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Agreement and Disagreement in Law

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In recent years, there has been renewed interest in the question of whether Ronald Dworkin was correct to allege that legal positivists are unable to account for what he called "theoretical disagreement". Briefly, Dworkin contended that legal officials often engage in theoretical disagreement (which, for present purposes, we can understand to be disagreement about the criteria of legal validity—that is, about the tests for determining which norms are legally valid, and hence what the law is).[1] He further argued that positivists—and possibly other theorists of law as well—cannot account for this fact, since they claim that there is general agreement or convergence among legal officials on the criteria of legal validity.[2]

The reaction to the ATD in the recent literature has varied.[3] In the piece that, to a considerable extent, prompted the renewed interest in the ATD, Scott Shapiro claimed that it represents "the most serious threat facing legal positivism at the beginning of the twenty-first century."[4] Shapiro's development of a distinctive theory of law, which he calls the "Planning Theory", can be seen, in part, as an attempt to develop a version of positivism that is not vulnerable to the ATD. By contrast, others have been less impressed by Dworkin's argument. Brian Leiter, for example, has claimed that positivists can account for theoretical disagreement without needing to modify their theory. Indeed, he contends, they provide a better account of it than does Dworkin. He concludes that the ATD "does not appear to amount to much[.]"[5]

Perhaps surprisingly, given the renewed interest in the question of who can best account for theoretical disagreement, relatively little attention has been paid to the related question of who can best account for *agreement* about law. An important exception is Leiter, in the course of his response to the ATD. While allowing that legal officials do occasionally engage in theoretical disagreement, Leiter

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1. This seems to be how most participants in the debate understand theoretical disagreement: see, e.g., Brian Leiter, "Explaining Theoretical Disagreement" (2009) 76 U Chicago L Rev 1215 at 1216; Scott J Shapiro, "The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed" in Arthur Ripstein, ed, *Ronald Dworkin* (New York: Cambridge University Press, 2007) 22 at 40. I have argued elsewhere that theoretical disagreement includes, but is not limited to, disagreement about the criteria of legal validity: Dale Smith, "Theoretical Disagreement and the Semantic Sting" (2010) 30 Oxford J Legal Stud 635 at 644. However, for present purposes, I shall leave this point to one side.
2. For a more detailed presentation of the argument from theoretical disagreement, see Smith, *ibid.*
3. I shall, for short, refer to Dworkin's "argument from theoretical disagreement" as the ATD. The fullest presentation of the ATD is in Chapter 1 of *Law's Empire*: Ronald Dworkin, *Law's Empire* (Oxford: Hart, 1998) ch 1.
4. Shapiro, *supra* note 1 at 50.
5. Leiter, *supra* note 1 at 1249.

argues that there is massive and pervasive agreement in legal judgments.[6] He contends that positivism can account for this agreement, but Dworkin's theory of law—law as integrity—cannot. This is important because "the most striking feature about legal systems is the existence of massive *agreement* about what the law is",[7] such that "any satisfactory theory has to do a good job making sense of that to be credible."[8] By contrast, Leiter claims, whether a theory of law can account for the occasional instance of theoretical disagreement is far less significant.[9]

While I shall suggest that Leiter underestimates the importance of explaining theoretical disagreement, he is right that it is not the only phenomenon that a theory of law should strive to explain, and that it is also important to consider whether competing theories of law can account for agreement in legal judgments. Thus, Leiter's argument poses an important challenge to law as integrity. However, I shall argue that he is wrong to think that Dworkin cannot account for such agreement. I shall further contend that, not only is this conclusion significant in its own right, it also weakens the force of Leiter's response to the ATD. Furthermore, it raises an important methodological question—if both positivism and law as integrity can account for agreement in legal judgments, how are we to choose between their competing explanations? I shall suggest that the answer to this question is itself the subject of dispute between positivists and Dworkinians, in ways that participants in the debate sometimes fail to acknowledge.

I shall not, however, seek to ascertain whether positivism or law as integrity provides the better explanation of agreement in legal judgments, let alone which is preferable all-things-considered. Rather, the aim of this article is more modest: to show that Dworkin does indeed have a plausible explanation of agreement in legal judgments, to show that this weakens one possible strategy positivists might employ when responding to the ATD, and to explore some of the issues that arise once we ask how we should choose between competing explanations of legal phenomena such as agreement in legal judgments.

The article is divided into five sections. In Section 1, I present Leiter's argument that, whereas positivism can account for agreement in legal judgments, law as integrity cannot. I then argue, in Section 2, that Dworkin *can* account for such agreement. In Section 3, I express some doubts about an alternative argument

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6. *Ibid* at 1227. Matthew Kramer has made a similar point: Matthew Kramer, *In Defense of Legal Positivism: Law without Trimmings* (Oxford: Oxford University Press, 1999) at 136, 141-44. However, Kramer appears to be interested in agreement in legal judgments only in so far as it provides a basis for responding to the ATD, whereas Leiter is also interested in it as a distinct legal phenomenon that theories of law should seek to explain.

7. Leiter, *supra* note 1 at 1247 [emphasis in original].

8. *Ibid*. Leiter may have retreated from this claim in a more recent, unpublished article: Brian Leiter, "Why Legal Positivism (Again)?" University of Chicago Public Law Working Paper No. 442 (September 9, 2013) online: Social Science Research Network http://ssrn.com/abstract=2323013. In that article, the ability to explain agreement in legal judgments is presented as merely part of one of three reasons why positivism is so popular among legal philosophers. However, at 11, he describes agreement in legal judgments as "the most important fact about modern legal systems" (since, if there was not massive and pervasive agreement in legal judgments, modern legal systems would collapse under the weight of legal disputes).

9. Leiter, *supra* note 1 at 1249 (describing theoretical disagreements as "relatively marginal phenomena within the scope of a general theory of law").

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that Leiter appears to offer—namely, that, even if law as integrity can account for agreement in legal judgments, positivism's explanation is more straightforward and therefore preferable. I then consider, in Section 4, some implications of these conclusions for the ATD, contending that Leiter's strategy for explaining theoretical disagreement is weakened once we recognize that law as integrity has a plausible explanation of agreement in legal judgments. In Section 5, I explore how we might choose between positivism's and law as integrity's competing explanations of agreement in legal judgments. I first examine the methodology suggested by Leiter's discussion of the ATD, before considering whether there are alternative methodologies that also need to be considered.

1. Leiter on Agreement in Legal Judgments

A. The competing theories of law

Leiter claims that positivism can account for agreement in legal judgments, but law as integrity cannot. However, there are many different versions of positivism, and some of the differences matter for our purposes. Leiter is concerned to defend HLA Hart's version of positivism.[10] For present purposes, what is distinctive about Hart's theory is that it claims that the criteria of legal validity are fixed by a convergent pattern of behaviour among legal officials of using those criteria to ascertain which norms are legally valid (or by "convergence among officials", for short).[11] It is this claim which, Dworkin alleges, renders Hart's version of positivism vulnerable to the ATD, but we shall see that it is also this claim which, Leiter contends, provides Hart's version of positivism with its explanation of agreement in legal judgments.[12]

I shall follow Leiter in focusing on Hart's version of positivism. Many (indeed, I think, most) contemporary positivists agree with Hart that the criteria of legal validity are fixed by convergence among officials, regardless of where they stand on other disputes between positivists (such as the debate between inclusive and exclusive legal positivism). However, it is important to acknowledge at the outset that not all positivists agree with Hart on this point.[13]

On the other side of the ledger, I shall also follow Leiter in focusing on Dworkin's theory of law as it is presented in *Law's Empire*.[14] More precisely, I

10. *Ibid* at 1220-22.

11. HLA Hart, *The Concept of Law*, 3rd ed (Oxford: Clarendon, 2012) at 108-10. Hart adds that officials must also share a certain attitude towards this pattern of behaviour, but my focus will be on the pattern of behaviour itself.

12. This is not to imply that other versions of positivism cannot account for agreement in legal judgments (or that they are not vulnerable to the ATD). However, their explanation of agreement in legal judgments will differ from Hart's (as will the basis, if any, on which they are vulnerable to the ATD).

13. For example, partly in response to the ATD, Shapiro has developed a form of positivism which denies that the criteria of legal validity are fixed by convergence among officials: Shapiro, *supra* note 1 at 43-49; Scott J Shapiro, *Legality* (Cambridge: Belknap Press, 2011).

