1. Introduction: Facts, norms and interdisciplinary research

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1.1 INTRODUCTION

Evolving understandings of the relationship between facts, norms and values attend the development of law as an academic field. Given that law always, in some way, needs to be related to its social context, various theoretical accounts of this relationship have been developed, and subsequently criticized. In doctrinal legal scholarship, the emphasis tends to fall on the relationship between legal norms and facts in judicial practice, that is on considering whether facts influence the interpretation of norms and vice versa. In jurisprudence, various conceptions of law have been proposed which are also undergirded by theories of facts, norms and values. To name a few well-known examples: the legal positivism of Kelsen depends on a strict separation between normative and factual statements about law, while Dworkin's interpretivism and Fuller's interactionism each imply a blend of normative and descriptive statements. Rather than revisit these well-known debates, this book considers the issue from a particular perspective: the influence of disciplinary or interdisciplinary approaches. By considering differences and similarities between disciplinary and interdisciplinary accounts of law, the significance of the conceptualization of facts, norms and values becomes evident, both for the understanding of law and the conduct of interdisciplinary legal research.

In this volume, we aim to advance an understanding of the relationship between facts, norms and values, not by arguing a particular theory of that relationship, but by presenting a variety of different perspectives. Contrasts then become apparent between the legal doctrinal views on facts, norms and values, and the interdisciplinary views containing philosophical or social-scientific components. Rather than tell an integrated, continuous story, this volume facilitates discussion by offering a

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diverse set of arguments on how to understand the positive and the normative. Although most legal scholars leave these issues implicit in their work – and there is nothing wrong with doing legal research without explicating one's view of facts or norms – implicit understandings do play a role in how research is conducted and how law is understood. For instance, in dogmatic legal research, it makes a difference whether you think it is possible to determine the meaning of legal norms by interpreting them as texts in relation to other norms only, or whether you believe the meaning of norms can only become apparent in light of the facts to which the norm is applied. In the first approach, the place of case law in research is potentially much smaller than in the second. Similarly, a socio-legal project will have a different outlook depending on the views of the socio-legal researcher on the possibility of connecting empirical findings with legal values. If a socio-legal researcher sees research as a neutral search for objective facts, values will be kept out of the research design as much as possible. If law is seen as a practice of which values are an integral part, the understanding of facts and values will be interdependent.[1] This volume presents different approaches to these kinds of questions.

However, thinking about the proper conceptualization of facts, norms or values is not a new issue: it has been debated before, and some of the arguments from these earlier debates are highly relevant today. In order to sketch a background against which the various chapters can be understood, this chapter will continue with a brief and condensed intellectual history of the debate between three core positions: positivism, pragmatism and hermeneutics. The three positions have a number of common characteristics: they have been prevalent in more than one period, and they can be found in different disciplines. In the following sketch, we will therefore combine consideration of debates in legal scholarship with those in philosophy. Particularly, we try to show how developments in philosophy of science have influenced debates in law, and to a lesser extent, how legal developments became embedded in broader philosophical discussions. Thus, section 1.2 will sketch out the debates we need to understand in order to grasp the playing field on which the arguments in the following chapters can be placed. Section 1.3

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[1]   The debate between Donald Black and Philip Selznick in the early 1970s provides a good illustration of the different positions (Donald J. Black, 'Book Review of: Philip Selznick, *Law, Society and Industrial Justice*, New York 1969' (1972) 78 *American Journal of Sociology* 709–714; Philip Selznick, 'Commentary and Debate: Rejoinder to Donald Black' (1973) 78 *American Journal of Sociology* 1266–1269).

will set out the central aims and questions of this volume and give an overview of the chapters to come.

1.2 SETTING THE SCENE

1.2.1 Developments in Legal Scholarship

Law has long been a big-tent discipline. Next to doctrinal analysis, which was, and continues to be, the bread and butter of legal scholarship, legal research has been characterized by a wide range of 'law-and-' disciplines at least since the late 19th and early 20th centuries when the rise of legal hermeneutics in Europe and the attack on formalist legal reasoning in the United States by the legal realist movement opened up the discipline to a range of perspectives from the humanities and the social sciences. Legal hermeneutics in Europe and legal realism in the USA expanded the reach of legal scholarship into the social, economic, historical and cultural context of law, and brought about a partitioning of legal research into a set of distinct sub-disciplines with their own established journals, associations and conferences: law and economics, law and society, legal history, law and the humanities, critical legal studies, to name just a few. In the last decades of the 20th century this produced a differentiated but fairly stable organization of the discipline of law. There was no unified, overarching paradigm for the conduct of legal research, to be sure, but a well understood division of labour, with doctrinal analysis dominating the field and a range of 'law and' perspectives organized around familiar disciplinary precepts contributing towards a richer understanding of law. This demarcation of the terrain now seems to be breaking up.

