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Conventionality, Disagreement, and Fidelity

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Introduction

H.L.A. Hart's *The Concept of Law* offers what continues to be an irresistible working assumption about the structure of law. In the ordinary case, it is difficult to argue with his claim that legal rules owe their status as law to meta-rules (such as constitutional provisions delineating lawmaking authority) that there is a consensus among legal officials to accord the status of meta-rules.[1] Yet suppose the content of the law were determined *exclusively* in that way by empirical consensus regarding meta-rules like the "rule of recognition" Hart famously took to separate the legal from the non-legal in any given legal system.[2] We would then seem forced to conclude that judges must be deceitful or confused in the many instances in which they employ non-consensus meta-rules, such as contested methods of legal interpretation defended at least partially on grounds that are not empirical but conceptual, and sometimes even moral. Ronald Dworkin characterized this challenge to the conventionality of law as the problem of "theoretical disagreement" about the law—i.e., disagreement about the "grounds of law," or the standards that determine what is and is not law.[3]

Like Dworkin, contemporary theorists who have taken up the issue of theoretical disagreement about the law have almost invariably seen it as a challenge for legal positivism in particular.[4] In this article, my first aim and contribution is

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1. Here and elsewhere, I do not take "consensus" to require strict unanimity, but something close, which I will sometimes alternatively call "convergence." To account for the ability of a legal system to endure and change, Hart introduced a seminal distinction between primary and secondary rules. Whereas the primary rules prohibit certain acts and facilitate others, the secondary rules determine the legal status of the primary rules and the ways that status may be revised. HLA Hart, *The Concept of Law*, 2nd ed (Oxford: Oxford University Press, 1994) at 79-123, especially 91-99.
2. *Ibid* at 94-95, 100-10.
3. Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986) at 3-11, 15-30, 122. No one has done more than Scott Shapiro to reconstruct Dworkin's idea of theoretical disagreement and the problem it poses for a broadly conventionalist view of law. My ideas about both are as indebted to Shapiro's work as to Dworkin's. See Scott J Shapiro, *Legality* (Cambridge: Harvard University Press, 2011) at 282-306 (reconstructing and critiquing Dworkin's argument that legal positivism is incompatible with judges' theoretical disagreements about the law).
4. This can be seen in Shapiro, *Legality*, *supra* note 3 at 282-306, Brian Leiter, "Explaining Theoretical Disagreement" (2009) 76:3 U Chicago L Rev 1215, and Barbara Baum Levenbook, "Dworkin's Theoretical Disagreement Argument" (2015) 10:1 Philosophy Compass 1. Dale Smith takes a different view, however, in "Theoretical Disagreement and the Semantic Sting" (2010) 30:4 Oxford J Legal Stud 635 at 643. He treats theoretical disagreement "as an objection to any theory of law that denies that theoretical disagreement exists." I follow Raz and

to reframe the significance of theoretical disagreement, casting it not as a thorn in the side of legal positivism in particular but as a component of a broader challenge for jurisprudence: how to refine and reconcile three theses that should appear plausible, important, and in tension, to all thoughtful observers of law, positivist or not. (1) Conventionality: the content of the law is determined, presumptively if not definitively, by meta-rules of law whose status as meta-rules arises from a consensus among relevant legal actors to treat them as having that status. (2) Disagreement: judges have theoretical disagreements about the law—i.e., disagreements about such meta-rules of law as legal interpretive methods, which they do not attempt to resolve merely by reference to explicit or implicit empirical consensus. (3) Fidelity: judges' theoretical disagreements can be in good faith, reasonable, and legally resolvable; they need not indicate that judges are systematically confused about the foundations of the law or that they are deceptively making law while pretending to find it.

My second agenda, beyond this reframing, is to generate a novel view of faithful theoretical disagreement by trying to identify a more robust and ecumenical reconciliation of Conventionality, Disagreement, and Fidelity than has yet been found.[5] A reconciliation of those three theses is more "robust," in my sense of the word, if it shows how non-trivial versions of all three theses can be true simultaneously, rather than how two of the theses can be saved at the expense of a third. By a more "ecumenical" reconciliation, I mean one that is not designed to serve the partisan agenda of legal positivists or their critics but instead avoids taking a stance on their longstanding dispute as far as possible. The leading voices in the academic conversation around theoretical disagreement have thus far treated it as a wedge issue in the debate over legal positivism. Perhaps partly for that reason, they have each settled for a partial reconciliation of Conventionality, Disagreement, and Fidelity that favors two of the three at the expense of a third. They have been, to my mind at least, too quick to accept unduly deflationary conclusions about, respectively, the conventionality of law (Dworkin), the nature of theoretical disagreement (Scott Shapiro), and the extent of judicial fidelity to the law (Brian Leiter).[6]

Shapiro in understanding legal positivism as defined by the claim that the content of the law does not depend on moral facts (other than, perhaps, indirectly and derivatively). Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed (Oxford: Oxford University Press, 2009) at 37-38; Shapiro, *Legality*, *supra* note 3 at 269-71.

5. To be clear, my aim is not to convince readers *definitively* that any particular version of the three theses is true—let alone that three particular versions of the three respective theses are true. To do so would require much more space than a single article. My aims are more limited and conditional: to show that (a) non-trivial and plausibly correct specifications of all three theses can be true simultaneously without contradiction, and (b) identifying and holding in mind such specifications leads to a novel and ecumenical view of faithful theoretical disagreement worthy of further examination.

6. One way to partially reconcile Conventionality, Disagreement, and Fidelity is to drop Fidelity—i.e., to conclude that theoretical disagreement must reflect confusion or deception. Brian Leiter has given us the best sympathetic reconstruction of that position. See Leiter, "Explaining Theoretical Disagreement", *supra* note 4 (discussing "Error Theory" and "Disingenuity" explanations of theoretical disagreement and arguing that, in any case, an explanation of theoretical disagreement is not especially important to a theory of law because theoretical disagreement is not central to the law). There are at least two reasons to search

This article unfolds as follows. In Section I, I use a critical overview of recent work on law's conventionality to chart a middle ground between overstating and understanding the conventionality of law. I demonstrate that even legal positivists should and do acknowledge limits to the conventionality of law. But I also review reasons for thinking Dworkin's alternative theory of law presupposed but obscured law's conventionality and in that way generated an unbalanced and misleading portrait of the structure of law.

In Section II, I discuss the problem of how to identify the law when the guidance offered by consensus standards runs out and theoretical disagreement comes to seem not only salient but inevitable. I contend that Shapiro, the leading positivist who has done the most to reconstruct and try to solve the problem of theoretical disagreement, ultimately ends up explaining it away, rather than explaining it. His provocative view is essentially that for "theoretical" disagreement to be legally resolvable it must be resolvable by standards given by contingent facts of legal practice—even if those facts are abstract and complex. Much of what initially appears to be theoretical disagreement may indeed be resolvable by reference to empirically given standards, in the way Shapiro implies. But Shapiro's implicit commitment to the idea that to be legally resolvable theoretical disagreement *must* be resolvable by reference to empirically given standards seems to reflect an attempt to insulate legal positivism from critique rather than an attempt to understand the scope and character of judges' interpretive disagreements on their own terms. Dworkin, by contrast, developed his account of theoretical disagreement as part of a critique of legal positivism. Though he took theoretical disagreement more seriously than Shapiro has, Dworkin was too quick to assume that theoretical disagreement must be moral in nature. He thereby obscured the more straightforward idea that theoretical disagreement is simply conceptual disagreement about the law, which may or may not be moral in nature.

In Section III, I offer an account of how theoretical disagreement may be faithful to the law when the legal guidance of consensus standards runs out. I argue that judges may, do, and should extract legal guidance from theoretical reflection upon the nature of law and its distinctive virtues—by which I mean something close to what Lon Fuller called the "internal morality of law."[7] They may have good faith, legally resolvable "theoretical disagreements" about the

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for a reconciliation of theoretical disagreement and conventionality that does not necessarily undermine judges' lucidity and/or good faith. First, as Shapiro argues, to treat theoretical disagreement as *necessarily* a sign of confusion is "uncharitable in the extreme," and it is one thing to suppose that jurists sometimes act in bad faith, quite another to suppose that they *necessarily* do so simply in virtue of having theoretical disagreements at all. Shapiro, *Legality*, *supra* note 3 at 290-91. As he points out, "no one, except for the legal positivist, thinks [judges] are acting in bad faith *merely because* they are engaged in theoretical disagreements." *Ibid* at 291. Second, even if the guidance that the law gives to judges is sometimes insufficient to yield unique determinate legal answers to legal questions, surely fidelity to the law requires judges to extract as much guidance from the law as possible. So we should search painstakingly for any ways in which theoretical disagreements may be guided by and faithful to the law before concluding that such disagreements necessarily reflect deception or confusion.

7. See Lon L Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71:4 Harv L Rev 630; Lon L Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969).

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standards that separate the legal from the non-legal, because such standards are a function not only of contingent empirical truths about consensus among legal officials but also of non-contingent conceptual truths about law's nature and distinctive virtues—and judges no less than philosophers have reasonable disagreements about those conceptual truths. Moreover, because it is an open question (about which philosophers have disagreed) whether we need to engage in moral theory to identify law's distinctive virtues, my account of Fidelity in the face of both Conventionality and Disagreement is ecumenical: the reconciliation does not immediately require us to take a stance on the truth or falsity of legal positivism.

Finally, in Section IV, I raise and respond to three likely lines of objection to my account of the possibility and nature of good faith, reasonable, genuinely *theoretical* disagreements.

