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Five Models of Legal Science

This paper pursues three goals. First, some traditional concepts of ‘legal science’ will be analysed, and a definition of ‘legal science ampio sensu’, ‘legal science stricto sensu’ and ‘legal dogmatics’ will be proposed. Second, a reconstruction of five models of ‘legal science ampio sensu’ will be presented to show the different methodological alternatives available to legal scholars. Third, I claim that it is necessary (for conceptual reasons) to argue for moral reasons when choosing a legal method. Finally, I offer some arguments for supporting the five methodological alternatives of legal science ampio sensu.

Keywords: legal science, legal dogmatics, moral reasons, concept of law, conceptions of science

1 ABOUT THE CONCEPT OF LEGAL SCIENCE

One of the most recurrent discussions in legal-theoretical debates—at least in the civil law legal culture—is that concerning the method of studying law. In fact, many of the most important contributions that have been made in the legal theory of the twentieth century can be read in this key. To give just a few famous examples: Kelsen maintains that the intention of his pure theory is to provide a method “to raise [legal science] to the level of a genuine science, a human science”;¹ Ross states that “the leading idea of [On Law and Justice] is to carry, in the field of law, the empirical principles to their ultimate conclusions”;² Hart holds that The Concept of Law “is concerned with the clarification of the general framework of legal thought”;³ and the concept of the normative system of Alchourrón and Bulygin appears as an idealization of what scholars of positive law do.⁴

However, it is not clear what we mean by ‘legal science’. Despite there being a discussion that has lasted several centuries—or perhaps precisely because of that—the fact is that we do not have a univocal, or even one shared, terminolo-

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4 Carlos Alchourrón, Eugenio Bulygin, Introducción a la metodología de las ciencias jurídicas y sociales, Buenos Aires, Astrea, 1975, 25.
In this sense, an experiment of entering expressions such as ‘science of law’ or ‘legal dogmatics’ into our library search engines and merely noting the huge number of titles returned by the system is particularly illustrative.

The problem is not just the enormous body of literature that has been generated on the subject but, above all, the heterogeneity of it. Under labels such as ‘legal science’, ‘legal dogmatics’ or ‘legal method’ we can find studies and monographs that often have little to do with one another: while some of them consider the meaning and scope of the various methodological directives, or about the very concept of methodology, others are dedicated to clarifying what is the legal perspective of the validity of law (the internal point of view), the interpretation, or the judicial balancing.

Despite their heterogeneity, and with the aim of proposing a minimum order, we can group this bibliography into different genres: (i) works made up of historical reconstructions about the different legal theoretical movements that have tried to answer questions such as “What is law?” and “What should legal scholars do?”; (ii) studies that examine the theory held by some authors—usually Kelsen, Hart and Ross, plus some others, depending on the preferences of the authors—about what is or should be the science of law; in addition to sorting between historical schools and authors, a number of studies present different methodological models for the study of law; (iv) a group that deals with the truth conditions of legal statements, or with some of the activities supposedly carried out by legal scholars; finally, there is a group of works that deals with more specific issues, such as in what sense the study

8 Antonio Hernández Gil, Metodología del derecho, Madrid, Editorial Revista de Derecho Privado, 1945; Enrique Zuleta Puceiro, Paradigma dogmático y ciencia del derecho, Madrid, Editoriales de Derecho Reunidas, 1981. For a theoretical analysis based on the characterisations of Roman law jurisprudence, see Rolando Tamayo Salmerón, El derecho y la ciencia del derecho, Mexico, UNAM, 1986.
12 Alchourrón and Bulygin 1975 (n. 4).
of law would be a dogmatic, normative, technical, or even a scientific discipline etc.

To address the issue of legal science, the first thing we need, therefore, is a definition that clarifies what we mean when we speak about ‘legal science’ and similar terms. To this end, we must get rid of some initial misunderstandings and ambiguities.

The first problem which arises is that we have different expressions that can be used to refer to the same object, with it being unclear whether they are used as synonyms: ‘science of law’, ‘legal science’, ‘legal dogmatic’, ‘legal knowledge’, ‘law doctrine’, ‘jurisprudence’17 (‘jurisprudence styles’18), ‘doctrinal vector’ and ‘legal method’ (‘legal methodology’)19. I will use only the first two expressions—‘legal science’ and ‘legal dogmatic’—in a way that I will highlight at the end of this section. In this regard, I start by analysing the expression ‘legal science’ and unravelling some common misconceptions.

As is well-known since the work of Nino,20 ‘legal science’ is an equivocal (ambiguous) expression to which partially different meanings can be attributed, many of them suffering from major vagueness. Let us examine these sources of ambiguity.

13 Carlos Santiago Nino, Consideraciones sobre la dogmática jurídica, Mexico, UNAM, 1989.
16 Albert Calsamiglia, Introducción a la ciencia jurídica, Barcelona, Ariel, 1986.
17 Although use by jurists has consolidated the synonym between ‘law’ and ‘activity of the courts’, the RAE dictionary of the Spanish Royal Academy defines ‘law’ (Span. Derecho), first as a ‘science of law’.
18 In a famous essay, Karl Llewellyn analyses three moments in American jurisprudence that can be configured as so many other ways to analyse the content of law. Meanwhile, Pound makes a well-known distinction between different ways of approaching the study of law. This classification is reintroduced, with modifications, by Felix Cohen. See Karl Llewellyn, On the Good, the True, the Beautiful, in Law, University of Chicago Law Review (1941-1942) 9, 224–265; Juan Antonio Pérez Lledó, El instrumentalismo jurídico americano, Lima-Bogotá, Palestra-Temis, 2007, cap. I; Pound 2010 (n. 10); Felix Cohen, Transcendental Non-Sense and the Functional Approach, in The Legal Conscience, New Haven, Yale University Press, 1960, 33–76.
19 For a brief but accurate analysis of the different meanings that can be ascribed to some of these terms or expressions, see Giovanni Battista Ratti, Sistema giuridico e sistemizzazione del diritto, Torino, Giappichelli, 2008, 205 ff.
20 Nino 1989 (n. 13) and Nino 1999 (n. 5).
1.1 The Ambiguity of ‘Legal Science’

i) The term ‘legal science’ suffers from the classical process/product ambiguity. Indeed, this term can be used both to refer to the set of activities performed by the person who studies the law and to the result of such activities. Here I use ‘legal science’ to refer to both the set of activities carried out by (or that should be developed by) legal scholars and to the methodological assumptions that govern (or should govern) these activities.

ii) The second ambiguity occurs whenever someone uses ‘legal science’ to refer to the set of disciplines which have, in some sense, the law as an object of study. In addition to that, some authors use the label in the plural form to refer to all the disciplines that deal with law: science of law, legal theory, jurisprudence, legal dogmatics, the sociology of law, legal anthropology, comparative law, history of law, etc.

In addition to this particularly comprehensive use of ‘legal science’, two other similar mistakes frequently occur in the literature. The first occurs every time ‘legal science’ is used to refer to both the study of positive law (i.e. a particular legal system) and to studies examining the structure, the framework, or the basis of all (or a group of) legal orders. Of course, there are good reasons to believe that between what civil, criminal, and constitutional legal scholars do, on the one hand, and what legal theorists do, on the other, there is merely a difference of the degree of generality. However, for reasons of conceptual clarity, it is necessary to maintain the distinction between both types of study.

The second variant of this ambiguity occurs because the term ‘legal science’ is used in at least two ways in this context: first, to refer to the disciplines that study the content of law; second, to designate only one or some of the possible ways of studying the content of law that deserve to be qualified as ‘scientific’. Here I use ‘legal science *ampio sensu*’, as I point out below, on the one hand to refer to all the methods of determining the content of law while, on the other,

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21 Nino, 1989 (n. 13), 10-11; Tamayo Salmerón 1986 (n. 8), 102.


