Tres tesis sobre jurisprudencia especial

Three Theses on Special Jurisprudence

Leandro Martins Zanitelli[1]

Fecha de recepción: 6 de octubre de 2023
Fecha de aprobación: 20 de febrero de 2024

RESUMEN:

En este artículo defiendo tres tesis sobre la metodología de la teoría de las áreas del derecho (sugiero simplemente sobre la «metodología de la jurisprudencia especial»). Mi punto de partida es que un posible propósito de teorizar sobre un área del derecho es saber si esa área es buena, es decir, saber si el área en cuestión es, si no la mejor que podría ser, al menos lo suficientemente valiosa como para que no debamos reformarla sustancialmente o incluso abolirla. Me refiero a este propósito de las teorías sobre las áreas del Derecho como el propósito de la justificación. A partir de este propósito, siguen las tres tesis. La primera tesis es que la teoría debería estar constituida por etapas, la primera de las cuales (la etapa de preevaluación) debería implicar juicios sobre qué características del área del derecho que estamos tratando son importantes (lo que Julie Dickson llama juicios indirectamente evaluativos), pero no sobre si el área del derecho en cuestión es buena o mala (juicios directamente evaluativos). La segunda tesis es que no debemos limitarnos a las características necesarias del ámbito del Derecho objeto de estudio, sino ocuparnos también de las características contingentes. La tercera tesis, por una determinada interpretación x de un ámbito del Derecho no debe descartarse sólo porque exista otra interpretación, y, superior a x. A pesar de no ser la mejor interpretación, x puede decirnos algo importante sobre el ámbito del Derecho que queremos evaluar. Una conclusión que cabe extraer de esta tercera tesis es que los debates sobre qué interpretación de un ámbito del Derecho es la mejor pueden ser menos interesantes de lo que se suele suponer.

Palabras Clave: Áreas del derecho; jurisprudencia especial; metodología; interpretación; derecho privado.

ABSTRACT

In this article, I defend three theses on the methodology of theory of law areas (I suggest simply on the "methodology of special jurisprudence"). My starting point is that one possible purpose of theorizing about an area of law is to know if that area is good—that is, to know if the area in question is, if not the best it could be, at least valuable enough that we should not substantially reform it or even abolish it. I refer to this purpose of theories about areas of law as *the purpose of justification*.

1 Licenciado en Ciencias Jurídicas y Sociales (1995), Magíster (1999) y Doctor (2005) en Derecho por la Universidade Federal de Rio Grande do Sul (UFRGS). Profesor Adjunto de la Facultad de Derecho y Ciencias del Estado de la Universidad Federal de Minas Gerais (UFMG) con dedicación exclusiva. Sus áreas de interés son Filosofía del Derecho (con énfasis en Derecho Privado) y Filosofía Política. (Texto proporcionado por el autor).

Based on this purpose, then follow my three theses.
The first thesis is that theory should be constituted by stages, the first of which (the pre-evaluation stage) should involve judgments about which features of the area of law we are dealing with are important (what Julie Dickson calls indirectly evaluative judgments), but not on whether the area of law in question is good or bad (directly evaluative judgments). The second thesis is that we should not limit ourselves to the necessary features of the area of law under study but also deal with contingent features. The third thesis, finally, is that a given interpretation *x* of an area of law should not be discarded just because there is another interpretation, *y*, superior to *x*. Despite not being the best interpretation, *x* can tell us something important about the area of law we want to assess. One conclusion to be drawn from this third thesis is that debates about which interpretation of an area of law is the best may be less interesting than is generally assumed.

Keywords: Areas of law; Special jurisprudence; Methodology; Interpretation; Private law.

This article is concerned with the methodology of special jurisprudence or theories about areas of law.[2] In Section 1, my claim is that the method of special jurisprudence is determined by the purpose of theorizing about an area of law. Next, I argue that one of the purposes (not the only possible one) of theorizing about an area of law is that of assessing whether the area of law in question is good, i.e., whether it is valuable enough that we should not substantially reform it or even abolish it. I call this purpose of theorizing *the purpose of justification*.

From the above purpose, there follow three theses on the methodology of special jurisprudence that the article also proposes to detail and defend. The first thesis (Section 2) is that theory must be sequential, excluding from its first stage—the stage in which the theory accounts for what a given area of law is—what Julie Dickson calls *directly evaluative judgments* (e.g., Dickson, 2022), that is, judgments about whether the area of law in question is good.[3] The second thesis (Section 3) is that, in accounting for what an area of law is, theory should not limit itself to its necessary features. The third thesis (Section 4) is that an interpretation *x* of an area of law should not be regarded as irrelevant just because there is

2 For the phrases *special jurisprudence* or *theories of areas of law*, see, e.g., Moore (2000); Khaitan & Steel (2022). My examples come from private law, the area of law with which I am most familiar. In an article published some years ago, Dan Priel observes that: "in the last three decades or so, there has been growing interest in questions of methodology in jurisprudence. It was perhaps growing awareness that substantive debates in this field seem to have ground to a halt, with disputants seemingly talking past each other, that may have prompted the thought that examining the different underlying methodological suppositions of competing theories theorists would achieve better understanding of what is at stake in the substantive debates of jurisprudence." (Priel, 2010, pp. 633-634). The present article is partly motivated by the impression that, similar to what Priel states regarding legal theory in general, substantive debates in the field of private law theory *seem to have ground to a halt*. Methodological discussions on the theory of private law, however, are comparatively scarce. I should add that Priel is not enthusiastic about the methodological turn referred to in the passage above.

