A HARTIAN ACCOUNT OF GENUINE THEORETICAL DISAGREEMENT

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In *Law's Empire*, Ronald Dworkin raised what he called a new objection to Hart's positivist theory of law. Dworkin contended that Hartian legal positivism cannot account for the genuine possibility of *theoretical* disagreement in the law, because, according to the positivists, law reduces to a question about social facts. This means that if there is a question about what the criteria of legal validity are, it must be resolved by answers to empirical questions, like how in fact the officials are acting, and not theoretical questions.

In response, Leiter and Shapiro proffer ways of defusing the problem for the positivist. Leiter questions the face value of theoretical disagreements by showing that the prototypical examples of theoretical disagreement are disingenuous or erroneous. Shapiro shows that the positivist can account for theoretical disagreement, by looking at competing interpretive methodologies, but answering the question this way requires sacrificing the conventionality thesis of Hartian legal positivism.

In this piece, I set forth a new response on behalf of the Hartian legal positivist. Specifically, I contend that the Hartian legal positivist can respond to the problem of theoretical disagreement in a way that both vindicates the face value of theoretical disagreement and maintains its critical commitments, specifically the separability thesis, the social facts thesis, and the conventionality thesis. To do so, I contend that we must attend to the role of inference and the norms of reasoning in legal discourse. Consistent with the Hartian picture, participants in a theoretical disagreement can agree about all the ground facts about the law, but disagree about the grounds of the law because they arrive at their positions by differing legal inferences and reasoning.

INTRODUCTION

For the last 50 years, the grounds of analytic jurisprudence have been dominated by legal positivism and its interlocutors.[1] Chief among these interlocutors was the prolific scholar Ronald Dworkin. In one of his later contributions, *Law's Empire*, Ronald Dworkin raised a purportedly

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[1] Scott J. Shapiro, *On Hart's Way Out*, 4 LEGAL THEORY 469, 476 (1998).

new objection to Hart's positivist theory of law.[2] Dworkin argued that Hartian legal positivism cannot account for the genuine possibility of theoretical disagreement in the law. In particular, Dworkin contended that positivists cannot account for genuine disagreement about "the grounds of law" or what positivists would call the criteria of legal validity: Positivism contends that what the law is reduces to a question about social facts. This means that if there is a question about what the criteria of legal validity are, it must be resolved by answers to empirical questions, like how in fact the officials are acting, and not theoretical questions.[3]

In response, Brian Leiter and Scott Shapiro offer ways to reconcile the problem of theoretical disagreement and legal positivism.[4] Leiter's response on behalf of the positivist denies the face value of theoretical disagreement. Leiter contends that the best explanation for the supposed theoretical disagreement is that the participants are not in fact engaging in theoretical disagreement, but rather are either disingenuous or erroneous. Leiter's explanation does not recognize genuine theoretical disagreement — in his words, it does not vindicate the "face value" of the theoretical disagreement. To this end, Leiter spends efforts deflating Dworkin's examples of theoretical disagreement.[5]

Shapiro's response takes another path. Shapiro seeks to locate theoretical disagreement in the positivist framework. Shapiro's sketch proceeds as follows: Theoretical disagreements about the law reside in questions about the proper interpretive methodology; such questions about proper interpretive methodology involve questions about the purpose of legal practice; the

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[2] RONALD DWORKIN, LAW'S EMPIRE 6 (1986) [hereinafter LAW'S EMPIRE].

[3] *Id.* at 6–7.

[4] Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, *in* RONALD DWORKIN 22, 35–43 (Arthur Ripstein ed., 2007).

[5] Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1232–37 (2009).

purposes of legal practice can be empirically ascertained; the proper interpretive methodology is the one that best "harmonize[s]" with the purposes of legal practice.[6] Shapiro states that this preserves the positivist commitment that law is grounded in social facts, but departs from the positivist commitment that the law is grounded in the convergent practices of officials.