Approaches and understandings that have marked legal scholarship for many years do not seem to garner the same enthusiasm anymore. Around the turn of the century, Duncan Kennedy noted that there was a widespread feeling of *fin-de-siècle* in the legal academy, a feeling that does not seem to have dissipated in the ensuing years.[2] There is no single root cause for this loss of vitality of trusted conceptions of legal scholarship. Some research programmes, like critical legal studies, still inspire work, but largely seem to have run their course. Others have been challenged by recent socio-economic events – for example, the consequences of globalization and privatization on the national focus of legal theory, or the effects of the financial crisis on law and economics. All are

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[2] Duncan Kennedy, *A Critique of Adjudication* (fin de siècle) (Harvard University Press, Cambridge, MA 1997).

affected by new insights in epistemology, linguistics and cognitive science which have called into question notions that sustained inter-disciplinary legal research for many years, but which, as of yet, have failed to consolidate into confident, new research programmes around which substantial groups of legal scholars coalesce.

At the end of the 20th century, Peter Novick famously argued that the discipline of history was fragmenting into a plethora of small insular communities of practitioners that poorly understood each other. The anarchic state of the discipline was like the state of Israel as described in *Judges* 21:25, he claimed: 'In those days *there was* no King in Israel: every man did *that which was* right in his own eyes.'[3] Law as a discipline has not descended into quite such a state of anarchy – doctrinal research still rules the realm – but the picture of unchallenged monarchic rule attended by a number of traditional aristocratic fiefdoms is giving way to a more complex, fractured picture of law as a limited constitutional monarchy with a confusing and still developing range of new power-sharing arrangements.

This development mainly touches on the several 'law and' perspectives. Yet, it does not *only* affect the way in which interdisciplinary subfields – referred to as interdisciplines below – are conceived. It also raises questions about the nature of doctrinal research itself. It relates to the way law as a normative system is connected to the world of fact, however conceived – a relationship at the heart of the interdisciplines wrought by legal hermeneutics and legal realism. It raises questions about how we should think about the study of a normative system in relation to the facts that are fed into it – i.e. the consideration of empirical facts from an internal legal perspective. It touches on the manner in which we discover facts about the practice of law and about the environment in which law operates – i.e. facts understood within the framework of a social scientific or cultural understanding of law. And, finally, it relates to the facts that law manages to bring about – i.e. the facts produced by law as an institution affecting the social world.

One of the main problems with interdisciplinary cooperation in legal contexts is that different disciplines and different approaches have different ideas about what should be regarded as a fact or a norm and how these are related. Moreover, the ways to establish or construct facts and norms are understood differently. Indeed, some approaches collapse

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[3] Peter Novick, *That Noble Dream: The 'Objectivity Question' and the American Historical Profession* (Cambridge University Press, Cambridge 1988), 628.

the normative into the positive altogether and treat norms as a species of fact, while others put norms squarely on the value side of the dichotomy. If we want to make fruitful use of the input of different disciplines in the context of law, we not only need to be aware of the different ways facts and norms are understood, but we also need to think about ways to connect the two.

1.2.2 New Conceptions of Facts and Values: Brian Leiter, Hilary Putnam and Legal Hermeneutics

The interrelationships between empirical facts and legal norms are a complex matter. A good way to discuss facts and norms is through the prism of a number of authoritative recent positions with respect to the relationship between fact and theory and between fact and value in the context of legal scholarship. Below, we will elaborate on the interventions in the debate on fact and value by the American philosopher Hilary Putnam and by legal theorist Brian Leiter, broadly within the legal realist tradition, but we will also reflect on contemporary incarnations of legal hermeneutics, an approach sprouting primarily from continental European philosophy.[4] These methodological reconsiderations raise fundamental questions about orthodox conceptions of legal scholarship, such as the notion that legal research can be a purely doctrinal affair that focuses solely on an analytic examination of law as a system of rules, or the notion that legal research can be limited to an entirely factual representation of positive law and steer clear of any reflection on the social and cultural context.

The methodological reconsiderations by Putnam and Leiter both trace back to W.V.O. Quine's seminal critique of logical positivism. Positivism provided a neat division of labour between philosophers and theorists who could focus on analytic questions and scientists who could focus on empirical research. It suggested that there were analytic truths to be uncovered about law as a normative system that were the proper subject for philosophers and legal theorists. According to Brian Leiter, what Quine showed was that all analytical questions ultimately turn on our empirical findings and that a purely analytical legal theory, in the end, is

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4   Hilary Putnam, *The Collapse of the Fact/Value Dichotomy: And Other Essays* (Harvard University Press, Cambridge, MA 2002); Brian Leiter, 'The Naturalistic Turn in Legal Philosophy' (2001) *APA Newsletter on Law and Philosophy* 142–146; Francis J. Mootz III, 'Hermeneutics and Law', in Niall Keane and Chris Lawn (eds), *The Blackwell Companion to Hermeneutics* (Wiley-Blackwell, Oxford 2015), 595–603.

an exercise in futility. As a result, he argued that legal theory should be naturalized. Legal theory should embrace scientific method and try to focus on the empirical questions that are ineluctably at issue in legal theory. This involves a species of legal positivism, Leiter believes, from which normative questions can, and should, largely be exorcised.