3 The idea of a sequential theory (or *staged inquiry*) that refrains from directly evaluative judgments in its first phase is also found in Dickson (2022, chap. 7).

another interpretation, *y*, better than *x* (or that accounts for features of the area of law at issue that *x* is unable to explain). A lesson to be drawn from the third thesis is that debates about the best interpretation of an area of law may be less important than is generally believed.

An important preliminary clarification is that the theses defended below concern theories about areas of law rather than theories about adjudication. My theses are therefore about how to characterize a given area of law and not about how judges should decide cases. This clarification is important because some theses—such as, for example, that theory should not distinguish between features of an area of law that are morally valuable and those that are not—may not be plausible in relation to adjudication. Perhaps authors like Dworkin (1986) are right in defending the idea that judges decide cases by interpreting laws and precedents in their best light. This does not entail, however, that theory about areas of law should proceed in the same way.[4]

Why theorize about an area of law?

My key claim in this section is that the purpose of a theory is methodologically relevant—that purpose determines the conditions of success of a theory as well as the nature of the propositions (non-evaluative, directly evaluative, indirectly evaluative) that constitute it. This is a claim analogous to the one made by Ronald Dworkin in Justice for Hedgehogs (Dworkin, 2011) regarding interpretation theory. According to Dworkin, the answer to questions about the method of interpreting depends on the purpose of the interpretation—to such an extent that any activity of interpretation is, at the same time, an interpretation of a certain object as well as of interpretation itself:

> When we interpret any particular object or event [...] we are also interpreting the practice of interpretation in the genre that we take ourselves to have joined: we interpret that genre by attributing to it what we take to be its proper purpose—the value that it does and ought to provide. (Dworkin, 2011, p. 131)

What Dworkin means, as I understand it, is that certain methodological stances that characterize any theory reveal a commitment (whether the theorist is aware of it or not) to an answer to the most fundamental question of why one theorizes. This is why theorizing about areas of law inescapably involves theorizing about (or at least committing to an answer to the question of) why one theorizes about areas of law.

4 For a recent defense of the distinction between theories of private law and theories of adjudication, see Jiménez (2021).

As the late Dworkin seems to believe about interpretation in general,[5] I don't think the question of the purpose of theorizing about areas of law necessarily has a single answer. Like any other practice, that of special jurisprudence can be valuable for more than one reason. I will limit myself to stating here, therefore, that one valid purpose of theorizing about a given area of law is to know if it is good—that is, to know if that area of law is, if not the best it could be, at least good enough that we shouldn't substantially reform it or even abolish it. I shall call this *the purpose of justification*. Areas of law not only affect our lives, but it is in our hands to change them (or even suppress them completely), and that is the simple reason why, when theorizing about areas of law, we might want to assess whether they are good or justified.

One possible objection is that the goodness of an area of law is too controversial to serve as the purpose of the theory. Why not simply stipulate that the purpose of theorizing about an area of law is to know what that area is, thus preventing the theory from becoming involved in contested judgments of political morality? In response, as we shall see below, the purpose of justification is not only compatible but, in my view, demands that an area of law be first characterized without endorsing any judgment about what makes for its goodness or badness. Judgments of political morality are, of course, inevitable in a justification-oriented theory, but they do not necessarily compromise how the theory describes the area of law to be assessed.

Staged inquiry

Following the example of Dworkin in *Justice for Hedgehogs*, I claim that the purpose of a theory has implications for the way of theorizing. In the previous section, I defended as a possible (not necessarily the only) purpose of special jurisprudence that of verifying whether areas of law are good, i.e., whether they are, if not the best we could aspire to, at least valuable enough that we shouldn't alter them substantially or even suppress them. I shall now demonstrate that, given this purpose, there are three theses on the methodology of special jurisprudence.

The first of these three theses, the subject of this section, is that special jurisprudence must occur in stages—what Julie Dickson (Dickson, 2022, chap. 7) calls *staged inquiry*. More precisely (and, to a large extent, in accordance with what Dickson has been advocating for legal philosophy in general), my thesis is that,

5 In *Justice for Hedgehogs* (Dworkin, 2011), Dworkin does not claim that the interpretation of interpretation (i.e., the interpretation of a given interpretive practice) is an instance of what, in other works (e.g., Dworkin, 1986, p. 52), he calls *constructive interpretation*. Treating the interpretation of interpretation as an instance of constructive interpretation would imply that interpretive practices must be interpreted in a way that reveals them as the best they can be.

