

Theorizing Areas of Law: A Taxonomy of Special Jurisprudence

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Abstract

This paper provides a taxonomy of the different kinds of theory that may be offered of an area of law. We distinguish two basic types of philosophical accounts in special jurisprudence: non-normative accounts and normative accounts. Section II explains the two central sub-species of non-normative accounts of areas of law: (i) conceptual and ontological theories and (ii) reason-tracking causal theories. Section III explores normative theories of areas of law. Normative accounts sub-divide into detached and committed normative accounts. Detached or committed normative accounts can be subdivided further into the following cross-cutting categories: (i) *pro tanto* or all-things-considered, (ii) hyper-reformist or practice-dependent. Section IV shows that our taxonomy does not presume a prior commitment to any particular school in general jurisprudence. This paper clarifies methodological confusion that exists in theorising about areas of law, and contributes to the sub-field of thinking generally about special jurisprudence.

I. INTRODUCTION

Legal theory has seen a surge in scholarly interest in theorizing discrete “areas of law” (variously described as “special jurisprudence”¹ or “particular jurisprudence”,² to contrast the field with general jurisprudence). General jurisprudence focuses on the nature, normativity, and operation of law and legal systems generally. It concerns itself with questions such as the conditions of a norm being a legal norm, the nature of legal obligation, whether the rule of law is inherently valuable, the nature of adjudication, and the possibility and implications of

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¹ Leslie Green, ‘General Jurisprudence: A 25th Anniversary Essay’ (2005) 25 Oxf J Leg Stud 565; Jeremy Waldron, ‘Can There Be a Democratic Jurisprudence?’ (2009) 58 Emory L J 675, 678.

² For a history of the terms “general” and “particular” jurisprudence, see William Twining, ‘General and Particular Jurisprudence: Three Chapters in a Story’ in William Twining, *Law in Context: Enlarging a Discipline* (Oxford University Press 1997). The terms, and a broadly connected distinction, are traceable to Bentham, but their meaning is different.

legal pluralism. The subject matter of theoretical inquiry in special jurisprudence, on the other hand, is a discrete *area* of law, such as labour law,³ discrimination law,⁴ tort law,⁵ family law,⁶ international law,⁷ criminal law,⁸ and constitutional law.⁹

The main purpose of this paper is to provide a clarificatory account of the different kinds of theory that may be offered of an area of law.¹⁰ Such a clarificatory account is needed, in our view, for three reasons. First, existing taxonomies of the types of account that may be offered of an area of law tend to underrepresent the possibilities. For instance, it is notable that Arthur Ripstein reports being posed the following question about his account of tort law: ‘is the account descriptive, prescriptive, or interpretive?’¹¹ Our analysis provides a more fine-grained delineation of the kinds of account that one could offer, drawing distinctions between different kinds of non-normative and normative account, and explaining that interpretive theories come in significantly different forms.

Second, it is quite often unclear what kinds of claim are being made in special jurisprudence. Identifying the nature of these claims allows us to determine the considerations bearing on their truth and, consequently, allows us to assess the success of the theory. A general example and a specific one. The general example is the category of theories that self-identify as ‘interpretive’ theories. We will show that there are importantly different kinds of interpretive

³ Alan Bogg, ‘Labour, Love, and Futility: Philosophical Perspectives on Labour Law’ (2017) 33 Int J of Comp Lab L. & Indus Rel 7; Hugh Collins, Gillian L. Lester and Virginia Mantouvalou, ‘Does Labour Law Need Philosophical Foundations?’ in Hugh Collins, Gillian Lester, and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018).

⁴ Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013); Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Bloomsbury 2018).

⁵ David G Owen, *Philosophical Foundations of Tort Law* (OUP 1995); John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014).

⁶ Elizabeth Brake and Lucinda Ferguson eds., *Philosophical Foundations of Children’s and Family Law* (OUP 2018).

⁷ Allen Buchanan and David Golove, ‘Philosophy of International Law’ in Jules L Coleman, Kenneth Einar Himma and Scott J Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004). We leave the question of whether international law is an ‘area of law’ or simply a different legal system with its own areas of law for another day.

⁸ John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (OUP 2007); Victor Tadros, *Wrongs and Crimes* (OUP 2016).

⁹ David A Strauss, ‘What Is Constitutional Theory’ (1999) 87 Cal L Rev 581; Jason Varuhas, ‘Taxonomy and Public Law’ (2017) U of Melbourne Legal Stud Res Paper No 789 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3037840> accessed 31 October 2021.

¹⁰ For a different, and well-known, taxonomy, see Stephen A Smith, ‘On the Nature of Theory: What is Contract Theory?’ in Stephen A. Smith, *Contract Theory* (OUP 2004). We discuss aspects of Smith’s view *infra*.

¹¹ A Ripstein, *Private Wrongs*, (HUP, 2016) 19.

theory and that these differences impact upon their success conditions. A specific example is Adrienne Stone's criticism of Yaniv Roznai's claim that the power to amend constitutions is impliedly limited inasmuch as it may not be used to change the identity of the constitution: the essence of Stone's criticism is that Roznai bases this claim on his *conceptual* distinction between constituent power and amendment power, whereas for his claim to stand, he needs a *normative* argument that constituent power (as actually exercised) has greater legitimacy than amendment power (again, as exercised in practice in a given context).¹²

Third, a lack of clarity afflicts the considerations that bear upon the success conditions of theories of areas of law, especially in evaluating the 'transparency' and the 'fit' of the proposed theory. The "problem" of *transparency* concerns the extent to which, if any, a theoretical explanation of an area of law should be sensitive to, even track, the *internally* accepted accounts of that area of law by legal officials. Does the fact that the legal officials in a particular jurisdiction largely believe that the point of criminal law is to deter criminal behavior place limits on the success of a theoretical account which refutes this claim? A second problem in special jurisprudence is the problem of *fit*. This concerns the extent to which an account of an area of law must explain or otherwise take account of extant features of that area. A common mistake concerning fit in comparative constitutional studies entails universal claims made by extrapolating from a very small set of 'canonical' constitutions. For example, the very first paragraph of Grimm's book on constitutionalism insists that a 'constitution establishes the rules by which political rule should be exercised *under law*.'¹³ This—German/American—understanding of constitutions as a collection of legal rules ignores vast swathes of constitutional practice that deploys non-legal norms for purposes aspects of constitutional governance.¹⁴ Ignoring relevant legal data is such a common fault in constitutional theories in special jurisprudence that an awareness of our taxonomy would make an author less likely to commit it.

¹² Adrienne Stone, Unconstitutional Constitutional Amendments: Between Contradiction and Necessity, 12(3) ICL Journal (2018) 357.

¹³ Dieter Grimm, *Constitutionalism: Past, Present, and Future* (OUP 2016) 3. Emphasis added.

¹⁴ See for example, Nick Barber, *The United Kingdom Constitution* (OUP 2021) ch 6; Tarunabh Khaitan, 'Constitutional Directives: Morally Committed Political Constitutionalism' 82 *Modern Law Review* (2019) 603.

Transparency and fit affect different types of theories differently: beyond a minimal threshold, it is as pointless to criticise (what we characterise as) a ‘hyper-reformist theory’ on the ground that it does not completely fit the existing law as it is to demand transparency in all theories of areas of law. In what follows, we aim to make some progress on the precise role that considerations of ‘transparency’ and ‘fit’ play within different accounts. We argue, for instance, that considerations of ‘fit’ can have an *evidential* bearing upon normative theories under certain assumptions.

By addressing these three points, through clarifying the different kinds of theoretical claim that might be made about areas of law, and explaining their interrelationship, we hope to make theoretical claims in special jurisprudence more transparently assessable, and genuine disagreements more readily identifiable. If one theorist is making a conceptual claim and another is making a normative claim, there may not be any real disagreement between them. If parties to debates can be clearer about the precise nature of the claims made, progress can be more readily made.

In this article, we distinguish two basic types of theoretical account: non-normative accounts and normative accounts. Section II explains the two central sub-species of non-normative accounts of areas of law: (i) conceptual and ontological theories and (ii) reason-tracking causal theories. Section III explores normative theories of areas of law. Normative accounts subdivide into detached and committed normative accounts. Detached or committed normative accounts can be subdivided further into the following cross-cutting categories: (i) *pro tanto* or all-things-considered, (ii) hyper-reformist or practice-dependent. Section IV will deal with some objections to this taxonomy. We also delineate different types of ‘interpretive’ theories in this section, and show how they are all accommodated within our taxonomy. Section V concludes.

