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# RESPONSE

## META-INTERPRETIVE QUESTIONS AND THE AIMS OF THEORIES OF INTERPRETATION: BEYOND THE REMEDIAL ANSWER<sup>†</sup>

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### CONTENTS

|                                                                 |      |
|-----------------------------------------------------------------|------|
| INTRODUCTION .....                                              | 1458 |
| I. THE ROLE OF THEORIES OF INTERPRETATION .....                 | 1461 |
| A. <i>What Theories of Interpretation Do</i> .....              | 1461 |
| B. <i>Why Do We Need Them?</i> .....                            | 1464 |
| C. <i>From Theories to the Meta-Interpretive Question</i> ..... | 1465 |
| II. ANSWERS TO THE META-INTERPRETIVE QUESTION .....             | 1466 |
| A. <i>The Question and an Answer</i> .....                      | 1467 |
| B. <i>Two Additional Answers</i> .....                          | 1468 |
| CONCLUSION .....                                                | 1472 |

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<sup>†</sup> An invited response to Bill Watson, *What Are We Debating When We Debate Legal Interpretation?*, 105 B.U. L. REV. 1407 (2025).

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## INTRODUCTION

Bill Watson begins his important and characteristically sophisticated Article by observing that “[d]ebates over legal interpretation—on how to interpret constitutions, statutes, and the like—show little sign of nearing resolution.”<sup>1</sup> These debates, for whatever reason, seem more pronounced in the United States than elsewhere.<sup>2</sup> Here, scholars and practitioners fall into “[d]ifferent camps,” with none of these camps winning over “a consensus among judges or theorists today.”<sup>3</sup> In this context, it is understandable that legal scholarship devotes some effort to “meta-interpretive” questions: questions not about how to interpret directly, but about how to think about such questions. “Meta-interpretive” theories are not theories about how to interpret (like originalism, textualism, intentionalism, purposivism, etc.)<sup>4</sup> but rather about how to approach the question of how to interpret—including how to assess interpretive theories and organize interpretive debates.

Interpretive choice theories are one such kind of meta-interpretive theory.<sup>5</sup> Sometimes, this is referred to as “meta-interpretation.”<sup>6</sup> One of the many

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<sup>1</sup> Bill Watson, *What Are We Debating When We Debate Legal Interpretation?*, 105 B.U. L. REV. 1407, 1410 (2025).

<sup>2</sup> See, e.g., Jamal Greene, *Interpretation*, in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 887, 888 (Mark Tushnet, Mark A. Graber & Sanford Levinson eds., 2015) (“[C]onstitutional conflict in the United States is almost exclusively channeled into the discourse of interpretation rather than formal constitutional change.”).

<sup>3</sup> Watson, *supra* note 1, at 1410.

<sup>4</sup> See, e.g., Walter Benn Michaels, *A Defense of Old Originalism*, 31 W. NEW ENG. L. REV. 21, 21-26 (2009) (defending original intentions originalism and dismissing public meaning originalism as “theoretically incoherent”); Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1957 (2021) (explaining original public meaning originalism); RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT 9, 13-14 (2012) (arguing for intentionalism); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 78 (2006) (explaining the differences between textualism and purposivism); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 351-53 (2005) (discussing differences between textualism and intentionalism).

<sup>5</sup> These theories frame debates among different theories of interpretation as a choice, with the different methods of interpretation proposed by the different theories of interpretation (originalism, textualism, etc.) as alternatives for this choice. See, e.g., CASS R. SUNSTEIN, HOW TO INTERPRET THE CONSTITUTION 8 (2023) (“How should we choose a theory of constitutional interpretation?” (emphasis omitted)); Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 537-38 (1999) (referring to a choice of “constitutional theory”); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 76 (2000) (referring to a “choice of interpretive doctrine[s]”); Francisco J. Urbina, *Reasons for Interpretation*, 124 COLUM. L. REV. 1661, 1669 (2024) (defining “[i]nterpretive choice” as “a choice of methods of interpretation”).

<sup>6</sup> This terminology is mostly associated with Shapiro’s work. See SCOTT J. SHAPIRO, LEGALITY 304-06 (2011); see also Nina Varsava, *How to Realize the Value of Stare Decisis: Options for Following Precedent*, 30 YALE J.L. & HUMANS. 62, 67 (2018); Piotr Bystranowski & Kevin Tobia, *Measuring Meta-Interpretation*, 180 J. INST. & THEORETICAL ECON. 281, 284 (2024). All above sources cited in Watson, *supra* note 1, at 1411 n.10.

contributions in Watson's paper is to give us a more expansive idea of meta-interpretation. Meta-interpretive theories do not need to be about interpretive choice. Another crucial issue is the one addressed by Watson, "regarding what we are debating when we debate legal interpretation."<sup>7</sup> What are theories of interpretation about exactly? What are they disagreeing about?

