



Special Jurisprudence and Normative Theories: Distinguishing Between Evaluative and Prescriptive Theories

Received: October 6, 2023 • Approved: June 2, 2026
<https://doi.org/10.22395/ojum.4590>

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Abstract

This article aims to bring to the spotlight the distinction between evaluative theories and prescriptive theories regarding a specific area of law—a distinction that a recently formulated classification fails to make. The difference between evaluative and prescriptive theories is significant because only the latter are subject to the “feasibility constraint” or the principle that “ought implies can.” In addition to demonstrating the importance of distinguishing between these two types of theory, the article discusses certain implications of the feasibility constraint for prescriptive theories concerning areas of law.

Keywords: special jurisprudence; areas of law; evaluative theories; prescriptive theories; feasibility constraint.

Jurisprudencia especial y teorías normativas: una diferencia entre teorías evaluativas y prescriptivas

Resumen

El presente artículo busca llamar la atención sobre la diferencia entre teorías evaluativas y prescriptivas en relación con una rama del derecho específica, una diferencia que no contempla una clasificación reciente. La diferencia entre teorías evaluativas y prescriptivas es importante porque solo estas últimas están sujetas a la "restricción de viabilidad" o al principio del "deber implica poder". Además de demostrar la importancia de diferenciar entre estos dos tipos de teoría, el artículo discute algunas implicaciones de la restricción de viabilidad para las teorías prescriptivas en relación con las ramas del derecho.

Palabras clave: jurisprudencia especial; ramas del derecho; teorías evaluativas; teorías prescriptivas; restricción de viabilidad.

Jurisprudência especial e teorias normativas: uma diferenciação entre teorias avaliativas e prescritivas

Resumo

Este artigo procura chamar a atenção sobre a distinção entre teorias avaliativas e teorias prescritivas em relação a um ramo específico do direito, uma distinção que uma classificação recente não faz. A diferença entre teorias avaliativas e prescritivas é relevante, pois apenas estas últimas estão sujeitas à "restrição de viabilidade" ou ao princípio de que "o que deve implicar o que poder". Além de demonstrar a importância de distinguir entre esses dois tipos de teorias, o artigo discute certas implicações da restrição de viabilidade para as teorias prescritivas relativas aos ramos do direito.

Palavras-chave: jurisprudência especial; ramos do direito; teorias avaliativas; teorias prescritivas; restrição de viabilidade.

Introduction

This article is the result of my research work on theories of the law of obligations (contracts, torts, and unjust enrichment). This study falls in the category of special jurisprudence or particular jurisprudence, consisting of theories about a particular area of law, such as contract law or discrimination law. While there is abundant literature on theories of areas of law, little attention has been given to special jurisprudence itself, i.e., the methodological questions that are specific to special jurisprudence. Comparing general theory and special theory of law, Bix (2022, p. 83) states: "Theories of doctrinal areas—for example, theories of contract law, tort law and property law—are common, but issues of methodology seem less commonly discussed and are certainly not widely agreed upon."

A welcome exception is two recent articles co-authored by Tarunabh Khaitan and Sandy Steel (Khaitan & Steel, 2022; 2023). In the latter, Khaitan & Steel address fundamental methodological questions of special jurisprudence, such as what constitutes an area of law (Khaitan & Steel, 2023). In the first one, which serves as the starting point for this article, they offer a taxonomy of theories about areas of law (Khaitan & Steel, 2022).¹

According to Khaitan and Steel, theories about areas of law can be either normative or non-normative. Non-normative theories can be conceptual or about causal reasons (reason-tracking causal theories). Furthermore, conceptual theories deal with the concept of an area of law (Khaitan & Steel, 2022, p. 329), while theories about causal reasons are "empirical socio-psychological" theories, whose object is "normative reasons that, as a matter of fact, guide legal officials in creating, developing, and determining the contours" of an area of law (p. 334). In this article, however, I shall focus only on normative theories.

