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Mathieu Carpentier

► **To cite this version:**

Mathieu Carpentier (Dir.). Meta-theory of law. ISTE / Wiley, 2022, 978-1-78945-074-3. hal-04128795

HAL Id: hal-04128795

<https://hal.science/hal-04128795>

Submitted on 29 Sep 2023

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SOCIOLOGY, ETHICS AND EPISTEMOLOGY OF SCIENCES

Epistemology of Normative Sciences

Meta-theory of Law

**Coordinated by
Mathieu Carpentier**

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Meta-theory of Law

SCIENCES

Sociology, Ethics and Epistemology of Sciences,
Field Directors – Bernard Reber and Jim Dratwa

Epistemology of Normative Sciences,
Subject Heads – Mathieu Carpentier, Emmanuel Picavet
and Bernard Reber

Meta-theory of Law

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Mathieu Carpentier

ISTE

WILEY

First published 2022 in Great Britain and the United States by ISTE Ltd and John Wiley & Sons, Inc.

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Library of Congress Control Number: 2022934061

British Library Cataloguing-in-Publication Data

A CIP record for this book is available from the British Library
ISBN 978-1-78945-074-3

ERC code:

SH2 Institutions, Values, Environment and Space

SH2_4 Constitutions, human rights, comparative law, humanitarian law, anti-discrimination law

SH4 The Human Mind and Its Complexity

SH4_13 Philosophy of science, epistemology, logic

SH5 Cultures and Cultural Production

SH5_9 Metaphysics, philosophical anthropology; aesthetics

SH5_10 Ethics; social and political philosophy

Contents

Introduction	xiii
Mathieu CARPENTIER	
Part 1. Legal Theory Methods	1
Chapter 1. Methodology in Legal Philosophy	3
Julie DICKSON	
1.1. Introduction: methodology in legal philosophy	3
1.2. The nature of law?	5
1.3. Changing questions: diversity and development	13
1.4. Directly evaluative legal philosophy versus indirectly evaluative legal philosophy	19
1.5. Conclusion	28
Chapter 2. The Methodology of Analytic Jurisprudence	31
Pierluigi CHIASSONI	
2.1. Foreword	31
2.2. The principles of an analytic approach to jurisprudence	32
2.3. The statute of analytic jurisprudence	38
2.4. Two sets of analytic tools	41
2.4.1. Tools for the analysis of legal discourses	42

2.4.2. Tools for the refinement of extant juridical terminological and conceptual apparatuses	48
2.4.3. The tools of analytic jurisprudence and conceptual analysis. . . .	52
2.5. Vindicating a modest and reconstructive variety of conceptual analysis	53
2.6. Vindicating the analytic approach (and the principle of simplicity) against “essentialist” jurisprudence	58
2.7. References	68
Chapter 3. Methodology for Theorizing About the Nature of Law and About Doctrinal Areas of Law	75
Brian H. BIX	
3.1. Introduction.	75
3.2. Theories of the nature of law	75
3.2.1. Increasing philosophical sophistication	76
3.2.2. Hans Kelsen	77
3.2.3. H.L.A. Hart	78
3.2.4. Ronald Dworkin.	79
3.2.5. Joseph Raz	80
3.2.6. John Finnis	81
3.2.7. Frederick Schauer.	81
3.2.8. Brian Leiter	82
3.2.9. Mark Greenberg.	83
3.3. Theories of doctrinal areas	83
3.3.1. Descriptive, prescriptive and neutral.	84
3.3.2. Purposes	85
3.3.3. Universal versus parochial.	85
3.3.4. The subject of explanation (the data)	86
3.3.5. Justice and autonomy or efficiency	86
3.4. Conclusion	87
3.5. References	87
Chapter 4. Empirical Complexity as a Conceptual Claim: Reappraising Hart’s Account of Law as a Complex Social Practice	93
Gregory BLIGH	
4.1. Introduction.	93
4.1.1. No place for empirical science in Hartian jurisprudence	94

