

## LIMITS OF PRIVATE LAW: ENRICHING LEGAL DOGMATICS

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### I. INTRODUCTION: A LEGAL PROBLEM

#### A. *Wrongful Life*

In 2005, the Dutch Supreme Court decided a wrongful life case.<sup>1</sup> During her pregnancy, a woman consulted her midwife because there were two cases of handicaps in her husband's family, due to a chromosomal disorder. The midwife did not think it necessary to investigate the matter any further. This was later considered a professional failure with dramatic effects. When born, baby Kelly turned out to have serious mental and physical handicaps from which she suffered severely. The parents claimed damages—both on their own accord and in the name of Kelly—and their claims were sustained by both the appeal court and the Supreme Court.<sup>2</sup> The Supreme Court not only considered the strictly legal issues but also considered moral and pragmatic arguments that had been put forward against such so-called “wrongful life claims.”

First, there is the moral opposition that sustaining these claims violates the principle regarding the dignity of human life, since it acknowledges that having not been born is preferable to living in a

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1. Academisch Ziekenhuis Leiden/Verweeters, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 18 maart 2005, NJ 606 (Neth.).

2. *See id.*

condition like hers. Second, there is the pragmatic argument that sustaining claims like this will tempt doctors to practice “defensive medicine” to avoid serious risk. Both arguments were carefully examined by the Court and subsequently rejected.<sup>3</sup> What is the Supreme Court in fact doing here? Is it calling out or explaining the law to us? Or is it exceeding its limits by elaborating on principles and policies, taking into account the moral grounds and the possible consequences of the ruling itself? In both directions the question arises: What constitutes the limits of private law?

### *B. Law Without Limits?*

The reasoning of the Supreme Court in this case exemplifies a pattern that is not uncommon in difficult cases, at least not in our part of the world. In first instance it reasons within the context of the accepted sources of law, in this case the relevant provisions of the civil code in an accepted interpretation. In difficult cases, though, the result of this approach is not completely satisfactory, since the decision is underdetermined by the law. On the one hand, the relevant rules and precedents do not offer sufficient guidance for the decision, while on the other hand the decision reached cannot be sufficiently justified by the relevant rules and precedents. In the light of the relevant facts the law shows certain “gaps,” as it were, which have to be filled in by other factors than the accepted sources of law. Therefore, the Supreme Court appeals, in second instance, to principles and policies to fill in these gaps, by making and justifying a decision for the case at hand. Its reasoning can therefore be considered as a two step line of reasoning, although the steps cannot always be clearly identified or separated.

This two step line of reasoning, however, displays some specific characteristics about the limits of law. First, it shows us that the law has what H.L.A. Hart has termed an “open texture,” which means that its rules, precedents or whatever standard of behavior will always, in the end, prove to be indeterminate, as a result of the general nature of the language used and the unpredictability of the social reality in which they are applied.<sup>4</sup> Rules are not self-applying, as Wittgenstein noted, and their application is therefore intrinsically mixed with the facts of the case or, in other words, its context.<sup>5</sup> This is the meaning of the old Roman

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3. *See id.*

4. *See* H.L.A. HART, THE CONCEPT OF LAW 124-36 (2d ed. 1994).

5. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 39-41 (G.E.M. Anscombe trans., 3d ed. 1967).

adagium *ius in causa positum*; the law is, in the end, given with the facts.<sup>6</sup> The two steps line of reasoning displays the open texture of law, but it also shows us something of the more fundamental nature of law. The contextual gaps of the law are often filled in by principles and policies, by values and practices, by idealistic and pragmatic notions.

This leads me to an important distinction of three different dimensions of law, namely the positivistic dimension (accepted sources of law), the idealistic dimension (“*de lege ferenda*,” law as it ought to be) and the pragmatic dimension (“law in action,” as it turns out to be). In a perfect world, perhaps, these dimensions would coincide. We do not live in a perfect world, however, and we are brought up with the tensions between “law as it is” and “law as it ought to be,” on the one hand, and between “law in the books” and “law in action” on the other. Moralists and realists have made a business of exploiting these tensions as a domain of research. Lawyers, judges, and courts tend to exploit them in finding an acceptable solution for a specific case. First, they appeal to the positivistic dimension to decide a case, but in difficult cases they often appeal to the other dimensions as well (as they did in the wrongful life case). Law then, seems to encompass more than we are inclined to think, at first sight. What, then, are its limits? And how are we to find them?

These are highly disputed questions in legal theory. Three Grand Old Theories of law have haunted us for many centuries now. Legal positivism acknowledges the existence of idealistic and pragmatic dimensions, but considers them to extend beyond the limits of the law. It defines law by its positivistic dimension, the black letter law of our first intuition.<sup>7</sup> Natural law theory, on the contrary, takes the idealistic dimension to be the defining characteristic element of law,<sup>8</sup> the positive norms being only shadows of this real norm leading a somewhat undetermined nature “in the omnipresent brooding of the sky” (paraphrasing Oliver Wendell Holmes).<sup>9</sup> Legal realism, lastly, considers the law to be the facts and practices that constitute legal norms and that precede and follow from black letter law. These three Grand Old Theories each take different characteristics of law to be defining: the positivistic, the idealistic, and the pragmatic dimension, respectively. As

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6. E.J.H. Schrage, *Unjust Enrichment: A Historical and Comparative Overview*, in UNJUST ENRICHMENT AND THE LAW OF CONTRACT 1, 1 (E.J.H. Schrage ed., 2001).

7. See HART, *supra* note 4, at 185-86.

8. See *id.*

9. See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (“The common law is not a brooding omnipresence in the sky . . .”).

the German postwar legal philosopher Gustav Radbruch has shown convincingly, these dimensions are not to be considered as different conceptions of law but are inherent tensions *within* the concept of law. The different dimensions of law serve different values, namely legal certainty, justice, and purpose, respectively. The values can never be realized completely at the same time. In law, as elsewhere, inherent values rarely coincide and mostly conflict with each other. The best one can do in legal practice is to look for and find an equilibrium, which exemplifies an optimal combination of these values.<sup>10</sup>

What the Grand Old Theories do share, in all their differences, is the mistaken view that the concept of law and thus its limits are the result of definition. In my view, instead of defining the concept of law, we would do better to investigate the phenomena that present themselves as law (for example in the wrongful life case). Paraphrasing Wittgenstein one could say:

Consider the phenomena we call ["law"] . . . What is common to them all? Don't say: "There must be something common, or they would not be called ["law"]"—but look and see whether there is anything common to all.—For if you look at them you will not see something that is common to all, but similarities, relationships, and of whole series of them at that. . . . I can think of no better expression to characterize these similarities than "family resemblances": . . . [law] forms a family.<sup>11</sup>

If we follow Wittgenstein's suggestion then—and don't define the law, but look and investigate it—what do we see and find? Is the law demarcated along tight and neat boundaries, reflecting ontological differences, as the Grand Old Theories picture it? Or does it resemble a patchwork of family resemblances of positivistic, idealistic and realistic dimensions, as the wrongful life case suggests? Or is law without limits whatsoever? What does the wrongful life case actually show and teach us; what can we learn from it?

## II. SOLUTIONS FROM LEGAL THEORY

### A. *Law in Context*

In his study *Law in Context*, William Twining tells us an anecdote from the days he lectured on private law at the University of Khartoum

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10. GUSTAV RADBRUCH, RECHTSPHILOSOPHIE 164-70 (1975).