I. Conventionality

Legal theorists of all stripes have seen "theoretical disagreement" as a problem for legal positivists in particular. The reason is straightforward. They have supposed that legal positivists (but not their critics) believe the "grounds of law" or "criteria of legal validity" are social facts that have their validating status simply in virtue of a consensus among relevant legal actors to treat them as having that status.[8] As Shapiro notes, reconstructing Dworkin: "positivists have maintained that the criteria of legal validity are determined by convention and consensus. But debates over interpretive methodology demonstrate that no such convention or consensus exists."[9] If we suppose that laws gain their status as law in part because they satisfy certain moral principles, then theoretical disagreement appears to be a natural outgrowth of the pervasiveness of reasonable ethical disagreement in the modern world.[10] In that sense, critics of legal positivism arguably have an easier time than legal positivists accounting for theoretical disagreement about the law.

However, the problem that theoretical disagreement poses for legal theory is how to reconcile it with the role that conventionality (broadly construed) seems to play in making law possible and determining its content. And both legal positivists and their critics vary in the extent to which they believe law is conventional. On the one hand, as I will show in the discussion to come, many leading positivists (including Shapiro) have offered persuasive reasons

8. The phrase "grounds of law" is Dworkin's. See Dworkin, *Law's Empire*, *supra* note 3. The phrase "criteria of legal validity" comes from Shapiro, and Hart before him. See Shapiro, *Legality*, *supra* note 3; Hart, *Concept of Law*, *supra* note 1.

9. Shapiro, *Legality*, *supra* note 3 at 283.

10. *Ibid* at 293 (claiming that in Dworkin's view, "insofar as the content of the law is dependent on which principles portray legal practice in its morally best light, genuine *moral* disagreements will induce genuine *legal* disagreements."). On the pervasiveness of reasonable ethical disagreement in the modern world, see especially John Rawls, *Political Liberalism*, expanded ed (New York: Columbia University Press, 2005); Charles Larmore, *The Morals of Modernity* (Cambridge: Cambridge University Press, 1996).

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for rejecting the idea that law depends upon a "coordination convention" (a type of convention that philosophers have analyzed rigorously and which may be understood as the focal case of a convention) thus raising the question of in what ways and to what extent law *is* conventional. On the other hand, critics of positivism can, should, and sometimes do emphasize more than Dworkin both that law requires extensive convergence of behaviour and that one of its most fundamental and distinctive benefits is the degree of social coordination such convergence makes possible.[11]

A. The Critique of Pure Coordination

Though it is difficult to deny that law is conventional in an important sense, it is not easy to identify in precisely what sense. In recent years, legal philosophers have made a persuasive case for rejecting the idea that law is based on the kind of narrow, paradigmatic form of convention that philosophers have labelled a "coordination convention."[12]

Loosely speaking, a convention is a pattern of coordinated activity. An extremely broad range of activities are conventional in this loose sense—activities ranging from those that are arbitrary save for coordination (say, driving and walking on the right, rather than left side of the median) all the way to activities that are far from arbitrary, yet still substantially coordinated (say, religious practices).[13] While noting that conventions come in degrees, David Lewis offered a seminal analysis of focal cases of convention that have come to be called "coordination conventions." The kind of conventions he analyzed are not just coordinated activities but a carefully defined set of them: roughly, behavioural regularities to which individuals adhere, expecting others to adhere, and each doing so on the conditional preference that he or she adhere given that others adhere.[14] More recently, Andrei Marmor has extracted from Lewis and emphasized an important idea about the rules of conventions that applies both to coordination conventions and an even broader set of conventions beyond them. The idea is that the rules need not be ones about which their adherents are "indifferent" but only ones that are "arbitrary" for them in the sense that "the reason to prefer one of the potential rules is not stronger than the reason to

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11. See John Finnis, "Law as Coordination" in *Philosophy of Law: Collected Essays*, vol 4 (Oxford: Oxford University Press, 2011) 66.

12. See Leslie Green, "Positivism and Conventionalism" (1999) 12:1 Can JL & Jur 35; Jules L Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001) at 94-100; Scott J Shapiro, "Law, Plans, and Practical Reason" (2002) 8:4 Legal Theory 387 at 388-94, 435-37, 441; Julie Dickson, "Is the Rule of Recognition Really a Conventional Rule?" (2007) 27:3 Oxford J Legal Stud 373; Andrei Marmor, *Social Conventions: From Language to Law* (Princeton: Princeton University Press, 2009) at 155-75; Shapiro, *Legality*, *supra* note 3 at 107-10.

13. On the non-arbitrariness of religious practices, see Shapiro, *Legality*, *supra* note 3 at 109 ("Consider, for example, the Ancient Hebrews …. Surely many, if not most, would not have preferred to follow a different text just in case everyone else did.").

14. These conditions are also "common knowledge" or the object of a hierarchy of reciprocal expectations regarding conformity. David Lewis, *Convention: A Philosophical Study* (Oxford: Blackwell, 2002, orig 1969) at 42, 58, 76, 78-79.

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follow the rule that is actually followed by others."[15] Marmor characterizes this as meaning partly that there are "compliance-dependent reasons" for following the conventional rule.[16]

The distinction Marmor highlights between "indifferent" and "arbitrary" should ease one potential qualm about the putative conventionality of law. Clearly the judges, government officials, and citizens who accept the American legal order and contribute to its continued existence are not indifferent between being in the American legal order and other actual or hypothetical legal orders. They need not be indifferent, however, for their consensus acceptance of standards separating what is and is not law to constitute a coordination convention.

However, as Leslie Green notes, "in the case of a mere [coordination] convention the fact of common practice is not just necessary but also sufficient to motivate conformity."[17] Yet in the case of acceptance of standards of legal validity, it is not clear to what extent reasons of coordination are likely sufficient. As Green observes, unlike in the case of say, spelling, about which "it just makes no sense to suppose that there are converging convention-independent standards of correctness," different individuals may each follow, for example, "a practice rule that prohibits murder, not because they are playing follow-the-leader, but because each thinks murder wrong, and thus independently comes to the same conclusion as the others."[18] Moreover, as he suggests, legal officials may identify reasons for following particular legal "rules of recognition" that are not only distinct but "even incompatible" with one another.[19] So although coordination conventions can give individuals reasons to follow a rule such as a rule of recognition,[20] these are compliance-dependent reasons which do not include many of the important reasons why officials may follow a legal system's rule or rules of recognition.[21]

If a legal system is sufficiently unjust or there is another better one for which to fight, officials may follow one rule of recognition for non-coordinative reasons, and coordinative reasons might be insufficient to get them to follow another. Shapiro speculates: "If most officials suddenly abandoned the United States Constitution, this would not lead all others to similar action. Some would resign in protest, while others would continue applying the rules validly enacted under the United States Constitution."[22] All this reflects what we already saw in Lewis's and Marmor's accounts of conventions, and which Green also puts well:

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15. Marmor, *supra* note 12 at 8. Decades earlier, Dworkin drew on Lewis to make, in substance, the same point, in his criticism of conventionalist perspectives on the law. Dworkin, *Law's Empire*, *supra* note 3 at 144-47.
16. Marmor, *supra* note 12 at 11.
17. Green, *supra* note 12 at 40.
18. *Ibid* at 39-40.
19. *Ibid*.
20. Finnis, *supra* note 11 at 70-71; William S Boardman, "Coordination and the Moral Obligation to Obey the Law" (1987) 97:3 Ethics 546; Gerald J Postema, "Coordination and Convention at the Foundations of Law" (1982) 11:1 J Legal Stud 165.
21. Shapiro, *Legality*, *supra* note 3 at 107-10; Coleman, *Practice of Principle*, *supra* note 12 at 94-95; Christopher Kutz, "The Judicial Community" (2001) 11:1 Philosophical Issues 442 at 454-55.
22. Shapiro, *Legality*, *supra* note 3 at 109-10.

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"in any [mere] coordination problem there can be no *radical* conflict of interest, i.e., conflict so great that it overwhelms the benefits of coordination."[23]

B. The Need for Cooperation

Although leading legal positivists reject the idea that the rules of recognition or ultimate determinants of law should be understood on the model of a coordination convention, it remains obvious that a substantial degree of consensus among legal officials is necessary for the existence of a legal system. Given the apparent inadequacy of coordination convention accounts for explaining the foundations of law and legal systems, legal philosophers have recently proposed alternative accounts that, while loosely conventional, allow for a greater range of reasons why legal officials might adhere to shared rules of recognition. Most notably, a handful of prominent philosophers of law have explored the possibility that the practices at the root of law may not be solely coordinative conventions, but rather more substantively oriented (while still somewhat coordinative) forms of "joint intentional activity" or "shared cooperative activity."[24]

Scott Shapiro has done more than any other legal philosopher to develop a conception of legal positivism on such a basis. Applying the work of Michael Bratman, philosopher of action and intention, to law, Shapiro has argued that law ultimately rests on a joint form of activity characterized by a certain level of commitment to the activity and cooperation with other participants in the activity.[25] As Jules Coleman has noted, a good, simple example of joint activity comes from philosopher Margaret Gilbert, who has written at length about the seemingly simple case of taking a walk with another person.[26] As they both suggest, that is an activity in which individuals are not merely coordinating, but are pursuing a shared goal, which gives them reasons to respond to one another's behaviour in certain ways.

A legal system can withstand a fair amount of disagreement among such legal officials as judges about highly abstract propositions of legal validation—as is attested by methodological disagreement about legal interpretation. This tolerance is possible in part because there is substantial overlap in the concrete implications of different sets of legal interpretive methods.[27] Yet substantial convergence is necessary, even if it arises not in the first instance because of coordination or cooperation, and even if the convergence is primarily onto lower-level legal rules

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23. Green, *supra* note 12 at 50.

24. See Shapiro, "Law, Plans, and Practical Reason", *supra* note 12 (drawing these technical ideas from Michael Bratman). For similar accounts, see Coleman, *Practice of Principle*, *supra* note 12 at 96-99; Kutz, *supra* note 21 at 455-65.