23 Other authors, such as Calsamiglia, do not use this term to refer to all these disciplines. However, he states that students of positive law must develop all these activities. Cfr. Albert Calsamiglia, Ciencia jurídica, in Ernesto Garzón Valdés and Francisco Laporta (eds.), *El derecho y la Justicia*, Madrid, Trotta, 1996, 17–27, 18.

24 Kelsen is one of the authors who has contributed the most to this confusion. This is because it is not entirely clear whether purity refers to the theory, to the science of law, or both. Meanwhile, Amselek does not seem to distinguish between the general theory of law and legal science. Cfr. Paul Amselek, El paradigma positivista de la dogmática jurídica, *Anuario de Derechos Humanos* (2006) 7, 17–38, 33.
as ‘legal science *stricto sensu*’ I understand the methods recommended by those who believe that legal scholars should merely describe the content of law (regardless of whether such activity can be qualified as scientific).

iii) The third ambiguity is due to the fact that the meaning of the term ‘science’ in the expression which we are analysing is unclear. To realize what the problem is, it is enough to take into account how long the debate about the conditions a discipline must meet to be considered scientific has lasted and the fact that, in a sense, it still is.25

The term ‘science’ also has, as Nino has stressed,26 a significant charge of positive value. This produces no ambiguity in the strict sense, but those who qualify an activity as scientific tend to shift the focus to the emotional level.27 Most attempts to define the concept of science—according to Nino—would result in persuasive definitions, that is, definitions that focus on the emotional content of the term, surreptitiously modifying the cognitive content.

Moreover, the meaning of the term ‘science’ is not only ambiguous but vague.28 This is because although we opt for one of the possible meanings of the term ‘science’, there are often cases where whether a particular discipline meets the requirements to be qualified as scientific is doubtful.

iv) The fourth ambiguity refers to the other term in question: ‘law’. Indeed, much of the theoretical debate of the last half century has placed the concept of law at the core of the discussion. If what we mean by ‘science of law’ or ‘legal science’ depends on which concept of law is assumed, the risk of misunderstanding seems to multiply exponentially.

1.2 Toward a Concept of ‘Legal Science’

It is possible to adopt different strategies for providing a definition which allows the clarification of which meaning can be attributed to this expression. The most important of these, and also the most frequently adopted, consists of the conceptual analysis of ‘legal science’, that is, of clarifying what the speakers of a given community mean and assume when they use this expression. It is not, of course, merely a collection of meanings but a way to build a simpler and more explanatory concept about what are we doing when we speak of ‘legal science’.

However, these definitions of ‘legal science’ are problematic because they assume—or, rather, are based on—a particular concept of law. That a definition of ‘legal science’ would presuppose a concept of law is not objectionable, of course. Now, what is objectionable is to make the concept of ‘legal science’ depend-

25 Calsamiglia 1986 (n. 16), ch. II.
27 Tamayo Salmerón 1986 (n. 8), 120.
28 Nino 1989 (n. 13), 11.
ent on a particular concept of law and, from this analysis, derive consequences about what the scholars of positive law do or what they should do. For example:

Ordinarily legal dogmatics is, at least in the Nordic tradition, defined as the study of the content of the legal rules (norms) and of the systematic order of those. The common terms referring to these tasks are ‘interpretation’ and ‘systematization’.29

We understand by science of law the knowledge that tries to describe the legal-positive standards and has traditionally been called legal dogmatics or jurisprudence.30

The root of the problem is a misconception about the role of concepts in our knowledge,31 in this case, the role that they play in our concept of ‘law’. Of course, the analysis of the concept of law—and any other concept—is a useful tool in legal theory. Now, what is dangerous is to think that the analysis of the concept of law, or a definition of ‘legal science’ based on that, will tell us something about what legal scholars do, or even what they should do.32

An overly broad confidence in the virtues of conceptual analysis leads, in this area, to overlooking two problems. The first is that—if our intention is to make a description about what legal scholars do (i.e. to define ‘legal science’ based on a concept of law—we will return a distorted picture of their activity, because not all legal scholars use or presuppose the same concept of law, nor do scholars use the same concept of law consistently in all their activities. Second, if the aim is to provide guidelines about what legal scholars should do, then it would be necessary to provide normative arguments, not only a definition.33

For defining our object of study what we need is, therefore, a definition that does not deviate from what we normally mean by ‘legal science’, but, at the same time, does not prejudice any answer to questions about what legal scholars do and what they should do. The best definition of ‘legal science’ that we have, at least for now, is that which refers directly to the method used (or that can

30 Calsamiglia 1986 (n. 16), 12-13.
31 Concepts are merely tools that allow segments of reality to be identified which are part of theories which in turn include other items that attempt to explain certain facts or events. On legal concepts, see Jaap C. Hage and Dietermar von der Pfordten (Eds.), Concepts in Law, Dordrecht, Kluwer, 2009.
33 One can imagine two ways to escape from this problem: the first is analysing the concept of ‘legal science’ with the conventional tools of analytic philosophy without committing to any concept of law. However, I cannot imagine how this would be possible when a definition of an expression is being proposed in which the term ‘law’ (‘legal’) serves as the only adjective. Second, it is also possible to provide a definition of this type without obtaining conclusions in the descriptive and normative fields of the theory of legal science. However, at such a point, we might ask ourselves why we want a definition like this of ‘legal science’ or ‘science of law’.
be used or that should be used) and/or the activities of scholars of positive law (criminal, civil, constitutional, etc.).

However, we do not identify legal science with all the activities developed in relation to positive law, so it is necessary to introduce two further boundaries in our definition. The first limit allows legal science to be distinguished from other disciplines that also take law as an object of study: the sociology of law, legal anthropology, legal history, the science of legislation. Nevertheless, although these disciplines also analyse the positive law, between legal science and other disciplines there are differences both methodologically and in terms of research objectives. In particular, leaving aside the question of methodology, disciplines such as sociology or anthropology pursue different objectives than those of civil, criminal, or administrative scholars whose aim is to determine the content of law, that is, to establish which is the legal qualification of a certain conduct in a legal system.34

The second limit allows us to distinguish legal science from the activity conducted by legal operators (judges, barristers, lawyers, etc.), getting rid, as well, of a last equivocal step regarding the use of the term ‘legal science’. Sometimes, terms like ‘legal method’ or ‘legal methodology’ are used as synonyms of ‘legal science’. The problem is that, in its regular use, ‘legal method’ does not refer exclusively to the pool of methodological guidelines used by positive law scholars but also to those followed by legal operators. This ambiguity is particularly dangerous because it leads to the conclusion that positive law scholars follow, or they should follow, the same methodology as other operators of law. It is possible, of course, to say that positive law scholars are using, or that they should use, the same method as the legal practitioners, but it requires an empirical demonstration or a practical argumentation.35

At this point, it is possible to define ‘legal science ampio sensu’ as the activity and/or the method used (or that can be used or that should be used) by those involved in determining the content of law (from this point ‘legal scholars’), and to which no legal value is recognized by any legal system. That is, the method and/or the activities of those engaged in establishing what is the legal qualification that corresponds to a behaviour according to a legal system, and those behaviours that the legal system does not recognize as having legal value.36

34 It is not, of course, the only activity carried out by legal scholars but it is the main activity to the extent that all others are functional or dependent on it.

