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ANALYTICAL, NORMATIVE, ASPIRATIONAL: CONNECTING AND DISCONNECTING THEORETICAL APPROACHES TO RIGHTS

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This article explores the relationship between descriptive and normative work in general legal theory by focusing on the possibility of describing contingent evaluations, as contrasted with a theoretical commitment to such an evaluation. This gives rise to a crucial distinction between analytical-descriptive and aspirational-normative theoretical work. Part I traces different levels of theoretical analysis, and the recognition of different theoretical roles in tackling normative subject matter. Part II introduces a triple-level analytical scheme developed to expand the Hohfeldian analysis of legal rights. This additional analytical resource is then utilised in working through different levels of the analysis of legal rights, and to reveal some points of overlap with the different levels of analysis of law's normativity found in Part I. This broader understanding is then related to the different theoretical roles identified in Part I, so as to produce a classification of theoretical approaches to rights, with the aim of revealing where intelligible discourse between them is possible.

I. Reconsidering Analytical and Normative in Legal Theory

A. *Introduction*

The starting point of this article evokes some of the most perplexing issues in legal theory, which generate continuing debates, marked by their complexity and sophistication.[1] The purpose of this article is not to address, nor to advance, any of these specific debates ranging over law's normativity or concerned with producing an authoritative analysis of the nature of law. The objective here is to offer a reorientation to the underlying framework on which much of the discussion of these issues proceeds. In particular, to propose a fresh configuration of the relationship between the analytical and the normative, which reveals space for the aspirational – and, a

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1 On law's normativity, Kenneth Einar Himma, Miodrag Jovanovic & Bojan Spaic, eds. *Unpacking Normativity* (Oxford: Hart Publishing, 2018) [Himma, Jovanovic & Spaic, *Unpacking Normativity*] provides an informative collection. In his contribution, Andrei Marmor, "Norms, Reasons, and the Law" in Himma, Jovanovic & Spaic, *Unpacking Normativity* 95 at 95, Marmor observes, "the normativity of law is both complex and multifarious".

necessary role for the aspirational, given certain conditions under which theoretical work in this area is undertaken.

The inclusion of aspirational within a framework encompassing analytical, normative, and aspirational provides a focus on an active role for the theorist, alongside a concern with the condition of the material being theorised. Clearly, certain conditions of a subject matter leave no room for the aspirations of the theorist over how that material should be viewed. No intensity of aspiration will turn base metal into gold. Accordingly, one of the preliminary tasks is to show how a certain condition of the subject matter of law, and its normativity, provides an opening for an aspirational role for the theorist. The task is not to demonstrate conclusively that theorising over law must involve an aspirational element. Rather, I shall explore the circumstances in which an understanding of the subject matter will give rise to an aspirational role for the theorist, and resort to illustration and suggestion to show that these circumstances might be prevalent in the environment in which legal theory is undertaken.

Once the possibility of a richer relationship between analytical, normative, and aspirational is established, a natural development would be to examine more rigorously how effective the broader framework encompassing these three elements can be in illuminating an analysis of the nature of law. That direction is not taken here. Instead, the value of the framework is tested in relation to theoretical approaches to legal rights. The switch to rights is motivated by a number of considerations. For one thing, legal rights represent an obvious and widely studied face of law's normativity. Any general pronouncements on normativity should be readily transferable to rights, or else their credentials should be doubted. For another thing, theoretical work on (legal) rights strikes me as displaying a greater interaction between different levels of analysis than is found in general theories of law. And furthermore, despite this greater interaction, there is an absence of a coherent understanding of how transactions between the different levels should be conducted. Finally, I find within the Hohfeldian analytical scheme, designed to apply to legal rights, an under-exploited resource for investigating different levels of analysis of legal rights.

Despite the strength of these motivations, I only attempt here a rough sketch of a schema covering the different levels of analysis applicable to legal rights, and the different theoretical roles which can be recognised in the light of a richer relationship between analytical, normative, and aspirational. I shall at times rely on assertion not fully backed up with present argument but dependent on a suggestion of initial credibility (accompanied by a challenge to rebut it). At other times, I shall rely on work which is explained and defended in greater detail elsewhere. The differentiation of different roles that a theorist of rights can assume is critical in revealing where meaningful discourse is possible between different theoretical positions in a controversy over rights. At the same time, it reveals where meaningful discourse is excluded.

B. *Analytical and Normative*

If one were commencing to teach an introductory course on legal theory, it would not be long before the terms "analytical" and "normative" came into use. One

advantage of adopting a theoretical approach to law we might try to impress upon our students is that it provides a more rigorous analysis of the subject matter than that gained from a less reflective study of legal subjects, or from satisfying the immediate demands of legal practice. There is no need to become sidetracked by a technical discussion of conceptual analysis at this point.[2] The virtue of a rigorous analysis, particularly if that involves a probing analysis of commonly held assumptions about the nature of the subject matter, should be self-evident. So, we can expect legal theory to be analytical in this evidently attractive, albeit not necessarily sophisticated, way.

Analytical in the sense employed so far amounts to undertaking a more careful, or more sensitive, description of the subject matter.[3] However, as soon as a descriptive account of law is attempted, one feature in particular becomes prominent, and troublesome. It is generally accepted that law is normative, yet the way that feature fits into an analytical account of law is deeply problematic.

Commencing with the fairly superficial observation that law is a normative phenomenon, we can work towards a level of greater understanding of the nature of law as a normative phenomenon – enriching our description, providing more valuable theoretical insights to enhance our understanding. The problems start when we realise that it is possible to take an uncontroversial superficial analysis of law's normativity in quite different, even opposing, directions, as we attempt to advance our theoretical understanding. In what follows, I provide a sketch in fig 1 of three possible levels of analysis of law's normativity, from the superficial level to more advanced levels.[4] I then demonstrate how divergent theoretical approaches emerge at the more advanced levels. Initially, it might be possible to accommodate these divergent approaches as alternative theoretical responses to the same basic normative phenomenon. However, at some point it is evident that the theoretical direction adopted at the more advanced level of analysis is affecting (if not interfering with) what is taken to be the subject matter being analysed.

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2 For present purposes I avoid altogether controversies over the nature and value of conceptual analysis. My contention is that a strong view of conceptual analysis, such that it is not refutable by empirical evidence (Joseph Raz, *Between Authority and Interpretation* (Oxford: Oxford University Press, 2009) at 25), is not plausible, given that it purports to offer explanatory power with regard to a particular subject matter. And accordingly, that some element of description of that subject matter is inherent within conceptual analysis – an element that is subject to empirical verification. I am unable to provide a full argument for that position here. For further discussion on the contrasting attitudes towards the empirical of Austin and Raz, see Andrew Halpin, "Austin's Methodology? His Bequest to Jurisprudence" (2011) 70 Cambridge LJ 175 at 188–191.