25. Shapiro, "Law, Plans, and Practical Reason", *supra* note 12 at 394-441.

26. Coleman, *Practice of Principle*, *supra* note 12 at 91. See Margaret Gilbert, "Walking Together: A Paradigmatic Social Phenomenon" (1990) 15:1 Midwest Studies in Philosophy 1.

27. We may disagree fiercely about textualism and purposivism, originalism and non-originalism while still substantially agreeing about most actual legal issues. On the possibility and actuality of agreements about many legal issues notwithstanding more abstract disagreements about law and legal principles, see Cass R Sunstein, "Incompletely Theorized Agreements" (1995) 108:7 Harv L Rev 1733.

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regulating behaviour rather than lofty constitutional principles or meta-rules regulating the legal system. Leslie Green, who has rejected the idea that law is a mere coordination convention, has nevertheless recognized that "[a]s Postema has argued, officials could not *succeed* in coordinating mass behaviour if they did not, to a significant extent, attempt to coordinate not only among themselves, but also with society at large."[28]

The attraction of cooperative over merely coordinative accounts of law lies in the ability of the former to allow for a broader range of reasons why judges, officials, and citizens may adhere to the same rules of recognition separating what is and is not law. Matthew Adler has suggested, however, that even cooperative accounts of law (such as those that have been endorsed by Shapiro, Coleman, and Kutz) may imply that legal systems require and depend for their content upon convergences of attitude and behaviour that are more arbitrary than the convergences of attitude and behaviour which we sometimes observe—or at least can imagine—in actual legal systems.[29] In his view:

> A striking implication of group-sensitive positivism [of the kind suggested by Shapiro, Coleman, and Kutz] is that a society of committed textualists—where each official uncompromisingly accepts the text of the 1787 Constitution, together with some interpretive method, as fundamental law, regardless of whether other officials accept a different text or method—would not be a full-fledged legal system.[30]

To be sure, if officials were dedicated to some supremely good set of rules and principles, they might cling to it tenaciously even if their colleagues should jump ship *en masse*. However, the kind of system Adler imagines is strikingly similar to the kind of "pre-legal" order of primary rules Hart discussed in order to illuminate the problems that a legal order with both primary and secondary rules helps to solve.[31] More specifically, a system of the sort Adler imagines would be fragile. In a snapshot in time, officials would appear committed to the same rules of recognition. But they would not be committed to coordinating with one another to achieve consensus on rules of recognition should the nature of some judges' commitments change over time.

C. Why Dworkin's "Integrity" Cannot Replace (and Must Presuppose) Conventionality

Dworkin was dismissive of what he called conventionalist accounts of law.[32] He exhorted judges to understand the law not as merely the "preinterpretive" "law"

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28. Green, *supra* note 12 at 48 (citing Postema, *supra* note 20 at 188-94).
29. Matthew D Adler, "Constitutional Fidelity, the Rule of Recognition, and the Communitarian Turn in Contemporary Positivism" (2006) 75:3 Fordham L Rev 1671 at 1674 (discussing the versions of legal positivism defended in Shapiro, "Law, Plans, and Practical Reason," *supra* note 12; Coleman, *Practice of Principle*, *supra* note 12 at 94-100; Kutz, *supra* note 21).
30. Adler, "Constitutional Fidelity", *supra* note 29 at 1674.
31. Hart, *Concept of Law*, *supra* note 1 at 91-99; Shapiro, *Legality*, *supra* note 3 at 79-83.
32. Dworkin, *Law's Empire*, *supra* note 3 at 114-50.

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which everyone recognizes as law, in some sense, but rather as the best moral reconstruction of the materials that legal participants and observers would, by consensus, recognize as legal materials to be interpreted.[33]

Some of what he appeared to deny regarding law's conventionality he may have accepted (in spite of himself) but simply downplayed and obscured. For he insisted that judges must weigh the competing moral merits of only those potential legal interpretations that first meet the "threshold test" of "fit" with the legal materials to which the interpretations would apply.[34] However, Dworkin's conception of what it means for an interpretation to "fit" the legal materials to which it applies appears to have been both more and less demanding than what we would ordinarily understand "fit" to require of a legal interpretation. He seems to have thought that the legal materials an interpretation should be judged to fit or not fit are not the materials bearing upon that provision, narrowly and formally construed, but rather the underlying principles of the whole surrounding area of legal doctrine and indeed of the entire legal system.[35] He appears to have thought this because he believed that the importance of fit arose not from the nature of interpretation, *per se*, but rather from his substantive commitment to "law as integrity" according to which "preinterpretive" law should be read by judges in such a way as to make it as principled as possible.[36]

To be fair to Dworkin, he sought to quell concern that his theory might therefore give specific provisions of law very different content than they would seem to have according to conventional understanding. He did so in several ways. First, he treated "compartmentalization [a]s a feature of legal practice no competent interpretation can ignore."[37] Second, he recognized that "constraints of fairness and process" will sometimes require that judges temper the extent to which they pursue the "integrity" of "consistency in principle"[38] for law and require them to settle for what he called "inclusive" rather than "pure" integrity.[39]

Still, in downplaying and obscuring the conventionality of law, Dworkin misrepresented the structure of law as whole, and in general. He not only failed to offer a persuasive explanation of the way in which social facts about convergence among legal officials constrain the content of the law. He also claimed,

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33. *Ibid* at 45-113, 139-40, 247-50, 254-58.

34. Dworkin recognized "fit" as a "threshold test" in several instances in *Law's Empire*. *Ibid* at 255, 259, 262, 374.

35. *Ibid* at 225.

36. Dworkin once wrote, for instance, of "questions of fit surfac[ing] … because an interpretation is *pro tanto* more satisfactory if it shows less damage to integrity than its rival." *Ibid* at 246-47. See also *ibid* at 257 (arguing that a judge's "convictions about fit … express his commitment to integrity: he believes that an interpretation that falls below his threshold of fit shows the record of the community in an irredeemably bad light…."). Note finally that Dworkin responds to the hypothetical critic who complains that "integrity is at work in [a Dworkinian judge's] calculations just up to the point at which he has rejected all interpretations that fail the threshold test of fit" not by disclaiming the idea that concern for fit is rooted in concern for integrity but by trying (and I believe struggling) to show that integrity somehow also bears upon the choice among competing interpretations of the law that satisfy the requirement of fit equally well. See *ibid* at 262-63.

37. *Ibid* at 251-52.

38. *Ibid* at 163.

39. *Ibid* at 404-07.

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implausibly, that "[l]aw as integrity explains and justifies easy cases as well as hard ones; it also shows why they are easy."[40] The contestable moral importance of "integrity" might well provide a moral justification for judges to follow the dictates of "easy" law given by convergent practice. But surely it cannot provide a compelling explanation of why easy cases are easy, legally speaking. Far from explaining why "easy" cases are easy, law as integrity can only presuppose that certain easy cases are easy and threaten to make them difficult.[41] That is because even in easy cases, the requirements of "consistency in principle" are often neither clear nor straightforward but matters of reasonable disagreement. Often a legal result is clear and undeniable but its consistency in principle with surrounding law is unclear and contestable.

In sum, we need not endorse legal positivism to recognize the substantial dependence of law on convergent legal practice. Even non-positivists who believe that moral rules and principles constrain what the law can require or allow must recognize that social facts about convergence in practice substantially constrain, if not uniquely determine, the content of the law.[42]

II. Disagreement

A. When Consensus Ends, Legal Reasoning Begins

Focused as he was on the most difficult problems of legal interpretation and adjudication, Dworkin offered an unbalanced portrait of law that foregrounded the exotic and backgrounded the quotidian. But he was right to resist the temptation to suppose that in the difficult legal cases that make theoretical disagreement salient there must simply be "no right answer" legally speaking.[43] When, as is often the case, existing practice has not yet explicitly converged to generate a unique determinate answer to a legal question, judges do not abandon legal reasoning. In fact, it is only because, and to the extent that, practice has not yet explicitly converged on a unique determinate answer to a legal question that legal reasoning, interpretation, and judgment arise at all. As Richard Fallon has observed, "one does not need to 'interpret' when one knows immediately and unreflectively how

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40. *Ibid* at 266.

41. *Cf* Hart, "Postscript" to *Concept of Law*, *supra* note 1 at 266 (arguing that to find the "preinterpretive law" he needs for his process of interpretation, Dworkin "presupposes" "something very like a rule of recognition").

42. In his explanation of constructive interpretation Dworkin contended that interpretations of the law must "fit" the "preinterpretive" materials of which they are interpretations. Change sufficiently the "preinterpretive" materials given by practice and our interpretations of the law must change accordingly. As Raz notes: "To deny that the criteria which determine the content of the law of this country or that have a content-independent component is to deny that there can be law-making authorities." Joseph Raz, "Two Views of the Nature of the Theory of Law: A Partial Comparison" in Jules Coleman, ed, *Hart's Postscript: Essays on the Postscript to* The Concept of Law (Oxford: Oxford University Press, 2001) 1 at 29-30.

43. Dworkin, *Law's Empire*, *supra* note 3 at 9-11; Ronald Dworkin, "No Right Answer?" (1978) 53:1 NYU L Rev 1; Ronald Dworkin, "The Model of Rules I" in *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) 14 at 31-39, 44-45; and Dworkin, "The Model of Rules II" in *Taking Rights Seriously* 46 at 68-71.

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to go on."[44] Conversely, as Joseph Raz has noted, "interpretation is possible only when the meaning of what is interpreted is not obvious."[45] Legal reasoning is precisely a matter of using general legal principles and interpretive methods to resolve specific legal questions whose answers cannot be straightforwardly determined by applying rules whose legal validity is clearly indicated by their acceptance as a matter of consensus.

