Theoretical Disagreement, Legal Positivism, and Interpretation

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Abstract. Ronald Dworkin famously argued that legal positivism is a defective account of law because it has no account of Theoretical Disagreement. In this article I argue that legal positivism—as advanced by H.L.A. Hart—does not need an account of Theoretical Disagreement. Legal positivism does, however, need a plausible account of interpretation in law. I provide such an account in this article.

1. Introduction

Debate over the merits of Ronald Dworkin’s claims for theoretical disagreement continues. After introducing the concept in Law’s Empire (Dworkin 1986), little attention was paid to it. Then in 2007, Scott Shapiro (2007) claimed that Dworkin’s criticism that positivists had no account of theoretical disagreement had been left unanswered. In 2009, Brian Leiter (2009) answered Shapiro with a critique of Dworkin’s claims on behalf of theoretical disagreement as well as advancing a “positivist” answer to Dworkin. Recently, a number of critics have raised objections to Leiter’s critique of theoretical disagreement as well as objections to Leiter’s positivist riposte to Dworkin (see Toh 2013; Levenbook 2015; Duarte d’Almeida 2016). The debate continues.

In this article, I will defend the proposition that positivism has the resources for a thorough reply to Dworkin.1 While there have been more than a few replies to Dworkin about the merits both of his claims for the centrality of theoretical disagreement as well as positivism’s account of it, none has been dispositive. The

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1 When I refer to “positivism” I mean to refer to the version of positivism found in Hart 2012 (hereafter “Concept”). The view of interpretation advanced in this article adopts Hart’s conception of the Rule of Recognition as found in Concept. I will argue for an approach to interpretation that is both consistent with and builds upon Hart’s conception of the Rule of Recognition as a social practice among officials.
reason for this is that the resources of positivism have not been adequately marshalled.²

Quite apart from the merits of Dworkin’s critique of positivism, there is a serious question whether theoretical disagreement is merely an externality of Dworkin’s general jurisprudence. Understanding this properly requires investigating the link between theoretical disagreement and Dworkin’s conception of law as an interpretive practice. While some have argued that Dworkin’s theory of law rests on an implausible metaphysics,³ there can be little doubt that Dworkin’s focus on the interpretive dimension of law is an important aspect of legal practice. In his argument for the centrality of theoretical disagreement, Dworkin makes interpretation a fundamental feature of legal practice. It is with this emphasis in his account of the nature of law that Dworkin goes too far in affording interpretation a fundamental role in law.⁴

2. Dworkin on Theoretical Disagreement

Dworkin (1986) begins Law’s Empire with a discussion of disagreement in law. The discussion is built on two core ideas: propositions of law and truth.⁵ Propositions of law, Dworkin (1986, 4) tells us, are “all the various statements people make about what the law allows or prohibits or entitles them to have.” He provides examples of such propositions. They include: “the Fourteenth Amendment to the US Constitution forbids denial of equal protection of the laws to anyone” to “the law requires Acme Corporation to compensate John Smith for the injury he suffered in its employ last February” (ibid.).

Propositions of law, Dworkin maintains, are either true or false. The important aspect of propositions of law is that they are “made true” or are “true in virtue of” other propositions.⁶ At least, Dworkin (1986, 4) states, that is what “[e]veryone thinks.” So, the proposition “the speed limit in California is 55 miles an hour” is true just in case the California legislature has enacted a statute to that effect. It is the act of the legislature in passing the statute that “makes” the proposition regarding the speed limit true.

² As the reader will see, positivism must be enhanced, specifically with the addition of an account of interpretation that is consistent with the main lines of positivism. It is the burden of this article to supply such an account. I agree with Scott Shapiro (2011, 382) when he writes that an account of legal interpretation is positivistic when “it roots interpretive methodology in social facts.”
³ For discussion of this point in the context of Dworkin’s use of natural kinds, see Patterson 2006.
⁴ As I will argue, “interpretation is conditional on understanding” (Tully 2003, 39). See also Wittgenstein 2010, sec. 201: “[T]here is a way of grasping a rule which is not an interpretation, but which is exhibited in what we call ‘obeying the rule’ and ‘going against it’ in actual cases” (emphasis added).
⁵ Dworkin’s interest in the propositional character of law and the concept of truth was longstanding. See Dworkin 1977, 1: “Even the debate about the nature of law, which has dominated legal philosophy for some decades, is, at bottom, a debate within the philosophy of language and metaphysics.”
⁶ Some have dubbed this picture of the grounds of law as “relational.” See Duarte d’Almeida 2016, 166: “The notion of the ‘grounds’ of law is therefore a relational notion.”
Lawyers sometimes disagree about the existence of a statute like the California speed limit statute. This is a factual disagreement, one that can be resolved by consulting the appropriate statutory reference. But this sort of disagreement—Dworkin calls it “empirical disagreement”—does not exhaust the types of disagreements lawyers sometimes have about law. In addition to, and far more important than empirical disagreement, is what Dworkin terms Theoretical Disagreement (hereafter TD). This type of disagreement is not one about facts but over what Dworkin calls “the true grounds of law” (ibid., 6.). Unlike empirical disagreement, TD cannot be resolved “by looking in the books where the record of institutional decisions are kept” (ibid., 7). More is required.