14. It is controversial whether the discussion of law in Dworkin's penultimate book, *Justice for Hedgehogs*, is compatible with the theory of law presented in *Law's Empire*. See Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Belknap Press, 2011) at 402, 485 note 1;

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focus not on Dworkin's general methodological approach (interpretivism), but rather on the particular version of interpretivism he endorses (law as integrity). It is true that the ATD represents an argument in favour of interpretivism in general, not in favour of law as integrity in particular. However, we shall see that Leiter's contention that Dworkin cannot account for massive and pervasive agreement in legal judgments is directed specifically against law as integrity, since it targets Dworkin's claim that the law consists, in part, of certain moral principles (a claim that would not be accepted by other versions of interpretivism, such as conventionalism). Nevertheless, if we regard law as integrity as having two sets of commitments—those that it inherits as a version of interpretivism, and those that distinguish it from other versions of interpretivism—then we can regard Leiter as arguing that (a certain version of) positivism is preferable to law as integrity, because 1) positivism can account for agreement in legal judgments whereas law as integrity cannot, and 2) law as integrity (as a version of interpretivism) does not in fact enjoy an advantage over positivism when it comes to explaining theoretical disagreement.[15] (These are not the *only* advantages Leiter believes that positivism has over law as integrity, as we shall see in Section 5.)

B. Leiter's argument

It is a familiar feature of legal practice that officials sometimes disagree about the appropriate outcome of a particular case. One need only note the existence of dissenting judgments on appellate courts to appreciate this. However, Leiter suggests, what is not always appreciated is that disagreement about the law is the exception, not the norm. If we look beyond those cases that come before appellate courts, and consider all the potential legal disputes that arise in a particular jurisdiction, we see that in the overwhelming majority of cases there is agreement about the legally right outcome. As Leiter puts it, "there is *massive* and *pervasive* agreement about the law throughout the system."[16]

This massive and pervasive agreement in legal judgments helps to explain other familiar features of legal practice:

> One may think of the universe of legal questions requiring judgment as a pyramid, with the very pinnacle of the structure captured by the judgments of the highest court of appeal (where, one may suppose, theoretical disagreements in Dworkin's sense are rampant), and the base represented by all those possible legal disputes that enter a lawyer's office. This is, admittedly, a very strange-looking pyramid, as the ratio of the base to the pinnacle is something like a million to one. It is, of course, familiar that the main reason the legal system of a modern society does not collapse under the weight of disputes is precisely that *most* cases that are presented to

Jeremy Waldron, "Jurisprudence for Hedgehogs" NYU School of Law Public Law Research Paper No. 13-45 (July 5, 2013), online: Social Science Research Network http://ssrn.com/abstract=2290309 at 6-8. Be that as it may, my concern is with the theory of law presented in *Law's Empire*.

15. I am grateful to Arie Rosen for a very helpful discussion of the issues canvassed in this paragraph.

16. Leiter, *supra* note 1 at 1227 [emphasis in original, footnote omitted].

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> lawyers never go any further than the lawyer's office; that *most* cases that lawyers take do not result in formal litigation; that *most* cases that result in litigation settle by the end of discovery; that *most* cases that go to trial and verdict do not get appealed; and that *most* cases that get appealed do not get appealed to the highest court, that is, to the court where theoretical disagreements are quite likely rampant.[17]

An important reason for this, Leiter claims, is that there is general agreement about how most potential legal disputes should be resolved. While acknowledging that there are other reasons why particular cases are or are not litigated or appealed, he maintains that the massive and pervasive agreement in legal judgments explains why so few potential cases reach the courts, why most decisions are not appealed, and so on.[18]

Leiter contends that positivism is well-placed to explain these facts:

> One of the great theoretical virtues of legal positivism as a theory of law is that it explains why the universe of legal cases looks like a pyramid—precisely because it explains the pervasive phenomenon of *legal agreement*. Legal professionals agree about what the law requires so often because, in a functioning legal system, *what the law is* is fixed by a discernible practice of officials who decide questions of legal validity by reference to criteria of legal validity on which they recognizably converge. Only as we approach the pinnacle of the pyramid do we approach those cases where the practice of officials breaks down, and the "law" is up for grabs.[19]

Leiter's argument can be summarized as follows. When we look at modern legal systems, we see that most potential legal disputes are not litigated, most disputes that result in litigation are settled before trial, and so on. One important reason for this is that there is general *agreement* about how most potential legal disputes are to be resolved. Positivists explain this agreement in legal judgments on the basis that there is convergence among officials on the criteria of legal validity. Officials agree about the outcome of most potential legal disputes because they generally use the same tests for determining what the law is (and the convergence on these criteria makes them the *correct* criteria). Thus, an important virtue of Hart's positivism, with its distinctive thesis that the criteria of legal validity are fixed by convergence among officials, is that this thesis explains the massive and pervasive agreement in legal judgments that we find in modern legal systems.

By contrast, Leiter argues that law as integrity renders such agreement puzzling:

> [O]n Dworkin's view, the law includes the moral principles that figure in the best explanation and justification of [the community's institutional] history, as well as whatever concrete decisions follow from those principles. Thus, the law, on Dworkin's view, is in principle esoteric, since much, indeed all, of the "law" in a community might be unknown, indeed never known, by members of that

17. *Ibid* at 1226-27 [emphasis in original, footnote omitted]. As parts of this passage hint, Leiter points to the existence of massive and pervasive agreement in legal judgments as indicating that theoretical disagreement is relatively uncommon, being confined primarily to appellate courts. I say more about this in Section 4.

18. *Ibid* at 1227.

19. *Ibid* at 1228 [emphasis in original].

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> community insofar as they fail to appreciate the justificatory moral principles and their consequences. If this were the true nature of law, the existence of massive agreement might seem puzzling indeed.[20]

Leiter contends that its difficulty in explaining agreement in legal judgments amounts to a serious weakness of law as integrity. As he puts it, "when the most striking feature about legal systems is the existence of massive *agreement* about what the law is, then any satisfactory theory has to do a good job making sense of that to be credible."[21]

2. Can Dworkin Account for Agreement in Legal Judgments?

Leiter is clearly right that most potential legal disputes are not litigated, most disputes that result in litigation are settled before trial, etc.[22] I also agree that this fact is explained, in part, by the further fact that there is general agreement about the legally correct outcome of most potential legal disputes. There may be other factors at work as well—in particular, the existence of alternative methods of dispute resolution (both formal and informal) which are generally cheaper than litigation. Nevertheless, I think that Leiter is right that the existence of agreement in legal judgments is an important part of the explanation of why most potential legal disputes are not litigated (etc).

Moreover, positivism offers an explanation of this agreement in legal judgments: officials agree about the outcome of most potential legal disputes because they generally use the same tests for determining what the law is.[23] However, this is not the only possible explanation of agreement in legal judgments. Officials might agree on the outcome of most cases even if they fail to converge on criteria of legal validity. Consider two judges, one of whom believes that the law made by a statute is fixed by the plain meaning of the words used, the other of whom believes that it is fixed by the (perhaps counterfactual) intentions of the legislature.[24] Let us call the first judge a "textualist" and the second an "intentionalist". (Nothing turns on the choice of labels; they are meant only to facilitate exposition.) These judges employ different criteria of legal validity, since they employ different tests for determining what law is made by a statute. Nevertheless, they may agree on the outcome of most cases, provided the intentions of the legislature generally coincide with the plain meaning of the words it uses.

There is reason to think that the intentions of the legislature *will* generally coincide with the plain meaning of the words it uses, at least in well-functioning legal systems. The words used in the statute are the primary mechanism (or at least the primary *official* mechanism) that the legislature has for communicating

20. *Ibid* at 1248 [footnote omitted].
21. *Ibid* at 1247 [emphasis in original].
22. He provides some empirical evidence from the United States to support this claim: *ibid* at 1226 note 54.
23. Though I suggest in Section 3 that this explanation is incomplete.
24. Cf the discussion of *Riggs v Palmer* 115 NY 506 (1889) in Section 5. For illustrative purposes, I assume that intentions can be ascribed to the legislature as a whole.

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its law-making intentions. Moreover, to the extent that judges consider the plain meaning of the words used in the statute (either because they think that plain meaning is legally significant in its own right, or because they believe that it provides evidence of the legislature's intentions), the legislature has reason to produce legal texts whose plain meaning matches its intentions.[25]

However, even if agreement in legal judgments can be explained without positing convergence among officials on criteria of legal validity, this does not mean that *Dworkin* is able to account for such agreement. As we have seen, Leiter argues that law as integrity renders such agreement puzzling, because it holds that the law consists (in part) of certain moral principles, and because members of the relevant community may fail to identify the correct principles.