35 Moreover, because legal science usually deals with describing standards, generic cases, or at least is not often referred to particular behaviours, it is odd to say that they have the same method. At best, the coincidence of methods could be partial, encompassing the method of legal operators to that of legal scholars of positive law. But this is an entirely debatable issue from the empirical point of view as well as from the normative one. See in this regard, Peczenik 2005 (n. 7), 2; Aarnio 1987 (n. 29), 15.

36 By ‘legal value’ I mean the recognition that, as part of a procedure for the creation or ap-
It is possible to point out two criticisms of this definition of ‘legal science ampio sensu’. The first one would be that this definition is not very informative and tells us nothing about what legal scholars do or which method they use. The second one would be that it is a radically ambiguous definition, since very different methods to address the determination of the content of law have been offered from the normative theory of legal science.

It is possible to respond to these two criticisms together: the main virtue of this definition of ‘legal science ampio sensu’ is that it captures some of the properties that are typically attributed to legal science—the activity of legal research professionals (civil, criminal, and administrative scholars, etc.)—without introducing considerations surreptitiously about what legal scholars do or what they should do.

But, in addition, this definition of ‘legal science ampio sensu’ is sufficient for distinguishing, on the one hand, the activity of scholars about specific parts of the legal system from that of other scholars who take the law as an object of study, and, on the other hand, for distinguishing their activity from that of legal operators as judges and lawyers. Thus, it is possible to identify our object of study, leaving the questions about what activities are actually carried out by legal scholars, or what they can do, or what they should do, open.

Together with the definition of ‘legal science ampio sensu’, and in order to introduce a criterion by which we will classify the different doctrines (the conceptions of legal science ampio sensu) about what legal scholars should do, I introduce two other definitions: ‘legal science stricto sensu’ and ‘legal dogmatics’. By ‘legal science stricto sensu’ I understand the method recommended by those who believe that legal scholars should devote themselves solely to describing the content of positive law; by ‘legal dogmatics’ I understand the method proposed by those who believe that legal scholars should not be limited to describing—or should not at all engage in describing—the content of law, but must propose solutions to the judges for resolving hard cases.37

37 It is not the usual use of this expression. However, I prefer to use this expression because, in several of its possible meanings, it refers to a set of methods used for generating legal responses for cases of indeterminacy. For a discussion about the uses of this term, see Álvaro Núñez Vaquero, Dogmática jurídica, Revista Euronomía (2013) 4 (forthcoming).
2 MODELS OF LEGAL SCIENCE (AMPIO SENSU)

Once we have an adequate conceptual framework, we can analyse some of the methods for determining the content of law. I will present the key features of five models of legal science ampio sensu: the normativist model, the realistic model, the argumentativist model, the technological model and the critical model. However, before analysing each of these models of legal science in the broad sense, it is necessary to briefly address a previous consideration.

This consideration has to do with the character of these models, that is, although they have been modelled using different doctrines about what legal scholars should do, they have an heuristic value in the way in which they allow the different doctrines of legal science ampio sensu to be organized. But, in addition, these models are useful in analysing the activities that are really carried out by legal scholars. Now, to the extent that they are reconstructions of ideal types, not all the normative doctrines of legal science, nor the work of all legal scholars, fit neatly into any of these models.

2.1 Normativist Legal Science

The normativist model is the most classical in the theory of legal science. According to authors like Kelsen, Bobbio, Scarpelli, Jori, Bulygin or Vernengo, legal scholars should be devoted to describing the set of rules that belong to a legal system, and its further systematization. Legal science could be described, in this case, as a normative discipline as its object of study is constituted by rules. It is also an activity that—while it may be controversial to attribute the adjective ‘scientific’ to it, according to its own defenders—can be qualified as objective. This means that the assertiveness conditions of the normative statements (statements about the content of law, that describe the qualification of conduct on the basis of law) have an objective quality, that is, are formed by applying a clear set of rules whose conditions of applicability are ordered and are also clear.

Although it is not at all obvious as what it means to describe rules—let alone how to establish which is the set of legal rules that legal science has to describe—by ‘description of rules’ most defenders of the normativist model of legal science understand the interpretation of normative sentences. That is, the

38 It is necessary to warn the reader here that this is an asymmetric classification because - although the fundamental criterion that characterizes each of the models is a doctrine about what legal scholars should do—each of these doctrines emphasizes different theoretical issues (interpretation and systematization of law, a theory of practical reasoning, a thesis about the role of intellectuals in our societies, etc.).

39 I am thinking here, for example, about the theory of legal science of Luigi Ferrajoli, which would be a mix of the normativist model (insofar as he finds that the interpretation of law is basically a descriptive activity) and the critical model (in terms of that he believes that law scholars should make proposals as regards how to safeguard fundamental rights). I reserve the further development of this argument for another opportunity.
description of the meaning expressed by a set of authoritative directives previously identified.

We can summarize the activity of describing legal rules in three steps: i) identification of the norms (or statements expressing such norms) that establish the conditions of validity (belonging to) of the rest of rules of the legal system; ii) identification and interpretation of authoritative directives that express the norms proposed as belonging to the legal system; iii) testing the validity of the norms expressed by such authoritative directives, that is, whether they satisfy the belonging criteria to the legal system.

Legal interpretation plays a key role in the normativist model of legal science because any authoritative directive about valid law—which claims the belonging of a rule to a legal system—is composed of two statements: an interpretive statement about the norm expressed by a legal disposition (authoritative directive), and another about the validity of such a norm. It should be noted that interpretation is necessary not only for describing the norm expressed by the authoritative directive; rather, for establishing whether a norm is valid, we also have to interpret the directive that expresses the criteria of belonging to this legal system. If we take into account that in most of our legal systems the belonging criteria are posited in constitutional texts, and that they are usually written in vague and ambiguous terms, the question becomes quite relevant.

Now, what does interpretative activity involve, according to the defenders of the normativist model? For most of these authors to interpret consists in applying a set of conventional linguistic rules to the statements coming from the authorities, that is, subsuming the statements expressed by the legislator (token statements) to the set of language rules or linguistic conventions followed by the legislator (type statements) as particular instances of language use. Although hard cases exist (mainly due to the inherent vagueness of natural language) and sometimes the interpreter must decide what meaning to attribute to a statement—the legislator’s language is usually clear in most cases. To interpret, in short, consists of describing the meaning of the authoritative directives.

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Different defenders of the normativist model of legal science defend, of course, different interpretative theses, and there are disagreements about which interpretive canon should prevail: the literal, the systematic, the intentionalist, and so on. However, these authors seem to be involved at least in some sort of moderated descriptivism and not just because if there was not normally an univocal correspondence between statements and the norms expressed by them, the law could not fulfil its essential function (to direct behaviour), but because, above all, the “description” of rules could not be qualified as objective (and even less as scientific activity).