before evaluating it as good or bad, theory must account for the area of law that constitutes its subject without resorting to what Dickson calls *directly evaluative judgments*—that is, to judgments about what makes for the goodness or badness of the area of law at issue. At this pre-evaluative stage, theory is nonetheless based on value judgments, but these judgments are either judgments about what constitutes, in general, a good theory (purely metatheoretical judgments) or they are judgments about the importance of certain features of the object—in the case, the area of law on which it is theorized. Judgments of the latter kind are called, by Dickson, *indirectly evaluative judgments*.[6]

What this staged inquiry thus implies is that the evaluative stage takes place based on a description of an area of law for which what counts (in addition to the epistemic values that any theory must honor, such as simplicity, clarity, and elegance) are the relevant features of the area of law at issue. As the theory refrains from directly evaluative judgments, it is immaterial to the account given in the pre-evaluative stage that a given feature is good or bad, i.e., contributes positively or negatively to the justification of the area of law. Suppose that, unlike efficiency, corrective justice is a genuine value and does play a positive role in justifying tort law. This assumption, even if correct, should not, according to the thesis presented here, influence the account of tort law in the pre-evaluation stage. Thus, the fact that corrective justice is a valid principle of political morality would not in itself constitute a reason for preferring an account of tort law based on corrective justice.

The staged inquiry thesis is thus opposed to authors such as Dworkin and John Finnis (Finnis, 2011, chap. 1), for whom legal interpretation, in general, cannot be done without judgments of political morality. In the field of private law theory, more particularly, the thesis runs counter to a claim made by Stephen A. Smith (Smith, 2004) in his influential book on contracts. Smith (2004) argues that one of the conditions for the success of interpretive theories of contract law is morality.[7] After differentiating some versions of the morality criterion, Smith (2004) concludes in favor of a moderate version, according to which a good interpretive theory should explain an area of law in order to show how it could be considered justified, even if in fact it is not: "Such a theory must show how legal actors could sincerely, though perhaps erroneously, claim that the law was morally justified" (Smith, 2004, pp. 62-63).[8]

6 The distinction between directly and indirectly evaluative judgments is made by Dickson in Dickson (2001, chap. 3). See also Raz (1995, pp. 236-237).

7 Smith (2004, pp. 29-30) defines interpretive theories of contract law as theories that "aim to enhance understanding of the law by highlighting its significance or meaning… this is achieved by explaining why certain features of the law are important or unimportant and by identifying connections between those features—in other words, by revealing an intelligible order in the law, so far as such an order exists."

8 In contrast, the strong version of the morality criterion requires an interpretation that shows the area of law in its best light or, as far as possible, as being in fact justified (Smith, 2004, pp. 59-60).

My claim is that even this moderate version of the criterion of morality does not hold. In the pre-evaluation stage, the theory should deal with whatever features are relevant to assess the area of law's normative status, regardless of whether those features contribute to our judging the area of law in question as good or bad. It follows that, contrary to Smith (2004), the interpretation that takes place in the pre-evaluation stage can highlight evil features, which no one could sincerely believe contribute to the justification of the area of law at issue.

In defense of the staged inquiry, it can be argued that the evaluation sought by the theory would be flawed if, for the description of the area of law that we want to evaluate, we privilege the features that contribute (or that we could sincerely think that contribute, according to the moderate version advocated by Smith (2004)) to the area of law to be justified. "What's good we show off, what's bad we hide"[9] is not a good policy for a theory whose purpose is evaluative.[10]

One objection is that, in the pre-evaluation stage, the staged inquiry must at least make use of indirectly evaluative judgments and that these judgments have an impact on the evaluation to occur in the next stage. In response, it is true that the pre-evaluative stage cannot be done without judgments about which features of the area of law are important. It is also true for theories aiming at justification that these indirectly evaluative judgments consist of judgments about which features are relevant for evaluating the area of law at issue.

Indirectly evaluative judgments are therefore based on directly evaluative judgments about which characteristics actually contribute to an area of law being good or bad.[11] It should not be concluded, however, that the separation between the pre-evaluative and evaluative stages is therefore compromised. Unlike Dworkin's constructive interpretation or theories following the moderate version of the morality criterion advocated by Smith (2004), the staged inquiry does not suffer from the bias of

9 Famous quote by Rubens Ricupero when Minister of Finance of Brazil in 1994.

10 Dickson (2022, p. 155): "The first risk which the staged inquiry approach helps to mitigate is that of being too quick to credit law with the moral value, authority, and obligatoriness that it claims." Another argument in favor of the staged inquiry concerns the social effect of a theory committed to revealing law in its best light. Liam Murphy (Murphy, 2001) argues that we should avoid theories capable of provoking excessive reverence for law, which is the case, according to him, of theories that condition legal validity on morality—as well as, we might think, of interpretations of areas of law drawing on directly evaluative judgments. On the other hand, it could be asked whether Murphy (2001) is right in asserting that legal methodology should consider the impact of theorizing on public culture. It depends on why we are doing theory; I would argue.

