

# The Logical Structure of Legal Disagreements

Giovanni Battista Ratti  
[giovanni.ratti@udg.edu](mailto:giovanni.ratti@udg.edu)

Government of Spain “Juan de la Cierva” Fellow  
at the Faculty of Law of the University of Girona

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## 1. Introduction

In recent times, Ronald Dworkin’s attack on legal positivism has been the object of theoretical and historical reconsideration, directed to reassess the scope and importance of its main tenets.<sup>1</sup>

Brian Leiter,<sup>2</sup> for instance, has maintained that Dworkin’s criticisms to legal positivism have been substantially met, so that, qua jurists, we should make use of Virgil’s famous suggestion to Dante: «let us not talk of them, but look and pass».<sup>3</sup> In other words, everybody interested in jurisprudence should know those criticisms but regard them as the central features of a past and already over debate.

Scott Shapiro,<sup>4</sup> in turn, has defended the view that Leiter is substantially right when commenting on the “first act” of the Hart-Dworkin debate, which is focused on the theses Dworkin propounds in “The Model of Rules I”, but he’s wrong for omitting consideration of the second act of the saga, lurking in “The Model of Rules II” and taking full shape in *Law’s Empire*.<sup>5</sup> In this second act, one can appreciate a significant change of focus in Dworkin’s critique: «whereas the first critique seeks to exploit the alleged fact that judges often take the grounds of law to be moral in nature, the second critique tries to capitalize on the alleged fact that judges often disagree with one another about what the grounds of law are».<sup>6</sup> The first critique, as is known, is aimed at attacking legal positivism by emphasizing the fact that judges often use moral principles in

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<sup>1</sup> In continental analytical jurisprudence, one can see volume 21 of the journal “*Ragion pratica*”, devoted to Hart’s Postscript and the subsequent debate.

<sup>2</sup> Brian Leiter “Beyond the Hart-Dworkin Debate: The Methodology Problem in Jurisprudence”, in Brian Leiter, *Naturalizing Jurisprudence. Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: Oxford University Press, 2007), initially published in (2003) 48 *The American Journal of Jurisprudence*.

<sup>3</sup> Dante – *Inferno*, III, 51 (A. Mandelbaum translation).

<sup>4</sup> Scott Shapiro “The Hart-Dworkin Debate: A Short Guide for the Perplexed”, in A. Ripstein, ed, *Ronald Dworkin* (Cambridge, UK: Cambridge University Press, 2007).

<sup>5</sup> See Ronald Dworkin, *Taking Rights Seriously* (London, Duckworth: 1977), chapters 2 and 3, and Id., *Law’s Empire* (London: Fontana, 1986). For a critical review of Shapiro’s thesis, see Matthew H. Kramer, “Review of A. Ripstein (ed.), Ronald Dworkin” (2008) *Notre Dame Philosophical Review*, <http://nd.edu/review.cfm?id=12125>, last modified: 21/05/2008.

<sup>6</sup> Shapiro, *supra* note 4 at 41.

deciding legal cases because they feel legally bound to do so. According to both Shapiro<sup>7</sup> and Leiter,<sup>8</sup> the main post-dworkinian Anglo-American schismatic schools of legal positivism (the inclusive and the exclusive) have satisfactorily accounted for such a problem: the former by loosening up the constraints on the criteria of legality (i.e. by rejecting the pedigree thesis) and stressing the conventionality of such criteria, the latter by upholding the pedigree thesis and introducing the distinction between valid and applicable legal standards to explain judges' references to moral norms.<sup>9</sup>

The next move by Dworkin, thus, has been attacking positivism where it seemed to be undefended: by putting disagreements at the center of the stage, whereas Hartian positivism seeks to explain law in terms of agreement or conventionality. Indeed, if we assume, as Dworkin does, that legal positivism is a plain-fact conception, which simply regards the law as a set of institutional sources based on agreement, the circumstance of frequent disagreements among officials and especially judges is absolutely inaccessible by means of a positivistic account.

In this paper, I want to argue that the arguments Shapiro and Leiter deploy to meet Dworkin's second critique are not completely successful. And this is partially due to the fact that their reconstruction of disagreements, owing much to Dworkin's own original reconstruction, is unsatisfactory. For this reason, I will, first of all, propound a refinement in the taxonomy of legal disagreements. I will do so by assuming a skeptical view on legal interpretation (much indebted to Kelsen, Alf Ross, and Guastini). Secondly, I will put forward two other ways of looking at legal disagreements. This will show that, when a good deal of linguistic and logical therapy is carried out, the problem of theoretical disagreements in law, as Dworkin understands it, simply dissolves and, by no means, constitutes a threat for legal positivism (at least as understood from the perspective of the Continental analytical jurisprudence tradition propounded, among others, by Hans Kelsen, Alf Ross, Eugenio Bulygin, and Norberto Bobbio). However, I will also argue, contrary to Leiter's view, that some kinds of disagreement are indeed relevant features of modern law, which must be accommodated into a complete positivistic theory of law.

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<sup>7</sup> Shapiro, *supra* note 4 at 31-34.

<sup>8</sup> Leiter, *supra* note 2 at 162.

<sup>9</sup> As Jorge Rodríguez, "En torno a las condiciones de verdad de los enunciados jurídicos", prologue to G. Súcar, *Concepciones del derecho y de la verdad jurídica* (Madrid: Marcial Pons, 2008) at 18 points out, according to some accounts of exclusive legal positivism (e.g. Andrei Marmor, *Positive Law and Objective Values*, Oxford: Oxford University Press, 2001, at 57-58), a legal norm exists only when there is a convention to that effect. According to this reading, all legal norms (and not only the rule of recognition) are based on convention or agreement.

## 2. *What are Theoretical Disagreements About?*

As is known, Dworkin uses two dichotomies in order to attack legal positivism on the topic of legal disagreements.<sup>10</sup>

The first dichotomy is the grounds of law/ propositions of law distinction. The latter are propositions bearing upon the existence of a norm in a certain legal system. The former are the stuff that makes propositions of law true. What the grounds of law are deemed to be manifestly depends on each one's theory of law. Indeed, one of the main jurisprudential questions is whether moral facts may or must figure among the truth conditions of propositions of law.

The second dichotomy deals with the nature of possible disagreements about law. A first kind of disagreement (which Dworkin dubs "empirical") consists in controversy about whether the grounds of law have in fact obtained (e.g. if a bill was passed by the requisite majorities). A second kind of disagreement (which Dworkin names "theoretical") consists in controversy about what the grounds of law are. We would face a theoretical disagreement whenever, for instance, we are in a situation where different subjects disagree about whether social normative standards (constitutions, statutes, judicial decisions, etc.) do exhaust the pertinent grounds of law, or not.

As Shapiro convincingly puts it, one of the main theses held by Dworkin in *Law's Empire* is the following: «the plain-fact view cannot countenance the possibility of theoretical legal disagreements. For if [...] legal participants must always agree on the grounds of law, then it follows that they cannot disagree about the grounds of law. Any genuine disagreement about the law must involve conflicting claims about the existence or nonexistence of plain historical facts. They must, in other words, be purely empirical disagreements».<sup>11</sup>

However, both positivists and Dworkinians seem to agree, to a certain extent, that there are things that virtually everybody takes to count as grounds of law and things that virtually nobody takes to be grounds of law. «The "theoretical disagreements" to which Dworkin calls attention – Leiter argues – neither deny that statutes and judicial decisions are grounds of law, nor claim that judges must turn to sacred texts or economic journals to figure out what law is».<sup>12</sup>

But if what precedes is correct, we manifestly need two different concepts of "grounds of law" to appear in the previous arguments, to which two different concepts of seemingly theoretical disagreements correspond. For if everybody agreed on a unique concept of "ground of law" no theoretical reconstruction of the dispute between positivism and anti-positivism would be possible in terms of disagreements about the grounds of law. Both conceptions would in fact agree that authoritative normative texts are indeed *the* grounds of law, and there would

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<sup>10</sup> Dworkin, *Law's Empire*, supra note 5 at 3-6.

<sup>11</sup> Shapiro, supra note 4 at 37.

<sup>12</sup> Brian Leiter "Explaining Theoretical Disagreements", in (2007) 124 *The University of Texas School of Law, Public Law and Legal Theory Research Paper*, at 1.

be no further space for debate. For the debate to be intelligible, we must then distinguish two meanings of the expression at hand.