Dworkin maintains that TD is a fundamental feature of legal practice.7 He faults positivism for having “no plausible theory of theoretical disagreement” (ibid., 6). But when lawyers disagree in ways that might be called “theoretical,” what is the nature of their dispute? Dworkin maintains that such disagreements are “about whether statute books and judicial decisions exhaust the pertinent grounds of law” (ibid., 5).

Dworkin uses the New York case of Riggs v. Palmer to illustrate his thesis.8 Riggs posed the question whether a grandson who poisoned his grandfather could benefit under the grandfather’s will. The majority and dissenting judges split over how to interpret the New York Statute of Wills. The majority took the view that the meaning of the statute should be discerned by asking what the legislature would have done had it been presented with the question then before the court. By contrast, the dissent argued that because the requisites of the New York Statute of Wills had been satisfied, Elmer should take under the will, his crime notwithstanding.

As mentioned, TD is disagreement about the grounds of law. The grounds of law make propositions of law true and false. When lawyers disagree about the grounds of law, their dispute is one about the nature of truth in law: Lawyers simply disagree about what makes propositions of law true and false. Dworkin’s claim is simple: Positivism lacks the resources to make sense of debates about the grounds of law and, therefore, positivists have an inadequate account of the nature of law.

How does the Riggs case illustrate Dworkin’s claim? Dworkin (1986, 7) takes the view that, for positivists, TD “is an illusion.” Positivists only have a “plain fact” view of law. Here are the main theses of this view, according to Dworkin:

7 “The various judges and lawyers who argued our sample cases did not think they were defending marginal or borderline claims. Their disagreements about legislation and precedent were fundamental; their arguments showed that they disagreed not only about whether Elmer 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; not only whether Mrs. McLoughlin should have her damages, but about how and why past judicial decisions change the law of the land. They disagreed about what makes a proposition of law true not just at the margin, but in the core as well. Our sample cases were understood by those who argued about them in courtrooms and classrooms and law reviews as pivotal cases testing fundamental principles, not as borderline cases calling for some more or less arbitrary line to be drawn” (Dworkin 1986, 42–3; emphasis added).

8115 N.Y. 506, 22 N.E. 188 (1889).
1. the law is only a matter of what legal institutions, like legislatures and city councils and courts, have decided in the past;
2. questions of law can always be answered by looking in the books where the records of institutional decisions are kept;
3. when lawyers and judges disagree in the theoretical way about what the law is, they are really disagreeing about what it should be. Their disagreement is really over issues of morality and fidelity, not law (ibid.).

As Dworkin frames the debate, his objections are quite salient. But, as we shall see, Dworkin’s characterization of positivism’s approach to theoretical disagreement may not be as persuasive as it first appears. Part of the blame, if you will, for the staying power of Dworkin’s critique is positivism’s failure to mount a complete response.9 Such a response is available, although no one in the positivist camp has yet advanced it.

3. The Place of Theoretical Disagreement in Dworkin’s General Jurisprudence

Before turning to the positivist response to the problem of TD, it is worthwhile to review how TD arises as a problem in Dworkin’s general jurisprudence. One of the reasons why the debate over TD continues—seemingly without end—is because Dworkin was clever about framing the terms of his debate with positivism.

As everyone knows, Dworkin’s early criticism of Hart’s positivism was that Hart failed to take account of the role of principles in judicial decisions. In this, Dworkin was right, as Hart later acknowledged.10 Unhappily for Dworkin, his early criticism of Hart came to be seen as a “helpful criticism,” one that positivists could easily accommodate.11 The position that came to be known as “soft

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9 Leiter 2009 and forthcoming are an excellent start. But Leiter says nothing about a positivist account of legal interpretation. He simply says that cases like *Riggs* show that there is no “fact of the matter” about which interpretation of the New York Statute of Wills is true. I think this is a mistake, one that serves only to motivate Dworkinians to continue with the criticism that positivism has no account of TD.

10 Hart 2012, Postscript, 259. “In this section of my reply I consider various aspects of the criticism that I have ignored legal principles and I attempt to show that whatever is valid in this criticism can be accommodated without any serious consequences for my theory as a whole. But I certainly wish to confess now that I said far too little in my book about the topic of adjudication and legal reasoning and, in particular, about arguments from what my critics call legal principles. I now agree that it is a defect of this book that principles are touched upon only in passing.”

11 Hart 2012, Postscript, 259. “Some critics who have found this defect in my work have conceived of it as a more or less isolated fault which I could repair simply by including legal principles along with legal rules as components of a legal system, and they have thought that I could do this without abandoning or seriously modifying any of the main themes of the book.”
positivism” or “inclusive legal positivism” was judged to incorporate Dworkin’s critique without doing any damage to Hart’s positivism.

As Gerald Postema (1987, 284) has observed, Dworkin’s general jurisprudence is founded on two key notions: interpretation and integrity. Of the two notions, the one that is most relevant for the discussion of TD is interpretation. As I hope to show, it is only by making interpretation foundational that the problem of TD in law arises. It is this claim—a deeply philosophical claim—that cannot be sustained. Once we return interpretation to its rightful place, the problem of TD dissolves.

