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LEGAL THEORY AND THE SOCIAL SCIENCES

VOLUME II

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Series Preface

Contemporary Legal Theory

The last thirty years have witnessed a proliferation of theorising about law, as well as reflection on the very practice of that theorising. As the discipline of legal theory has flourished, so have methodological debates and controversies. These debates are not only relevant to how legal theory understands its own enterprise: its problems and aims, and issues of scope. They are also relevant to many other aspects of the practice of legal theory, and its role vis-à-vis the practice of law and the practice of other related activities, such as legal scholarship and legal education. Further, as the ambitions of legal theory grow, so do questions concerning its relations with other disciplines, such as comparative law, but also, much more broadly, the social sciences.

This three volume series on Contemporary Legal Theory aims to track and project the relations between legal theory and related disciplines. Accordingly, the first volume is devoted to preparing the way, by assembling recent work on the methodology of legal theory. It examines the problems and aims of legal theory, issues of semantics and epistemology, perspectives on morality in the theory of law and issues of scope.

The second volume follows naturally from where the first volume ends, and takes up issues to do with mapping the intersections between legal theory and the social sciences. It is divided into three parts: first, it looks at methodological disputes and collaboration; second, it considers how both legal theory and the social sciences employ a variety of different modes of explanation of behaviour, and the role that these modes play in the construction of theories about law; and third, it surveys how both legal theory and the social sciences might work together to portray legal phenomena, especially insofar as one sets out to study the language of law in its social context as well as the place of laws within a broader context of normative phenomena.

The third volume completes the series by considering four further aspects of relevance to the practice of legal theory: first, its role in the common law curriculum; second, how legal theory has been and may be taught; third, the relationship between legal theory and legal scholarship; and fourth, the relationship between legal theory and comparative law.

Although this series looks back, offering a panorama of the most important contributions made to legal theory in the last thirty years, it does so with one eye to the future. Given the richness of contributions, any selective project such as this one is bound to be a risky business. In that respect, we should stress that we have not aimed for comprehensiveness. Certainly, our selections have been informed partly by the acknowledged importance of certain contributions to the field, and the continued popularity of certain debates, but they have also been informed by the directions we think legal theory may develop in decades to come. This future-oriented aspect of the three volumes can be seen particularly well in its discussion of the scope of legal theory and its relations with other disciplines.

Each volume in the series contains seventeen papers, and is supported by a substantial introduction that summarises and contextualises the chosen articles. Where it was thought to be necessary, we have developed the context in some detail (for instance, as in the case of the role of legal theory in the common law curriculum in Volume III); at other times, we have used our selection to offer highlights of the relevant debates. These introductions are supplemented by selective bibliographies.

If the past thirty years provides any indication, the future for legal theory looks bright. Of course, at least when compared to certain other debates in philosophy, many of the issues that have emerged in contemporary legal theory are but newborns: the great majority of the work lies ahead us. We hope that with this series we are able to provide the future generation of legal theorists with the necessary tools for success over the next thirty years.

We would like to acknowledge the support and professionalism of the Ashgate team. We owe particular thanks to Professor Tom Campbell.

We dedicate this series to the memory of Sir Neil MacCormick, who was to be involved as a co-editor before falling ill. Contemporary legal theory is so much the richer for having had the privilege of both his work and his intellectual generosity and openness of spirit.

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Introduction

There are many ways of mapping the intersections between legal theory and the social sciences. Here, we have decided to cut the cake in the following way: first, to focus on methodological collaborations and disputes; second, to consider the affinities between problems in legal theory and the social sciences, especially as they concern different modes of explanation of behaviour; and third, to examine the common objects of legal theory and the social sciences, including, most prominently, the study of language in its social context and normative pluralism. There is, of course, an even bigger literature of the treatment of these topics outside the discipline of legal theory; in this volume, as in the entire series of *Contemporary Legal Theory*, our focus is on the view from within and the prospects for legal theory.