11 In this, as in a good part of this section, I follow Dickson (2022, p. 152): "Indirectly evaluative judgments are made on the basis that they pick out and direct our attention towards understanding those features of law that are relevant to eventual direct evaluations of the law's moral goodness, justifiability, and obligatoriness." Unlike me, however, Dickson seems less willing to admit that judgments about the importance of a given feature are based on direct evaluation judgments. Taking one of Dickson's examples, it seems to me that the importance of academic duress rules at the University of Oxford being enforceable could only be affirmed based on a judgment that enforceability contributes (possibly negatively) to the moral status of the practice in question.

disregarding any perverse features of the area of law it seeks to address. That some features of the area of law are highlighted for their goodness or badness (and the importance that comes from this as regarding justification) is something that depends, of course, on directly evaluative judgments, but there is no way out of this.

According to Smith (2004), the reason for interpretive theories of contract law to be subject to the morality criterion is that, otherwise, these theories will be unable to account for one of the pervasive features of legal practice, namely, that its practitioners (e.g., judges and lawyers) at least appear to recognize the authority of law. Thus, a theory according to which contract law is a means for the rich to exploit the poor would fail for its inability to explain why, if contract law is indeed a tool of exploitation, its rules are treated as if they possessed authority.[12]

Let us concede, for the sake of argument, that practitioners accept the authority of law in the sense that Smith intends—that is, as morally justified authority (Smith, 2004, pp. 54-55). The question is, what if practitioners are wrong? Should we really discard interpretations such as that contract law is a tool of exploitation just because judges and lawyers disagree with it? Nor is it something we expect from a theory that it reveals hitherto unnoticed features of a given area of law, leading then to moral judgments different from those hitherto predominant? There is nothing wrong in itself with a theory that confirms our intuitions, but neither is there anything wrong in itself with a theory that does the opposite.

Smith claims that if practitioners are mistaken, then it is the burden of theory to explain how they could have been mistaken.[13] It does not seem to me, however, that the argumentative burden must be assigned in this way. Suppose a theory that convincingly attributes to contract law a certain feature *x* generally ignored by practitioners of this area of law. Why, once it has succeeded in demonstrating that *x* is a feature of contract law, should the theory have the task of also explaining why *x* has so far been ignored? I do not mean to say that the question of why practitioners were mistaken is uninteresting. It just seems doubtful to me that the success of such theory depends on the answer.

12 Smith admits that conspiracy theories manage to explain why judges and lawyers seem to recognize the authority of the law—according to these theories, it is merely a strategy to maintain the *statu quo*. The problem with conspiracy theories, according to Smith, is that they are far-fetched: "It is just not plausible to suppose that legal actors are involved in a mass conspiracy". (Smith, 2004, pp. 57-58)

13 This is what Smith claims when advocating for another condition for the success of interpretive theories, transparency: "By way of illustration, consider the idea that rules on duress are best explained on the ground that they promote efficiency. If nothing more is said, this explanation does not satisfy even the weakest transparency criterion. It fails because it offers no explanation for why the courts, in deciding duress cases, reason using concepts like consent and autonomy and do not mention efficiency or anything remotely similar" (Smith, 2004, pp. 80-81). On the transparency criterion, see Section 4 below. As I argue in the text above, I see no reason why a theory about the relationship between duress and efficiency should be rejected just because it does not explain why this relationship is most often ignored by judges.

Was not enough for Copernicus to offer proof of heliocentrism? Would he also be required to explain the hitherto widespread belief in geocentrism?

Necessary and contingent features

The second thesis is that theories aiming at justification should not be limited to the necessary features of the area of law under study. Necessary features are the characteristics that an object must have in order to belong to a certain class. So, the necessary features of a dog, for example, are those that any animal must have to be considered a dog. Contingent features, on the other hand, are those that a certain object may have but which are not necessary for it to belong to a certain class of objects. Some dogs have long hair, but this is a contingent feature since it is not a trait any animal must possess to be a dog.

My thesis is that special jurisprudence should be concerned with both necessary and contingent features of areas of law.[14] If justification is our purpose, then we cannot limit ourselves to necessary features, and this is for the simple reason that contingent traits are also relevant to stating whether an area of law is good or bad. In private law theory, this methodological principle is generally observed. In view of the differences, for example, between common law and civil law, authors tend to limit their theories to one or another of these systems, when not to the private law of a single jurisdiction.

One objection, however, is that, without limiting itself to the necessary features, a theory will not have its object properly demarcated. For example, suppose a theory of tort law purports to address both necessary and contingent features of this area of law. What would prevent such a theory then from including social insurance in the field of torts? And if social insurance can be included, why not also criminal law as well? It may seem that, if not restricted to necessary features, any delimitation of the theory's subject will be arbitrary.[15]

In response, we can make use of necessary features for the purpose of demarcating our subject without confining our inquiry to these features. Suppose that a necessary trait of tort law is a lawsuit in which the plaintiff claims to have been wronged by the defendant. As this is a feature that social insurance lacks, social insurance would not belong to our subject. Other features, however, are contin-

14 For a similar thesis regarding general jurisprudence, see Schauer (2013).

15 The objection assumes that things like an area of law can have necessary features. Regarding law in general, this assumption is controversial (see, e.g., Priel, 2007). I agree with Schauer (2013, pp. 21-22); however, that part of the difficulty comes from the false belief that necessary features of law must also be universal. There is no obstacle, however, to referring to the necessary features of law, as this concept is found in a given time and place.

gent but remain within the scope of tort law, as defined by the above-mentioned necessary feature. Take, for example, the case of damages for emotional harm. Although damages for emotional harm are not a necessary feature of tort law, such damages are granted in lawsuits in which the plaintiff complains about a wrong suffered at the hands of the defendant. Emotional damages can, therefore, be deemed as one of tort law's contingent features.

