Ideals and values in law. A comment on *The Importance of Ideals*

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The essay collection, *The Importance of Ideals*,[1] is a clarion call from a group of leading Dutch legal scholars and legal and political theorists to take ideals seriously in legal studies and political philosophy. As the editors, Wibren van der Burg and Sanne Taekema, put it: attention to ideals 'may help us to understand social reality better'. In particular, they argue that 'ideal-oriented theory' must be a part of legal studies.[2] The eleven authors are part of a larger group of scholars who cooperated at Tilburg University between 1997 and 2002 in a research programme on 'The Importance of Ideals in Law, Morality and Politics'. Clearly, the resulting book is the outcome of extensive collaborative work.

Although the project's intellectual foundations and motivation are not fully explained in the text, some sources are clear. One is the anti-positivist legal philosophy of Lon Fuller, focussed on exploring the value of legality and the moral foundations of various kinds of legal practice and institutions.[3] Another more general influence is the American pragmatist tradition, especially as represented in Philip Selznick's sociolegal work. But as van der Burg and Taekema stress, the book's contributors share a perspective, not a theory. The aim is to assert that ideals are worth studying as values embedded in social practices.[4] Ideals matter, they make a difference.

Surely that is right. But, to preface the commentary that will follow, some admissions are needed. Initially, the title 'The Importance of Ideals' conjured up for me the ghosts of old apprehensions and antagonisms. I should like to

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1 W. van der Burg & S. Taekema (eds) The Importance of Ideals: Debating Their Relevance in Law, Morality, and Politics [hereafter IofI], Brussels: Peter Lang 2004.

2 Ibid., p. 13, 30.

3 See further W. J. Witteveen & W. van der Burg, Rediscovering Fuller: Essays on Implicit Law and Institutional Design, Amsterdam: Amsterdam University Press 1999.

4 IofI, p. 39.

take a few moments to explain why, because this will also explain the perspective from which I approach this rich, stimulating book.

I

As an undergraduate law student, I found appeals by my teachers to ultimate values in legal analysis infuriating. These values (and practical models of the good, derived from them, as ideals)[5] seemed to resist analysis or to require none. The most abstract values, invoked in legal studies, often gave a vague sense of the rightness of legal rules or decisions, so that inquiries about the precise social effects of law were unnecessary. How could one argue against the rule of law, sanctity of property, or freedom of contract as indispensable foundations of legal thought and practice? Secure in a kind of fuzzy comprehensiveness, these ideas allowed such phenomena as administrative discretion, planning law or consumer protection to be presented as exceptional and peripheral to the great value-centres of law. It seemed that legal rules and decisions could often be judged conclusively – but sometimes in unpredictable, ad hoc ways – by applying values. So these values were *inside* law. Yet they were largely *outside its study* except sometimes in legal philosophy, which was widely considered to have no bearing on legal practice. Constitutional law, the only course that (briefly) mentioned the rule of law, presented A.V. Dicey, its British prophet, as an ancient guru whom it was not necessary to read. If he misunderstood legal responses to the growth of the modern administrative state, this in no way impugned his classic status. Values were not subject to empirical critique.

Yet some of them directly coloured practical legal understanding and informed professional ideals: among these, for example, were reverence for precedent (embodying particular values of order and authority); an ideal of judicial wisdom as imaginative incrementalism (the work of the best common law judges was often contrasted with the poor quality of legislation); the separation of law from politics; the superiority of private over public law; the model of the 'reasonable man';[6] and an ideal of morally neutral legal technicality, combining social conservatism with intellectual ingenuity. Professional legal practice was hard to understand except by referring to

5 Roscoe Pound, in his The Ideal Element in Law, Indianapolis: Liberty Fund reprint 2002, p. 7, defines an ideal (in legal contexts) as 'a mental picture of what one is doing or why, to what end or purpose, he is doing it'. Pound's book (based on lectures delivered in 1948) is not mentioned in IofI, but he too argues forcefully that legal ideals should be given 'the same thoroughgoing analytical study' that rules receive in legal study (p. 9).