According to the defenders of normativist legal science, describing rules is not, however, the only activity that legal scholars must develop. This first phase would be accompanied by a second of systematization. By ‘systematization’, however, at least three different types of activities can be understood:

a) The term ‘systematization’ means explaining all the logical consequences of a legal system and reformulating the normative basis of the system using less normative sentences. That is, first, to systematize implies developing all the logical consequences of the normative system from, and exclusively, those original statements of the system and the set of transformation rules accepted in that; and secondly, expressing the same set of rules by a smaller set of normative statements.

b) By the term ‘systematization’, the organized exposition of the norms pertaining to the legal system can be also understood, grouping those in respect of their content building conceptual categories that allow their understanding and easier use. That is, developing legal institutions (contract, tort, class action, etc.) that can be used to organize, present, and refer to a set of norms in an orderly way.

c) By the term ‘systematization’ we mean, finally, finding the solution to the logical flaws of the legal system: resolving antinomies and filling gaps. Nevertheless, it is debatable whether legal science must solve such problems or if, in contrast, it must be limited to establishing the existence of such defects since, if antinomies are solved and gaps filled, this would modify its object of study. However, it is plausible to say that such activities must be conducted by

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44 That is, a thesis that holds that in all cases to interpret is a cognitive activity or that it is so in most cases. See Moreso 1998 (n. 11), 156–160.
46 For a more detailed analysis about the concept of regulatory system, see Ratti 2008 (n. 19) and Jorge Rodriguez, Introducción a la lógica de los sistemas normativos, Madrid, CEPC, 2002.
legal scholars when they consist of applying rules pertaining to the legal system, clear ones, and whose conditions of applicability are also clear.48

2.2 Realistic Legal Science

The realistic model of legal science has, in its different versions, a sharply critical tone. To properly understand the scope and meaning of the realistic model of legal science, we must start just with the criticisms that authors such as Holmes, Ross or Guastini directed, above all, at the normativist model of legal science. Although the object of criticism of the different variants of realism differs from one author to another, it is possible to identify two common criticisms in the various realisms: one of an ontological nature and another of a methodological nature.

The ontological criticism derives from the radical empiricist epistemology (reductionism) to which most of its defenders subscribe. According to this first criticism, if only entities of a sensible reality exist, normativist legal science would be simply pointless: there is nothing in the world like the rules that are objects of description in normativism. Therefore, if legal science wants to be a scientific discipline, its statements have to be about empirical world entities. So, if we want to turn legal science into a really scientific discipline, its object of study cannot be anything but judicial decisions49 (in the broadest sense) and the sensations of obligation perceived by legal operators.

The methodological criticism takes its foundation from a thesis about legal indeterminacy. By ‘thesis of legal indeterminacy’ we understand the thesis according to which it is possible to decide the same controversy, based on the legal system, in incompatible ways all of which are equally justified.50 That is, the set of legal reasons which allows us, at least in some cases, to legally qualify the same behaviour in incompatible ways. Now, if normative statements can justify more than one solution for particular cases, then the causes or reasons that lead judges to opt for one possible legal solution are not found in law but in other kind of factors: political, psychological, economical, etc.51

48 Note in this respect that if the tasks of legal science would include resolving the logical flaws of the system, normativist legal science would also be a normative discipline, because rules would be applied.


51 It is in the light of this thesis that certain statements as “[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law” (Oliver Wendell Holmes, Jr., *The Path of the Law, Harvard Law Review* 5 (1897) 110, 994, or that “[t]he rules are important so far as the help you see or predict what judges will do or so far as they help you get judges to do something. That is their importance. That is all importance, except as
The sources of the indeterminacy of law are varied: vagueness, defeasibility, logical flaws in the system, etc. However, realists have traditionally emphasized the ambiguity of the legislator’s directives (and judicial precedents) as a source of the indeterminacy of law. By ambiguity we must understand the possibility of interpreting the same authoritative directives based on a different canon of interpretation applicable in the legal community, and the absence of lasting meta-legal criteria to determine which interpretive criteria is applicable or what norms derive from authoritative directives. In other words: it is possible to derive different norms from the same authoritative directive based on various interpretive techniques, all of them equally legitimate, and the legal system does not indicate which one we must use.

This thesis about indeterminacy leads to a radical criticism of the normativist model of legal science: given that normativists claim that they describe the content of law, what they are actually doing (or assuming) are value assumptions that prevent them from qualifying their normative statements as descriptive. Thus, normativist legal science could not be qualified as descriptive or objective activity because its normative statements are mediated by the legal-ethical preferences (defined in a broad sense) of those who state them.

The realist legal science model which is best known in the civil law culture is certainly Alf Ross’. According to him, the propositions of legal science should be predictions about how judges will decide future controversies. As is well-known, Ross carries out a synthesis between two types of realism—the behavioural (Holmes’) and the psychological (Olivecrona’s)—arguing that the existing law is the set of norms that judges feel as binding (valid) and would be willing to apply (if there is an action that is described in the antecedent of the norm).

The model of Ross is certainly not the only model of realistic legal science available, and probably not the most satisfactory. Defenders of the realistic model of legal science have proposed different methods for making predictions,
the heterogeneity among those being the predominant note: I refer to the writings that go from the study of the *rationale* of judicial decisions by American realists, to the most recent studies by Spaeth and Segal, Richard Posner or New Legal Realism, and moving over to the sociology *in the law* by Giovanni Tarello.

Now, if the thesis of indeterminacy is correct—and normative statements do not determine how judges decide particular controversies—realistic legal scholars seem to be headed towards some sort of interdisciplinarity or collaboration both with historians of legal and political thought, and economists, sociologists and psychologists. This is because if the solutions of the judicial process are determined by political or economic factors, and the role of legal science is precisely to make predictions about how judges will decide future controversies, then it is necessary to establish how these factors influence or determine judicial decisions.56

### 2.3 Argumentativist Legal Dogmatics

The debate on the scientific character of legal science has certainly occupied quite a large space in the history of the theory of legal science. However, for some decades this debate has been partially replaced by another of a meta-scientific and normative character. In short: according to authors like Aarnio, Alexy, Atienza, Nino, Peczenik, or Zagrebelsky, legal scholars not only describe the content of positive law, nor should they only describe it, but they must also propose solutions for hard cases to which, at least apparently, the law clearly does not provide a single right answer.

Faced with the legal science models *stricto sensu* (the normativist and the realistic one), defenders of the argumentativist model of legal dogmatics propose a radical criticism: a legal science *sticto sensu* is either not purely descriptive (and is therefore ideological) or is sentenced to total practical irrelevance.57 Legal scholars would traditionally perform, according to defenders of the argumentativist model, an important social function that is neither arbitrary or irrational nor purely descriptive, and that cannot be accounted for by the models of legal science *stricto sensu*.58 Therefore, in the words of Nino, “one finds oneself

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58 This criticism is a real challenge for all the doctrines of legal science in the strict sense, but not necessarily for the positivist conceptions of law. Indeed, we can state, without falling into contradiction, that to establish what is the content of law it is not necessary to resort to moral considerations (thesis about the no identifiable connection between law and morality) but,
in a somewhat ridiculous position of having to argue about obvious and almost things banal like that legal activity of jurists satisfies other functions than the one these models [of legal science *stricto sensu*] allow.”

According to defenders of the argumentativist model, it is precisely when legal scholars leave the descriptive plane that their work becomes interesting and relevant, even though it is not possible to identify a single right answer. But this does not mean, of course, that legal scholars should propose solutions for problematic cases based on their own preferences or moral tastes. Rather, their activity should be governed by two factors: first, by the set of values and principles, legal and/or moral, posited in the legal system and/or that govern the social practice called ‘law’; second, legal scholars must justify—by offering supportive arguments—each of their proposed solutions for hard cases, that is, legal scholars must provide reasons to support their solutions for hard cases.

Legal reasoning, to the extent that it justifies its thesis based on principles and values, would be—as most of these authors say—a type (a special case) of practical reasoning. That is, despite the differences that are present between defenders of the argumentativist model and between legal and moral reasoning, these differences would not be relevant at the time of determining whether a thesis is justified.

Among the defenders of the argumentativist model it is possible to distinguish three dimensions of legal reasoning. In extreme synthesis: the first approach deals with the logical validity of arguments, the second deals with its persuasive capacity, while the third deals specifically with the material (or substantive) plausibility of arguments. What is specific to this material dimension of legal reasoning is that it is possible to identify in advance which are the sufficient conditions that a thesis must satisfy to be finally considered as the best legally possible answer. That is, determining what is the best answer for the legal problem is not a matter that can be reduced to the application of a set of rules. To establish the best possible answer is an activity guided by a model of rationality (and of objectivity) distinct from that which governs our theoretical or cognitive activities: *phronesis* or practical reason.