Three preliminary points may usefully be dealt with upfront. First, with the possible exception of reason-tracking causal theories, our taxonomy is a taxonomy of recognisably *philosophical* theories of an area of law. One could, for example, offer an *empirical* account of the effect of the gender of the litigants on tort liability. This could be a kind of theory of the effects of gender on liability. But it is unlikely to be particularly helpful to classify this kind of empirical

theory alongside the kinds of philosophical theories we consider here. No one is in much doubt as to the nature of the claims being made by those seeking to investigate the empirical effects of gender on liability. They are empirical claims; the success conditions of empirical theories are reasonably well-established in the extant literature on social science methods. Our taxonomy is motivated by a concern to bring greater clarity to a domain of scholarship in which the nature of the claims being made is not very clear; this aim will not be served by a discussion of empirical theories, whose nature and success conditions are less controversial. We include reason-tracking causal theories in our taxonomy—despite the essentially empirical, rather than philosophical, character of these theories—because these theories claim to uncover *normative* reasons as causes that motivate the creation or development of an area of law.

Second, the reasons for grouping together items in a taxonomy is obviously motivated by a concern to identify important similarities and differences between the taxonomised items. Such similarities and differences always run along some dimension. In taxonomising theoretical accounts of areas of law, we argue that the relevant dimension is the *nature of the claim being made* by the theory, because this feature of the theory determines (a) the considerations bearing on the truth of the theory, (b) the kinds of claims which are licenced by the theory, and (c) the methods by which the theory will be established or assessed. Therefore, we restrict our taxonomy to *philosophical* theories of areas of law, without at all implying that this type of theorizing is the only useful mode of thinking theoretically about areas of law. On the contrary, we take empirical theories of law to be necessarily complementary to philosophical theories, if one is to understand legal phenomena more fully. Third, subject to the point just made about our focus on recognisably ‘philosophical’ theories, we use the word ‘theory’ interchangeably with the word ‘account’.

A final caveat: the taxonomy offered in this paper concerns theories that concern *particular* areas of law. It leaves out several metatheoretical concerns in special jurisprudence: concerns such as what count as ‘areas of law’, whether they are social or logical categories, whether

they admit to revision, normative criticism, and reclassification, and so on. We address some of these metatheoretical concerns in another paper.¹⁵

II. NON-NORMATIVE THEORIES IN SPECIAL JURISPRUDENCE

In this section, we outline two broad kinds of non-normative theories in special jurisprudence.

A. Conceptual and Ontological Theories

Conceptual theories of an area of law, say competition law, aim to give an account of the concept of competition law. ‘Conceptual analysis’ covers a range of different approaches. What we might call ‘traditional conceptual analysis’ normally self-describes as aiming to identify the necessary and sufficient conditions for something to count as a practice of competition law.¹⁶ Conceptual analysis may go beyond this concern for ‘necessary and sufficient conditions’, however. It may sometimes seek only to identify the inherently likely features of a phenomenon. For instance, ‘coercion’ might be an inherently likely feature of law, even if it is not a necessary condition.¹⁷ Although this is the traditional or standard account of conceptual analysis, it is clear that those who seek even these traditional conceptual analyses normally seek to identify more than simply the necessary and sufficient conditions of a concept.¹⁸ It is implicitly assumed in philosophical analysis that the necessary and sufficient conditions identified are ones which identify *more explanatorily fundamental* features *in virtue of which* something counts as that thing.¹⁹

¹⁵ See T Khaitan and S Steel, ‘Areas of Law: Three Questions in Special Jurisprudence’ (2023) Oxford Journal of Legal Studies (forthcoming).

¹⁶ For an account of the necessary and sufficient features that make a legal norm a norm of discrimination law, see Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) ch 2.

¹⁷ For an example of “likely” features, see Sophia Moreau, ‘The Moral Seriousness of Indirect Discrimination’ in Hugh Collins & Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (OUP 2018).

¹⁸ For illuminating discussion, see Joachim Horvath, ‘Philosophical Analysis: The Concept Grounding View’ (2017) 97(3) *Philosophy and Phenomenological Research* 724.

¹⁹ For a related distinction between analysis of the “necessary features” of a thing and the features that contribute to the thing’s identity, see Scott J. Shapiro, *Legality* (Harvard University Press 2011) 8–10.

Conceptual analyses differ not only in whether it seeks necessary and sufficient or only inherently likely conditions, but also in whether it claims to be offering an account of the *nature* of a thing, or only our ‘concept’ of that thing.²⁰ The very term ‘conceptual analysis’ suggests a concern, not with the world out there, but with our mental categorisations of it. Some theorists employing the *tools* of conceptual analysis, such as drawing distinctions, classifications, and family identifications and testing propositions with real or hypothetical examples, may be better considered as engaged in *ontological* analysis: they are seeking to identify the necessary, sufficient, or likely features of *the thing itself*. It seems to us there is room for both kinds of view: one could simply be seeking to unpick, say, the necessary conditions for the application of an important concept – without making an ontological claim – or one could go, in one respect, further and claim to be uncovering the *nature* of the thing itself. It is not always straightforward, however, to keep these things apart. There may be some ‘things’ in the world that exist *solely* as concepts. For example, a conceptual account of ‘unicorns’ or ‘fairies’ is entirely possible, but offering an ontological theory – as far as we can tell – is not possible for either unicorns or fairies. Closer to our purposes, there are phenomena, such as ‘areas of law’, whose existence depends – at least in part – upon certain mental categorisations (concepts) being in existence, even if (unlike unicorns) their conceptual dimension may not be all there is to them. It seems difficult, for instance, to test whether ‘Y’ is a necessary feature of discrimination law without testing one’s intuitions about the application of the concept ‘DISCRIMINATION LAW’ to hypothetical examples. It might be objected that there is no such need: one can simply look to the real-world *practice* of discrimination law, and determine whether such-and-such a feature is a necessary one. If the feature does not appear in all instances of discrimination law, then it is not necessary. But before we can identify something as an instance of the practice *of* discrimination law, we already need to apply our *concept* of discrimination law (even if that concept is, no doubt, partly shaped by extant practice).

Legal practice, like all human institutions, is dynamic and messy. Theory-sceptic legal scholars often cite the ever-changing and messy character of legal practice to deny the possibility of

²⁰ See Raz on nature and concept of law: Joseph Raz, ‘Can There be a Theory of Law?’ in Martin P. Golding and William A Edmundson (eds), *The Blackwell Guide To The Philosophy of Law and Legal Theory* (Blackwell Publishing 2005).

concept-building, or theorisation more generally.²¹ Their intuition is that (admittedly messy) practices cannot be explained by reference to theories that are—aspirationally at least—tidy and coherent. What this kind of scepticism ignores is that legal practitioners themselves make such proto-conceptual theoretical judgments all the time—determining whether a norm is a norm *of* discrimination law, for example, is often a practical necessity in order to decide what legal consequences follow. For example, the statutory limitation period for a tort and a contract claim may be different, and a lawyer would have to have some understanding of conceptual boundaries of ‘tort law’ or ‘contract law’ to persuade a judge that the norm in question belongs to the first area of law, or the second, or both, or neither.²² Especially when an area of law is underdeveloped or messy, practitioners are able to form their intuitions only because they have *some* concept of discrimination law to work with. If practitioners can unwittingly theorise about a phenomenon, there is no reason to claim that a more systematic and scholarly approach to its theorisation is *impossible*. The fact that the scholar, as much as the practitioner, may be wrong about their theoretical claims is beside the point.²³ Having said that, a theorist may well conclude—after analysis—that there are *no* necessary, sufficient, or even likely features that explain a phenomenon—asking the conceptual question does not mean that there will, necessarily, be clear conceptual answers. One may, for example, discover that there is only a family resemblance between the components that make up an area of law. Although unlikely for long-established norms (given the coherence-seeking forces typically at work in law), one may even find that nothing other than the fact that they are all found in the same piece of legislation binds together an arbitrary set of norms, norms that are nonetheless treated by the practitioners in a given jurisdiction as belonging to a particular area of law.

Conceptual analysis, in one or more of the forms explained, is a familiar form of theorisation in *general* jurisprudence, concerned with elucidating necessary, sufficient, or likely features

²¹ See, for example, Christopher McCrudden, ‘Indirect Religious Discrimination: Resisting the Temptation of Premature Normative Theorization’ (2021) 34(2) Harvard Human Rights Journal 249, 273-4.

²² *Henderson v Merrett Syndicates Ltd* [1994] [UKHL 5](#).