3 A more rigorous analysis is then being equated with a more careful or more sensitive description. That is not to suggest that analytical work can be reduced to a collection of empirical data that is organised and presented in a comprehensive manner. The rigour, or the care and sensitivity, involved suppose the generation of theoretical insight rather than the mere collection of data. Nevertheless, the descriptive element indicates that such theoretical insight is subject to empirical verification.

4 Note that advanced is used in the sense of theoretically advanced, which is not the same as being more abstract. See Christine Korsgaard, "Thinking in Good Company", John Dewey Lecture at the One Hundred and Eighteenth Eastern Division Meeting of the American Philosophical Association (13 January 2022) <https://cpb-us-e1.wpmucdn.com/sites.harvard.edu/dist/e/97/files/2022/07/Korsgaard-Dewey-Lecture.pdf?ref=refind> at 20, where Korsgaard observes, "work on directly practical issues" amounts to "some of the most difficult work philosophy has to offer".

Figure 1: Levels of Analysis

POSSIBLE LEVELS OF ANALYSIS OF LAW'S NORMATIVITY		
LEVEL	SCOPE	MATERIAL INVOLVED
(A)	superficial observation of law as a normative phenomenon	noting law has normative consequences such as imposing duties on those subject to it
(B)	investigating the basis of law's normativity	identifying what makes law capable of imposing duties, *etc*
(C)	more refined inquiry into the criteria for law's normativity	clarifying what meets the appropriate basis for law's normativity, as a valid legal duty, *etc*

For present purposes, I take level (A) as being uncontroversial. My interest lies in what emerges from the controversies arising in levels (B) and (C) that affects the relationship between the analytical and normative. At level (A), the analysis provides a purely descriptive account of the features of law that are widely regarded as marking it out as a normative phenomenon. The feature I emphasise at this introductory stage is law's ability to impose duties (or obligations). That is not to suggest the unimportance of other elementary characteristics of law which manifest its normativity. Indeed, other characteristics will emerge in later stages of the discussion in this article. However, duty or obligation is immediately recognisable as an indicator of law's normativity. It is found in Hart's primal distinctions between law, coercion, and habit;[5] and is frequently invoked in linking law and morality as both possessing a normative capacity.[6]

Despite sharing a common understanding at level (A) of the normative features of law, as soon as the move is made to levels (B) and (C) theorists engage in controversy. Perhaps the most frequently discussed controversy over law's normativity is that between a legal positivist and a natural law (or other non-positivist) conception of law's normativity. Put simply, for the positivist side at (B) the basis of law's normativity has to be found in some kind of acceptance within a community of an authoritative recognition of the practice of law;[7] for the non-positivist side, the social practice alone is inadequate – in addition, the practice must satisfy some kind of moral standards before law's normativity can be recognised. The adequacy of social facts, or, the need for moral values, in order to account for law's normativity, encapsulates this controversy.

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5 HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

6 For example, Nigel Simmonds, "Value, Practice, and Idea" in John Keown & Robert George, eds. *Reason, Morality, and Law: The Philosophy of John Finnis* (Oxford: Oxford University Press, 2013) 310 at 317–318; Leslie Green, "Legal Positivism" in Edward Zalta, ed. *Stanford Encyclopedia of Philosophy* (Stanford: The Metaphysics Research Lab, 2019) at 4.2(1).

7 Putting things simply, I am taking it that any positivist account of the existence of law will be an account of the existence of law *as a normative order*. Even in the case of Bentham and Austin, there can be found in the habit of obedience an acceptance of authoritative recognition of law (for illuminating discussion, see Michael Rodney, "What Is in a Habit?" in Michael Freeman & Patricia Mindus, eds. *The Legacy of John Austin's Jurisprudence* (Dordrecht: Springer, 2013) 185). That still leaves positivists with a great variety of responses to make on the nature of legal normativity, and on the extent of their concern (or agnosticism) over the deeper influences upon it.

The differentiation between level (B) and level (C) is provided to indicate that more refined levels of analysis are possible, once the potential for divergent approaches has been noted at (B), beyond the uncontroversial level of analysis at level (A). That is not to suggest a limit of one further level of refinement, but rather is indicative of the possibility of further levels of refinement. It might be possible to proceed to level (D), level (E), *etc*. These further levels of analytical refinement may proceed in abstract terms alone before (if ever) engaging in an understanding of how law's normativity applies to concrete situations of legal duties affecting specific conduct. An illustration of this process follows, adopting a non-positivist path at (B) and subsequently refining the analysis until eventually applying it to the existence, or not, of a particular legal duty.

Figure 2: Illustration of Levels of Analysis

(A) law has normative consequences, imposing duties on those subject to it
(B) law's normativity depends on moral values
(C) moral values identified with the political morality of a society
(D) point of political morality is justifying state coercion within a liberal society
(E) applied to recognition, or not, of duty not to publish pornographic material

The present purpose is not to exhaustively portray the different levels of analysis that might be possible. Suffice it to say that a number of levels may emerge beyond the uncontroversial level of analysis at (A). The matter of interest here is to discern at what stage, and on what path through the different levels, the relationship between analytical and normative changes.

C. *Describing and Engaging in Evaluation*

In the case of the controversy emerging between positivist and non-positivist accounts of law's normativity, it is commonly accepted that a significant change in this relationship occurs early on, at the very point when the denial of, or insistence on, a role for moral values occurs. This would be at level (B) in the illustration provided above. That is not to say that other significant changes might not occur later on. For example, the turn to a very specific set of moral values – at level (D) in the above illustration – could be regarded as involving an additional change in the relationship between analytical and normative, accompanying that very specific commitment to a particular set of moral values.[8]

The way that the elementary change at level (B) is introduced in a leading textbook is to suggest that a theorist may insist that an account of law cannot be regarded as "simply descriptive"; in addition, one has to recognise a "normative element that philosophers seeking analytical clarity cannot simply wish away."[9] It

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[8] Consider Hart's charge against Dworkin that Dworkin's analytical enterprise differs from his own general descriptive approach, in considering the law of a specific legal culture – HLA Hart, *The Concept of Law*, 2d ed, Penelope Bulloch & Joseph Raz, eds. (Oxford: Clarendon Press, 1994) at 240 [Hart, *The Concept of Law* 2d ed].

[9] Brian Bix, *Jurisprudence: Theory and Context*, 8th ed (London: Sweet & Maxwell, 2019) 23.

is clear from Brian Bix's discussion here (and his subsequent discussion of the contrasting theoretical positions of Finnis, Raz and Dworkin[10]) that this additional normative element being proposed intrudes into the analytical process itself, and as such is quite distinct from the recognition of a normative feature in the subject matter being analysed.