In this Article, I contend that the Hartian legal positivist can respond to the problem of theoretical disagreement in a way that both vindicates the face value of theoretical disagreement and maintains its critical commitments, specifically the separability thesis, the social facts thesis, and the conventionality thesis. This Article proceeds in six Parts. First, I set forth the basic foundations of Hartian legal positivism. Second, I explicate the Dworkinian objection to Hartian legal positivism that it cannot explain theoretical disagreement in the law. Third, I argue that this so-called new objection is not in fact new, and is reducible to a prior objection by Dworkin to Hartian legal positivism. Fourth, I set forth in detail the specific challenge before the Hartian legal positivist to answer the objection from theoretical disagreement about the law. Fifth, I set forth in detail the responses by Leiter and Shapiro and explain how they do not meet the specific challenge to genuinely explain theoretical disagreement while maintaining the most important commitments of Hartian legal positivism. Sixth, I provide such an explanation of theoretical disagreement.

I. Hartian Legal Positivism — The Basics

Legal positivism is a theory of what constitutes law. The crux of the theory is that what is law is purely a product of social facts — this is known as the social facts thesis and it undergirds all legal positivist theories. Alongside this foundational assumption is the famous

[6] Shapiro, *supra* note 4, at 44.

positivist mantra that law has "no necessary connection" to morality — known as the separability thesis.[7] As Les Green has observed, it cannot be taken literally, as there are many obvious "connections" between morality and law.[8] Thus, the exact contours of this thesis are uncertain. At the least, it would seem to mean that, for any particular moral claim, it need not be part of the legal system.[9]

Hart's own version of legal positivism proffered the following structure: A legal system is the union of primary and secondary rules. Primary rules are those rules that regulate behavior; they are the rules that are "concerned with the actions that individuals must or must not do." For example, the laws criminalizing murder, rape, and theft are primary rules. Secondary rules are rules about the primary rules. For Hart, these secondary rules are in three types: the rule of recognition, the rules of change, and the rules of adjudication. Importantly, secondary rules are fixed by convergent practice among the officials of the legal system.[10]

Hart contends then that, for there to be a legal system, regular citizens must generally obey the primary rules, and the officials of the system must, from an internal point of view, accept the secondary rules. Among the secondary rules, the rule of recognition is foremost in importance: it is the rule by which an individual in the legal system recognizes putative laws as actual laws. The rule of recognition does this through "criteria of validity"; these are conditions that are inferred from social practice and provide "conclusive affirmative indication that it is a rule of the group." This generates another important commitment that the criteria that validate

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[7] H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994) [hereinafter THE CONCEPT OF LAW] (with a Postscript edited by Penelope A. Bulloch and Joseph Raz).

[8] Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 N.Y.U. L. REV. 1035, 1041–45 (2008).

[9] *See* Shapiro, *supra* note 4, at 33 (stating that inclusive legal positivism allows for moral criteria of legal validity, but that such criteria are not necessary to have a legal system).

[10] THE CONCEPT OF LAW, *supra* note 7, at 94–101.

putative laws as law are a product of the convergent practices of officials — known as the conventionality thesis.[11]

Hart did not spell out what all forms the rule of recognition could take. But all of the secondary rules can seemingly be combined into one, potentially giant, rule of recognition. Such a rule of recognition, I contend, can be very complex, including numerous sub-rules and indeed even norms of reasoning and argumentation.[12] This possibility is not belied by anything Hart says; Hart only requires that the rule of recognition provide criteria of validity that can conclusively affirm that a rule is valid.[13] But a complex rule of recognition can do this, if the legal officials, or a sufficient number of them, understand the complex rule.

Filling out the picture is Hart's differentiation between the core and the penumbra of legal rules. In the core, the application of the rule is straightforward. Contrast this with the penumbra, where the application of the rule is not determined by the rules. Hart's famous example is of the rule prohibiting vehicles in a park. There are obvious cases, such as with an automobile. The application of the rule is straightforward and, thus, part of the core of the legal rule. But for more difficult cases, consider bicycles, roller blades and skates, and skateboards. There the application is not so straightforward and an adjudicator must use discretion to decide the case. According to Hart, such penumbral cases are more or less inevitable due to certain sources of indeterminacy, like the open texture of language and the indeterminacy of legislative aim.[14]

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[11] *Id.*

[12] Guha Krishnamurthi, *Don't Go Breaking My Hart*, 88 TEX. L. REV. 833, 851–52 (2010).

[13] THE CONCEPT OF LAW, *supra* note 7, at 97–98.