According to Putnam, however, the importance of Quine's critique is mainly that it has undermined the fact/value distinction. Putnam argues that once you reach the firm conclusion that facts are theory-dependent, like Quine, you can no longer maintain the notion that facts can be neatly separated from values. Hence, the positivist project founded on this strict fact/value distinction falls apart and such disciplines as social science and law become inextricably and inevitably 'entangled' with human values. The debate engaged by Leiter and Putnam resonates with a wider discussion on the relationship between facts, norms and values within legal scholarship. Their stories can be interpreted as rival histories of what has happened to the field of law, which arrive at different conceptions of law as a discipline.

From within a different, European tradition, legal hermeneutics has raised similar concerns about facts, norms and values. As Carel Smith notes, one of the basic insights of philosophical hermeneutics is that the methodology of humanities such as law, 'is based not upon a categorical partition between object and subject, between the thing studied and the detached scientist, but upon the involvement of the scholar, who is not a neutral observer, but whose experience of life is inextricably linked up with the act of understanding.'[5] The idea that there can be no clear separation between object and subject addresses the same problem as the separation between fact and value, or Is and Ought, of course, but is phrased in the language of continental philosophy. According to Smith, what European hermeneutics suggests, is, first and foremost, that culture matters for law:

> What is reasonable or true in law cannot be determined apart from the legal system as an historic (or cultural) phenomenon. One might consider this approach as characteristic of post-war European legal thought, influenced as it is by a distinctive 'continental' (i.e. German) theme in philosophy. […] It refers to a set of traditions of 19th and 20th century philosophy from

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[5]   Carel Smith, 'The Vicissitudes of the Hermeneutic Paradigm in the Study of Law: Tradition, Forms of Life and Metaphor' (2011) 4(1) *Erasmus Law Review* 23–24.

mainland Europe that emphasize the import of factors such as context, space, time, language, culture or history, on science and philosophical thought.[6]

The rise within legal scholarship of hermeneutic sensibilities calls into question the notion of objective knowledge and introduces a certain subject dependence to the notion of knowledge. In the last two decades, this hermeneutic sensibility, Smith argues, is colluding productively with the growing interest in the social sciences in metaphors and how they shape human thought and structure the way we understand reality. There is growing interest within law in 'the metaphors we live by' – to quote George Lakoff's and Mark Johnson's pioneering work – which are also the metaphors we argue and judge by.[7]

1.2.3 Exemplary Debates in Post-war Legal Scholarship

How pre-war currents in legal scholarship have come to inspire recent thinking about law as a discipline demands a brief excursion into the legal scholarship of the post-war period. The positivism of the interwar years was called into question by H.L.A. Hart. In his critique of the legal realists – which he understood to be positivists and legal behaviourists – he suggested that they had adopted a reductionist approach in which legal scholars were asked to think of legal rules as scientific predictions of what the courts would decide in fact. When a person said 'I have a right', Hart argued, he was not making a scientific prediction that the courts would decide in his favour, as the legal realists would have it. Rather, he contended, claiming 'I have a right' was a performative use of language. Much like a move in a game, a person claiming a right was appealing to a rule in a normative legal practice that was shared and accepted by the other participants.[8] Hence, legal research should not be focused on making predictions about the way judges were likely to decide, but on understanding and describing, from an external, detached perspective, what lawyers and judges thought they were doing when they were appealing to rules. Hart, famously, thought of this as a species of 'descriptive sociology';[9] it was a description of the way practitioners in

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[6] Ibid., p. 35.

[7] Ibid., pp. 35–36; George Lakoff and Mark Johnson, *Metaphors We Live By* (University of Chicago Press, Chicago 1980).

[8] H.L.A. Hart, *The Concept of Law* (2nd edn, Oxford University Press, Oxford 1994), 139.

[9] H.L.A. Hart, 'Definition and Theory in Jurisprudence' [1953] in *Essays in Jurisprudence and Philosophy* (Oxford University Press, Oxford 1983), 31–35.

the language game of law were applying the rules. Hart's brand of legal and methodological positivism – with its creative use of analytic and ordinary language philosophy – seemed to seal the fate of legal realist predictivism and dominated the field of law for many years. It counselled a description of the internal understanding of law and legal practice, by an external observer. Hence, with the rise to prominence of Hart, John Mikhail notes, a new phase of legal theory was initiated 'that shifted the focus of Anglo-American jurisprudence away from historical, doctrinal, and empirical inquiries toward analytic philosophy'.[10]