Methodological Collaborations and Disputes

The focus of Volume I in this series is on the methodology of legal theory. Some of the debates from that volume, then, will also be pertinent here. Nevertheless, although some overlap is inevitable, the methodological issues raised in this first part of Volume II are somewhat peculiar to, and also of particular importance for, the relationship between legal theory and the social sciences. The overlap, but also specificity, of these issues is exemplified in Chapter 1, Martin Krygier's '*The Concept of Law* and Social Theory'. The overlap is largely explained by the enormous influence, at least within the recent tradition of Anglo-American legal theory, of H.L.A. Hart's *The Concept of Law* (1961). What this means, in practice, is that the focus of debates tends to be on the advantages and limitations of adopting a Hartian explanatory framework; the question that then arises is whether the social sciences can assist in the advantages and supplement the limitations.

Some of the controversy concerning the relationship between a Hartian approach and the social sciences was caused by Hart's own comments. Famously, or perhaps by now infamously, Hart claimed that his book could be regarded 'as an essay in descriptive sociology' (1961, p. vii). At the same time, as Krygier points out, in other writings Hart distanced himself from the discipline of sociology – for example he said, by way of advice to teachers and students of jurisprudence, that 'the limited time which the student can spend on jurisprudence is better devoted to analytical inquiries than to sociological jurisprudence' (quoted by Krygier, p. 5). Hart, it seems, thought that sociology and other social sciences were not yet sufficiently developed to be of use to jurisprudence: 'Both psychology and sociology', he said, 'are relatively young sciences with an unstable framework of concepts and a correspondingly uncertain and fluctuating terminology.' 'If they are to be used', he continued, 'to illuminate us as to the nature of law, these sciences must be handled with care and with a sensitivity to the types of ambiguity and vagueness, and also other linguistic anomalies, which the student will best learn to appreciate in handling the leading concepts of the law in an analytical spirit' (quoted by Krygier, p. 5). As Krygier notes, most if not all of the traffic here is one way: from

analytical jurisprudence to the sociology and psychology of law; there is little, if anything, that 'Hart believes analytical jurists have to learn in the conduct of their *own* enterprise, from theoretical or empirical social science' (p. 6; emphasis in original).

Krygier certainly recognizes, and endorses, the value of conceptual rigour and nuance in analytical jurisprudence, but he also believes that much is to be gained by travelling in the opposite direction – that is, from the theoretical or empirical social sciences to legal theory. For one, Krygier argues that Hart himself could have benefited from a consideration of the discussion of 'social control' in the social sciences. According to Krygier, a key element of Hartian jurisprudence is that law is a means to social control. However, how are we to understand this notion – for example 'what or who controls or what or who is controlled' (p. 10)? It is important to note here that Krygier has the same criticism to make of the sociology and anthropology of law; they too, he argues, have worked with too narrow a range of the social function(s) of law. For much-needed sophistication on this front, then, we need to turn to the social sciences. We need to turn to them not to bolster our arguments but in order to learn from how they imagine social life in a different way. Further, says Krygier, Hart could also have considered how sociological and anthropological research and theory might support, or question, his account of the differing social functions of primary and secondary rules. Indeed, more generally, Hart might have done well to have considered the long-standing debate within the social sciences over the very idea of a social function. With respect to this last point, Krygier notes that out of the multiple functions that law can be said to serve, there may be some that are more significant or universal than others but the selection of such functions among others is a task that requires serious sociological research, which goes beyond ascertaining what people in general perceive (his example is that people who marry do not necessarily 'know (or care) much about the social functions of the institution whose rules they enlist'; p. 15). It is not that Hart's insights about the social functions of law are outright mistaken: it is just that, given their reliance on general ideas as to the nature of social life, they ought to be both informed, and tested, by research and theory in the social sciences.

Krygier also mentions a number of other such intersections between the interests of Hartian legal theory and the social sciences. For instance, Hart's distinction between internal and external points of view sometimes vacillates, says Krygier, between a theory of two different kinds of attitudes and a methodological position as to which perspective it is best to adopt when attempting to understand the social life of law. Understood methodologically, Hart's contribution – indeed, his injection of the hermeneutic perspective into legal theory – is, and has remained, of profound significance for the discipline of legal theory. However, seen as a substantive theory about the attitudes that persons can, and do, take to law in social life, it remains somewhat reductive – for example, according to Krygier, there may be many distinguishable attitudes within both the internal and the external points of view (pp. 18–19; see also Postema, 1998, which is included in Volume I of this series). One might want to distinguish, for example, between the 'bad man', the utilitarian and the foreign visitor within the external point of view or, within the internal point of view, one might think that there are important differences of attitude among the judiciary, the police force, prosecutors, administrative officials and so on. And, of course, one might also add that such differences in attitudes cannot be gleaned merely from the statements made by such persons but from the ways such attitudes are expressed in the practices of these officials. In all these cases, one can profitably draw on the social sciences.