That members of a particular community may fail to identify the moral principles that constitute part of their law does not necessarily mean that they will disagree among themselves. If they all make the same mistake, then they may agree about which moral principles form part of the law, even though they fail to identify the *correct* moral principles. This suggests that Leiter means to appeal, not to the possibility of moral error, but to the possibility of moral disagreement.[26] The thought seems to be that, in modern legal systems, there is widespread moral disagreement, and we should expect this disagreement to extend to the moral principles that Dworkin claims form part of the law. Moreover, since law as integrity claims that judgments about legally appropriate outcomes are derived from those moral principles, we should also expect widespread disagreement about the appropriate outcome of particular cases.

This is an important objection to law as integrity, but I do not think that it shows that Dworkin is unable to account for massive and pervasive agreement in legal judgments. Before I explain why, let me briefly address one complication. Positivism, as Leiter characterizes it, claims that, wherever there is law, officials converge on criteria of legal validity. It is natural, then, to think that the truth or falsity of positivism has implications for whether there is massive and pervasive agreement in legal judgments. By contrast, law as integrity claims (*inter alia*) that certain moral principles feature among the determinants of legal content.

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25. Even if judges generally consider the plain meaning of the words contained in statutes, this is not enough to show that there is the convergence on the relevant criterion of legal validity required by positivism. For one thing, there are many different roles that the plain meaning of a statute could play in determining what contribution the statute makes to the content of the law. (Even law as integrity can allow that it plays *some* role: see *infra* note 31.) On the version of positivism that Leiter seeks to defend, there must be convergence among officials on the *particular* role that the plain meaning of the statute plays.

One could imagine a different version of positivism, which claims that convergence among officials determines only what the sources of law are, and that there is a *non*-convergence-based way of getting from the sources of law to the content of the law. For example, convergence among officials might determine that statutes are a source of law, but not how statutes are to be interpreted—theories in philosophy of language and linguistics might settle the question of interpretation. I hope to show in future work that, while this view avoids some of the problems with the version of positivism that Leiter defends, it encounters other significant problems.

26. Leiter offers a different objection to law as integrity that *is* based on the possibility of moral error: see *infra* note 31.

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One might think that whether this claim is true has no implications for whether there is massive and pervasive agreement in legal judgments. It is whether people *believe* that it is true that has such implications. On this view, if people believe that law as integrity is true, then they will (presumably) search for the moral principles that it claims form part of the law, and (if Leiter is right) this will lead to widespread disagreement about the content of the law. However, whether law as integrity *is* true can (by itself) have no such implications.

This line of thought is, I think, misguided. On Dworkin's view, if law as integrity is correct, this is (in part) because it fits our legal practices. Thus, like positivism, law as integrity makes claims about what officials do, accept or believe. If it is correct, this is (in part) because officials generally treat certain moral principles as part of the law, and seek to identify and apply those principles. If Leiter is right, this means that we should expect widespread disagreement in legal judgments, because officials will disagree about what the moral principles are from which those judgments should be derived.

So why do I think that Leiter is wrong to claim that law as integrity cannot account for massive and pervasive agreement in legal judgments? For one thing, we should be careful not to overstate the amount of moral disagreement there is, even in pluralistic, liberal societies. True, there is much moral disagreement, but at any given time there are also many moral issues on which there is general agreement. This is especially so if we are concerned primarily with the views of legal officials.[27] Many officials may have undergone similar legal training, and officials may also tend to be of a similar socio-economic status—both factors that may tend to produce a higher than normal level of agreement on moral issues relevant to law. Thus, there may in fact be considerable agreement, at least among officials, about the moral principles that form part of the law on Dworkin's theory.

Nevertheless, there is also likely to be considerable disagreement about those principles. However, and this is the crucial point, where there *is* disagreement about the relevant moral principles, there need not be disagreement about the appropriate outcome of particular cases. We have seen that two people may agree about the outcome of very many cases even though they disagree about the basis on which those outcomes are to be reached. For example, two people may disagree about the correct theory of statutory interpretation (e.g., because one embraces textualism and the other intentionalism), and yet agree about the outcome of most cases involving statutory interpretation. There does not appear to be any reason why the same could not be true with regard to the moral principles that Dworkin treats as part of the law. If, in many cases, the competing moral principles accepted by different officials support the same outcome, then this renders

27. It seems plausible to suggest that, when seeking to explain the fact that relatively few potential legal disputes result in formal litigation (and so on), one should be particularly concerned with whether there is agreement among officials such as judges and lawyers. In most cases, the parties will consult lawyers when deciding whether to litigate, and the existence of agreement among judges may deter litigation even in circumstances where there is disagreement within the broader community.

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the existence of massive and pervasive agreement in legal judgments much less surprising on Dworkin's account.[28]

This may seem like an unsatisfying response. Leiter might concede that it is *possible* that, if law as integrity were correct, there would be considerable agreement about the appropriate outcome of particular legal disputes even where there was disagreement about the relevant moral principles. However, he might ask, is there any reason to think that this is in fact likely?[29]

This is a fair question. However, I think that there are features of law as integrity that make it likely that there will be considerable agreement in legal judgments, even where there is disagreement about the moral principles that form part of the law. Consider how law as integrity is meant to work. Legal interpreters seek to arrive at an interpretation of the law that shows it in its best light, by showing it to reflect a coherent (and independently attractive) conception of justice and fairness. Different interpretations of the law consist of different views about *which* conception of justice and fairness is reflected in the law. But any interpretation of the law must satisfy a threshold of fit—that is, it must fit sufficiently well with the political history of the community (the past decisions made by legal officials on behalf of the community) to be an eligible interpretation of that history.[30] This constraint ensures that there will be some level of agreement in legal judgments, since every legal interpreter shares a common set of "data points" (the previous decisions of legal officials that constitute the community's political history) and each eligible interpretation must fit a sufficient number of those data points.[31]

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28. If different officials reach the same conclusions for different reasons, would we not expect them to mention this? Not necessarily. Provided their fellow officials agree with them about the outcome, there may be little incentive to engage in explicit disagreement about the basis on which that outcome should be reached. (As Lael Weis pointed out to me, this is especially so in jurisdictions in which concurring judgments are discouraged.) There may also be little opportunity for them to engage in such disagreement. On the view Leiter presents, it is less likely that a matter will come before the courts if there is agreement about the appropriate legal outcome.

29. Indeed, this is one of the moves Leiter makes when responding to the ATD. He acknowledges that Dworkin might argue that legal officials hold different theories about how to resolve legal disputes and yet agree about the outcome of most disputes, but queries whether we have any reason to suppose that this is in fact the case: Leiter, *supra* note 1 at 1228-29.

30. Dworkin, *supra* note 3 at 255.

31. Admittedly, there may be some disagreement about what counts as a "data point". For example, do the data points include the legislative history of a statute? (For Dworkin's preferred answer, see *ibid* at 343-45.) However, any plausible interpretation of our legal practice must accept that, at least, orders made by courts and the text of statutes enacted by the legislature count among the data points, and so it remains the case that there is a shared set of data points, even if some legal interpreters recognize further data points that others do not.

Incidentally, the point made in the text may help to allay a further concern of Leiter's—namely, that law as integrity renders the law "esoteric", because it entails that we might fail to identify most (perhaps all) of the law in our community, since we might fail to identify the moral principles that form part of the law and by reference to which concrete legal decisions are to be reached (Brian Leiter, "Book Review" (2006) 56 J Legal Educ 675 at 675). Even if there are widespread misunderstandings of the moral principles that form part of the law on Dworkin's account, we may nevertheless know quite a bit of the law of our community, since there may be some data points that any plausible interpretation will fit (think, for example, of much of the traffic laws). In any case, unless Leiter's concern is premised on his rejection of moral cognitivism, one might expect him to allow that people are *sometimes* capable of moral knowledge, including about some of the moral principles relevant under law as integrity.

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Moreover, even where an interpretation fits enough of the data points to be eligible, fit continues to play a role.[32] Everything else being equal, the higher the degree of fit, the better the interpretation portrays the law as being and so the more attractive the interpretation is. Thus, regardless of where they set the threshold of fit, there is reason for legal officials to adopt interpretations that fit with a very considerable number of past legal decisions, at least in a largely just legal system. (In a less just legal system, a considerable degree of fit may need to be sacrificed to promote Dworkin's other dimension of interpretation—namely, justification.) Again, this is likely to militate in favour of considerable agreement in legal judgments.

It might be objected that this over-estimates how much agreement about fit there would be if law as integrity were true. As Dworkin acknowledges,[33] legal interpreters will disagree about where to set the threshold of fit—that is, about how well an interpretation must fit the community's political history in order to be eligible—as well as about how to trade off the dimensions of fit and justification when choosing among eligible interpretations. All of this is likely to lead to disagreement about the appropriate outcome of particular cases, since it is likely to lead to different interpretations having different degrees of fit with the community's political history.