11. WITTGENSTEIN, *supra* note 5, at 31-32.

in Sudan. In his lecture he discussed a case in which a visitor of a zoo had been feeding a camel and had been bitten by the camel. The question of law was, of course, whether the zoo was liable for the damage caused. At that time a student raised his hand. The lecturer, happy with a question, interrupted his lecture to experience the following anti-climax. "Please, sir", the student asked, "why was the camel in the zoo?"<sup>12</sup> This question puts everything in place again. Why was the camel in the zoo, while they are freely walking around in Sudan? What is the use of lecturing common law to an audience to whom the facts of the case are beyond comprehension? Twining's conclusion is that law cannot be properly understood outside the context in which it is developed and learned, and he therefore pleads for an approach of law "[to broaden] the study of law from within."<sup>13</sup> In such a contextualistic approach there are no standard recipes in law. Lawyers should look for the demands of the circumstances of the case "*pros ton kairon*" in the words of Aristotle<sup>14</sup>— and adjust their responses accordingly.

In my opinion Twining has a strong case, because the suggested approach is not one that is arbitrarily chosen, but is itself the result of relevant developments in law and its study. Let me try to explain this, starting with the contextualisation of law *itself*. Posner has named this phenomenon "the decline of law as an autonomous discipline," by which he refers to the blurring of the sharp boundaries between law, politics, and morality.<sup>15</sup> Let me illustrate this development with examples from the European context, starting with the demarcation between law and politics. Under the influence of the doctrine of the separation of powers this demarcation was rather strict until the end of the nineteenth century. The content of law was determined by politics, while its shape and enforcement were by and large considered to be the result of doctrinal law. With the emerging welfare state, this clear division blurred because the law became an instrument of politics to change society, while at the same time the judiciary developed new legal standards for politics. As a result of both tendencies the domain of public law has grown, while its content became more and more the subject of political controversy. The best example from the Dutch context is offered by the emerging principles of good governance in administrative law, such as the prohibition of the misuse of power and of *detournement de pouvoir*.

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12. WILLIAM TWINING, *LAW IN CONTEXT: ENLARGING A DISCIPLINE* 26-28 (1997).

13. *See id.* at 13-14.

14. ARISTOTLE, *ETHICA NICOMACHEA* 106 (Kalias 1997).

15. Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-87*, 100 HARV. L. REV. 761 (1987).

Though these principles supply additional legal standards for government, their content is seriously disputed. Only recently have politicians complained that government is hindered by the fact that these principles of good governance bring the administrative judiciary too close to the business of politics.

The relation between private law and morality shows similar developments. Until the late nineteenth century law and morality were strictly separated, the law enforcing minimal standards of behavior, leaving the aspirations and ideals to critical morality. From the twentieth century onwards the boundaries were blurred in two opposite directions: the moralization of private law, and the legalization of morality. On the one hand, unwritten norms of a moral character got hold of the central doctrines of tort, contract, and property. Most of the classics of the Dutch Supreme Court of the twentieth century belong to this category. On the other hand, more and more social relationships were brought under the influence of the law, such as those between teacher and student, parents and children, and doctors and patients (wrongful life is an example).<sup>16</sup> Again, the domain of private law has grown, but its norms are more and more of a social cum moral nature and therefore more disputed.

A telling case from recent years suggests that this development has come to an end. The case was about an accident by which a boy named Jeffrey drowned under unrevealed circumstances after his swimming therapy in a hospital pool. At the time he was under the supervision of his mother and a hospital therapist, but neither was there at the time. The parents did not claim money, however, but asked the court for a declaration that the hospital was liable, because that would help them cope with their loss. The parents filed a claim against the hospital for the recognition of their rights, but not for the compensation of damage. Should the court give such a moral declaratory ruling, even if it is conceded that the hospital is liable for the accident? Should the judge become a psychological therapist, instead of the priest or the psychiatrist? The Dutch Supreme Court denied the claim, because of a lack of a legitimate interest of the claimants.<sup>17</sup> And that was the end of it.

These examples—however roughly sketched—show that there is every reason “to broaden the study of law from within” (as Twining has

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16. See, e.g., *Academisch Ziekenhuis Leiden/Verweerders*, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 18 maart 2005, NJ 606 (Neth.).

17. *Sylvia Johanna Van Aalten/De Vereniging voor Christelijk Wetenschappelijk Onderwijs*, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 9 oktober 1998, NJ 853 (Neth.).

named it).<sup>18</sup> Law cannot be understood properly—as perhaps in the late nineteenth century—without reference to politics and morals. Legal discourse has been extended far beyond the traditional boundaries and overlaps the political and the moral discourse. As a matter of fact, we do regularly appeal in legal discourse to moral principles and pragmatic arguments, besides traditional legal sources. In that sense, law is a meta-discourse, a discourse on other discourses. We could introduce the metaphor of demarcation by saying that the traditional legal sources constitute the inner limits of legal discourse, while principles and policies mark the outer limits. Most lawyers stay most of the time within the inner limits, appealing to statutes, precedents, or customary law. In difficult cases, however, when the traditional sources are exhausted, we do in fact appeal to moral and political arguments; not *per se*, however, but *as* legal arguments. Although we regularly appeal to other discourses than law, in law we do subject them to the limitations of legal discourse. After all, legal concepts determine what can be said (and thought) in law.

As a result, we have to beware of two possible risks in this regard. On the one hand, there is the risk of losing sight of these limitations. This is the pitfall of those lawyers who tend to forget the limitations of legal discourse, who trespass the boundaries of legal discourse unknowingly, and commit the sins of sheer activism or moralism. They do speak in law—not as lawyers though, but as activists or moralists. On the other hand, however, we run the risk of not exhausting the possibilities because we tend to stay within the inner limits of legal discourse. This is the pitfall of the lawyers we tend to accuse of legalism, formalism, or black letter law. Again, they do speak in law, and they even speak as lawyers, but they do not speak as open-minded lawyers. I will return to some examples of these pitfalls later on. For now, it is enough to conclude that the contextual approach of law holds the middle between these two opposites. What are the consequences for the study of law? This question will be addressed in Part II.B.

### B. *The Interdisciplinary Study of Law*

One of the reasons “to broaden the study of law from within,”<sup>19</sup> as Twining suggested and we investigated, is the contextualization of law itself. There is another good reason for this approach, however, and that is the contextualisation of *the study of* law (not of law itself). There are,

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18. See *supra* note 13 and accompanying text.

19. *Id.*

of course, several ways to drive this point home. In legal theory it is an accepted proposition that the application of law, or the identification of a legal proposition, presupposes an interpretation of law.<sup>20</sup> Apart from the facts, legal disputes are mostly disputes on different interpretations of the relevant law.<sup>21</sup> In difficult cases, different interpretations of law are supported by both parties, each struggling for recognition as the authoritative interpretation. These diverging interpretations are not always the result of mistake or bad faith (although they sometimes are), but of different interests and perspectives of the parties, lawyers and judges involved. Interpretation is therefore intrinsically interwoven with the argumentation of different positions.<sup>22</sup>

Legal reasoning is essentially a practical syllogism, where a case is confronted with arguments deduced from experience which results in a provisional solution. As Stephen Toulmin has shown us, this line of reasoning is always defeasible, that is, it can always be annulled by adding new information.<sup>23</sup> In this sense it differs from theoretical reasoning, which indeed has the potential to lead to certain and objective conclusions (given the premises). As a domain of practical reason, law misses this comfortable certainty, leaving its practitioners to find their way in daily practice with no other means than experience and practical wisdom.