[14] *Id.*

Dworkin first objects to two pieces of the Hartian framework, namely (1) the account of judicial discretion and (2) the rule of recognition. On judicial discretion, Dworkin argues that Hart's account is implausible because it ignores cases where there are seemingly no applicable rules but judges regard themselves and act as if they are bound by the law. Dworkin, here, distinguishes legal rules from legal standards, observing that even when the rules have run out there are plenty of applicable standards. Dworkin then claims that legal positivism is implausible as a theory of law because it ignores the presence of legal standards.[15]

Regarding the rule of recognition, Dworkin argues that the fact that judges apply legal principles based on their inherent moral content and not based on their pedigree undermines the existence of a rule of recognition. That is because, as Dworkin understands it, the rule of recognition is a pedigree rule.[16]

These objections were rather easily blunted by defenders of Hartian legal positivism, but in ways that developed further richness in legal positivism. On judicial discretion, Hart believed that judicial discretion would be necessary because of the "open texture of language" — that is, it is simply impossible to convey standards of conduct that will settle every potential situation in advance.[17] "In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide. There will be plain cases constantly recurring in similar contexts to which general expressions were clearly applicable . . . but there will also be cases where it is not clear whether they apply or not."[18] Hart's view was not dependent on the rule–standard distinction Dworkin imposed on the Hartian

[15] Ronald Dworkin, *The Model of Rules I*, *reprinted in* TAKING RIGHTS SERIOUSLY 14, 44–45 (1978).

[16] *Id.* at 17.

[17] THE CONCEPT OF LAW, *supra* note 7, at 100.

[18] *Id.* at 126.

framework.[19] Indeed, it is seemingly not part of Hart's view, and it certainly need not be. Hart was notoriously quiet about the way these legal rules would look. All told, the Hartian framework can easily accommodate Dworkin's "legal standards" as a variety of legal rule. As such, many of Dworkin's cases where "the legal rules have run out" are specious — the legal rules have not run out, the legal standards are the legal rules, and the adjudicators were not exercising unconstrained judicial discretion but just applying the legal standards, difficult as it might be. And this is in line with Hart's own view that true judicial discretion was a rare exercise, but nevertheless inevitable in some rare cases because of the indeterminacy in language.[20]

Similarly, on the rule of recognition, Dworkin wrongly ascribed to the Hartian framework that the rule of recognition could not include moral principles. Thus, though answerable by legal positivists, this objection exposed an important distinction, between exclusive and inclusive legal positivism.[21] For exclusive legal positivists, "tests of legality must always distinguish law from non-law based exclusively on their social source and must be implementable without resort to morality."[22] Most famously, Joseph Raz set forth the most compelling case for exclusive legal positivism. His response to Dworkin's challenge is to observe that judges may be under a legal obligation to apply *extralegal* standards, and that thus the fact that judges may apply moral principles that have no legal pedigree does not mean they are acting outside of their legal obligation.[23]

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[19] Shapiro, *supra* note 4, at 30.

[20] THE CONCEPT OF LAW, *supra* note 7, at 126.

[21] Shapiro, *supra* note 4, at 32.

[22] *Id.*

[23] *Id.*

For inclusive legal positivists, tests of legality may include moral tests, but the legal validity of utilizing these moral tests is grounded in social facts.[24] Specifically, because the rule of recognition is a social rule, it may incorporate moral principles, but that would be in light of social consensus.[25] Because Hart was an inclusive legal positivist, I will assume that legal positivism means inclusive legal positivism from this point forward.[26]

This takes us to an important inflection point in this story: Dworkin had a strong riposte to the inclusive legal positivist that further questioned the plausibility of incorporating moral tests in the rule of recognition: Dworkin noted that judges appeal to moral principles in hard cases, where there is often disagreement. Despite such disagreement, in such cases, judges act as if and believe that they are applying the law. Yet, per the conventionality thesis, there cannot be law where there is disagreement; law requires sufficient consensus and the fact of disagreement between judges in hard cases undermines that consensus.[27]

For an example, Dworkin considers *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 73 (N.J. 1960). That case concerned whether an auto manufacturer could be held liable based on injuries resulting from a manufacturing defect, despite the fact that the injured plaintiff signed a waiver of liability. On Dworkin's reading, the court ruled for the injured driver over the manufacturer not based on any explicit rules but rather on legal principles such as the public-good limitation on freedom of contract and the special obligations of auto manufacturer's in furnishing safe products. Dworkin further notes that this kind of case — rife with reasoning from legal principles and not explicit rules — is common and especially so in hard cases.

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[24] *Id.* at 33–35.