4.1.2. Hart’s object: “characterizing” the “complexity” of the legal system	96
4.1.3. Two key sources of influence: J.L. Austin and P.F. Strawson . . .	99
4.1.4. Do the (linguistic) twist	101
4.2. Hart’s Austinian account of the quotidian empirical statement	106
4.2.1. A critique of reductive sense-data empiricism	106
4.2.2. Accounting for the complexity of experience	112
4.3. Rejecting the descriptive fallacy	115
4.3.1. A critique of Russell’s theory of meaning	116
4.3.2. A rejection of the descriptive fallacy carried over into Hart’s jurisprudence	122
4.4. The empirical relevance of the conceptual scheme in <i>The Concept of Law</i>	126
4.4.1. “Descriptive metaphysics” and “linguistic phenomenology” . . .	127
4.4.2. Empirical complexity and presupposition in <i>The Concept of Law</i>	135
4.5. Conclusion	140
4.6. References	142

Chapter 5. Authoritative Disagreement: Meta-Legal Theory and the Semantics of Adjudication 149

Andrej KRISTAN and Giulia PRAVATO

5.1. Introduction.	149
5.2. Explananda	150
5.2.1. Authoritative disagreement in fact-oriented interpretation	150
5.2.2. Authoritative disagreement in text-oriented interpretation	151
5.3. Meta-theoretic demarcation	154
5.3.1. Rule-skeptical legal positivism	155
5.3.2. Conventionalist legal positivism	155
5.3.3. Interpretivist legal antipositivism.	156
5.4. Semantic explanations	157
5.4.1. Semantic invariantism	158
5.4.2. Expressivism.	159
5.4.3. Indexical contextualism	161
5.4.4. Non-indexical contextualism	164
5.4.5. Dialetheism	164
5.4.6. Content relativism	165
5.4.7. Assessment relativism	166
5.4.8. Truth-value indeterminism	168

5.5. Conclusion	169
5.6. References	170
Chapter 6. Jeremy Waldron, the Legitimacy of Judicial Review and <i>Political</i> Political Theory	179
Charles-Maxime PANACCIO	
6.1. Introduction.	179
6.2. The first Waldron	180
6.2.1. The circumstances of politics	180
6.2.2. <i>Political</i> political theory	181
6.2.3. Rights	182
6.2.4. CRJR	182
6.3. Reviews of the first Waldron	184
6.3.1. The nature of disagreement	184
6.3.2. Substance and results versus process and procedure	185
6.3.3. CRJR	187
6.4. The second Waldron	187
6.5. Conclusion	191
6.6. References	192
Part 2. Legal Science Theories	195
Chapter 7. Metatheory of an (Empirical) Legal Science	197
Eric MILLARD	
7.1. General framework: theory, metatheory and metascience	197
7.1.1. Theory and metatheory.	197
7.1.2. A theory of legal science as a metascience	200
7.1.3. A theory of (empirical) legal science	201
7.1.4. A theory of (empirical legal) science as applied metatheory.	205
7.2. (Meta)theoretical theses of an (empirical) legal science.	206
7.2.1. Epistemological thesis	208
7.2.2. Meta-ethical thesis	209
7.2.3. Methodological thesis	212
Chapter 8. Legal and Social Sciences: What are the Links?	215
Véronique CHAMPEIL-DESPLATS	
8.1. Social sciences, a factor in redefining legal sciences	218

8.1.1. Epistemological movements: the positioning of legal sciences between exact, physical and natural sciences and social sciences	218
8.1.2. Heuristic movements: the reinvigoration of legal sciences by the social sciences	221
8.2. The modalities of disciplinary articulations	225
8.2.1. Difficulties and pitfalls	225
8.2.2. Interdisciplinary experiences and the pragmatism of interweaving knowledge.	228
8.3. References	231

**Chapter 9. A Hermeneutic Reading of Law and Legal Theory:
Regarding Paul Ricœur 235**

Xavier BIOY and Thomas ESCACH-DUBOURG

9.1. The outcome of a long journey, from the interpretive method to a general epistemology	237
9.1.1. A philosophy of interpretation	237
9.1.2. A hermeneutic of symbols as a propaedeutic of a grand philosophy: the symbol suggests.	243
9.2. Hermeneutic and textual disciplines	247
9.2.1. The conceptual break brought about by textual hermeneutics: the paradigm of textuality	248
9.2.2. The methodological break brought about by textual hermeneutics: reading and textual interpretation	253
9.3. Law as a hermeneutical discipline	257
9.3.1. Interpretation of the law: quoting the law and understanding it are one and the same thing	257
9.3.2. Interpretation by law and interpretation in law.	260