In this regard, the most innovative feature of Khaitan & Steel's classification is the differentiation between detached and committed theories (2022, pp. 337–338). Detached theories explain an area of law based on some assumed value or principle without committing to the genuineness of this value and its actual contribution to the justification of the area of law in question. One question that could be asked is about the reason for existence of detached theories. What is the point of saying that an area of law is explained by *x* if we are not committed to saying that *x* is a true value? Wouldn't it be better to limit ourselves to morally genuine explanations, that is, to value-based explanations that contribute (albeit *pro tanto*) to the area of law in question being justified? According to Khaitan and Steel, detached theories can be worthwhile due to moral uncertainty. It is because we may not be certain about

¹ Moore (2000) and Bix (2022) have also dealt with special jurisprudence, while the discussions in Smith (2004, ch. 1), Lucy (2007) and Bix (2017)—even though they refer to a particular area of law (contract law)—are of general scope.

the value of x that we may want to pursue a theory of an area of law that has x as its basis, “in the hope that further moral analysis may be able to establish that it [x] is of genuine value” (2022, p. 339).

In contrast, committed theories contain one or more judgments of political morality. Thus, when explaining an area of law based on a certain value, committed theories also assert that this is a true value and contributes—although perhaps only *pro tanto*—to the justification of the area of law to which the theory refers.

Even though the taxonomic effort is commendable, I fear that, by emphasizing the distinction between detached and committed theories, Khaitan and Steel may have overlooked other differences and details that are more important for normative special jurisprudence. Therefore, in this article, I intend to present an alternative classification of normative theories of areas of law, by emphasizing the distinction between evaluative and prescriptive theories. I aim to demonstrate here that a classification of theories about areas of law that is indifferent to this distinction is seriously incomplete, mainly due to the fact that prescriptive theories (unlike evaluative ones) are subject to a feasibility constraint (“ought implies can”) and all that this constraint entails. Both evaluative and prescriptive theories are committed theories because a detached theory cannot assert that something is good or desirable (as evaluative theories do) or, even less so, that something must be done (as prescriptive theories do).

Evaluative theories contain judgments about what would be desirable for a certain area of law, such as the judgment that a creditor victim of non-performance should be able to claim restitution damages from the debtor. However, evaluative theories refrain from asserting that something must be done. Thus, an evaluative theory about the desirability of contractual disgorgement would avoid saying which agents (if any) should take action regarding the law of contract remedies. Prescriptive theories, on the other hand, include propositions about what must be done. Therefore, a prescriptive theory of contract law may include the proposition that X (which can be an individual agent, such as a judge, a collective agent, such as the State, or even a collective of agents, such as a group of judges) must decide in favor of the creditor’s claim to the restitution of the debtor’s profits.

As mentioned earlier, a recurring theme in this discussion is that of feasibility. It is commonly considered that moral prescriptions are subject to a feasibility constraint. Thus, it is not the case that agent X ought ϕ if X cannot ϕ or if ϕ is not feasible for X (“ought implies can” or “ought implies feasible”).²

The importance of feasibility for the taxonomy of normative theories in special jurisprudence lies in that it is at least a common opinion that—unlike prescriptive

² For an introduction to the literature on the “ought implies can” question, see Howard-Snyder (2013). For a sampling of recent work on the feasibility constraint in political obligations, see Lawford-Smith (2012), Wiens (2015), Gilabert (2017), Southwood (2018), and Stemplowska (2021).

theories—evaluative theories do not have to meet the feasibility constraint (see, e.g., Gheaus, 2013, p. 458; Gilabert, 2011, p. 56; Tomlin, 2012, p. 42). The feasibility constraint can have different implications when dealing with individual or collective obligations as, for example, something that is not feasible for certain agents individually may be feasible collectively.

To clarify the problem mentioned above, this article is organized as follows. Section 1 deals with the distinction between evaluative and prescriptive theories. Section 2 focuses on the most important reason for differentiating evaluative and prescriptive theories, namely, the feasibility constraint to which prescriptive theories (but not evaluative ones) are subject. Section 3 deals with complications that may arise from the fact that the commands of prescriptive theories are directed at a collective agent, such as the State, or a group of collective agents, such as judges in higher courts. Then, we present some conclusions.