However, that legal scholars should propose solutions for those cases where the law is indeterminate. Cfr. Nino 1999 (n. 5), 13.

59 Nino 1999, (n. 5), 13. Similar expressions can be found on authors like Amselek, Atienza, Zagrebelsky, Dworkin, Alexy, etc.


The argumentativist method proposes a model of the legal scholar who offers solutions for legal disagreements in an analogous manner to the way moral philosophers suggest answers for moral or ethical-political problems: justifying their decisions based on rules, principles and values. This kind of practical rationality which underlies the argumentative model (characteristic of deontological morality) is reflected in the different instruments theorized by moral philosophy: reflective equilibrium, coherentism, the holistic interpretation of a set of norms in its best light, the discussion in front of a rational ideal auditorium, etc. However, due to its diffusion through the work of Robert Alexy, the most common instrument among defenders of the argumentativist model is that of the balancing of principles: a method for the application of principles and the resolution of their conflict.

The fact that legal reasoning is a special case of practical reasoning does not imply, however, that legal reasoning will collapse with moral reasoning. Instead, the discussion about the best legal solution can yield, as a result, not the best moral response, but a morally second best: a morally justified response that would not be the optimal response from the ethical point of view. This is because legal reasoning would be governed, in addition to moral principles and values, by principles and values specifically legal, like legal certainty, consistency with the institutional history, etc.

2.4 Realistic-Technological Legal Dogmatics

Within the literature on legal realism, especially the American, a section dedicated to the model of legal dogmatics by authors associated with legal realism such as William Douglas, Karl Llewellyn and Felix Cohen may frequently be found. That is, a method—more practiced than explicitly theorized—not used to make predictions about the existing law but used for proposing solutions for hard cases (the constructive method). Here I carry out a reconstruction of such a model of legal dogmatics based on the thesis of these authors, other American realists and from elsewhere (Michael Troper, Vilhelm Lundstedt or Giovanni Tarello), but also precursors and heirs of realism like Rudolf von Jhering, Richard Posner, Brian Leiter or Hans Albert.

66 Dworkin 1986 (n. 61), 45 ff.
67 Aarnio 1987 (n. 29), 221 ff.
In order to understand what this technological model of legal dogmatics involves, it is necessary to start pointing to where it overlaps with the realistic model of legal science: the thesis of legal indeterminacy. That is, the thesis that authoritative directives can be used to qualify the same behaviour in some incompatible ways in a justified manner—which makes a resort to extra-legal considerations in deciding disputes necessary.

However, defenders of the technological model go a step further with the thesis of the indeterminacy of law. According to them, the deontological model of practical rationality—the one that underlies the argumentativist dogmatics—provides tools that, based on the same set of rules and moral and legal principles, allow us to justify incompatible decisions. That is, it is not only that the law is indeterminate, or that the tools that legal scholars use to interpret the law will generate indeterminacy; but that defenders of this model present a sceptical thesis about practical reasoning, conceptually independent of any theory about how our legal systems are.

The problem is not only that there are no objectively correct values (external scepticism) but that even if we could agree on what values are correct, the instruments of a deontologic moral discourse based on rules, principles and values allow us to justify incompatible legal decisions, which action would be further honouring our moral principles depends on what weight or value legal scholars attribute to each of them (internal scepticism). Instruments such as reflective equilibrium, communicative dialogue or balancing of principles do not diminish uncertainty to the extent that would allow for resolving conflicts between rules, principles and moral standards rationally. On the contrary, such instruments give only an appearance of rationality to decisions based on mere intuition or simple prejudice, fulfilling a purely ideological function. In other words, if it is not possible to identify sufficient conditions for determining when a conduct should be considered correct, then when legal scholars propose answers for hard cases they will rely on purely intuitive, if not idiosyncratic, considerations.

This does not mean that defenders of the technological model are radically sceptical on matters of practical reasoning, or at least not in all the possible senses of ‘scepticism’. Although most of these authors are non-objectivists

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71 For a brief but effective presentation of the pluralism of values, I refer to Mauro Barberis, Etica per giuristi, Rome, Laterza, 2006, ch. V.

72 For different types of skepticism in meta-ethics, see Pierluigi Chiassoni, Tre esercizi per una critica del’oggettoivismo morale, Analisi e Diritto 2009; Jose Juan Moreso, El reino de los derechos y la objetividad de la moral, in Constitución: modelo para armar, Madrid, Marcial Pons, 2009, 69–94.
(they deny the existence of ultimate criteria of moral rightness), when these authors develop legal dogmatic works—proposing solutions for hard cases—they present practical arguments that seem rational, but in a different sense of the term 'rational' (in respect of the model of practical rationality that seeks to justify practical decisions based on norms, moral and/or legal values and principles).

A vaguely particularist conception in moral matters has often been attributed to these authors, that is, the thesis that what counts as moral reason in a particular case may have no relevance in another similar case. However, the thesis of these authors is much more plausible if we reconstruct the model of practical rationality that underlies their work, like that of consequentialist ethics. In other words, ethics—utilitarianism being the best known among them—that argue that the sole criterion to morally qualify an action is that it is suitable for, or contributes to, achieving the best possible state of affairs. Thus, the statements that morally qualify behaviours, as they indirectly deal with facts and causal relationships, result in having truth-value.

This does not mean that legal scholars should seek some purpose in law or intentions on the part of the legislator, nor that some kind of sociological, psychological or economic investigation will allow which is the best state of affairs to be discovered. Rather, the technological model of legal dogmatics requires that legal scholars choose a state of affairs as the best—making that choice explicit—and offering evidence for supporting that a particular legal solution is the appropriate one to attain this state of affairs.

Of course, there is still considerable discretion to the extent that, according to defenders of the technological model, we have no objective criteria for determining what is the best state of affairs. However, this type of practical reasoning has at least three advantages: first, it places our best knowledge about the world (the scientific) at the core of practical reasoning; secondly, practical discourse becomes more controllable since statements that morally qualify behaviours result in having truth-value; and finally, a conception of practical reason in this


75 For a brief but accurate introduction to ethical consequentialism, see the reconstruction of this offered in Juan Carlos Bayón, Causalidad, consecuencualismo y deontologicismo, in *Doxa* (1989) 6, 461–500.
way implies that choosing any course of action will be more rational because it is chosen based on objective criteria.\(^{76}\)

In addition to proposing solutions to hard cases, the technological dogmatics pays special attention to the reprocessing of legal concepts. In particular, defenders of the technological model propose to first reduce all legal concepts to the set of empirical facts referred to,\(^{77}\) expelling any concept from legal language that refers to non-existing entities or facts that it is not possible to confirm;\(^{78}\) second, to fragment the traditional legal concepts into different concepts of a smaller scope that refer to types of cases described in a richer way (fine cases); and, finally, to update these concepts in the light of the possible changes that may have occurred in the social reality.\(^{79}\)

### 2.5 Critical Legal Dogmatics

The latest model is the one which is typical of the critical theories of law.\(^{80}\) To summarize it in a slogan, the critical model of legal dogmatics—defended by movements such as Critical Legal Studies, Argentinian critical theory or Uso alternativo del diritto—it could be the following: the law is a continuation of politics by other means, thus legal scholars are political agents that must be aware of the important role they play, and they should act accordingly.

The critical doctrines of legal dogmatics hold some variant of the thesis of legal indeterminacy in its most common formulations. However, this view is common to many legal scholars, Crits and those scholars of other legal theories. What is characteristic of critical theories of legal dogmatics—at least in its most familiar version—is the (main) source of indeterminacy: the thesis of fundamental contradiction.