Even when legal practice has not converged directly on a rule or set of principles that unambiguously answers a legal question, it may still *indirectly* determine a unique legal answer if it sufficiently constrains the general interpretive methods and legal principles to which judges may appeal in answering the question. The legal meaning of a phrase in a statute may seem ambiguous on its face or on initial inspection, and it may be that no legal actors have yet taken a position on its legal meaning—let alone converged in their interpretations of it to such an extent that there is no longer any real question of its legal meaning. Yet convergent practice may still limit the general interpretive methods and principles of legal reasoning to such an extent that any combination of those methods and principles would speak decisively in favor of one reading of the legal provision in question.[46] In that case, we should say that the legal meaning of the provision remains determined by social facts of practice, albeit in an especially indirect manner. Moreover, American judges have, in fact, converged to a substantial extent on a limited number of familiar legal principles and interpretive methods that they treat as relevant to the resolution of disputable points of law. For instance, Philip Bobbitt has offered a useful classification of five widely accepted kinds of constitutional argument: historical, textual, doctrinal, prudential, and structural.[47]

Yet there are obvious and important limits to the extent to which unique determinate answers to legal questions arise from judges' convergent acceptance of a range of familiar legal principles and interpretive methods. First, as many legal theorists have pointed out—including the legal realists in particular—many of the accepted canons of legal interpretation stand in tension, if not outright conflict, with one another.[48] Second, as we have seen, a salient fact about judicial practice, which Dworkin rightly emphasized, is that judges appear to have not only "empirical disagreements" about what the law is *in practice* but also "theoretical disagreements" about what the law is even *in principle*, because they

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44. Richard H Fallon, Jr, "Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition" in Matthew D Adler & Kenneth Einar Himma, eds, *The Rule of Recognition and the US Constitution* (Oxford: Oxford University Press, 2009) 47 at 58.

45. Joseph Raz, "Why Interpret?" in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford: Oxford University Press, 2009) 223 at 224.

46. In other words, there might be what Sunstein has called an "incompletely theorized agreement" in law analogous to what Rawls called an "overlapping consensus" in a political liberal state. See Sunstein, *supra* note 27; Rawls, *supra* note 10 at 133-72.

47. Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford: Oxford University Press, 1982). Bobbitt also discussed an additional category, "ethical argument," but I leave it aside here because it is not the subject of the same consensus acceptance as the other types of argument Bobbitt identified.

48. Shapiro, *Legality*, *supra* note 3 at 260 (citing Karl N Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed" (1950) 3:3 Vand L Rev 395 at 401).

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disagree about the very interpretive methods and principles by which to answer any question about what the law requires or allows. For instance, some judges believe that it is inappropriate to consider legislative intent or purpose in interpreting statutes, while others believe that it is wrong to take the meaning given by text and statutory structure as decisive if that meaning clearly conflicts with the intent or purpose of the lawmakers who crafted the statute.

Dworkin argued that theoretical disagreements among judges push us toward the conclusion that the law is not ultimately determined by social facts of convergent practice but rather by the results of constructive interpretation—i.e., examining a set of "preinterpretive" materials and attempting to reconstruct them "in the best light" by adopting the construction of them that best combines "fit" with the preinterpretive materials and "justification," in the sense of resulting moral justifiability or value attributed to the object.[49] Before turning to Dworkin's account of theoretical disagreement, formulated in opposition to conventionalism about law, let us first examine the leading alternative account of theoretical disagreement put forth by legal positivist Scott Shapiro. Whatever other merits it may have, it is at least designed to harmonize with a broadly conventionalist view of law.

B. Shapiro's Reduction of Theoretical Disagreement to Empirical Disagreement

In his reconstruction and response to the problem of theoretical disagreement, Shapiro makes the following observation. When judges have not only first-order disagreements about propositions of law but also second-order disagreements about the interpretive methods by which to resolve those first-order disagreements, they may still share third-order standards by which to adjudicate their second-order disagreements regarding competing interpretive methods. Shapiro writes: "The commitment to the social foundations of law, I have tried to show, can be satisfied in the absence of a specific convention about proper interpretive methodology just in case a consensus exists about the factors that ultimately determine interpretive methodology."[50] To illustrate his point, Shapiro argues that

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49. Dworkin, *Law's Empire*, *supra* note 3 at 45-113, 139-40, 247-50, 254-58.

50. Shapiro, *Legality*, *supra* note 3 at 383. Shapiro's positivist response to the problem of theoretical disagreement has the same structure as that of Jules Coleman's. In response to Dworkin's use of judicial disagreement to call into question legal positivism, Coleman observed, correctly, that "judges can disagree in some significant set of controversial cases, without in the process abandoning their agreement about what the rule [of recognition] is." Coleman, *Practice of Principle*, *supra* note 12 at 116. As Dworkin argued, however, this "abstraction strategy" signals significant limits to the extent to which convergent practice determines unique answers to legal questions. Ronald Dworkin, "Thirty Years On" (2002) 115:6 Harv L Rev 1655 at 1658-62 (reviewing Coleman, *Practice of Principle*, *supra* note 12). Shapiro accepts that disagreements about interpretive methodology often will not be settled even indirectly by convergence upon principles by which to resolve such disagreements. In his view laws are plans and "in systems where meta-interpretive disputes are prevalent, proper interpretive methodologies are not plans, or even as planlike as customary norms. Meta-interpretive disputes arise precisely because no one has settled on how legal texts are to be interpreted." Shapiro, *Legality*, *supra* note 3 at 446.

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even if a legal system has not directly settled all disputes over the interpretive methods for judges to employ, it may have indirectly settled or at least narrowed them, because the structure of specific legal institutions may have implications for the appropriate scope of judicial authority and reasoning.[51] Shapiro implies that if theoretical disagreements have unique determinate legal resolutions they do so *only* in virtue of higher-order convergence (within a specific legal system) on shared standards for judging interpretive methods. Hence, he does not so much explain theoretical disagreement as explain it away. In Shapiro's view, theoretical disagreements have genuinely legal resolutions only when there are standards for resolving them given by facts about convergence in legal practice—facts that are ultimately empirical, even if also complex and abstract.

Shapiro is right to note that disagreements about interpretive methods can be explained at least in part by disagreements among judges and academic lawyers about complex, contingent social facts regarding the degree of trust a legal system implicitly accords to judges, and the relative degrees of cooperation and contestation involved in the making of laws that judges must interpret.[52] For example, Justice Scalia's and Dworkin's competing ideas about interpretation plausibly rested in part on divergent views about the scope of the role that their legal system has entrusted to judges.[53]

Yet judges and legal theorists do not generally defend their favored interpretive theories *merely* by emphasizing the explicit and implicit footholds they already have in the structure of existing legal institutions and in the behavior of legal officials. As evidence of this, consider, for instance, that several prominent legal scholars have recently put forth the idea of defending originalism on predominantly empirical grounds, and framed doing so as an innovation for constitutional theory.[54] Most often judges and legal theorists defend their views, and attract adherents, on the grounds that their way of understanding the law is more faithful to attractive ideals, and not just to barren social facts about institutional structure and convergence in legal officials' attitudes and behaviour.[55] Judges

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51. See Shapiro, *Legality*, *supra* note 3 at 383 ("There may be no right answer to those disputes, but there are usually *wrong* ones."). See generally *ibid* at 307-87.

52. *Ibid* at 353-87.

53. *Ibid* at 340-42.

54. William Baude, "Is Originalism our Law?" (2015) 115:8 Colum L Rev 2349 (arguing for originalism on empirical as opposed to "conceptual" or "normative" grounds and suggesting that doing so is innovative); Stephen E Sachs, "Originalism as a Theory of Legal Change" (2015) 38:3 Harv JL & Pub Pol'y 817 at 819 ("In academic circles, positive defenses [of originalism] are relatively rare; they're almost unheard of.").

55. Matthew Adler puts the point modestly when he notes that leading constitutional theorists "[Bruce] Ackerman, [John Hart] Ely, [Richard] Fallon, [Thomas] Grey, [Michael] Perry, and [David] Strauss, all … ground interpretive methods in culture/tradition facts in a manner not too distant from [Dworkin's idea of] constructive interpretation." Matthew D Adler, "Social Facts, Constitutional Interpretation, and the Rule of Recognition" in *The Rule of Recognition and the US Constitution* 193, *supra* note 44 at 231. Even those who think that political morality is not directly implicated in legal interpretation can and often do argue for particular approaches to interpretation partly on the basis of their accordance with normative ideals and not just empirical facts. Keith Whittington, a constitutional originalist hardly Dworkinian in his view of the content of American law, has expressed a view about how to judge interpretive methods that sounds like something Dworkin might have written: "[t]he justification for adopting any particular interpretive method depends on external reasons of normative political theory. As a consequence, originalism cannot be justified by reference to the intent of the founders or by a purely historical

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are generally less self-conscious than academics. But consider one of the more self-conscious jurists in recent memory: former Associate Justice of the Supreme Court of the United States, Antonin Scalia, who had a distinctive theory that clearly informed his practice. He argued for his textualist, originalist approach to constitutional interpretation in part by invoking considerations of political morality, such as democratic legitimacy, as *against* what he observed of ground-level judicial practice.[56]

It is important not to move too quickly here, however. Arguments like Scalia's democratic case for constitutional originalism do not obviously depend on *truths* of political morality. Often proponents of such arguments are best understood as purporting to derive interpretive methods not from the political values they judge to be *morally* best but rather from those political values they judge to be immanent within the constitutional order, and to give coherence and purpose to its rules, principles, and institutional structures.