[25] *Id.*

[26] THE CONCEPT OF LAW, *supra* note 7, at 250–54.

[27] Ronald Dworkin, *The Model of Rules II*, *reprinted in* TAKING RIGHTS SERIOUSLY 46, 63–64 (1978).

Moreover, reading *Henningsen*, one could easily disagree with the result, even though none of the other judges apparently did. And given this potentiality for disagreement, the question arises how the Hartian legal positivist (the "Hartian") can explain the existence of law.[28]

Jules Coleman furnished a response to this objection, by distinguishing between two types of disagreement: (1) disputes about the content of the rule of recognition and (2) disputes about the application of rules to particular cases. Coleman contended that hard cases are disputes about the application of the rules to particular cases. That is, the disagreeing judges agree that moral principles are part of the rule of recognition, they simply disagree how those moral principles apply in a particular case and that such disagreement about application does not undercut the consensus necessary for the existence of law.[29] Hart seems to have eventually accepted Coleman's answer to the Dworkinian objection and left it at that.[30]

II. The New Objection

Carrying on from the *Model of Rules I & II*, in *Law's Empire*, Dworkin raised a purportedly new challenge to legal positivism.[31] Dworkin begins by distinguishing propositions

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[28] Ronald Dworkin, *The Model of Rules I*, *reprinted in* TAKING RIGHTS SERIOUSLY 14, 23–39 (1978).

[29] Jules Coleman, *Negative and Positive Positivism*, *in* MARKETS, MORALS, AND THE LAW 3, 20 (1988). This is how Shapiro understands Coleman's response. Shapiro, *supra* note 4, at 34. I think Coleman's arguments arguably go further than Shapiro suggests. Coleman also addresses how a positivist can account for disagreements on what the conditions of the grounds of law in fact are. Coleman proposes a law-as-social-convention theory and contends that as long as the ways of resolving any disputes about the grounds of law are conventional, this poses no problem for his positivist theory. *Id.* at 21–23. *See infra* note 59 and accompanying text.

Ultimately, I think Coleman has the right idea, but there is a flaw in his ascriptions to traditional positivism. Coleman states that the legal obligations in controversial cases involving the rule of recognition arise from conventional practices of how to resolve such disputes. Coleman, *supra*, at 21–23. But if there are such conventional practices to resolve controversies in the rule of recognition, then, as I have argued, those conventional practices are part of the rule of recognition and there is actually no controversy in the rule of recognition and any such appearance of controversy was specious.

[30] THE CONCEPT OF LAW, *supra* note 7, at 250–54.

[31] LAW'S EMPIRE, *supra note* 2, at 4–6.

of law—roughly equivalent to Hart's primary rules — from the grounds of law — roughly equivalent to secondary rules and the rule of recognition in particular.[32] Dworkin observes that there are two types of disagreements we can have about law: (1) about whether the conditions of the grounds of law have manifested, such as whether Congress in fact satisfied the requirements to pass a particular bill; and (2) what the conditions of the grounds of law in fact are. Dworkin calls the first an empirical disagreement and recognizes that those are easy enough to understand as a legal positivist.[33] He calls the second a theoretical disagreement and contends that this cannot be accounted for by the Hartian.[34] The reason is that for the grounds of law to validate a proposition of law — that is, for the rule of recognition to validate a primary rule — there must be sufficient social consensus on the grounds of law. Hartians are committed to that per the conventionality thesis — what Dworkin terms the plain-fact view of the law. But when there is disagreement, Dworkin contends that this undercuts the ability for there to be law, given the conventionality thesis.[35]

For this, Dworkin calls to our attention *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978). In that case, the U.S. Supreme Court confronted a challenge to a $100 million dam project, based on a violation of the Endangered Species Act of 1973 (ESA). Conservationist groups claims that the dam's construction would threaten the continued existence of the snail darter, a particular type of fish. The TVA argued to the contrary that the dam was duly authorized and almost completed, thus the ESA should not be applied to prohibit the dam's

[32] *Id.* at 5.

[33] *Id.*

[34] To be clear, I understand Dworkin's use of the terms "empirical" and "theoretical" to be technical terms.