A second fundamental critique of logical positivism was the one formulated by Quine – not from within the field of law, but from within the field of philosophy. In a number of articles, Quine authored a seminal rejection of the synthetic/analytic distinction, a distinction fundamental to logical positivism. For the positivists, there were synthetic terms that related to the world of fact, which were the provenance of the scientist; and there were analytic terms that related to the conceptual world, which were the provenance of the philosopher and the theorist. It was the task of the philosopher and the theorist to purify the analytic and conceptual terms of science, to reduce language to words that stated clear relations and words that were truly representative of the empirical phenomena that they referred to. It was a programme that sought to provide scientists and scholars with a pure, scientific, observation language to describe reality in. If scientific terms referred to clear and objective facts and their clear and unambiguous relationships, then empirical phenomena could be described in an objective and scientific fashion. This basic understanding of conceptual terms became very influential and, to a certain degree, has become part of our common sense. Yet, Quine argued that this distinction made no sense. All analytical questions in the end turned on our empirical findings. What Quine showed was that facts were not innocent and unproblematic sense data, but that the theories and concepts a researcher employed were deeply implicated in what would count as facts in the research. Theory and fact were entangled. Facts were sometimes theoretically assumed without any prior observation and, then, validated indirectly through the predictive success of a theory.[11] This meant that

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[10]   John Mikhail, '"Plucking the Mask of Mystery from its Face": Juris-prudence and H.L.A. Hart' (2007) 95 *The Georgetown Law Journal* 763.
[11]   The great success of relativity theory and quantum mechanics at the beginning of the 20th century exposed the problems of a positivist conception of science. Relativity theory and quantum mechanics simply assumed the existence of a number of elementary particles – electrons, protons, neutrons – without being able to observe these particles in any direct way. They were theoretically

scientific theories could only be tested whole to see how well they fit with empirical reality and that they could not be dissected to evaluate the analytic or synthetic truth of the composite parts.[12] Quine's critique had repercussions for the way legal research was conceived. It vitiated against the idea that there were pure analytic questions for legal scholars to focus on, something that not only undermined the logical positivism of the interwar years, but also created problems for Hart's influential revision of legal positivism.

In continental European philosophy, finally, Heidegger's metaphysics were taken up by Hans-Georg Gadamer to rethink the project of hermeneutics. In his magnum opus *Wahrheit und Methode*,[13] Gadamer took the act of interpretation, *Verstehen*, to be central to human understanding, thus not only criticizing the positivism of the natural sciences, but also making philosophical method continuous with everyday practice. According to Gadamer, interpretation is an application of tradition, which is at the same time a remaking of the tradition. Applied to texts this means that there is no stable, original meaning of the text, but merely a canon of the text's understanding, which is reshaped with every new interpretation. As Mootz argues, Gadamer's understanding of hermeneutics is continuous with legal hermeneutics in the sense that legal interpretation is precisely such an application of the traditional understanding of texts. Indeed, earlier legal scholarship, such as the work of Dutch private law scholar Paul Scholten, also stresses the creative moment of applying the legal norm to facts.[14] Scholten particularly argued against syllogistic reasoning as a method for judicial practice, as it had been promoted by doctrinal scholars in late 19th-century continental Europe. To him, the work of the judge was neither the application of legal rules nor the creation of rules *ex nihilo*, but the finding of

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assumed to exist, and could only be proven indirectly through the success of the theory as a whole. Hence, what was fact and what was theory, what was an analytic and what was a synthetic statement, could not be neatly separated. Facts were theory-laden or even pure theoretical constructions.

[12] Willard Van Orman Quine, 'Carnap and Logical Truth' (1960) 12(4) *Synthese* 350–374.

[13] Hans-Georg Gadamer, *Wahrheit und Methode* (3rd edn, Mohr Siebeck, Tübingen 1972).

[14] Paul Scholten, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht. Algemeen Deel* (3rd edn, G.J. Scholten, ed., W.E.J. Tjeenk Willink, Zwolle 1974). For an English translation of the first, 1931 edition, see the website of the Paul Scholten Project: www.paulscholten.eu/research/article/english/ (last checked 20 February 2016).

the rule while taking a decision.[15] Post-war philosophical hermeneutics can therefore also be interpreted as a more radical version of a critique that was already developing within doctrinal legal scholarship, taking issue with strict legal positivism or legalism.

1.2.4   The Scientific Naturalism of Brian Leiter

The epistemological insights of Quine that both Putnam and Leiter draw on were a critique of traditional logical positivist, or logical empiricist, conceptions of truth. This does not mean that Leiter distances himself from the spirit of positivism.[16] Quine, for him, does not replace the positivist programme with something radically different, but puts it on a naturalistic footing. What Quine rejects in positivism is the notion of a priori analytical truths, not the method of science.

   According to Leiter, Quine's 'naturalistic turn' has had a profound influence and is widely accepted in contemporary philosophy. Yet, legal theory, Leiter contends, still 'proceeds via conceptual analysis and intuition-pumping as though nothing had transpired in philosophy in the last forty years'.[17] With this, Leiter turns the prevailing view of 20th century legal theory on its head. For many legal scholars, Hart exposed the shortcomings of the realist approach, by pointing out that lawyers and judges were not predicting legal behaviour on the basis of regular behaviour patterns, as the legal realists suggested, but were purposefully applying the rules and making moves in the going social practice of law. In other words, according to the self-image of many legal theorists, in 1961, with the publication of Hart's *The Concept of Law*, legal theory moved beyond the old-fashioned and unsophisticated behaviourism of the realists and reoriented itself on the profound Austinian/Wittgensteinian insights characteristic of the linguistic turn.