Another intersection – the final one to be mentioned here with respect to Krygier's discussion – can be found in Hart's contrast between pre-legal and legal systems. Only those systems, said Hart, that have secondary rules, and where their officials adopt the internal point of view towards them, have legal systems: all others, including (or especially) primitive (though also, again infamously, international law) systems, are not legal. Krygier is careful to point out that some sociologists and anthropologists have found Hart's account useful in accounting for pre-modern societies. On the whole, however, this aspect of Hart's argument has been happy hunting ground for sociologists and anthropologists. As Krygier points out, much of the viability of Hart's account here lies in the explanatory power of the concept of a rule (as Hart understands it). However, many sociologists and anthropologists have provided at least equally powerful explanations of social life – especially in pre-modern communities – that have not relied on the concept of a rule (or norm). They have done so not merely for the reason that in many cases members of the communities being studied do not speak of their own communities in this way (that is, they do not use the language and concepts of rules, standards and norms). Rather, they have done so more on the basis of a careful observation of the unique interpersonal dynamics at play, especially in small-scale and closely knit communities, where, Krygier says, 'there are many ways of knowing, and being reminded, what is expected, other than by a reliance on rules' (p. 23). In other words, it may be (as Max Weber (1954) pointed out in great detail) precisely in largely impersonal, heavily institutionalized and bureaucratized communities – such as, arguably, the modern, Western world – that an emphasis on rules is more pertinent. If that is so, then to argue on the basis of a distinction between primary and secondary rules that pre-modern communities did not have legal systems is, at the very least, to beg the question.

We have already encountered – simply on the basis of our single, opening essay – a number of intersections between legal theory and the social sciences. The key themes are threefold: first, the benefits for legal theory to be gained by being informed by the rich variety of conceptions of the nature of social life in the social sciences; second, the need for conceptions of social life relied on by legal theorists to be tested by social scientific research methods and findings; and third, the utility for legal theory of the methodological discussions in the social sciences, which are characterized by their high degree of reflexivity in terms of the role of the social theorist as an observer/participant. These themes arise again and again in the essays selected in this volume. It will be useful to briefly point out how these themes are addressed in the six remaining essays in Part I of this volume.

Chapters 2 and 3 – the first by Kim Scheppele, the second by Brian Tamanaha – both offer maps, though of very different sorts, of intersections between legal theory and the social sciences. Where Scheppele's map is largely disciplinary, Tamanaha's is analytical – that is, instead of grouping together insights about law based on divisions between legal theory, sociology and the anthropology of law, and the social sciences more generally, Tamanaha offers 'two fundamental categories of the concept of law', or two paradigmatic 'social scientific concepts of law', and gathers the various contributions under that categorization. Our focus here will be on Tamanaha's essay, but it is worth pointing out just how different (apart from certain classics such as Weber, Marx, Durkheim and so on) are the literatures drawn on by Tamanaha and Scheppele. Perhaps the most striking difference is Scheppele's sensitivity to the political undertones (or overtones) of legal theories and ways of framing the nature of social life (Tamanaha, as we shall see, groups theories more on the basis of explanatory tendencies

than on political orientations or reform agendas). Indeed, in being so sensitive, Scheppele reminds us of the many contributions made to politically informed, and politically charged, social theory under the guise of theories of law and legal institutions. Scheppele's essay is not a Cook's tour of contemporary legal theory; rather, it is a masterly survey, managing an incredible range of literature, of the contributions made to social scientific issues by law and rationality studies, critical jurisprudence (including feminist jurisprudence and critical legal theory), the literary turn in legal theory (including postmodern legal theory), various forms of structuralist legal theory (which we shall return to later, in Chapter 8 of this volume) and various forms of legal pragmatism. Her impressive bibliography is almost reason alone for inclusion in this volume.