Nevertheless, it remains the case that there is also likely to be considerable *agreement* about legally appropriate outcomes among eligible interpretations of the law. Even if legal interpreters disagree about where to set the threshold of fit, they all agree that there is a threshold. Perhaps more importantly, they also agree that, even when this threshold is surpassed, the more fit there is, the better (everything else being equal).

Moreover, I suggested above that we should be careful not to exaggerate the amount of moral disagreement there is among legal officials, especially given that many of them are likely to share a particular form of legal training. For similar reasons, we might plausibly speculate that, in familiar legal systems, there is likely to be a significant degree of convergence in terms of where officials set the threshold of fit and how much weight they attach to fit when balancing it against justification. While there are undoubtedly differences between officials, we might think that judges, in particular, are likely to require a high degree of fit before an interpretation counts as eligible, and to give considerations of fit a relatively high weight when choosing between eligible interpretations. This is, in part, because judges are likely to have internalized (though perhaps to different degrees) the view that they should be very significantly constrained by previous legal decisions (respecting legislative supremacy subject to any constitutional limitations, being hesitant to overturn settled common law doctrine, and so on).[34]

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32. Dworkin, *supra* note 3 at 256.

33. *Ibid* at 255-56.

34. This appears to be true of the jurisdiction with which I am most familiar. With regard to statutory interpretation, the High Court of Australia typically attaches a great deal of weight to the words of the statute, so as to respect the constitutional separation of judicial and legislative power: see, e.g., *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [78]; *Thiess v Collector of Customs* [2014] HCA 12 at [22]; *Zheng v Cai* (2009) 239

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In fact, even if judges disagreed significantly about where to set the threshold of fit, or about how to balance the dimensions of fit and justification when they conflict, it would still be likely that there would be considerable agreement about legally appropriate outcomes. This is because most judges are likely to regard their legal system as legitimate, and so are unlikely to believe that dramatic sacrifices of fit are needed to arrive at an interpretation of the law that scores well along the dimension of justification.[35] (That they believe their legal system to be legitimate may also help explain *why* judges generally attach great weight to legislative supremacy and are hesitant to overturn settled common law doctrines.) All of this suggests that we should expect considerable agreement in legal judgments, since—while different officials hold different interpretations of the law—most of those interpretations (and certainly the more popular ones) are likely to fit with a considerable proportion of the data points referred to above.

Of course, this is speculative. However, it does suggest that Leiter underestimates the resources available to law as integrity to explain agreement in legal judgments. Since competing interpretations of the law are rival attempts to fit and justify the same body of previous legal decisions, it should not be surprising that there are many instances in which the competing interpretations support the same legal outcome, leading to considerable agreement in legal judgments.

Leiter might respond that, while there might be *considerable* agreement in legal judgments if law as integrity were true, there would not be *massive and pervasive* agreement. Even if different interpretations of the law often overlap in terms of the particular legal outcomes they support, there will still be many cases where they do *not* overlap (i.e., where the different moral principles that they regard as part of the law have different implications for the appropriate resolution of particular legal disputes). Thus, Leiter might readily concede that law as integrity can account for a considerable amount of agreement in legal judgments, while maintaining that it cannot account for the full extent of the agreement that exists in well-functioning legal systems.

To assess this response, one would need to be much more precise than either Leiter or I have been, in terms of quantifying both how much agreement in legal judgments there is and how much agreement law as integrity can account for. I shall not seek to undertake this task here. Quantifying how much agreement in legal judgments there is in modern legal systems would require a careful empirical investigation. However, if I have succeeded in showing that Dworkin can account for considerable agreement in legal judgments, in ways that Leiter does not adequately take into account, one might reasonably think that the onus is on Leiter to show that this still falls short of explaining the full extent of the agreement that exists in modern legal systems.

That said, I do want to suggest that the evidence Leiter offers in support of his claim that there is *massive and pervasive* agreement in legal judgments is more

CLR 446 at [28]. Similarly, while there are notable exceptions, it has also generally taken a conservative view towards judicial reform of the common law: see *Momcilovic v R* (2011) 245 CLR 1 at [392]-[398].

35. Thanks to John Tasioulas for helpful comments on this point.

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equivocal than it may first appear. Recall his reason for concluding that there is massive and pervasive agreement—namely, that this explains why very few potential legal disputes are litigated, why most litigation is settled before trial, and so on. He claims, I think rightly, that the existence of agreement in legal judgments is one important reason for this relative lack of litigation. However, I suggested earlier that there may be other reasons as well, such as the existence of formal and informal alternatives to litigation—most of which tend to be cheaper, simpler and quicker than litigation.[36] Thus, one cannot assume that, because the overwhelming majority of potential legal disputes are not litigated, there is agreement about the appropriate outcome of the overwhelming majority of such disputes. Rather, to ascertain the amount of agreement in legal judgments there is, one would need to ascertain what contribution *other* factors make to the relative lack of litigation. Again, I cannot undertake this task here, but it is worth noting that, the greater the contribution made by other factors, the easier it will be to show that law as integrity can account for the full extent of agreement in legal judgments.

3. Does Positivism Offer a More Straightforward Explanation of Agreement in Legal Judgments?

As we have seen, Leiter's official position is that law as integrity cannot account for massive and pervasive agreement in legal judgments. Such agreement, he claims, would be puzzling if law as integrity were correct. I have argued that he is wrong about this (or, more cautiously, that much more would need to be done to vindicate his claim). However, at times, he appears to offer an importantly different objection—namely, that, while law as integrity *can* account for agreement in legal judgments, its explanation is less straightforward than positivism's. In this Section, I consider this alternative objection.

In the course of responding to the ATD, Leiter acknowledges that Dworkin might seek to account for agreement in legal judgments along roughly the lines I have suggested—namely, that different interpretations of the law frequently overlap in terms of the concrete results they support.[37] Leiter offers several responses to this suggestion, one of which is that:

> agreement is agreement, and surely one might think, only someone presupposing the truth of Dworkin's view would *impute* to these agreements [in legal judgments] abstract, and hidden, theoretical disagreements lurking in the background.[38]

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36. Susan Blake, Julie Browne & Stuart Sime, *A Practical Approach to Alternative Dispute Resolution*, 2nd ed (Oxford: Oxford University Press, 2012) at 13-15. While Leiter acknowledges that there are other reasons (apart from agreement in legal judgments) why particular cases are or are not litigated or appealed, he does not mention this consideration.

37. Leiter, *supra* note 1 at 1228-29. He does not, however, consider the features of law as integrity (especially the operation of the dimension of fit) that support such an account in the way suggested in Section 2.

38. *Ibid* at 1229 [emphasis in original]. Leiter prefaces this statement by indicating that he is assuming, for the purposes of this response, that Dworkin is right to take legal discourse at "face value".

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It is not entirely clear how this passage should be understood, but the idea seems to be that law as integrity offers a less straightforward explanation of agreement in legal judgments, because it requires us to hypothesize that there are theoretical disagreements lurking hidden beneath the surface agreement in legal judgments. By contrast, positivists have no need to entertain such a hypothesis, since they explain the massive and pervasive agreement in legal judgments on the basis that there is agreement (or convergence) among officials on the criteria of legal validity.[39]

However, it is misleading to claim, in this context, that "agreement is agreement", even if we leave to one side the possibility that the convergence that positivism posits among officials may not be best thought of in terms of agreement. Agreement about the appropriate outcome of legal disputes is not the same as agreement (or convergence) on the criteria of legal validity, and it is not clear why we should regard the latter as representing the most natural or straightforward explanation of the former. Just as Dworkin imputes to agreement in legal judgments an underlying disagreement about the correct interpretation of the law, positivists impute to agreement in legal judgments an underlying convergence on the criteria of legal validity. *Both* sides engage in "imputation", and we have not yet been given any reason to think that one imputation is more plausible than the other.

To put the point differently, it is misleading to suggest that Dworkin's explanation of agreement in legal judgments involves positing widespread disagreement about the correct interpretation of the law that is "hidden" by the surface agreement. The existence of agreement in legal judgments (i.e., agreement about the outcomes of particular cases) does not, by itself, suggest that there is agreement about the criteria of legal validity, such that Dworkin has to claim that disagreement about these criteria is widespread *despite appearances*. Convergence on criteria of legal validity is, on Leiter's view, something that positivists *posit*, in order to explain what *is* apparent (namely, agreement in legal judgments).