As we saw in the wrongful life case, judges do appeal in their reasoning to principles and policies, beyond the appeal to more traditional legal sources. And as we argued before, these appeals are subject to the possibilities and limitations of legal discourse. If these observations hold, then this has implications for the nature of legal knowledge. We tend to consider “thinking like a lawyer” as deliberating on positive law, that is, the traditional legal sources. If we take the suggestion “to broaden the study of law from within” seriously, however, then this is not enough and the legal student should come to learn also to think like a sociologist, an economist, or a psychologist (compare with the Jeffrey case).<sup>24</sup> Or, perhaps, we should say that “thinking like a lawyer” includes thinking like all these other professionals.

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20. See Ken Kress, *Modern Jurisprudence, Postmodern Jurisprudence, and Truth*, 95 MICH. L. REV. 1871, 1910-11 (1997) (reviewing DENNIS PATTERSON, *LAW AND TRUTH* (1996)).

21. See RONALD DWORKIN, *LAW'S EMPIRE* 1-30 (1986).

22. See PAUL RICOEUR, *THE JUST* 109-26 (David Pellauer trans., Univ. of Chi. Press 2000) (1995).

23. See STEPHEN EDELSTON TOULMIN, *THE USES OF ARGUMENT* 107-13, 118-22, 141-45 (1958).

24. See *supra* notes 15-18 and accompanying text.

A lawyer who understands law in its context will never restrict herself to the strictly legal domain, but will integrate sociological, economic, or psychological expertise. The professional knowledge of a lawyer extends beyond the strictly legal and will overlap with other disciplines. Also in this epistemological sense, law is a discourse on other discourses. In his daily work a lawyer is, at the same time, to some extent an engineer, or accountant, etc. Not in the sense that he can replace their expertise, for example as an expert witness, but in the sense that he is capable of analyzing the problem into its different aspects and of redressing them on their own merits. Again, just like in speaking the legal language, we should realize that this knowledge is applied in a legal context and therefore subject to the limitations of law and legal discourse. At the end of the day, these elements have to be integrated in one legal judgment. One could even say, perhaps, that it is the particular knowledge of the lawyer to integrate all these different kinds of expertise in a legal judgment. Similarly, a legal scholar who understands law in its context will not restrict herself to legal dogmatics, in the strict sense, but will include history, literature, anthropology, etc. A contextual approach is necessarily an inclusive one, resulting in the interdisciplinary study of law.

In a similar tone, James Boyd White has discussed the nature of the interdisciplinary study of law when he combatted “doctrine in a vacuum” in legal education and pleaded for an interdisciplinary training.<sup>25</sup> Such a training is not one of “law *and* sociology,” or “law *and* “history,” White argues, but one of “law *as* each of these.”<sup>26</sup>

This is a different view of interdisciplinary work from the usual models, for we are not interested in translating findings or even methods from one field to another; rather, in this kind of work each of the disciplines would be looked at as I suggest law should be looked at: as a language, an activity, and with an eye both to its special resources and to its limits.<sup>27</sup>

Put differently, “thinking like a lawyer” implies thinking like all the others and training in the first should therefore encompass the last. Not by imitating the sociologist, economist or psychologist, but by being aware of the sociological, economic, and psychological elements *in law*.

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25. See JAMES BOYD WHITE, FROM EXPECTATION TO EXPERIENCE: ESSAYS ON LAW AND LEGAL EDUCATION 8-24 (1999).

26. *Id.* at 22.

27. *Id.*

After all, Twining wanted “to broaden the study of law *from within*”<sup>28</sup> (not from outside). A contextualist approach in law, therefore, implies more than just adding some social circumstances in our thinking and acting in law; it presupposes the capacity to switch perspectives, in the full awareness of the possibilities and limitations of each of the positions chosen (first and foremost, the legal one). Contextualism is necessarily connected with perspectivism. There is no such thing as a “view from nowhere” (in the words of Thomas Nagel),<sup>29</sup> but only an observation from the viewpoint of the observer. Every observation presupposes a blind spot, which is the context which cannot be observed from the standpoint taken. One has to step aside to observe the blind spot, thus creating a new one.

### C. *Alternative Theories of Private Law*

In this contextualistic approach of private law, its limits then are fluid and constantly changing, depending on context and perspective. Are there any alternatives available? There are two I can think of, and I name them “back to dogmatics” and “forward to policies” respectively. I hope to show that they represent extremes that should be avoided, since they commit the sins of underexploiting legal discourse and trespassing the boundaries of legal discourse respectively, as discussed before.<sup>30</sup> The position taken here represents a middle of the road position that, at least in my view, avoids the pitfalls of the alternatives while combining their advantages.

First, then, the program of “back to dogmatics,” for which I take the views of Weinrib as exemplary. Weinrib is concerned with the understanding of private law, his claim being that private law is to be understood in its own terms (and not in terms of its purpose). In Weinrib’s view, “private law is a self-understanding enterprise,” that is, it is “simultaneously explanandum and explanans, both an object and a mode of understanding.”<sup>31</sup> Thus understood, the idea of private law is considered to be a synthesis of three theses, namely formalism (the understanding of private law through its structure), corrective justice (the specification of this structure), and a Kantian notion of rights (the moral standpoint immanent in this structure).<sup>32</sup> In Weinrib’s view, private law

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28. See *supra* note 12 and accompanying text.

29. THOMAS NAGEL, *THE VIEW FROM NOWHERE* (1986).

30. See *supra* text accompanying notes 18-19.

31. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 14 (1995).

32. *Id.* at 18-19.

is autonomous, and he rejects any “law and . . .” approach as resulting in either reductionism or an infinite regress. Though he acknowledges that law can be understood in terms of its history, sociology or economy, the understanding of law in its own terms—legal dogmatics in its purest form—is the only legitimate approach of law.<sup>33</sup>

On the other hand, there is the “forward to policies” program, for which I take Richard Posner’s ideas to be exemplary. Posner offers a pragmatist program that is “practical, instrumental, forward-looking, activist, empirical, skeptical, anti-dogmatic, [and] experimental.”<sup>34</sup> Posner’s pragmatism is quite the opposite of Weinrib’s formalism. For Posner, his law-and-economics program introduces in law the ethics of scientific inquiry, because “economics is the instrumental science par excellence.”<sup>35</sup> Modern economics offers the theoretical framework for the empirical research in law. The economic analysis of law therefore denies law’s autonomy; legal rules are viewed in instrumental terms. Both law and legal rules are analyzed in terms of means to achieve certain ends, be that wealth maximization or something else. Its moral concern is to serve the welfare of the non-legal community. Law itself is considered to be a mechanism for social control, to be replaced by more effective ones, as soon as they are available. Legal dogmatics in its current form is pretentious, prejudiced and uninformed, Posner concludes, and should be replaced by a more pragmatic program.<sup>36</sup>

This is not the time and place to redress both programs on their own merits, but I do want to make the point that the proposed “law in context” approach holds middle floor between both opposites. In the most abstract terms, the comparison can be framed like this. Like Weinrib’s program, the “law in context” approach acknowledges a certain autonomy for law and legal dogmatics, though it does take into account the increasing importance of mutual influences between law and its contexts. There is no reason whatsoever to ban approaches that focus on law in context, though we should not forget that external influences are integrated into law. That is why we preferred the expression “law *as* (etcetera)” above “law *and* (etcetera),” since the former expresses this need for integration in law better than the latter.<sup>37</sup>

Like Posner’s program, ours acknowledges that law cannot be understood properly without taking its context into account (economics

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33. *See id.* at 17-18.