As noted above, Tamanaha's essay is quite different in scope and spirit. Tamanaha identifies two categories under which he groups social scientific concepts of law: first, law as actual patterns of behaviour; and second, law as a state law model of rules and institutions. This mapping work is already original and helpful, but Tamanaha also has his own theoretical agenda. Although he has developed it in much more detail in subsequent work (see, for example, Tamanaha, 2001), Tamanaha's perspective is already visible here. The central idea of this perspective is that the concept of law is itself a construct, that law has no universal or essential nature but that, rather, whatever it is that people, in any community at a certain time, call law simply is law; 'Law', says Tamanaha, '*is* whatever we attach the label *law* to' (p. 87; emphases in original; for a critical view of this claim, see, for example, Himma, 2004). This debate over the universal or contingent status of any concept of law has already been discussed in Volume I of this series. The key point from the perspective of the scope of this volume is that it is often those who argue that the status of any concept of law is a contingent construction who are also more likely to call on, and be generally more sympathetic to, the insights and research methods of the social sciences.

Of course, one may also say that any construction of the categories of concepts of law – such as Tamanaha's – is itself contingent (that is, that it is itself a construction that can be done differently) and that it is precisely the contingency of this mapping work that leads to Tamanaha's own contingent concept of law. Indeed, it is common in both legal theory and the social sciences for theorists to present two extreme views, as a summary of the literature, and then situate their own view in between them or as a synthesis of them. In this sense, any mapping work (whether synchronic and/or diachronic) of theories of law is itself a theoretical contribution, with important theoretical implications (especially if any one way of mapping the literature becomes established and influential).

But let us return to Tamanaha's categories. In the first – to recall, of law as actual patterns of behaviour – Tamanaha places figures such as Eugen Ehrlich and Bronislaw Malinowski. The key for both, according to Tamanaha, is the focus on actual, concrete usages; they both study social life, he asserts, on the basis of direct observation of customs and habits, and although some of their explanations would make use of the concept of a rule, that concept is not one anchored to any account of formalization or institutionalization; rather, it is but a way of expressing what is stable, regular and familiar in social life. These accounts – and their close kin, such as Marc Galanter's influential account of law as 'concrete patterns of social ordering' (1981, p. 14) – all suffer, says Tamanaha, from the same problem: given their generous interest in 'actual, regularized behaviour within groups', 'all of them are plagued by an ability to identify the distinctively legal' (p. 58). The second category – represented,

according to Tamanaha, by figures such as Max Weber – conceives of law as consisting of 'institutionalized norm enforcement' (p. 58). Although Tamanaha does not seem to notice it, it is interesting to observe that the theorists in the second category begin with the very problem that is said to plague the first category; or, differently put, what is a problem for those theorists in the first category is but a beginning for those theorists in the second. Thus, for example, Tamanaha quotes Adamson Hoebel as having said: 'A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting' (p. 59). In other words, theorists in this second category begin with a delineation of the concept of law, which then immediately sets the ambit of their inquiry (whereas theorists in the first category prefer to keep the concept of law suspended, perhaps on the back of a belief that law cannot be separated too quickly from social life). Tamanaha associates the above definition by Hoebel – and others in this second category – with the state law model – that is, Tamanaha argues that on such a conception, 'Norm enforcement is the presumed function of state legal institutions' (p. 59). The problem with this concept, Tamanaha says, is that it grates against the intuitions of many scholars that communities without the state law model of political organization – or, even more broadly, without institutions whose specific task it was to enforce norms – nevertheless had/have law.