Perhaps there is a better way of understanding the suggestion that positivism provides a more straightforward explanation of agreement in legal judgments. It might be argued that positivism's explanation follows directly from a central tenet of that theory (namely, that there is convergence among officials on the criteria of legal validity), whereas Dworkin needs to add an additional hypothesis (namely, that the different interpretations of the law overlap in many cases) to the central claims of his theory. For this reason, it might be thought, positivism offers a *simpler* explanation of agreement in legal judgments than does law as integrity,

39. There is another possible reading of this passage—namely, that Leiter is simply querying whether Dworkin has provided any affirmative evidence in support of the suggestion that there is widespread theoretical disagreement underlying the massive and pervasive agreement in legal judgments. Indeed, Leiter starts the relevant paragraph with this query. However, the passage quoted in the text seems to go further, by asserting that "agreement is agreement" and that only someone already committed to law as integrity would accept the Dworkinian explanation of agreement in legal judgments.

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and so (everything else being equal) its explanation is preferable.[40]

This is an interesting suggestion, but I doubt whether it shows that positivism's explanation of agreement in legal judgments is preferable to law as integrity's. For one thing, it is not clear that Dworkin does need to add an additional hypothesis to the central claims of his theory in order to explain agreement in legal judgments. As we have seen, it is central to law as integrity that any eligible interpretation of the law must fit sufficiently well with the political history of the community, and that—everything else being equal—the better an eligible interpretation fits with that history, the more attractive the interpretation is. To the extent that Dworkin's explanation of agreement in legal judgments follows from these claims, that explanation does not require him to formulate any additional hypothesis.

Nevertheless, it might be argued that these claims do not suffice to enable Dworkin to account for massive and pervasive agreement in legal judgments. On this view, it is also necessary that most legal officials: 1) operate with a very high threshold of fit (such that, to be eligible, an interpretation of the law must fit with the overwhelming majority of the data points referred to in Section 2), 2) attach a great deal of weight to considerations of fit when weighing this dimension against the dimension of justification (so that fit with the community's political history is rarely sacrificed in order to promote other considerations of political morality), and/or 3) believe that the dimensions of fit and justification rarely push in different directions (so that there is not normally any pressure to sacrifice fit in order to promote justification). If this is right, then Dworkin does need to add one or more additional hypotheses to the central claims of his theory in order to account for massive and pervasive agreement in legal judgments.

Even if this is so, it is still not clear that positivism enjoys an advantage over law as integrity in this respect. Consider again the explanation of agreement in legal judgments that Leiter ascribes to positivists. The claim is that legal officials employ the same criteria of legal validity, and this explains why they agree about the legally appropriate outcome in the overwhelming majority of cases. However, the mere fact that two people employ the same tests for determining what the law is does not necessarily mean that they will arrive at the same outcomes. Whether they do so depends also on whether they *apply* those tests in the same way. It seems, therefore, that positivists, too, need to add an additional hypothesis to the central claims of their theory (i.e., that, not only do officials employ the same tests of legal validity, but they apply those tests in the same way in the overwhelming majority of cases), in order to account for massive and pervasive agreement in legal judgments.

Of course, it is open to Leiter to argue that the additional hypothesis required by positivism is more plausible than the one required by law as integrity.

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40. In presenting this objection, I draw on the account of the theoretical virtue of simplicity sketched in Dale Smith, "Must the Law Be Capable of Possessing Authority?" (2012) 18 Legal Theory 69 at 91. Note that Kramer also argues that positivism offers a simpler explanation of agreement and disagreement about law than does Dworkin, though for a somewhat different reason than the one suggested in the text: Kramer, *supra* note 6 at 139-40.

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However, this is a different argument from the argument that positivism provides a *simpler* explanation of agreement in legal judgments. Moreover, to the extent that it proceeds by trying to show that Dworkin's hypothesis is implausible, it is likely to lead us back to many of the considerations canvassed in Section 2.

For these reasons, it is doubtful whether positivism provides a more straightforward explanation of agreement in legal judgments than does law as integrity. To be fair, Leiter does not rest content with the suggestion that it does. He offers further grounds for rejecting the claim that underlying the massive and pervasive agreement in legal judgments is widespread disagreement about the criteria of legal validity. I consider some of those grounds in the next two Sections; my aim in the present Section has simply been to address *one* of the bases on which Leiter might argue that positivism offers a better explanation of agreement in legal judgments than does law as integrity.

4. Explaining Theoretical Disagreement

I have argued that law as integrity can account for agreement in legal judgments, and that its explanation is not less straightforward than positivism's. This has significant implications for Leiter's response to the ATD, which involves contending that positivism can not only account for Dworkin's examples of theoretical disagreement, but can do so better than law as integrity.

Leiter begins his response to the ATD by suggesting that positivists have two alternative accounts of theoretical disagreement.[41] On either account, while theoretical disagreements *appear* to be disputes about what the law *is*, or more precisely about what the criteria of legal validity are, and hence appear inconsistent with positivism's claim that there is convergence on the criteria of legal validity, they are in fact disputes about what the law *should be*, in circumstances where the existing law does not dictate a uniquely correct answer.

The first account, which Leiter labels the "Disingenuity" account, explains theoretical disagreements on the basis that the judges who participate in those disagreements are disingenuous. They realize (either consciously or subconsciously) that there is no settled law in the case before them, but present their disagreement as being about what the law already is. The second account, which Leiter labels the "Error Theory" account, explains theoretical disagreements on the basis that the judges who participate in those disagreements are simply mistaken. They honestly believe that there is a fact of the matter about what the law is in the case before them, but the absence of convergence on criteria of legal validity that would govern that case means that they are wrong about this.

Leiter then asks whether these explanations of theoretical disagreement are preferable to Dworkin's. To ascertain which explanation is preferable, he suggests, we should appeal to the same theoretical virtues (such as simplicity, consilience and conservatism) that we use to judge rival scientific theories.[42] Leiter

41. Leiter, *supra* note 1 at 1224.
42. *Ibid* at 1239.

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pays particular attention to the virtue of consilience, which he characterizes in the following terms:

> We prefer more *comprehensive* explanations—explanations that make sense of more different kinds of things—to explanations that seem too narrowly tailored to one kind of datum.[43]

As we have seen, Leiter regards agreement in legal judgments as a particularly important kind of datum, and he believes that only positivism can account for it. He argues that the fact that positivism's explanations of theoretical disagreement are part of a theory of law that can account for agreement in legal judgments "may be [the] primary virtue [of those explanations]."[44] By contrast, he contends, Dworkin's explanation of theoretical disagreement is part of a theory of law that cannot account for agreement about the law.

Thus, if I am right that Dworkin does have a plausible explanation of agreement in legal judgments, then this deprives Leiter of an important strand of his response to the ATD. If both positivism and law as integrity can account for agreement in legal judgments, then Leiter cannot point to positivism's ability to explain such agreement to support his claim that positivism's explanation of theoretical disagreement is more consilient than Dworkin's.

Another important part of Leiter's strategy for responding to the ATD is to downplay the frequency with which theoretical disagreements occur. He contends that "theoretical disagreements about law represent only a miniscule fraction of all *judgments* rendered about law, since most judgments about law involve *agreement*, not disagreement."[45] He draws two important conclusions from this contention. First, he concludes that Dworkin places too much emphasis upon the ability of a theory of law to account for theoretical disagreement, given that the amount of such disagreement is insignificant when compared to the massive and pervasive *agreement* in legal judgments.[46] Second, he concludes that positivism's Error Theory account of theoretical disagreement does not encounter the problem faced by global error theories—namely, the problem of explaining "why a particular discourse persists when all its judgments are false."[47] This is because positivism ascribes error to legal officials only in those relatively infrequent cases where they engage in theoretical disagreement, and so the error arises only at "the margins" of legal practice.[48]

Both of these conclusions depend, however, on Leiter's claim that theoretical disagreement is relatively rare, "since most judgments about law involve

43. *Ibid* [emphasis in original].
44. *Ibid* at 1247.
45. *Ibid* at 1226 [emphasis in original].
46. See, e.g., *ibid* at 1226 (claiming that the significance that Dworkin attaches to the phenomenon of theoretical disagreement is puzzling, given the relative rarity of such disagreement). This is not the only basis on which Leiter questions the emphasis that Dworkin places on the ability of a theory of law to account for theoretical disagreement. For example, he also contends that the onus is on Dworkin to show that theoretical disagreement is a central feature of law, and that Dworkin has not discharged this argumentative burden: *ibid* at 1220.
47. *Ibid* at 1225.
48. *Ibid* at 1232.