These questions open a fruitful field of inquiry. Watson offers an answer to them. Having surveyed different alternatives,<sup>8</sup> Watson argues that "the debates are (or at least should be) mainly about interpretation in a *remedial* sense: They concern how to go on when a legal text's effect on the law is underdetermined."<sup>9</sup> This conclusion relies on a thesis of general jurisprudence, Hartian Positivism.<sup>10</sup> "According to Hartian Positivism, every jurisdiction has social rules, called 'rules of recognition,' that identify and validate the jurisdiction's legal norms. Put simply, "'rules of recognition tell us which types of facts make law around here.'"<sup>11</sup> This means, Watson explains, that "rules of recognition must at least identify their jurisdiction's *sources of law*."<sup>12</sup> Watson also assumes that "rules of recognition determine not just what counts as a source of law but also how any such source contributes to the law."<sup>13</sup> More concretely, "[o]fficials in the United States seem to converge on the criterion that a legal text's clear communicative content—or in lawyerly terms, its 'plain meaning'—fully determines its contribution to the law."<sup>14</sup> By plain meaning, Watson means "communicative content that is beyond reasonable dispute."<sup>15</sup> Because plain meaning runs out, the law (legal content, the legal norms that follow from a legal

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<sup>7</sup> Watson, *supra* note 1, at 1411.

<sup>8</sup> *See id.* at 1412-18.

<sup>9</sup> *Id.* at 1412.

<sup>10</sup> *See id.* at 1420.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1423.

<sup>13</sup> *Id.* at 1427. As Watson explains, this is a more controversial position. *See id.* (acknowledging that not all Hartian Positivists agree that rules of recognition play a role in how legal texts contribute to the law); Felipe Jiménez, *Legal Principles, Law, and Tradition*, 33 YALE J.L. & HUMANS. 59, 81-84 (2022) (cited in Watson, *supra* note 1, at 1427 n.96). *See also* Luka Burazin & Giovanni Battista Ratti, *Rule(s) of Recognition and Canons of Interpretation*, in JUDGES AND ADJUDICATION IN CONSTITUTIONAL DEMOCRACIES: A VIEW FROM LEGAL REALISM 123-24 (Pierluigi Chiassoni & Bojan Spaić eds., 2021) (arguing that "the rule of recognition sets the criteria only for sources of law and not legal norms themselves"). Part of the motivation for the view that the rule of recognition sets criteria only for sources is to accommodate interpretive disagreement. *See id.* at 124 (explaining "the theoretical disagreements objection" in terms of interpretive disagreement being incompatible with the convergent practice underlying the rule of recognition). Watson's remedial answer seems to at least assuage this concern, since his framework accommodates interpretive disagreement, which takes place when the law "runs out." *See* Watson, *supra* note 1, at 1430-38.

<sup>14</sup> Watson, *supra* note 1, at 1420.

<sup>15</sup> *Id.*

source) runs out too.<sup>16</sup> “Insofar as the text’s plain meaning cannot resolve a case, there is no legally correct answer to what the text requires in that case.”<sup>17</sup> Here is where theories of interpretation, and the debates about them, play a role:

[I]nterpretive theories concern how legal actors should proceed when a legal text’s contribution to the law is underdetermined. Interpretive theories are primarily about how legal actors should exercise the discretion that the law affords them to fill in the law’s gaps—how they should use their own moral-political judgment within legal bounds.<sup>18</sup>

Watson’s rich and sophisticated argument makes several contributions. It expands our understanding of meta-interpretation. It offers an original recasting of interpretive debates. It raises the question of whether there is something distinctive about plain meaning—a question turned into an incisive critique of originalism in other work by Watson.<sup>19</sup> More fundamentally, Watson’s argument shows, in a positivist vein, how legal content interacts with interpretation.<sup>20</sup>

Here, I focus on two aspects of the argument: The role of theories of interpretation (in Part I) and whether interpretive debates should be about remedial interpretation only (in Part II). Adopting Watson’s premises on Hartian Positivism and plain meaning, I argue that theories of interpretation and interpretive debates could concern two issues distinct from remedial interpretation. First, they could articulate different ways of deriving norms from legal sources, regardless of whether this aligns with legal content. Second, they could entail proposals of change to the rule of recognition.<sup>21</sup> These inquiries lead

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<sup>16</sup> For a tentative defense of the opposite view, see Charles F. Capps, *Does the Law Ever Run Out?*, 100 NOTRE DAME L. REV. (forthcoming 2025) (manuscript at 3-6) (on file with author).

<sup>17</sup> Watson, *supra* note 1, at 1430.

<sup>18</sup> *Id.* at 1437.

<sup>19</sup> See Bill Watson, *The Plain-Meaning Fallacy*, 67 B.C. L. REV. (forthcoming 2026) (manuscript at 4) (on file with author) (explaining the fallacy in “assuming that the benefits of enforcing plain original meaning extend to enforcing less than plain original meaning too”).

<sup>20</sup> Mark Greenberg has done much to put this question in the foreground. See, e.g., Mark Greenberg, Response, *What Makes a Method of Interpretation Correct? Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105, 105-07 (2017) (“The more general point is that what makes a method of legal interpretation correct is that it accurately identifies the law. Consequently, . . . answers to questions about legal interpretation depend on how the content of the law is determined at a more fundamental level than legal standards.”); Mark Greenberg, *Legal Interpretation and Natural Law*, 89 FORDHAM L. REV. 109, 109-10 (2020) (“Behind the familiar question of what method of interpretation is the right one lies a more fundamental question: what does legal interpretation, by its nature, seek? . . . [R]oughly speaking, legal interpretation seeks the contribution that statutory and constitutional provisions make to the content of the law.”). Watson makes a unique contribution in showing the distinctive way this question looks from the point of view of Hartian Positivism.