The expression “grounds of law” denotes, in a first sense, the possible sources of law (i.e. constitutions, statutes, judicial decisions, natural law principles, etc.), whereas in a second sense it denotes the *meaning* of these sources of law. Of course, we may disagree about what are the sources of law, or about what is their meaning. Sometimes, Dworkin seems to refer to the disagreements of the first kind, which can be regarded as the genuine theoretical disagreements: for instance, an institutional theory can identify the constitution and statutes as the *only* sources of law, whereas a more imaginative theory can allow moral norms to count as such sources. In any case, we know that such norm-formulations are sources of law according to this or that theory even before we know what their content is.

When dealing with judicial cases which supposedly exemplify theoretical disagreement, however, Dworkin seems to refer to disagreements about the meaning which is to be assigned to the sources of law: «the dispute about Elmer was not about whether judges should follow the law or adjust it in the interest of justice. [...] It was a dispute about what the law was, about what the real statute the legislator enacted really said».<sup>13</sup>

This ambiguity, generated by Dworkin, is not absent in the papers by Leiter and Shapiro. While at the very beginning, Leiter says that «the key theoretical disagreements for Dworkin concern the meaning of the acknowledged sources of law»,<sup>14</sup> later on he states that «a theoretical disagreement is a disagreement about the criteria of legal validity, that is, about the content of what Hart calls the Rule of Recognition»,<sup>15</sup> that is about what sources count as valid law. Pretty much analogously, Shapiro at some point affirms that theoretical disagreements occur

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<sup>13</sup> Dworkin, *Law's Empire*, *supra* note 5 at 20. Obviously, the notion of “interpretation” employed by Dworkin is much wider than the mere attribution of meaning to an authoritative text, and may encompass a broad range of “objects”, such as practices, concepts, works of art, inferences, etc. However, the examples Dworkin uses to deal with theoretical disagreements within the legal domain may easily be reconstructed as cases of disagreements about the ascription of meaning to some norm-formulations (be it a lawgiver-made or judge-made norm-formulation). *Elmer's Case* and the *Snail Darter Case* can be easily reconstructed as cases of this sort, as will become clearer in what follows (see Leiter, *supra* note 12 at 3). But also *McLoughlin* and *Brown*, which are based on precedent, seem to fit comfortably with the explanation provided in the text. *McLoughlin* rests upon a disagreement on how to interpret the (implicit) general (judge-originated) rule-formulation according to which “judges ought to follow earlier decisions of certain other courts”. The defenders of the strict version of the doctrine of precedent construe it as an indefeasible rule (“judges are obliged to follow the precedents of certain other courts, even if they believe those decisions to have been wrong”). Those who hold the so-called “relaxed doctrine of precedent” read this rule as a defeasible rule, according to which “judges are obliged to follow the precedents of certain other courts, unless they think them sufficiently wrong to outweigh the initial presumption in their favor”. In turn, *Brown* can be seen as a case of interpretive disagreement about the fourteenth amendment of the US Constitution (i.e. a normative text), which famously provides that no state might deny any person “the equal protection of the laws”.

<sup>14</sup> Leiter, *supra* note 12 at 1.

<sup>15</sup> *Ibid.*, at 3.

when legal participants all agree about the sources of law but «dispute their legal significance»,<sup>16</sup> whereas at some other point he holds that this kind of disagreements «involves conflicting claims about what the grounds of law are».<sup>17</sup>

For the sake of clarity, we should thus redefine “theoretical disagreements in a proper sense” those that stem from the competing theories which judges (and jurists at large) employ when dealing with the identification of the sources of law. By “source of law” I mean here any *norm-formulation* (that is any ought sentence), which may be used by judges to justify their decision.<sup>18</sup> In this sense, not only authoritative texts are legal sources. Also implied or implicit norms may be legal sources. But if they count as such, it is because a legally competent organ formulates them in what is considered their canonical form. This definition allows considering as legal sources such different “objects” as authoritative texts, moral principles, customary norms, and judicial precedents.

We should rather call “interpretive disagreements” those divergences that bear upon the validity, the ordering or the use of different canons of interpretation, which must be used in attributing a meaning-content to the different legal sources. Within “interpretive disagreements”, we can further distinguish between disagreements about the validity of different canons of interpretations (“validation interpretive disagreements”) and disagreements about the best way to interpret a determinate source of law, i.e. about which canon should be used in a certain class of cases (“selection interpretive disagreements”).

Of course, there may be links between theoretical and interpretive disagreements. Judges, for instance, may hold a theory of morality as a legal source that requires choosing certain canons of interpretation as the morally privileged ones (e.g. an economic analysis oriented morality, triggered by some normative provisions, may deem the consequentialist canon as the privileged one). However, this is absolutely contingent. For a disagreement at the level of the theory of the sources of law by no means necessarily implies a disagreement about what’s the meaning of these sources.

Possibly the confusion stems from the fact that both kinds of disagreements, in some sense, can be said to be theoretical. One may hold a certain theory of the sources of law, just as one may have a certain theory of interpretation. In any case, it is important to stress that a theory about the sources of law is a logical presupposition of a theory of legal interpretation. One cannot interpret something, which has not been identified yet as a legal source. Disagreements about what are the sources of law appear to be on a higher conceptual level than disagreements about how to interpret such sources. In other words, disagreements about sources are indeed pre-interpretive, whereas disagreements about interpretation are, as the expression suggests, interpretive. Obviously, disagreements on the character of source of a certain kind of norms may be due

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<sup>16</sup> Shapiro, *supra* note 4 at 37.

<sup>17</sup> *Ibid.*, at 36.

<sup>18</sup> This amounts to *partially* rearticulating Alf Ross’s concept of a legal source. Cf. Alf Ross, *On Law and Justice* (London: Stevens & Sons, 1958) at 77: «‘Sources of law’, then, are understood to mean the aggregate of factors which exercise influence on the judge’s formulation of the rule on which he bases his decision».

to an interpretive disagreement about the correct interpretation of a legal provision dealing with legal sources. But this is, not less obviously, contingent. More importantly, it already implies a certain theory of legal sources: i.e. what counts as a legal source depends, exclusively, on what is provided by authoritative texts (whose interpretation may well be controversial).

### 3. *One More (Short) Visit to Riggs and TVA*

The examples that Dworkin uses to illustrate theoretical disagreements are the very well known US judicial cases *Riggs v. Palmer* (for short: *Riggs*), and *Tennessee Valley Authority v. Hill* (for short: *TVA*).<sup>19</sup> In the former case, the question was whether Elmer, who had murdered his grandfather, could inherit under the valid will in which the old man declared Elmer heir of his rights and goods. The majority held that Elmer was not entitled to inherit, although a *prima facie* reading of the New York Statute of Wills would have suggested otherwise. In the latter case, the question was whether, under the Endangered Species Act, a hundred million dollars dam should be halted for threatening the habitat of the snail darter, a small fish of no particular esthetical or biological interest. The majority held that the construction of the dam had to stop, although a teleological reading of the relevant statute would have suggested otherwise. Both cases may and have been reconstructed in several ways.<sup>20</sup>

Both Shapiro and Leiter agree that Dworkin, through time, has read these cases in different ways in order to justify different theses.

Leiter's analysis is particularly instructive and illuminating.<sup>21</sup> It shows with the utmost clarity how Dworkin manipulates the explanation of *Riggs* in order to defend his changing theses. In "The Model of Rules I" the stress was on the Savignyan-flavored argument that some principles are legally valid because they originate naturally in a certain society. In *Law's Empire* things have changed, and the stress was put on the different interpretive canons privileged by Judge Earl and Judge Gray respectively. This reading of disagreements was corroborated by reference to *TVA*, and the canons picked up by Chief Justice Burger and Justice Powell.

Now, contrary to what both Shapiro<sup>22</sup> and Leiter maintain, it seems that theoretical disagreements in a proper sense are those of the "early" Dworkin, not those of the "later" one<sup>23</sup>. In "The Model of Rules I", virtually all the cases, which are mentioned, seem to point to the fact that judges indeed disagree about

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<sup>19</sup> *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889); *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

<sup>20</sup> For a reconstruction of *Riggs* that makes use of normative relevance of properties as the key feature of disagreement, see Giovanni B. Ratti, "Dos modelos de relevancia normativa", in J.J. Moreso, M.C. Redondo, eds, *Un dialogo con la teoría del derecho de Eugenio Bulygin* (Madrid: Marcial Pons, 2006).