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agreement, not disagreement."[49] By now, it should be clear why this claim is problematic. It follows from the fact that there is massive and pervasive agreement in legal judgments that disagreement about the appropriate outcome of particular cases is relatively uncommon, but it does not necessarily follow that theoretical disagreement is relatively uncommon. Whether it follows depends on whether the best explanation of the existence of massive and pervasive agreement in legal judgments is that there is convergence on criteria of legal validity—in other words, it depends on whether positivism's explanation of agreement in legal judgments is correct.

This would not be a problem if positivism was the only theory of law that could account for agreement in legal judgments, but—as we have seen—this is not the case. Dworkin also has an explanation of this phenomenon. Moreover, if it is an open question whether positivism or law as integrity better accounts for agreement in legal judgments, then it is also an open question as to how common theoretical disagreement is. If Dworkin's explanation is correct, massive and pervasive agreement in legal judgments is compatible with widespread theoretical disagreement, because different interpretations of the law often support the same outcome. This calls into question Leiter's contention that Dworkin overstates the importance of theoretical disagreement as a phenomenon for theories of law to explain, at least to the extent that this contention is based on Leiter's assumption that theoretical disagreement is relatively uncommon.[50] It also calls into question Leiter's claim that positivism's Error Theory account of theoretical disagreement does not face the problem that global error theories face, since it can no longer be assumed that legal officials make the error in question only in relatively rare cases.

In this Section, I have considered only two strands of Leiter's multi-layered and challenging response to the ATD. (I consider a third strand in Section 5.) Thus, the brief remarks in this Section cannot be regarded as a refutation of his response, which is itself only one of several ways in which positivists might respond to the ATD. Nevertheless, these remarks are sufficient to show that, if Dworkin can account for agreement in legal judgments, this not only deprives Leiter of one of his main objections to law as integrity, but also casts some doubt on his response to Dworkin's objection that positivism cannot account for theoretical disagreement.

5. Choosing between the Competing Explanations of Agreement in Legal Judgments

Of course, the fact that law as integrity has an explanation of agreement in legal judgments is not the end of the story. It may be that the positivist's explanation of this phenomenon is preferable to Dworkin's. To ascertain whether this is so, we need to consider how we should choose between the competing explanations.

49. *Ibid* at 1226 [emphasis in original].
50. As mentioned in *supra* note 46, this is not the only basis for the contention.

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As we saw in Section 4, Leiter confronts an analogous question with regard to competing explanations of theoretical disagreement, since he believes that both positivism and law as integrity can account for that phenomenon. His answer is that we should judge the competing explanations in the same way that we judge rival scientific theories—that is, by reference to theoretical virtues such as simplicity, consilience and conservatism.[51]

Leiter would deny that we need to appeal to these virtues to adjudicate between competing explanations of agreement in legal judgments, because he denies that law as integrity can account for this phenomenon.[52] However, if (for the reasons already given) we regard Leiter as mistaken on the latter point, then it might be thought to make sense to appeal to the theoretical virtues to adjudicate between the competing explanations of agreement in legal judgments, too. In the first part of this Section, I explore how this might work, before considering (in the second part of the Section) whether there are alternative ways of adjudicating between the competing explanations.

In Section 3, I examined whether positivism provides a *simpler* explanation of agreement in legal judgments than does law as integrity. I begin the present Section by considering the virtue of *consilience*, Leiter's characterization of which was presented in Section 4. This requires us to consider whether positivism's and law as integrity's explanations of agreement in legal judgments also make sense of other legal phenomena.

Dworkin might argue that one advantage of his explanation of agreement in legal judgments is that it is part of a theory of law that makes sense of the phenomenon of theoretical disagreement. As a version of interpretivism, law as integrity can allow that officials disagree about the appropriate justification of their legal practices, and about the best way to adjust their pre-interpretive understanding of those practices in light of the relevant justification. Even where two officials both accept law as integrity, they may disagree about which moral principles form part of the law, and this disagreement may extend to fundamental principles such as those that constitute the doctrines of legislative supremacy and precedent. All of this leaves much scope for theoretical disagreement. By contrast, positivism struggles to account for theoretical disagreement because it explains agreement in legal judgments by positing convergence among officials on criteria of legal validity.

One of the interesting features of Leiter's response to the ATD is that he seeks to turn this dialectic on its head. Consider *Riggs v. Palmer*,[53] which is one of

51. Leiter's view seems to be that we appeal to these virtues only where there is more than one explanation that "makes sense" of the relevant phenomenon: Leiter, *supra* note 1 at 1239-40. Of course, the idea of an explanation "making sense" of a phenomenon could do with elaboration, but Leiter claims that an intuitive understanding of the idea will suffice in the present context. I say a bit more about this below.

52. At least, this is his official position. In Section 3, I suggested that he sometimes appears to allow that law as integrity *can* explain agreement in legal judgments, while claiming that its explanation is less straightforward than positivism's. I also suggested that one way of understanding this claim is as an appeal to the virtue of simplicity.

53. 115 NY 506 (1889).

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Dworkin's examples of theoretical disagreement. The judges in *Riggs* disagreed about whether a beneficiary was precluded from inheriting under a will, given that he murdered the testator (his grandfather) in order to inherit. The Statute of Wills did not explicitly address this situation, and the grandfather's will satisfied all of the explicit requirements set down in the Statute. Leiter concedes that the judges in *Riggs* appeared to disagree about which test they should use to determine if the grandson could inherit. More precisely, he says, they appeared to disagree about whether they should look to the plain meaning of the Statute or to the counterfactual intentions of the legislators had the legislators considered the application of the Statute to the present situation.[54] Judge Earl, who wrote the majority judgment, held that the grandson could not inherit, in part because the legislators would not have intended that he inherit had they contemplated this possibility. By contrast, Judge Gray, who wrote the dissent, looked to the plain meaning of the Statute, which (he held) required that the grandson be allowed to inherit despite the fact that he killed his grandfather in order to do so.

However, Leiter maintains that the disagreement in *Riggs* should not be taken at face value. Rather than there being a fundamental disagreement between the judges about the correct approach to interpreting statutes, the judges in *Riggs* were opportunistic in their choice of a theory of statutory interpretation. When we consider his opinions in other cases, there is reason to believe that Judge Earl embraced a version of intentionalism in *Riggs* in order to support his preferred result in that case, rather than that choice "reflecting his deep theoretical commitments about interpretation[.]"[55] Similarly, Leiter points out that Judge Gray adopted a very different approach to statutory interpretation in other cases (including a case decided around the same time as *Riggs*), trading his textualism for a version of intentionalism.[56] Based on his decisions in other cases, Judge Gray's "opportunistic literalism in *Riggs* in all likelihood has more to do with his ideological opposition to state interference with property rights than with a considered view of statutory interpretation."[57]

Once we realize the true nature of the disagreements in cases like *Riggs*, Leiter claims, we can see that positivists have a perfectly satisfactory explanation of those disagreements. While judges generally converge on the same criteria of legal validity, that convergence breaks down in certain exceptional cases (e.g., where it would lead to results that some judges regard as absurd or repugnant). Precisely because these cases are not governed by criteria of legal validity on which officials converge, judges are required to make new law in order to resolve them (and, because judges may not realize that this is what

54. Leiter, *supra* note 1 at 1218.

55. *Ibid* at 1242. Leiter bases this conclusion partly on the fact that, previously, Judge Earl had unsuccessfully opposed the view that convicts retain their property rights (including the right to inherit) (*id*), and partly on the fact that, in other probate cases (unlike in *Riggs*), Judge Earl sought to uphold the testator's intentions and was generally unconcerned with the correct theory of statutory interpretation (*ibid* at 1244).

56. *Ibid* at 1243.

57. *Ibid* at 1246. More generally, Leiter appeals to the work of Karl Llewellyn and Philip Bobbitt to support his contention that, in difficult cases of statutory and constitutional interpretation, judges tend to act opportunistically: *ibid* at 1229-30.

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they are doing,[58] or because they may be disingenuous,[59] they may appear to engage in theoretical disagreements when they disagree about the appropriate resolution of those cases). Moreover, in these cases, but only in these cases, judges tend to act opportunistically, using whichever purported criterion (e.g., textualism or intentionalism) supports their preferred outcome in the case before them. In this way, Leiter suggests, positivists can explain theoretical disagreements in a way that is consistent with their explanation of agreement in legal judgments. They can also explain why judges who decide cases involving theoretical disagreement often appear to adopt a contrary position on other occasions (such as Judge Gray's embrace of textualism in *Riggs* and a version of intentionalism in other cases).