<sup>21</sup> Watson most frequently uses the term “rules of recognition.” In what follows I use “the rule of recognition,” which I take to be more common. I do not think anything of substance for my argument (or Watson’s) depends on this terminological issue or on whether there is

to additional answers to the meta-interpretive questions, alongside Watson's remedial answer. None of this denies the relevance of the remedial answer; rather, it draws on Watson's fruitful categories and questions to suggest other possible answers that may also be relevant. I take my comments to be largely compatible with, and complementary to, Watson's arguments.

## I. THE ROLE OF THEORIES OF INTERPRETATION

### A. *What Do Theories of Interpretation Do?*

What do theories of interpretation do? One approach is that theories of interpretation "concern how legal actors should proceed when a legal text's contribution to the law is underdetermined"<sup>22</sup> or "how legal actors should proceed in . . . hard cases."<sup>23</sup> Formulations of this kind are standard.<sup>24</sup> But what aspect of how legal actors "should proceed" are interpretive theories about exactly? Not everything legal agents should do in the face of underdeterminacy is the concern of theories of interpretation. For example, judges must decide a case even in the face of legal underdeterminacy, but it is implausible that all aspects of how judges should decide a case are the subject matter of theories of interpretation. An example of a consideration that arguably is not part of an interpretive theory is a consideration relating to the parties themselves, such as whether the decision should somehow reflect a special concern for a weaker party or the victim of a harm. So, we need a more precise account of what theories of remedial interpretation are about. This is not a critique of Watson, because he does provide one: "[o]n the remedial view, a textualist and a purposivist who disagree over *Taniguchi* are disputing how the justices should have evaluated and selected from a range of candidate norms that the relevant statute could have contributed to our law."<sup>25</sup>

Note that here interpretation aims at arriving at a norm, but this need not be a *legal* norm, in my view. If interpretation is an activity that derives a norm from

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one rule of recognition in a given jurisdiction or several. See Watson, *supra* note 1, at 1420 n.61.

<sup>22</sup> *Id.* at 1437.

<sup>23</sup> *Id.* at 1412.

<sup>24</sup> See, e.g., Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 Nw. U. L. REV. 269, 296 (2019) ("[D]ebates about statutory meaning in reasonably disputed cases . . . are debates about how judges should decide cases when a statute's linguistic meaning is underdeterminate."); JOHN GARDNER, *LAW AS A LEAP OF FAITH: ESSAYS ON THE LAW IN GENERAL* 123-24 (2012) (arguing that interpretive debates are "moral and political debates about what judges should do when they interpret . . . [and] change the meaning of the text"). Both sources are cited in Watson, *supra* note 1, at 1418 n.46.

<sup>25</sup> Watson, *supra* note 1, at 1417. See also *id.* at 1430 ("After exhausting a legal text's plain meaning, some officials may continue parsing its text in context, but others may turn to its legislative history . . . or something else. That is, officials may employ a variety of means to evaluate and select from a range of candidate norms that a text could have added to the law." (footnote omitted)).

a legal source (such as a text),<sup>26</sup> that norm *could be* a legal norm, but it need not be. If the norm derived from the legal source corresponds to actual legal content produced by an actual legal source—its “contribution to the law”—it is a legal norm.<sup>27</sup> As mentioned above, Watson believes that rules of recognition do not only identify legal sources, but also “play a role” in “*how* legal texts . . . contribute to the law”<sup>28</sup> and that rules of recognition in the United States adopt the “criterion that a legal text’s clear communicative content—or . . . its ‘plain meaning’—fully determines its contribution to the law.”<sup>29</sup> If this is so, then if the text’s plain meaning entails a norm,<sup>30</sup> and legal interpretation ascertains that norm, then legal interpretation ascertains a legal norm.

However, the legal norms thus derived may be insufficient *in practice*. Legal interpretation typically takes place in the context of a practical activity, such as deciding cases, adopting regulations, passing legislation, or drafting a contract.<sup>31</sup> These activities may require settling on an applicable norm precise enough to address the needs of the situation, even when legal content runs out. Take

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<sup>26</sup> See Fábio Perin Shecaira, *Sources of Law Are Not Legal Norms*, 28 *RATIO JURIS* 15, 19-20 (2015) (adopting a “broader” concept of interpretation and justifying its adoption). For Shecaira, “legal norms” are “the normative propositions (or meaning-contents) which can be derived from sources.” *Id.* at 17. The notion of legal norms that I adopt here is more restricted, referring not to any norm that could be derived from a legal source, and not even to norms that could be derived following some standard approaches to interpretation (such as intentionalism, textualism, etc.), but to those norms that correspond to actual legal content. There is nothing wrong with Shecaira’s definition of legal norms. I do not adopt it to avoid a possible misunderstanding, since some readers may read “legal norms” to mean norms that necessarily correspond to legal content. Those readers may take my definition of interpretation to commit me to the view that legal interpretation always yields norms that necessarily correspond to legal content. I am grateful to Bill Watson for discussion on these matters. See *infra* Section II.B.

The notion of interpretation adopted here is broader than one associated with the “interpretation-construction distinction.” See Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 *CONST. COMMENT.* 95, 95-96 (2010) (defining interpretation as “discover[ing] the linguistic meaning . . . of the legal text” and construction as “the process that gives a text legal effect”). The reasons for adopting a broader sense of interpretation are analogous to those offered in Urbina, *supra* note 5, at 1716-22 (arguing that interpretive choice is concerned with both interpretation and construction).