According to this thesis, the law of our legal systems would be underlayed by an ideology: political liberalism. Yet in liberalism—as the critics declare—there are sometimes two “spirits” of a contradictory nature present: individualism and

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\(^{76}\) See in this sense Mario G. Losano, Introduzione, in: Rudolf von Jhering, Der Zweck Im Recht (1877); in Italian trans. by Mario G. Losano, Lo scopo nel diritto, Torino, Einaudi, 1972.


\(^{78}\) Cohen 1960 (n. 18).

\(^{79}\) For an example of this type of analysis see William Douglas, Vicarious Liability and Administration of Risk, Yale Law Journal (1929) 38, 584–604.

\(^{80}\) Here I will focus on the Critical Legal Studies and the Argentinian Critical Theory. I shed light on the reconstruction of the critical model of legal dogmatics in these two movements to the detriment of others such as the Uso Alternativo del Diritto or the Critique du Droit, for several reasons: the first case, because the Critical Legal Studies—although little remains now of them—remain a reference for those wishing to do critical legal science, in the second, for the relevance of the contributions from Argentina that have been performed in this field and, finally, because the heterogeneity of critical legal theory is such that for clarity we should focus on some of them. Nor will I take into account other Latin American authors whose theses are also clearly positioned in the scope of the critical currents, such as Eros Grau or Oscar Correa.
altruism, that is, ethical-political values that are incompatible, and which would prevent its defenders from offering rational responses of an ethical-political or legal nature whenever a hard case is presented.\textsuperscript{81} This contradiction, however, does not allow us to take justified decisions, nor does it prevent legal scholars and legal practitioners from ending up deciding most disputes in favour of the individualistic aspect of liberalism.

The thesis of fundamental contradiction would not only be reflected in the field of contents; moreover, it finds expression in the context of the way in which law is structured. In particular, the difference between rules and principles would also show such a contradiction to the extent that a structured law based only on rules gives an appearance of certainty, encouraging legal actors to pursue their goals with the only limit of these rules, enhancing thus the individualistic aspect of liberalism.\textsuperscript{82} This image of a law based solely on rules is further reinforced by the programs of legal education, where a particular \textit{forma mentis} is reproduced, a way of conceiving the study and the application of law that presents jurist activity as politically neutral.\textsuperscript{83}

Now, if an objective knowledge of law (even at meta-jurisprudential level) is not possible, and any consideration about law is expressed from a political viewpoint, then—according to the critics—it is better to be aware of such conditioning and make a “legal dogmatics consciously committed”\textsuperscript{84} All of this because, by their categories and interpretations, the jurists would be willing to change both the way in which the law is applied (and in some sense to change the law itself) and to change the society itself, which is the ultimate goal of the critical model of legal dogmatics. We can articulate this committed dogmatics in two phases: a first critical phase and a second constructive one.

The critical phase is the systematic reporting of political mediations that are found in the description and application of law, both by other legal scholars as well as legal operators. In particular, what critics are interested in this phase is denouncing that what is presented as objective interpretations and necessary decisions are purely contingent and they are dependent on the preferences and ideologies of legal operators. Once the contingency of these solutions is noted, it is possible to question even the easy cases, discussing the underlying ethical-political choice, and proposing a new solution to the conflict between individualism and altruism.

\textsuperscript{81} The “classical” thesis about fundamental contradiction was made by Roberto Unger. See Roberto Unger, \textit{Knowledge and Politics}, New York, Free Press, 1975.


\textsuperscript{83} About legal education in the U.S., see Juan Antonio Pérez Lledó, \textit{La enseñanza del derecho}, Lima-Bogotá, Paletra-Temis, 2006.

The construction phase of the critical model of legal dogmatics is projected onto the image of the jurist (-intellectual) who is committed to serving a particular ideal of justice. This second phase involves constructing useful knowledge for social change, conceptual categories that serve to bring us closer to the ideal of justice. The ideal of justice that jurists should pursue and to which they should guide its activity is chosen—if, as these authors say, the law is indeterminate—by each legal scholar autonomously, although most critical movements remain on the left political wing, the radical and the emancipatory. To this purpose, it is necessary that legal scholars understand law as a part of a larger social system, thus generating new knowledge based on different disciplines and approaches to the law.85

## 3 HOW TO DO THINGS WITH METHODS

Slightly modifying a quotation from Felix Cohen,86 it can be said that there are three important issues in the field of theory of legal science (the meta-discourse or study of the science of law): what legal scholars do; what they should do and what they can do.

While the reconstruction of five models of legal science in the previous section presented different normative models of legal science, it constitutes a sufficiently wide response—but not exhaustive—to the last question. Now it is necessary to say something about the first two questions: what legal scholars do (3.1) and what should they do (3.2). What follows is not intended to be anything else than a first step in that direction, since answering both questions satisfactorily would require a separate work.

### 3.1 What Legal Scholars Do

In relation to the empirical question as to which model of legal science has the greater prestige, it is necessary to differentiate between two different issues: first, which model has greater support among the theorists of legal science from

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85 Important in this respect are legal studies from the psychoanalytic point of view of Enrique Marí. For a summary of the positions held by Marí, see Christian Courtis, Enrique Marí (1928–2001), Doxa (2001) 24, 5–19. For a discussion about the different meanings that the concept of “multidisciplinary” can take in studies of law, claimed and assumed by much of the critical legal theory, see François Ost, Science du droit, in André-Jean Arnaud et al. (eds.), Dictionnaire encyclopédique de théorie et de sociologie du droit, Paris, Librairie générale de jurisprudence et de droit, 1988.

86 “Fundamentally there are only two significant questions in the field of law. One is ‘How do courts actually decide cases of a given kind.’ The other is, ‘How ought they to decide cases of a given kind.’ Unless a legal ‘problem’ can be subsumed under one of these forms, it is not a meaningful question and any answer to it must be nonsense”. Cfr. Cohen 1960 (n. 18), 49-50.
the normative point of view?; and second, what model of legal science *ampio sensu* is more widely accepted in the practice of legal scholars?

As it has been said before, while there are several doctrines about what legal scholars should do, the majority of jurisprudence theorists subscribe—at least in Western legal culture—to some variant of the argumentativist model, and to some variant of the normativist model. The realistic, critical and technological models receive less support among those who are behind the normative theory of legal science, thought it is possible to find some defenders of these, too.

Quite similar is the answer to the question of which method legal scholars use in their research: while some scholars adopt some variant of realistic models and critical technology, further methods are practiced in this order, first the normativist and later the argumentativist.87 However, this does not mean that other models are not subscribed and used by a number of scholars, but only that those are not the majority.

### 3.2 What Legal Scholars Should Do

The question of what legal scholars should do also allows for two different interpretations: first, it can be—and often it has been—interpreted as a technical question (3.2.1); but it has also been interpreted as a normative question in ethical-political or moral sense (3.2.2).

#### 3.2.1 A Technical Question

From the first point of view, the question of what legal scholars should do allows two further interpretations which generate two different questions and to which partial responses have been offered. However, given its importance, it seems appropriate to insist on these arguments.

i) The question of what legal scholars should do has been formulated as a dependent question to that about our best concept of law. Which method should legal scholars employ would simply be a corollary about what is our best concept of law, what law “really” is.