That latter form of analysis is compatible with a purely descriptive account of a normative phenomenon, and can be found in the uncontroversial level of analysis at (A). Moving beyond level (A), the possibility that "Description may still be description, even when what is described is an evaluation" is remarked upon by Herbert Hart in the response made to Dworkin in his posthumous Postscript.[11] This would suggest that even in the case of a more sophisticated account of normativity than that found at (A), capable of expanding the account to bring in a process of evaluation, that process could still be described – and, described in terms of social facts. So, to return to the above illustration, one could accept (B) and (C), in holding that the normativity of law is based on law reflecting a moral evaluation in accordance with the political morality of a society, and yet insist on an analytical description of that process. Particularly so, if one were also able to identify within that analysis the law-making bodies whose resolution of this process of evaluation were regarded in that society as determining the law in accordance with the relevant political morality.[12]

In order for a normative element to intrude into the analysis, something more is required than such a descriptive analysis provides. In seeking to establish how exactly an intrusive normative element might arise, let us start with the assumption that the recognition of something as law, and as possessing the normativity of law, always involves an evaluation – as is portrayed in the standard representation of the non-positivist position. In this respect, law can be regarded as being like art or literature,[13] possibly like courage or justice.[14] One cannot identify something as being one of these things without relying on an evaluation of what counts as art, literature, *etc*. Still, it would be possible to provide an analysis of art, or law, that remained purely descriptive by incorporating that evaluative element into the description as a contingency. This would then be filled out by an actual evaluative process conducted on any occasion in which the subject matter is identified by a particular person, or within a specific community, possessing their own set of values to bring to the process. In this way, a descriptive analysis of art could accommodate the evaluation of something as art in accordance with the contingent values of either Renaissance Florence or Dadaist Paris, without an intrusion of the evaluative process into the actual analysis.

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10 *Ibid* at 80–81, 96.

11 Hart, *The Concept of Law* 2d ed, *supra* note 8 at 244.

12 In short, a social sources thesis. Incidentally, there is no need for a *rule* of recognition here, just the social fact of recognition. The insistence on a rule involves an additional theoretical construct, required for maintaining a theory of law as a system of rules. It is not required for establishing a positivist understanding of law in terms of social facts.

13 As Bix, *supra* note 9 at 23, explains to his readers.

14 Taking these to be essentially contested and evaluative. Bix, *ibid*, offers democracy as another example. Art was taken to be an essentially contested concept by WB Gallie, "Art as an Essentially Contested Concept" (1956) 6 Phil Q 97.

There is a rich literature on the analysis of art,[15] but a crude analysis embodying a contingent evaluation could be given along the lines of, "Art is a human creative work taken to express an aesthetic statement."[16] The "taken to express" indicates the contingent evaluation that must be present for the descriptive analysis to be satisfied. The requirement that there be some evaluation of the work as expressing an aesthetic statement would be capable of distinguishing a urinal fitted by a plumber into the toilets of the Grand Central Palace in New York (as not art) from the urinal presented by Marcel Duchamp for an exhibition of the Society of Independent Artists at that venue (as art).[17] The contingency of the evaluation would allow for the Dadaist judgment of art as embracing Duchamp's urinal to be rejected in Renaissance Florence.

The fact that I who am a member of neither of these communities can intelligibly discuss both of their approaches to art can be regarded as vindicating a descriptive analysis incorporating a contingent evaluation. This still leaves open the question of what it would take for the evaluative element to intrude into the analysis. The obvious answer is that it would be necessary for the theorist to undertake the evaluation as part of the analysis; and this might then go all the way down to the specific finding of a particular obligation, as found at (E) in the above illustration. As noted, it might stop at a more abstract level in proposing the relevant moral values for a particular society, as found at (D) in the above illustration.

Wherever the evaluative intrusion into the analysis might occur, there is a fundamental problem in regarding it as both evaluative and analytical. If we take evaluative to involve making an evaluation as distinct from descriptively analysing an evaluation, then the evaluative must involve taking up an evaluative position that is not itself subject to analytical determination. The Society of Independent Artists did just that in holding Duchamp's urinal to be art, not because a sound analysis of art required them to do so.

We accordingly have three possible interplays between the analytical and the evaluative. Starting with (i) a general descriptive analysis incorporating a contingent evaluative element; we may move to (ii) an application of that general descriptive analysis to particular instantiations where the evaluative process has been realised; but also acknowledge (iii) the possibility of an evaluative process being undertaken (an evaluative position being adopted over the subject matter) so as to add to the stock of contingent evaluations.

The difference between (i) and (ii) together (regarding (ii) as an application of (i)), as opposed to (iii), is crucial in clarifying the role of the theorist. Whereas the theorist in (i) and (ii) can be understood as undertaking descriptive analysis, if the theorist embarks on (iii) then he or she is actively involved in an evaluative process

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[15] For a helpful overview, see Stephen Davies, *Definitions of Art* (Ithaca, NY: Cornell University Press, 1991) [Davies, *Definitions of Art*].

[16] Note this is an analysis, not a definition, and as such shares the anti-essentialism found in a significant strand in the literature favouring a Wittgensteinian approach, employing family resemblances. For valuable discussion of the emergence of this strand, see Daniel Whiting, "Margaret Macdonald on the definition of art" (2022) 30 British Journal for the History of Philosophy 1074.

[17] In both cases the "creative work" lies not in creating the urinal, but in fitting it (plumber) or exhibiting it (Duchamp). Technically, this is the denial of the artifactuality condition – see Davies, *Definitions of Art*, *supra* note 15 at 5.

which can no longer be understood as descriptive analysis. Subsequently, of course, another theorist may seek to describe this new addition to the stock of contingent evaluations. In this way, a theorist of art might add the Dadaist conception of art to the array of understandings of art falling under the general descriptive analysis incorporating a contingent evaluation. However, this still leaves the Dadaist conception of art as just that – the Dadaist conception. It does not bring it under the criteria of a general concept of art which need to be satisfied in order for it to count as art. To put it another way, as was emphasised above when the descriptive analysis incorporating a contingent evaluation was introduced:[18] this amounts to an analysis, but not a definition capable of determining what is and what is not to be accepted as art.[19]

It also follows that the evaluative process employed in the Dadaist conception of art cannot itself be turned into an analytical tool to judge the status of other conceptions of art. Certainly, it might be the case that a Dadaist would want to dismiss another conception of art, in the same way as was suggested above that a Renaissance artist might want to dismiss the Dadaist conception. However, such a dismissal would be on evaluative grounds, not on analytical ones. Your conception of art does not count as art in accordance with the values adopted in my conception of art.