1. Differencing Between Evaluative and Prescriptive Theories

An evaluative theory of an area of law contains judgments about what is just or unjust, morally desirable or undesirable, or simply good or bad concerning the area of law that constitutes its subject. One may prefer “morally desirable or undesirable” to “fair or unfair” if one considers that theories of justice must be prescriptive (as in Wiens, 2014). Some distinctions that can be made among evaluative theories are as follows.

First, an evaluative theory can be an end-state or transitional theory (Valentini, 2012, p. 660). An end-state theory defines an optimal state of affairs under certain conditions, while a transitional theory simply compares states of affairs without defining an optimum. Special jurisprudence’s end-state theories deal with the best version of a given area of law under certain conditions. Transitional theories, on the other hand, limit themselves to comparisons between different versions of a given area of law. A theory that asserts that an ideal (i.e., optimal) law of contracts includes the sanction of disgorgement is an example of an end-state theory. In contrast, a transitional theory is limited to saying that availability of the disgorgement remedy would constitute an improvement in contract law, i.e., that a law of contracts allowing for disgorgement of profits is *ceteris paribus* better than one in which that remedy is lacking.

Note that other parts of the current law may be among the conditions under which an end-state theory defines an optimal state of affairs. Thus, the best possible contract law may be the one ruling that other areas of law remain as they are (for example, that there is consumer law with special rules for adhesion contracts). This caveat is important because how an area of law affects people is always moderated by other factors, including the rest of the legal order. Therefore, we are hardly in a position to talk about an ideal version of an area of law tout court, i.e., one which is not conditioned by a certain configuration of other parts of the legal system.

Another distinction to be made among evaluative theories, following Khaitan and Steel (2022, p. 340), is between hyper-reformist theories and practice-dependent theories. An evaluative theory will be hyper-reformist if it treats as morally desirable a version of an area of law very different from the current one. This is compatible with both end-state and transitional theories. In the first case, the theory defines an optimal state of affairs that is considerably different from the current one. In the second one, the theory limits itself to a comparison between the current version of an area of law and some other rather different version, with an advantage for the latter. In either case, hyper-reformist evaluative theories do not include any prescription about who should act to implement reforms.

I agree with Khaitan and Steel (2022, p. 340) that a theory can be hyper-reformist without ceasing to be a theory about the area of law to be reformed. For example, a hyper-reformist theory of tort law does not cease to be so, even if it envisages a quite different version of that area of law. There are limits, however, to how reformist a theory can be, since, depending on the reforms envisioned, what the theory aspires to may simply no longer be a version of the area of law at issue. Thus, I also agree with Khaitan and Steel (2022, p. 340) that, in order to determine the limits of hyper-reformist theories, we need to rely on some account of what is characteristic of a given area of law.

Meanwhile, a practice-dependent theory is limited to considering incremental changes to a certain area of law as desirable. At first glance, one might think that a practice-dependent theory is necessarily transitional (rather than end-state), but this is not the case. Since the distinction between hyper-reformist theories and practice-dependent theories has to do with the distance between what the theory regards as desirable and the status quo, practice-dependent theories can also be end-state theories given that there is a small distance between the optimal state defined by the theory and the current state.

Moving on to prescriptive theories, these ones differ from evaluative theories because they contain judgments about what ought to be done. Thus, a prescriptive theory of an area of law does not limit itself to stating that certain reforms in the area of law in question are desirable. It also asserts that reforms must be implemented, although the subjects and the nature of the obligations assigned by the theory may vary.

Prescriptive theories are subject to the same subclassifications applied above to evaluative theories. Thus, prescriptive theories can be end-state or transitional state theories, hyper-reformist or practice-dependent. It is important to consider, however, that, unlike evaluative theories, prescriptive theories are allegedly subject to the feasibility constraint. According to this constraint, the validity of the proposition that an agent *X* should ϕ is conditioned on whether *X* can ϕ or whether ϕ is feasible for *X*. Therefore, although more ambitious versions of prescriptive theory—such as those

of end-state and hyper-reformist theories—are not to be ruled out, it is necessary to assess how they would meet the feasibility constraint.