Making the point more concrete helps show how far it can render Shapiro's reductionist view of theoretical disagreement compatible with what we observe of judges' interpretive disagreements. So let us consider constitutional interpretation in light of just one aspect of the *immanent* political morality of a constitutional order: the conception of representative democracy it encodes. Two judges may agree that their legal system is structured around an ideal of representative democracy and that this ideal should inform the way they interpret the constitution. Yet they may disagree about the conception of representative democracy encoded in the constitutional order in four salient ways.[57]

First, judges may agree that their constitutional order encodes a particular conception of representative democracy (call it conception *A*), but disagree about which interpretative method would be most consistent with that conception of representative democracy.

Second, one judge may think the constitutional order encodes conception *A* of representative democracy while another judge thinks it encodes conception *B*.

Third, one judge may think the constitutional order encodes a particular conception of representative democracy. Another judge, however, may think the constitutional order encodes merely a general idea of representative democracy, forcing judges to weigh and choose among competing moral ideals of representative democracy to resolve uncertainties about how to interpret the constitution. We can illustrate the point using Shapiro's framework of trust and distrust. The second

argument." Keith E Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University Press of Kansas, 1999) at 3.

56. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, Amy Gutmann, ed (Princeton: Princeton University Press, 1997) at 40 ("The Constitution … even though a democratically adopted text, we formally treat like the common law.").

57. In more abstract terms, Smith, *supra* note 4 at 642, distinguishes four types of disagreements he deems theoretical disagreement about the law: "theoretical disagreement encompasses not only disputes about what sources of law there are, and about what effect a given source has on the content of the law, but also disputes about what *determines* what sources of law there are and what *determines* what effect a given source has." The concrete disagreements I describe here could be characterized as instances of some of the types of disagreement Smith describes, though it is not obvious to me which fall into which categories, because it is not obvious how to distinguish in practice between a source of law and a determinant of a source of law.

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judge may believe that there are strands of the American ideal of representative democracy that both empower and disempower judges vis-à-vis other branches of government and the constitution's authors. Hence, she may believe the extent of her license to update constitutional provisions in light of citizens' evolving ideals ultimately depends in part upon the compatibility of different conceptions of the judicial role with the best *moral* conception of representative democracy and not just with America's *immanent* conception of representative democracy.

Finally, two judges may agree that the constitutional order commits judges to interpret the law in the light of the morally best conception of representative democracy but disagree about which specific conception fits that description.

In cases one through three, the disagreement may be resolvable on grounds that are best described as "empirical" because they are dependent upon contingent facts about the practices of the specific legal system at issue. There may be an empirical answer to the question of which conception of representative democracy the constitutional order encodes. Moreover, it may be that the conception encoded is one whose conceptual contours (a) can be derived from empirical facts about legal practice and (b) dictate a unique, determinate answer to whatever concrete questions of legal interpretation are at issue. However, suppose the constitutional order's *immanent* conception of representative democracy is not precise enough to do whatever interpretive work is needed from it, and judges are left to draw partly upon a *moral* ideal of representative democracy, as in case four. In that case, disagreement they have about the best moral ideal of representative democracy will be genuinely "theoretical" in the sense that its resolution will derive from moral truths that transcend—rather than depend upon—contingent facts about practices in the legal system at issue.

Shapiro recognizes the possibility that empirical facts determining the law might direct judges to moral theory and in that way provoke putatively theoretical disagreement about the law. But he has a subtle way of deflecting the idea that the possibility of such disagreement reveals the content of the law to be potentially dependent upon non-empirical, theoretical truths of political morality. Shapiro is a so-called "exclusive" (as opposed to "inclusive") legal positivist. This means he rejects not only Dworkin's claim that law *necessarily* depends on morality in the way Dworkin suggests, but also the idea that law may *contingently* depend on morality in virtue of social facts that make it so dependent.[58] Shapiro recognizes that there is a sense in which judges can be—and indeed apparently are—required by positive law to take morality into account in their decisions. He simply follows Raz in arguing that this must be merely analogous to the way in which American judges can sometimes be required by American law to take foreign law into account in resolving cases—i.e., not because the foreign law is itself part of domestic law.[59] In Shapiro's view, "in hard cases, where the pedigreed primary norms run out, American judges are simply *under a legal obligation to apply extra-legal standards*."[60]

58. Shapiro, *Legality*, *supra* note 3 at 267-81.
59. *Ibid* at 271-73 (citing Raz, *Authority of Law*, *supra* note 4 at 46).
60. Shapiro, *Legality*, *supra* note 3 at 272.

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Presumably, then, Shapiro would acknowledge that the convergent, higher-order standards governing disputes about competing interpretive methods may, as a matter of fact, instruct judges to consider political morality in deciding which interpretive methods to adopt. Shapiro appears committed simply to insisting that if (a) the plans of a legal system are such that judges must engage in moral reasoning to select the "correct" interpretive methods and (b) a legal question arises that cannot be resolved by reference to an "incompletely theorized agreement,"[61] but instead requires a judge to apply contested interpretive methods, then (c) there is *a sense* in which there is no unique determinate *legal* answer to the question. As Shapiro puts it:

> … [J]udicial decisions can be legally regulated under one description but legally unregulated under another…. Under one description, "deciding for the morally entitled party," the decision is legally mandated; under another, "deciding for the promisee," it is legally unregulated.[62]

Shapiro thinks it important to make such a qualification lest we "end up describing the law as providing far sharper guidance than it has in fact provided."[63]

Though I cannot address the issue in detail here, there are good reasons to doubt the truth of exclusive positivism.[64] If we reject exclusive positivism, it is open to us to allow that social facts determining the content of law can also make the law dependent upon considerations of political morality such as, for example, the best moral reconstruction of the ideals of representative democracy. And doing so gives us one way of reconciling theoretical disagreement with a broadly conventionalist understanding of the law: treating theoretical disagreement as prompted by empirical facts about legal institutions and practices that implicitly demand we employ theoretical reflection on ideals of political morality to resolve otherwise ambiguous points of law.

That said, there is an important conceptual distinction between what judges ought to do, *all things considered*, and what judges ought to do, if they are to be faithful to the law. In cases in which empirical facts about legal institutions and

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61. See Sunstein, *supra* note 27.
62. Shapiro, *Legality*, *supra* note 3 at 280-81.
63. *Ibid* at 280.
64. As Jules Coleman has suggested, Raz and Shapiro have each endorsed exclusive rather than inclusive legal positivism because they have thought that (a) the law's status as law must be able in principle to give us additional reasons for action than those already given to us by ethics or morality and (b) to the extent that the law's status as law is itself dependent upon ethical or moral considerations, it gives us no additional reasons for action beyond those that ethics and morality already supply. See Coleman, *Practice of Principle*, *supra* note 12 at 134-48. Yet as Coleman points out, even if we accept (a), which Shapiro has called the "practical difference thesis," "[w]hat is or must be true of *the law* need not be true of *a law*" and "it is not obvious why each rule must be conceived of as contributing to the guidance function [of law] in the same way." *Ibid* at 144, 146. Shapiro discusses and defends the practical difference thesis in Scott J Shapiro, "On Hart's Way Out" (1998) 4:4 Legal Theory 469; Scott J Shapiro, "Law, Morality, and the Guidance of Conduct" (2000) 6:2 Legal Theory 127. Scott Hershovitz's recent criticisms of exclusive legal positivism are also intriguing. See Hershovitz, "The Model of Plans and the Prospects for Positivism" (2014) 125:1 Ethics 152. At the least, they should reinforce our sense of the demandingness and non-obviousness of exclusive legal positivists' claims about laws' necessary capacity for guidance.

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practices point judges to political morality, even exclusive legal positivists such as Shapiro can recognize that there is *a sense* in which judges are more faithful to the law when they answer those questions of political morality correctly. On the other hand, this is legal fidelity in an attenuated sense. If it were the only form of fidelity to law that judges engaged in genuinely theoretical disagreement might claim for themselves, then we should give up on the hope of a *robust* reconciliation of Conventionality, Disagreement, and Fidelity. Conventionality would in that case trump, leaving genuinely theoretical disagreement to be peripheral to the law and potentially faithful to it in only a peripheral sense.

Hence, I do not claim that a robust reconciliation of Conventionality, Disagreement, and Fidelity can be derived from an attempt to rescue (from exclusive legal positivists) the bona fide legality of legally required backstop moral reasoning. Instead, I hope to show that a robust reconciliation of Conventionality, Disagreement, and Fidelity can be found if we are not too quick to assume that as soon as empirical consensus runs out, so too does law, and all that is left is morality. In particular, we should not discount the possibility that when legal facts determined by empirical consensus run out, we may still be able to extract legal guidance from conceptual truths about law and its distinctive virtues before having to resort to backstop moral reasoning.

C. Dworkin's Leap from Theoretical Disagreement to Political Morality

Ironically, in my view, despite their disagreement about whether to characterize backstop moral reasoning as genuinely legal or not, Dworkin and his critics make the same mistake of resorting to such reasoning too quickly. They do so because they both assume that if there is no fact of the matter about law dictated (albeit perhaps implicitly) by contingent, convergent practice, then moral reasoning is the next and last resort of a judge tasked with either identifying—or, failing that, making—law. But that is not so. Although Dworkin fares better than his critics on this score, neither pays adequate attention to the possibility of extracting legal guidance from *the distinctive virtues of law* before resorting to more capacious ethical theorizing to find or make law.

We can read Dworkin as taking "integrity" to be *the* distinctive virtue of law.[65] But he elevated integrity to the exclusion of other important, distinctively legal virtues, such as the predictability in governance it produces.[66] Moreover, although concern for integrity perhaps can and should help judges resolve difficult cases, Dworkin uses it first (and arguably foremost) as a rationale simply for accepting the meaning of some legal provisions as "easy" (because only one

65. In fact, Jules Coleman has put the matter in just that way. See Coleman, "The Architecture of Jurisprudence" (2011) 121:1 Yale LJ 2 at 19 ("For Dworkin, the distinctive virtue of law is not justice, but what he calls 'integrity.'").