34. RICHARD A. POSNER, *OVERCOMING LAW* 11 (1995).

35. *Id.* at 15.

36. *See id.* at 21.

37. *See supra* notes 25-28 and accompanying text.

included), though we should not reduce law to economics. Not only because there are other legitimate perspectives, but also because law cannot be understood properly in purely instrumental terms since it has and expresses values of its own. For that reason law cannot be made instrumental to any political purpose whatsoever; some purposes are simply contradictory to law's own values such as the principles of legal certainty, justice and purpose, distinguished by Radbruch.<sup>38</sup>

"Law in context" then is preferable to "back to dogmatics" and "forward to policies." First, because it holds the promise of better law than the alternatives. It is my conviction that contextualists do better as lawyers than formalists and activists, both with respect to the development of law and the judgment of cases. Second, and more important in this context, because it provides us with a better understanding of law than the accounts of Weinrib and Posner do. Law is neither a mere instrument for policy, nor an island in itself; it is a social practice with semi-autonomous language, methods, and values. The understanding of law then should not be merely reductionist or self-referring—as in the accounts of Posner and Weinrib—but should give insight into its relations with the different contexts in which it is developed and applied. "Law in context" offers just that.

### III. PHILOSOPHICAL FOUNDATIONS

#### A. *The Rise and Decline of Modernism*

We have already seen that the "law in context" approach is also more fitting for recent developments in law than its alternatives. Now I would like to show that the interdisciplinary study of law also fits better with recent developments in philosophy. For this purpose, I want to sketch the bigger picture of the history of ideas that underpins our discussion and that is often referred to as modernism. For Stephen Toulmin, the rise and decline of modernism can be sketched as a pendulum which brings our present day post-modernism back to the intellectual heritage of sixteenth century Renaissance.<sup>39</sup> In between is the epoch of modernism which lasted from the end of the seventeenth century to the end of the nineteenth century and that is characterized by

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38. See Eric F. Hinton, *Balancing Justice, Expediency, and Legal Certainty: The Free Movement of Goods in the European Union*, 5 WILLAMETTE J. INT'L L. & DISP. RESOL. 1, 7-8 (1997).

39. STEPHEN TOULMIN, *COSMOPOLIS: THE HIDDEN AGENDA OF MODERNITY* 22-28 (1990).

what John Dewey has named “the quest for certainty.”<sup>40</sup> This phrase was used by Dewey to express that man, looking for certainty, is inclined to prefer theoretical reason over practical reason.<sup>41</sup> Theoretical reason, then, is the domain of thought, universality, certainty, stability, and rationality, while practical reason is the domain of action, contingency, uncertainty, flexibility, and reasonableness.

One of the purposes of Dewey’s pragmatism was to restore the balance between the domains of thought and action, which meant a restoration of the Aristotelean insight that the degree of exactness of a discipline or activity is dependent on its subject.<sup>42</sup> “[D]ifferent methods for different topics,” as Toulmin summarized, which means a return to the “World of Where and When, a world in which everything we say refers to a particular time and place, without claiming any abstract, universal validity.”<sup>43</sup> This return to contextualism at the beginning of the twentieth century was a symptom of the decline of modernism, the roots of which go back to sixteenth century Renaissance.

The rise of modernism started around 1650, when the Peace Treaty of Westphalia ended the religious wars by dividing Europe into fixed nation states. At the same time scientists like Newton changed the picture of the universe beyond recognition, describing it as a clock in which every event was connected through lawlike causal generalizations. Starting with Descartes, philosophy came into the grip of three dreams: the dream of a unified science (Newton), a unified method (Descartes), and a unified language (Leibniz). This “quest for certainty” also had its impact on social thinking. Political philosophy changed from the art of politics from Machiavelli to the picture of society as a construction sketched by the social contract philosophers (Hobbes, Rousseau, Locke).

Ethics developed from the art of casuistry it had been since Aristotle—acting “*pros ton kairon*,”<sup>44</sup> as the circumstances demand—to the quest for a categorical imperative in the work of Kant. Even legal thinking did not escape the demands of the time. The legal humanistic perspective on Roman law as a series of texts gave way for the idea of

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40. JOHN DEWEY, *THE QUEST FOR CERTAINTY: A STUDY OF THE RELATION OF KNOWLEDGE AND ACTION* (1929).

41. *See id.* at 21.

42. ARISTOTLE, *ETHICA NICOMACHEA*, *supra* note 14.

43. STEPHEN TOULMIN, *RETURN TO REASON* 96, 192 (2001).

44. *See supra* note 14 and accompanying text.

Roman law as “*ratio scripta*,” which is exemplified in the work of Grotius—*On the Law of War and Peace*).<sup>45</sup>

In general, the rise of modernism shows a shift from practical to theoretical reason, from humanism to rationalism, from rhetoric to logic. In its heyday, modernist thinking can be characterized by two distinct, but connected ideas. First, there was a picture of language as a representation of the world, presupposing a correspondence between word and world. Wittgenstein’s “picture theory of meaning” was one of the most important prerequisites of objective knowledge. Second, scientific knowledge was considered to be in need of indisputable justification, whether in self-evident axioms (rationalism) or in objective observations (empiricism). This ideal of objective knowledge could not be realized in the social sciences, which from then on were considered to be suspect, soft, and unreliable. Law, of course, shared in this judgment.

At the end of the nineteenth century the tide turned. The nation states eroded and became involved again in great wars. New scientists like Einstein and Bohr developed theories that seriously put into question the picture of the universe as an organized clockwork. Wittgenstein in his later work demolished the picture theory of meaning, leaving us with the idea of language as a variety of games, played according to different rules. Logical positivism was the last attempt to find a foundation for objective knowledge, but it failed. “The totality of our so-called knowledge or beliefs,” Willard Van Orman Quine wrote, “from the most casual matters of geography and history to the profoundest laws of atomic physics or even of pure mathematics and logic, is a man-made fabric which impinges on experience only along the edges.”<sup>46</sup> The German philosopher Hans Albert showed why the search for objective knowledge had to end in an infinite regress, a circle, or a dogma; a trilemma named after the famous Baron Von Münchhausen who was not able to pull himself up from the swamp by his own wig.<sup>47</sup> The modernist project appeared to be an illusion, and the French philosopher Lyotard proclaimed the end of “the Great Stories of Enlightenment.”<sup>48</sup> The question remains, of course, where this leaves us.

The rise and decline of modernity has been marked by poets. At the beginning of modernity in 1611, John Donne wrote in his poem *An anatomy of the world* the lines: “Tis all in peeces, all cohaerence

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45. See HUGO GROTIUS, *ON THE LAW OF WAR AND PEACE* (2004).