Possible plurality of interpretations

Discussions of special jurisprudence are often disputes about which interpretation is the best, understood as *interpretation* an explanation about the point or purpose of an area of law and how this point or purpose is able to explain the area of law's main features: "[...] revealing an intelligible order in the law, so far as such an order exists" (Smith, 2004, pp. 29-30).[16] Accordingly, interpretive theories are judged by their fit to the area of law to which they refer: The more a theory succeeds in accounting for features of the area of law in question, the better.[17]

A well-known methodological issue regards what kind of features an interpretation should fit. A frequent question, in this vein, is whether a successful interpretation may fit only case outcomes or whether, on the contrary, it needs to account for judicial rhetoric as well—as will happen, say, if the point or purpose assigned to the area of law in question is at least consistent with the rhetoric of judges and lawyers.[18]

I will return to this issue shortly. My third thesis has to do (among other things) with this dispute. It consists in asserting that, although fit is undeniably important, interpretations that fail to explain certain features of the area of law at issue (such as, for example, judicial rhetoric) can nevertheless be seen as successful interpretations. More precisely, the fact that an interpretation *x* fails to explain a certain feature *z* is no reason why *x* should be disregarded in favor of *y*, an interpretation that, unlike *x*, manages to account for *z*, no matter how relevant *z* may be. The success condition for *x* is to account for sufficiently

16 This resembles what Michael Moore (Moore, 2000) calls *descriptive theories*. According to Moore (2000, pp. 732-733), what seems to motivate some of these theories "is their architectonic ambitions—a desire to display the law as having a pleasing logical architecture." Not all interpretive theory, however, conforms to this characterization. Rather than as an intelligible unit or order, certain interpretations may present an area of law as constituted by irreconcilable principles. For an example of interpreting private law along these lines, see Kennedy (1976).

17 Which does not mean, of course, that fit is the only success condition. Remember once again Smith (2004, chap. 1), for whom, in addition to fit, interpretive theories must also be evaluated by other criteria, including morality.

18 Endorsing the claim that fit to case outcomes is enough, see, e.g., Dworkin (1986, pp. 284-285); Perry (2002, pp. 1767-1768). Against this claim, see, e.g., Zipursky (2000); Coleman (2001, pp. 30-31).

relevant (for evaluation purposes) features of the area of law and not to account for more features (or more relevant features) than alternative interpretations. Consequently, the same area of law can be the subject of two or more successful interpretations.

My argument in favor of the thesis of the possible plurality of interpretations is based, as in the other cases, on the purpose of justification. Suppose that contract law is subject to two distinct interpretations drawing on autonomy and efficiency, respectively. Suppose also that the autonomy-based interpretation is superior to the efficiency one regarding fit—or, at the very least, that there are certain features of contract law, such as judicial rhetoric, that only the autonomy-based interpretation can explain.[19] Would this be enough for us to disregard the other interpretation? If our purpose in theorizing is to assess whether contract law is a good thing, of course it is not. If contract law realizes a certain value (for the purposes of the example, I'm assuming efficiency is one), this is relevant for justification and remains so even if there are other values that that area of law realizes to a greater extent or that the value we are talking about is not mentioned in the arguments made by judges and lawyers.

Let me alert you to something that the thesis defended in this section is not. I am not suggesting that, for areas of law attending to a plurality of values, the best interpretation is a pluralist one, understood as an interpretation that, rather than presenting the area of law in question as *an intelligible order*, recognizes the presence of multiple and potentially conflicting values.[20] By presenting such an interpretation as the best one, what is being asserted is that, compared to other interpretations (among them, single-valued interpretations), the pluralist interpretation best meets certain conditions for success (such as fit).

I am not making this kind of claim. It would be too ambitious to defend pluralism as the best interpretation for any area of law, but the considerations made above could suggest the thesis that, at least for areas of law that realize more than one value, the correct interpretation must be the pluralist one. In fact, however, what my thesis calls into question is whether we should, in fact, take the time to assess which interpretation is better. Assuming that the autonomybased and efficiency-based interpretations reach a certain threshold of fit (sufficient for us to conclude that these values may count toward the justification of contract law), what do we gain by asking which of these interpretations is better? Surely,

19 The caveat is that it may not be simple to state that one interpretation is superior to the other. As different interpretations can account for different characteristics of the interpreted object, fit judgments are subject to incommensurability problems.

20 A pluralist interpretation may or may not offer a solution to value conflicts. For an example of a pluralist interpretation of contract law that seeks to accommodate the values of autonomy and efficiency in a "principled way," see Oman (2005).

it may be relevant to see not only whether, but also to what extent, contract law actually satisfies the values of autonomy and efficiency. After all, if autonomy and efficiency are genuine values, it matters to justification knowing how well contract law accords with them. Apart from this, however, it is not easy to perceive what we would get with the conclusion that the autonomybased interpretation is the best one. Of course, what this conclusion would not entail, as I argued above, is that the relationship between contract law and efficiency can be ignored.