6 See e.g. M. Moran, Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard, Oxford: Oxford University Press 2003.

such ideas. Yet insofar as practice embodied or seemed to follow ideals, the ideal elements were usually taken for granted, as though separable and immune from the criticism that practice itself might attract.

If ideal-oriented discourse in this context seemed complacent, social science offered a way to address this complacency. It held out the prospect that ultimate values as elements of practice could be examined empirically and, especially, historically. It might become possible to see (i) how the dominance of some particular value had come about; (ii) whose interests it served or disadvantaged; (iii) what the effects (political, economic, social, cultural) of its influence on practice were, now and in the past; (iv) under what conditions certain values were widely accepted or came to seem problematic; and (v) whether other values might appear more meaningful if conditions changed.

This approach did not reject values or ideals: quite the opposite, it affirmed their importance. But it contextualised them by studying their conditions of existence. Since a commitment to ultimate values often seems strongly resistant to challenge from the evidence of experience, this commitment could easily be understood as ideological, entailing adherence to whole systems of valuation and understanding offering *comprehensive* interpretations of the world or some aspect of it. The linking of ideas to interests, stressed in Marxist conceptions of ideology, was also a promising approach – although not if it involved claiming that the attractiveness of ideas made sense *only* in terms of economic interests they might promote.

Overall, it seemed (and still seems to me) helpful to approach the study of legal values and ideals from the standpoint of a sociology of legal doctrine (i.e. rules, principles, concepts and values, and modes of reasoning with these in the various settings in which they are institutionalised). This is not just a sociology of *lawyers'* ideas and practices because legal understanding and experience is not the monopoly of lawyers.[7] Empirical studies of the ways legal values are invoked outside lawyers' practice are therefore of great value. And because values are part of legal doctrine, a sociology of morals (i.e. socially recognised values) must surely accompany a sociology of law. Emile Durkheim's sociology is very important in this context. More than any of the other great social theorists, he emphasises the ultimate inseparability of law and moral values – law being identifiable from the wider realm of morality because its judgments are organised rather than

7 See e.g. P. Ewick & S.S. Silbey, The Common Place of Law: Stories from Everyday Life, Chicago: University of Chicago Press 1998.

diffuse:[8] law is thus normative doctrine institutionalised in organised processes.[9]

Of course, the problem of values and ideals cannot be simply subsumed into sociology. Sociologically-oriented study of law is itself guided by values and ideals. But I think this study can and must examine systematically and empirically the social contexts in which ultimate values and ideals gain their meaning – including those that inform its own scholarly practices. Hence the need for an endlessly reflexive approach which finds values embedded in practices, and recognises that provisional interpretations of experience are central to any claims about 'truth'. This begins to sound a little like pragmatism – at least, enough so to provide a lead into discussing *The Importance of Ideals* which, in part, is strongly informed by pragmatist views of the treatment of ideals in law.

II

Queries will be raised later about some aspects of the pragmatist outlook that informs parts of *The Importance of Ideals*, but there is much in the book as a whole that appeals very strongly to this commentator. For example, the important point that the ambiguity of ultimate values may not impair but sometimes enhance their power to structure legal discourse (the 'fuzzy comprehensiveness' I mentioned earlier) is strongly brought out in Willem Witteveen's study of the *Pikmeer* case which established a significant immunity of Dutch municipal authorities from criminal liability, at least with regard to environmental controls.[10] Witteveen shows different kinds of appeal to the rule of law (or legality) in judicial and juristic practice. Legality, he says, can be best seen as a cluster of ideals, often in tension. Their significance is apparent when they are invoked in practice: on the one hand, strategically as devices of government and legal control and, on the other, as aspirational reference points in political and legal debate. Invoking legal ideals is never innocent. It presupposes particular objectives of debate and regulatory strategies.

He also notes 'large differences in local understandings of the rule of law',[11] a point that ties in with efforts to study ultimate legal values not only as promulgated 'officially' in the legal agencies and institutions of the state

8 R. Cotterrell, Emile Durkheim: Law in a Moral Domain, Edinburgh/Stanford: Edinburgh University Press/Stanford University Press 1999, p. 60.