46. WILLIAM VAN ORMAN QUINE, *Two Dogmas of Empiricism*, in *FROM A LOGICAL POINT OF VIEW* 20, 42 (1953).

47. HANS ALBERT, *TREATISE ON CRITICAL REASON* 16-21 (Mary Varney Rorty trans., 1985).

48. See TOULMIN, *supra* note 39, at 172.

gone.”<sup>49</sup> At the end of modernity, shortly after the First World War, Yeats wrote: “Things fall apart; the centre cannot hold.”<sup>50</sup> Postmodernism started, as modernism did, with a widespread feeling of crisis, both in science and society. Some philosophers supported this feeling with a conviction that—now nothing is determined—“anything goes” (Feyerabend).<sup>51</sup>

Toulmin, on the contrary, pleads for a restoration of the humanist ideals of sixteenth century Renaissance.<sup>52</sup> The values of humanity, tolerance and reasonableness seem perfectly fit to countervail the diversity, ambiguity and uncertainty of our days. The end of the Great Stories of Enlightenment marks, in his view, a return to the practical wisdom, modesty and skeptical tolerance of the Renaissance or—put differently—a humanization of modernism.<sup>53</sup> This is an appealing program with consequences for philosophy (a return to practical philosophy), for science (different standards for different disciplines), and for politics (a moderated pragmatism as antidote for absolutist thinking, from whatever origin or source). In any case, it shifts the pendulum back from theoretical reason to practical reason, from rationality to humanity, and from logic to rhetoric. The circle is round, we are back to where we started. But what does all this mean for the study of law?

### B. *Private Law as a Battlefield*

Private law belongs—together with medicine and theology—to the eldest disciplines. In fact, the history of the university started in the eleventh century in Bologna with the rediscovery and the study of the *Corpus Juris Civilis* of Justinianus. From then onwards, private law has always been—with variations in focus and methods—the study of authoritative texts to solve cases. Private lawyers pretty much stuck to their methods, when science and technology emerged in the seventeenth century. Since the eighteenth century, the study of society began to evolve and resulted in a process of “Ausdifferenzierung” of the various social sciences out of the shadow of the law. Economics emerged from

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49. *Id.* at 64-65.

50. *Id.* at 66.

51. *See id.* at 198 (explaining that Feyerabend “bids farewell” to “scientific rationalism,” i.e., “logical rationality”).

52. *Id.* at 180 (“As matters now stand, our need to reappropriate the reasonable and tolerant . . . legacy of humanism is more urgent than our need to preserve the systematic and perfectionist . . . legacy of the exact sciences . . .”).

53. *Id.* at 180-86 (tracing the humanization of Modernity).

the administration of government, political economy, and a new focus on the empirical effects of the law (Marx). Anthropology took its starting point in the study of law and legal practice in newly discovered cultures (Maine). The founding fathers of sociology took an interest in the process of modernization in which law (as religion) did play an important role (Durkheim, Weber). It is noteworthy that all the pioneers mentioned were lawyers by education; it was a new way of looking at law and society that started these new disciplines.

Next, it was a process of specialization, stimulated by external factors, that facilitated the development into separate, autonomous disciplines. This process of specialization has, of course, advantages and disadvantages. On the one hand, it focuses the necessary attention to make any progress whatsoever, on whatsoever; on the other hand it forces one to bracket off different procedures, methods or perspectives, thus stimulating selective blindness. “[S]elective attention is one thing,” Toulmin writes, however, “blindness is another.”<sup>54</sup> I will try to illustrate this later. For now, it suffices to conclude that the demarcation between legal dogmatics and the other social sciences is a contingent matter.

As a result of these developments, the study of private law is a battlefield. On the surface it has developed rather quietly since the days of its birth, the main development being the transition from a *Ius Commune* to national codified private law in the early nineteenth century with the emergence of the nation states, and now with their erosion back to a European private law. Beneath the surface, however, there is a lot more going on. First, the separation between the natural sciences and the humanities—“The Two Cultures,” in the words of C.P. Snow<sup>55</sup>—left its traces in private law, too. These traces were not only in topics of substantive law (like causation), but also in method. Traditional legal dogmatics has found its home in the humanities, but from time to time ideals and devices are borrowed from the sciences. I mention a few examples without any pretense of completeness: Langdell’s legal formalism,<sup>56</sup> Von Savigny’s *Begriffsjurisprudenz*,<sup>57</sup> Kelsen’s *Reine Rechtslehre*,<sup>58</sup> Hart’s analytical jurisprudence.<sup>59</sup> These and other

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54. TOULMIN, *supra* note 43, at 42-43.

55. See generally C.P. SNOW, *THE TWO CULTURES* (1993) (discussing how far apart intellectuals in the Natural Sciences and the Humanities have strayed).

56. See generally Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

57. See generally JH Dalhuisen, *Legal Orders and Their Manifestation: The Operation of the International Commercial and Financial Legal Order and Its Lex Mercatoria*, 24 BERKELEY J. INT’L L. 129 (2006).

58. See generally HANS KELSEN, *PURE THEORY OF LAW* (Max Knight trans., 1967).

59. See generally HART, *supra* note 4.

movements in (private) law shared an inspiration in science, which manifested itself in the ideals of objective knowledge, a rational method, order and system in law, and a strict separation between law and politics, or law and morals.<sup>60</sup> As such they were nearly always followed by a reaction in the form of a turn to society: legal formalism by Holmes's legal realism, *Begriffsjurisprudenz* by *Interessenjurisprudenz*, the analytical movement by the critical legal studies, etcetera.<sup>61</sup> Again we hit upon a pendulum, this one located in private law, attracting it alternatively between system and society, logic and experience, technique and policy. This movement had a large impact, not only on the study of private law, but also on the practice and content of private law itself.

Next, there is the differentiation in different disciplines which has not left the study of private law untouched. Paradoxically, the early differentiation of the social sciences from law confirmed the core of the study of private law in its dogmatic, practice-oriented approach of law. It stimulated a professional ideology that legal dogmatics sticks to positive law and its application in cases, leaving the rest out. Let me try to explain this, explicating some of the "blindness" I mentioned before. With regard to its subject matter, legal dogmatics has been from the start a study of authoritative texts, taking these texts as the sources of positive law. In limiting itself to texts, legal dogmatics has left practice to the social sciences. To fill in the gap between the study of law and the social sciences in the late twentieth century bridging (sub) disciplines emerged, such as sociology of law, anthropology of law, psychology of law, etcetera. A peculiar development if one realizes that sociology, anthropology, psychology and the others emerged from the study of law in the first place. However, this restriction to texts is one blindness of legal dogmatics, but not the only one.

With regard to the purpose of the study of law, I already mentioned that it has always been dedicated to cases, using authoritative texts as the *loci* for arguments in legal dispute. As such, it operates between law and case, text and context, logic and experience. Legal dogmatics has thus always played an important social role, though at the expense of the formation of theory which was left for other disciplines. With regard to the method, legal dogmatics has always stayed close to text-analytical methods—whether the scholastic method, philology, or hermeneutics—thus leaving the use of empirical methods to other disciplines. These

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60. K. LARENZ, *METHODENLEHRE DER RECHTSWISSENSCHAFT* 1-165 (1979).