We will return to the departures within legal theory from the state law model in Part III of this volume. For now, it is important to see how Tamanaha differentiates social scientific concepts of law. As Tamanaha notes, despite the above-mentioned differences between the two approaches, they have a lot in common. For example, both approaches seek 'to distinguish the *real* law from that which merely was claimed to be law' (p. 64; emphasis in original). It is just that one approach thought that 'real law' was to be found in the behaviour of people within the community or social group, whereas the other approach thought it appropriate to focus on the behaviour of legal actors or legal institutions. Helpfully, Tamanaha observes that there are, in this respect, two versions of the 'gap problem':

> One version is the gap between state legal rules (or the rules cited as binding by non-state 'legal' institutions) and *what people in the community actually do*, the rules they actually follow in the course of social life. Many of the concepts of law in the first category highlighted this first gap. A second version is the gap between state legal rules (or the rules cited as binding by non-state 'legal' institutions) and *what the legal institutions actually do*, which norms they in fact enforce and how they do so, regardless of what they claim. Many of the concepts of law in the second category highlighted this second gap. (p. 64; emphasis in original)

Tamanaha's point here is useful, for, as he notes, the 'gap problem' has been a constant companion of legal theory; its influence is visible in such distinctions as 'law on the books' versus 'law in action' or, arguably, in the very research programmes of various forms of realism and various forms of positivism. But Tamanaha's purpose is not merely clarificatory: he traces both of these categories and their specific versions of the gap problem to the 'same fundamental belief' – that is, that '*law maintains social order*' (pp. 65–66; emphasis in original). Whether one focuses on the patterns of behaviour in communities or groups (in the 'social relations themselves'), or on the state-centred forms of institutional norm enforcement or dispute processing, the common element to both approaches is the idea that the function of law is the maintenance of social order. We have already witnessed Krygier's comments

concerning both the concept of 'social order' and functional analysis. Krygier called for more reflection on that concept and that form of analysis – a form of reflection, furthermore, that he thought could glean a great deal from the social sciences. And that is precisely the kind of reflection that Tamanaha provides in his essay. We shall not retrace his steps here. Neither will it be desirable, given space restrictions, to summarize Tamanaha's many points concerning other links (empirical as well as conceptual) between the two categories. What is, however, of particular importance for present purposes is how integral Tamanaha sees the role of the social sciences in our grappling with legal phenomena. Perhaps his clearest statement in this respect is the following: 'What needs to be investigated is the complex mix of interrelations among the expansion of law as a mode of cultural discourse, the increasing rationalization of transactions through legal means, and the scope and nature of the coercive activities of legal institutions, and this will require contributions from both interpretivist and behaviourist social science' (p. 85).

An equally powerful argument for the importance of the social sciences for legal theory was made by Roger Cotterrell in an influential essay included here as Chapter 4. Of course, Cotterrell has since developed his approach in much more detail (see Cotterrell, 2006), but the essay selected here continues to be influential and is likely to continue to occupy a central place with respect to the issues being discussed here (for a critical review of Cotterrell, 2006, see Roberts, 2008). Cotterrell's essay tackles a commonly witnessed claim concerning the division of labour between legal theory and the sociology of law. This claim is one in which it is said that whereas 'lawyers and jurists analysed law as doctrine – norms, rules, principles, concepts and the modes of their interpretation and validation ... sociologists were concerned with a fundamentally different study: that of behaviour, its causes and consequences' (p. 89). As a result, sociology of law is thought to be irrelevant to 'the understanding of legal ideas, abstracted from their effects on specific actions' (p. 90). The task of Cotterrell's essay is to undermine that claim, and thus to show the relevance of the sociology of law for legal theory.

Indeed, Cotterrell's argument can be stated even more strongly. Cotterrell does not believe that the relation between legal theory and the social sciences is one where 'social science should be "on tap rather than on top"' (p. 90), by which he means that there is no reason to think that social science can only ever play a subordinate role that never challenges the '*meaning* of law (as doctrine, interpretation, reasoning, and argument)' (p. 91; emphasis in original). This hierarchical division has, he says, been detrimental to both disciplines. On the back of it, Cotterrell notes, both disciplines have caricatured each other: jurists have 'often ignored scholarship expressing well established sociological positions', and social science has 'sometimes treated lawyer's legal understanding as entirely positivistic', neglecting to make room for such experiences central to the legal process as 'interpretation, argument, negotiation, presentation, influence, decision-making and rule-formulating' (p. 91). Making a case for a role for the social sciences, then, requires that one distance oneself from this division, as well as from these mutually detrimental caricatures. But it also requires one to be ambitious about what the social sciences can achieve. In other words, it is not enough simply to suggest that social science can explain aspects of legal doctrine; rather, it is necessary to consider what 'specially powerful' insights social science can provide. It is necessary, in short, to demonstrate the unique benefits to be gained from employing the insights of the social sciences.