66. Dworkin rightly contended that predictability is not always required by fairness, often conflicts with other values, and should not be pursued to its limits. Dworkin, *Law's Empire*, *supra* note 3 at 140-44. But none of those considerations furnishes a decisive argument against the idea that predictability in government is morally important, nor against the idea that it is a characteristic virtue of law.

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interpretation of them "fits" the landscape of legal principle that surrounds them) and turning other "easy" cases into difficult ones by "encourag[ing] a judge to be wide-ranging and imaginative in his search for coherence with fundamental principle."[67] Dworkin contended that "[h]ard cases arise, for any judge, when his threshold test [of "fit" as determined by the demands of integrity] does not discriminate between two or more interpretations of some statute or line of cases."[68] Rather than emphasize the extent to which distinctively *legal* virtues in and of themselves might be used to resolve cases in which multiple interpretations are consistent with the empirical facts of legal practice, Dworkin emphasized instead the extent to which such cases prompt a need for more general and expansive moral theory: "in hard cases judges must make controversial judgments of political morality whichever conception of law they hold."[69]

In sum, though Dworkin saw law's content as dependent upon its distinctive virtues in a way that many positivists have refused to, he obscured the force of that position by blurring the line between law's distinctive virtues and the many substantive values that it ought to serve as a matter of political morality but that are not distinctive of law. In the next section, I will offer a sketch of the guidance judges can extract from law's distinctive virtues, which I believe are close in structure to (even if not the same in substance as) the kinds of virtues Lon Fuller famously called "the internal morality of law." Moreover, I will argue that by understanding theoretical disagreement as reasonable disagreement about the nature and distinctive virtues of law, we can better understand how theoretical disagreement can be in good faith, genuinely legal in nature, and even about the content of existing law—and all this consistent with the idea that law is broadly conventional and even that legal positivism may be true.

III. Fidelity

A. Theoretical Disagreement as Conceptual Disagreement about Law

Legal systems may—and, I believe, often do—include implicit rules or principles instructing judges to take into account such distinctive virtues of law as generality and predictability in government in their efforts to resolve legal issues otherwise indeterminate within some range.[70] And if such virtues are contingently

67. *Ibid* at 220.
68. *Ibid* at 255-56.
69. *Ibid* at 163.
70. For important philosophical analyses of the nature and values of the rule of law, or what I call "law's distinctive virtues," see especially Fuller, *Morality of Law*, *supra* note 7 at 33-94; Raz, *Authority of Law*, *supra* note 4 at 210-29; Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (In Florida)?" (2002) 21:2 Law & Phil 137; Shapiro, *Legality*, *supra* note 3 at 388-400. I borrow the term "virtue" from Raz, though I do not endorse his conception of law's virtue. Margaret Jane Radin argues that Fuller's "internal morality of law" fundamentally requires "rules" "capable of being followed." Radin, "Reconsidering the Rule of Law" (1989) 69:4 BU L Rev 781 at 785 (cited in Waldron, "Is the Rule of Law an Essentially Contested Concept (In Florida)?" at 154). I will assume that law's distinctive virtues include but are not obviously limited to the virtues of generality and predictability in government. Waldron refers to "generality, clarity, and prospectivity" as "formal or structural," aspects of the rule of law,

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picked out by the social rules and principles of a legal system as determinants of the content of the law, then no one but (perhaps) the exclusive legal positivist should be expected to object to saying that such virtues may dictate *legally determined* answers to legal questions.[71]

However, if *specific* distinctive virtues of law affect the requirements of judicial fidelity to law only because convergent practice has picked them out as determinants of the law, then the only legally relevant disagreements about those virtues and their implications in particular cases must be complex empirical disagreements about (a) which virtues have gained the requisite acceptance within the particular legal system at issue and (b) how best to realize those virtues in particular cases. And I am particularly interested in precisely those disagreements about law that are genuinely theoretical in the sense that they are not resolved by empirical facts about convergent practice.

Suppose, for example, that there is a dispute about whether to apply the rule of lenity to a criminal statute. Further assume that in the legal system in question, the rule of lenity has not yet achieved consensus acceptance. Nor, let us assume, is there a direct consensus among judges to interpret ambiguous law in the light of *specific* rule of law values such as predictability in the state's use of coercion.

As a matter of empirical fact, judges in the legal system might nevertheless be bound to interpret ambiguous laws in a way that accords with rule of law values, and this might in turn dictate that they apply the rule of lenity. As legal systems develop more complex divisions of labor and seek more precisely to delineate the bounds of the judicial role, more concrete rules and principles like the rule of lenity are likely to emerge which preemptively decide how judges should interpret the law so as best to realize law's distinctive virtues. In that sense, theoretical disagreement about the law (understood as disagreement about the implications of rule of law values for the content of the law) has undoubtedly diminished, and is likely to continue to diminish, along with the historical phenomenon of the increasing formalization and codification of positive law.

But however advanced the state of narrowly positive law may be in anticipating and channeling uses of rule of law values to resolve otherwise uncertain points of law, gaps in narrowly positive law are bound to remain. And my claim is that when they arise, judges should follow a strategy of filling them in by resorting to theoretical reflection on law and its distinctive virtues—before opening their reasoning to more general considerations of political morality that are not distinctively legal in nature. The theoretical disagreements judges will have about rule of law values (which narrowly positive law has not preemptively resolved) will have legal resolutions in a more robust, less attenuated sense than disagreements among judges that have devolved to backstop moral reasoning of a generic and not distinctively legal kind.

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which he believes also includes procedural aspects. See Waldron, "The Concept and the Rule of Law" (2008) 43:1 Ga L Rev 1 at 7.

71. Even the exclusive positivist need not object to saying that such virtues may dictate *legally determined* answers to legal questions, so long as the relevant principles—of say, generality, predictability, and the like—can be correctly understood and applied in particular cases without reference to moral reasoning.

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In short, theoretical disagreements appear genuinely theoretical, yet susceptible to legal resolution, if they are understood as disagreements about the best way to conceptualize law and its distinctive virtues—disagreements therefore resolvable by reference to the standards for judging superior and inferior accounts of the distinctive virtues of law and their relative importance in the ideal of the rule of law.[72] Even if the law appears indeterminate, leaving judges to create new law to resolve its indeterminacy, still, if it is possible in doing so for judges to promote the distinctive virtues of law, then their resulting "lawmaking" remains open to praise or criticism according to its adherence to law (even if not to *the* laws in a narrower sense).[73] Even judges who are on the wrong side of theoretical disagreements may be acting in good faith, because they may be taking as a guide a reasonable, albeit inferior, conception of law and its distinctive virtues. Whereas fidelity applies to the identification and application of the law because judges can do better or worse at identifying and applying the law that exists (rather than the law they think ought to exist), fidelity applies to judicial "lawmaking" because the laws judges make to resolve the indeterminacies of existing law can be better or worse *qua* law—i.e., they can be more or less successful at promoting the distinctive virtues of law.

I now want to make an even stronger point, but one I contend is the same point more boldly unveiled. When contingent social facts of convergent legal practice fail to dictate a unique legal answer, but judges extract sufficient guidance to resolve the issue by considering what disposition would make the law most faithful to the rule of law and its distinctive virtues, *judges are simply following the law*. Raz has rightly acknowledged that "[i]n cases of [legal] indeterminacy there is often no clear divide between application and innovation," and "on most occasions the reasoning justifying law-making decisions is similar to and continuous with decisions interpreting and applying law."[74] However, precisely because judges are subject to the requirement of fidelity to law in not only the application but also the "creation" of law, Raz overstates the difference between the two activities when he claims that "[i]t is the difference between rules imposed by authority which the courts are bound to apply … whether they like them or not and rules which they follow because they judge them to be suitable."[75] For the same reason, Shapiro is wrong to distinguish sharply between "legal reasoning" and "judicial decision making" and insist that "when the law has gaps or is inconsistent, a judge who is obligated to rule cannot employ legal reasoning, and therefore has no choice but to rely on policy arguments in order to discharge his duty."[76]

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72. It is debatable whether those standards are wholly conceptual or also partly moral. For more detailed discussion, see *infra* note 81 and accompanying text.

73. *Cf* Waldron, "The Concept and the Rule of Law", *supra* note 70 at 51 ("I think Dworkin is right to observe that those who disagreed in each of [the "hard"] cases [he discussed] disagreed not just about what to do, but about what it meant to *abide by the law* when deciding what to do."). See also *ibid* at 35 (noting that "the pretense" that judges do not create law is enabled by the fact that "[t]he process by which courts make law involves projecting the existing logic of the law into an area of uncertainty or controversy….").

74. Raz, *Authority of Law*, *supra* note 4 at 208.

75. *Ibid* at 197.