   Leiter, however, argues that in philosophy the linguistic turn has since been followed by a naturalistic turn. Hart's approach to legal theory is starting to look dated. The legal realist approach, on the other hand, is starting to look more judicious with its anticipation of the naturalistic

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[15]   'Eerst met de beslissing is de regel gegeven.' The rule is given simultaneously with the decision. Scholten, 1974, p. 9.

[16]   Brian Leiter, 'Why Quine is not a Postmodernist' (1997) 50 *Southern Methodist University Law Review* 1740.

[17]   Brian Leiter, 'The Naturalistic Turn in Legal Philosophy' (2001) *APA Newsletter on Law and Philosophy* 142–146.

direction that philosophy took at the end of the 20th century.[18] The realists realized that the answers to the questions of legal theory should not be sought in conceptual analysis, but in an empirical understanding of what courts did.

However, Leiter believes that legal realism, from this Quinean perspective, is naturalistic only in a limited sense. For Leiter, naturalism in philosophy, and in legal realism, is primarily 'a *methodological* view to the effect that philosophical theorizing should be continuous with empirical inquiry in the sciences'.[19] It is a naturalism that solely seeks to describe the world in the language of science, not a pragmatist naturalism that also seeks to derive substantive conclusions from our scientific knowledge about what that world is like. There are no transgressions from Is to Ought. Leiter thus provides the philosophical grounding for the recent rise of Empirical Legal Studies as a branch of legal scholarship that introduces empirical knowledge to the study of law but maintains the positivist divide between fact and norm.

1.2.5 Hilary Putnam and the Promise of Pragmatism

Putnam places Quine in a different tradition and presents a different history, a different account of the development of method in the social sciences and law. At the beginning of the 20th century, positivism was not the only epistemology in town. Indeed, in the USA philosophical pragmatism constituted a great rival to positivism. Classic pragmatists like William James and John Dewey rejected the dichotomies on which positivism was based. For Dewey and James, positivism's foundational distinctions between fact and value, and fact and theory, were untenable. Experience, they believed, could not be carved up in such neat categories. As situated beings, we are part of the world, not outside observers who could take a detached point of view. Science may have evolved into a highly technical and esoteric practice, yet the pragmatists insisted that it should be seen as continuous with people's everyday efforts to shape and manipulate their living environment.

These pragmatist insights also moulded the way the legal realists looked at legal scholarship. It was the inspiration behind their social engineering outlook on law, their melioristic conception of law as an

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[18] Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press, Oxford 2007), 57.

[19] Ibid., 34.

instrument for human flourishing. It was the reason for their consequentialism, their focus on the real-world effects of law. It was the inspiration behind their institutional perspective on law, the view of law as a social practice in a social and historical context. These characteristics all suggest that the pragmatists did not observe a strict separation between fact and value, or fact and theory.

In his effort to revive pragmatism, Putnam, like Leiter, returns to the critique of the analytic/synthetic distinction by his former teacher Quine. Putnam, however, draws very different conclusions from Quine's critique. The collapse of the analytic/synthetic distinction, Putnam maintains, also fatally undermined the fact/value dichotomy. The logical positivists were primarily interested in developing a pure and objective scientific language in which true statements could be made about the empirical world. The fact/value distinction had to be strictly observed to keep science free from mere preferences and value judgements. Ethical questions of right and wrong, aesthetic judgements, political reason or judicial prudence did not refer to anything concrete in empirical reality, but merely expressed our attitude towards given states of affairs.

Putnam believes this was profoundly mistaken. He believes the analytic/synthetic and the fact/value distinction are cognate phenomena and argues that the collapse of the synthetic/analytic distinction resulted in undermining the fact/value distinction. What caused problems for the fact/value distinction was primarily the loss of the notion of pure, unencumbered, naked facts, a notion that the collapse of the synthetic/analytic distinction made implausible. If it was no longer possible to separate facts from theories, if there was no longer a realm of pure, observable phenomena untouched by our different conceptions of the world, then how could we still believe that facts can be neatly separated from our values? If we can no longer separate the facts neatly from our conception of the world, then neither can we separate them neatly from our substantive projects and objectives.[20]

In the context of law, Putnam's view supports a pragmatist legal theory that stresses the continuity of legal description and evaluation. Not only should law be understood as a profoundly value-oriented practice, but the interpretation of facts in law always takes place in a broader context of social and moral value.[21] Pragmatism, as read by Putnam, thus invites interdisciplinary connections between law and moral philosophy.

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[20]   Hilary Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays* (Harvard University Press, Cambridge, MA 2002), 29–30.
[21]   Sanne Taekema, 'Beyond Common Sense: Philosophical Pragmatism's Relevance to Law' (2006) 29(4) *Retfaerd vol* 22–36.