This leads to the recognition of a basic distinction between two roles a theorist might take. In the first the theorist employs descriptive analysis; and this might extend into the evaluative realm as subject matter, in the form of a descriptive analysis incorporating a contingent evaluation. By contrast, in the second role the theorist makes an evaluative judgment over the subject matter, and in so doing departs from a descriptive-analytical role.[20] Two important questions follow. Do we find a clear demarcation between these two roles in theoretical work, or do theorists slip effortlessly between them without acknowledging the place of evaluative judgment in their work, when that is being undertaken? The second question assumes that a clear demarcation between the descriptive-analytical and evaluative has been made. How do we then assess the respective merits of descriptive-analytical and evaluative work?

D. *Further Clarification of Theoretical Roles*

An explicit recognition of a distinction between "the project of describing human affairs" and "the project of evaluating human options" is made by John Finnis in his

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[18] See *supra* note 16.

[19] Stephen Davies, *Philosophical Perspectives on Art* (Oxford: Oxford University Press, 2007) at 2, dismisses too easily a Wittgensteinian approach to art employing family resemblances, by forcing upon it the requirement of a conventional definition.

[20] It remains possible that in presenting his or her favoured evaluative position over the subject matter the theorist provides a clear *analysis of that position*. However, this use of analysis is far from an *analysis which determines the status of that position* as art, as law, *etc*. The theorist's analysis is dependent wholly on a contingent evaluation made by the theorist. As mentioned in the main text, we should also distinguish the role of another theorist who recognises the principal theorist's evaluative judgment as providing another instance falling under a descriptive analysis incorporating a contingent evaluation. The other theorist should then report this as a Dadaist conception of art; or as a Dworkinian conception of law (see continuation of discussion in Part I.E below); *etc*.

Natural Law and Natural Rights.[21] Finnis sees these as interdependent projects,[22] and in so doing regards "the evaluations of the theorist himself" as "an indispensable and decisive component" of theoretical work.[23]

The stress placed by Finnis on interdependence in the relationship between the descriptive and evaluative in theoretical work makes it more difficult to establish a clear demarcation between the two, and, correspondingly, to discover distinct criteria for assessing the merits of either. Furthermore, it appears that the evaluative is regarded by Finnis as the dominant party in the relationship,[24] which makes it more troublesome to grasp how success in theoretical work is to be measured. Recall that in the discussion above, the descriptive may incorporate the evaluative in theoretical work by treating it as contingent. Here, theoretical work is maintained by extending analytical-descriptive to cover the contingent evaluative. An actual process of evaluation, dependent on the values of a particular community or commentator, does not in itself acquire theoretical status. Descriptive remains paramount. In taking the evaluative to be dominant in theoretical work, Finnis is reversing this order, yet without providing an obvious means for assessing the merits of evaluative work.

The task of assessing the evaluative is made more problematic by two features of the way Finnis treats it. First, Finnis sees the evaluative not as contingent (to a particular community or commentator) but as common to mankind. It amounts to "truly reasonable judgments about what is good and practically reasonable", it identifies "conditions and principles of practical right-mindednesss", in order "to assist the practical reflections" not only of judges and statesmen, but also of citizens.[25] Yet, secondly, Finnis acknowledges that in practising this common capacity for evaluation of the good and practically reasonable, some exponents are more qualified than others: "more reasonable than others".[26]

What is missing from Finnis's account of excellence in practical reasonableness is the way in which those of lesser skill are meant to appreciate the superiority of those with higher skill in this area. In the absence of such criteria, open to all, the inevitable outcome is that different views of who really possesses excellence will emerge, not only in different communities, but also between different commentators; or, between pretenders for the recognition of excellence within a particular community. Contingency of evaluation returns.

Since the professed commonality of practical reason cannot be relied upon to provide discrimination between contingently adequate exercises of it, and the variation in qualifications for practising it cannot be relied upon to discern who is the supreme exponent of it, we are left with no means for assessing the merits of theoretical evaluative work. The claim to excellence of the theorist occupies the same

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[21] John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 19 [Finnis, *Natural Law and Natural Rights*].

[22] *Ibid*; *cf* John Finnis, "Comment" in Ruth Gavison, ed. *Issues in Contemporary Legal Philosophy* (Oxford: Clarendon Press, 1987) 70, treating "explanatory descriptive general theory of law" and "moral justification and critique of law for the guidance of one's own conscience" as "radically inter-dependent intellectual enterprises" [emphasis in original omitted].

[23] Finnis, *Natural Law and Natural Rights*, *supra* note 21 at 16.

[24] See his treating evaluation as a "decisive component", in text quoted immediately above. Note also, Finnis takes the mutual interdependence as being "not quite symmetrical" – *ibid* at 19.

[25] *Ibid* at 17, 18.

[26] *Ibid* at 15.

position of contingency as that of any other exponent of practical reason: reliant upon acceptance within a particular community, or the support of those inclined to share a commentator's evaluations.

We can now provide a clearer picture of the roles a theorist might assume in tackling law as a normative subject matter. First of all, we should not omit the possibility of simply descriptive-analytical work being undertaken, even if the subject matter is normative. We first noted an uncontroversial example of this at level (A) in figs 1 and 2 above. There is also the possibility of controversy occurring within the simply descriptive. As an example, the issue of whether law should be treated as a system of rules alone or viewed as a combination of rules and principles, may be examined as a matter of purely descriptive-analytical work. It should be possible to settle the argument here by reference to empirical data alone.

Secondly, we can extend descriptive-analytical work to incorporate a contingent evaluative element. As we have seen, this may be presented at a general abstract level, or as surveying instantiations where the contingent evaluation has been realised.

Thirdly, we can distinguish theoretical work which is not descriptive-analytical but engages in an evaluative process through adopting an evaluative position on the subject matter. Even if, subsequently, the theorist includes an analytical description *of that position*, such descriptive analysis involved is of the evaluative position adopted rather than of the subject matter over which that evaluative position has been taken.[27] In specific terms, this means that a natural law theory of law is first and foremost an instance of evaluative-theoretical work adopting an evaluative position on the nature of law, no matter how much analytical clarity accompanies it in expounding that particular theory of natural law. The same point applies to other non-positivist theories of law, such as the one found in the illustration in fig 2.

Any attempt to refute this conclusion is faced with a serious problem. If a non-positivist theory of law is to be regarded as distinct from a positivist approach precisely because it is evaluative and not simply descriptive, then we have acknowledged only two ways in which this evaluative feature can be recognised. One is found in the second role of the theorist, as just enumerated: it is incorporated as a contingent evaluative element in descriptive-analytical work. However, while this enriches descriptive theory it fails to turn it into evaluative theory. The other is found in the third role of the theorist provided above. This involves the theorist adopting an evaluative position on law rather than engaging in analytical work. The evaluative intrudes into the analytical at the expense of curtailing the analytical. Although this preserves a distinctive evaluative feature, it does so at the cost of downgrading the evaluative-theoretical enterprise to the exercise of a contingent evaluation reliant upon the support of those sharing the values selected. The difficulty of finding a way in which an evaluative feature can be recognised as directly constituting theoretical work is where the problem really bites.