<sup>21</sup> See Leiter, *supra* note 12 at 7-10.

<sup>22</sup> Shapiro, *supra* note 4 at 41.

<sup>23</sup> Cf. Kramer, *supra* note 5.

the best theory of legal sources. Judges Earl and Gray agree on the validity of the New York Statute of Wills, but they diverge on the validity of the “No man may profit from his own wrong” principle. Judge Earl admits it as a principle of “natural law”, whereas Judge Gray advocates for an institutional theory of legal sources that rejects it. In *Law’s Empire*, this is not the explanation: they agree on the sources, but they hold different views as to interpret them. So that it is misleading to affirm, as Shapiro does,<sup>24</sup> that positivists cannot explain disagreements such as the one in *TVA* because they hold that the grounds of law are fixed by agreement. Here “grounds of law” means “meaning of the sources of law”. The judges, however, agree on what counts as a source of law: they are just having an interpretive disagreement about how to interpret them, not a theoretical one about which sources should count as legal sources (e.g. whether natural law norms should be regarded as valid law or not).

The very narrative of the *Snail Darter Case* justifies this reading. In all evidence, Chief Justice Burger and Justice Powell do not impugn the validity of the *Endangered Species Act*: nothing can be found in their opinion against this statement and much can be found in its favor. The opinion of both judges is very much focused on interpreting section 7 of the *Endangered Species Act*, whose invalidity is never claimed. Better said, the invalidity of such a section is not even taken into consideration.

However, both judges manifestly disagree about what is the interpretation such a statute requires.<sup>25</sup>

As Dworkin points out, «Burger said that the acontextual meaning of the text should be enforced, no matter how odd or absurd the consequences, unless the court discovered strong evidence that Congress actually intended the opposite».<sup>26</sup> In other words, Chief Justice Burger held the view that statutes are to be interpreted literally, unless such interpretation brings about a result, which was *manifestly* not intended by the legislature. Absurdity or normality of the result of an interpreting activity is not at stake in Burger’s opinion: the only thing that counts is the legislature’s intention. If the literal or acontextual meaning fits with it, there is no problem. But if it clearly does not fit, the interpretation of the statute should vary accordingly.

On the contrary, Justice Powell affirmed that it was not the Supreme Court’s business to rectify policy or political judgments made by the Congress, but held that, when absurd consequences follow from a certain interpretation, it is «a duty of this Court to adopt a permissible construction that accords with some

<sup>24</sup> Shapiro, *supra* note 4 at 41.

<sup>25</sup> Leiter, *supra* note 12, at 9 holds a different view: «it seems far more plausible to construe Burger and Powell as having an empirical disagreement about a criterion of legal validity they *both* accept, namely, that the intention of Congress controls the interpretation of the statute. The dispute concerns the intention of the Congress, and *not* the criterion of legal validity». However, it does not seem that Burger and Powell disagree empirically about the intentions of the lawgiver, they primarily disagree about what is the meaning to attribute to the statute dealing with endangered species. Perhaps, we could also hold that both judges disagree on the lawgiver’s intentions one may deduce from the provisions of the statute: but this would be an interpretive problem, more than an empirical one.

<sup>26</sup> Dworkin, *Law’s Empire*, *supra* nota 5 at 23.

modicum of common sense and the public weal». <sup>27</sup> Put somewhat differently, Justice Powell justified his opinion by holding the interpretive canon according to which the courts should accept an absurd result only when statutory language is clear and there is compelling evidence that it was intended. <sup>28</sup> Here, absurdity or normality is the key-vault of meaning-ascription. The general canon of interpretation is that a literal or acontextual meaning may be accepted only if it does not bring about absurd results. The exception is constituted by legislature's clear intention of bringing about the absurd result: only in this case literal meaning resulting in absurd consequences ought to be enforced.

That the dispute is eminently interpretive (and not properly theoretical, i.e. about sources' validity) is proved by some of Chief Justice Burger's remarks, which criticize Justice Powell for ascribing a meaning to section 7, without justifying his interpretation. «No explanation is given – Burger CJ argues – to support the proffered interpretation. This recalls Lewis Carroll's classic advice on the construction of language: 'When I use a word' – Humpty-Dumpty said, in rather a scornful tone – 'it means just what I choose it to mean, neither more nor less'» <sup>29</sup>. Chief Justice Burger clearly holds that «[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in 7 of the Endangered Species Act» <sup>30</sup>. Justice Powell, on the other hand, no less clearly holds that «In my view, [section] 7 cannot reasonably be interpreted as applying to a project that is completed or substantially completed when its threat to an endangered species is discovered. Nor can I believe that Congress could have intended this Act to produce the "absurd result" [...] of this case. If it were clear from the language of the Act and its legislative history that Congress intended to authorize this result, this Court would be compelled to enforce it» <sup>31</sup>. Observe that both judges do not seem to disagree on the fact that statutes are to be construed literally. They disagree, to a great extent, on the literal meaning of section 7 of the Endangered Species Act (and also on legislature's intentions which may be derived from it).

Shapiro's contention that *Henningsen* and *TVA* are hard cases for different reasons is also to rebut. Shapiro argues that «though both *Henningsen* and *TVA* are hard cases, they are hard for different reasons. *Henningsen* is hard because, although the court agreed on the grounds of law, figuring out whether those grounds obtain in the particular case is a demanding question that reasonable people may disagree about. *TVA* is hard because to determine the correct outcome of the case, the court had to first resolve what the grounds of law are, and reasonable people can disagree about that question as well» <sup>32</sup>.

There are at least two remarks that can be put forward against this view.

First: *Henningsen*, at least in Dworkin's presentation, was *not* a hard case. The court was pretty steadfast in identifying a Savignyan-flavored set of

<sup>27</sup> *TVA*, *supra* note 19 at 196.

<sup>28</sup> Dworkin, *Law's Empire*, *supra* nota 5 at 23.

<sup>29</sup> *TVA*, *supra* note 19 at 173, note 18.

<sup>30</sup> *TVA*, *supra* note 19 at 173.

<sup>31</sup> *TVA*, *supra* note 19 at 196.

<sup>32</sup> Shapiro, *supra* note 4 at 41.

“historical” principles that evidently fitted the facts of the case at hand. However, as Dworkin suggests by making reference to the fact that the plaintiff «was not able to point to any statute, or to any established rule of law, that prevented the manufacturer from standing on the contract»,<sup>33</sup> this position can be opposed by an “institutional theory” stance, according to which only explicitly stated provisions can be sources of law.<sup>34</sup> The potential disagreement (which did not materialize in the actual case) is about the sources that are to be admitted as legal sources. It is, in short, a theoretical disagreement.

Second: *TVA*, in turn, was not a case of dissenting about whether these kinds of Savignyan-flavored “historical” principles are deemed to be law. Again, judges agreed that the Endangered Species Act was the statute that controlled the case. Accordingly, no disagreement existed as to the sources to be regarded as legal. However, there was a disagreement about the meaning to attribute to this statute: hence, it was an interpretive dispute.

I hold the view that at least two other explanations of the cases at hand are possible, which are more plausible and theoretically more rewarding than those we have just examined, since they allow a better clarification (i.e. one that is more exact, fruitful, and, other things being equal, simpler) of the phenomenon of legal disagreements. To them must we now turn: we shall devote the next two sections to their analysis.

#### 4. *The Inconsistency of the System and an Alternative Account of Disagreements*

Leiter’s explanation of Dworkin’s theoretical disagreement is highly illuminating, in so far it demonstrates that the judges involved in the cases Dworkin cites incline inconsistently to certain interpretive techniques, on the basis of their ideological preferences.<sup>35</sup>

However, it seems to be puzzling to dub this situation as one of “theoretical disagreement”, both because the disagreement seems to be only an apparent one, and because there is no reason to define it as “theoretical”.

As we have seen, both judges in *TVA* seem to have the same theory of what counts as a source of law. Moreover, the judges agree on the fact that both the “plain-meaning rule” and the “intentional rule” are legally valid canons of interpretation. Their theory of law seems to be the same on this point. They also agree that these canons, in the cases at hand, justify two different and contradictory solutions: say, *p* and non-*p*. If this is so, any conclusion can be said to be granted in the system, so that the judges are only disagreeing on what justified solutions they prefer to pick up: this depends, of course, on their

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<sup>33</sup> Dworkin, *Taking Rights Seriously*, *supra* note 5 at 23.