However, focusing on the issue in these terms is, as we have seen, a bad idea. First, because we have different concepts of law in competition with which we can build different methods to study the content of law. If the adequacy of a concept depends, among other factors, on its consistency within a given theory—and therefore on the research objectives that are pretended to be achieved by it—then the concept of law cannot determine which method should be used by legal

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87 It should be noted that the main tendency among legal scholars is—although this depends on the legal culture of reference—a combined use, and often undifferentiated, of argumentativist and normativist methods. That is, a large number of scholars combine the methodological tools of both models, but not in a fully conscious manner.
scholars. Putting the question of the concept of law before the normative question about what legal scholars should do is like putting the cart before the horse.

Second, because those that appear to be the best candidates within the legal philosophical debate to occupy the position of the concept of law (the one that legal scholars should employ to identify their object of study), are conceptual reconstructions based on intuitions about what legal theorists consider what legal operators believe is the legal practice.\(^{88}\) Beyond the fact that these intuitions are often contradictory—otherwise such philosophical reconstructions would not be necessary—these concepts of law intend to account for the totality of legal practice. For this reason, those are unwieldy for legal scholars, and seem rather to respond to the final product of the research of those, not the criteria that should be used by them to identify the object of study (the function that the concept of law should accomplish).

ii) Much of the discussion about which should be the method used by legal scholars has been discussed in meta-scientific terms, that is, analysing which method they should use to consider their activity as scientific (at least under any of the scientific criteria available).

However, as authors such as Nino have said,\(^ {89}\) it is not a good idea to reduce the question of what legal scholars should do to the criteria of any conception of science—although the right reason for not doing it is not what many defenders of the argumentativist dogmatics believe. Indeed, the problem is not that the models of legal science in the strict sense are irrelevant\(^ {90}\)—to know how judges will decide future disputes or what is the interpretation according to the linguistic conventions is relevant to any legal operator—but that all activity, even scientific practice, requires a practical justification.

The first reason is that the scientific method can be applied to countless objects of study but such investigations can never be considered justified by this: consider, for example, a predictive and rigorous study on the number of vowels that will be used in a judicial decision.

The second reason is that if we try to universalize the argument, and we interpret it \textit{a contrario} (in its productive version), it seems unacceptable to the extent that only scientific activities would be justified. Any other activity—i.e.

\(^{88}\) Much of the conceptual analysis developed in recent decades about the concept of law claims to be based on the beliefs of the legal operators about what the law is. However, in such investigations empirical evidence is not normally provided as a basis for attributing these beliefs to legal operators. Rather, what usually happens is that legal theorists ascribe their own conception of what the law is to legal operators. See in this regard Leiter 2007 (n. 63), 13 ff.

\(^{89}\) Nino 1989 (n. 13), 13 ff.

\(^{90}\) Atienza and Ruiz Manero claim that a legal science and/or a purely descriptive legal theory would be irrelevant because they would not serve for solving hard cases. Cfr. Atienza and Ruiz Manero 2007 (n. 57); Nino 1999 (n. 5), ch. I, III.
lege ferenda or sententia ferenda research—would not be justified on the basis of this argument, and it seems a very implausible consequence.

3.2.2 A Normative Question

The second way to interpret the question of what legal scholars should do is to shape it as a genuinely normative question of an ethical-political or moral nature. In particular, as the question of the contribution that legal scholars have to make to the legal community.

There is a first set of arguments to justify that choosing a legal method is a moral question. If we define ‘moral values’ like those that do not require or permit further arguments for justifying a decision, then it can be said that any choice can be qualified as moral. Perhaps this thesis is true, but it probably does not have much interest. Nonetheless, from a second point of view it is possible to state that it is necessary (for conceptual reasons) to use some of the most important values that are normally considered moral values, for justifying the choice of method.

However, as any reasoned response to any practical problem, it is not based solely on axiological considerations but empirical and theoretical considerations are also relevant. Among the reasons that have to play a decisive role in choosing between the possible methods for establishing the content of law we can find at least the following types of reasons:

a) Theoretical-legal reasons: for example, what interpretation is about, doctrines of the sources of law, what is the nature of legal concepts, etc.

b) Philosophical reasons in general, whether epistemological, ontological or meta-ethical such as the positions on what is considered justified knowledge, what are the entities that exist, the truth values of moral statements, etc.

c) Considerations of the empirical, political, economic and socio-legal reality, such as the level of litigation within the legal community, what is the degree of disagreement within that community, a social change or a change in production methods, a moment of institutional crisis, etc.

d) Reasons of a moral or political ethical nature, concerning the contribution that legal scholars have to make to the legal community. That is, the role to be played by legal scholars in the development, education, knowledge, interpretation and application of law.\footnote{I stop at this point because many realists have held, and currently hold, that legal scholars should not engage themselves in legal practice but only in describing it, or that its activity should not take into account their potential impact on legal practice. However, to the extent that they intend that their research would not be irrelevant to the practice of law—that it would be considered reasons for action by someone—the thesis seems implausible. Given this last argument, two further arguments can be presented. In the first, the activity is relevant but does not require a moral justification. According to the second, the activity of legal scholars should not be relevant to legal practice.}
This is not the place to explain how each of these criteria justifies the adoption of a particular model of legal science (ampio sensu). Rather, here I defend the conceptual thesis\(^\text{92}\) by which it is (conceptually) necessary to use ethical-political or moral reasons in order to qualify the choice of one of the methods for establishing content of the law as justified. Of course, I’m not arguing that all legal scholars will decide which method they will use in resorting to moral considerations (the empirical question), nor should they necessarily introduce value considerations in its methodology for determining the content of law (the methodological question). What I hold is that in order to be justified, the choice of the method of legal scholars must be based on moral reasons (for conceptual reasons).

For understanding in what sense the ethical-political or moral reasons play a conclusive role in the methodological choice it is advisable to start with some examples. Imagine, first, a legal scholar who believes that the best definition of the concept of law is the one presented as a set of norms from normative authorities, that there is a considerable agreement on what criteria and techniques should be used to interpret the law, and that the number of hard cases is marginal. So, it would be plausible to think that, due to legal-theoretical reasons, he should adopt the method of normativist legal science.

The first argument can be summarized as follows: in the same way that we do not consider knowing the laws of aerodynamics as an activity that requires a moral justification, nor would it predict how judges will decide future disputes. Now, we do not know the laws of aerodynamics for the mere fun of it but because this knowledge will be useful for other activities, in particular, as necessary knowledge for technical activities, such as building airplanes. In this sense, it is aircraft construction (or any other technical activity) which justifies the knowledge of the laws of aerodynamics (or any other scientific activity). However, if we build airplanes then it is not for the mere fun of it but because we consider the result of such activity valuable. That is, because we consider these objectives as morally valuable. Similarly, knowing how judges will decide is a worthy purpose because you can perform some activities that we consider valuable – as guiding our behaviour – that actually affect legal practice. According to the second argument, the activity of legal science simply does not have to impact on legal practice. In response to this argument, it is possible to pose two further arguments: first, it is almost impossible that the activity of legal scholars have no impact on legal practice, unless it is kept concealed; secondly, it would be possible to question, then, why it is important to study the content of law, that is, to make legal science (ampio sensu). Everyone, including the realists, is in the same boat in the legal community. On this point, the discussion between Brian Leiter and Julie Dickinson can be followed. Cf. Julie Dickson, Methodology in Jurisprudence: a critical survey, Legal Theory 10 (2004) 3, 117–156; Leiter 2007 (n. 63), 148 ss.