If Leiter is right that the judges in *Riggs* were acting opportunistically, then it is Dworkin who will struggle to explain the disagreement in this case. It now seems implausible to claim, as Dworkin does, that the disagreement in *Riggs* was "pivotal"—that is, that it was a disagreement, "not only about whether [the grandson] should have his inheritance, but about why *any* legislative act, even traffic codes and rates of taxation, impose the rights and obligations everyone agrees they do[.]"[60] If so, Dworkin cannot infer from the existence of theoretical disagreement in *Riggs* that there is latent theoretical disagreement in other cases as well. And this weakens his case that judges frequently act on conflicting interpretations of the law, though those interpretations produce the same outcomes with regard to many potential legal disputes. To avoid these unpalatable conclusions, it seems that Dworkin would have to ignore the way that the judges in *Riggs* decided other relevant cases—that is, he would have to offer an explanation of the disagreement in *Riggs* that is less consilient than positivism's. Leiter concludes from this that, not only does positivism have an explanation of theoretical disagreement, but its explanation is preferable to Dworkin's.[61]

This is an ingenious and important response to the ATD. It differs in important respects from a response anticipated by Dworkin—namely, that judges simply *pretend* to engage in theoretical disagreement.[62] Nevertheless, it might be thought to be subject to a similar objection. If, in certain disputed cases, judges are opportunistic in the way Leiter claims, would we not expect this opportunism to be exposed for what it is? The losing party in such cases would, it seems, have an incentive to do so. And, while the losing party may not themselves have the necessary expertise—it may require careful analysis of the decisions made by a particular judge, of a sort not easily undertaken by laypeople, to expose her opportunism—we might expect the losing party sometimes to have access to

58. This is the Error Theory account of theoretical disagreement.
59. This is the Disingenuity account of theoretical disagreement.
60. Dworkin, *supra* note 3 at 42-43 [emphasis added].
61. Leiter, *supra* note 1 at 1247. As we have seen, Leiter does not base this conclusion solely on his contention that positivism can, and Dworkin cannot, account for the judicial opportunism in cases like *Riggs*. He also bases it, *inter alia*, on his contention that positivism can, and Dworkin cannot, account for agreement in legal judgments.
62. Dworkin, *supra* note 3 at 37-39.

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people (such as lawyers) who *do* have the necessary expertise.[63] There may also be interested observers (such as legal academics) who possess that expertise. It might seem strange, then, that legal practice appears to continue as if theoretical disagreements were genuine disputes about the criteria of legal validity.

There are possible responses open to the positivist. Perhaps lawyers and legal academics have nothing to gain from exposing judicial opportunism, though it seems doubtful that this would always be true. More plausibly, perhaps some lawyers and legal academics *have* sought to expose judicial opportunism (think of the Legal Realists), but have been largely ignored by the judges themselves. However, some explanation is needed of how judges have gotten away with ignoring those members of the profession who have spoken out.[64]

For these reasons, one might harbor doubts about whether positivism can make sense of theoretical disagreement along the lines Leiter suggests. However, Leiter is right to point out that, even if there are problems with positivism's explanation of theoretical disagreement, that explanation might still be preferable to Dworkin's.[65] If Dworkin rejects Leiter's claim that the judges in *Riggs* were opportunistic, what alternative explanation can he provide of the apparent mismatch between the approach they took in *Riggs* and the approach they took in other cases?

Here is one alternative explanation. In presenting his theory of law, Dworkin makes reference to Hercules, "an imaginary judge of superhuman intellectual power and patience who accepts law as integrity."[66] Hercules is able to arrive at an interpretation of the law that reveals it to be fully coherent in principle. However, real-life judges—including those in *Riggs*—are not Hercules. According to Dworkin, they strive to render the law fully coherent in principle. However, they have only mixed success in doing so. Sometimes, they struggle to find a way to reconcile their various substantive and theoretical commitments, potentially causing them to toy with different theories of statutory interpretation in different cases. Like anyone else, they may also fail to live up to their own aspirations. They may sometimes depart from what integrity requires because they feel strongly about the substantive merits of a case, while acknowledging that the inconsistencies in the law that this produces are undesirable.[67] All of this gives rise to a pattern of decision-making that may sometimes appear to be

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63. Cf Shapiro's suggestion that the reason the public "has yet to pick up on the judicial ruse" is that "the law is a professional practice and lay persons are either ignorant of its ground rules or too intimidated by legal officials to challenge them." (Shapiro, *supra* note 1 at 42; referred to in Leiter, *supra* note 1 at 1238.) For the reason given in the text, ignorance on the part of laypeople may not be an insurmountable obstacle to exposing judicial opportunism. Moreover, while we can easily imagine legal systems in which laypeople are too intimidated by legal officials to challenge them, we might query whether this is a plausible portrayal of those legal systems with which we are most familiar.

64. Again, we can imagine legal systems where officials get away with this through a campaign of terror and intimidation. But, again, it is far from clear that this is true of the legal systems with which we are most familiar.

65. Leiter, *supra* note 1 at 1239.

66. Dworkin, *supra* note 3 at 239.

67. See *ibid* at 184 (acknowledging that our legal structure often violates integrity in various ways, but insisting that we regard such violations as wrongful).

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opportunistic, but in fact represents a flawed but genuine attempt to arrive at the best overall interpretation of the law.

This explanation of the appearance of judicial opportunism in cases like *Riggs* requires Dworkin to concede that judges sometimes depart from the requirements of integrity, and that they sometimes struggle to ascertain what integrity requires of them. However, these are concessions that he has already made. He acknowledges that real-life judges are not Hercules, and that they are likely to operate with much more incomplete and partial interpretations of the law.[68] He also acknowledges that our "legal structure" often violates integrity in various ways, though he insists that legal actors regard such violations as wrongful.[69] Thus, the need to explain away the appearance of judicial opportunism in cases like *Riggs* does not require Dworkin to make any *new* concession.

Obviously, much more would need to be said before one was in a position to conclude that Dworkin provides the better explanation of the disagreements in cases like *Riggs*, after all. However, I shall leave the discussion of theoretical disagreement here. When judging the consilience of their competing explanations of agreement in legal judgments, we should not focus only on the ability of positivism and law as integrity to account for theoretical disagreement. There are many other legal phenomena that a theory of law should also make sense of. Leiter mentions several that he thinks law as integrity cannot account for, while positivism can. For example, he contends that positivism offers a *general* theory of law, whereas law as integrity "can only make sense … of legal systems whose institutional history falls above the threshold required for *moral* justification of that legal system to be possible[.]"[70] This is a version of the familiar, and important, objection that Dworkin cannot account for evil legal systems, given the role that moral considerations play in constituting the law on his account.[71]

On the other hand, theoretical disagreement may not be the only legal phenomenon that positivism struggles to explain. For example, there is a well-known problem (or set of problems) for positivists in accounting for law's normativity, given their claim that the existence and content of the law depends (ultimately) on social facts alone.[72] There is considerable disagreement about how this "normativity problem" should be understood, but—at a minimum—there appears to be a puzzle in explaining how the law can purport to create obligations (whether moral, legal or both) if the existence and content of the law ultimately depends only on social facts. Is the law (or, if you prefer, are legal officials) committed to claiming that it (they) can derive an "ought" from an "is"? If so, this would be a puzzling feature of law, to say the least.[73]

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68. *Ibid* at 265.
69. *Ibid* at 184, 217.
70. Leiter, *supra* note 1 at 1248 [emphasis in original].
71. For Dworkin's response to this objection, see Dworkin, *supra* note 3 at 101-04. The objector, of course, denies that this response is satisfactory: see, e.g., Hart, *supra* note 11 at 270-71.
72. See, e.g., Shapiro, *supra* note 13 at 46-49.
73. For an interesting attempt to dissolve the normativity problem, see David Enoch, "Reason-Giving and the Law" in Leslie Green & Brian Leiter, eds, *Oxford Studies in Philosophy of Law: Volume 1* (Oxford: Oxford University Press, 2011).

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This is obviously far from an exhaustive list of the challenges, in terms of consilience, facing both positivism and law as integrity. If we take the approach to theory choice that Leiter utilizes when responding to the ATD, and apply it when assessing the competing explanations of agreement in legal judgments offered by positivism and law as integrity, we would need to assess each of these challenges before we could reach a final conclusion as to which explanation is preferable. (We would also need to consider other theoretical virtues, such as conservatism, which I have not discussed.)

I shall not seek to undertake this task here. Instead, I want to suggest that any claim that this represents an appropriate way of choosing between the competing explanations of agreement in legal judgments itself requires defence. When he suggests appealing to the theoretical virtues to choose between the competing explanations of theoretical disagreement, Leiter provides little in the way of argument to support the suggestion. It may seem that little in the way of argument is needed—appeal to considerations of consilience, simplicity and conservatism may appear to provide an obvious and helpful way of arbitrating between competing theories of law.[74] Yet this approach would be rejected by some of the key protagonists in the debate between positivism and law as integrity.