<sup>34</sup> This was, for instance, Mrs. Sorenson’s case in Dworkin’s reconstruction. Cfr. Ronald Dworkin, *Justice in Robes* (Cambridge, Mass.: The Belknap Press, 2006) at 143-145.

<sup>35</sup> More precisely, Leiter *supra* note 12, at 14 observes that the influence of the judges’ ideological preferences may be based on a disingenuous construction (interpretive techniques are means to hide their political options) or error (judges act on the mistaken assumption that there is law on the matter, when actually there is not).

ideological preferences. But this kind of disagreement is of another level, different from of a proper theoretical disagreement. It is a lower-level disagreement: they diverge at the level of the decision to favor, but not at the theoretical level which determines what solutions are to be considered justified within the system. Judges have pretty much the same theory about what grounds-sources are to be admitted and what canons are justified: this is confirmed by the fact they do not impugn each other's choice of the interpretive canon. They identify the same statutes as the correct sources of law for a certain case. The sources, thus, are the same, as well as the theory they employ to interpret them.

In order to rationally reconstruct the case at hand, thus, what we have to do is admitting, in addition to theoretical disagreement and interpretive disagreements, what we may call “decisional disagreements”: those disagreements that regard the picking up of one solution to a legal case among a bunch of different and contrasting but by hypothesis equally justified legal solutions.

It could be objected that not always (or not often) we face equally justified legal solutions, stemming from different attributions of meaning to legal sources. There can be *legal* arguments – so the objection runs – that allow considering one solution better than all the rest<sup>36</sup>. This is only an apparent objection, though: usually, the rules on the interpretation of legal sources are formulated as norms imposing certain canons of interpretation in attributing a meaning to such sources. In many cases, these norms of interpretation impose a series of different canons. If the set of legal canons of interpretation is not ordered – i.e. there is no hierarchical structure among those canons – then an interpreter is allowed to use any canon, within the set of obligatory canons. In logical terms, we could say that the interpreter is subject to a so-called “alternative obligation”, whose logical form is usually represented by the deontic formula “ $d \rightarrow O(p \vee q \vee r \vee \dots n)$ ”, which reads “When a judge has to decide, he/she ought to use interpretive canon p or q or r or...n”. The addressee of an alternative obligation is obliged to carry out one of the courses of action imposed by the norm, but he/she is free in choosing which one. And by carrying out one of the alternative actions prescribed by the norms, he/she complies with it. This is what usually happens with legal canons of interpretation: the addressee of the norms on legal interpretation is obliged to construe legal sources in a legally valid way, but he/she may choose freely among the different legally recognized canons. If this is correct, then there is no way to logically regard one solution as better than the other solutions. Of course, this does not mean that there is *no* way at all to regard a specific solution as the best one: it only means that, as far as the use of canons of interpretation may be reconstructed as the subject-matter of alternative obligations, there is no *legal* way to classify a specific solution as “better than the other ones”. In order to structure the set of canons of interpretation and so altering the equal justified character of every solution, one must impose some extralegal constraint on the ordering of such set (which in logical terms amounts

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<sup>36</sup> Hans Kelsen, *The Pure Theory of Law* (Berkeley: University of California Press: 1967) at 351-352.

to changing the alternative obligations into a conjunction of hierarchically ordered single obligations).<sup>37</sup>

If what has just been argued is correct, we may assume that the system containing an alternative obligation about legal interpretation will be flawed by problems of coherence. As a matter of logic, in fact, if a system (at least potentially) contains both  $p$  and non- $p$  as equally valid solutions, it is obviously an inconsistent system that, for logical reasons, admits any of these two solutions.

Now, the problem is whether we can affirm that  $p$  is better than non- $p$  (or vice versa), though each of them would be legally justified within the system. In other terms, we face the question whether to choose  $p$  or non- $p$  all things considered. Obviously, this is a moral or axiological (or at least extralegal) question, which can be answered definitively only if we have a set of objectively best moral principles.<sup>38</sup> If such a set does not exist, the claim that  $p$  is morally better than non- $p$  is obviously erroneous or disingenuous, as Leiter points out. Judges would be, consciously or unconsciously, carrying out a redress of law, since they impose some relations of hierarchy on the members of a system that were not originally ordered.<sup>39</sup> Observe, therefore, that disagreements about the existence of a set of objective moral or axiological principles (which can be dubbed “ontological disagreement”) is what is really at stake when it comes to choose the best *moral* solution: we could say, loosely, that this is the logical form of the divergences about what’s the best solution to pick up within a set of equally justified legal solutions. Ontological disagreements can be at least of two different kinds. There may be two judges both maintaining the existence of a set of true moral values but diverging on the content of this set. But it can also be the case that one judge affirms while the other rejects the existence of such a set of privileged moral norms.

The former case recalls of course the dispute between different foundations of objective ethics, such as the dispute between Bentham and natural lawyers.<sup>40</sup>

The latter case recalls, in turn, the dispute between natural lawyers and legal positivists (or better: ethical skeptics) about the existence of a set of objective and universal norms,<sup>41</sup> and can be considered as another instance of an age-old historical jurisprudential dispute about what counts as a legal source.

This result could seem to be inconsistent with what has been said earlier about disagreements about legal sources: decisional disagreements would be, in the end, disagreements about sources (whether natural law is a valid source or not, for instance). Notice that it is not the case. Such disagreements materialize when there is no unique *legal* way of picking up a certain solution and one must then

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<sup>37</sup> In symbols: “ $d \rightarrow Op$ , iff  $p \rightarrow \sim s$ ”, “ $d \rightarrow Oq$ , iff  $p \rightarrow s \ \& \ q \rightarrow \sim s$ ”, “ $d \rightarrow Or$ , iff  $p \rightarrow s \ \& \ q \rightarrow s \ \& \ r \sim s$ ”, etc.

<sup>38</sup> Carlos E. Alchourrón, “On Law and Logic”, in (1996) 9 *Ratio Juris*.

<sup>39</sup> Carlos E. Alchourrón and D. Makinson, “Hierarchies of Regulations and Their Logic”, in R. Hilpinen, ed, *New Studies in Deontic Logic* (Dordrecht: Reidel, 1981).

<sup>40</sup> Norberto Bobbio, *Il positivismo giuridico* (Turin: Giappichelli, 1996, or. ed. 1961) at 86.

<sup>41</sup> Alf Ross “Validity and the Conflict between Legal Positivism and Natural Law”, in S.L. Paulson and B. Litschevski, eds, *Normativity and Norms* (Oxford: Oxford University Press, 1998) at 148, originally published in *Revista juridical de Buenos Aires*, 1961.

turn to morality in order to find an “all-things-considered” best solution. This is a disagreement about the use of “second-order” sources, i.e. extralegal criteria of solution of antinomies that one must resort to when legal ones by hypothesis have run out. This is to say that for ethical skeptics, when a legal system is unavoidably inconsistent there is no way of justifiably solving the contradiction by *moral* means, whereas other conceptions may (and often do) allow for such a solution.

Observe, moreover, that not every ontological disagreement implies a theoretical disagreement.<sup>42</sup> Two judges may have diverging opinions about the existence of a set of objective moral values, but, at the same time, they may share an identical theory of legal sources. However, if they have different opinions on which are the legal sources to be admitted into the system (and, consequently, to be regarded as the truth conditions of propositions of law), in most cases they will have different stances about the existence of a set of objective values.

Although being more exact and fruitful (if not simpler) than the traditional explanations, since it allows dissolving a bunch of false and fictitious ideas about disagreements in the law, this explanation presents a characteristic which some could regard as problematic or puzzling. The present reconstruction seems, to a certain extent, to “explain away” any possible theoretical disagreement *within* the law, since decisional disagreements seem to remit to ontological questions about morality, and to trigger, so to speak, “second-order theoretical disagreements”. Almost any disagreement in the legal domain would be, in the end, ethical and not legal: it would bear on the law as it ought to be, not on the law as it is.

We should seek, therefore, another way to explicate theoretical disagreement in law.

##### 5. Disagreements and The Dispositional Account of Defeasibility

A further way to approach Dworkin’s examples is by reference to the so-called “dispositional account of defeasibility”, propounded by Carlos Alchourrón.<sup>43</sup>

According to Alchourrón, defeasibility in law is fruitfully approached from a pragmatic standpoint about the counterfactual intentions of the lawgiver. At least three attitudinal dispositions of the lawgiver about the defeat of a certain normative standard, on the grounds of a certain implicit circumstance C, can be envisaged:<sup>44</sup> 1) the lawgiver may have a disposition to accept both “If A then B” and “If A and C then B”: in this case C counts as an implicit non-exception; 2) the lawgiver may have a disposition to accept “If A then B” whilst rejecting “If A and C then B”: circumstance C is thus to be regarded as an implicit exception;

<sup>42</sup> In what comes forth, I will argue that, from a certain *moral* perspective, all legal disagreements can be viewed as ontological.