Chapter 10. Legal Science According to the Pure Theory of Law . . 265

Thomas HOCHMANN

10.1. The negation of legal science (Sander)	267
10.2. The defense of legal science (Merkel)	270
10.3. Legal science pushed into the background (Kelsen)	276
10.3.1. Absence of denial of legal science	277
10.3.2. A theory of law, not of legal science.	278
10.3.3. An interest in decision, not knowledge	279
10.3.4. A regression: the theory of the tacit alternative clause	281

Chapter 11. Axiological Neutrality, Oppositional Thinking and Knowledge	285
Jean-Baptiste POINTEL	
11.1. The three aspects of a theory	285
11.1.1. Pascal’s wager, a textbook case	286
11.1.2. A scientific theory of law	288
11.1.3. A factual analysis of “ought to be”	289
11.2. “Hume’s Guillotine”, a false foundation for axiological neutrality	290
11.2.1. The definition of “Hume’s Guillotine”, an error of interpretation	290
11.2.2. The meaning of “Hume’s Guillotine”, explaining its motivations	291
11.2.3. The consequence of “Hume’s Guillotine”, a return to argument	292
11.2.4. Purity or axiological neutrality, a return to Max Weber	293
11.2.5. Language acts in John L. Austin, the inevitable fusion between descriptive and prescriptive	294
11.2.6. Platonic reductionism, a problematological repression	295
11.2.7. The importance of the implicit, a more scientific approach	296
11.3. Oppositional commitment to the theory	298
11.3.1. The critical eye, connecting analysis to policy	298
11.3.2. Scientific purity, a political program	299
11.3.3. Methodological anarchism, a basis for research	300
11.3.4. The archaeology of knowledge, a critical method	302
11.3.5. Example: the concept of state tyranny	303
11.3.6. Oppositional knowledge in law, a program to be defined	304
11.4. A new disciplinary ethics, but for which academic field?	305
11.5. References	306
Chapter 12. Legal Science and Its Roles in Legal Reasoning	311
Fábio Perin SHECAIRA	
12.1. The concept of a source of law	311
12.1.1. Explicit reference in legal practice	312
12.1.2. Prescriptions that serve as content-independent reasons	313
12.2. Arguments from authority	314
12.3. Types of scholarly authority	316
12.3.1. Describing and prescribing	316
12.3.2. Can legal science really serve as practical authority?	319
12.3.3. A note on legitimate and de facto authority	323

12.4. Implications for jurisprudence	324
12.5. Conclusion	327
12.6. References.	327

Chapter 13. Inference to the Best Explanation in Legal Science; on Balancing Contrastive Hypotheses 329

David DUARTE

13.1. Normative propositions in legal science	329
13.2. Inference to the best explanation	337
13.3. Speculative (hypothetical) normative propositions and inference to the best explanation	343
13.4. Contrastive hypotheses in balancing	346
13.5. References.	353

List of Authors 359

Index 361

Introduction

Mathieu CARPENTIER

Institut Maurice Hauriou (IMH), University of Toulouse, France

This book is devoted to the theory of legal theory, which may also be referred to using the barbaric term “metatheory of law”. The aim of this emerging discipline is to determine the objective, aims and methods of legal theory (however it might be referred to: philosophy of law, jurisprudence, *Rechtstheorie*, *Rechtsphilosophie* and so on). The aim of the metatheory of law is to establish the conditions of possibility, and the criteria of validity, of theoretical discourses on law. The contributions gathered in this book aim to take stock of the object, methods and aims of legal theory, from a variety of very different perspectives and approaches.

Indeed, the different traditions of legal theory have sometimes seemed to maintain a “dialogue of the deaf” on these issues. On the Continent, that is to say, the countries with a continental (or civil law) legal system, the object of legal theory has seemed to primarily be that of legal science¹, following an essentially epistemological perspective: the aim was to establish the conditions for a science of law that was both authentically *scientific* and authentically *legal* (or *juristic*). This trend culminated in the work of the Vienna School or, in a decidedly different way, the Scandinavian Realists, including Alf Ross². In the tradition of English-speaking countries, the concerns were different, even if they may have been present in the work of someone like Bentham. Hart’s successors have mostly been interested not in

1 See, in particular, Shecaira, F. (2015). Legal scholarship and the subject matter of jurisprudence. *Archiv für Rechts- und Sozialphilosophie*, 101, 411–427.