9 See also W. van der Burg, An Interactionist View on the Relation between Law and Morality, in: IofI, at p. 212 (law's distinctiveness has its primary basis in its institutional dimension).

10 W.J. Witteveen, Realist Idealism and the Rule of Law, in: IofI.

11 Ibid., p. 119.

but also as these values are understood by different social groups and in different regions of society. Marc Hertogh, introducing the valuable idea of the 'living *Rechtsstaat*', examines the views of local population groups in Zwolle about acceptable standards in regulatory practices.[12] Empirically studying legal values as they exist in popular understandings, his paper links with a substantial body of legal sociological research on law and popular consciousness. The key point is that legal values, like all aspects of law, are not the monopoly of lawyers, judges and jurists. Their centre of gravity (to adapt Eugen Ehrlich's idiom) lies not in the activity of the state but in society itself.[13] The role of legal values can be appreciated only by seeing how they inform the practices and understandings of lay citizens as well as legal professionals. Caroline Raat's essay[14] on *Rechtsstaat* values in private organisations extends the point, following Selznick's lead in recognising that legal values do not only concern the state legal system and the regulation of public life. They can apply also to private rule systems, as Selznick showed in studying legality as a value in industrial relations.

Yet it is right to criticise (as Hertogh and, by implication, Raat do) mechanical applications of official values (those recognised by officials in the state legal system) in local social contexts. What is needed is a pluralistic sociological view of values. The implication goes beyond legal studies to political philosophy: there is no Archimedean point,[15] 'perspective of eternity' or 'view from nowhere' which makes it possible to see values in a single perspective and thus theorise them in some absolute way irrespective of context. This is Bert van den Brink's point in advocating a 'hermeneutical perspectivism'.[16] Such an approach accepts that there is always a particular standpoint from which values are conceptualised and embedded in practice. We should ask what values bearing on regulation are accepted in different social settings and populations. What diverse practical models of the good (ideals) do these promote?

But serious analytical problems arise for any study of ideals that seeks to combine sociological sensitivity and philosophical rigour. First, there is the general problem of perspectivism (how to communicate across the divide of

12 M. Hertogh, The Living Rechtsstaat: A Bottom-Up Approach to Legal Ideals and Social Reality, in: IofI.

13 E. Ehrlich, Fundamental Principles of the Sociology of Law, transl. W. L. Moll, New Brunswick, NJ: Transaction repr. 2002, p. 390.

14 C. Raat, Stories and Ideals, in: IofI.

15 Cf. R. Dworkin, Hart's Postscript and the Character of Political Philosophy, (2004) 24 Oxford Journal of Legal Studies 1 (rejecting 'Archimedeanism' in legal studies).

16 B. van den Brink, Ideals of Doing Political Philosophy: From the Perspective of Eternity to Hermeneutical Perspectivism, in: IofI.

different perspectives). Van den Brink suggests solving this through an overarching ethos of civility[17] but that seems to me merely to introduce another value which (viewed from one perspective or another) may or may not be accepted. Secondly, even if the perspective of just a single sociolegal observer is considered, legality may appear not as a single value but several in potential tension (as in Witteveen's study of the *Pikmeer* case). What relation then can or should exist between these values? What is to be made of a value such as legality if, as empirical studies show, it means different things in different contexts and to different population groups? Surely 'value' and 'ideal' as objects of inquiry need clarifying, and further questions remain to be asked as to how values, in all their vagueness and indeterminate plurality, are to be studied.

How far does this book answer these questions? Ideals, as values embedded in social practices, are seen by the editors as a third category of normative standards, alongside rules and principles. What I call their vagueness is termed by Van der Burg and Taekema a 'surplus of meaning'.[18] So ideals are usually too indefinite to control legal decisions but can influence long term legal development.[19] They stimulate the imagination and aid debate, sometimes providing a framework which opposing arguments can share, or identifying fundamentally opposed reference points. Van der Burg and Taekema properly note that idealism has led to disasters and that adherence to ideals can be a recipe for irreconcilable conflict. But they stress that attention to ideals can also show common presuppositions behind a plurality of viewpoints and so facilitate understanding. A focus on ideals might clarify conceptual disagreements.