In order to break out of the contingency of evaluation which is present in both of the above ways of recognising an evaluative feature, it would seem necessary to identify a non-contingent evaluative feature. Were this possible,[28] that would have

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[27] See the point mentioned in *supra* note 20.

[28] The asssumption of the possibility of a non-contingent evaluative element is made for the sake of argument. No attempt is made to show that this is actually feasible. The postulate of an Aristotelian

the consequence of rendering it open to a descriptive-analytical approach. We have seen in the second role of the theorist the possibility of incorporating a contingent evaluative element in descriptive-analytical work. How much easier would it be to do so assuming a non-contingent evaluative element in our understanding of law. That would effectively make it the object of simply descriptive work.

We are left then with three distinct roles for the theorist tackling law as a normative subject matter:

(1) simply descriptive-analytical work —
  (a) uncontroversial;
  (b) controversial;
(2) descriptive-analytical work incorporating a contingent evaluative element —
  (a) at a general abstract level;
  (b) covering realised instantiations of contingent evaluation;
(3) engaging in an evaluative process through adopting an evaluative position.

Whereas roles (1) and (2) possess a descriptive-analytical character with regard to the normative subject matter of law, role (3) involves adopting an evaluative position over the subject matter rather than taking a descriptive-analytical approach.

E. *Evaluative and Aspirational*

When it comes to considering particular theories of law, it may accordingly be possible to differentiate descriptive-analytical from evaluative-theoretical work, and to identify a mixture of the two within a particular theory, in more subtle ways than a hard distinction between descriptive-analytical (positivist) and evaluative (non-positivist) would allow. This does not mean that the process of differentiation will always be straightforward. We noted in Part I.D that the issue of whether law should be treated as a system of rules alone or viewed as a combination of rules and principles may be examined as a matter of purely descriptive-analytical work. However, the strictly empirical issue of the existence of principles in legal materials may then have to be joined, in considering the same theory, to the recognition of a particular evaluative position adopted by the theorist on the way that principles operate within the law.[29] It may take some effort to disentangle (and to assess) the purely descriptive claims of a theory from an evaluative position adopted by the theorist.

Another opportunity for entanglement occurs once we acknowledge that role (2)(a) is properly regarded as descriptive-analytical. It is possible to discern this type of descriptive-theoretical work alongside a move into role (3), when a specific evaluative position is subsequently adopted by the theorist. Again, Ronald Dworkin provides us with a nice illustration. In *Law's Empire* Dworkin takes up as a general methodological position that a theory of law must engage with the fact that legal

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spoudaios (Finnis, *Natural Law and Natural Rights*, *supra* note 21 at 15 n 37) as a supreme exponent of practical reasoning might be regarded as a means to attaining a non-contingent evaluation, but, as already indicated in the main text, we have no available criteria for identifying the *spoudaios*, and claims to the status are contestable.

[29] Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985).

practice displays law as involving normative argument over its purpose, or point, within a society.[30] This is a clear example of role (2)(a), descriptive-analytical work incorporating a contingent evaluative element, at a general abstract level. Dworkin then proceeds to his own favoured evaluative position, adopting the justification of state coercion as being the point of law within a society.[31] At which point, Dworkin has assumed role (3), adopting an evaluative position which he proceeds to fill out in the remainder of his book.[32]

The precise mix of descriptive claims and evaluative positions adopted within a particular theory may be made more complex due to two further factors. One is that theorists themselves appear reluctant to acknowledge their own taking up of contingent evaluative positions within their theories – contingent upon the adoption of their favoured values. Consequently, theories are promoted without a clear indication of their precise ambit. Is Dworkin's theory of law in *Law's Empire* a general theory of law, a theory of American law, or a theory of what Dworkin would like American law to be? The second factor is that there is the opportunity for multiple evaluative positions to be adopted as the levels of analysis become more concrete. So, we noted at the beginning of Part I.C that in the stylised representation of a Dworkinian non-positivist theory of law, found in fig 2, it is possible to detect more than one evaluative position being adopted as the analysis progresses. It follows that common assent to the adoption of an evaluative position at one level may not lead to agreement on an evaluative position at a less abstract level – nor, at the level of the disposition of a concrete case.[33]

To the extent that any one or more evaluative positions within a particular theory of law can be identified as not being descriptive-analytical work[34] and so involve an evaluative position of the theorist himself or herself, then the resulting theory delivers a theory of that theorist's conception of law (or of legal normativity), in precisely the same way as we recognised in Part I.C that the Dadaist conception of art was nothing more than the Dadaist conception of art.

Theorists are seldom so modest as to offer their theories merely as the result of personal rumination on their own preferred evaluative outlook. Yet if a clear distinction between descriptive-analytical and evaluative theoretical work were stringently applied, the need to confess the influence of personal normative commitments in the construction of a theory dealing with normative subject matter might become more evident.[35]

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30 Ronald Dworkin, *Law's Empire* (London: Collins, 1986) at 13, 93.

31 *Ibid* at 93, stated to be one possible "abstract description of the point of law".

32 For more detailed discussion, see Andrew Halpin, "The Methodology of Jurisprudence: Thirty Years Off the Point" (2006) 19 Can JL & Jur 67 at 76–77, 95–96.

33 Consider, hypothetically, that the theory found in fig 2 is a theory of American law; and, that within the community of American legal theorists, there is general agreement over levels (B), (C) and (D). There might still be room for disagreement over the concrete outcome at level (E).

34 Bear in mind that this category encompasses theoretical roles (1) and (2). Continuing the thread from the previous footnote, it might be possible to argue that the theorist is at levels (B), (C) and (D) simply describing the accepted values of American law, thus engaging in theoretical role (2)(b). However, as descriptive-analytical work this would be subject to fairly swift empirical falsification. When it comes to a concrete outcome at level (E), the prospects for arguing that an accepted understanding prevails diminish further.

35 As well as the need to defend *empirically* the material contributing to a theory on the descriptive-analytical side.

However, to treat theorists as solely preoccupied with the importance of their own personal outlook would be unfairly harsh. Theoretical work (over normative subject matter) is frequently presented as being concerned with promoting the common good. Nevertheless, to the extent that this remains evaluative work, it will necessarily involve adopting an evaluative position over where the common good lies. At the same time, as it is not descriptive-analytical then it cannot be advanced by an uncontested survey of prevailing normative practice; nor by an empirical challenge to competing descriptive-analytical views. The theorist is left expressing a personal aspiration for the way that the normative practice might be regarded and the objectives it might fulfil.