The “ought implies can” principle is not exempt from criticisms, but they are beyond the scope of this article. So, I will assume that, in some versions, the principle is a valid one. In this vein, Gilabert (2011) states, on the difference between evaluative and prescriptive theories, that:

The familiar meta-ethical principle that ‘ought’ implies ‘can’ can be used to challenge prescriptive claims: since they take feasibility constraints as a necessary condition for what they demand, they may not demand what cannot be done. No such challenge would be cogent with respect to evaluative claims, as they merely refer to hypothetical obligations taking feasibility as a sufficient condition. (p. 56)³

In the next section, I will discuss the feasibility constraint and its implications for prescriptive theories in more detail.

2. The Feasibility Constraint and Prescriptive Theories

Consider a prescriptive theory of contract law in which a judge (X) must grant the plaintiff’s request to condemn the defendant to return the profit obtained from a contract breach. According to the feasibility constraint, the proposition that X ought ϕ (in this example, to grant the plaintiff’s claim to restitution damages) will only be valid if X can ϕ or if ϕ is feasible for X.

Let’s delve into what the feasibility constraint may mean more precisely. According to Gilabert’s conditional conception (2017), feasibility is a relational concept of power or ability that involves an agent, a certain outcome, and specific circumstances. Thus, an outcome O is feasible for agent A in circumstances C if A is capable of achieving O in C, and “A has the power to bring about... O in... C if and only if O would occur if A tries, in C, to bring it about (and A can indeed try)” (p. 97). As the clause in parentheses indicates, it is not enough for A to be able to produce O if A tries. A must also be able to try, meaning “be able to form the decision to act and sustain the intention to act through the duration of the relevant actions” (p. 97). For versions of the conditional account in which the “can try” clause is not included,⁴ one difficulty is differentiating cases of true motivational incapacity from those of mere unwillingness to act.⁵

According to Gilabert, feasibility can be scalar (2017, p. 99). Thus, O will be more feasible for A in C the more likely it is that A will achieve O in C if she tries (and A can indeed try). Instead of stating that something is more or less feasible, a minimal threshold could be stipulated, so that results whose likelihood falls below this threshold would be deemed unfeasible. See Wiens (2015). In either case, a question to face is the

³ On this topic, see also Tomlin (2012, p. 42); Gheaus (2013, p. 458).

⁴ For these cases, see Brennan and Southwood (2007); Gilabert and Lawford-Smith (2012).

⁵ For a discussion, see Estlund (2020, chapter 5); Stemplowska (2021); Wiens (2016).

limits of the “ought implies can” principle. Above, I assumed that this principle holds to both impossible and highly unlikely outcomes.

One reason why the feasibility constraint is particularly important for prescriptive theories about areas of law is the following. Let’s return to the example of a prescriptive theory of contract law in which X, a judge, must condemn the defendant in a contract breach case to disgorgement of profits. Well, it’s unlikely that the feasibility constraint would not be met in such a case. After all, there is little to obstruct X from issuing a decision with certain content within her jurisdiction. Exceptions, however, are possible. Consider a prescriptive theory about women’s right to terminate a pregnancy. Although Y, a Catholic judge, would be able to render a ruling in favor of the right in question if he decided to do so, this ruling may not be feasible due to Y’s inability to motivate himself to render it.