This is the aspect of the ideal-oriented approach that attracts Roland Pierik in considering debates between liberal egalitarians and multiculturalists in political philosophy.[20] The ideal of equality may be shared by both sides but they differ as to what endowments of individuals are natural, what choices are meaningful for them and how culture relates to these matters. Pierik quotes Will Kymlicka's critique of liberals' 'idealised model of the polis in which fellow citizens share a common descent, language and culture'.[21] But many liberals, for their part, see a multiculturalist focus on groups as undermining the equal protection of individuals. Pierik claims that, given the common focus of both positions on equality, there need be no intrinsic

17 Ibid., p. 159.
18 IofI, p. 21.
19 Ibid., p. 17-18.
20 R. Pierik, The Ideal of Equality in Political Philosophy, in: IofI.
21 Ibid., p. 180-181.

incompatibility between the two approaches.[22] What seems important, extending his argument, is to examine different contexts of interpretation of the equality ideal, and its meaningfulness in the experiences of different social groups. Philosophical deadlock points to a need for empirical social inquiry guided by a focus on ideals.

This suggests partial answers to the problem of perspectivism noted earlier. Sociological inquiries can clarify the contexts in which values are interpreted and given significance. If values are inherently vague, the 'surplus' of meaning is, to some extent, controlled in specific practices that can be empirically studied.[23] Practices are informed by values, values acquire practical meaning (as ideals). What is entailed is an endless reflexivity uniting philosophy and social science, evaluation and experience. Does this involve combining fact and value, and seeing knowledge as validated by practice? That, of course, would be to move close to the postulates of pragmatist philosophy, and it is to the use of pragmatism in *The Importance of Ideals* that we need to turn now.

III

A main attraction of pragmatism is that it treats ideals and values as 'rooted in reality' in 'the concrete situation', to use Sanne Taekema's words.[24] Ideals, understood pragmatically, are 'part of problem-solving', not some external criterion of evaluation added on to practice. They exist objectively 'in the constraints provided by the way the world is' and subjectively as creatively imagined desirable possibilities.[25] So they are part of practice and something with which empirical social science can concern itself (as in Selznick's value-oriented sociology). Yet they remain also aspirational, available to inspire debate, indicate progress and aid communication. Perhaps most importantly, they need not be seen as distant or abstract. The first intuitive knowledge of an ideal comes from experience. It presents itself as a hypothesis: the ideal will be judged by the factual consequences of adhering to it.[26] Fact and value are intertwined, 'aspects of the same reality which can be distinguished, though not separated.'[27]

22 Ibid., p. 182.

23 But not always, according to some essays in IofI. Peter Blok's study of the ideal of privacy in data processing law suggests that its use has created 'a turn to abstraction' obscuring empirical differences in the contexts of practice. By contrast, Jonathan Verschuuren and Timon Oudenaarden, studying environmental law and policy, see relevant ideals as too indefinite to provide any real guide for practice in this area.

24 S. Taekema, What Ideals Are: Ontological and Epistemological Issues, in: IofI, p. 40- 41.

25 Ibid., p. 39, 45; and Van der Burg & Taekema, Introduction, in: IofI, p. 15.

26 Taekema, What Ideals Are, p. 51-52.

27 Ibid., p. 54.

Wouter de Been, discussing pragmatism and sociolegal studies,[28] sees pragmatist social scientists as actively engaged with society's concerns. Pragmatism frees science from positivist illusions: social science must choose its goals, hence it cannot avoid values and commitments; it cannot be neutral. There can be no absolutes to found its scientific protocols but only the 'partial concepts and contingent scientific procedures inherited from earlier generations to frame the best possible solutions for the problems thrown up by an ever-changing world'.[29] Unlike some postmodernist thought, pragmatism does not discard science as an illusion. But neither does it hope to find foundations for scientific inquiry (or for judgments of 'truth') beyond what accumulated experience has made methodologically plausible for the time being: it offers a 'bootstraps' theory of knowledge (and of ideals and values) for a world all too aware of contingency and instability.