²³ For an engagement with McCrudden’s theory-scepticism, see Tarunabh Khaitan, ‘Two Facets of Religion: Religious Adherence and Religious Group Membership’ (2021) 34 Harvard Human Rights Journal 231, 244-5.

which contribute to the identity of the phenomenon that is *law*.²⁴ In *The Concept of Law*,²⁵ for example, Hart was, at least in part, interested in the identification of the necessary and sufficient conditions for the existence of legal systems and the validity of legal norms. The same project can, however, also be undertaken with areas of law in special jurisprudence. An excellent example is John Gardner's essay, "Torts and Other Wrongs", which seeks to offer an ontological analysis of "tort law".²⁶ Here is Gardner's analysis:

- "the law of torts is a law of
- (a) civil recourse
 - (b) for wrongs
 - (c) in which primarily corrective justice is attempted
 - (d) in a primarily reparative mode
 - (e) in response to claims for unliquidated sums
 - (f) where the duties breached are non-contractual."

Each of (a)-(f) is defended by further conceptual or ontological analysis of terms of each condition, and by arguments that one loses the sense of the category "tort law" without that condition. So, for example, (a) is explicated by reference to the notion of a normative legal power, and the argument that, unless we include this condition, we lose the distinction between criminal law and tort law. Both areas regulate wrongdoing, but only tort law allows the victim largely undirected control over the enforcement of the wrong.²⁷ Drawing distinctions between the phenomenon under study and other, related, phenomena, in order to sharpen our understanding of the former, is a quintessentially conceptual move.

²⁴ For an example of a theory based on "likely" features, see Sophia Moreau, 'The Moral Seriousness of Indirect Discrimination' in Collins and Khaitan (n 4). For a distinction between analysis of the "necessary features" of a thing and the features that contribute to the thing's identity, see Scott J Shapiro, *Legality* (Harvard University Press 2011) 8–10.

²⁵ There is a dispute about whether Hart's method is appropriately so characterised. cf Andrei Marmor, 'Farewell to Conceptual Analysis (in Jurisprudence)' in Wil Waluchow and Stefan Sciaraffa (eds), *Philosophical Foundations of the Nature of Law* (OUP 2013). See also NJ McBride and S Steel, *Great Debates in Jurisprudence* (Palgrave, 2018), ch 1.

²⁶ Gardner (n 8). See also Khaitan (n 16) ch 1.

²⁷ Often, these classifications themselves become issues of abiding theoretical disagreement.

Having separated it from criminal law, Gardner's analysis then distinguishes tort law from the law of equity through criterion (d). In his view, equity is distinguished by the primacy of non-reparative, gain-based, remedies. In maintaining a distinction between the law of tort and the law of equity, Gardner's view reflects the ordinary view of legal officials and practitioners. However, suppose we thought that gain-based remedies are not a central feature of the law's response to equitable obligations and that, on reflection, there are no conceptual or normative differences between equitable obligations and tortious obligations. We might then conclude that the law draws the boundaries of these areas of law in a way which serves no useful purpose.²⁸ If two sets of norms have the same conceptual structure and normative justification, it is unlikely to promote consistent reasoning to treat them as separate areas of law. Notice, however, that this moves beyond merely offering a *conceptual* analysis of the socially recognised area of law in question. To generalise, an ontological analysis of an area of law might serve as a premise in an argument that the existing recognised boundaries of two ostensibly distinct areas of law are incoherent: such a claim involves a normative taxonomic claim, i.e. a claim about how areas of law *should* be classified.

The *methods* by which conclusions concerning a particular concept are reached are typically the traditional tools of analytical philosophy, such as drawing distinctions, explicating the relationships between phenomena, and testing propositions about necessity or sufficiency with real or hypothetical examples. Accordingly, a theorist of a particular area of law, for instance, identifies norms, and inferential relationships between norms, that, according to her own conceptual intuition, constitute the area of law as distinct from or related in particular ways to other areas of law, while also giving substantial weight to the application of the concept in legal practice.²⁹ Her conclusions will be tested by consulting her own intuitions and the evidence available from the practice about real and hypothetical norms. Intuitions and practice also inform which cases are treated as paradigmatic, and which are peripheral or controversial, with varying impact on theory construction. We hasten to add that we do not assume that a 'case' must be one concerning an individual engaged in a

²⁸ See Section III.

²⁹ For a detailed argument that attending to the concepts embedded in the norms that constitute a legal area is necessary to give an accurate theoretical account of the area, see B Zipursky, 'Pragmatic Conceptualism' (2000) 6 Legal Theory 457. Offering an account of the characteristic patterns of inference in an area of law can be understood as a conceptual theory in our taxonomy.

particular action whose legal character is under scrutiny: such methodological individualism could distort understanding, and often lead to ignoring structures and emergent properties of systems. A ‘case’ for a philosopher can be different from how a lawyer understands the term, and could include a type of legal liability (the ‘case’ of indirect discrimination liability, for example) or even an entire area of law.

To the extent that conceptual or ontological theories are mainly concerned with the nature, structure, concept etc of an area of law, their exclusive focus on the conceptual data provided by *law-making* or *law-constituting* institutions (viz legislatures and appellate courts) is understandable. However, this inquiry might benefit from more robustly empirical methods in some domains. In recent years, experimental jurisprudence – “the study of jurisprudential questions using empirical methods”³⁰ – has begun to emerge.³¹ Practitioners of experimental jurisprudence survey lay-people, for example, as to their application of a concept, such as causation or intent, in hypothetical examples, to test whether the ‘ordinary’ concept of X is affected by certain factors.³² This approach seems most likely to be fruitful in so far as the law purports to apply ‘the ordinary concept of X’ in delimiting the boundaries of an area of law, or in so far as is one is simply seeking an account of such a legal concept; experimental jurisprudence can test the veracity of the law’s claim to employ the ordinary concept. There is, of course, a real probability that the law’s concept has taken on its own distinctive contours and so the evidential bearing that an account of the folk concept of X has in identifying the *legal concept* of X is necessarily limited.³³ More generally, it might also be fruitful to expand the theoretical dataset to examine not only the docket of appellate courts, but also those of lower courts and tribunals, as well as the practice of other, non-judicial, law applying officers such as the police and the bureaucrats, in constructing a conceptual or ontological theory.

B. Reason-tracking Causal Theories of Areas of Law

³⁰ Joshua Knobe and Scott J Shapiro, ‘Rethinking Proximate Cause: An Essay in Experimental Jurisprudence’ (2021) 88 U Chi L Rev 165.

³¹ See, e.g., Raff Donelson and Ivar Hannikainen, ‘Fuller and the Folk: The Inner Morality of Law Revisited’ in Tania Lombrozo, Joshua Knobe and Shaun Nichols (eds), *Oxford Studies in Experimental Philosophy: Volume Three* (OUP 2020).

³² See, e.g., Knobe and Shapiro, above n 31.

³³ For a helpful discussion, see F Jimenez, ‘The Limits of Experimental Jurisprudence’ in *The Cambridge Handbook of Experimental Jurisprudence* (forthcoming).

A reason-tracking causal theory of an area of law is a kind of socio-psychological empirical theory in special jurisprudence which seeks to identify the more fundamental motivating normative reasons which, *as a matter of fact*, guide legal officials in creating, developing, and determining the contours of that area. The sense in which such a theory looks for ‘more fundamental’ reasons is that it does not merely describe the surface-level institutional facts of legal practice, for instance, what judges *said* in cases X, Y, Z, or even if the explicit formulation of the norms given in legal materials. Rather, it seeks to explain what normative reasons truly motivated legal officials to say such and such in cases X, Y, Z or the legislators to enact a particular statute. However, despite this concern for seeking more fundamental explanations of surface level legal phenomena, such theories are *descriptive* in the sense that they aim to identify those more fundamental reasons which *as a matter of fact* influence the institutional content of the law.

In so far as it insists upon those reasons which, as a matter of fact, influence the institutional content, this type of account is not, then, a Dworkinian ‘best moral justification’ of the institutional facts. The best moral justification of the institutional facts may or may not be the one that motivated the judges to determine the content of the law in this way. If judges were as skilled moral reasoners as Dworkin’s Hercules, then there may be a convergence between the Dworkinian best moral justification of an area and the fundamental motivating reasons for the legal content of that area. But in our world, while a morally superior explanation M1 may, sometimes – when we can rationally believe that legal officials are reasonably competent moral reasoners – be the *more likely* explanation, than a morally inferior explanation M2, the moral superiority of M1 would at best be *one indication* that it in fact motivated the judges to create the legal content. What this shows is that, for this kind of theory, the moral superiority of an explanation may have an *epistemic*, empirical, role in the theory.