As others have observed, Dworkin’s theory of law as an interpretive practice is a particular instance of Dworkin’s general conception of the role of interpretation in social practices. Dworkin places himself squarely within the hermeneutical 

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12 This was the position championed by Jules L. Coleman (1982) and endorsed by Hart in the Postscript to Concept: “There is one further respect in which Dworkin misrepresents my form of legal positivism. He treats my doctrine of the rule of recognition as requiring that the criteria which it provides for the identification of law must consist only of historical facts and so as an example of ‘plain-fact positivism’. But though my main examples of the criteria provided by the rule of recognition are matters of what Dworkin has called ‘pedigree’, concerned only with the manner in which laws are adopted or created by legal institutions and not with their content, I expressly state both in this book and in my earlier article on ‘Positivism and the Separation of Law and Morals’ that in some systems of law, as in the United States, the ultimate criteria of legal validity might explicitly incorporate besides pedigree, principles of justice or substantive moral values, and these may form the content of legal constitutional restraints. In ascribing ‘plain-fact’ positivism to me in Law’s Empire Dworkin ignores this aspect of my theory” (Hart 2012, 247). And: “Dworkin in attributing to me a doctrine of ‘plain-fact positivism’ has mistakenly treated my theory as not only requiring (as it does) that the existence and authority of the rule of recognition should depend on the fact of its acceptance by the courts, but also as requiring (as it does not) that the criteria of legal validity which the rule provides should consist exclusively of the specific kind of plain fact which he calls ‘pedigree’ matters and which concern the manner and form of law-creation or adoption. This is doubly mistaken. First, it ignores my explicit acknowledgement that the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values; so my doctrine is what has been called ‘soft positivism’ and not as in Dworkin’s version of it ‘plain-fact’ positivism. Secondly, there is nothing in my book to suggest that the plain-fact criteria provided by the rule of recognition must be solely matters of pedigree; they may instead be substantive constraints on the content of legislation such as the Sixteenth or Nineteenth Amendments to the United States Constitution respecting the establishment of religion or abridgements of the right to vote” (ibid., 250).

13 “Dworkin thinks his theory applies as well to literary/artistic interpretation; indeed, interpretation of social practices is in some respects modelled after what he takes to be literary/artistic interpretation” (Postema 1987, 286 n. 6). In fact, Dworkin goes so far as to say that the act of understanding the speech of another person is itself an act of interpretation: “The most familiar occasion of interpretation—so familiar that we hardly recognize it as such—is conversation. We interpret the sounds or marks another person makes in order to decide what he has said” (Dworkin 1986, 50).
tradition\textsuperscript{14} with his embrace of the idea that in order to understand an object or practice, we have to interpret it.\textsuperscript{15} By “interpretation” Dworkin means imposing a point or purpose on the practice.\textsuperscript{16} Although Dworkin does have an intersubjective element to his account of interpretation, it is only through an individual act of interpretation that the point or purpose of a practice is identified.\textsuperscript{17} As Dworkin (1986, 58) says, each participant in the practice “is trying to discover his own intention in maintaining and participating in that practice [...] in the sense of finding a purposeful account of his behavior he is comfortable in ascribing to himself.”

Late in \textit{Law’s Empire}, Dworkin tells us that Law’s Empire “is defined by attitude, not territory or power or process” (ibid., 413). The attitude is one Dworkin describes as “self-reflective [and] addressed to politics in the broadest sense” (ibid.). Importantly, Dworkin goes on to describe this attitude as “protestant” (ibid.). In finding the point of the practice of law, the interpretive task is “to lay principle over practice to show the best route to a better future, keeping the right faith with the past” (ibid.).

With this summary of Dworkin’s account of the role of interpretation in law before us, let us revisit TD and its place in Dworkin’s general jurisprudence. Participants in legal practice decide what the law is by identifying a principle that puts legal materials (indeed, the practice as a whole) in their best light. The truthmaker for propositions of law is not a case or a statute; rather, it is a moral principle which shows those cases and statutes in their best light. The principle is produced through a three-step process of interpretation,\textsuperscript{18} the last stage of which finds the interpreter identifying a principle she believes puts the law in its best light.

Given the priority Dworkin assigns to TD, it is no wonder that he sees interpretation as a central feature of law and legal practice. But there are reasons why we should question Dworkin’s picture of the practice of law. Despite Dworkin’s claims to the contrary,\textsuperscript{19} his conception of law as an interpretive practice fails to capture the quotidian dimensions of law. Dworkin develops his picture of legal practice by starting with highly contested cases and then trying to build an account of legal practice out of it. The fact of the matter is that most legal questions are not

\textsuperscript{14} There are references to Dilthey, Gadamer, and Habermas throughout \textit{Law’s Empire} (Dworkin 1986).

\textsuperscript{15} The notion that “all understanding is interpretation” is a central feature of much contemporary work in philosophy and the social sciences. An interesting genealogy of the idea is found in Descombes 1991.

\textsuperscript{16} “[C]onstructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong” (Dworkin 1986, 52).