1.2.6   Hermeneutics: The Interpretative Alternative

Although pragmatism was the main driver of the early 20th century debate in the USA, in Europe the main challenge to positivism was not pragmatism, but hermeneutics. Informed by debates in German philosophy, especially with regard to the character of the humanities as a discipline concerned with meaning and interpretation, this alternative to positivism emphasized the distinction between law and the natural and social sciences. Law was seen as an academic field aligned with the humanities in its subject matter and its method. While Heidegger and Gadamer were developing the philosophical groundwork of hermeneutics, legal scholars studied the concrete practices and tools of interpretation used in adjudication. Thus, the development of the more practical hermeneutical methods for understanding legal reasoning in practice was the dominant form of hermeneutics in law, in the works of Ronald Dworkin in the USA, Karl Larenz and Josef Esser in Germany and Paul Scholten in the Netherlands, for instance.

What philosophical and legal hermeneutics shared was an appreciation of the subjectivity involved in understanding human action and judgement. Whether a scholar was trying to understand literary texts, the Holy Scriptures or historical practices, or whether a judge was trying to understand legal texts and their application in actual cases, both needed to come to terms with the fact that their own perspective was a key factor in the interpretation. According to Gadamer, interpretation involved a fusion of horizons: building on prior knowledge and prejudices, the interpreter had to make sense of a text that was produced within a different context of meaning or cultural tradition. Gadamer considered legal interpretation to be a prototypical example of interpretation in general. In the application of a general rule to a concrete case, the judge inevitably added something new to the existing meaning of the rule. A rule is never fully clear and determinate. It acquires its interminably temporary meaning in, and through, its application to the case at hand.

Dworkin has also rejected the idea that legal rules have an objective meaning. In his view, legal interpretation is a matter of interpretative construction. In all cases, but most clearly in hard cases, the judge works from a general notion of what the legal system is for and what its underlying principles are – that is, from the theory of political morality implicit in the legal system – in order to find the best interpretation of the way specific legal rules apply to the case. According to Dworkin, in legal interpretation fact and value cannot be separated. Every interpretation of a legal rule both has to be in accordance with prior applications of the

rule (the dimension of 'fit') and has to present the legal system in its best light (the dimension of 'justification').

Leaving aside the interpretative turn in sociology, which can also be linked to philosophical hermeneutics, the most important legal scholars who employ hermeneutics in their research have been those in law-and-literature and post-structuralist and post-foundationalist legal theory. The common ground between the two traditions can be found in their fusion of fact and value, and in their grounding of theory in human practice.

1.3 SCOPE, PURPOSE AND OUTLINE

After having sketched the intellectual background of the debate on facts, norms and values in science in general and the study of law in particular, we are now able to relate this discussion to the contributions in this book.

1.3.1 Scope

As we argued above, legal research today is characterized by a bewildering range of interdisciplinarity. Fields such as law and economics, law and humanities, and socio-legal studies thrive and produce new perspectives and subdisciplines continuously. Behavioural law and economics, law and the image, and regulatory studies, are examples of new interdisciplines that take into account the developments in other fields of scholarship and connect these to law. Many of these new fields, however, take their cue from developments within the non-legal disciplines involved, insinuating that legal scholarship should be responsive to those developments. In the past, this gave rise to debates about what interdisciplinary research implies for the integrity of legal scholarship, and to the identification of two approaches – old-fashioned black-letter legal scholarship versus new-fangled interdisciplinary legal studies.[22] More recently, the focus of the debates has shifted. For instance, there has been the emergence of empirical legal studies, which takes an approach which is slightly different from the 'law-and' disciplines, staying closer to the concerns of black-letter law but using the methodologies of empirical social science within the context of legal research.[23] An important strand

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[22]   J.M. Balkin, 'Interdisciplinarity as Colonization' (1996) 53 *Washington and Lee Law Review* 949–970; Douglas Vick, 'Interdisciplinarity and the Discipline of Law' (2004) 31 *Journal of Law and Society* 163–193.

[23]   Mark Suchman and Elizabeth Mertz, 'Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism' (2010) 6 *Annual Review of*

in these developments, which may even have become more prominent with the rise of empirical legal studies, is the methodological justification for using elements from other disciplines in the context of law. Although there are many accounts of the value of specific approaches or methodologies, most of them are framed within a particular interdiscipline. What is lacking is a more general, cross-disciplinary approach, which examines the contribution of different perspectives to an overarching methodological question: How can different, empirical and normative, disciplines construe a shared methodology to study legal phenomena?

A common justification for introducing insights from other disciplines to legal scholarship is that it will improve the law. Empirical knowledge, the claim is, enables legislatures and policy makers to adapt to social change better.[24] Such a justification, however, is based on a number of presuppositions, which are not usually explained or explored fully. This can be problematic. First of all, the use of empirical knowledge in relation to law is not self-evident, because it requires an account of what counts as a fact and of what generates knowledge of facts. For instance, psychological research sets different standards for what counts as evidence than legal research. Moreover, the relationship between factual knowledge and the development of law is underexplored: In what way can factual knowledge be used fruitfully in a legal context? Second, there are different normative points of view on what it means to improve or develop the law. For instance, more instrumental views of law, which assess the contribution that law makes to the achievement of political or economic goals, perceive improvement very differently from more autonomous views of law, which conceptualize improvement as the realization of legal values.[25] What complicates matters is that underlying such views and disciplinary perspectives are different theories of what counts as true knowledge, of what proper research goals are, of what the

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Law and Social Science 555–579; Pierre Larouche, 'A Vision of Global Legal Scholarship' (2012) 17 *Tilburg Law Review* 206–216.

