impossibility of restricting a theory of law to the doctrinal model – at some point reference to the practice is needed, even if this reference makes the architecture of the theory more problematic.

[41] I believe this makes him invulnerable, as he claims in the 'Postscript', (note 3), at 246, to Dworkin's criticism in terms of the semantic sting, but this invulnerability comes at the loss of an increase in vagueness.

[42] The posthumously published Postscript shows clearly how difficult it is for him to come to terms with Dworkin's critique. The fascinating biography by Lacey describes how intense and painful this struggle has been (Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*, 2004).

[43] Dworkin (note 29). Here Dworkin is often guilty of what he claims others to do with his own work: constructing theories of his opponents in which they hardly recognize themselves.

[44] E.g., in Dworkin (note 20), 41-43

[45] Cf. his 'Reply to Critics', in Dworkin (note 4), 293; Dworkin (note 29), 90-91

[46] For an example of how a dialectic interplay between the two models is required in order to make critical discussion possible, see Antonie A.G. Peters, Law as Critical Discussion, in: *Dilemmas of Law in the Welfare State*, ed. G. Teubner, 1986, 250-279.

[47] For some of these complaints of being unable to understand the other and being misunderstood by the other, see Lacey (note 42), 198 (quoting a letter by Hart in which Fuller's reply to his famous Holmes lecture is called a "piece of logomachy" with an enormous length and obscurity); H.L.A. Hart, Book Review of The Morality of Law, 78 (1965), 1281-95; Fuller (note 3), 154 ("I must confess I am puzzled by it." – referring to Hart's criticism); Hart (note 3), 'Postscript', passim, using terms with reference to Dworkin's interpretation and critique as "perplexing" (ibid., p. 243), "tantalizingly obscure" (ibid., p. 257); Dworkin (note 20), 166 (arguing that he can only stick to his own interpretation of Hart's theory, despite the explicit denial by Hart that it is a correct interpretation). In fact, large parts of the latter book address how other authors, including Hart and Coleman, have completely misinterpreted his theory.

[48] Cf. Van der Burg (note 2), Two Models

[49] Earlier versions of this article were presented at the IVR-conference in Lund, at Tilburg University, at the Law and Public Affairs Seminar at Princeton, at Penn State Dickinson School of Law, and at the meta-ethics workshop of the Netherlands School for Research in Practical Philosophy. I would like to thank all the audiences at those forums for stimulating discussions. Special thanks are due to Stanley Brubaker, Luigi Corrias, Vincent Geeraets, Gilbert Harman, Gideon Rosen, Sanne Taekema, Willem van Genugten, Marcel Verweij, Kenneth Winston and Willem Witteveen for their helpful comments, and in particular to Intisar A Rabb for her meticulous editing and for many interesting suggestions. Most of the research for the article was done during a sabbatical stay at the Center for Human Values at Princeton.