\textsuperscript{17} “If the raw data do not discriminate between these competing interpretations, each interpreter’s choice must reflect his view of which interpretation proposes the most value for the practice—which one shows it in the better light, all things considered” (Dworkin 1986, 52–3).

\textsuperscript{18} For details see Dworkin 1986, 65–8.

\textsuperscript{19} “Law as integrity explains and justifies easy cases as well as hard ones; it also shows why they are easy” (Dworkin 1986, 266).
disputed.\textsuperscript{20} The question is why this is so. The answer has to be found in what participants share in common.\textsuperscript{21}

Take the distinction between hard and easy cases. In hard cases, judges do seem to have disputes that support a prima facie case for TD. But can the same be said for easy cases? Dworkin (1986, 266) sees no difference between easy and hard cases: “easy cases are [...] only special cases of hard ones.” However, as Matthew Kramer (1999, 136) has observed, Dworkin’s recounting of hard cases in the opening pages of \textit{Law’s Empire} “does not in itself go any way toward showing that judges adhere to different sets of criteria when ascertaining the law in easy cases.” What is it that makes an easy case easy? On Dworkin’s account, it is the same thing one finds in hard cases: convergence in interpretive outcomes. Easy cases are easy because interpreters come to the same conclusion through apprehension of the principle that puts the law in its best light. The positivist would say that what makes easy cases easy is the fact that lawyers agree on criteria of legal validity and, in any particular case, there is no question as to how to construe them.

One way to resolve the dispute between Dworkin and positivism is to ask which theory best explains the facts about law. One obvious fact is that within the legal system there is widespread agreement about what the law is.\textsuperscript{22} To explain this, the positivist would point to the fact that almost all legal questions are answered by lawyers reverting to the same cases, statutes, and authorities in giving answers to legal questions. It is, as Hart (2012, 100–1) argued, the practice of officials that is the ground of legal practice. It is the fact of shared technique that explains why most legal questions are undisputed.

As Dworkin sees it, TD can break out at any point.\textsuperscript{23} Given his account of easy cases, this seems to be a direct corollary of his general jurisprudence. If law really were a matter of imposing the best constructive interpretation on an institutional history, one would expect controversy to be a regular feature of legal practice. But it is not. Worse still, Dworkin marries his theory of law as an exercise in interpretation to a realist metaphysics that maintains the existence of objective moral truths.\textsuperscript{24} This just adds complexity and difficulty where a simpler explanation seems more perspicuous.

The merits of Dworkin’s arguments for TD occupying a central place in legal theory depend in no small way on Dworkin’s general conception of legal practice. Claims and arguments oscillate between the empirical and the conceptual.

\textsuperscript{20} See Endicott 2012, 120: “A red traffic light, an income tax, a right to return defective goods under a sales contract—any of these might raise questions of interpretation in particular circumstances, but they need not do so (in fact, they are designed not to do so, and they generally do not do so).”

\textsuperscript{21} Postema (1987, 318–9) identifies this as follows: “[C]onsensus takes the form of a shared discipline and a thick continuity of experience of the common world of the practice.”

\textsuperscript{22} Leiter makes this point in Leiter forthcoming, 4: “Massive agreement about what the law is remains the most striking feature of functioning legal systems [...].”

\textsuperscript{23} It is the sweep of Dworkin’s claim for the ubiquity of interpretation that poses a problem for his theory.

\textsuperscript{24} See Dworkin 2004. This essay is reprinted in Dworkin 2006, 140–86.
Positivists reject Dworkin’s picture of legal practice because, in their view, it fails to fit the facts.

Importantly, Dworkin and the positivists divide not over the question whether some judge or lawyer is “doing law”; rather, their disagreement is over how best to characterize legal practice. This is the nature of legal philosophy. The battle is over which picture of the practice is the most plausible and perspicuous. Let us turn now to the positivist account of law and begin to locate TD within it.

4. Hart’s Positivism: The Basics

The fundamental contours of Hart’s account of law are well known. For purposes of clarity, and to set the stage for later discussion, let us take a moment and rehearse the basic details.

In *The Concept of Law* (Hart 2012), Hart’s account of law focuses on core features of modern legal systems. Hart conceived his account of law to be “descriptive.” What Hart described were the conditions under which a rule could be said to be a legal rule and not a rule of some other sort (e.g., a moral rule). The criteria for legal validity are found in the Rule of Recognition. The Rule of Recognition, Hart argued, is a “social rule” (a customary rule/practice of officials), meaning that the criteria of legal validity are simply a matter of an intersubjective practice among legal officials, which practice certifies the legal status of the work of legislatures, courts, and other officials as “valid” sources of law. In other words, the validity conditions for legal propositions (what Dworkin calls “the grounds of law”) achieve their status solely in virtue of the ongoing willingness of officials in the legal system to recognize them as such.

There are two important aspects of the Rule of Recognition that need to be highlighted in any discussion of the concept. First, the Rule of Recognition identifies valid sources of law. Although the Rule of Recognition tells us what counts as valid sources of law, it is itself neither valid nor invalid. In short, one consults the Rule of Recognition for criteria of validity for what may be called “subordinate” legal rules. As an ultimate rule, the Rule of Recognition rests only on an intersubjective consensus manifested in the ongoing practice of officials.