61. *See generally* ALAN HUNT, *THE SOCIOLOGICAL MOVEMENT IN LAW* (1978).

limitations make us aware that legal dogmatics has always been a limited enterprise: it restricted itself to positive law for pleading and solving cases, by using analytical methods on authoritative texts. This is legal dogmatics, in the proper sense.<sup>62</sup> As such, it has left empirical research legal practice and the formation of theory to other social (sub)sciences. Legal dogmatics has thus both defined law and its context, restricting itself to the former, and leaving the latter to other disciplines. Again, the study of law and thereby the definition of law itself appear to be a contingent matter.

Legal dogmatics has its own reasons, of course, to suggest differently. The authority of its expertise is underlined by the suggestion that its subject matter, purpose and method are somehow “given,” thus resulting in the exclusion of different approaches to the study of law. As mentioned before, this focus is beneficial for the growth of knowledge within the given paradigm, but this is achieved at the cost of bracketing off different approaches and perspectives. In their daily work, however, legal scholars find themselves often referring to the demands of “practice,” which is an often used and sometimes misused expression. Sometimes it refers to the principles or policies involved, at other times to the particular preferences of the scholar, and again at other times to (aspects of) the context of the case. At this point my plea for a “law in context” approach comes in, not as a radical alternative for the existing practice of legal dogmatics, but as a way of conceptualizing the appeal to “practice.” Does it refer to a calculation of consequences, to the social circumstances of parties involved, to the principles and policies lurking in the background of positive law, or to some other relevant context? This question can only be answered by changing perspective—from legal dogmatics to the economics, sociology, psychology or history of law—not to end up finding ourselves in a different discipline, but to integrate this perspective in our own legal discourse. In its daily life, law *is*—besides everything else—economics, sociology, psychology, history, literature, etcetera. Why then do we not integrate these perspectives in the study of law? The interdisciplinary study of law, properly understood, is meant to improve the study of law and thus to enhance our understanding of the law, nothing more nor less. What does that mean for the private lawyer’s expertise? We will address this question in the Part III.C.

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62. LARENZ, *supra* note 60, at 204.

### C. *The Private Lawyer's Expertise*

In private law, as in other disciplines, our picture of professional knowledge has long been dictated by the model of technical rationality. According to this model, professional knowledge is nothing more, or less for that matter, than the application of scientific knowledge, like a kind of technology. This model fits positivistic premises, of course, since it rests on the characteristic positivist separation of means and ends, facts and values. In law, it served the purpose of the separation of “law as it is” and “law as it ought to be,” the latter being the domain of the politician or the moralist, and the former being that of the lawyer. In legal theory, it has found expression in the movements of legalism, formalism, the case method of Langdell, and Von Savigny’s *Begriffsjurisprudenz*. In practice, however, the model of technical rationality served a specific need for the justification of professional practice.

The rise of positivism in the nineteenth century demarcated a shift from a “legitimacy of character” to a “legitimacy of technique.” The privileges of a professional were no longer justified by his social position, honor, and the authority and character of the whole of its practitioners (their courage, wisdom, responsibility), but by the application of objective and rational scientific techniques.<sup>63</sup> Weber has framed this shift in the social domain as one from charismatic authority (depending on the person of the authority) to authority on legal and rational grounds (depending on the methods used).<sup>64</sup>

Since the decline of positivism, however, this model of professional practice is discredited, both for intellectual and social reasons. Socially, we have lost appreciation of technocrats who instrumentally apply their scientific expertise for whatever purposes. The twentieth century offers plenty of examples to justify this discontent. Intellectually, we have come to a different and more complex understanding of what it takes to participate in professional practice. Let me try to express that understanding by comparing the expertise of a private lawyer with that of a private legal scholar. Three differences come into view. The first is that the body of professional knowledge of lawyers practicing in the field of private law is organized differently, not according to the principle of logical coherence, but according to that of practical utility.

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63. See ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* 184-95 (1988).

64. See MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 328 (A.M. Henderson & Talcott Parsons trans., 1947) for a description of these types of authority.

She is not so much interested in the system of private law, of course, as well as its use-based organization.

Second, the professional knowledge of the private lawyer has a larger component of practical knowledge than that of the private law scholar, while the latter has a larger component of theoretical knowledge. On the difference between theoretical and practical knowledge, “knowing that” and “knowing how,” “*epistèmè*” and “*phronèsis*” (as Aristotle would say), there is a vast amount of literature that I will not discuss here.<sup>65</sup> For now, it suffices to say that the first is conceptual, propositional knowledge, while the latter is of a perceptual and dispositional nature. For that reason, practical knowledge is partly “personal knowledge,” as Michael Polanyi would have it, or “tacit knowledge.”<sup>66</sup> A practitioner usually knows more than she can tell. From both the first and the second difference, it follows that the professional knowledge of the private lawyer has a larger moral component than that of the private legal scholar. The practitioner knows better what to do under what circumstances, not only from a legal point of view but also from a moral point of view. In fact, it is part of her expertise to know what to do in private law, as it is the scholar’s expertise to fit and explain this solution in terms of the system of private law. These differences are there, not to be neglected, though they do not deny the connections between both types of expertise, as the private lawyer and the private legal scholar would confirm. What they do deny, though, is that the relation between both types of knowing is simply one of application, as the model of technical rationality would have it.

The private lawyer’s expertise, then, is far more inclusive than we are inclined to think. It encompasses knowledge and competences, of a legal, moral or some other kind, both explicit and implicit belonging to the lawyers’ repertoire. In a case like the wrongful life case, for example, the Dutch Supreme Court considered not only the legal issues, but also the moral grounds of the different options, as well as their expected consequences.<sup>67</sup> This includes moral wisdom, legal interpretation, financial calculation of the consequences, and a feeling of empathy with the parties, especially the parents of baby Kelly. In doing so, the judges appeal to different contexts of the case, bringing their moral, economic, psychological and other experiences to the job. To get

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65. See, e.g., GILBERT RYLE, *THE CONCEPT OF MIND* 27-32 (1963).

66. See generally MICHAEL POLANYI, *PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY* (1958) (exploring the nature of “Personal Knowledge” as the “fusion” between personal and objective understanding).

67. See *supra* Part I.A.

these different contexts into view the judge has to change perspective, subsequently taking a legal, moral, economic or other perspective, and eventually integrating them into one decision that fits and justifies the law at stake. Now compare this way of proceeding with the alternatives: excluding non-legal elements from the decision, and following policies of one's own preference. In my view, the contextualistic approach promises more informed, and therefore better law.

Now let us switch to the legal scholar. For the private law scholar who is trying to make sense of the ruling, there is not much difference. When she tries to understand the ruling, she can of course neglect all the expertise that does not fit into the model of legal dogmatics as a self-sufficient enterprise (as Weinrib's scholar would do).<sup>68</sup> In my view, she would make poor sense of the ruling, and she would not do justice to the court. On the other hand, she can try to reconstruct the ruling as an attempt to realize some predetermined extra-legal policy or goal (as Posner's legal scholar would do).<sup>69</sup> Again, I think she would misunderstand the ruling and would not do justice to the court. Instead of both these options, she could also try to review the ruling from different perspectives, alternatively taking the moral, financial, psychological and legal aspects into account. In other words, she could try to study the ruling in different contexts, thus bringing different kinds of expertise to the job. At the end of the day she will attempt to integrate these different kinds of expertise in a coherent understanding of the case, expressing her views on what the court has ruled and what this ruling attributes to the law. Of course, she may fail in doing so, but at least she has tried to come to a better understanding of the law than the available alternatives can provide.