In defending the possible plurality of interpretations, I am opposing the thesis that certain interpretations of private law—among them, the economic analysis of law—fail for not accounting for the rhetoric of judges and lawyers or the bilateral structure of this area of law (call this *the internalist* or *structuralist thesis*). If I am correct, however, the internalist critique directed against the economic analysis of law and functionalist theories in general is misplaced. In order for these theories to be refuted, we would then need an argument from political morality about the values these theories appeal to—an argument, for example, about the moral irrelevance of efficiency. Alternatively, we could also dismiss functionalist theories for their general lack of fit, i.e., for their inability to explain not only judicial rhetoric but also case outcomes around the law under analysis.

The internalist thesis has been heavily criticized (e.g., Lucy (2007); Barzun (2015, pp. 1245-1253); Priel, 2020). I would like to dedicate myself to it now, even knowing that I will not be able to deal with the debate in all its minutiae. My intention is simply to reinstate certain arguments used by internalists to see if they have any force against the thesis defended in this section. The issue, in short, is the following: Assuming that the purpose of theorizing about private law is justification, is there any reason to reject *ab initio* interpretations that are at variance with the beliefs and attitudes of practitioners (the *internal point of view*) or with the bilateral structure of private law?

Let's start with the argument used by Smith (2004) in defense of both the morality criterion (discussed in the previous section) and the internalist thesis—or what he calls the transparency criterion:

> To understand a human practice—to make it intelligible—it is necessary to understand what the participants in the practice think they are doing. In other words, it is necessary to understand how the practice is regarded internally. Suppose a social scientist is trying to understand—to interpret—the 17th-century medical practice of bloodletting. An account of bloodletting might focus purely on the physical act of hood-letting and on the physical consequences produced by bloodletting. Such an account might conclude that the practice of bloodletting, which turned out to be a poor medical technique, was basically a practice for making sick people

> sicker. In purely medical terms, this account is not inaccurate, but as an interpretation of the meaning of bloodletting it is missing something [...]
>
> In the same way, to understand the human practice of law, it is necessary to take account of how law is understood from the inside—by legal actors. More specifically, it is necessary to understand legal actors' public or 'legal' explanations of what they are doing. (Smith, 2004, pp. 51-52) <CITA>

Whatever merit it may have in other cases, this argument fails to hold for theories aiming at justification. Of course, if we were theorizing about bloodletting in order to know whether the practice is good, it would be of little relevance to know what practitioners thought of it in the 17th century, since they could be—as, in fact, were—deluded about the value of the practice at issue. Likewise, there is no reason to stick to judicial rhetoric about contracts, shall we conclude that judges and lawyers are wrong because, contrary to what they think, contract law has nothing to do with autonomy.

Note that, as regards the purpose of justification, even what Smith calls *the weak version of the transparency criterion* should be rejected. According to this version, a successful interpretation of an area of law can cause a misalignment between judicial rhetoric and the point of the area of law in question, as long as it provides us with an explanation of why this is so (Smith, 2004, pp. 81-83). An example of a theory that satisfies the transparency criterion in the weak version is, therefore, what Smith calls *a conspiracy theory*, that is, a theory according to which judges intentionally mislead the public about the reasons for their decisions.

Regardless of what we think about conspiracy theories,[21] the bottom line is that even the weak version of the transparency criterion asks for too much.[22] I do not see why it should be the burden of a theory, rather than just demonstrating the point of a given area of law, to explain why judges and lawyers are wrong (or feigning) about it. It may be an interesting question to know why 17th-century physicians believed (or pretended to believe) in bloodletting therapy, but not one that a current medical treatise on the practice necessarily has to address in order to advise against it.

Another argument in favor of the internalist thesis is that theories at odds with judicial rhetoric fail as a conceptual analysis of the area of law in question (Zipursky, 2000; Coleman (2001, chap. 2)). The problem with theories that, like

21 According to Smith (2004, pp. 81-83), conspiracy theories are implausible.

22 In the strong and moderate versions, the transparency criterion requires that interpretation fits judicial rhetoric (strong version) or, at least, that it accounts for why judges are led to believe they are arguing in accordance with the true point of law, even if they are not (moderate version). See Smith (2004, pp. 82-95).

the economic analysis of law, distance themselves from judicial rhetoric[23] is that they would then find themselves doomed to reduce the concepts used by practitioners to other concepts. As, however, this conceptual reduction fails, so does the explanation offered by the theories in question.