It is perhaps easier to acknowledge the presence of an aspirational feature to theoretical work when the normative subject matter is more obviously contested, and even the lines of a descriptive-analytical approach are more difficult to draw. Recent theoretical work on pluralist jurisprudence discloses such a state of affairs. In our introduction to the field, Nicole Roughan and I pointed out that, "The subject matter of pluralist jurisprudence is itself contested and obscure, and the prospect of providing a clear picture ... appears misguided, if not simply undeliverable."[36] It is difficult to avoid being aspirational when constructing a theory in such circumstances. Subsequently, we observed a great variety of aspirational agendas intruding into theoretical work on pluralist jurisprudence.[37]

More recently, Fernanda Pirie has raised concerns over work on pluralist jurisprudence failing to respect the distinction, as she puts it, between "analytic and descriptive" and "normative and critical" work.[38] The latter phrase as used by Pirie clearly encompasses what has been referred to here as aspirational. Pirie refers to the ideological character of this work,[39] and points out that, "These are not projects that seek to explain what law is, but to advocate how it should be".[40]

Given that the common subject matter of theoretical investigation across the different theoretical approaches (or roles) being examined here is itself normative, it is possibly more helpful to avoid linking "normative" to one particular role or approach. Indeed, one might even suggest drawing a basic distinction between "descriptive-normative" and "aspirational-normative" theoretical work, with the former including roles (1) and (2), and the latter covering role (3), as found at the end of Part I.D above.[41] However, as the former type of work is analytical in a way that the

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[36] Nicole Roughan & Andrew Halpin, "Introduction" in Roughan & Halpin, eds. *In Pursuit of Pluralist Jurisprudence* (Cambridge: Cambridge University Press, 2017) 2 [Roughan & Halpin, *Pluralist Jurisprudence*].

[37] Nicole Roughan & Andrew Halpin, "The Promises and Pursuits of Pluralist Jurisprudence" in Roughan & Halpin, *Pluralist Jurisprudence*, *ibid* at 337–340, 345–347.

[38] Fernanda Pirie, "Beyond pluralism: a descriptive approach to non-state law" (2023) 14 *Jurisprudence* 1 at 1.

[39] *Ibid* at 4–6.

[40] *Ibid* at 6.

[41] Elaborating on the suggestion of this broader terminology, two points to note. The phrase "descriptive-normative" could be applied to work under roles (1) and (2), but there remains value in distinguishing the different types of descriptive-analytical work. Pirie, *supra* note 38, embraces type (1) alone. As for the relationship between "aspirational-normative" and role (3), strictly speaking, the former is narrower than the latter, in that the adoption of an evaluative position in (3) does not necessarily require that one hopes others will adopt it – which is the additional feature of the aspirational-normative. In practice,

latter is not,[42] the more appropriate term to use might be "descriptive-analytical" – so long as it is borne in mind that this can extend to normative subject matter.

The task of recognising an aspirational turn in other areas of legal theory, where the subject matter appears to be in a less chaotic state than that of pluralist jurisprudence, may be more challenging but is still crucial to perform. The existence of controversy in other fields can readily be detected. If the division of theoretical roles proposed here is accepted, then engaging with that controversy without acknowledging the difference between testing empirical assumptions for descriptive-analytical work, and assessing the adoption of evaluative positions in aspirational-normative work, has no prospect of delivering a meaningful outcome.

Alongside the recognition of controversy, the possibility of an uncontroversial level of analysis was introduced at an early stage of this article, where the subject matter involved the normativity of law – level (A) of fig 1. The question posed at the end of Part I.B, regarding where on the path through the different levels of analysis the relationship between analytical and normative changes, can now be rephrased in the light of the ensuing elaboration of theoretical roles. How does an understanding of these different roles respecting descriptive-analytical and evaluative-aspirational work affect the emergence of controversy from an uncontroversial starting point? That then raises the additional question of where meaningful discourse is possible between opposing positions within a controversy.

II. Theoretical Approaches to Rights

A. *Introduction*

We turn in this part to legal rights as providing a more accessible area of theoretical work touching on normative subject matter. The narrative in Part I traced different levels of theoretical analysis, and the recognition of different theoretical roles in tackling normative subject matter, culminating in a crucial distinction between analytical-descriptive and aspirational-normative theoretical work. Within this section, an initial requirement will be to show that the different levels of analysis and the subsequent recognition of different roles can be replicated over legal rights. Beyond that, the aim will be to demonstrate how the outworking of the interactions between different levels of analysis and different theoretical roles can lead to an understanding of where meaningful discourse is possible.

I take legal rights to be the primary focus of the present investigation, and as having the advantage of possessing a clearer institutional status, while acknowledging that legal rights cannot be insulated from other types of rights (as will be recognised below); and, that a number of the lessons gained from investigating legal rights may be transferable to moral or political rights.

The discussion in this part takes the following course. In Part II.B, I introduce a triple-level analytical scheme developed to expand the Hohfeldian scheme of analysis, and attempt to show some points of overlap with the different levels of analysis

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however, the work of theorists can be assumed to carry an expectation that others will pay attention and be persuaded by it.

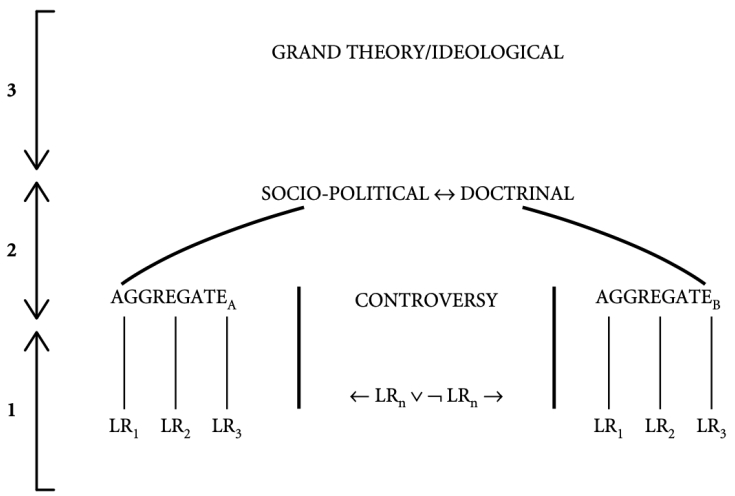
[42] See main text accompanying *supra* note 27.

of law's normativity found in Part I. Part II.C then utilises this additional analytical resource in working through different levels of analysis of legal rights. In Part II.D, this broader understanding is related to the different theoretical roles identified in Part I so as to produce a classification of theoretical approaches to rights, with the aim of revealing where intelligible discourse between them is possible.

B. *Expanding the Hohfeldian Scheme*

Although the Hohfeldian scheme of analysis is primarily associated with his fundamental conceptions arranged in correlative pairs within legal relations, I have suggested elsewhere that this perspective misrepresents Hohfeld's own understanding of his scheme and the importance he placed upon (but due to his premature death did not fully attend to) a complementary aggregate level of analysis. Once this misrepresentation is corrected, it is possible to provide a dual-level analysis, drawing respectively on the legal-relations and aggregate levels of analysis, and ultimately a triple-level analysis, taking in a further level of grand-theoretical or ideological considerations.[43] I reproduce the diagrammatic representation of this fuller scheme of analysis in fig 3 below.