It is useful to step aside for a moment here to consider the arguments of those who do attempt to make room for 'law's truth' (the phrase is David Nelken's; see Nelken, 1994). Law, it is said by some, 'interprets social life in its own terms'; it tends towards self-closure and is self-referential (and resourcefully so); it produces its own specifically legal point of view and has 'no need, and no possibility, of doing more than creating its own normative understanding of its social environment' (pp. 93–4; the last quotation refers to the work of Niklas Luhmann; see, for example, Luhmann, 2004). It is important to raise these points as they touch directly upon the very possibility of methodological collaboration between legal theory and the social sciences. Indeed, they have been interpreted by some to suggest that the sociologist of law ought not to focus too much on substantive law but more on forms of legal professional competence. Thus, Reza Banakar suggests that:

> Law is *how* to get things done legally, that is, about tasks which require institutional facts, thus opening up the law to meaningful *exchanges* with sociology. Focusing on law as a practice-based activity places social sciences in a privileged position to describe and analyse legal practice, without reducing it to legally irrelevant observations. Sociology can, for example, provide law with systematic empirical knowledge of the limits of institutional action, while learning from the law about society, and its own paradigmatic limitations. (2000, pp. 283–84; emphasis in original)

Cotterrell, however, is not content to maintain such a constrained role for sociology. His answer to the above arguments is twofold. First, he says, the very idea of law's truth is false. The falsity of the idea, however, does not render false, or any less important, the fact that the claim to law's truth is often made. Indeed, that is the rub of Cotterrell's critique, namely, that it is not to be doubted that 'law is presented professionally as a more or less unified, specialized discourse' (p. 99); it does not follow, however, that this self-presentation also constitutes or guarantees its status. Second, sociology is vital for the understanding of legal ideas, for 'the *only* way to grasp these ideas imaginatively as ideas about the organization of the social world is through some form of sociological interpretation' (p. 95; emphasis in original). The balance that needs to be struck, then, is between attention (and sociology can assist with this) to law's claim to unique self-sustaining existence (including placing this claim properly in its social context) and recognition (and, here, sociology is not only useful, but necessary) that 'Theorizing legal ideas is not a separate enterprise from theorizing the nature of social life' (p. 103). Certainly, there are specific aspects to legal ideas, and to the legal process more generally – but we should not think these aspects are so specific as to divorce law from its character 'as a social phenomenon, a phenomenon of *collective human life*: an expression and regulation of communal relationships; a means of codifying, being systematically aware of, working out, planning, and co-ordinating the relationships of individuals who co-exist in social groups' (p. 103; emphasis in original). All this has a profound methodological implication: there is no distinction, Cotterrell argues, to be made between internal and external points of view; the attempt to make and impose such a distinction is better understood as part of the self-presentation of the legal world. Such a distinction is better replaced 'by a conception of partial, relatively narrow or specialized participant perspectives on (and in) law, confronting

and being confronted by, penetrating, illuminating, and being penetrated and illuminated by, broader, more inclusive perspective on (and in) law as a social phenomenon' (p. 106).[1]

A different, but related, attempt to re-imagine the relationship between legal theory and the social sciences is evident in Chapter 5, Nicola Lacey's 'Analytical Jurisprudence Versus Descriptive Sociology Revisited'. Lacey's essay is helpful not only because she articulates 'the mutual dependence of analytic-conceptual and social-institutional aspects of legal theory' (p. 113) but also because she offers a unique perspective of the disjunction between the way Hart practised legal theory (and the repercussions this has had) and Hart's own claims concerning his work being an essay in descriptive sociology. We shall leave the reader to consider Lacey's sympathetically critical account of Hart's approach to legal theory and its legacy (for an equally sympathetically critical review of Lacey's reading of Hart, see Schauer, 2005–2006). What requires some attention here, though, is her specific proposal for a rapprochement between legal theory and the social sciences.