Consider now, however, a prescriptive theory that is not interested in the decision of just one case of contract breach case. This time, the theory aims for a comprehensive change in case law so that, in the future, claims for disgorgement are generally granted. Furthermore, it is not implausible to assume that, according to the theory, infrequent application of the disgorgement doctrine by the courts is worse than none at all. Reasons for rejecting unpredictable decisions regarding remedies for breach are not hard to figure out. They may concern both the frustration of contractors’ expectations and the unequal treatment given to similar cases. On the other hand, it is true that a prescriptive theory can, in certain circumstances, tolerate uncertainty caused by innovative judicial decisions, even though it is expected that these decisions will become the rule over time. As long as a theory about an area of law is focused on reforms to be achieved not through a single decision but through several decisions—most often by different authorities—the issue of feasibility becomes crucial. For example, let’s suppose that the theory continues to direct its commands to judge X. But if now what the theory commands is ϕ —a comprehensive change in case law—then unless X’s decisions are unusually influential among their peers, ϕ will not be feasible for X in the current circumstances. Note that the difficulty of meeting the feasibility constraint tends to worsen in prescriptive theories that are end-state or hyper-reformist. If a specific change in an area of law is unlikely to be feasible for an individual agent like X, even more so if it concerns an optimum state of affairs or substantial reforms of the area of law at issue.

A solution would be thus to redefine the addressee of the prescription. Instead of X, the theory could then direct its commands to a collective agent, such as the State, or even to an uncoordinated group of agents, such as judges from higher courts. This solution will be the subject of the next section.

3. Prescriptive Theories, Collective Agents and Collectives of Agents

Consider a prescriptive theory in which X ought ϕ , with ϕ being the reform of a certain area of law. When X is not an individual agent but a collective agent or a collective of agents (i.e., several agents who are not enough coordinate to count as a collective agent), several questions arise that theory must address. These questions pertain to whether collective agents exist, whether collectives of agents can have obligations, how the feasibility constraint applies to the obligations of collective agents or collectives of agents, and what the possible unfeasibility of a collective action entails for individuals' obligations.

It is beyond the scope of this article to delve into the sophisticated literature on each of these topics.⁶ My aim here is to highlight how these questions are pertinent to prescriptive theories about areas of law. Let's thus begin with the issue of collective agency.

One way to conceive the prescriptive theories of special jurisprudence is to see them as theories with commands directed at a collective agent. If we are dealing with an area of law within a particular state, then it is conceivable that the theory's prescriptions are aimed at that state as a collective agent. The proposition that tort law of state Z ought to be reformed would therefore translate into the proposition that Z (a collective agent) must ϕ , with ϕ representing tort law's reform. Apart from the question of whether Z can genuinely be considered a collective agent, this solution invites inquiry into the impact of Z's obligation on individual obligations. What does Z's duty to reform tort law entail for the obligations of Z's citizens, especially those holding certain public offices?⁷ An important distinction is between what Lawford-Smith calls the "citizen-inclusive state," or the state as a collective agent in which citizens in general (including those who do not occupy positions of authority) participate, and the State conceived more narrowly as government or citizen-exclusive state.

On the other hand, should we conclude that the state or other relevant candidates do not meet the conditions for being a collective agent, our prescriptive theory could be focused on a collective of agents, such as judges from different courts. The question then is whether collectives of agents can have obligations ("collective obligations"). To illustrate this, consider the example offered by Schwenkenbecher (2021, p. 7), "Motorcyclist." Ten passersby who happen to be at the scene of an accident can together save a motorcyclist trapped under a car about to catch fire. Under certain conditions (such as not facing greater risks to themselves), could we say that the ten passersby are collectively obligated to save the victim?

⁶ On collective agency, see Pettit (2007); List & Pettit (2011). On the obligations of collectives of agents, see Collins, 2013; Held, 1970; Lawford-Smith, 2015; Pinkert, 2014; Schwenkenbecher, 2021. On the feasibility of collective actions, see Lawford-Smith 2012; Stemplowska (2016).

⁷ For a discussion, see Lawford-Smith (2019).