The epistemic relevance of the moral superiority of an explanation to a reason-tracking causal theory might lead to some confusion. It might give the impression that, after all, reason-tracking causal theories in special jurisprudence are inherently ‘normative’ after all. We think that this impression is misleading. This is because the truth of a reason-tracking causal theory

is never logically guaranteed by its normative appeal. Rather, the normative appeal of an explanation has an epistemic, empirical significance: under certain, and in many systems rarely existent, conditions concerning the quality and independence of judges, the moral superiority of an explanation may make it more likely to have been the reason which influenced the legal content. Similarly, the fact that an explanation entails that judges were motivated by mutually inconsistent normative values does not establish that the explanation is false. It only, depending on one's views about the moral reasoning abilities of officials in particular contexts, renders the explanation less likely to be true. The epistemic relevance of 'morality' or 'coherence' does not undermine, then, the fundamentally non-prescriptive nature of these theories. Given this fundamental concern to identify what reasons *in fact* motivated the development of the legal content in the area, these theories are normatively inert. Nothing directly follows from them about what ought to be done by anyone. If we offer a compelling reason-tracking causal account of tort law in terms of efficiency as the normative driver for judicial and legislative development of tort law, this is logically compatible with tort law being of no genuine value whatsoever. Having said that, we do not deny that a reason-tracking causal account may acquire normative relevance if seen by a judge as giving her reasons to decide cases in a particular way.

If what one is trying to do is offer a reason-tracking causal account, one's method should be determined by the nature of such an account. In particular, whether one seeks an account which is 'transparent' to legal officials or not will depend upon one's views about certain *empirical questions*. These empirical questions concern the relative likelihood of a reason in fact guiding official decision-making when the official does not articulate that reason (as guiding their decision-making) compared to the likelihood of the decision being guided by an explanation which is articulated by the official (or which would be able to be articulated under some suitable hypothetical conditions). The important point is that there is nothing *logically* inherent in the nature of a reason-tracking causal theory which insists upon transparency. The force of transparency is always empirically contingent. This point tends to be neglected in discussions of methodology in special jurisprudence where it seems often to be assumed that transparency either is or is not baked into the very idea of offering a theoretical account. For instance, Andrew Gold, in an insightful discussion of 'interpretive' theories of private law, initially seems to be in agreement with our view that the correctness of a non-transparent (or,

transparent, for that matter) explanation of an area of law is an empirical, contextually contingent, matter. For instance, he writes that ‘judicial opinions need not be perfectly transparent, but a theorist should at least be able to explain why judges would claim to reason in the way that the language of their opinions suggests’.³⁴ Later, however, when discussing whether a pluralistic theory of tort law is problematic from the perspective of a ‘coherence’ criterion, his discussion of the merits of such a criterion becomes untethered from the empirical issue of how likely it is that institutional actors act on the basis of incoherent reasons.³⁵ If, however, the aim is to provide a reason-tracking causal account (which may not be Gold’s aim – he describes his position as ‘interpretivist’ – a label we deconstruct later), the answer to the relevance of ‘transparency’ and ‘coherence’ simply cannot be answered as an abstract theoretical matter. Their relevance is empirically contingent. Thus, we claim that their *actual* reasons may or may not be transparent to the judges or legislators: sometimes they would know their reasons for doing what they do, at other points they may hold their normative assumptions unconsciously or sub-consciously.³⁶ Furthermore, even when their real reasons are transparent to judges, whether they report these reasons accurately in their judgments is also empirically contingent.

There is no bright-line between reason-tracking causal theories and what might be termed ‘deeply empirical’ causal theories of an area of law, for both seek to make sociological or psychological (rather than primarily philosophical) claims about law. In general jurisprudence, at least one major strand of legal realism is an empirical theory, in this sense: it claims that the primary causal explanation of judicial decisions is the classification of the facts by the judge as belonging to a certain factual pattern extraneous to law, facts which give rise to reasons that are external rather than internal to legal doctrine.³⁷

Empirical theories can be useful in testing the claims made by ontological and normative theoretical scholarship. They can highlight the gap between the law in action and the law as constituted by authoritative sources. They can expose the role of power, social identity,

³⁴ Andrew Gold, *The Right to Redress* (OUP 2020) 18.

³⁵ *ibid* 130-135.

³⁶ See Barbara Havelkova, ‘Judicial Scepticism of Discrimination at the ECtHR’ Collins and Khaitan (n 4).

³⁷ Brian Leiter, ‘Legal Realism and Legal Positivism Reconsidered’ (2001) 111 *Ethics* 278 (on conceptual vs. empirical legal realism).

culture, and political ideology as factors that shape the law and influence its functioning and implementation.³⁸ For example, critical race theorists have shown how one of the factors that led to the celebrated judgment of the United States Supreme Court in *Brown v Board of Education*,³⁹ desegregating America's racialised schools, was a temporary convergence in the interests of some powerful white groups and black people.⁴⁰ Much of critical legal scholarship aims not at providing theoretical explanations of legal phenomena by itself, but rather to 'destabilize the complacent and/or apologetic focus on the naturalness or autonomy' of such phenomena.⁴¹ At least when informed by robust social science methods of inquiry (instead of *a priori* and unfalsifiable ideological presumptions), empirical theories can perform an extremely valuable role of revealing aspects of the practice which need to be considered by a normative theory; a justification of a practice may be incomplete or skewed if it fails to account for its actual operation.

III. Normative theories

Normative theories are concerned with assessment of areas of law in terms of genuine reasons for action or genuine values (normative theories *simpliciter*), or reasons for action and values which exist from a perspective which is not necessarily shared by the theorist (*detached* normative theories). Normative theories *simpliciter* aim to identify the genuine reasons and values – or more generally the rationales – which justify particular areas of law or, indeed, require the reform or abolition of an area of law. Their overarching question is: 'is X area of law justified?' or 'Should society have the norms that constitute area X?' The idea of a normative theory is often treated, however, in a rather monolithic way, without acknowledgment that there are different types of normative theories that could be offered for an area of law.⁴² We will draw certain cross-cutting distinctions in this sub-section to map various normative approaches adopted in special jurisprudence, fully recognising that even

³⁸ Duncan Kennedy, 'A Semiotics of Critique' (2001) 22 Cardozo L Rev 1147, 1157.

³⁹ 347 U.S. 483 (1954).

⁴⁰ Derrick A Bell Jr., 'Brown v Board of Education and the Interest Convergence Dilemma' (1980) 93 Harv L Rev 518; Mary Dudziak, 'Brown as a Cold War Case' (2004) 91 J of Am Hist 32.

⁴¹ Kennedy (n 38) 1158.

⁴² Compare the now classic taxonomy of theories in Smith (n 10) ch. 1.

the possibility of some of these distinctions may well be controversial, and rejected by some theorists.

Detached v committed theories

A first distinction is between detached and committed normative theories.⁴³ A *detached* normative theory proceeds by assessing whether the area of law can be explained in terms of a *putative* normative value, reason, rule, principle, or set thereof, without the theorist taking a stand on whether that value, reason, rule, principle, or set thereof is a genuine value, reason, rule, or principle. An area of law is “explained by” a putative normative reason when, were the rationales valid, it would rationally support the adoption of the norms constitutive of that area. For instance, we might offer an efficiency theory of discrimination law while remaining aloof from whether efficiency is a goal that should be pursued. We would proceed by considering the implications of efficiency to the problems faced by the area of law and consider whether an efficiency-based solution to those problems would rationally support the legal rules in question (or enough of them). A detached theory is conditional; the conditionality is in relation to whether the value etc. doing the explaining is a genuine one. It is (implicitly) of the form: if *N* [a putative value] is valid, then it *pro tanto* justifies this area. By contrast, a *committed* normative theory includes an assertion of commitment to the value which is serving as the *explanans* (*explanans* = the thing doing the explaining). It asserts that, say, tort law is justifiable by efficiency (i.e. that (i) tort law (or, sufficiently significant components thereof) achieves efficiency, and that (ii) efficiency is desirable). Notice, however, that a committed normative theory could still be conditional in the way we explain in the next section.