The second point is more important and more controversial. In addition to identifying sources of law (e.g., statutes and precedents) the Rule of Recognition identifies customary ways of taking those sources and using them to decide cases. But the Rule of Recognition is not a complete guide to adjudication. The Rule identifies what count as valid sources of law and it also contains the conventional ways of construing those sources to decide cases. However, the Rule of Recognition is not an

25 Hart describes *Concept* as an exercise in “descriptive sociology” in the Preface to Hart 2012, v.
26 A. W. B. Simpson (1986, 20) said it best: “[T]he common law system is properly located as a customary system of law in this sense, that it consists of a body of practices observed and ideas received by a caste of lawyers, these ideas being used by them as providing guidance in what is conceived to be the rational determination of disputes litigated before them, or by them on behalf of clients, and in other contexts. These ideas and practices exist only in the sense that they are accepted and acted upon within the legal profession, just as customary practices may be said to exist within a group in the sense that they are observed, accepted as appropriate forms of behaviour, and transmitted both by example and by precept as membership of the group changes.” It is, of course, ironic that such a wonderful description of the actual practice of law is found in a work that purports to shows the shortcomings of legal positivism.
algorithm: In other words, not all disputes in law can be settled merely by consulting the Rule of Recognition.

The Rule of Recognition raises a number of problems, some of them epistemic and some metaphysical (see Marmor 2001 and Dickson 2007). While it is clear that the Rule of Recognition imposes a duty on judges to apply valid legal rules,27 it is not always clear what “correct application” consists in. Any account of the Rule of Recognition has to answer the question of the relationship between the validity-certifying aspect of the Rule and its role in adjudication. The reason for this will now become apparent.

As Hart himself acknowledged,28 Dworkin’s early criticisms of Hart’s positivism were deemed to be “helpful” in that Dworkin drew attention to the important role played by principles in deciding hard cases. In a sentence that was later to prove important in the division of positivism into the Inclusive and Exclusive camps, Dworkin (1978, 40) said that principles found their way into law not by virtue of pedigree but owing to “a sense of appropriateness developed in the profession.” With the acknowledgement that Hart never argued for a strict test of pedigree as the ground of validity, the stage was set for the appropriation of Dworkin’s criticisms by what came to be known as Inclusive Legal Positivists (see Coleman 1982).

When we look at the examples Dworkin provides in Law’s Empire, this reading is not implausible. In Riggs, the disagreement was not over the binding quality of the New York Statute of Wills: Rather, the dispute was over how the rules in that statute were to be applied in the unusual circumstances found in the case. We shall return to this way of looking at Riggs later. For now, it is enough to say that Dworkin clearly rejects this view of his enterprise because he insists that cases like Riggs represent not emendations to existing law but “improved reports of what the law, properly understood, already is” (Dworkin 1986, 6). In making these statements, the judges “claim, in other words, that the new statement is required by a correct perception of the true grounds of law even though this has not been recognized previously” (ibid.).

5. Theoretical Disagreement: What Practice Tells Us

For Dworkin, TD is a central feature of law. Dworkin uses cases like Riggs to make the point that a deep understanding of law and legal practice must begin by explaining the phenomenon of theoretical disagreement and its central role in explicating the very concept of law. A look at the actual practice of law suggests the situation is otherwise.

We cannot truly understand disagreement in law until we understand the phenomenon of agreement, specifically agreement in legal judgments. To put the point more strongly, disagreement can only occur against the background of pervasive disagreement.

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27 For Hart, the “duty” to follow the Rule of Recognition is not a function of morality. Rather, it identifies the perception or attitude (Hart calls it the “internal point of view”) officials take to the Rule of Recognition.

28 See Hart 2012, Postscript, 263. “I certainly think that arguments from such non-conclusive principles are an important feature of adjudication and legal reasoning, and that it should be marked by an appropriate terminology. Much credit is due to Dworkin for having shown and illustrated their importance and their role in legal reasoning, and certainly it was a serious mistake on my part not to have stressed their non-conclusive force.”
agreement in judgment. Thus, Dworkin starts in the wrong place and, as a result, vastly overstates the significance of TD.

I start with the observation that, as Brian Leiter put it, “there is massive and pervasive agreement about the law throughout the system.” Given this sociological fact, how are we to account for it? There are two aspects to this pervasive “agreement in judgment” that require attention. The first is the fact that lawyers, judges, and other institutional officials agree about what is the case as a matter of law. The second issue is the question whether or not they agree for the same reasons.

There is overwhelming sociological, academic, and institutional evidence to support the proposition that in the vast majority of cases, there is little if any question about the state of the law. Of course, when I speak here of “cases” I do not mean to refer to litigated cases, for these account for a miniscule portion of the total number of instances where, on a quotidian basis, lawyers and legal officials answer the question “what is the law on this question?” Anyone making the case for global indeterminacy with respect to law has a massive sociological impediment to sustaining their claim.