[24]   Jennifer K. Robbennolt, 'Evaluating Empirical Research Methods: Using Empirical Research in Law and Policy' (2003) 81 *Nebraska Law Review* 777–804.

[25]   Compare Roger A. Shiner, 'Theorizing Criminal Law Reform' (2009) 3 *Criminal Law and Philosophy* 167–186; and James Boyd White, 'An Old-Fashioned View of the Nature of Law' (2011) 12 *Theoretical Inquiries in Law* 381–402.

relationship between fact and value is, and of what different conceptualizations of core ideas constitute.[26] These research philosophies and methodological assumptions are often not addressed explicitly, even though they influence the range of possibility for interdisciplinary research.

Clearly, law is a normative system in which different factual and normative elements interact. Yet, this basic notion of law leaves open the question of how to conceive of these facts and norms and their interaction. One of the main problems in interdisciplinary cooperation in legal contexts is that different disciplines have different ideas about what should be regarded as a fact and what should be regarded as a norm. As we noted earlier, the ways to establish or construct facts and norms are also understood differently. The contributions in this volume, therefore, typically concern both the development of concepts *and* the methodology used to approach them. If we want to make fruitful use of the input of different disciplines in the context of law, we need to be aware of the differences between them, and need to find ways to connect them.

1.3.2 Purpose

The contributions to this book highlight how the development of law can be stimulated through interdisciplinary research. They discuss to what extent law can open itself up to input from other disciplines as a relatively autonomous field of study. What are the possibilities and limitations of interdisciplinary exchange? In particular, what can be learned from a confrontation of the different perspectives on facts and norms, when the distinction between the two is addressed from different disciplinary and philosophical positions? The background question for each contribution is how the perspective on the establishment of legal facts and/or norms influences the possibilities for the cooperation of law with other disciplines. The contributions link discussions in the humanities and social sciences with legal analyses of the development of law. In order to focus the discussions, the book is divided into five sections. The first section contains a general conceptual overview. The second section addresses the establishment of facts in law. The third investigates the development of norms and values in law. The fourth explores possible interrelations between facts and norms; and, finally, the fifth contains a

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26   Sanne Taekema and Bart van Klink, 'On the Border: Limits and Possibilities of Interdisciplinary Research', in Bart van Klink and Sanne Taekema (eds), *Law and Method: Interdisciplinary Research into Law* (Mohr Siebeck, Tübingen 2011), 7–32.

concluding chapter that engages with the contributions and suggests some common themes and insights that can be drawn from the discussions in this volume. In each part, there is a combination of contributions from a legal perspective with non-legal perspectives from philosophy and the social sciences. By confronting different positions in this ongoing debate, we intend to highlight both the possibilities and the limitations of interdisciplinary research into law. This is an attempt to overcome difficulties in interdisciplinary exchange as well as an effort to deepen our understanding of the difficulties involved.

1.3.3 Outline

As indicated, the book consists of five sections. This first section provides a discussion of the basic concepts central to the contributions in this volume. Jaap Hage advances a conceptualization of facts, norms and values and provides a novel account of the interlinkage between them on the basis of analytical theories.

The second section of this book focuses on the place of facts in interdisciplinary research into law. Facts in law may refer to different things and may play different roles. In judicial practice, legal methods of establishing the facts of the case are confronted with the diverse methods of experts that assist the court. Facts may also refer to empirical knowledge about the subject matter of law, which needs to inform legislatures. More generally, the question is what legal knowledge of facts amounts to, and how it relates to our usual understanding of law as primarily a normative enterprise. The main interdisciplinary question that is addressed in this part is how to translate empirical knowledge generated by other disciplines (in particular socio-legal studies) so it can be used in the discipline of law, and the related question of how different conceptions of facts impede cooperation. The three contributions that make up this section are complementary. The first, by Geoffrey Samuel, stays close to legal argument within case law, while Rachel Herdy and Péter Cserne each offer an examination of a particular interdisciplinary account of facts. Samuel investigates how facts acquire meaning within the law and shows that law is a construction with broad-ranging implications for what is to count as fact, as part of a world of competing narratives. It offers vivid legal examples of what Putnam refers to as entanglement, the interpenetration of facts, values and theoretical notions. Herdy uses the debate on epistemic dependence in the context of law to address the question of how courts decide on matters of fact. She argues that these are formally determined on the basis of the personal cognitive states of the decision maker. In her chapter, she questions this procedure

as an approach that is too individualistic. Epistemic justification is irreducibly a social and interactive process that involves dependence on others. Cserne looks closely at an interdisciplinary approach that is on the rise – behavioural empirical legal studies – and questions whether such a behavioural approach takes sufficient account of the enterprise of law as a form of 'normative guidance', which presupposes a view of human beings as moral agents. Not all regulatory approaches respect this assumption and some are, therefore, difficult to integrate into law, a problem which in itself deserves empirical study.