What distinguishes reason-tracking causal theories from detached normative theories? The two may seem similar in that in neither case does the theorist take a stand, *qua theorist*, on the genuine moral value of the explanation. A further similarity is that both only licence claims

⁴³ We follow Gardner (n 8) ch 2 here, but develop the distinction further. See also John Gardner, ‘Tort Law and Its Theory’ in John Tasioulas (ed), *The Cambridge Companion to Philosophy of Law* (CUP 2018). On the distinction between detached and committed normative statements generally, see Rob Mullins, ‘Detachment and Deontic Language in Law’ (2017) 37 L & Phil 351. We tentatively agree with the view that the distinction relates to the pragmatics of assertion rather than the semantics of these statements.

about what one *genuinely* ought to do on the basis of some (further) normative premiss which the theorist does not purport to defend. It may seem, then, that there is a case for treating detached normative theories and reason-tracking causal theories within the same taxonomic category.

The main difference, however, which justifies their inclusion in this part of the taxonomy, is that detached normative theories do not necessarily purport to establish that the reasons which they identify are the ones which *in fact* motivated the development of the legal content. In principle, one could argue that *if Kaldor-Hicks efficiency* is genuinely-to-be-pursued, then one ought to have tort law, and *yet* still believe that it is false as a causal account of tort law. It would be a remarkable coincidence, of course, if tort law could be justified by Kaldor-Hicks efficiency even if it never guided the development of the legal content in the area. Nonetheless, it is a logically separate kind of claim. A detached normative theorist is, strictly, freed from demonstrating that their theory *actually influenced* legal practice.

It might be questioned whether ‘detached normative theory’ is a worthwhile enterprise.⁴⁴ If the theorist does not purport to identify a *genuine* reason which justifies the legal content of the area, and *nor* do they purport to be able to explain what actually influences the legal content of the practice, why bother? In our view, such theories can nonetheless be valuable. This is because it is often unclear whether something is of genuine value or genuinely permissible or required. Moral uncertainty (not merely empirical uncertainty) is a pervasive feature of practical life. It can thus be valuable to investigate whether a *putative* value may justify an area of law, in the hope that further moral analysis may be able to establish that it is of genuine value.⁴⁵

If the primary distinction between detached and committed normative theories is the theorist’s assertion of a commitment to the genuine normative value of the propositions in

⁴⁴ Charlie Webb raises this doubt in relation to interpretive theories. See, generally, Charlie Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (OUP 2016). While we otherwise agree with Webb’s perspicacious discussion, in particular his insistence of the difference between non-normative and normative theories, we differ on this question of value.

⁴⁵ Of course, this does not save detached normative wealth-maximisation law and economics, which is so obviously based on a normative error (a joke, sort of).

the theory, it may seem odd to distinguish them. Why distinguish between theories depending upon the theorist's moral commitments? The main reason for doing so is that, typically, detached normative theories do not provide us with any reason for believing in the moral (or other) value of the explanans. Their posture is merely one of implicitly stating that such-and-such, a putative moral position, justifies the law. Therefore, it is likely that, without more, we will not have sufficient grounds for concluding that the theory has any genuine normative bite if the theory is offered as a detached theory. We will likely need to look elsewhere—to committed normative theories—for arguments showing why the explanans is valuable.

Pro tanto v all-things-considered theories

A normative theory may be *pro tanto* or *all-things-considered*. A *pro tanto* theory sets out a defeasibly sufficient justification, or set of justifications, for the area. An *all-things-considered* theory purports to demonstrate that the area of law is what one ought to have in the circumstances to which the theory applies. For instance, a theorist could argue that a defeasibly sufficient justification of tort law is the fact that institutional recognition of reparative, interpersonal non-agreement-based moral rights increases the probability of conformity to such rights, or usefully resolves indeterminacies in their content. However, the theorist may remain neutral on whether tort law is justified *all-things-considered*. It may be that tort law creates such woefully counterproductive incentive structures that it will lead to more violations of moral rights than if tort law did not exist. Or it may be that, when compared with the benefits of alternative possible institutional arrangements, the opportunity cost of tort law arrangements is too great. These kinds of defeating circumstance may well entail that tort law is not justified *all-things-considered*. This is not the same distinction as detached versus committed. A detached theory may only seek to identify a *pro tanto* justification *by the lights of efficiency* for the area or it may seek to show that by the lights of a moral system the theorist does not take a stand on, it is *all-things-considered* justifiable.

In any sufficiently complex jurisdiction, offering *all-things-considered* theories for most areas of law is likely to be extremely difficult, if not impossible. Doing so for legal systems generally, i.e. without reference to the particularities of a given jurisdiction, even more so. Furthermore,

the application of even an all-things-considered normative theory of an area of law to a specific multifaceted real-world problem arising within that area of law is unlikely—on its own—to generate specific prescriptions to act or decide in one way rather than another, albeit it will narrow the field of permissible possibilities.⁴⁶

Hyper-reformist v practice-dependent theories

Normative theories are unconstrained by considerations of ‘fit’ in the following sense: it does not necessarily count in favour of a normative theory that it fits the practice. Fit bears no necessary connection to normative appeal. This is a central contrast between normative theories and conceptual and reason-tracking causal theories: the latter fail if the theory substantially fails to fit the data, and lack of fit counts against the theory.

This is consistent, however, with the following roles for ‘fit’ in normative theories. First, if the conclusion of a normative theory is that ‘X area of law’ ought to be reformed or abolished, or ‘X area of law is problematic because of feature F’, the theorist must, of course, accurately identify X and F.

Second, in relation to certain kinds of normative issue, there may be a weak evidential significance to considerations of fit. As we noted above, in relation to reason-tracking causal theories, the moral superiority of an explanation can have, in certain contexts, an epistemic significance: it can make it more likely to be the explanation of a legal norm. If a particular legal rule is found in multiple legal systems, created under conditions that are conducive to moral correctness, and arrived at independently by multiple legal systems, this at least raises a chance that the rule is justified. Of course, until a justification for the rule is actually identified, the mere fact that it is widely posited in these circumstances is unlikely to be a robust defence of the rule.

⁴⁶ A normative theorist need not be committed to the idea that there is a single morally best form of an area of law. It may be that an area morally must have general features X, Y, Z, but the precise way in X, Y, Z are realised may permissibly vary. For instance, property law is morally required, one might think, to have rules for when property is owned, but the precise content of these rules may permissibly vary from system to system. This is a familiar feature of Kantian theories, which emphasise the indeterminacy of pre-legal rights as a reason for legal authority in general. See, e.g., Ernest J Weinrib, *The Idea of Private Law* (OUP 1995); Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (HUP 2009).

Finally, normative theories might still begin with existing practice. This might simply be because they are directly concerned to contribute to the normative assessment of present institutional arrangements. There might, however, be a theoretical value in doing so in relation to certain types of theoretical question. The law is a rich repository of moral distinctions and reasoning, developed across thousands of particular examples; it may assist in identifying important moral distinctions that would otherwise be missed by even the most ingenious exponent of trolleyology.

Normative theories can be more reformist or more vindictory of existing practice. At one extreme, a theory could be radically reformist – *hyper-reformist*, we might call it – and yet still be a normative theory of a particular area of law. For instance, one could offer a hyperreformist theory which argued that the morally ideal form of tort law is one which only protects people's freedom-based rights and no more. This theory is hyper-reformist in the sense that it may not purport to justify any significant parts of the extant area of law in question. Such a theory may hold that, for instance, the torts of defamation and privacy are unjustifiable, because they go beyond protecting people's freedom-based rights. Even so, this is a normative theory *of tort law* since it still prescribes the existence of something recognisably like existing practice. Consequently, it is clearly an error to criticise hyper-reformist theorist on the basis that they recommend wide-ranging changes to an area of law. A theory of the morally best form of tort law, which recommends radical changes to extant practice, can still be a theory *of* tort law in so far as it justifies some key aspect of existing systems of tort law. For example, a hyper-reformist theory of tort law that calls for limiting its scope to the protection of people's freedom-based rights must—either explicitly or implicitly—have a view about the nature of tort law, which underpins its hyper-reformist claims, else it risks recommending the existence of something justifiable, but not properly described as *tort law* at all. In short, even hyper-reformist theories *of* areas of law are accountable to the existing contours of the practice of that area to some minimal extent.

IV. [Objections](#)

- (i) *Non-normative theories are impossible in special jurisprudence*

Previous iterations of this paper have been met with the objection that non-normative theories of an area of law – conceptual theories and reason-tracking causal theories – are impossible. Here are some more fine-grained versions of this objection and our responses to them.

a. 'Legal validity depends upon moral validity'

Suppose one is an anti-positivist. This means that one denies that legal validity (at least ultimately) depends only upon social facts.⁴⁷ Suppose further one is a *moral* anti-positivist: one believes that legal validity depends, necessarily, upon moral facts.⁴⁸ If so, then identifying the legal content of an area of law will necessarily depend upon moral argument, since an area of law is constituted by binding legal norms, and whether a norm is such, on this view, necessarily depends upon moral facts. If we grant all this, does it follow that *conceptual* and *reason-tracking causal* theories are impossible? It does not.