Now to the second issue. One of the principal features of Hart’s arguments about the Rule of Recognition is that it supplies a “test for law.” But no test can be adequate if participants are applying different criteria to reach the same result. In other words, agreement in judgment has to be motivated by the same materials for the Rule of Recognition to do the job Hart took it to do.

29 Schauer 1985, 407: “A theory, or at least a set of insights, about easy cases is the necessary first step toward development of a theory for dealing with hard cases.” Postema 1987, 316: “Disagreement, even substantial disagreement, then, has a place in a world of common meanings.”
30 I agree completely with Leiter’s (2009, 1220) remark that Dworkin’s theory exhibits “a curious dialectical structure” by starting with a few hotly disputed cases and using them to illuminate the more quotidian aspects of law.
31 Leiter 2009, 1227; emphasis in original. See also Patterson 1999, 92: “Much of the lawyer’s work involves no sort of ‘interpretation’ or ‘theory’ whatsoever.”
32 See Wittgenstein 2010, § 242: “If language is to be a means of communication there must be agreement not only in definitions but also (queer as this may sound) in judgements. This seems to abolish all logic, but does not do so.—It is one thing to describe methods of measurement, and another to obtain and state results of measurement. But what we call ‘measuring’ is partly determined by a certain constancy in results of measurement.”
33 One objection to this argument (for example Toh 2013; Levenbook 2015; Duarte d’Almeida 2016) is that this argument turns on “number counting” and, thus, cannot be right. This is a mistake. Intersubjective agreement turns on more than just numbers. Again, Postema (1987, 318–9) states what is at stake: “Conflict always presupposes consensus, but the consensus, on this view, does not take the form of agreement on a discrete set of formal, constitutive rules, nor on the behavioral ‘data’ of the practice. Instead, consensus takes the form of a shared discipline and a thick continuity of experience of the common world of the practice. This consensus does not obviate the need for interpretations, nor does it guarantee univocality of the interpretations. But it does decisively shape the spirit in which interpretations are constructed and debated. Controversy, then, is possible, even at what we might call the ‘constitutional’ level of the practice, without jeopardizing the practice as a whole (and it may even be healthy for it). It is possible because there is a deeper and broader continuity of experience and discipline. Where this continuity is threatened or weakened, there the practice itself is threatened.”
Observation of the ordinary work of lawyers shows a practice suffused by a thick web of mutual intelligibility. To take just one example, contract interpretation starts with the text. The ordinary meaning of terms is given prima facie authority. Similarly, statutes are consulted for all manner of rules from conveyancing to tax and regulatory matters. Even the US Constitution, about which there is so much controversy, enjoys a deep and hermeneutically available structure.

6. Interpretation

While a Rule of Recognition may identify valid sources of law, that is insufficient to decide all disputed cases. In addition to identifying valid sources of law, lawyers

34 This is the central insight in Postema 1987, 318–9.

35 See Schauer 1985, 403–4: “Once we recognize the ways in which many rarely litigated constitutional provisions have a profound effect on the nature and direction of American public life, excluding those provisions from the attention of the constitutional theorist is counterintuitive. It is not simply a matter of dividing the universe of constitutional theory between the lawyers and the political scientists. The structural provisions of the Constitution, including and perhaps especially those that never see the judicial system, represent a critical source of the public’s attitude towards this Constitution and towards constitutionalism in general. This attitude, in turn, is an ever-present consideration in the kinds of issues and disputes with which constitutional lawyers, qua lawyers, deal. Controversies about congressional control of Supreme Court jurisdiction, the virtues or vices of selective avoidance of decision, and even the design of more particular substantive doctrines constantly take account of the ways in which the judiciary is poised with or against the body politic, and with or against the other branches of government. Constitutional adjudication exists within a framework held together by acceptance of the Constitution as this nation’s constitutive and governing instrument. The existence of this acceptance, as well as the location and seriousness of the cracks in its welds, is a product of the nonlitigated portions of the document as much as, if not more than, the litigated. Constitutional adjudication is intimately and frequently concerned with those general attitudes about the Constitution that are by no means necessarily produced by or peculiar to adjudication, however, because preserving and operating within this framework is in part the responsibility of the courts. Unlitigated portions of the Constitution remain important influences in many ways on the process of adjudication, and drawing an artificial line between the litigated and the settled clauses for the purpose of selecting the respective turfs of the law schools and the political science departments neglects a major factor in constitutional adjudication” (notes omitted).

I will suggest infra that notwithstanding the embedded character of many legal doctrines, it is always possible in theory that the need for interpretation (even of very familiar law) is always, in principle, possible.