2 See, in particular, Ross, A. and Holtermann, J.v.H. (eds) (2019). *On Law and Justice*, Uta Bindreiter (trans.). Oxford University Press, Oxford.

the science, but in the *nature* of law, the salient, important, even essential properties of which they try to determine.

Today, this “tale of two traditions” has clearly lost both its force and its explanatory power. Legal theory is subject to increasingly varied approaches and to ever greater cross-fertilization between different traditions. A series of works has emerged attempting to capture these methodological developments³ and to establish the role and methods of legal theory⁴. The purpose of this book is to follow this trend and to propose elements of a “theory of the theory” of law by questioning the two primary objects of legal theory (the “nature” versus the “science” of law), which are often likely to conflict.

Part 1 of this book draws on contributions that question the methods of legal theory. In this field, methodological questioning is not new⁵ and on several occasions there has been talk of a “methodological turn” in the philosophy of law⁶. The end of the 20th century saw legal theorists engaged in argument – or, rather, several arguments – concerning the descriptive character of legal theory as practiced by Hart and many of his disciples. Dworkin’s positions⁷ in his debate with Hart⁸, as

3 See, in particular, Pavlakos, G. and Coyle, S. (eds) (2005). *Jurisprudence or Legal Science?* Hart Publishing, Oxford.

4 See, for example, Dickson, J. (2001). *Evaluation and Legal Theory*. Hart Publishing, Oxford; Leiter, B. (2003). Beyond the Hart/Dworkin debate: The methodology problem in jurisprudence. *American Journal of Jurisprudence*, 48, 17–51; Kramer, M. (2012). What is legal philosophy?, *Metaphilosophy*, 43; Banas, P., Dyrda, A., Gizbert-Studnicki, T. (2016). *Metaphilosophy of Law*. Hart Publishing, Oxford; Leiter, B. and Langlais, A. (2016). The methodology of legal philosophy. In *The Oxford Handbook of Philosophical Methodology*, Cappelen, H., Gendler, T., Hawthorne, J. (eds). Oxford University Press, Oxford; Lamond, G. (2016). Methodology. In *The Cambridge Companion to the Philosophy of Law*, Tasioulas, J. (ed.). Cambridge University Press, Cambridge.

5 We would like to refer to our study devoted to this subject, some passages of which are reproduced here: Carpentier, M. (2018). Controverses sur la “nature” du droit. *Droit & Philosophie*, 9.

6 See, in particular, Green, L. (2005). General jurisprudence. A 25th anniversary essay. *Oxford Journal of Legal Studies*, 25, 565–580. In general, we refer French-speaking readers to the following excellent study: Chérot, J-Y. (2013). Le tournant méthodologique en philosophie du droit. In *Le droit entre autonomie et ouverture. Mélanges en l’honneur de Jean-Louis Bergel*, Chérot, J.-Y., Cimamonti, S., Tranchant, L., Trémeau, J. (eds). Bruylant, Brussels.

7 Dworkin, R. (1986). *Law’s Empire*. Harvard University Press, Cambridge, MA.

8 Hart responded to Dworkin twice: at a symposium in Jerusalem in 1984 (Hart, H.L.A. (1987). Comment. In *Issues in Contemporary Legal Philosophy*, Gavison, R. (ed.). Clarendon Press, Oxford) and in the postscript to *The Concept of Law* (Hart, H.L.A. (2012). *The Concept of Law*, 3rd edition. Oxford University Press, Oxford).

well as the very different theses of John Finnis⁹ and Stephen Perry¹⁰, have cast doubts on the viability of undertaking a descriptive philosophy of law, free from any normative or evaluative element. The contributions of Julie Dickson, Brian Bix, Andrej Kristan and Giulia Pravato each return to some aspects of these controversies.