<sup>27</sup> See Watson, *supra* note 1, at 1431-32.

<sup>28</sup> *Id.* at 1429; see also sources cited *supra* note 13.

<sup>29</sup> Watson, *supra* note 1, at 1429.

<sup>30</sup> To my mind, this way of formulating the role of plain meaning in determining legal content is agnostic to how exactly plain meaning determines legal content. See Bill Watson, *In Defense of the Standard Picture: What the Standard Picture Explains That the Moral Impact Theory Cannot*, 28 *LEGAL THEORY* 59, 80-87 (2022).

<sup>31</sup> See PIERLUIGI CHIASSONI, *INTERPRETATION WITHOUT TRUTH: A REALISTIC ENQUIRY* 19 (2019) (acknowledging the “practical purpose to which textual interpretation is being performed”).

*Taniguchi v. Kan Pacific Saipan*,<sup>32</sup> Watson's running example.<sup>33</sup> Does "a statute permitting prevailing parties to recover 'compensation of interpreters' appl[y] to costs incurred for translating written documents"?<sup>34</sup> Plain meaning does not point either way. It is compatible with both a norm allowing prevailing parties to recover costs incurred only for oral translators and a norm allowing them to recover costs incurred for oral and written translators. But the practice of adjudication requires applying a norm such as these, and, in this case, applying one or the other.

Here, interpretation derives a norm from a source (the statute) that goes beyond the legal content produced by the statute. If one reserves the term "legal norm" only for legal content, then the norm that interpretation yields in this case is not a legal norm, though it is a norm needed and acted upon by legal practitioners.<sup>35</sup> Interpretation in this case of underdeterminacy is Watson's "remedial interpretation." Remedial interpretation gets to norms that are not part of legal content. Theories of remedial interpretation are theories about how to do this interpretive exercise. They articulate what interpreters should attend to in a legal source to derive norms from it: authorial intention, objective purpose, original public meaning, or something else.

Note that the norm arrived at through interpretation (including, in my view, remedial interpretation) is a norm *derived from a source*. This is distinctive of interpretation. If this norm is still insufficient for the practical needs of the situation, there may be a need to undertake a different activity, a more creative enterprise of elaborating doctrine or decision rules to supplement that norm. One can call this last activity "construction," "implementation," or something else.<sup>36</sup> Regardless of the terminology, these two activities are distinct.<sup>37</sup>

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<sup>32</sup> 566 U.S. 560 (2012).

<sup>33</sup> See generally Watson, *supra* note 1, at 1413, 1416-17.

<sup>34</sup> *Id.* at 1413.

<sup>35</sup> It may also become a legal norm if the norms that (a set of) practitioners derive from sources and act upon (in a specific way) are recognized by the legal system as legal norms. For example, practitioners may have a legal power to "make" law through their interpretation and application of the law, or custom may recognize that law over time, etc. I am grateful to Bill Watson for discussions on all this.

<sup>36</sup> See Mitchell N. Berman, *Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space*, 27 CONST. COMMENT. 39, 40 (2010) (discussing different theories and terms for this activity).

<sup>37</sup> See RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 38 (2001) (distinguishing between an activity of "identifying constitutional norms and specifying their meaning and another of crafting doctrine or developing standards of review"); Stephanie Barclay, *Constructing Constitutional Rights*, 138 HARV. L. REV. F. 140, 145-46 (drawing this distinction); Berman, *supra* note 36, at 67 (same). The terminology is tricky here because the term "construction" could be used for either of the two activities mentioned above, or for both of them. See Berman, *supra* note 36, at 50-53 (surveying different alternatives on how to systemically place the determination of legal content in the interpretation-construction distinction); Barclay, *supra* note 37, at 145 (explaining different types of "construction").

B. *Why Do We Need Them?*

When the law runs out, but interpreters still have a practical need for a more precise norm, they can resort to remedial interpretation. Interpreters will face a plurality of alternatives here. Theories of interpretation, seen as theories of remedial interpretation, propose different ways to derive norms from a legal source. For Watson, the selection of an approach to remedial interpretation is normative<sup>38</sup>: It is ruled by moral and prudential considerations, such as which approach better serves the rule of law, promotes justice, or makes the legal order better.<sup>39</sup> As Watson notes, this raises the question of whether there is a need for *theories* of interpretation at all.<sup>40</sup> If normative reasons rule the choice of a remedial approach, this would suggest a contextual approach. As Andrew Jordan explains, the reasons bearing on different cases are different, given that the set and weight of the relevant normative considerations vary with circumstances.<sup>41</sup> Thus, if we seek the most normatively appealing approach to each case, this will lead to different approaches in different circumstances. And yet theories of interpretation are general. They promote ways of interpreting couched in general terms and explain the values generally associated with those theories. What is their use?

Watson suggests two roles for such theories, one related to the judicial role and one to epistemic considerations.<sup>42</sup> To these, one could add others. Here, I address Watson's two theories. First, theories of interpretation can help the judiciary (and other agents) be more aware of what they are doing and what others are doing. By articulating and labeling approaches to interpretation, and often connecting them with reasons for their adoption, theories of interpretation help clarify the interpretive alternatives and their justifications. In a culture that has refined interpretive approaches to the point of elaborating distinct theories of interpretation, a judge searching for original meaning is aware of what that

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<sup>38</sup> See Watson, *supra* note 1, at 1452 ("Thus, interpretive theories require a moral-political defense."). Here, Watson aligns himself with authors suggesting that interpretive choice is practical, though cabinining interpretive choice to cases where the law runs out. See *supra* note 31 and accompanying text.