<sup>43</sup> *Supra*, note 38.

<sup>44</sup> See Alchourrón, *ibidem* at 341-342.

3) the lawgiver may have no disposition at all about whether considering C as an exception (like in case 2) or a non-exception (like in case 1).

Both *Riggs* and *TVA* can be examined in the light of the dispositional approach.

What is at stake in *Riggs* is whether the circumstance K (“killing one’s own testator”) is to be regarded as an implicit exception to the general statutory provision that provides that “If one is designated heir by a valid will, then he is entitled to inherit”. According to Judge Earl, circumstance K was to be regarded as an implicit exception, whereas Judge Gray advocated for regarding K as an implicit non-exception.

*TVA* coheres with this explanation even better, since Justice Powell and Chief Justice Burger have their own particular views on what may count as an implicit counterfactual exception, in the absence of overwhelming evidence about the lawgiver’s *real* intentions. As has been seen, Justice Powell thought that absurd consequences should not be considered as valid, unless it was so intended by the normative authority. On the contrary, Chief Justice Burger thought that normative authorities may (or must) be attributed a “default” disposition to accept the logical consequences of expressed norms (not matter how absurd they may appear), unless there is compelling evidence that they did not intend the result.

The problem with this approach is, of course, that it takes some (supposed) empirical facts as the key features for identifying law’s content. Since counterfactual intentions are virtually impossible to be ascertained, it follows that «what appears to be a historical investigation hides the political preferences of the interpreter». <sup>45</sup> This is but a logical conclusion: if the key-vault of the argument is an unknown element (i.e. lawgiver’s dispositions at the time of the enactment of a certain norm-formulation), then the interpreter is free in redressing the meaning of such norm-formulation according to his/her personal conjectures about what lawgiver’s attitudes would have been. Such a thesis would thus be a sort of disingenuity account in disguise.

The present approach, however, is important since it triggers another more fundamental question, which seems to be theoretical: what logical consequences of the expressed norms are to be considered as valid law. In fact, the problem of the identification of the legal criteria of recognition (and, as a consequence, of the content of a legal system) may be related to the defeasibility of legal norms. This happens when one considers that the identification of the rules of inference forms part (or can be reconstructed as forming part) of the set of the criteria, which makes it possible to identify legally valid rules. Within this context, the main query is about whether any logical consequence whatsoever of expressly enacted rules is to be regarded as legally valid or, rather, just *some* of them. <sup>46</sup> Manifestly, such a query is about the scope of the set of the criteria of

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<sup>45</sup> Alchourrón, *ibidem* at 344.

<sup>46</sup> There is, of course, a third possibility, which negates the qualification of “valid law” to the logical consequences of expressly enacted norms. Cf. C.E. Alchourrón & E. Bulygin, “The Expressive Conception of Norms”, in R. Hilpinen, ed, *New Studies in Deontic Logic*, *supra* note 39.

recognition, and mostly about the possible inclusion of the rules of inference into the set of such criteria.<sup>47</sup>

A first answer to this question maintains that all the logical consequences of expressly enacted rules are legally valid, on the basis of the idea that unless we accept the rules of inference of classical monotonic logic, law, as a normative set, would be completely inert: it would be impossible to qualify reality by means of classifications (i.e. subsume individual states of things under generic categories) and, consequently, law could simply not be applied by judges.<sup>48</sup>

A second answer consists in holding a defeasible conception of legal rules. As a matter of fact, recent jurisprudential literature offers at least three different conceptions of legal defeasibility. These conceptions share the common idea that not all the monotonic logical consequences follow from legal rules, but they differ on how the consequences of expressed rules ought to be determined.

A first thesis – which can be dubbed “teleological defeasibility thesis” – suggests that we accept as valid logical consequences of expressed rules only those consequences that comply with alleged rules’ underlying reasons.<sup>49</sup>

A second conception – which can be dubbed “authoritative defeasibility thesis” – holds that, in order to determine what logical consequences of legal rules can be regarded as valid law, it is essential to determine the *actual* intentions of the lawgiver.<sup>50</sup> As Rodríguez puts it,<sup>51</sup> this second conception «limits the set of the derived norms to those norms which could be justifiably ascribed to the authority that enacted the norms from which they can be drawn from».

The third conception is but the ‘dispositional defeasibility thesis’, according to which a logical consequence of a norm can be considered valid law only if there would have been, at the time of the enactment, a disposition of the lawgiver to accept it as such, had he/she thought about the circumstances.

In this sense, disagreements about the defeasibility of legal norms (interpreted as a tenet about what logical consequences of legal norms count as valid law) are indeed theoretical in nature, for they refer to what rules of inference, if any, are admitted by a certain theory of the criteria of identification of a legal system.<sup>52</sup> In this sense, inquiring into the different conceptions of legal defeasibility seems, at first sight, to be a proper way to reconstruct *theoretical* disagreements in law (at

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<sup>47</sup> Such a possibility is strongly rejected by Matthew H. Kramer, “Why The Axioms and Theorems of Arithmetic are not Legal Norms”, in (2007) 27 Oxford Journal of Legal Studies.

<sup>48</sup> E. Bulygin, “Lógica deóntica”, in C.E. Alchourrón, ed, 7 *Lógica, Enciclopedia Iberoamericana de Filosofía* (Madrid: Trotta, 1995) 139-140.

<sup>49</sup> Frederick Schauer, “On the Supposed Defeasibility of Legal Rules”, in M.D.A. Freeman, ed, *Current Legal Studies 51. Legal Theory at the End of the Millenium* (Oxford: Oxford University Press, 1998).

<sup>50</sup> See Joseph Raz, “Authority, Law and Morality”, in J. Raz, *Ethics in the Public Domain*, (Oxford: Clarendon, 1994) at 213.

<sup>51</sup> Jorge L. Rodríguez, “Las consecuencias lógicas de las normas”, in G. Maniaci, ed, *Eguaglianza, ragionevolezza e logica giuridica* (Milano: Giuffrè, 2006) at 232

<sup>52</sup> This issue has been explored more thoroughly in Jordi Ferrer and Giovanni B. Ratti, “Validity and Defeasibility in the Legal Domain” (forthcoming).

least from a positivistic perspective).<sup>53</sup> Some further clarifications are in order here. All three conceptions agree on the “posited” nature of the sources of law. However, they disagree on two other points: what are the relevant posited sources, and how legally valid derived norms are to be determined. The teleological defeasibility thesis is, among other things, a thesis about what are the primary elements of law: namely, expressed rules and their underlying reasons. The logical part of this conception is but a corollary of this assumption: logically derived norms are those consequences of legal norms that are not at odds with legal reasons. The authoritative defeasibility thesis, at least in Raz’s formulation, hold the opposite view that only expressed rules are the primary elements of law, and that their logical consequences may be considered part of the law only if they stick to the *actual* intentions of the lawgiving authorities. Pretty much the same may be said of the “dispositional defeasibility thesis”, the only difference being the *counterfactual* nature of the lawgiver’s intentions.

Therefore, we can identify two levels of possible theoretical disagreements which are present in the (positivistic) debate about legal defeasibility: the first one consists in the relevance of reasons as independent legal sources, which is advocated for by the teleological account, but is clearly opposed by the authoritative account and, probably, also by the dispositional account. The second level refers to the origins of logically derived norms. In all evidence, the three examined conceptions hold a very different theory on how derived norms (i.e. a substantial part of the content of law) are to be determined.