Let me explain. We have seen that Leiter motivates his appeal to the theoretical virtues on the basis that we should judge competing explanations of legal phenomena in the same way that we judge rival scientific theories. However, this approach would be rejected by influential positivists such as Joseph Raz, who distinguishes between classifications or concepts "introduced by academics for the purpose of facilitating their research or the presentation of its results" and concepts "entrenched in our society's self-understanding".[75] Appeal to the theoretical virtues is, Raz contends, appropriate when assessing the former type of classification or concept, but not the latter, and law belongs in the latter category.

Dworkin would also reject Leiter's methodology, though for a different reason. In *Law's Empire*, he allows that scientific practice, like legal practice, could be said to be interpretive.[76] However, if we do say this, we must recognize that science is a different *type* of interpretive endeavour from constructive interpretation (of which law is an instance). They differ, says Dworkin, in terms of their standards of success. In science, what counts as a successful explanation is judged by reference to standards that include the theoretical virtues to which Leiter refers. By contrast, constructive interpretation employs

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74. When, on another occasion, Leiter recommends the use of these criteria to assess a certain argument for moral realism, he describes them as "intuitively plausible": Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: Oxford University Press, 2007) at 205. In that context, though, Leiter can (and does) claim, with some plausibility, that his opponents are also committed to the use of those criteria. We shall see that the same is not true in the present context.

75. Joseph Raz, *Between Authority and Interpretation* (Oxford: Oxford University Press, 2009) at 31.

76. Dworkin, *supra* note 3 at 53.

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standards of fit and justification.[77] On this view, too, it would be inappropriate, when choosing between competing theories of law, or competing explanations of legal phenomena, to appeal to the theoretical virtues that we use to judge rival scientific theories.[78]

The methodological divide between Dworkin and Leiter affects not only how we choose between competing explanations of legal phenomena, but also what it is to explain legal phenomena in the first place. In Section 2, I sought to show that Dworkin can play Leiter's game, so to speak, in the sense that he can offer an explanation of agreement in legal judgments that makes sense of that phenomenon. Here, "making sense of" the phenomenon involves telling a plausible story about why we might expect there to be massive and pervasive agreement in legal judgments, were law as integrity correct. However, while Dworkin could join Leiter in saying that we seek explanations of legal phenomena that make sense of those phenomena, he would offer a very different account of what this involves. For Dworkin, it involves offering an interpretation that both fits and justifies the relevant aspects of legal practice (or, perhaps, offering an interpretation that meets the threshold of fit, and which can *then* be compared with other eligible interpretations along the dimensions of fit and justification). It is, therefore, at least in part, an exercise in political morality.[79] On this approach, if we were to ask whether positivism and law as integrity can make sense of agreement in legal judgments, we would be engaging in a different type of inquiry from the one Leiter recommends.

Of course, the fact that Leiter's methodology for choosing between theories of law is controversial does not necessarily mean that it is mistaken. It does,

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77. It would be a mistake to equate the dimension of fit with the virtue of consilience. Dworkin emphasizes that our convictions about fit (where the threshold of fit should be set, how the dimensions of fit and justification should be balanced against each other, etc) reflect our convictions of political morality: *ibid* at 257. By contrast, judgments of consilience are not meant to be responsive to our convictions of political morality in this way.

78. That Dworkin would regard this as inappropriate is even clearer from his discussion in *Justice for Hedgehogs*. There, he argues for what he calls the "independence of value" thesis—namely, that morality and ethics represent a separate domain of inquiry from science and metaphysics, and that any moral or ethical argument must ultimately stand or fall on moral or ethical (not scientific or metaphysical) grounds: Dworkin, *supra* note 14 at 9-11. Moreover, the methodology that is appropriate in each domain differs radically. Dworkin seeks to defend accounts of moral and ethical values (which, on the view presented in *Justice for Hedgehogs*, include law) by showing that those accounts fit with each other in such a way as to reveal our moral and ethical values to be integrated and mutually supporting. Further, those accounts must be ones we can authentically embrace, in the sense that they must reflect genuine moral or ethical convictions on our part: *ibid* at 108. On this view, theory choice in the moral/ethical domain requires moral/ethical judgment, rather than appeal to the sorts of considerations that would be appropriate when choosing between scientific theories. Admittedly, though, it is controversial whether the discussion of law in *Justice for Hedgehogs* is compatible with the view Dworkin defends in *Law's Empire*: see *supra* note 14. It is also debatable whether the discussion of methodology in the two books is consistent.

79. Concerning the normative character of the dimension of fit, see *supra* note 77. Further, on Dworkin's view, we do not seek discrete explanations of different legal phenomena, but rather a unified interpretation of the entirety of our legal practices. Note, though, that there is also some pressure within Leiter's methodology to adopt unified accounts of multiple phenomena. At least where there are competing explanations that make sense of a particular phenomenon, we adjudicate between those explanations in part based on whether they make sense of other phenomena as well.

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however, mean that it requires defence. If one were to employ that methodology to adjudicate between the competing explanations of agreement in legal judgments offered by positivism and law as integrity, one would need to explain why that methodology is the appropriate one to use for this purpose. Moreover, simply pointing out that Leiter's methodology has the virtue of bringing our account of theory choice in law into line with our account in the sciences would not be sufficient, given that we have seen that both Dworkin and Raz deny that this is a virtue.[80]

This is important because different methodological options may well favour different theories of law.[81] While I have suggested that Dworkin's explanation of agreement in legal judgments fares surprisingly well under Leiter's methodology, it may fare considerably better under Dworkin's own methodology. For example, part of the attraction of law as integrity, according to Dworkin, is that it does a better job of portraying our legal practices as morally legitimate, because it shows how those practices give rise to political obligations on the part of the law's subjects.[82] This sort of argument makes sense if we should choose between theories of law, in part, by reference to the dimension of justification. However, it does not make sense if we should choose between theories of law by reference to the theoretical virtues. While, on Leiter's methodology, we might (perhaps) ask which theory of law makes better sense of people's *beliefs* about the moral legitimacy of their legal practices, this is a different question from the one Dworkin asks.

6. Conclusion

I have argued that Leiter is wrong to claim that, whereas positivism can account for massive and pervasive agreement in legal judgments, law as integrity cannot. Both theories of law offer an explanation of this phenomenon. I have also

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80. On my reading of Leiter, he intends his critique of law as integrity in Leiter, *supra* note 1 to stand independently of the claim he makes elsewhere that we should adopt a naturalistic approach to legal philosophy: see Leiter, *supra* note 74 at Part II. I base this reading partly on the fact that Leiter does not explicitly appeal to his naturalism when presenting his critique of law as integrity, and partly on the approach he takes elsewhere, which is first to argue that Hart is the victor in the debate with Dworkin and *then* to consider whether there are further (methodological) problems with Hart's approach: *ibid* at ch 6. However, given the point we have reached in the text, Leiter might appeal to his naturalism to support the claim that we should employ the theoretical virtues when choosing between competing theories of law. I cannot properly evaluate this possibility here, but I should point out that, at least in some moods, Leiter would regard the implications of naturalism for legal philosophy as being much more radical than this (though he has wavered as to what those implications are). It is also worth noting that Leiter's claim that the theoretical virtues represent the appropriate criteria for choosing between rival scientific theories is disputed by some philosophers of science. See, e.g., Helen E Longino, "Gender, Politics, and the Theoretical Virtues" (1995) 104 *Synthese* 383 (arguing that there are alternative bases for choosing between rival scientific theories and that, in some contexts, the choice between employing the traditional theoretical virtues or alternative virtues must be made on socio-political grounds).

81. Indeed, it may be that each methodology must be assessed in conjunction with the theory of law that fits most naturally with that methodology, rather than us first choosing between the competing methodologies and then using the chosen methodology to adjudicate between rival theories of law. See Julie Dickson, *Evaluation and Legal Theory* (Oxford: Hart, 2001) 13-14.

82. Dworkin, *supra* note 3 at 190-216.

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argued that this fact weakens some strands of Leiter's response to the ATD, and that there are further reasons to query other strands of his response. However, I have not sought to show that law as integrity is preferable to positivism all-things-considered. I have not even ascertained which of the competing explanations of agreement in legal judgments is preferable. Rather, I have sought to explore some of the issues that may arise when choosing between the competing explanations of agreement in legal judgments, and to show that the appropriate methodology for making that choice is itself disputed in a way that significantly complicates the debate between positivism and law as integrity.

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