<sup>39</sup> See, e.g., SUNSTEIN, *supra* note 5, at 62 ("Any theory must be defended on the ground that it will make our constitutional order better rather than worse."); Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1300 (2015) (explaining that when choosing a theory of interpretation one should weigh "the strengths and weaknesses in promoting rule of law values such as predictability and stability, in facilitating political democracy, and in defining a morally defensible set of individual rights"); Urbina, *supra* note 5, at 1665 (arguing that "normative reasons and only normative reasons can ultimately justify interpretive choice").

<sup>40</sup> See Watson, *supra* note 1, at 1453 ("After all, it seems like the easiest and surest way to have legal actors do what is best is to tell them to do exactly that.").

<sup>41</sup> See Andrew Jordan, *Constitutional Anti-Theory*, 107 GEO. L.J. 1515, 1534-38 (2019) (explaining the "context dependence of sound constitutional decisionmaking"); see also Urbina, *supra* note 5, 1727-37 (explaining that a consequence of the "normative choice thesis is the contingency of interpretative choice").

<sup>42</sup> See Watson, *supra* note 1, at 1454-55.

search entails, is capable of distinguishing the search for original intent or original public meaning, understands the values pursued by this approach, and knows some alternative approaches that could have been pursued instead. Others in the community will find it helpful to identify this judge's approach as an instance of a well-known theory. This attribution will clarify what this judge is doing when interpreting the law and makes the alternatives clear for others in the community who react to the judge's interpretation. For example, this information may have important implications for other judges choosing whether to follow the example of this judge or depart from it, for parties coming before this judge in deciding what interpretations to offer to support their arguments, and for commentators in criticizing or praising her decisions, among others. In this sense, articulation at the level of theories facilitates discourse, evaluation, and coordination.

A second role of theories is epistemic, not in the sense of a heuristic but instead in the sense of a guide. Theories of interpretation suggest possible ways of deriving norms from sources. Each theory suggests one such way. Taken together, theories of interpretation indicate an array of possible ways to go about deriving norms from sources. The point here is not so much that they label something we already know, but that they help us know something—the different courses of action one could take. Each theory is like a piece in a map, illustrating a path one could take. Several theories illustrate several possible paths. The existence of several of those theories in a legal community conveys a sense, for those in that community, of the many different ways interpretation could be undertaken.

### C. *From Theories to the Meta-Interpretive Question*

Let us recapitulate. Theories of interpretation recommend a way of deriving norms from sources. These norms do not need to be legal norms, and in fact often go beyond legal content. The relevant activities in which interpretation takes place (such as deciding cases, passing legislation, etc.) may require the application of norms of certain precision, yet the legal norms that constitute the legal content of such sources do not have such precision. At least part of the reason for having such theories of interpretation is that they suggest alternatives that could lead to norms of the required precision. The choice between interpretive theories is normative; it is ruled by moral and prudential reasons.

Now, in Watson's account, such theories are about remedial interpretation. They are confined to supplementing legal content when legal content "runs out," i.e., when (in the formulation above) the legal norms derived from the relevant source lack the precision needed to address the practical needs of the situation, as in *Taniguchi*. This leads to Watson's answer to the meta-interpretive question: "Interpretive theories are primarily about how legal actors should exercise the discretion that the law affords them to fill in the law's gaps."<sup>43</sup>

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<sup>43</sup> *Id.* at 1437.

But must they be? Watson has already shown us how theories of interpretation are not limited to discovering existing legal content. Must they be limited by legal content? Theories of interpretation could simply be about how to derive norms from legal sources, regardless of whether they match or are even consistent with legal content. They would not be about exercising discretion “within legal bounds,” but simply about how to interpret, period.<sup>44</sup> In doing this, the theories may even suggest ways of changing the “legal bounds.”<sup>45</sup> This view would entail different answers to the meta-interpretive question than the remedial one, though these answers would be compatible with it. This is the topic of the next part.

## II. ANSWERS TO THE META-INTERPRETIVE QUESTION

Watson’s Article illuminatingly poses the meta-interpretive question and offers a persuasive answer, the remedial answer. Is this the only legitimate answer? Watson suggests other alternatives, but only to largely discard them.<sup>46</sup> At the same time, Watson does not claim that theories of interpretation should *only* be about remedial interpretation; on the contrary, his formulation that interpretive theories are “primarily” about remedial interpretation explicitly allows for other legitimate answers.<sup>47</sup> Here, I lean into this ecumenical aspect of Watson’s argument. The meta-interpretive question seems most fruitful and illuminating if it sheds light on the different worthwhile aims for theories of interpretation and the distinct subject matters of relevant interpretive debates. Neither interpretive theories nor interpretive debates need to be about one thing. In what follows, I only suggest, though I cannot flesh out, two different additional answers to the meta-interpretive question. They follow from the discussion above on theories of interpretation. These answers presuppose Watson’s Hartian positivist premises and that legal content runs out with plain meaning, and Watson’s overall framing helps introduce them more sharply. To my mind, these two answers stand alongside the remedial answer, such that all of these answers could be correct, and more than one type of theory and debate could be worthwhile.