It is also important to consider how the feasibility constraint is met as regarding both collective agents and collectives of agents.⁸ This is because, assuming that φ is the result of contributions $\varphi_1 \dots \varphi_n$ from agents $X_1 \dots X_n$, respectively, the fact that φ_1 is feasible for X_1 (and φ_2 for X_2 , etc.) may not entail that φ is feasible for the collective formed by $X_1 \dots X_n$. For instance, consider the case of a prescriptive theory that calls for a comprehensive change in the case law. Assume that case law is constituted by the individual decisions of judges $X_1 \dots X_n$, so that φ is, in this case, made of by $\varphi_1 \dots \varphi_n$, when φ_1 is a decision by judge X_1 contributing to the intended change. That individual feasibility does not translate into collective feasibility means that the feasibility of $\varphi_1 \dots \varphi_n$ for judges $X_1 \dots X_n$ individually does not necessarily imply that φ is feasible for the collective agent or collective of agents comprising $X_1 \dots X_n$.

The reason why a collective action φ might not be feasible is in spite of the feasibility of individual contributions $\varphi_1 \dots \varphi_n$ is that φ requires $\varphi_1 \dots \varphi_n$ in tandem (Stemplowska, 2016). The same considerations made below hold, albeit with less force, if φ is constituted by the contributions of only some of the members of $X_1 \dots X_n$. So, if there is a significant difficulty for $X_1 \dots X_n$ to coordinate, φ may not be feasible. As exemplified by Stemplowska (p. 276), it is not feasible for each of the approximately eight billion living human beings to touch their noses next Tuesday (φ), despite the fact that individual actions making up φ (each person touching their nose) are feasible. It is highly unlikely that eight billion people can coordinate to touch their noses on the same day. Stemplowska (2016):

The difficulty is ... not merely that next Tuesday is just around the corner but that the touching of the noses by all needs to happen on the same day but, by assumption, we are not in the presence of a collective agent here whose parts (the individuals involved) can come and work together. (p. 283)

Coordination obstacles should be lower in collective agents than in collectives of agents, which does not mean that there cannot be special problems of feasibility for the actions of the former.

To grasp the importance of these remarks for prescriptive theories about areas of law, consider the following. If the feasibility of a collective action cannot be inferred from the feasibility of each of the individual actions that constitute it, then commonly found prescriptions in theories about areas of law may be invalid. In cases where a theory of an area of law aims for reforms that can only occur through the coordinated actions of several agents—such as a statutory reform or a comprehensive change in the case law—feasibility issues may arise.

Coordination difficulties among authorities may be more common than initially assumed. One might think of a change in case law, for example, as a case where each individual agent knows what to do—a case, therefore, in which coordination

⁸ For a discussion on this, see Stemplowska (2016).

is easier. It must be remarked, however, that innovative decisions carry reputational risks. Furthermore, these are decisions that tend to be more time consuming, because public officials need to present their reasons in detail in order to persuade their peers. The upshot is that, when it comes to reforming the law, public authorities can act cautiously and “pick their battles,” that is, commit to some reforms instead of others that also prove desirable. Thus, for example, even among judges $X_1 \dots X_n$ who agree on a certain reform in the case law ϕ , there may be considerable coordination difficulties undermining the feasibility ϕ . Judges often do not know what their peers think, and even if they do, they may be uncertain about what others will do, given that it is not possible to engage into many reforms at the same time.

The above considerations also apply, *mutatis mutandis*, to groups of other authorities, such as parliamentarians. Suppose $X_1 \dots X_n$ be a group of deputies with enough votes to change legislation on abortion. The fact that it is feasible for each of them to vote to change the legislation would not imply that the change is feasible. Even if they know what their colleagues think about abortion, $X_1 \dots X_n$ may have difficulty coordinating their actions so that the law is altered.

If a collective action is not feasible, then it is necessary to assess what this entails for the obligations of individual agents. If ought implies can, then a certain reform in an area of law that is not feasible (e.g., because it requires coordination among the actions of many authorities, and that coordination is unlikely) cannot be the subject of a collective obligation. This does not entail, however, that X_1 , an individual agent, has no duties whatsoever in this regard. Perhaps X_1 , a judge, is bound to decide in favor of a creditor’s claim for disgorgement of profits even if the coordination among judicial decisions needed to bring about a widespread change in jurisprudence is unlikely. On the other hand, it may be the case that the unfeasibility of a collective action affects individual obligations. If ϕ , a collective action, is not feasible, then perhaps ϕ_1 , the contribution of individual agent X_1 to ϕ , may also not be due because, despite being feasible, ϕ_1 proves to be ineffective, if not harming. Returning to “Motorcyclist,” if a passerby has some reason to believe that the others will not help lifting the car, it is quite plausible that this individual agent is not obliged to attempt to lift the car alone—that for example, she must rather seek help elsewhere.