Durkheim, comparing pragmatism's outlook on knowledge with that of his sociology, termed it logical utilitarianism.[30] He meant that, while utilitarianism judges values and policies consequentially in terms of their practical results for individuals, pragmatism assesses the validity of knowledge in similar terms. Hans Joas criticises Durkheim for failing to recognise that pragmatism does not leave individuals to make such assessments of consequences. Instead, it locates these assessments in collective social experience and history.[31] Thus, Joas sees very close parallels between pragmatism and Durkheim's sociology: both aim to address philosophical issues empirically,[32] both see truth as a *social* product in some sense, but both need to find new justifications for the universality of knowledge.[33] I think this is a fair assessment and, in the rest of this comment, I want to explore its implications for sociolegal studies of values and ideals, such as those included in *The Importance of Ideals*.

The issue of how the *usefulness* of ideals, values or forms of knowledge is to be judged remains a serious problem for pragmatism. What makes a value

28 W. de Been, Pragmatism and Ideal-Oriented Socio-Legal Study, in: IofI.

29 Ibid., p. 64.

30 E. Durkheim, Pragmatism and Sociology, transl. J.C. Whitehouse, Cambridge: Cambridge University Press 1983, p. 72-74.

31 H. Joas, Pragmatism and Social Theory, Chicago: University of Chicago Press 1993, p. 59-60.

32 Joas (ibid., p. 57) claims that both tend to treat philosophy's key questions ('what can be known as true and what is morally good') 'in a manner which is saturated in empirical evidence and which draws on historically and culturally variable forms of morality and worldviews'. In my view, this empirical orientation characterises Durkheim's sociology, but how far pragmatism as *philosophy* actively seeks such broad materials remains in doubt.

33 Ibid., p. 57-58.

useful? Who must it be useful for? If it emerges out of problem-solving, how are problems defined or identified? What if they appear differently to different people, so that relevant ideals embedded in them also appear differently (contrasting meanings of legality might be an example)? What kind of collective experience provides sufficient validation of knowledge or values and why, for example, should my individual experience not be, for me, a better validation than any collective one? Does pragmatism lead, as Durkheim insisted, to a disabling relativism? Pragmatism may claim that relativism is irrelevant once it is accepted that absolutes are in practice unattainable;[34] yet we need means of assessing competing claims about knowledge or values.

Undoubtedly, to some extent, an immersion in practice (or a close empirical study of practice, which is near to the same thing) does make it possible to gain a new perspective on conflicts in knowledge-claims made at an abstract level. So Wibren van der Burg argues illuminatingly[35] that conflicts between natural law theory and legal positivism over the separation of law and morals can be better understood and even avoided by focusing on the practice of law, rather than on the idea of law as product (i.e. as finished knowledge or doctrine). But practice itself (like experience) can be interpreted in different ways. Whose interpretations count? What makes them count, so that we can use them to identify plausible knowledge claims (and coherent values and ideals)? These problems remain.

Ultimately most of them come down to the difficult idea of values as useful, and what this can mean. Ronald Dworkin argues that pragmatism 'self-destructs wherever it appears'.[36] The pragmatist might say, for example, that knowledge is successful practice. But if lawyers or scientists find it useful to treat knowledge *not* as successful practice but as an understanding of the way things are (what the law in force is; what the characteristics and mechanisms of the natural world are), where is the advantage in utility-talk? To know that scientific knowledge (or law, or legal values) is 'actually' a matter of successful practice would not help that practice. It still leaves open many questions as to how judgments about knowledge are (and should be) made in order to engage in successful practice, and how to judge success. Unless it becomes a demand that knowledge be judged ceaselessly against an ever-widening diversity of experience, pragmatism may encou-

34 W. James, Essays in Pragmatism, New York: Hafner 1948, p. 170-171.

35 W. van der Burg, Interactionist View, loc. cit. in: IofI.

36 R. Dworkin, Pragmatism, Right Answers and True Banality, in: M. Brint & W. Weaver (eds.), Pragmatism in Law and Society, Boulder, Colorado: Westview 1991, p. 361.

rage complacency, as in a ready acceptance of its own homely 'banality'[37] or a tendency to mock ambitious, comparative social explanation as 'fancy theory'.