Lacey develops her proposal in the context of three specific case studies: causation, responsibility and corporate criminal responsibility. In all these cases, she distances herself from what she sees as methodological limitations of Hart's approach. In the case of causation, for example, she argues that we need to go beyond an analysis of linguistic data gleaned almost exclusively from appellate case law (this being what Hart and Tony Honoré are said to have done in *Causation in the Law*, 1959). What Lacey would have preferred to see is 'a systematic analysis of the institutional, practical, professional, or social context in which that legal language was used' (p. 133). For example, it would be important, she says, to consider 'the institutional factors that restrict the extent to which judges will appeal to pragmatic or policy arguments' (p. 134) (which itself may differ depending on the matter at hand, for example whether it is contractual, criminal or tort-based). In the case of responsibility, Lacey goes further. Here, she extends the scope of investigation to encompass a historical dimension. Thus, for example, she argues that certain kinds of approaches to criminal responsibility only became possible on the back of other cultural shifts (responsibility based on character rather than on capacity was much more prevalent in the eighteenth century than now and this can only be understood in the context of the spread of liberal, democratic and humanist sentiments). Of course, there were other important 'minimum institutional conditions' involved in the rise of capacity responsibility, which included '1) a systematic law of evidence; 2) regular representation by lawyers...; 3) law reporting...; and 4) a system of appeals' (p. 138). Against that background, then, it becomes inadequate to claim that there is a general, universal structure or content to the idea of criminal responsibility, or to claim to have found such a structure or content in the justifications of decisions offered by appellate courts. And it is precisely in the need for the study of such historicized institutional conditions that we meet the happy marriage of legal theory and the social sciences. In the context of her third case study, corporate criminal responsibility, Lacey makes the following representative statement:

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[1] For criticism, see Nelken (1998) and Roberts (2008), the latter of whom argues that the distinction is important, as is the very 'aspiration to distanced commentary in accordance with some "analytical scheme" that attempts to remain distinct from folk perspectives' (p. 140). See also Kahn (1999), who argues for the infusion of legal scholarship with the social sciences but at the same time advocates a radical separation between legal theory and legal practice.

> If we are interested in the philosophical foundations of law and of other social institutions, we must be concerned with the structure and dynamics of how these social institutions operate and hence (potentially) with literature in political science, sociology, and economics, as well as with the more obviously relevant interdisciplinary literature on corporate governance. And if we agree with Hart that attributions of criminal liability are a legal or political matter and not a matter of logic, we should not follow him in holding that practices or conceptions of attribution can be analyzed without adverting either to the circumstances in which questions about holding collectivities socially responsible are raised or to details about the actual workings of the relevant collectivities. This is because it is a mistake to think that law can afford to ignore insights into the operation of the institutions whose practices it seeks to shape, or that the structure of those practices places no constraints on the development of adequate legal policy. Both policy and theory are, in short, answerable to context. A radical separation between the analytic and the contextual will, therefore, occlude our understanding of law. (pp. 144–45)

Where Lacey makes a specific case for collaboration between legal theory and the social sciences, Christopher McCrudden, in Chapter 6, surveys much of the work that has already been done in this spirit. McCrudden usefully organizes the issues taken up by legal scholars (he includes legal theory as part of legal scholarship) into four research agendas: first, '*the understanding and internal coherence of legal concepts and legal reasoning*'; second, '*the meaning and validity of law*'; third, '*the ethical and political acceptability of public policy delivered through legal instruments*'; and fourth, *the effect of law* ... on human behaviour, attitudes and actions' (p. 149; emphasis in original). What is of great benefit for the present volume is that he goes on to examine whether, and if so how, the treatment of these agendas has been informed by social scientific research.

McCrudden's contribution is valuable also because he reminds us that there have been different models of science – models that have had their own distinct life in legal scholarship. Thus, in one model of science, one 'acquires knowledge on the basis of constructing logically coherent conclusions from elementary principles' (p. 150) – and this is a model that certainly flourished in legal academies during the last few centuries. The second model is based on 'the generation of knowledge by *empirical investigation* of natural phenomena, often using laboratory investigation' (p. 150; emphasis in original), and over the course of the last few decades, and increasingly so now, this model has become more popular in legal academies. Of course, to say it is becoming more popular is not to say that it dominates the methodology of scholarship in legal academies, but a certain shift is discernable. McCrudden's point, in any event, following on from the survey of previous and current efforts, is to argue that contemporary legal academies have embraced 'methodological pluralism'.