Figure 3: A Triple-Level Analytical Scheme



Note that the central column of controversy expresses the difference between two putative views of an aggregate, A or B, with the cutting edge of that controversy manifested as opposing legal relations, either LR_n or $\neg LR_n$.

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[43] Note the numbering of Levels here, unlike the lettering of levels in figs 1 and 2, does not indicate theoretical progression (see *supra* note 4), but simply additional complexities to the conventional representation of Hohfeldian analysis at Level 1. For detailed discussion, see Andrew Halpin, "The Value of Hohfeldian Neutrality when Theorising about Legal Rights" in Mark McBride, ed. *New Essays on the Nature of Rights* (Oxford: Hart Publishing, 2017) 1 at 25–28 [Halpin, "The Value of Hohfeldian Neutrality"]; see also, Andrew Halpin, "Hohfeld and Rules" in Shyamkrishna Balganesh, Ted Sichelman & Henry Smith, eds. *Wesley Hohfeld a Century Later: Edited Work, Select Personal Papers, and Original Commentaries* (New York: Cambridge University Press, 2022) [Balganesh, Sichelman & Smith, *Wesley Hohfeld a Century Later*] 138 at 155–56 [Halpin, "Hohfeld and Rules"].

The key points to take from this triple-level analysis for present purposes are:

(a) At Level 1 we find an analysis solely in terms of legal relations and the normative positions they contain.
(b) At this level any legal dispute before a court can be expressed in terms of a controversy over the existence of a specific normative position within a legal relation or its "opposite" or "negation", as Hohfeld put it, (*eg*, a liberty to enter Whiteacre or a duty not to enter).
(c) Although the resolution of such a dispute will be manifested in terms of recognising one of the opposing legal relations at the expense of the other, the process of resolving the dispute cannot be undertaken at Level 1.
(d) In order to decide between the competing legal relations, recourse must be had to Level 2 so as to assess the significance of one or the other as contributing to the aggregate legal position of a party (*eg*, a liberty to enter Whiteacre under a licence at will, or under an easement).
(e) An aggregate level analysis at Level 2, in assessing the merits of one view or another of the party's aggregate position, may consider legal doctrine as well as the socio-political (moral)[44] significance of that aggregate position as it affects both parties to the dispute (*eg*, should a licence at will be revocable with or without reasonable notice to the licensee).
(f) Once the interaction between values and doctrine is recognised at this level, it also becomes possible to consider at Level 3 a more refined (abstract) consideration of values, in terms of grand theory or ideology, that might have an influence upon the socio-political values (or even upon the formation of settled doctrine) that impact upon determining a party's aggregate position at Level 2.

At this point, we can note some obvious points of overlap between the above scheme and the different levels of analysis of law's normativity introduced in Part I. First, the duties found at an uncontroversial level of analysis of law's normativity (level (A) in fig 1) are also present within the legal relations at Level 1 of fig 3, alongside a number of other normative positions recognised within Hohfeld's scheme. Secondly, the controversy representable in terms of opposing legal relations at Level 1 and resolvable at the aggregate Level 2 in fig 3 replicates a point of controversy over law's normativity represented in figs 1 and 2 potentially affecting the recognition of specific legal duties (at level (C) of fig 1, level (E) of fig 2). Thirdly, the significance of the evaluative which figured at different levels, from level (B) onwards, in our discussion in Part I can also be traced through Levels 2 and 3 in fig 3. Fourthly and finally, the recognition of aspirational-evaluative positions in Part I reappears in fig 3, as we consider positions advanced at both Levels 2 and 3 but not adopted in the resolution of a dispute at Level 2, affecting a specific legal relation at Level 1. The question to ask is whether the additional analytical resource introduced here can amplify the insights gained from the deliberations in Part I in the context of legal rights.

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[44] By "socio-political" I refer to any values prevailing in the society whose law we are considering. These may include recognised moral or political rights. Of course, such values may themselves be conflicting.

C. *The Analysis of Legal Rights*

We start by considering whether the uncontroversial level of analysis found at level (A) in fig 1 can be extended to include all of the eight normative positions (fundamental legal conceptions) within Hohfeld's scheme. At first sight, this seems implausible, given the number of controversies currently affecting that scheme.[45] However, on an elementary understanding of the scheme pertinent to our current preoccupations, and without encroaching on more complex contested ramifications of the scheme, I suggest that the eight positions can be brought in at an uncontroversial level of analysis.

All eight positions, or, more helpfully, their four pairings within legal relations, represent the possible positions of parties in a legal dispute before the courts. And this is uncontroversial. No matter what controversies rage over other aspects or implications of Hohfeld's scheme, there cannot be found a challenge to this basic representation of legal positions as found in legal disputes.[46] Nobody has come up with a ninth (or tenth) position; and nobody has denied the existence of any of the types of legal disputes in which the four pairs of legal relations figure.

On this basis, we can include all eight positions at an uncontroversial level of analysis of law's normativity. Significantly, this then includes all four types of rights that Hohfeld distinguished: claim-right, liberty, power and immunity. That is to say, theorists of (legal) rights are provided with, at an admittedly superficial level, uncontroversial material on rights as normative phenomena, that is accessible to descriptive-analytical work. Things become rather more interesting, as we saw in Part I, when we make progress through the further levels of analysis. How might the expanded Hohfeldian scheme contribute to the discussion there?

The framework of levels of analysis in fig 1 and the illustration provided in fig 2 present opportunities for theoretical controversy over law's normativity from level (B) onwards, but do little to indicate how that controversy works through the different levels so as to ultimately resolve controversy over the existence of a specific duty.[47] In contrast, the expanded Hohfeldian scheme in fig 3 presents a sharper focus on where exactly the controversy is resolved: at Level 2 so as to determine a position at Level 1. And consequently, theoretical controversy that might be detected elsewhere – either in competing understandings of the aggregate at Level 2 prior to resolution,[48] or in more abstract conflict over the applicable values at Level 3 – become subordinated, in practice, to that moment of resolution.

A further point follows, reinforcing the observation made in Part I, that more abstract levels of analysis need have no bearing on the ultimate determination of a specific duty – here, on the ultimate resolution of controversy at Level 2 over a

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[45] A number of which appear in the contributions to Balganesh, Sichelman & Smith, *Wesley Hohfeld a Century Later*, *supra* note 43.

[46] Indeed, the basic representation precedes Hohfeld – see David Frydrych, "Hohfeld vs. the Legal Realists" (2018) 24 Leg Theory 291 at 329–330. For detailed discussion of the relationship between Hohfeld's scheme and disputes, see Halpin, "The Value of Hohfeldian Neutrality", *supra* note 43.