92 This is not a normative thesis about what legal scholars should do but a conceptual thesis about when we can consider a decision as justified from a formal point of view. In short: if the decision affects moral goods, the decision cannot avoid referring to these goods. It is not that the decision would be wrong from the material point of view, but it would be incongruous to decide moral issues by reference to non-moral reasons. Something similar would happen if we try to resolve empirical or conceptual questions through moral reasons.
However, it is perfectly possible to accept this thesis and to hold, without falling into contradiction, that legal scholars should devote themselves to proposing solutions for hard cases. For example, the description of the content of law could be for this hypothetical scholar—because in order to know the deontic qualification of behaviour it is enough to apply interpretive methods existing in the legal community—an irrelevant activity because any informed person knows the conventional interpretation of the statements of the legislator. On the contrary, the scholar may consider that what he should do is to suggest solutions for cases for which the law is indeterminate because in such way he improves the decisions of the courts, even if it were necessary to resort to non-legal considerations or expand their concept of law.

Secondly, the opposite situation is also possible. Imagine a scholar who believes that the law includes some principles and values that we can know and use to identify a single right answer for hard cases. However, this second hypothetical legal scholar might consider that—since judges do not read legal dogmatics, they systematically move away from these right decisions, or because there is much disagreement among them—he should devote his research to predicting how judges will decide future disputes. That is, although reasons might be offered to establish which is the best answer to hard cases, for this second scholar it would have greater moral value to make predictions on how judges will decide, because that would promote legal security and, therefore, the autonomy of the subjects.

Positions like these are not necessarily contradictory. But why should moral or ethical-political criteria determine methodological choice? Since the activity of legal scholars should be relevant—that is, that the result of their activity would be taken into account as a reason—in the action of legal operators, such activity must have a moral basis. The reason is that the activity of legal operators—their education, and the creation, interpretation and application of law—affects ethical-political or moral goods (life, liberty, equality, autonomy, political stability, etc.) so, in the same way, the results of the research work of legal scholars affect such moral goods. Therefore, given that legal scholars influence—albeit indirectly—the treatment of moral goods protected by the order, then the justification of the method—for reasons of consistency—must refer to moral reasons.

If the reasons for adopting a particular model of legal science (*ampio sensu*) are of a moral or political ethical nature, and different research objectives require different coherent methods for such purposes, then the legal scholar must take his own methodological premises based on the research objectives pursued. What concept of law, what theory of interpretation or what ontology of legal rules is chosen will depend on the objective pursued by the legal scholar:
to describe rules according to linguistic conventions, to predict court decisions or to propose normative solutions for easy and hard cases.

3.3 Some Reasons for Legal Science

To analyse what are the moral reasons that justify the adoption of each of these models of legal science (ampio sensu) unfortunately exceeds the scope of this work. Nonetheless, to finish, I would like to highlight some of the moral reasons that can be used in support of each of these methods.

3.3.1 Reasons for Normativist Legal Science

At least two reasons can be pointed to as justification for the normativist method. First, the preference for normativist method may be based on the political consideration that a legal document or legal authority should be given greater respect in the practice of the courts as, for example, the rules from a democratic legislator, or the norms of the constitution. Normativist legal science thus would become the guardian of the sources of law, ensuring that a valid law is not modified, especially during the adjudication process.

Second, normativist method finds justification on the principle of rationality, because presenting the content of law in an orderly and systematic way facilitates the identification of gaps, contradictions and redundancies, promoting wholeness and coherence of the legal system. Thus, such a model would find justification—even indirectly—on the principle of legal certainty.

3.3.2 Reasons for Realistic Legal Science

The realistic model of legal science has frequently been justified by its advocates as the only scientific way to address the study of the content of law. However, we have already seen that this is not a good justification for any model of legal science.

Nevertheless, it is possible to offer some practical or moral arguments in favour of the realistic method. First, to know how judges will decide future controversies is relevant to the general public: to the extent that court decisions affect moral goods, to know how judges will decide allows anyone to plan his own behaviour rationally. For example, to know under what conditions it is possible to end up in jail has moral significance because it allows the planning of our actions, which involves a greater degree of autonomy.

94 Ferrajoli 1983 (n. 42).
Second, legal operators (legislator, judges, lawyers, etc.) have a special interest in knowing what the consequences of one's own actions at the judicial level will be: how a reform will be implemented, when one's own decision will be rejected by the higher courts or what possibilities exist to win a court case. The realistic method finds, in this way, justification by the greater degree of rationality and higher probability of pragmatic success of decisions made taking into account how these actions will be considered by the courts, which also promotes the better functioning of the legal system.

3.3.3 Reasons for Argumentativist Legal Dogmatics

Regarding the argumentativist model of legal dogmatics, it seems beyond doubt that the main practical justification is based on the moral or ethical-political quality of the proposed solutions for hard cases. That is, it would be justified to adopt the argumentativist method precisely because it serves, at least according to its advocates, to obtain the best possible response.

However, it is possible to wonder why it is important to propose answers (or the best answer possible) to hard cases. The question, while apparently banal, allows for two different answers. First, to provide the best possible solution to a hard case would have an intrinsic value. That is, in the same way that telling the truth would be good—at least accordingly to some value systems—in itself, it would be the same presenting which is the correct answer.

Second, a proposed solution to a hard case can have instrumental value in two different ways: first, because providing the best answer possible—for example, through a comment in a specialized publication—makes it more likely to be finally adopted by the courts; second, even though it was not “really” the best possible answer, to give reasons and/or arguments supporting some of the possible solutions is valuable to the extent that it contributes to the discussion on what it is due to do.

3.3.4 Reasons for Technological Dogmatics

In the same way as in the case of argumentativist dogmatics, technological dogmatics finds its justification first in the goodness or rightness of the solutions taken in using it.

However, based on the criticisms that advocates of technological dogmatics direct, mainly against argumentativist dogmatics, it is possible to provide ad-

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96 See, in this regard, Núñez Vaquero 2011 (n. 41).
97 I have developed this argument extensively in Álvaro Núñez Vaquero, Ciencia jurídica realista: modelos y justificación, in Doxa (2012) 35.
98 See, among others, Ronald Dworkin, In Praise of Theory, in Justice in Robes, Cambridge Massachusetts, Harvard University Press, 2006, ch. II.
ditional reasons that would justify the technological method. First, the greater controllability of the proposed solutions to hard cases. If, as defenders of the technological model claim, the argumentativist method would serve only as *ex post facto* justification of decisions based on non-explicit reasons (and therefore not subject to analysis and control), then the technological model could be justified because it is a method that allows the proposed solutions to be more rationally controlled. Also, the adoption of this method would increase the chances of pragmatic success—in the sense that it achieves the goals it sets—of those decisions.

Second, if the adoption of this method is used to discard those solutions that are not instrumentally suitable to achieve the state of affairs that is considered better, then this method also supports the certainty of law and therefore autonomy. This is because if one of the possible answers to the hard case is shown to be irrational—in the sense that it is not enough to achieve the stated objective—it is less likely that it would be adopted by any court and, in this way, the degree of legal certainty increases.

### 3.3.5 Reasons for Critical Legal Dogmatics

Again, and as with argumentativist and technological dogmatics, the primary justification for supporting the critical model is founded on the moral or ethical-political rightness of its proposed solutions for hard cases.

However, in the case of critical legal dogmatics, as it proposes converting easy cases in hard cases, it requires greater effort in terms of justification. This is because the aim is not only to make proposals for hard cases but also to propose new or different solutions for easy cases, modifying the conventional legal solution, which seems to go against the principle of legal certainty.

That being said, the critical model of legal dogmatics finds more justification precisely where the legal system of reference is considered to be very unfair. In this sense, it is plausible to say that where the law is unjust, it would be more justified that legal scholars devote their efforts to also proposing solutions to hard cases.

The method which should be used by legal scholars is a question that depends on different factors, and probably cannot be answered in abstract terms. Here I have only tried to provide a map of the different models of legal science and to clarify what kind of arguments justify the choosing of one of the methods.

*Translated from Spanish by Ester González Bertrán.*