> Economic analysis often seeks to explain tort law [...] by reducing its concepts to terms that reflect the function of producing economically efficient outcomes. Thus, it is a staple of economic analysis that once we understand the concept of negligence or unreasonable risk in terms of *cost-justified precautions*, there is nothing else left in the concept for us to understand. The content of the concept of negligence is exhausted by its relationship to a certain economic theory of the law's function. I argue that this reductive conceptual analysis of tort law fails. The reductive accounts of concepts like negligence do not exhaust their legal content, and, moreover, these accounts leave altogether unexplained some concepts—like that of duty—that are central to tort law. (Coleman, 2001, p. XIV) <CITA>

It is not necessary to ask whether Coleman is correct in asserting that the economic analysis of law fails as a conceptual analysis of tort law. The question that truly concerns us is the following: Can a theory that fails as a conceptual analysis of a certain area of law still be successful? Coleman (2001) considers two alternatives. According to him, instead of a conceptual analysis, the theory can offer a causal-functional explanation or a constructive interpretation of the area of law at issue.[24]

We can put aside the idea of *constructive interpretation* since this kind of interpretation involves the same kind of moral judgment that one of the theses defended above, the staged inquiry thesis, claims that we should avoid when giving an account of what areas of law are. Let's then consider the causal-functional theories. These explain areas of law by their outcomes. As such, causal-functional theories are externalist theories since the outcomes of a given area of law may have

23 Obviously, the claim that consequentialist arguments, like those of the economic analysis of law, are foreign to the rhetoric of judges and lawyers is empirical. Just for the sake of argument, I assume this claim to be generally correct. For opposing views, however, see Kraus (2007) and Priel (2020).

24 Unlike Coleman, Zipursky (2000) does not even consider these alternatives. According to him, "to fail to offer a conceptualistic account is a deep shortcoming, and… to offer a theory that is incompatible with any plausible conceptualistic account of the law is a fatal flaw in a theory that purports to capture what the law is" (Zipursky, 2000, p. 480). As Barzun (2015, pp. 1251-1252) notes, however, there are other places where Zipursky (2000) limits himself to claiming, much more modestly, that a theory that takes judicial rhetoric seriously might be correct. See, e.g., Goldberg & Zipursky (2006, p. 1577): "One has to concede that, in the first instance, it [tort law] presents itself and hangs together as a law of rights, duties, and wrongs. Of course, it still may be the case that appearances are misleading or that this way of thinking about the law is unsatisfactory. But there is no philosophical reason to adopt this supposition from the start. Quite the opposite, it is entirely possible for tort law to be what it appears to be."

nothing to do with the arguments of judges and lawyers. For Coleman, however, causal-functional theories are subject to a particular success condition, namely:

> If a practice or institution really is to be explained by an outcome that lies outside the intentions of those who have developed and maintained it, then a particular kind of causal relationship must be shown. The kind of causal relationship that must figure in a formally adequate functional explanation should support a range of theoretically interesting counterfactuals. It must be the case that were the outcome substantially different, the practice would not exist, or its central elements would be different. Barring some appeal to the intentions or goals of an agent, only a causal relation can support such counterfactuals, and thus warrant the claim that the outcome is the practice's purpose or function. (Coleman, 2001, p. 26) <CITA>

Therefore, it is not enough for the economic analysis of law to demonstrate the efficiency of tort law. If the theory intends to explain tort law on this basis, it also must account for efficiency as the cause of tort law, showing that, were it not for the efficiency of its results, tort law would not be what it is. Otherwise, says Coleman (2001, p. 26), economic theory would be nothing but *a Just So Story*—a theory that relates tort law to a given outcome, but that says nothing about how tort law is explained by that outcome.

One can see why Coleman (2001) subjects causal-functional theories to this condition. There are endless results that can be attributed to an area of law, such as tort law—efficiency, deindustrialization, thriving law firms, etc. It is inevitable, therefore, that we limit ourselves to some of them, and the idea that we should restrict ourselves to the outcomes that actually explain tort law—that is, that determine the current shape of this area of law—is rather plausible. The problem is that this is not the only way to circumscribe our analysis, and that, depending on the purpose for which we are theorizing, Coleman's solution may not be the best.

If we are theorizing for the purpose of justification (which Coleman is not), then the results we should be interested in are not those that explain (in the causal sense) the area of law we are studying, but those that enable us to assess whether this area of law is good or bad. If tort law is efficient and efficiency is a value (let's assume both), this is enough for tort law to be featured as an area of law whose point (not necessarily the only one) is efficiency. It does not matter that efficiency is unable to causally explain tort law since, even if it is contingent, the relation between tort law and efficiency may still be relevant to the justification of this area of law.

To illustrate, let's consider Coleman's example of leopard's spots (Coleman, 2001, p. 26). According to Coleman, we would only be authorized to explain the leopard's spots by their *camouflage efficiency* if we were able to demonstrate the causal mechanism to support counterfactual claims such as, "Were they not camouflage-efficient, the leopard's spots would not be." But suppose that, instead of random mutation and natural selection, the leopard's spots were the result of genetic manipulation conducted by humans for purposes other than camouflage. If our investigation is about whether leopards are good hunters, it does not matter that the relationship between spots and camouflage is, as in the hypothesis just suggested, merely accidental. The fact is that spots make leopards better hunters, and this is, after all, what counts for us.

Conclusion

This article draws on two claims. The first one is that one of the purposes (not necessarily the only one) of theorizing about an area of law is to know whether that area of law is good; that is, to know whether the area of law at issue is, if not the best it could be, at least valuable enough that we have no reason to considerably reform it or even abolish it. I have called this purpose *the purpose of justification*. The second claim is that (agreeing with Dworkin in this regard) the theory's purpose is methodologically meaningful—it determines how we should theorize.