76. Shapiro, *Legality*, *supra* note 3 at 248.

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We might say that judges are bound both in the application and "creation" of law by the authority of law—in the first case, by the authority of *the* laws and in the second case, by the rule of law and its distinctive virtues. But when judges extract a unique answer to a legal question by determining that the rule of law requires that the answer be *X* rather than *Y*, it seems artificial to say that simply because the resolution arises from conceptual truths about law as such rather than empirical truths about the law, it is therefore something that judges "create" rather than find and apply. Arguably that thought is implicit in the plausible, if controversial claim of Dworkin and Waldron that "disagreements about what constitutes law in [hard] cases and about what the Rule of Law requires amount to the same disagreement."[77]

In many cases, it will be difficult to know whether judges trying to make their decisions reflect the distinctive virtues of law are doing so because they understand this to be part of fidelity to law as a conceptual matter or because they understand those virtues of law to be principles that are the subject of convergent acceptance by officials in their legal system. The most obvious cases in which it may be charitable and illuminating to understand judges as appealing to putative distinctive virtues of law on theoretical rather than empirical grounds will be ones in which judges distinguish themselves with non-consensus (and, if they are lucky, pathbreaking) styles of interpretation. The view I have defended implies that whether their cutting edge interpretive approaches should be judged legal successes or failures depends not—or not only—on whether they eventually enter the mainstream of judicial practice, or on whether they make what passes for law morally better than it otherwise would be, but on how the application of their methods bolsters the rule of law by promoting law's distinctive virtues. The innovators of judicial history—whether they be John Marshall or Oliver Wendell Holmes, Jr., Earl Warren or Antonin Scalia—need not be unfaithful to the law simply because they buck mainstream trends. But whatever moral virtues can be claimed for their interpretive visions should not be taken to make them good jurists, except to the extent that those moral virtues are distinctively legal virtues.

B. Conceptual Disagreement about Law: From Dworkin to Positivists to Judges

I have suggested that the content of the law is a function not only of contingent social facts but also of non-contingent facts about the nature of law and its distinctive virtues. It is critics of legal positivism who are generally thought to insist that law's content depends on non-empirical truths—namely moral truths. But even prominent legal positivists accept a version—albeit an implicit and

77. Waldron, "The Concept and the Rule of Law", *supra* note 70 at 53 (citing Ronald Dworkin, "Hart's Postscript and the Character of Political Philosophy" (2004) 24:1 Oxford J Legal Stud 1 at 24-25) (attributing this view to Dworkin and endorsing it). Similarly suggestive is David Dyzenhaus's claim that "[t]he seemingly intractable disputes between Dworkin and legal positivists about hard cases, and within legal positivism over the same issue, are best understood in light of the puzzle of legality." Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality*, 2nd ed (Oxford: Oxford University Press, 2010) at 179.

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negative version—of the idea that the content of the law regarding a particular issue in a given legal system depends upon non-contingent conceptual truths about law and its functions, if not its distinctive virtues.

For instance, Shapiro argues that laws are plans and the content of a plan cannot depend upon an independent resolution of the very issue that a plan attempts to resolve; hence, the content of the law cannot depend on the resolution of contestable matters it attempts to resolve.[78] Put concretely, if I need to resolve the question of which movie to watch in order to know which movie I plan to watch, then I do not yet have a plan about which movie to watch. Likewise, Shapiro claims, if I need to appeal to moral rules to know which moral rules the law binds me to respect, then there is no preexisting law that already settles which moral rules I am bound to respect.[79] Raz makes a very similar claim, which also implies that what law we have depends upon the nature and distinctive function of law: "The law to be law must be capable of guiding behaviour, however inefficiently."[80] In sum, as we have seen, it is precisely Raz's and Shapiro's belief that law must be able to serve its function of providing guidance separate from the guidance of morality that leads them to conclude that the law cannot include or depend upon moral principles.

Even if the distinctive virtues of law sometimes shape what the law requires, permits, and empowers us to do, it is a further question whether understanding the nature and implications of such virtues requires us to engage in moral reasoning, making morality a determinant of the content of the law.[81] However,

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78. Shapiro, *Legality*, *supra* note 3 at 273-81, 309-12.

79. *Ibid* at 278.

80. Raz, *Authority of Law*, *supra* note 4 at 226.

81. This question is subtly but importantly different from the question of whether law's distinctive virtues are necessarily *pro tanto* moral goods. On the one hand, it is possible that the law's distinctive virtues are not *pro tanto* moral goods, but that the reason this is so is that partly moral reasoning about law tells us that law is purely instrumental. Raz, for instance, seems to derive his view of the law in part from the moral premise that "law must be the sort of thing of which the claim to legitimate authority could be true." (The phrase in quotation marks comes from Jules Coleman, interpreting Raz in Coleman, "The Architecture of Jurisprudence", *supra* note 65 at 43.) Yet Raz denies "that there is necessarily at least some moral value in every legal system." Raz, *Authority of Law*, *supra* note 4 at 224. On the other hand, it is possible that law's distinctive virtues are *pro tanto* moral goods, but that it is possible to understand them and their implications for legal interpretation without engaging in moral reasoning. We may, for instance, understand what predictability in governance means and implies for legal interpretation, without having to engage in moral reasoning. And this may be true even if it is also true that predictability in governance is a *pro tanto* moral good. Hence, even if disagreements about the content of the law are sometimes legally resolvable by reference to the ideal of the rule of law *and* that ideal has *pro tanto* moral value, this does not imply the disagreements are resolved by morality and thus inconsistent with legal positivism. Here I follow Jeremy Waldron, who has suggested that the law may depend on rule of law principles that happen to lead to the satisfaction of certain moral principles without those rule of law principles themselves being moral principles and making the existence or content of the law dependent upon morality. Waldron, "Positivism and Legality: Hart's Equivocal Response to Fuller" (2008) 83:4 NYU L Rev 1135 at 1165-66.

Those who gravitate toward thicker and less instrumental conceptions of the rule of law are more likely to suppose we cannot understand the rule of law and its implications for legal interpretation without engaging in substantive reasoning about political morality. Suppose, for instance, we adopt Dworkin's view that "integrity" is the distinctive virtue of law, or we conclude that ideals such as equality of treatment or due process are part of the ideal of the rule

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we need not take a stance on that issue now. In fact, for present purposes, it is a good thing to the extent that it remains a matter of reasonable dispute. For the reasonableness of disagreement about whether law's distinctive virtues can be identified without reference to morality implies that both positivists and their critics can consistently endorse my view of faithful theoretical disagreement. Non-positivists surely can, because they allow that the content of the law may depend in part upon morality. But positivists can too, provided they maintain that law's distinctive virtues can be identified without reference to morality.

C. Recovering Dworkin's Obscured Insight

I believe Dworkin was committed to the idea that judges should interpret the law in light of law's distinctive virtues[82] but that he obscured this interesting fact by adopting a conception of the nature and virtues of law that is so moralized as to blur the distinction between the requirements of law and the requirements of political morality more broadly. If one accepts Dworkin's moralized conception of law and its distinctive virtues, then when the lower-level details are fleshed out, the principled reconciliation I have sketched of conventionality and disagreement in the law will lead to a view of law more moralized than conventionalist. However, there are good reasons not to accept "law as integrity." One of the most important is that it seems radically to underestimate the extent to which the rule of law depends on broadly conventional practice—and morally must, if it is to realize its distinctive virtues as a way of structuring society. The path I have opened makes it possible to recognize the conventionality of law more than Dworkin did while still making sense of the idea that judicial theoretical disagreement can be a reasonable, good faith response to the imperative of fidelity to law rather than necessarily a sign of confusion or bad faith.

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of law. Then we are unlikely to suppose we can understand the nature of the rule of law, or its implications for legal interpretation, without recourse to substantive moral reasoning.

As to the distinct question of whether law's distinctive virtues are necessarily *pro tanto* moral goods, the answer is not obvious if we adopt a minimalist conception of them. Waldron, for instance, suggests that "conformity to the principles of legality does tend to mitigate certain aspects of injustice that might otherwise be present," but "might also have the potential in some cases to aggravate injustice." Waldron, "Positivism and Legality" at 1162. It might be thought, for instance, that the distinctively legal virtue of generality in governance is a moral good in the sense of necessarily demanding at least some degree of equal treatment of persons, even when it involves treating some people equally badly, and worse than members of some other group. Alternatively, perhaps the distinctively legal virtue of predictability in the use of sanctions is a moral good in the sense of necessarily ensuring for people at least some degree of fair opportunity to avoid punishment. See TM Scanlon, "Punishment and the Rule of Law" in *The Difficulty of Tolerance: Essays in Political Philosophy* (Cambridge: Cambridge University Press, 2003) 219; HLA Hart, "Legal Responsibility and Excuses" in *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed (Oxford: Oxford University Press, 2008) 28. On the other hand, those ideas are open to dispute. And it could be that the coordinative powers of generality and predictability in governance make them a particularly effective tool in service of immoral agendas (and perhaps for that reason they cannot as a general matter be considered even *pro tanto* moral virtues). See Waldron, "Positivism and Legality" at 1162-63.

82. As Waldron demonstrates in "The Concept and the Rule of Law", *supra* note 70 at 53, this comes through most clearly in Dworkin, "Hart's Postscript", *supra* note 77 at 24-25.

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To account for good faith theoretical disagreement, one need not accept a specific conception of law and its distinctive virtues—neither Dworkin's or Waldron's, nor Raz's or Shapiro's. To the contrary: theoretical disagreement appears all the more reasonable and likely to be in good faith on the assumption that conceptions of law such as theirs remain the subject of reasonable, good faith contestation among judges and lawyers no less than philosophers.[83] On that score, Dworkin was correct—whether or not he was also right in his substantive claim that "law as integrity" offers us the best account of law and its distinctive virtues (or in his methodological claim that in order to arrive upon that conception, we need to resort to political morality).[84]

IV. Objections

Before concluding, let me briefly raise and respond to three salient objections to the reconciliation of Conventionality, Disagreement, and Fidelity I have articulated and tentatively defended.