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<sup>44</sup> See *id.*

<sup>45</sup> See *id.*

<sup>46</sup> See *id.* at 1440–42 (engaging with linguistic, legal, epistemic, remedial, and amending answers). Watson nevertheless allows a role for these possible answers. See, e.g., *id.* at 1436 (“Some aspects of interpretive debates may concern how legal texts communicate.”); *id.* at 1437 (“Some aspects of interpretive debates, particularly those involving the existence or scope of judges’ duty to avoid interpretations that yield absurd results, may concern the appropriateness of amending legal texts.”).

<sup>47</sup> See *id.* at 1457 (“That being so, interpretive debates must be primarily about interpretation in a remedial sense. . . . This is probably not the only question at issue in interpretive debates, but it is the primary one. When participants in these debates argue about something else, they should be careful to clarify what it is.”).

A. *The Question and an Answer*

Recall Watson's meta-interpretative question. The

"meta-interpretative question" regard[s] what we are debating when we debate legal interpretation . . . .

. . . Judges and theorists use that word ["interpretation"] to pick out a variety of related activities. The meta-interpretative question concerns which of those activities is primarily at issue in debates over legal interpretation. . . . [It concerns] what interpretive theories like textualism, purposivism, originalism, and living constitutionalism aim to achieve . . . [o]r at least . . . should . . . aim to achieve if our debates are to be sensible and constructive . . . .<sup>48</sup>

One could take this question in one of two senses. One could take it in a descriptive sense, which would be empirical, inquiring about what those participating in academic debates on interpretation take themselves to be debating. One could also take the meta-interpretative question as a normative question, about what theories *should* be about. In any of its versions, the meta-interpretative question is worth asking, but these are ultimately different questions. Watson's formulation captures both.<sup>49</sup> And yet, while his articulation of the remedial answer offers a rational reconstruction of the debate as it exists, it also explains why that debate is worth having. Both dimensions of Watson's question and answer are interesting and important. In what follows, I am interested in the normative version. Now, in what sense could one say that theories of interpretation and the debates they give rise to *should* be about a particular issue, say, remedial interpretation? I see no criterion other than that the object of the theory is worth understanding, assuming theory can advance such understanding.

Watson's theory of remedial interpretation illustrates this. Hartian Positivism necessitates an answer regarding what to do when the law runs out. More precisely, if the law is how Hartian Positivism says it is, it will "run out." Because, as explained above, many activities involving the application of law demand acting on norms going beyond legal content, legal practitioners face a practical need to figure out how to derive more precise norms from legal sources when the law runs out. If Watson is right that legal content ends when plain meaning does, then legal content will run out in many cases, where interpreters will face the need for a more precise norm. Theories of remedial interpretation respond to this practical need. Because those theories help address this problem

<sup>48</sup> *Id.* at 1411-12.

<sup>49</sup> See *id.* (referring to meta-interpretative debates as concerning "[w]hat . . . interpretive theories like textualism, purposivism, originalism, and living constitutionalism aim to achieve . . . or at least . . . should . . . aim to achieve if our debates are to be sensible and constructive" and answering the meta-interpretative question by asserting "debates are (or at least should be) mainly about interpretation in a *remedial* sense"); *id.* at 1457 ("Yet Hartian Positivism's import for these debates is also significant in that it clarifies what the debates are about (or at least should be about).").

of practice, they are worth having, and debating about their content and which one should be adopted by practitioners is a worthwhile enterprise. Debates about interpretation should be about this, even if, perhaps, not only about this.

B. *Two Additional Answers*

Here, I suggest two other possible answers to the meta-interpretive questions. I cannot fully elaborate on them in this brief Response. However, I hope that what I say is enough to raise at least the question of other fruitful roles and debates for interpretive theories, and to suggest that Watson's question leads to a fruitful and diverse inquiry. The two answers I present are distinct but closely related.

The first has been hinted at already. Theories of interpretation chart possible ways to undertake interpretation. They suggest to interpreters a menu of possible ways to derive norms from a legal text (or another source). We need theories because we need to have those refined accounts of different ways to read a text. In a legal culture where those ways of reading a text are expressed and legal agents know them, they are genuine alternatives to choose from. In a legal culture where some or all have not been articulated, legal agents may be blind to those alternatives.

As mentioned above, theories of interpretation may specify possible ways of deriving norms from legal materials regardless of whether they track actual legal content.<sup>50</sup> What would be the use of this exercise? If one accepts, as positivists do, that interpreters do not always have most reason to follow legal content,<sup>51</sup> then these theories will matter, because identifying legal content is never the only relevant inquiry for a practitioner. The theories specify other courses of action available to the practitioner. Watson's example of the First Amendment could be taken to illustrate this: while the First Amendment states that "*Congress shall make no law . . . abridging the freedom of speech*,"<sup>52</sup> it "has been held to limit the power of all branches of government."<sup>53</sup> Here, for Watson, there is no alternative but to conclude that "[t]he first time that a court applied the First Amendment to a branch of government besides Congress, the court acted

<sup>50</sup> For example, if legal content is determined by plain meaning, consider the following observation by Shecaira: "Purposivism . . . is not a method which, *as matter of legal practice*, is used only when plain meaning is dubious. Practitioners who have a preference for purposivism will occasionally appeal to purpose *in spite of* plain meaning." Shecaira, *supra* note 26, at 20. This is an empirical claim, but the claim could be shifted to a normative register: the reasons that justify purposivism may, on occasions, justify appealing to purpose, in spite of plain meaning. Interpretation, here, is uncoupled from legal content.