More recently, legal theory has undergone a new methodological turn. Legal theorists, foremost among them being Joseph Raz¹¹, often assign¹² the task of determining the “nature” of law to their discipline. This undertaking can typically be understood in two ways: in a weak sense, the expression “the nature of X” generally and vaguely means “what X consists of/in”; in a strong sense, however, it is, in many respects, synonymous with “the essence of X”. The nature of law is, in this hypothesis, no less than the set of essential properties that make the law what it is and without which the phenomenon studied would not be law. However, whenever legal philosophy sets out to elucidate the nature of law in the strong sense, that is to say, to determine the essential properties of law, it exposes itself to accusations of essentialism, led by authors as diverse as Frederick Schauer¹³, Pierluigi Chiassoni¹⁴ and Dennis Patterson¹⁵. Several contributions to this book attempt either to defend a cautious version of this essentialism (contributions by Julie Dickson and Brian Bix,

9 Finnis, J. (2011). *Natural Law and Natural Rights*, 2nd edition. Oxford University Press, Oxford.

10 Perry, S.R. (2001). Hart’s methodological positivism. In *Hart’s Postscript*, Coleman, J.L. (ed.). Oxford University Press, Oxford.

11 Raz, J. (ed.) (1994). The problem about the nature of law. In *Ethics in the Public Domain*. Oxford University Press, Oxford; Raz, J. (ed.) (2009). Can there be a theory of law? In *Between Authority and Interpretation*. Oxford University Press, Oxford; Raz, J. (ed.) (2009). Two views of the nature of the theory of law: A partial comparison. In *Between Authority and Interpretation*. Oxford University Press, Oxford; Raz, J. (ed.) (2009). On the nature of law. In *Between Authority and Interpretation*. Oxford University Press, Oxford.

12 See, in particular, Dickson, J. (2001). *Evaluation and Legal Theory*. Hart Publishing, Oxford, p. 19; Shapiro, S. (2001). *Legality*. Harvard University Press, Cambridge, MA; Gardner, J. (2012). *Law as a Leap of Faith*. Oxford University Press, Oxford.

13 Schauer, V.F. (2012). On the nature of the nature of law. *Archiv für Rechts- und Sozialphilosophie*, 98, 457–467; Schauer, F. (2013). Necessity, importance, and the nature of law. In *Neutrality and Theory of Law*, Ferrer Beltrán, J., Moreso, J.J., Papayannis, D.M. (eds). Springer, Dordrecht; Schauer, F. (2015). *The Force of Law*. Harvard University Press, Cambridge.

14 Chiassoni, P. (2011). The simple and sweet virtues of analysis. A plea for Hart’s metaphilosophy of law. *Problema*, 5, 53–80.

15 See, in particular, Patterson, D. (2016). Can we please stop doing this? By the way, Postema was right. In *Metaphilosophy of Law*, Banas, P., Dyrda, A., Gizbert-Studnicki, T. (eds). Hart Publishing, Oxford.

in particular), or go beyond it by modifying its tools, which involves a reconfiguration of conceptual analysis as the preferred method of legal theory (contribution by Pierluigi Chiassoni), or a defense of an complexity-oriented empiricism (contribution by Gregory Bligh).

Finally, several contributions explore certain avenues that are still in their infancy. Thus, Brian Bix intends to set out a roadmap for what might be called the “special” theory of law, or the theory of *branches* of law (such as the theories of constitutional and criminal law). This field (or, rather, fields) of legal theory is booming and is accompanied by an intense metatheoretical and methodological reflection on the topic¹⁶. Finally, Charles-Maxime Panaccio considers the relationship between legal and political theory, following the work of Jeremy Waldron. The aim is to show how a renewed conception of political theory can enable us to take a fresh look at certain classic problems of legal theory (and in particular constitutional theory), such as the role and legitimacy of constitutional adjudication.

Part 2 of this book reflects upon the role of legal theory as a theory of legal science¹⁷. The question of the scientificity of legal knowledge has been regularly debated. The study of law has been given many names: *doctrine*, *Rechtsdogmatik*, *jurisprudentia*, legal scholarship and so on, but the exact nature of this activity, which today is the (occasionally contested) prerogative of academic lawyers, remains indeterminate and therefore controversial. The study of law should be described as an authentic *science*, if not in the sense of one of the “hard” sciences, then at least as one of the human sciences – though this is not self-evident. First, such a qualification seems to run contrary to the accepted image according to which the lawyer mobilizes an art (or even know-how) rather than a science (*ars aequi et boni*, according to the formula known to all first-year students); second, it seems to introduce a distance between the object and the science used to study it, as if this object could lend itself to scientific treatment and as if the science in question were not to some extent the producer of the object itself – the study of law sometimes being difficult to distinguish from the very production of law¹⁸; finally, it assumes that the study of law can correspond to criteria of scientificity and that it is in some way suitable for scientific interpretation.