Objection 1: The argument that the content of the law may depend on law's distinctive virtues depends upon conflating ideal and non-ideal senses of law. Legal positivists have drawn several distinctions that might be thought to limit or preclude the dependence of the content of the law on the distinctive virtues of law in general. One is the distinction between functional law, which fulfills the functions or realizes the aims of law, and nonfunctional law, which fails to do so.[85] Unsurprisingly, positivists have frequently supposed that whether a rule or principle has the status of law does not depend upon whether it functions well *qua* law, or successfully realizes law's distinctive virtues. Raz and Shapiro, for instance, insist that in order actually to be law, a putative law must be the sort of thing that *in principle* could fulfill its function of creating special reasons for action distinct from those provided by general moral principles—not necessarily a thing that actually does fulfill that function.[86] Positivists have similarly distinguished between the existence of law, in the sense of having rules and principles of a legal system, and the existence of the "rule of law," in the sense of a legal system that lives up to law's distinctive virtues.[87] And as Waldron has suggested, legal positivists have often thought that whether we have law, and what our law is, are questions independent of how successfully our legal system realizes the rule of law.[88] Finally, Raz has distinguished between law in the sense of instances

83. *Cf* Smith, *supra* note 4 at 642 ("[A] dispute between exclusive legal positivists and their opponents counts as a theoretical disagreement.").

84. For relevant discussion of Dworkin's ideas about methodology in legal philosophy, see Dworkin, "Hart's Postscript", *supra* note 77.

85. Shapiro, *Legality*, *supra* note 3 at 391 ("Broken clocks are not diluted, peripheral, borderline clocks…. Broken clocks are real, but defective, clocks."). *Cf* Raz, *Authority of Law*, *supra* note 4 at 226 (suggesting that the law "… is not of the kind unless it has at least some ability to perform its function" in the way that "[a] knife is not a knife unless it has some ability to cut.").

86. See the discussion in *supra* note 64.

87. See Waldron, "The Concept and the Rule of Law", *supra* note 70.

88. *Ibid* at 10-19. Mark John Bennett finds that some leading contemporary positivists have been willing to accept that a legal system must conform at least to a minimal extent to distinctively

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of the concept of law and law in the sense of what passes for law in a particular legal system.[89] Raz has used this distinction to make a notable claim that stands opposed to the view I have defended in this article:

> Judicial decisions in American courts are vulnerable to the charge that they are wrong as a matter of American law. But it is irrelevant to their justification that they conform, if we can make sense of the notion, with the correct theory of the nature of law….
> … The point is that [judges'] duty (under the system in whose courts they sit) is to judge in accordance with the rules of that system, and it matters not at all whether these rules are legal ones.[90]

Perhaps there is something correct in the claim that there is a sense in which a clock is no less a clock for the fact that it is broken, and a law no less a law for the fact that it fails to perform well the distinctive functions of law and realize its distinctive virtues.[91] Yet legal positivists often imply that fidelity to law *always* and *only* requires adhering to *the* laws, even when they do not yield unique determinate answers to legal questions and even when they fail to realize law's distinctive virtues. I defend here only the limited claim that fidelity to law may sometimes require judges to supplement narrowly positive law, fixed by convergent legal practice but indeterminate within some range, by considering what legal resolutions to difficult cases would best promote the distinctive virtues of law. But it is also plausible, albeit more controversial, to believe that judges may sometimes be most faithful to law by resisting convergent practice when it involves the acceptance of hostility to the rule of law, in the form of, say, *ad hoc* decrees, bills of attainder, or *ex post facto* punishment. Fuller was on to something important when he claimed that judges need not reach outside law to morality—but can appeal to law itself—to resist those forms of injustice in the law brought about through "laws" profoundly at odds with the rule of law.[92] Finally, though I can accept Raz's distinction between fidelity to law as such and

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legal principles like Lon Fuller's, but have denied that even minimal conformity to the rule of law must be among the standards determining which specific laws exist and what they require and allow. See Bennett, *Legal Positivism and the Rule of Law: The Hartian Response to Fuller's Challenge* (unpublished SJD Thesis, University of Toronto, 2013) at 177-219, 262-316. Bennett worries about the consistency of those two stances and expresses sympathy for the idea that fidelity to law should be understood to encompass fidelity to the rule of law. I defend here a modest version of the idea—rightly attributed to Fuller—that rule of law considerations sometimes at least partially determine what judges ought to do to follow the law. Dyzenhaus notes, for instance, that "[Fuller] argues that fidelity to law is served when judges interpret particular laws in accordance with the principles of legality so that these principles inform the judicial understanding and interpretation of the law." Dyzenhaus, *supra* note 77 at 21 (citing Fuller, "Positivism and Fidelity to Law", *supra* note 7 at 661-69). However, I do not believe there is any obvious incoherence in the position of positivists who believe that a legal system, but not necessarily individual laws, must minimally exhibit distinctive virtues of law. For as we have already seen, "[w]hat is or must be true of *the law* need not be true of *a law*." Coleman, *Practice of Principle*, *supra* note 12 at 144.

89. Raz, "Two Views of the Nature of the Theory of Law", *supra* note 42 at 35.

90. *Ibid*.

91. Shapiro, *Legality*, *supra* note 3 at 390-92.

92. Fuller, "Positivism and Fidelity to Law", *supra* note 7 at 659-60. For a defense of this idea based largely on analysis of real judges' behaviour during apartheid in South Africa, see Dyzenhaus, *supra* note 77.

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fidelity to *our* law or *the* law, I cannot accept the use to which he puts it in the passage from which I have quoted. If there is a difference between the reasons for caring about judges' fidelity to *the* law *qua law* and the reasons for caring about judges' fidelity to the *rule of law*, it is extraordinarily subtle—enough so that its significance is beyond this author's present comprehension. Why, then, think that judges have an obligation of fidelity only to *the* law, construed in narrowly positivist fashion, but not to the rule of law?

Objection 2: Perhaps law has no distinctive virtues. We have not been offered an account of what it would mean for a virtue to be "distinctive" to law. A second way to object to the view I have articulated would be to argue that law does not have distinctive virtues.[93] I believe that claim is false, and clearly so, but also that it merits several responses. Initially, it is important to notice that the idea that law has no distinctive virtues is compatible with the idea that theoretical disagreement about the law can be reasonable, good faith disagreement about law's distinctive virtues, so long as it can be reasonable to believe that law does in fact have distinctive virtues. (That said, if a belief that law has distinctive virtues can be reasonable but is ultimately mistaken, then although they are not vulnerable to charges of bad faith, judges engaged in theoretical disagreement understood in the manner I have proposed are guilty of confusion—albeit reasonable confusion).

Still, the idea of virtues "distinctive" to law calls for clarification. Are law's "distinctive" virtues merely those that are "intrinsic" to it, in the sense that law necessarily promotes them to at least some extent? To the contrary: I have chosen the term "distinctive" precisely to avoid a problem that arises when one focuses exclusively on law's "intrinsic" virtues. As Frederick Schauer has pointed out, it is sometimes true that some of the qualities of a class of entities that are of greatest importance in understanding the class and distinguishing it from other classes are not exhibited by all entities in the class.[94] To appropriate his helpful example, though an animal's ability to fly is neither necessary nor sufficient to make it a bird, we could not adequately describe what I would call the "distinctive" qualities of birds without mentioning their ability to fly.[95] I will not attempt here to provide a set of conditions necessary and sufficient to qualify a trait of an entity—such as a virtue of the law—as distinctive to it. I need not do so to make my point.

Objection 3: Fidelity to law's distinctive virtues should not be equated with fidelity to law. Nevertheless, the way I have defined distinctive virtues may seem to give rise to a third objection to the idea that judges are more or less faithful to law depending upon the extent of their allegiance to law's distinctive virtues. On the one hand, law does not necessarily realize its own apparently distinctive virtues and, on the other hand, its apparently distinctive virtues can be promoted

93. Coleman and Hershovitz have both expressed some openness to a similar sounding but importantly distinct claim "that law has no fundamental aim". Hershovitz, *supra* note 64 at 166 (citing Coleman, *Practice of Principle*, *supra* note 12 at 113).

94. Frederick Schauer, "The Best Laid Plans" (2010) 120:3 Yale LJ 586 at 613-14 (reviewing Shapiro, *Legality*, *supra* note 3).

95. *Ibid.*

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by some means other than law. On the one hand, laws may be relatively *ad hoc*, unclear, and unpredictable. On the other hand, traditions and customs, for instance, might also promote such values as generality and predictability in governance without themselves being or becoming laws. One might wonder, therefore, whether we should say that when judges attempt to fill apparent gaps in the content of the law by reference to such virtues they are not only avoiding infidelity to law but attaining affirmative fidelity to law.

Yet should we say that promoting the distinctive virtues of an institution or practice is a means of being faithful to it only if those virtues are not only distinctive of the institution or practice but also uniquely realizable through it? I see no reason to adopt such a restricted view and good reason to reject it. Perhaps promoting the distinctive virtues of an institution or practice is an *especially* faithful act when those virtues cannot be realized other than through that institution or practice. But when we are concerned about whether and why we should be faithful to an institution or practice, we are concerned about whether and why we ought to follow it even when its dictates and guidance come into conflict with other reasons for action. And the reasons in such a case for faithfully following the institution or practice lie in the virtues that set it apart from salient alternatives—and not solely in those virtues that it claims exclusively (which after all may be none).

Conclusion

The aims of this article have been twofold: first, to place the problem of theoretical disagreement in a wider frame than the debate between legal positivists and their critics and, second, to begin to draw a novel and ecumenical view of theoretical disagreement out of an attempt to wrestle with it in that broader frame—a broader frame which consists in the tension among Conventionality, Disagreement, and Fidelity. I have argued that a plausible reconciliation of law's conventionality and faithful theoretical disagreement about the law lies in the view that the content of the law is a function not *only* of contingent empirical facts about the convergent practice of legal officials such as judges but also of non-contingent conceptual truths about the nature of law and its distinctive virtues. Judges disagree about interpretive methods and principles not (or not only) because they disagree about what vague or ambiguous laws ought to mean, all things considered, but because they disagree about what such laws ought to mean in order that decisions made under them should uphold the rule of law.

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