First, it is difficult to deny, as a matter of social fact, that the practice of law makes categorisations of norms into certain groups. These categorisations may be morally arbitrary or otherwise indefensible. For instance, one might think that the social categorisation of norms into 'equitable' and 'non-equitable' does not track any moral distinction. But this is clearly a different point from whether this categorisation exists as a matter of social fact. If these categorisations exist as a matter of social fact in a given jurisdictional context, then their conceptual content is a subject matter of special jurisprudence. It may turn out that the concept so revealed is incoherent, arbitrary, vague and so on – but so be it.

⁴⁷ See John Gardner, 'Legal Positivism: 5½ Myths' (2001) 46 Am J of Juris 199.

⁴⁸ One could, logically, reject the claim that validity depends only on social facts as well as deny that it depends on moral facts. Perhaps one, oddly, believes that legal validity depends entirely upon logical validity (also non-social). Hence moral anti-positivism is a subspecies of anti-positivism. For a compelling rejection of a recent strand of moral anti-positivist theories of law: Hasan Dindjer, 'The New Legal Anti-Positivism' (2020) 26 Legal Theory 181.

It is notable in this connection that Dworkin – a moral anti-positivist – excluded the conceptual boundaries of ‘areas of law’ from his notion of an ‘interpretive concept’.⁴⁹ An interpretive concept, for Dworkin, is a concept whose content is determined by moral argument. For instance, the nature of democracy, according to Dworkin, depends upon what is the morally best interpretation of democratic practice.⁵⁰ Dworkin did not regard the concepts that marked out areas of law (or, in his terminology, ‘departments of law’) to be interpretive concepts.⁵¹ Although he insisted that “compartmentalization is a feature of legal practice no competent interpretation can ignore”, he also claimed that the boundaries of these “departments of law” themselves are not interpretive phenomena but “based on tradition”.⁵² Sure, a judge may well seek to alter the traditional boundaries of classification for moral reasons. But these alterations will be effected, Dworkin accepts, only “[i]f he persuades the profession of his view”.⁵³ So, unlike his interpretive claim that what the law *is* cannot be determined without answering some normative questions, the existence and scope of an area of law is entirely determined by reference to a social fact concerning its recognition as such by legal practice.

Of course, Dworkin could be wrong about this and fail to carry through appropriately his non-positivistic commitments into the domain of special jurisprudence. We do not think this is the case, however. First, the central debate between positivists and anti-positivists is one about *legal validity* – about the kinds of fact which ground legal content. Whether a norm belongs to an area of law is not a question of the norm’s *validity* or bindingness as a legal norm. It is, therefore, logically consistent to hold a social fact view about the contours of legal areas and a non-social-fact view about legal validity. Second, even if the classificatory bases that pick out areas of law are informed by an implicit moral principle or set of principles, those principles may or may not be fully realised in the social categorisation that is employed in legal practice. It should be possible to accept two kinds of inquiries here: one that seeks to understand the bases-of-classification actually employed in legal practice to delimit areas of

⁴⁹ See Ronald Dworkin, *Law’s Empire* (HUP 1988) ch 3; Ronald Dworkin, *Justice for Hedgehogs* (HUP 2011) chs 7, 8.

⁵⁰ Ronald Dworkin, ‘Hart’s Postscript and the Character of Political Philosophy’ (2004) 24 *Oxford J of Legal Stud* 1.

⁵¹ See Dworkin, *Law’s Empire* (n 49) 250–54.

⁵² *ibid* 251–52.

⁵³ *Ibid* 254.

law, and one that seeks to articulate the categorisation which would be employed if the underlying principles of the socially employed categorisation were consistently extrapolated. Indeed, the view that the boundaries of an area of law are *solely* an interpretive phenomenon seems implausible. Imagine that for some curious historical reason, a legal system sets up separate courts to deal with ‘Tuesday law’. All legally relevant events that take place on Tuesdays—crimes committed, contracts agreed upon, injuries inflicted—are litigated before these special courts. A separate set of the Bar, called Tuesday lawyers, develops specialism in Tuesday law. Law Schools have special courses teaching Tuesday law. There is even a journal called Tuesday Law Review (published, oddly, on a Wednesday). For all that, no one can quite remember why Tuesday law developed in the first place, and there seems to be no contemporary reason for its separate existence. In fact, let us suppose there are very good, even overwhelming, reasons why Tuesday law should not exist as a separate area of law, but should instead be disaggregated and merged with the rest of criminal law, tort law, contract law and so on. It is, nonetheless, not at all clear to us in what sense one could claim that Tuesday law *does not exist* as an area of law in that jurisdiction. Whatever one’s views might be on the interpretive character of law, we suspect—with Dworkin—that there is at least one important sense in which an area of law is a social fact rather than an interpretive phenomenon. This sense can be analysed as part of a conceptual theory.⁵⁴

Normally, the areas of law that are the subject of theoretical inquiry are those in which the relevant members of legal practice consider the norms to have some important rational connection such that membership in the subset has an important normative implication. For instance, legal actors will consider classification as part of area X as implying the apt operation of other rules of law. If something is classified as a tort, it is considered apt to respond to it legally in certain ways, for instance, with damages claims before civil courts. Thus, some might say that *this is part of what it is for an area of law to exist*: an area only exists if something’s being classified as part of that area has a legal significance, such as giving rise to pro tanto legal reasons for certain legal responses. These kinds of categorisation – what Peter Cane has

⁵⁴ For an elaboration of this claim, see Khaitan and Steel (n 15).

called ‘dispositive’ classifications⁵⁵— seem to us to be an important sub-class of areas of law. But it seems too narrow to exclude from the objects of theoretical inquiry socially-recognised classifications which do not have normative significance within legal practice. Even if the classification of a norm as a norm of labour law has no dispositive significance within legal practice, there is still a clear sense in which labour law exists as an area of law within law schools, and it could still be pedagogically rewarding and theoretically interesting to investigate, for instance, whether its norms have any rational unity.

b. ‘Conceptual disagreement reduces to moral disagreement’

A second objection to thinking that non-normative conceptual theorization of an area of law is possible might derive from Finnis’ methodological argument in *Natural Law and Natural Rights*.⁵⁶ Finnis argues that when we adopt the internal perspective on the law, from which the law creates *norms*, we will find that people disagree about the necessary and sufficient conditions which a social organisation must satisfy in order to amount to a ‘legal system’. If legal theory is to avoid simply collecting a variety of different perspectives on the nature of law, it must, for Finnis, identify the ‘central’ case of law, which is the case of law that we end up with by arguing from first moral principles about what kinds of state institutions we need in society.⁵⁷ Again, we cannot fully engage with this argument here – our primary aim is to categorise and explain different approaches to special jurisprudence with the goal of clarifying their distinctive claims. But we are sceptical of the claim that the existence of disagreement amongst persons who adopt the internal perspective *necessarily* entails what

⁵⁵ Peter Cane, *The Anatomy of Tort Law* (Bloomsbury 1997) 198–201.

⁵⁶ John Finnis, *Natural Law & Natural Rights* (2nd ed, OUP 2011) ch 1.

⁵⁷ For Finnis, the central case of a social phenomenon sometimes seems to be stipulatively defined as the case that is morally required or desirable. Other possible meanings of “central case” include: (i) the uncontroversial instance of a kind (e.g. murder as an instance of a crime); (ii) the instance of a kind which serves best as a communicative explanation of the kind (e.g. it’s easiest to explain what a knife is first by reference to one that cuts, rather than a blunt one); (iii) the statistically most frequent instance of a kind (e.g. spotted cheetahs); (iv) the instance of a kind similarity to which determines whether some instance is a species of that kind (e.g. race as a paradigmatic characteristic protected by discrimination law, based on which claims to protect other characteristics are determined in American law); (v) the instance of a kind which best exhibits the characteristic function of that kind (the sharp knife v the blunt knife); (vi) the evaluatively best instance of a kind (e.g. the tastiest and most nutritious foods); (vii) the instance of a kind which best exhibits the reason(s) for having that kind of thing (law that fosters the common good, in Finnis’ view). For a helpful elaboration of some of these possibilities, see Julie Dickson, ‘Law and Its Theory: A Question of Priorities’ in John Keown and Robert P George (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013).

is, in substance, full-fledged normative political philosophy, and no longer conceptual theory at all.⁵⁸ For instance, suppose that someone disagreed with one of Gardner's necessary features of tort law, say (b), that the law of torts is a law of wrongs. There are various ways in which this disagreement might be explained or resolved without resort to normative argument. As Shapiro says, conceptual disagreement might happen because one person "engages in fallacious reasoning, overlooks relevant evidence, lacks imagination, indulges in wishful thinking, or brings to bear a different worldview than their interlocutor".⁵⁹ At any rate, even in the face of pervasive disagreement conceptual theory could still proceed to identify the conceptual implications of *a prominent or widely shared* understanding of the area in question. It seems, then, that non-normative conceptual theories of areas of law are possible even if one accepts Finnis's general jurisprudence account of theorising about legal systems.