<sup>51</sup> See H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 618 (1958) (criticizing Radbruch for assuming, contrary to positivism, that "the bare fact that a rule may be said to be a valid rule of law . . . was conclusive of the final moral question: 'Ought this rule of law to be obeyed?'").

<sup>52</sup> U.S. CONST. amend. I.

<sup>53</sup> Watson, *supra* note 1, at 1450.

unlawfully.”<sup>54</sup> If that court acted unlawfully, it did so not in facially disobeying the law, but in offering an interpretation of it. It may have had, from a normative point of view, most reason to provide this interpretation. If it is possible that sometimes a legal official has most reason to read a text in ways that depart from plain meaning, then it is useful to have theories of interpretation that specify the range of possible readings and their normative justifications, regardless of whether these readings are consistent with plain meaning.<sup>55</sup> That is, it is useful to have theories of interpretation that are not confined to remedial interpretation.<sup>56</sup> Following these theories perhaps leads officials away from asserting what the law actually is, and instead to “misstate the law,” “err” in applying it, “disregard” it, etc.

But this last conclusion should be tempered because their action may also entail or provoke a change in the law, such that it will not be an obviously unlawful course of action. If other officials follow their interpretations, then this may change what is recognized as part of the content of the law and how. It could thus happen that at the time of their interpretation, it did not capture the actual content of the law, but later, after others followed suit, that interpretation does capture the (new) content of the law. If evaluated at that later time, the interpretation will be lawful. “Here all that succeeds is success.”<sup>57</sup>

This takes us to the second possible answer to the meta-interpretive question. Interpretive theories could also be about the politics of the rule of recognition;

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<sup>54</sup> *Id.* at 1451.

<sup>55</sup> This is not exactly the “amending answer,” which is “that interpretive theories aim to tell legal actors when or how they morally or politically should amend or revise a legal text’s contribution to the law.” *Id.* at 1417. On the view sketched above, theories of interpretation chart possible ways of reading a text and suggest the one that is most normatively appealing, both to be applied when it is consistent with the content of the law (and thus, when it does not revise or amend it) or when it is inconsistent (and thus *may* revise or amend it, depending on the legal powers of the interpreter and other such contingencies).

<sup>56</sup> If the need for such readings happens rarely, then this means that theories focusing on this purely practical dimension are less relevant in practice, for now, than they would be if such need was more frequent. Perhaps that makes them less relevant than remedial theories and debates. As mentioned above, I am agnostic about whether interpretive debates are or should be “primarily” about remedial interpretation. To my mind, because officials and other interpreters ultimately need normative reasons all the way down, the practical theories and debates suggested above are indispensable.

<sup>57</sup> H. L. A. HART, *THE CONCEPT OF LAW* 153 (3d ed. 2012). Hart uses the sentence in a different though related context.

they could be about which theory should be legally recognized,<sup>58</sup> if any.<sup>59</sup> If adopting a specific theory would make the legal order better than any alternative,<sup>60</sup> why not make this a criterion of legal validity, to the exclusion of others? This would certainly be possible,<sup>61</sup> even if not necessarily desirable.<sup>62</sup> For example, as Solum suggests, “[o]riginalist[s] can . . . argue that the rule-of-recognition should change, and that officials should eventually come to regard Supreme Court decisions that disregard original meaning as unlawful.”<sup>63</sup> As Jiménez explains, “[a]t any point in time, legal argument is also about figuring out, determining, and settling the content of the rule of recognition, and defining its implications for more specific issues.”<sup>64</sup>

Awareness of this question would highlight the contingency of any legal settlement on interpretation. If originalism were “our law” as a matter of the rule of recognition, as some argue,<sup>65</sup> it would be because this theory made its way into the law by becoming generally adopted in the practice of officials.<sup>66</sup> And

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<sup>58</sup> More precisely, they would be about which possible meaning, promoted as the relevant one by a specific theory, is treated as a criterion of validity. For a discussion on possible relevant meanings, see Fallon, *supra* note 39, at 1244-51 (theorizing and analyzing what legal practitioners mean when discussing “legal meaning”). For meaning as a specific object of interpretive choice, among others, see Francisco J. Urbina, Choices in Interpretation 20-26 (July 29, 2025) (unpublished manuscript) (on file with author) (explaining that a text’s plurality of possible meanings creates a choice-situation for legal actors).

<sup>59</sup> Here the different meta-interpretive questions are relevant. A theorist may hold that some approach is best for remedial interpretation, but not go as far as to hold that it should be made part of the rule of recognition to the exclusion of other approaches. I am grateful to Bill Watson for pointing this out. I offer reasons for non-inclusion of a specific aspect of interpretive choice (that of the object of interpretation) in Francisco J. Urbina, *The Object of Interpretation*, 114 GEO. L.J. (forthcoming) (manuscript at 33-37) (on file with author) (“From a normative point of view, it may even be advantageous for a legal system to leave the object of interpretation unsettled, at least for some sources[,] . . . allowing officials to adjust to different circumstances.”).

<sup>60</sup> See SUNSTEIN, *supra* note 5, at 8 (“Judges . . . should choose the theory that would make the American constitutional order better rather than worse.”); *id.* at 91 (“Among the reasonable alternatives, any particular approach to the Constitution must be defended on the ground that it makes the relevant constitutional order better rather than worse.”).