Similarly, regarding prescriptive theories of areas of law, we must be aware of the implications of collective action unfeasibility for the duties of individual agents, such as judges and legislators. It does not seem an exaggeration to say that these theories have been based most of the time on the assumption that, if ϕ is desirable, then individual actions $\phi_1 \dots \phi_n$ (of which ϕ is constituted) are mandatory. Such an assumption, however, is false. Reforms in areas of law are often comparable to the action of lifting a car to save an injured person. They are desirable, but if they are not expected to happen, individual attempts may be a mere waste of time, if not worse.

This does not mean that individual agents do not have any duties, but it may be that these are different duties than those that would take place if collective action φ were viable. Thus, instead of applying contractual disgorgement to the cases that come to her, judge X_1 's obligation may be to act so that this possible reform of contract law gains prominence among her peers, thus fostering the conditions for collective action. It may also happen, however, that the circumstances are so unconducive to actions in favor of the disgorgement remedy that the best thing for X_1 to do is to fight for other legal improvements.

Conclusions

To the useful taxonomy developed by Khaitan and Steel (2022) about areas of law theories, with a focus on their classification as detached and committed normative theories, I have aimed to draw the attention here to another distinction that I believe is worth making, namely, the distinction between evaluative and prescriptive normative theories. This distinction is crucial because, according to common opinion, only prescriptive theories are subject to the feasibility constraint.

My aim in emphasizing the distinction between evaluative and prescriptive theories is to contribute to the methodological background of special jurisprudence. It is useful for theorists of areas of law to inquire into and gain greater clarity on the ways in which different types of theories are possible and the conditions for their success. In particular, if we are interested in a prescriptive theory (a subset of what Khaitan and Steel call committed theories) of an area of law, it is essential to consider whom the theory's commands are directed at and how to address potential unfeasibility problems.

References

- Bix, B. H. (2017). The promise and problems of universal, general theories of contract law. *Ratio Juris*, 30(4), 391–402. <https://doi.org/10.1111/raju.12179>
- Bix, B. H. (2022). Methodology for theorizing about the nature of law and about doctrinal areas of law. In M. Carpentier (Ed.), *Meta-theory of law* (pp. 75–91). ISTE. <https://doi.org/10.1002/9781394163694.ch3>
- Brennan, G. & Southwood, N. (2007). Feasibility in action and attitude. In T. Rønnow-Rasmussen, B. Petersson & D. Egonsson (Eds.), *Hommage à Wlodek: Philosophical papers dedicated to Wlodek Rabinowicz*. <https://www.fil.lu.se/hommageawlodek/site/abstra.htm>
- Collins, S. (2013). Collectives' duties and collectivisation duties. *Australasian Journal of Philosophy*, 91(2), 231–248. <https://doi.org/10.1080/00048402.2012.717533>
- Estlund, D. (2020). *Utopophobia: On the limits (if any) of political philosophy*. Princeton University Press. <https://doi.org/10.2307/j.ctvhrd1gx>
- Gheaus, A. (2013). The feasibility constraint on the concept of justice. *The Philosophical Quarterly*, 63(252), 445–464. <https://doi.org/10.1111/1467-9213.12058>
- Gilabert, P. (2011). Feasibility and socialism. *Journal of Political Philosophy*, 19(1), 52–63. <https://doi.org/10.1111/j.1467-9760.2010.00383.x>