This is not to deny that conceptual and reason-tracking causal theories may require the theorist to engage in what Julie Dickson calls 'indirect' evaluation.⁶⁰ They do not necessarily require the theorist to make committed normative judgments, such as "x is morally required" or "x is morally valuable". But they may require the theorist to make non-committed normative judgments—that is judgments that X is required, permissible, valuable (etc.) from a certain perspective, particularly the perspective of those whose actions primarily constitute the practice. For example, the theorist may, herself, regard corrective justice as moral bunk, but to explain whether corrective justice is a necessary feature of the socially recognised concept of tort law, she may need to determine the implications of the idea of corrective justice.

c. 'Detached normative judgments are impossible'

An anti-positivist may still object to the various sub-classifications we make within normative theories. What meaning, it might be said, can be given to 'detached normative theory' if one believes that determining the content of the law necessarily involves moral argument? Any

⁵⁸ Finnis (n 56) ch 1. See also Grégoire Webber, 'Asking Why in the Study of Human Affairs' (2015) 60 Am J of Juris 51.

⁵⁹ Shapiro (n 19) 18.

⁶⁰ Julie Dickson, *Evaluation and Legal Theory* (Bloomsbury 2001) ch 3.

proposition about the content of the existing law is, it might be said, a committed normative proposition, since it takes a stand on the moral justification of the existing law. This objection overlooks the possibility of offering a detached theory as a *possible* account of the legal content of the area. Suppose the anti-positivist is uncertain about whether efficiency is a genuine value. If so, she might offer an account of the following form: ‘if efficiency is a value, then the legal content of this area is X, Y, Z’. For this kind of anti-positivist, a detached normative theory may be a kind of preliminary to determining the true legal content of the area.

Furthermore, any plausible anti-positivist theory of law must still find a way of recognising a distinction between the law as it is and the law as it ought to be.⁶¹ So an anti-positivist might still engage in *hyper-reformist* theorising. For instance, let us take Greenberg’s moral impact theory, according to which the legal obligations in a jurisdiction are the moral obligations created by the actions of legal institutions. So, for Greenberg, a statute that requires us to reduce our carbon emissions by 25% over the next year may successfully create a moral obligation on us to do so, even if such an obligation would otherwise be morally sub-optimal.⁶² So our categorisation still makes sense from an anti-positivist perspective. And, of course, if we dispensed with detached normative theory, this would exclude an important brand of theorizing about areas of law

(ii) ‘*Interpretivist theories are a tertium quid*’

Some theorists offer “interpretive” theories of areas of law. The nature (and value) of these theories has itself become an object of significant discussion.⁶³ What seems to undergird them, as a whole, is the negative claim to be neither simply descriptions of the existing law *nor* purely normative.⁶⁴ Indeed, their critics accuse them of incoherently adopting a non-existent methodological *tertium quid*.⁶⁵ Our aim in this section is to deconstruct different

⁶¹ This is not controversial. See, e.g., Dworkin, *Justice for Hedgehogs* (n 49) ch 19.

⁶² Mark Greenberg, ‘The Moral Impact Theory of Law’ (2014) 123 Yale L J 1118.

⁶³ Steve Hedley, ‘The Shock of the Old: Interpretivism in Obligations’ in Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law* (Hart 2008); Webb (n 44); Allan Beever and Charles Rickett, ‘Interpretive Legal Theory and the Academic Lawyer’ (2005) 68 Mod L Rev 320.

⁶⁴ cf Frederick Wilmot-Smith, ‘Reasons? For Restitution?’ (2016) 79 Mod L Rev 1116, 1122.

⁶⁵ See Webb (n 44) 7.

possible versions of interpretivism and show that they are accommodated by our taxonomy. This deconstruction aims to assist in the clarification of the kind of claim made by these theories. Given the variety of different kinds of claim that might be made under the banner ‘interpretivism’, it seems preferable to us to use more fine-grained descriptions of the kinds of theory being offered. Ultimately, we show, these theories are either non-normative or normative theories, and fit neatly within our taxonomy.

a. Interpretivism as detached normative theory

One reason why interpretive theorists may be reluctant to characterise their inquiry as ‘normative’ is that they might be engaged in *detached* normative theory: avoiding the ‘normative’ label is a means of indicating that one is remaining aloof from the question of whether the explanation of the area one identifies is truly normatively valid. For example, an interpretive theorist could purport to show that the area is explained by efficiency, bracketing whether that is a goal-to-be-pursued (the detached version).⁶⁶

This is one reading of Smith’s characterisation of interpretive theories: “[i]nterpretive theories aim to enhance understanding of the law ... by revealing an *intelligible order* in the law, so far as such an order exists”.⁶⁷ The revelation of such an order proceeds by showing how features of the law are “best explained”.⁶⁸ If one seeks an explanation in terms of reasons for the area of law, but one remains uncommitted on whether those reasons are genuine reasons, then one offers a detached normative theory.

b. Interpretivism as reason-tracking causal theory

Smith’s characterisation could also be read as saying that interpretive theories are *reason-tracking causal* theories. On this reading, these theories seek to reveal an intelligible order – a set of reasons – which *as a matter of fact* guide the practice in that jurisdiction. This reading

⁶⁶ See, e.g., Richard A Posner, ‘A Theory of Negligence’ (1972) 1 J Legal Stud 29.

⁶⁷ Smith (n 10) 5.

⁶⁸ *ibid* 5. Smith describes a theory that contract law rules are “best explained” by economic efficiency as an example of interpretive theory.

is supported by what Smith says about whether a theory should be ‘transparent’. Smith seems to see transparency to be significant for epistemic, empirical, reasons: it should increase our confidence that the explanation is the one actually underlying legal practice.⁶⁹ Note the importance, however, of disaggregating these two possible things one could be doing as an ‘interpretivist’. If one is offering a detached normative theory, there is no inherent reason to care about transparency. If one is offering a reason-tracking causal theory, one is bound to provide evidence that one’s theory is as a matter of empirical fact the one which is guiding the determination of legal content. This is likely to involve a greater (epistemic) significance being attached to transparency.

This conception of interpretivist theory also seems to underpin Smith’s discussion of interpretivism when he prefers a ‘moderate’ morality criterion for what constitutes a good theory of an area of law. This criterion requires that a theory must “show how legal actors could sincerely, though perhaps erroneously, claim that the law was morally justified”.⁷⁰ The rationale for this criterion, at least in part, is that the theory is *more likely to be the one which explains the rules and reasoning* in the area because legal officials claim that the law is morally justified.⁷¹

c. Dworkinian interpretivism

Dworkinian interpretivism seeks the explanation of an area of law which (i) best fits the features of the area and (ii) has the most moral appeal. It is distinct from *reason-tracking causal theory* in two ways. First, having identified the explanation satisfying (i) and (ii) – if such an explanation exists – it concludes that *this is already part of the law*.⁷² So, Dworkin argues, there may be a legal right to engage in civil disobedience in a given jurisdiction even if its apex court has held otherwise, for ‘though the courts may have the last word in any particular case about what the law is, the last word is not for that reason alone the right word.’⁷³ Second, this brand of interpretivism is not committed to the idea that the

⁶⁹ Smith (n 11) 24-28.

⁷⁰ Smith (n 10) 18.

⁷¹ *ibid* 18–20.

⁷² Dworkin, *Law’s Empire* (n 49).

⁷³ Ronald Dworkin, *A Matter of Principle* (HUP 1985) 116.

explanation identified is the one that actually influences the development of the area. Of course, if the explanation cannot be said to have any causal impact, this may reduce the probability that it will *fit* the practice, but this is a contingent matter. Dworkinian interpretivism is essentially a kind of committed normative theory, albeit one that insists that the upshot of its argument is a conclusion about *what the law is*.