It would thus seem plausible to say that a disagreement about the defeasibility of legal rules is, in the end, a theoretical disagreement (and not a disagreement about the interpretation of legal sources): a disagreement about what derived rules count as valid law. Dworkin would thus be right in maintaining that every interpretive disagreement would be, eventually, a properly theoretical one. However, this is not the case. The three conceptions about legal defeasibility we have just analyzed are general (positivistic) jurisprudential conjectures about the validity of derived rules: they disagree theoretically because they are different theories about what (positive) law is. It is very controversial, though, that judges and jurists at large deploy such “meta-logical” theories in dealing with questions of law or that their sentences may be reconstructed as resting on such theories. For the purposes of the present inquiry, the dispositional account of defeasibility may more properly be understood as a simple meta-interpretive tenet. Understood in this sense, it is but a tenet about the possible different interpretations of a certain legal source, which are carried out to decide particular legal questions, and not (necessarily) to identify valid legal sources. That is to say that, in order to decide cases, sometimes jurists and judges carry out a literal interpretation of the legal sources, whereas some other times they carry out a “dispositional” interpretation of such sources. In the following paragraph, whilst

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<sup>53</sup> Anti-positivistic conceptions usually conceive of defeasibility as the effect of objective values on the application of legal rules. When the application of a rule brings about unjust results, the rule itself must be defeated by higher order considerations, which have a moral nature. In this sense, anti-positivistic conceptions see morality as a source of confirmation of the legal validity of logically derived norms.

elaborating on Leiter's thesis that disagreement is not a central feature of contemporary legal orders, I will take up this issue again.

### 6. *The Place of Agreement in Legal Theory*

One of the central contentions of Leiter is that Dworkin emphasizes a phenomenon that is completely marginal to law: disagreements materialize only in a very small percentage of cases.<sup>54</sup> Most of the times, most people agree on the solution of a case. What is then the fruitfulness of explaining a certain object by pointing at some features that only obtain in unimportant occasions?

The problem of this argument is evident and some other times Leiter himself uses it against Dworkin: it is a parochial argument, which is quite useless in general jurisprudence. It is totally contingent that, in the USA, agreement is central in adjudicatory practices. Other legal systems (such as, e.g., the Italian legal system) seem to be far less characterized by a general adjudicative agreement than the US system (at least as it is depicted in Leiter's account). There are many reasons for such divergences: the different costs of adjudication, the different ways lawyers gain from a process, the different structures of the courts, the force of *stare decisis*, etc. Both actual agreement and disagreement seem to be contingent features of a legal system. If this is correct, neither agreement nor disagreement, thus, should figure as main theoretical issues of a *general* theory of a legal system.

For Leiter's (and Anglo-American positivism) argument to be definitive, one has to show that agreement about a rule of recognition is a necessary feature for a legal order to exist. This does not seem to be granted. A legal system, which exists without there being agreement on its rule of recognition, seems perfectly possible to be conceived of. Effectiveness is not the same as agreement, and a system has to be effective, not necessarily agreed-on, to exist.

Let me elaborate. By "effectiveness" I mean that the rules that compose a legal system are, by and large, obeyed and applied by their norm-addressees. It seems that the notion of effectiveness is independent from that of agreement. That is to say that a legal system may be effective, without any previous agreement on its sources and content. In other words, legal rules can be (and often are) obeyed and complied independently of legal reasons. As Raz points out,<sup>55</sup> in fact, «A person may conform to laws imposing obligations without knowing that they exist. He may exercise legal powers without realizing that his actions have any legal effects». This may be showed by means of a simple example. Imagine that I do not know English, and I do not understand what the rule-formulation 'No jaywalking' means. Let us also imagine that I do not jaywalk (i.e. I guide my behavior by the 'No jaywalking' rule) for reasons other

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<sup>54</sup> Leiter, *supra* note 12.

<sup>55</sup> Joseph Raz "The Functions of Law", in J. Raz, *The Authority of Law. Essays on Law and Morality* (Oxford: Oxford University Press, 1979) at 168. Originally published in A.W.B. Simpson, ed, *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1973).

than legal ones: e.g. I am afraid of being run over by vehicles. In such a situation, the rule, which prevents from walking against the light, is indeed effective, although it would be very strange to say that I agree with the widespread interpretation of the norm-formulation or with the widespread construction of the rule of recognition<sup>56</sup>.

Now, let us imagine a more complex situation, in which the problem of agreement concerns a group of people (i.e. a community) and a group of authoritative norms (i.e.: a legal system). Let us suppose that all judges enforce the rule 'It is forbidden to breach contracts'. Let us also suppose that a first group of judges enforce this rule because they believe it is logically derived from the natural law principle '*Pacta sunt servanda*' (and that the authoritatively posited norm to that effect makes no practical difference in adjudicating the cases of breach of contract). Another group of judges enforce the rule because it is a means to make the principle of utility effective in the society: i.e. there is an instrumental nexus between the norm and its consequences in terms of utility, which follows from its application. They would not apply the norm if it were not the case (and they apply the norm *only* because it is the case). A third group of judges hold the view that neither natural law principles nor principles of utility are part of the law. Accordingly, they think that neither of them is applicable. The only reason to apply the rule on breaches of contract is its (contingent) membership to the legal system: they take legal norms as content-independent reasons for action.

Let us now suppose that the three groups of judges hold their different theories as to all the rules which compose the legal order and that a great number of norms (derived from these three different conceptions of law and its master rule) overlap. Well, such a legal set (i.e. the set of the overlapping norms) would be, to a great extent, an effective one. However, it would be really odd to say that it is an agreed-on system. If this is correct, we cannot take (theoretical) agreement as a necessary condition for the existence of a legal system. However, effectiveness seems to constitute such a condition: a set of rules exists in a certain society to the extent it is obeyed and applied.

At any rate, Leiter's discourse seems to be centered on what we have called "interpretive disagreements", and not on "theoretical disagreements in a proper sense". In other words, what Leiter repeatedly affirms is that there is no diffuse disagreement about the interpretation of authoritative formulations. The pyramid of legal cases – Leiter argues – has a ratio of «a million to one» between the basis (composed by the cases which enter a lawyer's office) and the apex (composed by cases debated in front of highest courts)<sup>57</sup>. However, this may well

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<sup>56</sup> In Shapiro's terms, it could be said that my behavior is guided by the norm on jaywalking, even though I do not know that my behavior is, within that particular system, also norm-governed by such a norm. cf. Scott Shapiro, *On Hart's Way Out*, in J. Coleman, ed, *Hart's Postscript* (Oxford: Oxford University Press, 2001) at 153-154, originally published in 4 *Legal Theory* 1998.

<sup>57</sup> See Leiter, *supra* note 12 at 5: «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

be the result of some contingent sociological features. It may be the case that, in some system, the pyramid of judicial case is so shaped because the costs of justice are so high that for a great number of people, which could in theory claim the protection of a right, is *de facto* impossible to make their claim in front of a court of justice. In such a system, the widespread agreement would be only an apparent one: as a matter of fact, the costs of justice prevent possible widespread disagreement from surfacing. Other systems may be (and in fact are) differently shaped, and interpretive disagreements are far more evident<sup>58</sup>.

Within this conceptual context, we can say that modern law has a disposition to bringing about interpretive disagreement. Dworkin does not deny that many solutions are by and large agreed-on at a local level.<sup>59</sup> More importantly, however, Dworkin affirms that any solution (independently of its degree of confirmation) is subject to the threat of justificatory ascent<sup>60</sup>. That is to say, any decision may in future be reviewed in the light of another interpretation, triggered by a different contextualization of a normative provision.<sup>61</sup> Any interpretive decision is only *pro tempore* and in any case depends on evaluative considerations: the acceptance and the use of the agreed-on solution is a decision, not an innocent discovery.

As we have seen, Leiter affirms that positivism is a better theory since it explains agreement throughout the system. He expressly affirms: «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*».<sup>62</sup>

However, contemporary legal systems seem indeed to be pervaded by conflicting principles that boost interpretive disagreements.<sup>63</sup> No doubt,

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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 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 proceed to 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, i.e., to the court where theoretical disagreements are quite likely rampant».

<sup>58</sup> N. Bobbio, *Contributi ad un dizionario giuridico* (Turin: Giappichelli, 1994) at 291-293.

<sup>59</sup> Dworkin, *supra* note 34 at 53-54: «Of course I do not mean, by calling attention to the constant threat of justificatory ascent, that the threat will always or even often materialize. Most of the time it will not, at least in a serious and time-consuming way, and we can cheerfully proceed on the footing of what we might call very local priority – in effect, looking no further in our interpretive arguments than the statutes or cases directly dealing with the matter at hand».

<sup>60</sup> Dworkin, *ibidem* at 54: «But justificatory ascent is always, as it were, on the cards: we cannot rule it out a priori because we never know when a legal claim that seemed pedestrian and even indisputable may suddenly be challenged by a new and potentially revolutionary attack from a higher level».