It is also important to note that the traffic has not all been one way. While legal scholars have reached out to other disciplines, other disciplines have also become more sympathetic to legal scholarship. Thus, for example, 'rational choice theory', as developed in economics and political science, 'is now more open to the role that institutions and organisations play in individual decision-making' (p. 159), and this has made its insights more readily applicable to legal institutions and organizations. Further, and as we shall see more in Part III of this volume, the emergence of certain objects – such as non-state forms of regulation – has meant that more theorists, from different disciplines, are becoming interested in the same phenomena, also making the research less grounded in specific cultures and legal systems, and thus increasing dialogue between theorists and intersections between bodies of research. A form of multi- or trans-culturalism, then, accompanies methodological pluralism.

McCrudden is not opposed to such a paradigm shift in legal academies, but he is careful to stress that taking legal research seriously can be beneficial for the social sciences. He argues that legal research can make a contribution to the social sciences in four ways: first, 'doctrinal and philosophical consideration of law can help provide conceptual clarity and specificity about particular sets of social norms and social concepts that occur in both the legal and social contexts'; second, careful attention to legal research can indicate that 'Law is not a datum; it is in constant evolution, developing in ways that are sometimes startling and endlessly inventive'; third, without attention to legal research, 'social scientists who are not lawyers are perhaps less likely to recognise when law is playing an important role in the social and economic phenomena they are attempting to analyse'; and fourth, legal research may have something specific to offer when it comes to 'navigating practical decision-making, normative principles, and institutional considerations' in the context of offering specific policy recommendations (pp. 164–66). If one is persuaded by McCrudden, the future appears to be bright for methodological collaboration between legal theory and the social sciences.

To close Part I, we offer an example of a legal theorist who has, for some time, sought to show the relevance and significance of the social sciences for legal theory and legal practice (for more on the use of social science in legal practice, see Feeley, 2001; Nelken, 2001; Mertz, 2008). Already in his *Epistemology and Method in Law*, Geoffrey Samuel had argued that we can learn a lot about legal epistemology, primarily in the form of historical framing and structuring of facts, if we look to the 'schemes of intelligibility' developed in the social sciences (2003, pp. 302–18). These schemes include the causal scheme, the functional scheme, the structural scheme, the hermeneutical scheme, the actional scheme and the dialectical scheme (Samuel drew on Berthelot (2001) for the schemes). In that work, he also drew on other traditional debates in the philosophy of the social sciences – such as the debate between those who favour holistic and those who favour individualistic (or atomistic) accounts of society – and used them to illustrate the law's social ontology (how law cuts the cake of social life; see Samuel, 2003, pp. 320–29). In Chapter 7, Samuel returns to the question of the similarities and differences between law and social science, and in doing so once again places on the agenda the question of legal method. His essay is a response to Berthelot's claim (2001) that the object of law, and legal scholarship, is a body of norms and not an interacting social reality, and that for this reason we can exclude law from an investigation into the epistemology of the social sciences. Samuel's riposte is that if we understand legal method as we should understand it we will find much more in common with the social sciences than first meets the eye.

The key, for Samuel, is not to look at the law as a system of propositions but rather to consider law as a history of changing methods. Here, Samuel leans again on the idea that the very same schemes of intelligibility that exist in the social sciences also exist in legal method – for example 'the dialectical scheme finds expression ... in a whole range of conceptual and category dichotomies such as the distinctions between public and private law, real and personal rights, corporeal and incorporeal property and so on' (p. 179). Indeed, in some cases it may even be in the law itself that these schemes originated. Thus, for example, Samuel traces the notion of an interest (a key concept in economic theory), which he associates with the structural scheme, to the jurist Paul telling 'us that it is not just the owner of stolen property who has the *actio furti* but anyone who has an "interest" in the thing, such as a hirer' (p. 181). The point, in any event, is not to argue for the historical priority of legal concepts vis-à-vis