#### IV. BACK TO LAW

##### A. *Integrity in Law, and in Lawyers, Too*

So far we have argued the need for switching perspectives by taking different contexts into account, both in the practice and in the study of law. This approach holds the promise of better informed law as well as a more comprehensive understanding of legal practice. We mention in passing that to fulfill this promise it is not enough to compare these different perspectives; we really have to integrate them into our

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68. See *supra* notes 31-33 and accompanying text.

69. See *supra* notes 34-36 and accompanying text.

practice or understanding of the law. For James Boyd White this means that we have to put them together in something new that changes our understanding of the composite parts. “As lawyers we cannot simply accept the conclusions of others; we must make them our own, and to do that we must move out of the legal culture and into the other one.”<sup>70</sup> For White, this process is very similar to that of the translation of texts, not as a simple substitution of words, but in the sense of creating a new discourse of meaning.<sup>71</sup>

In law itself this process is exemplified by the way the expertise of expert witnesses is integrated in legal deliberation and judgment. Forensic and psychiatric expertise is transformed into a legal judgment, but not without mutual influence and transformation. In the study of law, bridge-disciplines like the sociology or psychology of law illustrate the same point; their best practices are not to be considered as an application of sociological or psychological theory to law, nor as mere examples of legal imperialism, but as a contribution to new ways of looking, talking, and knowing.

In cases of integration of non-legal knowledge it is of course harder to pass Ronald Dworkin’s integrity-test than when we integrate just another legal case. Law as integrity requires an interpretive attitude—a specific case is interpreted as the best possible continuation of legal practice, thus fitting as well as justifying the practice as a whole. For legal cases this means that they are interpreted as an exemplification of the principles and values lurking behind legal rules and precedents. The question is then: What is the best realization of these principles and values in this case? The answer to this question may, as we know, even contradict accepted interpretations of legal rules and precedents (*contra legem*).<sup>72</sup>

Now, what happens if we try to integrate originally “non-legal” knowledge into the body of legal knowledge, as in the examples given? The metaphor of translation sets us on the right track, since it makes us aware that intellectual integration is a matter of bridging cultures, that is, of languages, methods, and values. Take the example of a legal scholar and a scientist engaging in interdisciplinary research. They may be tempted to conceptualize the obstacles they encounter as differences in idiom, method, and values. The gap between their cultures almost seems unbridgeable then. Idioms cannot be translated without loss of meaning,

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70. JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 14 (1990).

71. *See id.*

72. *See* DWORKIN, *supra* note 21, at 225-76 (discussing “law as integrity”).

different methods determine a different outlook, and both are in the end reducible to diverging beliefs and attitudes. Is there no way, then, to escape this fragmentation in our disciplines?

There is, and in my view it can be phrased like this. The crucial step is getting to learn to recognize the foreign elements in our own culture and thus (mirrorwise) the characteristic elements in our own culture. What does the law do with forensic or scientific evidence? And what does that teach us about the legal outlook itself? How does the law conceptualize human relations, and what can we conclude about legal concepts? How do we strike the balance between the demands of safety and traditional liberty rights, and what does it tell us about these rights? How does the Supreme Court in the ruling of baby Kelly appeal to the moral principle of the dignity of human life? And what does that tell us about the relationship between law and morality? Such questions really draw our attention to interdisciplinary research, since they redress the foundations of our own discipline as well. In law and its study, as in daily life, the communication with other practices cannot but influence our own practices. This is what intellectual integration is all about—a slow and tough development of our own culture in the continuous contact with others, thereby opening new horizons, and at the same time closing others.

The attempt to remedy fragmentation can be taken one step further, as a struggle against the fragmentation in ourselves. For this, we should start to consider diverging bodies of knowledge or conceptual frameworks as different communities thinking and talking. In the words of James Boyd White: “We should conceive of the relevant world as a world of people speaking to each other across their discourses, out of their languages, out of their communities of knowledge and expertise, and speaking as people seeking to be whole. We should try to write that way ourselves.”<sup>73</sup> Engaging in interdisciplinary research entails communication with representatives of other disciplines, getting to know their way of speaking and thinking, and thus (again, mirrorwise) getting to know ourselves, as lawyers. As such it exemplifies the old Socratic wisdom in modern disguise: know thyself, as a lawyer.

Self-knowledge cannot but serve a therapeutic purpose as well. The interdisciplinary study of law is not only a remedy for the fragmentation in law and our understanding of it; it is also a remedy for the fragmentation in ourselves. Changing perspective draws from different sources in us, restoring our blinders, fighting professional deformation

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73. WHITE, *supra* note 70, at 20.

and leaving us as richer and more competent lawyers—not only, and perhaps not even primarily, because of our expertise, but at least as much because of our imagination. The continuous contact with different perspectives and other disciplines therefore not only makes us better lawyers, but perhaps even better persons. After all, integrity characterizes not only legal systems, but also people.

### B. *Wrongful Life Re-Addressed*

Let us, finally, re-address the wrongful life case with which we started. In light of what has been said thus far, it can be considered to be a serious attempt to integrate a moral perspective into the legal one, since it explicitly appeals to the principle of the dignity of human life. As such it deserves our praise. Faced with the moral nature of the issue at stake, the Dutch Supreme Court is not satisfied with taking the safe road, that is, an appeal to the legal sources. The Court apparently wants to address the issue also on its own merits, thus trying to contribute to a public debate about a controversial matter. The Court chooses for itself a specific ethos, as a moral guide in a pluralistic society. Of course the members of the Court would never admit this, but it suggests the ambition to play a social role like a “philosopher-king” in the sense distinguished by Plato.<sup>74</sup> The question is whether the judiciary is equipped to fulfill the function of a moral compass in matters of substantial justice in a morally divided society. It may well be, as Sunstein remarks, that: “Like all of us, judges have limited time and capacities, and like almost all of us, judges are not trained as philosophers.”<sup>75</sup>

Has the attempt of the Supreme Court to integrate a moral perspective into its ruling in the case of baby Kelly not been successful then? In my opinion, the answer is negative. The Supreme Court undertook to investigate whether or not sustaining the claim for compensation of the parents of baby Kelly (both on their own accord and in the name of Kelly) would constitute a violation of the principle of the dignity of human life. The Supreme Court addresses this question not less than three times—in the context of its squashing of several defenses

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74. See Robert G. Natelson, *The Constitution and the Public Trust*, 52 *BUFF. L. REV.* 1077, 1097 (2004).

75. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 249 (1999).

of the defendants—showing a gradual inclining integration of this argument in the motivation of its ruling.<sup>76</sup>

Let us analyze the argument closer. First, the Court states that the implicit recognition of the birth of a handicapped child as “damage”—in establishing a causal relation between the fault of the midwife and the damage of the claimants—does not imply any judgment whatsoever on the value of that child as a person or his or her existence. The argument is not yet integrated in the motivation here; it is more or less added as a loose remark, an obiter dictum. Second, the Court states that sustaining the claim for immaterial damage of the parents—which is the decision of the Court in this context—does not imply that the child is a source of grief for them, but rests exclusively on the judgment that the fault of the midwife infringes fundamental rights of the parents. The Court seems to suggest a specific reading of its own decision here—we should see it as a consequence of the fault, not as a judgment on the meaning of the life of the child. The argument is therefore better integrated here, than in its first use. Even more integrated is the third occasion of use, when the Supreme Court deals with the defense that the damage cannot be determined, since if the fault would not have been committed, baby Kelly would not have been born at all. The Court rejects this defense on the legal ground that the damage should be estimated in a case like this. Sustaining this claim does not in any way imply that the existence of Kelly should be valued lower than her non-existence, the Court argues, but rests on the recognition of the unlawfulness of the acts of the midwife and the hospital. Holding them liable does not infringe Kelly’s dignity, the Court concludes, but, on the contrary, facilitates her ability—as far as money ever can—to lead a better life.<sup>77</sup> Here the argument is most fully integrated, because the Court finally provides a reason why the principle of human dignity is not infringed. But is it a good reason?

I do not think so. Although it looks plausible enough—at first sight it even looks like a truism—it changes the nature of the argument it seeks to refute. First, it addresses not so much human dignity in an abstract sense—as it was put forward by the opponents—but the dignity of this specific existence, the life of baby Kelly. Next, human dignity does not function any longer as a ground for the judgment—as it was used by the Bundesverfassungsgericht (“Die Verpflichtung aller

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76. *Academisch Ziekenhuis Leiden/Verweerders*, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 18 maart 2005, NJ 606 (Neth.).

77. *Id.*

staatlichen Gewalt, jedem Menschen in seinem Dasein un seiner selbst willen zu achten . . . verbietet es, die Unterhaltspflicht für ein Kind als Schaden zu begreifen”)—but as a goal of the ruling (the possibilities for Kelly to lead a better life). As a result, the appeal to human dignity transformed from an argument of principle to a pragmatic argument.<sup>78</sup> In short, the Supreme Court did succeed in integrating this moral argument in its ruling, but not without a fundamental transformation of its nature. Is this a serious flaw? I think it is, for two reasons. First, it misses the point of the argument of the opponents. Nobody in his right mind will deny that compensation for damage will put baby Kelly in a better position to lead a better life, but that was not the argument of the opponents. Their argument was that doing this will infringe the principle of the dignity of better life, and this still holds good.<sup>79</sup> Besides, the argument of the Supreme Court justifies too much. The proposition that compensation for damage will put the victim in a better position to lead a human life is valid for almost each medical liability claim. In fact, the Court confines itself to a policy of victim protection.<sup>80</sup>

## V. CONCLUSION

Starting with the ruling of the Dutch Supreme Court in the wrongful life case we asked ourselves the question: What constitutes the limits of private law? Since there are no fixed limits anymore, as the Grand Old Theories presuppose, the practice of law nowadays shows us a patchwork of characteristics or family resemblances, in different combinations in changing circumstances. The wrongful life case is just one example of a difficult case, in which the Supreme Court explicitly appeals to a moral principle and empirical effects to justify its ruling (besides the traditional appeal to legal sources). As such, it is a perfect illustration of the way the positivistic, idealistic, and pragmatic dimensions of private law interrelate.

What specific legal theory then offers the best account of the current practice of private law? In this Article it is argued that the “law

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78. See generally P.S. Atiyah, Professor of English Law, From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law, Inaugural Lecture delivered before the University of Oxford (Feb. 17, 1978), in P.S. ATIYAH, FROM PRINCIPLES TO PRAGMATISM (1978) (discussing the movement from principle to pragmatism in the law).

79. Academisch Ziekenhuis Leiden/Verweerders, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 18 maart 2005, NJ 606 (Neth.).

80. The line of reasoning followed here is borrowed from an earlier publication. See M.A. Loth, “Engaged in a search for justice,” over grenzeloze aansprakelijkheid en de moeizame integratie van een moreel principe, in ONRECHTMATIGE LEVEN? OPSTELLEN NAAR AANLEIDING VAN BABY KELLY 40-47 (Martin Buijsen ed., 2006).

in context” approach offers the best possible theory, both in terms of fit and in terms of justification of current legal practice. First, it does justice to the most prominent developments in law itself in the twentieth century, which can be characterized as a “contextualization” of the legal order (by which we refer to the blurring distinctions between law, politics, and morality). Second, it seems a perfectly natural consequence of the developments in the study of law, which have resulted in a prominent position for the interdisciplinary study of law. Third, both seem perfectly natural consequences of more general, philosophical developments, as our sketch of the rise and decline of modernism attempted to show. In all respects, “law in context” seems preferable to the most likely alternatives—“back to dogmatics” and “forward to policies” respectively. I have tried to present “law in context” as a middle ground between both alternatives, combining their virtues while avoiding their vices. Perhaps both alternatives can be considered as reminiscent of a surpassed positivistic ideology, but the argumentation of that hypothesis would need more attention.

The question, then, is how legal dogmatics—itself the product of contingent developments—can be enriched by the “law in context” approach. In the most general terms, the recipe is twofold. First, we must keep an open eye for the contextuality of law and legal phenomena and be ready to give the contextual dimension of law its due. In legal practice this is stimulated by the prominence of the facts and the training of legal practitioners in their dealing with them. Their expertise contains a good deal of practical wisdom and a strong hold on moral attitudes, which is constantly triggered and strengthened. No practitioner in her right mind would deny, in principle or in practice, the contextuality of law, unless she is distorted by some legal theory such as Langdell’s legal formalism, Von Savigny’s *Begriffsjurisprudenz*, or Kelsen’s *Reine Rechtslehre*.

In legal dogmatics, though, it is much harder to keep an open eye for the contextuality of law. Legal scholars deal differently with the law and are more subject to methodological schools and convictions. Here my second device applies. Legal scholars should do better in interdisciplinary research, not as an escape to the application of the results or methods of other disciplines in the domain of law, but as a way of changing perspective to grasp otherwise unnoticed aspects of the practice under research. This is not the “law *and* . . .” approach that is

viewed critically by so many, but a “law *as . . .*” approach that James Boyd White has addressed.<sup>81</sup>

Interdisciplinary research entails both a broadening of the horizon as well as an intellectual integration of the results. From this perspective we have re-addressed the ruling of the Supreme Court in the case of baby Kelly. The integration of a moral argumentation—though at first sight most promising—turned out to be less than a success upon closer analysis. The Court ended up surrendering to a policy of victim protection (a perfect exemplification of the “forward to policies” approach). The reason is that it unconditionally placed the decision in the service of the humanity of the life to be lived by Kelly. There are other techniques, though, that can avoid this pitfall. The Court could, for example, have restricted its ruling to this specific case, or it could have used specific legal concepts as intermediary for moral considerations. The technique of integration deserves more attention than received in this Article. The same goes for the techniques of interdisciplinary research in legal dogmatics, as a way of enriching the study of law. There is gold in those hills, but we have not yet sufficiently explored them.<sup>82</sup>

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81. WHITE, *supra* note 25, at 22.

82. This seems to be the attitude of prominent legal scholars in the Netherlands as well. See J.B.M. VRANKEN, *ALGEMEEN DEEL, VERVOLG*, DEVENTER (2005); Hans Nieuwenhuis, *Waartoe is het recht op aarde?*, in DEN HAAG: BOOM JURIDISCHE UITGEVERS 1-32 (2006).