The third part of the volume shifts the focus to the normative side of the relationship. In particular it discusses the place and possibilities of providing normative direction to law. Anne Ruth Mackor takes the legal doctrinal endeavour to be central and argues against overemphasis on the prescriptive and evaluative component of law. She draws on the theory of abstract objects to argue that doctrine centres on norm description rather than prescription. Both Lyana Francot and Alessio Pacces focus on the prescriptive question, but not from an internal legal point of view. They take an external perspective as their vantage point. Francot examines the possibilities of using Luhmann's classic systems theory – originally conceived as a purely descriptive theory – as a source of normative critique of law. She shows that in systems theory a critical stance can be developed, either by building on systems theory itself, or by incorporating other theoretical perspectives. Pacces critically evaluates the self-image of classic law-and-economics research as providing a positive or factual analysis only. He investigates to what extent law-and-economics can provide normative policy advice and argues that present-day questions of economic growth enable such normative input. Both Francot and Pacces, thus, use external approaches which are usually seen as descriptive or empirical in orientation to make innovative claims about their normative potential.

In the fourth section, the relationship between fact and norm, or fact and value, takes centre stage. Bart van Klink and Oliver W. Lembcke focus on the separation between facts and norms, as defended by Kelsen and criticized by Jellinek. They show that Jellinek's notion of 'the normative force of the factual' offers a good starting point to question the dichotomy between norms and facts in law. Jellinek's two-sided theory of the state attempts both to safeguard the autonomy of legal scholarship and to explore the possibilities of interdisciplinary legal research. Maksymilian Del Mar deals with Putnam's critique of the fact–value dichotomy head on and in a critical discussion of Putnam's argument sketches out what it should mean for law. Del Mar argues that we should get rid of the hard dichotomy between facts and values in the context of

legal research, though he claims that does not mean there is not still a valuable 'distinction' to be made between the two, which will aid research and analysis. Roger Cotterrell situates the relation between fact and value in a detailed assessment of the field of legal sociology. Cotterrell outlines the use that has been made of social science within law, as well as the development of the interdiscipline of legal sociology and its many false starts. Even though the mix of sociology and law has often been quite problematic, Cotterrell argues that sociology still has an important contribution to make to legal understanding. Sociology can help lawyers and legal scholars think critically about the place of law in the larger social context and elucidate its connection to the culture of its time and place.

In the closing contribution, in the fifth section, Wibren van der Burg traces the methodological implications of the various perspectives by arguing how interdisciplinary knowledge can be incorporated meaningfully in legal scholarship.

1.3.4   Connections

Taking a step back from the particular questions tackled by each chapter, there are affinities between different contributions which make it possible to relate them more directly to legal hermeneutics and to the debate between Leiter and Putnam, as discussed in section 1.2 of this chapter. Three different approaches become apparent when we link them to the issue of the possibility of value-free legal scholarship, not so much on the basis of the conclusions that the authors draw but on the basis of their points of departure. The first set of contributions grapple with issues that are central to the neo-positivism of Leiter. Hage provides a rich and innovative discussion of analytical distinctions that confronts concerns raised by Leiter. By presenting abstract object theory as a promising alternative framework to study legal systems scientifically as a system of norms, Mackor, in turn, rejects the implications of Leiter's (and Putnam's) analysis altogether; while Cserne and Pacces discuss the empirical, social-scientific turn that Leiter advocates with their respective discussions of the role of economics and the behavioural approach in legal inquiry. The second set of contributions reflects Putnam's neo-pragmatism, directly visible in the work of Del Mar, with his discussion of the fact–value distinction, and in the themes of Herdy, with her focus on epistemic dependence and the irreducible social dimension of research and the judicial determination of the facts. It is also a good way of understanding Cotterrell and his sociologically informed approach that attenuates the distinction between facts and values. The third set of

contributions shows a more continental-European neo-hermeneutics, which, like the pragmatists, questions a value-free approach, but which stays closer to the systematic orientation of legal scholarship. Here, Samuel, Francot and Van Klink and Lembcke can be situated. Samuel provides a rich analysis of legal argumentation that weds legal realist themes to the continental tradition of legal hermeneutics and insights from Raymond Durgnat's work on cinema. Francot shows that the ostensibly value-free, scientific understanding of law provided by Luhmannian systems theory is increasingly revealing immanent sources of value and critique. Van Klink and Lembcke, finally, uncover an undeservedly forgotten understanding of law by Georg Jellinek – a predecessor of Hans Kelsen – that provides powerful arguments for the irreducible importance of the social and cultural context for understanding law. The value of the different contributions to the book primarily lies in taking these approaches a step further, developing arguments about the methodology of legal scholarship and the benefit of interdisciplinary studies of law. Reconsidering how best to study the intricate relations of these three concepts in the practice of law is a valuable component of developing one's own approach to legal method.