36 Leiter forthcoming mentions this issue but fails to provide an answer that would further the positivist position: “Tim Macklem presses on me a different kind of positivist response: namely, that a RR identifies the sources of law, but does not adjudicate among all the ways of interpreting them. Here I agree, I take it, with Dworkin (as well as Shapiro): namely, that this austere conception of the RR would be inadequate to discharge the functions of an RR as Hart originally conceived them, namely, eliminating some (if not all) uncertainty about the valid legal norms are in a particular system. I thus agree (infrequent as that may be) with Dworkin that saying the duly enacted statute is a source of law is not enough for a RR that resolves uncertainty: it is necessary that the RR provide guidance as to what norms the statute enacts as legally valid. This, of course, can be done by content-neutral criteria: e.g., the intent of the legislature, the plain meaning of the text, and so on. And, indeed, these content-neutral criteria can come in hierarchical orderings, such that some sources trump others. But a RR that did not resolve some number of TDs would not, in fact, be adequate to support a functioning legal system.”
and judges must know how to construe those sources in deciding what is true as a matter of law. Hart (just like his followers) never addressed this issue and it is the missing element in a complete positivist account of law. This is not simply a matter of completing the positivist account of law. Once we understand how interpretation in law works, the problem of TD will simply fade away.37

The need for interpretation is actuated by facts. In _Riggs_, the actuating fact was the murder of the testator by his grandson. But why is this fact an actuating event? Not only does the majority opinion show why the murder actuates the need for interpretation, the opinion shows how the state of the law explains the legal (that is, interpretive) significance of the murder. In other words, we need to explain how understanding (that is, the unreflective act of probating the will in the normal course of things) broke down as the court tried to come to terms with the significance of the murder as the event that precipitated the need for interpretation.

The majority opinion in _Riggs_ is a sophisticated doctrinal argument. As Dworkin (1986, 20) taught us, the opinion makes reference to the common law maxim “no man shall profit from his own wrong.” But there is more to the opinion than mere recitation of an equitable maxim. When we look at the ways in which Judge Earl showed the true state of the law, we see why the facts themselves make it clear that a straightforward reading of the requisite statute was all but impossible.

The majority opinion begins in classic fashion with the distinction between law and equity. The distinction is embraced in full measure by the common law systems of both the United States and England and can be traced back to the writings of Aristotle. The sheer breadth and diversity of classic writers on the role of equity within all departments of law should cause an educated legal mind to experience a sense of unease when confronted with the facts in _Riggs._

Having shown how the “no man shall profit from his own wrong” principle is a constitutive feature of law in the most general way (that is, the law and equity distinction), Judge Earl then demonstrated the reach of the principle throughout varied departments of law. Citing cases from the law of wills and insurance, Earl made a strong case for the proposition that precedents both directly on point (that is, the law of wills), as well as those from related departments of law, support an exception to the ordinary meaning of the words of the statute. That is, Earl made a doctrinal argument to the effect that the words of a valid legislative enactment (here, the Statute of Wills) are to be given their normal force and effect unless there is some exception demonstrated by the facts. In short, Judge Earl did not change the law: He clarified it (by pointing to an underlying and well-established legal principle).

By contrast, Judge Gray, in dissent, argued for a straightforward reading of the words of the statute. Claiming that the court was “bound by the rigid rules of law,”38 Gray argued that Elmer is being twice punished for his offense. In a clever rebuttal to Judge Gray, the majority pointed out that he begged the question of whether Elmer was entitled to receive his victim’s property under the will. The point was that the

37 Although it borders on speculation, one plausible explanation for the staying power of the debate over TD is the fact that positivists have simply failed to mount a credible account of legal interpretation. One unfamiliar with the jurisprudential literature may find this claim implausible but it is, in fact, the case. Timothy Macklem (see n. 37) makes just this point. Positivism must have some account of how to adjudicate among conflicting interpretations. Without such an account, TD will remain a viable account of interpretive disputes.

38 _Riggs v. Palmer_ [191] (Gray, J., dissenting).
very question before the court was whether the property rightfully belonged to Elmer or not. Judge Gray did not seem to notice his error.

What does Riggs teach us about interpretation in law? First, it is clear that without the complicating factor of the murder of the testator, the text of the New York Statute of Wills is decisive (i.e., it is an easy case). Without the murder of the testator, it is true as a matter of law that Elmer was entitled to receive his grandfather’s property according to the dictates of the New York Statute of Wills. It is only when the complication of the murder is added to the facts that lawyers dispute the true state of the law.

How did Judge Earl persuade enough of his colleagues to see the law as he did? Three factors suggest themselves. First, the majority opinion did no damage to the existing state of the law. I will call this interpretive norm “minimal mutilation.”39 In other words, deciding against Elmer did not put in question the efficacy of any other element of the New York Statute of Wills. Second, through its decision, the majority demonstrated that its conclusion was consistent with everything else it knew to be true about the law of wills. I shall refer to this as coherence.40 Finally, the opinion shows how a decision against Elmer comports with similar decisions in other departments of law. I shall refer to this aspect as generality.41 Taken together, minimal mutilation, coherence, and generality are the three aspects of the majority’s opinion that support the notion that its interpretation of the law is more persuasive than that offered by the dissenting opinion.42

What do we learn about legal interpretation from the Riggs case? The first thing we learn is that there is more to the positivist approach to interpretation in law than Leiter allows. Leiter’s contention was that if there was no convergence in how valid sources of law are to be construed in a particular case, then there is no fact of the matter about the truth of the proposition in question.43 Before we reach this conclusion, more work is needed.