A way forward is perhaps, first, to emphasise forcefully the role of a *reflexive, permanently self-critical social science* in broadening perspectives on practice: the aim of such a science should be to overcome parochialism as far as possible by endlessly comparing the contexts and meanings of practices. Secondly, it might be helpful to distinguish, more precisely, different kinds of values that need to be understood in relation to practice.

As regards the first of these matters, *The Importance of Ideals* says relatively little about empirically-oriented social theories (theories of social change and social stability and of the nature of societies, social groups and social relations in general). Certainly, such theories offer no more than a perspective, but at their best they aim to embrace a wide swathe of empirical description of social life. At the same time, the best social theory attempts to remain sensitive to the detail of social practice. Social theory remains essential to put interpretations of social practices into the widest possible contexts and so to revise provisional judgments of social 'truth'. The effort continually to broaden perspectives entails that particular experience is always to be confronted with other, different experience, especially beyond our own era, society and culture; in other words, with experience that continually, relentlessly *challenges* what we know and what we value.

As regards the second suggestion made above – to differentiate kinds of values or ideals – pragmatist approaches seem to me to be relatively unconcerned with this. Nevertheless, the old dissatisfactions I felt with appeals to values when I first studied law were linked to the apparently endless fluidity and imprecision of legal ideals, invoked at many levels of generality and encompassing a vast array of valuations. I felt that these were of different kinds, yet very hard to classify and so to analyse.

In considering values and ideals surely we should distinguish different moral criteria (social valuations) applicable to different kinds of social relations. This is a prerequisite for judging the sociological significance of ideals and values (locating them in the contexts that fix the parameters of their practical meaning for actors). Using such an approach it might be possible to see more clearly how such basic resources as 'trust' and 'morality', needed

37 Cf. R. Rorty, The Banality of Pragmatism and the Poetry of Justice, in: Brint & Weaver, op. cit; James, Essays, op. cit. p. 146.

to structure social life, require very different meanings (and legal expressions) in different social contexts – for example, in instrumental relations between contracting parties, or relations based on a shared common environment, or on emotional responses or affection, or on commitment to some abstract ultimate value, such as liberty, human dignity or equality.

Durkheim's main disagreement with pragmatism was around its understanding of the nature of truth. He condemned its relativism: for him, the social world gives truth, a truth 'out there' that bears on us and which we need to discover so as to orient ourselves to our environment. Pragmatists claim that whether truth is 'out there' in any absolute sense or not makes no difference since our only access to truth is through experience. Perhaps the issue comes down to how intensive, wide-ranging and ambitious the search for truth about the social world should be. Ronald Dworkin adds another perspective. For him, political values are 'real', not dependent on anyone's 'invention, or belief or decision'. So legality as an ideal has a significance not reducible to its existence as an aspect of practice or problems, yet that significance is discoverable only in endless interpretation and debate.[38] Religious believers have a different view of truth again. Ultimate truth is beyond human cognition, but faith affirms its existence; the truth that can never be finally known is, indeed, the most important truth of all. Faith is the only means of connecting with it; faith puts into perspective human beings' feeble efforts at understanding.

Do claims about the existence of (an unreachable) ultimate truth matter? I think they do. The idea that perspectives are to be broadened towards some ultimate understanding, and not merely juxtaposed with each other, is what makes the ongoing, ungrounded philosophical conversation[39] worthwhile. It may persuade us, finally, why civility in that conversation matters, and why reflexivity and endless self-criticism in social inquiry are necessary. If truth cannot finally be *validated* in experience, neither can ideals. They can, however, be clarified philosophically, and social science can help us to say what the consequences of adhering to them will be. In that way it becomes possible to establish empirically the parameters in which values seem meaningful in practical contexts.

38 Dworkin, Hart's Postscript, loc. cit., p. 12, 23-26.

39 R. Rorty, Philosophy and the Mirror of Nature, Oxford: Blackwell 1980.