16 See, in particular, Moore, M. (2000). Theories of areas of law. *San Diego Law Review*, 37; Khaitan, T. and Steel, S. (2020) Theorising areas of law. Unpublished manuscript.

17 For a renewed approach to the issue, reference is made to the following important thesis: Ho Dinh, A.-M. (2018). *Les Frontières de la science du droit*. LGDJ, Paris.

18 See, in particular, Peczenik, A. (2005). *Scientia Juris: Legal Doctrine as Knowledge of Law and as Source of Law*. Springer, Dordrecht.

The contributions in Part 2 of this book attempt to trace the metatheoretical assumptions that accompany the very idea of legal science. Indeed, it is important to question the way in which legal theorists conceive science, on the one hand, and law and the study of law, on the other hand, so that it may or may not make sense to speak of a science of law and to set out its guidelines in terms of epistemological norms (definition of the truth of propositions, coherence of theoretical statements, objectivity in the handling of data, research devices, axiological neutrality and so on). Thus, Eric Millard demonstrates that an empirical theory of legal science, of the type he supports following on from Alf Ross' work, is, in fact, based on metatheoretical assumptions that imply a choice between several scientific theories from science itself. For his part, Jean-Baptiste Pointel returns critically to what has been the keystone of many theories of scientificity since Weber (if not before), namely axiological neutrality, the political and ethical stakes of which he shows as sometimes unsuspected. Did not Kelsen himself recognize that the choice of a theory of law and a scientific reconstruction of a particular branch of law could be a political choice¹⁹?

The theory of legal science is undoubtedly also based on a metatheory of law – and not simply a metatheory of science. Thomas Hochmann thus shows, on the basis of an analysis of the internal dissensions from the Vienna School, the extent to which the theorist's conception of law – as being capable of understanding defective norms, in other words, in a sense, capable of being qualified as contrary to a higher norm – determines the conception he has of the very possibility of a science of law.

Second, it is possible to question the boundaries of legal science: Véronique Champeil-Desplats notably questions the relationship between social sciences and legal science; Xavier Bioy and Thomas Escaich Dubourg defend the usefulness of recourse to Ricoeur's hermeneutic philosophy for legal science, within which interpretation plays a key role.

Finally, the last two contributions in this book consider the relationship between legal science theory and legal reasoning theory in different ways. David Duarte highlights the role of inference to the best explanation (a mode of reasoning sometimes called abduction) within legal science, while theories of scientific reasoning frequently emphasize its importance in scientific discovery. Fabio

19 On the subject of the choice between the two variants of the monistic theory in international law, Kelsen writes: "Which of the two theses deserves preference? This is a question without a properly legal answer [...]. One can only decide in consideration of metalegal elements – ethical and political ideas." (Kelsen, H. (1925). *Les Rapports de Système entre le droit interne et le droit international public. Recueil des cours de l'Académie de droit international de La Haye*, 14, 313).

Shecaira shows the role of legal science *within* legal reasoning, including the way in which judges use arguments from legal doctrine, which requires a fresh look at the theory of the sources of law.

The contributions gathered in this book contribute to an ever-increasing reflection in contemporary literature on the theory and methods of legal theory and/or legal science. In doing so, they do not claim to be encyclopedic, nor to offer purely tertiary literature on these issues. This would, moreover, have been impossible, given that these questions, which have occupied theorists for half a century, have given rise to a mass of writings, theses and theoretical positions. While, for the most part, the contributions in this book give an overview of the state of the art within which they take place, they each bear the mark of their authors' specific perspective and approach. More than a sum, it is a kaleidoscope, reflecting the diversity of questions that arise in the metatheory of law. We hope that this book will help to provide some answers to the fundamental metatheoretical question: "What is the point of legal theory?"