[47] See *supra* note 33 and accompanying text.

[48] For an explanation of the dynamic nature of the aggregate with respect to its constituent legal relations, see Halpin, "Hohfeld and Rules", *supra* note 43 at 148–149.

specific legal relation. Consider as an example the case of *Craft*,[49] which involved a dispute over the nature of a form of joint ownership known as a tenancy by the entirety, held by spouses on the matrimonial home. The issue at Level 1 was whether the IRS held a power to impose a lien against the property to cover the husband's unpaid taxes, or the wife enjoyed an immunity defeating that power. The conflict as resolved at Level 2 eventually turned on whether this type of property interest should provide the IRS with an effective revenue stream from the husband or secure independent financial security for the wife, and was settled by a majority decision.[50] The outcome, one way or the other, was not clearly determined by analysis provided at levels (B)–(D) of fig 2, nor by a general theory of property or ideological considerations at Level 3 of fig 3.

Moreover, the existence of competing views in the dispute, over how the aggregate interest of a tenancy by the entirety should be understood, reinforces the existence of aspirational-evaluative positions. These are present on both sides prior to the resolution of the dispute. They might also be detected within a critical perspective on the course adopted by the law, as well as in more abstract considerations proposed at Level 3 but neglected in the particular determination of a legal right.

What remains to be considered is how this expanded understanding of the different levels of analysis of legal rights might relate to a concern with understanding different roles for the theorist in approaching legal rights.

D. *Different Theoretical Roles Regarding Rights*

We should bear in mind that the challenge posed at the end of Part I was to trace the emergence of controversy from an uncontroversial starting point, in working through different theoretical roles. Our starting point, accordingly, is to identify the uncontroversial starting point for legal rights. I have taken this to be the four pairings of Hohfeldian legal relations as representing possible positions of parties in a legal dispute before the courts; and, as an outcome of such disputes, the recognition of one of the four types of legal right together with its correlative subordinate position. If this is accepted, then we have here a parallel to level (A) in figs 1 and 2, which can be approached through role (1), simply descriptive-analytical work. If this is not accepted, then an alternative uncontroversial starting point should be suggested. If no uncontroversial starting point can be suggested for identifying the subject matter of legal rights, then the task of attempting meaningful discourse between different theories of rights should be abandoned.

I proceed without taking this pessimistic turn, and continue on the assumption that the initial assertion is sound. The next step that follows is to expand role (1), simply descriptive-analytical work, into contested material on legal rights which is still amenable to empirical verification, like the issue considered in Part I.D over rules and principles. Here we might anticipate more advanced understandings of the practical workings of the Hohfeldian scheme, and of the interrelationship between

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[49] *United States v Craft* 535 US 274 (2002), discussed in more detail in both Halpin, "The Value of Hohfeldian Neutrality", *supra* note 43 and Halpin, "Hohfeld and Rules", *supra* note 43.

[50] See Halpin, "The Value of Hohfeldian Neutrality", *supra* note 43 at 9–10.

different positions (*eg*, claim-rights and powers); possibly, the introduction of other features of legal rights, such as a significant interest of the right holder. The important point about this type of theoretical work is that any conflict between opposing theories remains open to empirical resolution. However, we should also remind ourselves that a particular issue might straddle both the descriptive and evaluative, as we noted with principles above.[51] The presence of *significant* interests would appear to require evaluative work in order to make sense of what counts as significant.

I use "significant interest" as something of a place holder.[52] The suggestion is that any such depiction of the right holder's position will be qualified by a requirement of significance. Not every person's interest, will, *etc*, is recognised as a right. If this is so, then the theorist opting for such a particular depiction of the position of a person enjoying a right is necessarily including an evaluative element in the analysis provided.

In that case, we should note that the theorist might still stick to descriptive-analytical work in role (2), by incorporating a contingent evaluative element: either at a general abstract level, (2)(a); or covering one or more realised instantiations of contingent evaluation, (2)(b). It might be suggested that in all systems of legal rights, there will be some significant interests protected, subject to the contingent evaluation of significant interests within each jurisdiction; or, that we can point to the interests valued as significant within specific jurisdictions. That leaves the further possibility that by introducing significant interest into the analysis of legal rights the theorist is performing role (3), through adopting his or her own evaluative position on which interests are significant, and participating in aspirational-normative work.

Within this range of theoretical approaches to rights the possible emergence of controversies is self-evident. What is more complicated is ascertaining the availablility of meaningful discourse between different theories on opposing sides of a controversy. The first complication to overcome is to correctly identify the particular role, or roles, taken up by a theorist within a theoretical approach to rights. We observed in Part I.E that a mixture of roles is possible within a single theory, and the discussion above of incorporating an interest into the analysis of a legal right demonstrates that both descriptive-analytical and aspirational-normative roles may be at play. Accordingly, the second complication to overcome is to correctly identify the appropriate basis for each aspect of a theorist's position within a controversy, and to ensure that (i) empirical differences are contested empirically; (ii) evaluative differences are assessed evaluatively; and (iii) a contest between the empirical and the evaluative is rejected. In case (i) meaningful discourse is straightforward. In case (ii) there may be meaningful exposure to evaluative differences but whether that leads to an evaluative reconciliation is far more difficult to determine – clearly, in many cases that does not prove possible. In case (iii) meaningful discourse is excluded from the outset.

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[51] See main text accompanying *supra* note 29.

[52] I am not able here to engage with the will/interest debates, nor to elaborate on other contenders for taking its place. Briefly, two examples: "demand", developed in Margaret Gilbert, *Rights and Demands* (Oxford: Oxford University Press, 2018); an "addressive" feature, developed in Rowan Cruft, *Human Rights, Ownership, and the Individual* (Oxford: Oxford University Press, 2019).

Finally, there is another aspect of controversy between different theoretical roles in approaching legal rights which emerges from the insights provided by the expanded Hohfeldian scheme in fig 3. In Part II.C we observed that the resources in this scheme present a sharper focus on where exactly a practical controversy over legal rights is resolved; even going so far as to suggest that other levels of analysis are subordinated to that point of resolution, while noting that more abstract levels need have no impact on the ultimate resolution of controversy over the existence of a concrete normative position. This leads to the possibility of a theoretical role performed solely at an abstract level having no bearing on the resolution of a legal dispute, and the determination of a specific right. Meaningful discourse between descriptive-analytical work undertaken in this abstract way and theoretical work which is concerned with the resolution of (actual or hypothetical) legal disputes would appear precluded for want of common empirical data. It would also be problematic where one theory involves aspirational-normative work, if the evaluative work is not sufficiently fine-grained to deal with concrete applications. Discourse between theories both operating solely at this abstract level may seem easier, liberated from the imperative of practical resolution. It remains questionable whether it is meaningful.