<sup>61</sup> See Giovanni B. Ratti, *Sistema giuridico e sistemazione del diritto* (Turin, Giappichelli, 2008) 256-267, 333-335.

<sup>62</sup> Leiter, *supra* note 12 at 6.

<sup>63</sup> Contemporary legal systems are usually based on constitutions that incorporate supposed natural rights. The first author to stress emphatically on the constant conflict of such rights was Jeremy Bentham: see H.L.A. Hart, "1776-1976: Law in the Perspective of Philosophy", in H.L.A.

inconsistency of principles and subsequent disagreements seem to be one of the key features of modern law in constitutional states.<sup>64</sup> Now, that a legal system, looked at in a momentary fashion, could be regarded as a bunch of agreements on different matters is an acceptable tenet, even though not problem-free: the agreement reached, in fact, is often a “faked” one. As Tarello correctly puts it,<sup>65</sup> agreement in modern legal orders often is about normative texts, not meanings<sup>66</sup>. That is to say that contemporary legislatures tend to agree on the *formulations* of the norms: formulations, which are often “negotiated” by the different agents involved in lawmaking<sup>67</sup>. However, they usually do not agree on the meaning-content of such formulations. They agree on the formulation of the text, but not on its interpretation. In some sense, we could say that there is an overall constitutional and legislative agreement on leaving things for the judges to settle. In other words, there is a theoretical agreement, which conceals likely interpretive disagreements.

At any rate, if we look at the legal system in a dynamic fashion, it seems to be quite misleading to affirm that it contains only a few disagreements regarding some marginal points. The same normative provisions are normally interpreted over and over, without ever reaching a point of final confirmation: one can easily appreciate that jurists constantly disagree on their meaning when the time factor is taken into consideration. What are the main causes of such diachronic disagreements?

As Guastini has recently pointed out,<sup>68</sup> linguistic ambiguity (strictly understood as multiplicity of meanings due to semantic or syntactical features of language) is not the main cause of interpretive disagreements. Disagreements due to linguistic ambiguity make us facing (statistically rare) questions which have the following logical structure: “Does normative text T express the norm

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Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon, 1983) at 149-150. Originally published in (1976) 51 *New York Law Review*.

<sup>64</sup> Dworkin, *supra* note 34 at 52-53.

<sup>65</sup> Giovanni Tarello, *L'interpretazione della legge* (Milan: Giuffrè, 1980) at 367.

<sup>66</sup> On a different level of conceptualization (one regarding logical truths and not empirical ones), we could say that Jules Coleman’s “abstraction strategy” regarding the rule of recognition, deployed to save Inclusive Legal Positivism, may perhaps be construed as a theory which predicates agreement on the formulation of the master rule, but not on its interpretation. Coleman holds that Dworkin’s criticisms about the centrality of disagreement may be rebutted on the grounds of the possibility of conceiving of a more abstract level of agreement among the legal participants. E.g. a disagreement about which conception of political morality stick best to the US law, conceals an agreement about the idea that US law is better seen as allowing principles of political morality being part of the law (that is, on a certain formulation of a master rule of the system). Another example: judges applying different conceptions of justice may agree on the fact that they are subject to the rule ‘You have to consider valid law what is just’. We could say that they agree on the formulation of the master rule of the system, although they interpret it in different manners. About the “abstraction strategy”, see Jules Coleman, *The Practice of Principle. In Defense of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001), and, for criticisms, Ronald Dworkin, *supra* note 34 at 191-194.

<sup>67</sup> Which are not, of course, only political parties, but also business groups, trade unions, religious communities, etc.

<sup>68</sup> Riccardo Guastini, *Lezioni di teoria del diritto e dello stato* (Turin: Giappichelli, 2006) at 78-80.

N1 or the norm N2?”. However, the majority of interpretive disagreements stem from other (much more frequent) questions about the meaning of a normative text: e.g. “Does T express only N1, or N2 as well?”, “Does T, which surely expresses N1, also imply N2?”, “No doubt, T expresses N1. However, is N1 defeasible?”. We may dub this kind of indeterminacy “contextual ambiguity”, i.e. an ambiguity that does stem not from some syntactical or semantic features of language, but from other kinds of mostly pragmatic considerations about a rule-formulation.

According to Guastini, the meaning of a normative text can be broken down into two parts: an uncontroversial kernel and a controversial halo. Observe that this is not Hart’s core/penumbra dichotomy, for Hart was thinking of controversies about subsumptive sentences (‘Is this skateboard a vehicle?’, ‘Is the deal between Tim and Tom a contract?’), whereas Guastini is pointing to controversies about genuine interpretive sentences (‘May ambulances and fire engines enter the park under the ‘No vehicle in park’ rule-formulation?’, ‘Does section 1 of the Sherman Act invalidate all the acts which restrain trade or just some of them?’). Let me elaborate. According to Hart,<sup>69</sup> the main problem for a theory of legal meaning regards the logical status of subsumptive sentences, such as “The fact F is (is not) a case of murder”, “Skateboards are (are not) vehicles”, and so on. Subsumptive sentences have to do with predicates and cases (being the latter particular instances or generic states of things). Doubtful subsumptive sentences, due to the vagueness of concept-words, have to do with the difficulties that stem from qualifying a certain state of things (be it particular or generic) under a certain predicate. All predicates are, according to Hart, inevitably vague: they have clear instances of application, clear instances of non-application, and a zone of penumbra, where we do not know whether to apply the concept to a certain state of things or not. Subsumptive sentences, however, get involved only when the ascription of meaning to legal sources has already been carried out.

For this reason, Hart’s theory seems to overlook a problem, which is paramount for a theory of legal meaning. And this has to do with interpretive sentences, by means of which one ascribes a certain meaning to rule-formulations. In these cases, what is doubtful is the very scope of the rule: e.g. does the rule-formulation ‘No vehicles in the park’ prevent ambulances or fire engines from entering the park? Evidently, here the problem is not about subsumption under concept-words (no doubt, ambulances and fire engines *are* indeed vehicles). The question concerns the identification of the rule itself, namely (in this case) its implicit exceptions (if any). Now, we may affirm that every rule-formulation has a kernel of agreed-on meaning: in our examples, everybody would agree that the rule contains a prohibition about introducing vehicles into the park. However, we may also affirm that (almost) every norm has a halo of doubtful meaning, which is not agreed-on: in the case at hand, it would be uncertain whether the rule applies, e.g., to ambulances, fire engines or other rescue vehicles. It would also be doubtful, for instance, whether the rule applies, by analogy, to horses or other

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<sup>69</sup> H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon, 1994; or. ed. 1961) at 124-136.

kinds of animals, which can be used as means of transport, but which clearly are not vehicles. In a nutshell, Hart deals with vagueness of concept-words in the legal discourse, whereas Guastini deals with the ambiguity (broadly understood as a mostly pragmatic phenomenon) of the sentences, which pertain to the discourse of lawgiving authorities.

This phenomenon of controversy about the halo of meaning of a text seems to be central in modern law, since different sets of values, which can supposedly be deemed to underlie the rule-formulation, may be used to pop up questions about the scope of the meaning of a text (in this sense, they may be said to be capable of extending the halo of controversy).<sup>70</sup>

Recall Schauer's explanation of *Riggs*.<sup>71</sup> According to Schauer, rules are instantiations of their justifications. However, the rules of the Statute of Wills (or at least the rule involved in *Riggs*) are not an instantiation of the more general justification "No man shall profit from his own wrong" (although this justification may have had some weight in formulating the Statute's provisions)<sup>72</sup>. In a complex normative system, however, rules are liable to conflict vertically with the results indicated by their justifications, but also "diagonally" with other justifications lying elsewhere in the legal order.<sup>73</sup> Earl Judge construes the provisions of the Statute of Wills not on the basis of their supposed underlying values, but on the basis of some other justification, which pertains to other areas of the system. Now, the use of such justifications, or reasons, may extend the halo of controversy in interpreting a certain rule-formulation. *Riggs* seems to be a clear example. Judges Earl and Gray agreed on the fact that the statutory text allowed a designated heir to inherit, but they disagreed about whether a designated heir who killed his testator was so entitled. They agreed on the kernel but not on the halo of meaning of the statutory provision involved in the case. And the controversial halo of meaning was indeed extended by the influence of the general justification according to which "No man shall profit from his own wrong".