Legal judgment proceeds from the intersubjective application of the same methods of appraisal across time, in various contexts, and with identical outcomes. Agreement in judgment is both the central fact of legal practice and the most 39 See Ullian and Quine, 66–7 (discussing the virtue of conservatism). See also Harman and Thomson 1996, 12: “It is rational to make the least change in one’s view that is necessary in order to obtain greater coherence in what one believes” (citations omitted). Cf. Hart and Sacks 1994, 140 (discussing reasoned elaboration).
40 The idea of coherence is apt. See Condren 2014, 148: “[A]t its most general level, coherence refers to the ways in which parts are interconnected to form a whole; and at a similar level of generality, the appraisive category of coherence is an abridgment of the range of questions one asks of a text in terms of its parts and the closeness of their interrelationships.” While Dworkin maintains that coherence is a central feature of his theory of law, there is reason to doubt this. See Raz 1995.
41 Ullian and Quine 1978, 73: “The wider the range of application of a hypothesis, the more general it is.”
42 While I acknowledge that more work needs to be done, I do believe the Riggs opinion is sufficient to identify the basic contours of a positivist account of interpretation. Minimal mutilation, coherence, and generality are three interpretative norms one finds in virtually every account of legal interpretation. These three norms will find diverse expression in different departments of law. But all three will be present and are a quotidian feature of law.
43 Leiter forthcoming, 2: “Let us now suppose that officials in the New York legal system at the time of Riggs did not converge upon either the counterfactual intention theory of statutory meaning or the plain meaning theory. It follows, then, on the positivist view, that there is no fact of the matter about which criterion of legal validity is correct.”
important social fact that any account of law must explain. Positivists have focused on valid sources of law and have concluded, rightly, that validity is a function of intersubjective agreement. The constitution is law because everyone regards it as such. Validity is best explained as a psychosocial phenomenon. This might be what Hart meant when he described Concept as a work in “descriptive sociology” (Hart, 2012, Preface, v).

Quite frankly, Hart and his followers have not gone far enough in identifying the validity conditions for methods of legal interpretation. But just as we do with sources of law, so too is it possible to identify the ways in which valid sources of law are construed in making legal judgments.

One might object that there are no facts about legal interpretation that could motivate a claim to validity. Riggs illustrates why this claim is false. Judge Gray was alone in dissent: His decision attracted no support, while the majority opinion got the votes. What explains this? And what can we learn from the explanation? There has to be a reason why the majority opinion was so persuasive to the other members of the New York Court of Appeals. The best explanation for this is that there are features of the majority opinion which attracted the assent of the vast majority of the court. My contention is that once those factors are identified, it becomes clear that there is intersubjective agreement on matters of interpretation just as there is when it comes to valid sources of law. These interpretive methods are just as much a part of the Rule of Recognition as valid sources of law. A complete positivist account of law needs to explain both valid sources of law and valid methods for their construal. Not only is this possible, it is essential.

From what I have said about interpretation from the positivist point of view, one might infer that on this account, some parts of law are never open for interpretation and may be deemed to be permanently “settled.” I want to dispel this notion. The vast majority of (potential and actual) legal questions are readily answerable. It is only against a settled background of law that questions of interpretation arise. But our settled expectations are always capable of being unsettled if the facts and circumstances upon which our understanding is based changes. In short, nothing in law is ever permanently “beyond interpretation.”

It is always possible to call into question our settled understanding of any particular legal doctrine. The history of law is littered with doctrines and rules that were once seen as permanent features of the legal landscape. We can acknowledge the role of interpretation in legal practice without making it fundamental in the way Dworkin does. When it comes to interpretation, our aim is not to minimize or exaggerate it but to find its proper place in our account of legal practice. As I have argued, Hart’s positivism—duly supplemented—does a better job of this than does Dworkin’s jurisprudence. Dworkin was right to draw our attention to the

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44 One could argue that the consensus was “ideological” in some sense but one should draw that conclusion only after finding a simpler explanation implausible.

45 Here, again, Tully is instructive: “It is important not to infer [...] that there must be a stock of conventional uses that are permanently beyond interpretative dispute” (Tully 2003, 39).

46 Wittgenstein (1972, sec. 204, p. 28e) made the general point: “Giving grounds, however, justifying the evidence, comes to an end;—but the end is not certain propositions’ striking us immediately as true, i.e. it is not a kind of seeing on our part; it is our acting which lies at the bottom of the language-game.”
importance of interpretation in law. It falls to us to take his insight and find interpretation’s proper place in law.

7. Conclusion

The great American logician and philosopher Willard Van Orman Quine said the following about beliefs and persuasion: “We convince someone of something by appealing to beliefs he already holds and by combining these to induce further beliefs in him, step by step, until the belief we wanted finally to inculcate in him is inculcated” (Ullian and Quine 1978, 77). This could easily be a description of what happens when lawyers interpret the law. It is a sound basis from which to build a positivist account of interpretation in law.

Of course, there are disagreements in law and we need an account of how interpretive disagreements are resolved if there is to be a convincing alternative to Dworkin’s arguments for TD. In this article, I have made the case that such an account is available to positivism and that we see it on display in cases like *Riggs*. While I have identified the basic contours of such an account, much work remains. This article shows that such work can be done in a manner that is faithful to and grounded in Hart’s account of the nature of law.

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