<sup>61</sup> See Jiménez, *supra* note 13, at 83 (“The practices of judges might fully converge towards the collective acceptance of originalism . . . . There is nothing in the notion of a rule of recognition or in the nature of interpretive disagreement that would prevent such a process from taking place.”).

<sup>62</sup> See sources cited *supra* note 59 and accompanying text.

<sup>63</sup> Lawrence B. Solum, *Sachs on Normative Constitutional Theory*, LEGAL THEORY BLOG (Apr. 7, 2025, 7:30 AM), <https://lsolum.typepad.com/legaltheory/2025/04/sachs-on-normative-constitutional-theory.html>.

<sup>64</sup> Jiménez, *supra* note 13, at 83 (footnote omitted).

<sup>65</sup> See William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1478 (2019) (arguing that the practice “which Hart dubbed our rule of recognition . . . is one that supports original-law originalism”).

<sup>66</sup> How this exactly happens, and whose practice matters, is contested. See, e.g., Grant Lamond, *The Rule of Recognition and the Foundations of a Legal System*, in READING HLA

just as it was adopted, it could be disowned or replaced. Theories of interpretation may suggest other courses of action, and criticize the legally sanctioned approach as immoral, unjust, or inept. Here, theories of interpretation would not be about what the law is, but about what it should be. The aim of such theories would be to suggest to officials that there is something wrong with their legal practice, and, given that it is in their power to change it, the theories would appeal to their moral responsibility to do so. Note also that the change in the rule of recognition just alluded to could happen in the course of courts doing remedial interpretation. Theories of remedial interpretation could (though they do not need to) also be theories of the politics of the rule of recognition, promoting the same approach both as a form of remedial interpretation for the time being and as a criterion of legal validity worth incorporating in the rule of recognition.<sup>67</sup>

If legal settlement is the product of human agency, it depends on human evaluations and beliefs as much as the remedial parts of interpretation and other aspects of adjudication. True, changing something like the rule of recognition may be hard; the actors with genuine capacity to do so are difficult to define; and there are probably many of them. Nevertheless, if it can be changed by human action, it is a matter fit for moral evaluation, deliberation, and action.

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HART'S THE CONCEPT OF LAW 108-12 (Luís Duarte d'Almeida, James Edwards & Andrea Dolcetti eds., 2013) (discussing "[w]hose actions and beliefs constitute the rule of recognition"). For a sophisticated discussion of these matters, see Nina Varsava, *Derivative Recognition and Intersystemic Interpretation*, 30 LEGAL THEORY 170 (2024). Varsava distinguishes between criteria of validity (included in the rule of recognition) and the means that assist courts in ascertaining that a norm satisfies those criteria. See *id.* at 179-85. For the subject matter most commonly associated with theories of interpretation (authorial intention, purpose, original public meaning, etc.), Varsava uses the term "criteria of validity" (when those criteria are included in the rule of recognition). See, e.g., *id.* at 181 (referring to "independent criteria of validity (such as reflecting legislative intent or ordinary public meaning)"). Some people refer to the subject matter of theories of interpretation as "methods of interpretation." See, e.g., Shecaira, *supra* note 26, at 19-20 (discussing "methods of interpretation . . . such as textualism . . . [and] purposivism"). For Varsava, in contrast, "interpretive methodology" refers to means, such as consulting legislative history. See Varsava, *supra*, at 180 ("[B]y statutory interpretive methodology I mean methods, techniques, or means that interpreters may use to identify the statutory or statute-based legal norms that apply to disputes."); *id.* at 182-83 (referring to judges' disagreement "on statutory interpretive methodology—for example, on the question of whether and when consulting legislative history is appropriate"). I am grateful to Nina Varsava for clarifying conversations on this topic and to Andrew Jordan for a helpful discussion of this distinction in an email exchange. The distinction is useful, since it is not obvious that legal adoption of the two settlements can be done in the same way and have the same consequences, as Varsava's paper illustrates. See *id.* at 185-96 (discussing how legal systems' adoption of the former settlement turns it into criteria of validity, affecting legal content, unlike with respect to the latter). Elsewhere I cast this distinction in terms of interpretive choice, distinguishing between interpretive choice of meaning (the subject matter of most theories, such as original public meaning, intended meaning, etc.) and a choice of interpretive means (such as whether to adopt legislative history, use dictionaries, etc.). See Urbina, *supra* note 58 (manuscript at 2-3).

<sup>67</sup> I am grateful to Bill Watson for this observation. See Watson, *supra* note 1, at 1453-57.

Theories could do worse than bringing this choice into relief and suggesting alternatives for it.

#### CONCLUSION

A crucial contribution of Bill Watson's *What are We Debating When We Debate Legal Interpretation?* is to confront us with the meta-interpretive question. Watson offers a sophisticated response and, in doing so, he gives us a way to think about the interaction between legal content (and the jurisprudential theories that account for it) and interpretation (and the theories that promote ways of undertaking it). If Hartian Positivism is right, and if the United States' rule of recognition is such that legal content is restricted to the plain meaning of legal texts, then, in practice, there will be a need to figure out what to do when the law "runs out." It is possible to understand interpretive theories as providing an answer to the question of how to derive norms from sources when this happens. But perhaps theories of interpretation also do other things, responding to other questions arising from practice. Whether this is right or not, Watson deserves praise for giving us a rich model and conceptual framework to think about these questions.