Let us consider another case: the so-called "Friedman case", which was decided by the Spanish Constitutional Court in 1991<sup>74</sup>. León Degrelle, a former Belgian member of the SS, conceded an interview to the Spanish magazine "El Tiempo", where he, among other things, negated the Shoah, declared his wishes for the coming of a new *Führer*, and affirmed that Mengele was just «a normal physician». Mrs. Violeta Friedman, whose entire family was exterminated in Auschwitz, impugned these declarations by means of an action of "individual right protection" (*amparo*) in front of the Spanish Constitutional Court. Such Court had repeatedly enforced the rule (originated in its own precedents) that the

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<sup>70</sup> See Giovanni B. Ratti, *The Consequences of Defeasibility*, in P. Comanducci and R. Guastini, eds, *Analisi e diritto 2007. Ricerche di giurisprudenza analitica* (Turin: Giappichelli, 2008).

<sup>71</sup> Frederick Schauer, *Playing by the Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Oxford University Press, 1991) at 190.

<sup>72</sup> Dworkin, *Taking Rights Seriously*, supra note 5, at 77.

<sup>73</sup> Schauer, supra note 71 at 191.

<sup>74</sup> STC 214/1991, held on November 11th, 1991. For further remarks on this sentence, see M. Atienza and J. Ruiz Manero, *Ilícitos atípicos* (Madrid: Trotta, 2nd ed., 2000) 29-31.

manifestation of value judgments or opinions is permitted (in that is implied by freedom of expression). According to the criteria of the Spanish Constitutional Court, freedom of expression, in turn, collides with the right of honor only when value judgments affect the honor of a particular person. At first sight, if precedents had been followed, Mrs. Friedman should not have been attributed a right of protection under the Spanish Constitution (as had been held by lower courts). However, the Constitutional Court decided otherwise: freedom of expression – the Court argued – does not contain the right to carry out racist or xenophobe value judgments, and a person who is a member of the offended group, whose dignity has been hurt by such declarations, is protected under the Spanish Constitution. Accordingly, Mrs. Friedman was attributed protection. Notice that the kernel of agreement regards, in this case, the permission of the conduct consisting in expressing one’s opinions freely, and that halo of controversial or doubtful meaning concerns the exceptions to this permission. In other words, it all depends on the meaning which is attributed, all things considered, to the judge-made rule-formulation according to which “The expression of value judgments is permitted, unless it hurts the honor of a particular person”.

As has been frequently noted throughout the present work, it is not very clear whether the agreement repeatedly referred to, in the debate we have analyzed, is the first-order agreement on how to interpret the sources of law or a higher-level agreement on the existence of a master rule that founds the whole system. That is to say, there may be agreement on the existence of a master rule, even though there are disagreements about what such rule requires regarding the interpretation of normative provisions. But to disagree about the content of the normative provisions of a system requires an agreement about the fact that the system is made of these provisions:<sup>75</sup> what makes arguments about interpretive disagreements pretty much useless to tackle Dworkin’s criticisms, since such criticisms point (or should point, if coherently developed) mainly to disagreement about what counts as a source of law.

A major fact of our contemporary systems seems to be that our supreme and constitutional courts roughly agree on what counts as a valid legal source but they are often split into different ideologically laden parties, which hold different and opposite views about their interpretation. It does not matter how many cases reach the stage of these superior courts: the relevant fact is that the foundations of our legal systems, save an abstract criterion to determine what counts as a *legal rule-formulation*,<sup>76</sup> seem to be, to a certain extent, undetermined. That is to say that, in many Western countries, superior courts are often divided on

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<sup>75</sup> This can be a way of interpreting José Juan Moreso, *Legal Positivism and Legal Disagreements* (forthcoming) at 4, when he affirms that «A disagreement is genuine if and only if the presupposition of common ground is not defective».

<sup>76</sup> What Alchourrón, *supra* note 38, 338, calls “Master Book”. As Riccardo Guastini, “Le avventure del positivismo giuridico”, introduction to E. Bulygin, *Il positivismo giuridico* (Milan: Giuffrè, 2007) points out, this seems to be enough to defend legal positivism about the thesis that the identification of what counts as a valid source of law does not depend on moral or axiological evaluations. But see *contra* Rodríguez, *supra* note 9 at 19-22.

fundamental matters, whose uncertain status cannot but spread to the entire legal order. This, in turn, is often due to the fact, which has been already noticed, that modern constitutions usually contain contradictory (or at least somehow conflicting) principles<sup>77</sup>: this tension among the fundamental values of the legal system does indeed affect the other layers of the legal system. If the foundations of a legal order are, to a certain extent, up for grabs, this indeterminacy will have an effect, for logical reasons, on the content of the whole order (although stipulative means are available to reduce it at lower levels of the same legal system). If, for instance, we do not know the exact scope of the principle of equality, as a consequence we do not know how to determine all the relevant “operative facts” of the legal norms, the determination thereof is indeed founded on a judgment of equality or similarity.<sup>78</sup> If we do not know what is the scope of the clause, which provides an “equal protection of the laws”, we would face subsequent problems in determining which rules-formulations express valid norms and which do not. More in general, if we cannot know in advance the scope of basic principles, we really cannot know the scope of each rule-formulation of the system, when read in accordance to such principles. In other words, each rule-formulation can be adapted to different, often competing, principles and accordingly interpreted in several different ways. Section 7 of the Endangered Species Act does not have the same meaning content, if we read it through the lenses of the principle of wildlife safeguard, or, instead, if we read it with reference to the principle of economic efficiency. Analogously, section 1 of the Sherman Act does not mean the same thing if we adapt it to the principle of contractual freedom, or, instead, to the principle of consumers’ protection. For this reason, (actual or potential) interpretive disagreements are to be regarded as one of the key features of contemporary legal systems.

## 7. Conclusion

The main contentions of the present article are as follows:

1. Dworkin’s attack on legal positivism based on the notion of disagreements is ill founded, since it confuses several kinds of disagreement, which should be kept separate in order to have a better grasp of jurists’ understanding of law.
2. Once distinguished the different kinds of disagreements jurists have, one is in a better position when he has to defend legal positivism against Dworkin’s different attacks, as soon as the dissolution of the original problem is realized.

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<sup>77</sup> See L. Gianformaggio, *Filosofia del diritto e ragionamento giuridico* (Turin: Giappichelli, 2008) at 184-185.

<sup>78</sup> Schauer, *supra* note 71, at 193; Guastini, *supra* note 68, at 152; José Juan Moreso, *La indeterminación del derecho y la interpretación de la Constitución* (Madrid: Centro de estudios constitucionales, 1997) at 177-181.

3 The cases used by Dworkin to demonstrate the relevance of disagreements in law are not well chosen, for they only show that judges, who have the same theories about legal sources and legitimate canons of interpretation, diverge about which equally justified solution to pick up.

4. This, in turn, shows that when judges have a disagreement about what is the best solution “all-things-considered” they are better seen as having a profound “ontological disagreement”, either because they believe in the existence of two different set of true and objective moral values or because one affirms and the other denies the existence of such a set.

5. Another possible reconstruction of theoretical disagreements pivots on the “dispositional account of defeasibility”, propounded by Carlos Alchourrón. Once put in place, this account may show that the logical form of the disagreement is about when a norm is to be considered defeasible. This, in turn, triggers the fundamental question about what logical consequences are to be considered as legally valid.

6. Disagreement, understood as interpretive controversy about the attribution of meaning to legal sources, is indeed a relevant phenomenon in modern legal systems, and must be accommodated in a fruitful legal theory. Moreover, disagreement is boosted by the common structure and content of our principled-shaped legal systems, so that it should by no means be regarded as a marginal problem. This renders it vain any parochial tenet devoted to argue that disagreement in a particular judiciary system is a marginal phenomenon, which does not call for particular attention.

7. Disagreement may thus be regarded as a key feature of our legal systems, but its scope is usually confined to disagreements about the ascription of meaning to legal sources (i.e. interpretive disagreements).

8. Regarded from a morally best solution perspective, any instance of legal disagreement, independently of its *legal* characterization (as interpretive, theoretical, etc.), may be traced back to a more profound “ontological disagreement” about the existence of a set of morally best principles. Interpretive disagreements, *once construed as discrepancies about the best solution*, may be seen as ontological disagreements about the existence of such solution. In turn, theoretical disagreements about what counts as a source of law are, in their own right, disputes about the existence of *something more* than mere posited sources. If this is correct, the whole debate about disagreements in law, read from this perspective, is but a reiteration (or a reformulation) of the ethical objectivists/skeptics (or in other terms, natural law/legal positivism) debate.