Three theses followed regarding theories on areas of law aiming at justification. The first thesis is that the investigation must be conducted in stages (staged inquiry). In the first, or *pre-evaluative stage*—the stage in which an account of the area of law is given—directly evaluative judgments must be avoided. Accordingly, theory in this first stage must deal with the features of the area of law at issue that are important for the evaluation to be carried out in the next stage, without differentiating between positive (i.e., good) and negative features. The staged inquiry thesis therefore runs counter to the idea that areas of law should be interpreted constructively (that is, interpreted in their best light, morally speaking) or that an interpretation is better, *ceteris paribus*, if it explains the area of law based on principles that are morally valid or, at least, that judges could consider as such.

The second thesis is that theories should be concerned with both the necessary and contingent traits of the area of law that constitutes their object. Necessary features are relevant for delimiting the area of law in question, but they are not the only features to be drawn on for evaluative purposes.

The third thesis, finally, is the thesis of the possible plurality of interpretations. According to this thesis, the fact that an interpretation *y* of a given area of law is superior to another interpretation *x* (because, for example, *y* fits the area of law at issue better than *x*) does not entail, in itself, that *x* is flawed. If *x* explains the area of law we are dealing with well enough (although not as well as *y*), then the feature (or features) to which *x* refers must be present in this area of law to a non-negligible extent. Such a feature, therefore, may be important for justification, which is enough for *x* not to be set aside. In light of the possible plurality of interpretations, therefore, it is even questionable whether debates about which is the best interpretation of an area of law are as interesting as they are sometimes assumed in the literature.

Still regarding the possible plurality of interpretations, the article focused on the thesis (often found in works on private law) that theories that completely disregard the reasons employed by the practitioners (judges and lawyers) are flawed (internalist or structuralist thesis). Against this thesis, I argued that theories that are out of step with judicial rhetoric can nonetheless offer successful interpretations. Furthermore, it is not the burden of these theories to explain why judges and lawyers can be mistaken about the point of law, nor, either, to demonstrate a causal nexus between the area of law and its point or purpose.

References

Barzun, C. L. (2015). Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship. *Virginia Law Review*, *101*(5), 1203-1288.

Coleman, J. L. (2001). *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory*. Oxford University Press.

Dickson, J. (2001). *Evaluation and Legal Theory*: *A review of law and policy*. Hart Publishing.

Dickson, J. (2022). *Elucidating Law*. Oxford University Press.

Dworkin, R. (1986). *Law's Empire*. Belknap Press.

Dworkin, R. (2011). *Justice for Hedgehogs*. Belknap Press.

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

Goldberg, J. C. P., & Zipursky, B. C. (2006). Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties. *Fordham Law Review*, *75*(3), 1563-1591.

Jiménez, F. (2021). Two Questions for Private Law Theory. *Jurisprudence*, *12*(3), 391-416.

Kennedy, D. (1976). Form and Substance in Private Law Adjudication. *Harvard Law Review*, *89*(8),1685-1778.

Khaitan, T., & Steel, S. (2022). Theorizing Areas of Law: A Taxonomy of Special Jurisprudence. *Legal Theory*, *28*(4), 325-351.

Kraus, J. S. (2007). Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis. *Virginia Law Review*, *93*(2), 287-360.

Lucy, W. (2007). Method and Fit: Two Problems for Contemporary Philosophies of Tort Law. *McGill Law Journal*, *52*, 605-656.

Moore, M. (2000). Theories of Areas of Law. *San Diego Law Review*, *37*(3), 731-742.

Murphy, L. (2001). The Political Question of the Concept of Law. In: Coleman, J. (Ed.)., *Hart's Postscript: Essays on the Postscript to The Concept of Law* (pp. 371-409). Oxford University Press.

Oman, N. (2005). Unity and Pluralism in Contract Law. *Michigan Law Review, 103*(6), 1483-1506.

Perry, S. R. (2002). Method and Principle in Legal Theory. *Yale Law Journal, 111*(7), 1757-1814.

Priel, D. (2007). Jurisprudence and Necessity. *Canadian Journal of Law & Jurisprudence, 20*(1), 173-200.

Priel, D. (2010). Description and Evaluation in Jurisprudence. *Law and Philosophy, 29*(6), 633-668.

Priel, D. (2020). Structure, Function, and Tort Law. *Journal of Tort Law, 13*(1), 31-79.

Raz, J. (1995). *Ethics in the Public Domain: Essays in the Morality of Law and Politics*. Clarendon Press.

Schauer, F. (2013). Necessity, Importance, and the Nature of Law. In: Beltrán, J. F.; Moreso, J. J.; Papayannis, D. M. (Eds.)., *Neutrality and Theory of Law* (pp. 17-31). Springer.

Smith, S. A. (2004). *Contract Theory*. Oxford University Press.

Zipursky, B. C. (2000). Pragmatic Conceptualism. *Legal Theory, 6*(4), 457-485.