Within special jurisprudence, Dworkinian interpretivism has been especially popular with constitutional theorists.⁷⁴ Constitutional law is particularly amenable to Dworkinian insights because of the very wide latitude judges have in deciding politically-charged decisions due to only being governed by vague and broad constitutional provisions and often conflicting precedents. This is precisely what makes it easy to characterise constitutional judgments as ‘wrong *in law*’, as permitted by Dworkin’s one-right-answer thesis. It has also been applied to explain US antitrust law, in part because it is an area of law where US courts have been very willing to revisit or ignore precedents.⁷⁵ McGinnis and Meerkins’s antitrust theory is Dworkinian (rather than causal) because their overarching organisational principle for this area of law—consumer welfare—explains US antitrust law (on their view) despite some legislators in fact being motivated by other purposes when legislating in this area of law.⁷⁶

d. Interpretivism as restricted reason normative theory

Here are Beever and Rickett, self-described interpretivists:⁷⁷

“The theorist begins with what appear to be salient features of the case law.
She then attempts to produce a theory that explains these features ...”

Beever and Rickett at points seem clear that they are not causal theorists:

⁷⁴ See, e.g., Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2010); Robert Alexy, ‘The Dual Nature of Law’ (2010) 23 *Ratio Juris* 167.

⁷⁵ John O McGinnis and Andrew M Meerkins, ‘Dworkinian Antitrust’ (2016) 102 *Iowa L Rev* 1, 37-8.

⁷⁶ *ibid* 31-2.

⁷⁷ Allan Beever and Charles Rickett, ‘Interpretive Legal Theory and the Academic Lawyer’ (2005) 68 *Mod L Rev* 320, 325. For other views that might be understood as ‘restricted reason’ interpretivist theories, see generally Paul Miller, ‘The New Formalism in Private Law’ (2021) 66 *American Journal of Jurisprudence* 175.

“the legal theorist is primarily concerned, not with the reasons individual judges may have had for reaching their decisions, but with the best explanation for those decisions”.⁷⁸

Nonetheless, Beever and Rickett insist that the ‘best explanation’ must be one which is in some way “internal” to the area.⁷⁹ In this way, these theorists *restrict* the kinds of reason that are permitted to enter into the best explanation – the best justification – of the area. For Beever and Rickett, the fact that a normative consideration provides a reason for having a particular feature of that area is not sufficient to make it “internal” to the area. It follows that, for them, an efficiency-based reason is not ‘internal’ to tort law. It is not entirely clear, however, what ‘internality’ means in this case. One possibility is that this brand of interpretivist theory asserts that judges have been influenced indirectly or sub-consciously by the reasons that the theory identifies, but that judges articulate these reasons badly (inadvertently or otherwise). However, some interpretivist theories make little effort to vindicate this causal claim, such that it seems unlikely that these theorists are really causal theorists.⁸⁰ If ‘internality’ does not mean this – that is, if internality is not an indication that the theorist is trying to track the implicit, if unarticulated, explanation underlying the practice *as a matter of fact*, then the theory is ultimately a normative theory. If so, its exclusion of certain reasons from the justification of the practice has to be defended *on normative grounds*.

⁷⁸ Beever and Rickett, x.

⁷⁹ Dworkin may also be described, at least in some of his work, as an interpretivist of this kind, in so far as he opposed, or gave less priority to, “policy” reasons over rights-based, principle reasons in the “justification” criterion. See Ronald Dworkin, *Taking Rights Seriously* (HUP 1977).

⁸⁰ Beever’s brand of interpretive theory diverges from a straightforward detached or committed normative theory in a further way. Beever and Rickett claim that “the appeal to policy must always be problematic. This is because policy must be appealed to only if the existing explanations of the law are manifestly inadequate.” See Beever and Rickett (n 63) 335. Beever and Rickett do not say what they mean by “policy”, so it is not straightforward to assess this claim. At points, they seem to mean any normative consideration that is, in some sense, not recognised by the law. However, what does it mean, for them, for a normative consideration to be “recognised” by the law? It does not mean that it has received an articulation by any legal official. It simply means that it explains the law, or the structure of the law, but, of course, an explanation of the law should not appeal to reasons which do not explain the law! In every instance, however, it is a substantive theoretical question whether any particular normative consideration explains the law. It may be that considerations of a certain kind are doomed to failure as explanations, but that is a *finding* of the theory, not a methodological constraint. Thus, we agree with Beever and Rickett that explanations which do not fit the (salient) legal facts are not good explanations. Nevertheless, this does not rule out, pre-theoretically, any particular kind of normative consideration.

Interpretivist theories: the importance of clarifying their nature

As noted above, interpretive theorists are typically keen to distinguish their enterprise from at least certain types of normative theory. Beever writes that “though the theory is prepared to jettison some elements of the positive law, it is not prescriptive. It is not an account of how the law ought to be in some ideal, or even non-ideal, state.”⁸¹ If this is just a declaration of being a *detached* normative theory, then it makes perfect sense. Nonetheless, and somewhat puzzlingly, it seems that interpretive theory *does* offer *committed* prescriptions: “interpretive legal theory will often call for changes to details of positive law”.⁸² Is this call for change just a detached prescription? Maybe. Perhaps Beever is saying that “the details of the law should be changed from the perspective of, or *given* the rational commitments of, the area of law—but whether it *really* ought to be changed is another question”.

Or perhaps Beever is saying *both* that, from perspective of the area of law, the law ought to be changed *and* that this alone provides a genuine and sufficient normative reason for changing the area of law. On this latter understanding, the interpretive theorist, in prescriptive mode, claims that the law ought to be changed in order to be more consistent with whatever explains the central features of the area of law, while bracketing the issue of whether that explanation is morally valid. This prescriptive aspect of Beever-interpretivism seems problematic to us. This brand of interpretivism can only validly make conditional prescriptive claims—that is, claims that are conditional upon the validity of the value (etc.) serving as the explanans. To see this, suppose that the only possible explanation of employment law in a given jurisdiction are the principles of the Cenotine religion (an imaginary religion whose precepts include doing fruitful work on every day of one’s life),⁸³ but one branch of this legal system’s employment law is not consistent with these principles. Is there a reason to alter this branch so that employment law as a whole is more consistent with Cenotine principles? If you like, there is a reason *from the Cenotine perspective* for doing so. However, that is no true reason. In relation to the law, if we conclude that the only possible justification of a set of rules is X, we may wish to say that, if the law is to adopt a *maximally*

⁸¹ Allan Beever, *A Theory of Tort Liability* (Bloomsbury 2018) 5.

⁸² *ibid* 329.

⁸³ Terry Pratchett, *Feet of Clay* (Harper 1996).

consistent set of normative propositions, then it ought to alter the law to conform to X. Regardless, consistency-based reasons are only reasons worth paying attention to if a minimal threshold of genuine value is met. In our example, Cenotine principles have to meet some objective threshold of value before we can make committed claims about making employment law consistent with them. Even if we were to conclude that the *only* thing which could make sense of an area of law were Cenotine—all other explanations are inadequate—this would *still* provide us with *no* reason to alter that area of law to make it more Cenotine-like unless we thought that Cenotine principles were in some way good, or unless, perhaps, people have planned their life around the area of law's moving in a Cenotine-like direction—a rule of law concern.

Interpretivists could avoid the problem we identify here by arguing that the explanation they offer has some genuine moral merit, even if it is not morally optimal. There may then be reasons for the law to continue along a morally sub-optimal path, and interpretivists could validly offer prescriptions. This is precisely the approach that Smith adopts when endorsing “the moderate version of the moral criterion”, which is “that good [interpretive] theories show that the law is, or could be thought to be, supplied by recognisably moral principles”,⁸⁴ without also insisting that these “are the best possible moral foundations”.⁸⁵ Notice, however, that even the sub-optimal moral merit of the normative propositions has to be established for any valid prescriptions to follow.

V. CONCLUSION

This paper is aimed at enhancing the clarity of theoretical debates in special jurisprudence by providing a taxonomy of the different kinds of theoretical claim that may be made about areas of law. We have proposed a fundamental division of theories into non-normative and normative and explained the variety of different possible theoretical claims within this division. At the same time, we have shown how these divisions can become blurred in practice because of the *indirect*, epistemic, relevance of moral considerations to non-normative

⁸⁴ Smith (n 10) 22.

⁸⁵ *ibid* 24.

theories. Nonetheless, the *in-principle* distinction is clear, should be acceptable regardless of the *school* of general jurisprudence one subscribes to, and bears importantly upon the assessment of claims being made in special jurisprudence.