- Gilabert, P. (2017). Justice and feasibility: A dynamic approach. In K. Vallier & M. Weber (Eds.), *Political utopias: Contemporary debates* (pp. 95–126). Oxford University Press.
- Gilabert, P. & Lawford-Smith, H. (2012). Political feasibility: A conceptual exploration. *Political Studies*, 60(4), 809–825. <https://doi.org/10.1111/j.1467-9248.2011.00936.x>
- Held, V. (1970). Can a random collection of individuals be morally responsible? *Journal of Philosophy*, 67(14), 471–481. <https://doi.org/10.2307/2024108>
- Howard-Snyder, F. (2013). Ought implies can. In H. La Follet (Ed.), *International Encyclopedia of Ethics*. Blackwell Publishing. <https://doi.org/10.1002/9781444367072.wbiee402>
- Khaitan, T. & Steel, S. (2022). Theorizing areas of law: A taxonomy of special jurisprudence. *Legal Theory*, 28(4), 325–351. <https://doi.org/10.1017/S1352325222000192>
- Khaitan, T. & Steel, S. (2023). Areas of law: Three questions in special jurisprudence. *Oxford Journal of Legal Studies*, 43(1), 76–96. <https://doi.org/10.1093/ojls/gqac025>
- Lawford-Smith, H. (2012). The feasibility of collectives' actions. *Australasian Journal of Philosophy*, 90(3), 453–467. <https://doi.org/10.1080/00048402.2011.594446>
- Lawford-Smith, H. (2015). What 'we'? *Journal of Social Ontology*, 1(2), 225–249. <https://doi.org/10.1515/jso-2015-0008>
- Lawford-Smith, H. (2019). *Not in their name: Are citizens culpable for their states' actions?* Oxford University Press.
- List, C. & Pettit, P. (2011). *Group agency. The possibility, design, and status of corporate agents*. Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780199591565.001.0001>
- Lucy, W. (2007). Method and fit: Two problems for contemporary philosophies of tort law. *McGill Law Journal*, 52(4), 605–656. <https://lawjournal.mcgill.ca/issue/volume-52-issue-4-2007/>
- Moore, M. (2000). Theories of areas of law. *San Diego Law Review*, 37(3), 731–742. <https://digital.sandiego.edu/sdlr/vol37/iss3/6/>
- Pettit, P. (2007). Responsibility incorporated. *Ethics*, 117(2), 171–201. <https://doi.org/10.1086/510695>
- Pinkert, F. (2014). What we together can (be required to) do. *Midwest Studies in Philosophy*, 38(1), 187–202. <https://doi.org/10.1111/misp.12023>
- Schwenkenbecher, A. (2021). *Getting our act together: A theory of collective moral obligations*. Routledge.
- Smith, S. A. (2004). *Contract theory*. Oxford University Press.
- Southwood, N. (2018). The feasibility issue. *Philosophy Compass*, 13(8), e12509. <https://doi.org/10.1111/phc3.12509>
- Stemplowska, Z. (2016). Feasibility: Individual and collective. *Social Philosophy and Policy*, 33(1–2), 273–291. <https://doi.org/10.1017/S0265052516000273>
- Stemplowska, Z. (2021). The incentives account of feasibility. *Philosophical Studies*, 178, 2385–2401. <https://doi.org/10.1007/s11098-020-01530-y>
- Tomlin, P. (2012). Should we be utopophobes about democracy in particular? *Political Studies Review*, 10(1), 36–47. <https://doi.org/10.1111/j.1478-9302.2011.00245.x>

- Valentini, L. (2012). Ideal vs. non-ideal theory: A conceptual map. *Philosophy Compass*, 7(9), 654–664. <https://doi.org/10.1111/j.1747-9991.2012.00500.x>
- Wiens, D. (2014). 'Going evaluative' to save justice from feasibility—A pyrrhic victory. *Philosophical Quarterly*, 64(255), 301–307. <https://doi.org/10.1093/pq/pqt057>
- Wiens, D. (2015). Political ideals and the feasibility frontier. *Economics and Philosophy*, 31(3), 447–477. <https://doi.org/10.1017/S0266267115000164>
- Wiens, D. (2016). Motivational limitations on the demands of justice. *European Journal of Political Theory*, 15(3), 333–352. <https://doi.org/10.1177/1474885115578446>