[35] *Id.* at 6–11.

completion.[36] The Court held that the ESA required halting the construction of the dam. In so doing, the Court reasoned that, although the decision might be inefficient and unjustified by policy concerns, the text of the statute did not suggest any other result.[37] The dissent argued that because such a result was absurd, that was a disfavored textual interpretation and that it should not have won the day.[38]

As Dworkin reads *TVA*, the majority and dissenting opinions were disagreeing about the grounds of law. The majority determined that the plain meaning of the text should control, even in the face of absurdities, whereas the dissent contended that the textual interpretation must yield in the face of such absurd results, unless there was sufficient evidence that Congress intended such absurd results. Dworkin maintains that in such cases, legal positivists cannot explain how the majority and dissent are disagreeing about what the law is, as there is obviously not sufficient agreement; rather legal positivists can only claim that the participants are disagreeing about what the law ought to be. But because judges in, and for that matter spectators of, such debates see these as disagreements about the law, legal positivism fails to explain a key aspect of our legal culture.[39]

III. A New Objection?

I begin my analysis with the preliminary question of whether this point is in fact a new objection at all. Recall Dworkin's initial argument against legal positivism from the *Model of Rules I & II*: Judges, especially when appealing to moral principles that are part of the law,

[36] *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 170–72 (1978).

[37] *Id.* at 187–91.

[38] *Id.* at 196–97.

[39] LAW'S EMPIRE, *supra* note 2, at 6–11.

disagree in hard cases yet act as if and believe that they are applying the law. In such cases the fact of disagreement undercuts the consensus required to validate law under the legal positivist conception.

The new argument from Dworkin can be stated as follows: Judges, when assessing the grounds of the law, may disagree in difficult cases yet act as if and believe that they are applying the law. In such cases, the fact of disagreement undercuts the consensus required to validate law under the legal positivist conception.

Superficially, these arguments seem similar. Shapiro explains the putative difference as follows: "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. . . . Thus, 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."[40]

I am skeptical of the distinction based on *Henningsen* and *TVA*. *Henningsen* is purportedly a question of how to apply the grounds of law, because we agree that the different doctrines — the generalized freedom of contract and the limitation of freedom of contract when threatening public safety — are part of the law, we just have some trouble drawing the contours of their application. But *TVA* seemingly raises the same issue: The majority and dissent were

[40] Shapiro, *supra* note 4, at 41.

asking, in this particular case, how it should reconcile two different doctrines — the general rule that the text controls and the limitation on text in the face of the potentiality for absurd results.

One might retort that the majority in *TVA* did not even agree that there was such a limitation on text in the face of absurd results — that such a doctrine was not part of the law. At the least, perhaps that is how Dworkin saw it. As Leiter explains, there is strong evidence that this is *not* what the majority was doing.[41] Indeed, in support of Leiter's point, the majority appealed to *reduction ad absurdum* itself.[42] But even if Leiter is right about *TVA*, and he likely is, it is certainly *possible* for jurists and well-informed legal spectators to disagree about whether a particular doctrine is part of the law.

Importantly, however, such a dispute is not obviously enough to distinguish the challenge presented by *Henningsen*. That is because disputes about application are not obviously different in kind from disputes about whether a particular principle is part of the law. That is, a dissenter in *Henningsen* may be questioning whether the "principle" that *the concerns of public safety should trump the freedom of contract when a single person is injured* is part of the law. (This may not be the particular principle that is being debated — it is only meant to be schematic.) There is no obvious limitation on how general or specific principles must be — questions of application are questions of principle, but perhaps rather specific principles.

Indeed, this may reveal that Coleman's response to Dworkin's initial challenge was never actually satisfactory.[43] That is, insofar as Coleman's response depended on distinguishing

[41] Leiter, *supra* note 5, at 1236–37.

[42] *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190–91 (1978).

[43] As I suggested above, Coleman seems to have had a deeper response to Dworkin's challenge, namely that, when there is controversy not resolved by the rule of recognition, judges are legally obligated to resolve those cases in a certain way when there is a convergent practice to resolve such cases in that way, and judges are not legally obligated in the absence of such convergent practice. Coleman, *Negative and Positive Positivism*, *supra* note 29, at

between the grounds of law and applications of law, such a response may not withstand the realization that applications of law are isomorphic to a question about whether a particular principle is part of our law — which is in turn a question about the grounds of law.

As a consequence, I see Dworkin's "new" objection as simply a riposte to Jules Coleman's initial rejoinder. Dworkin poses the challenge how the Hartian legal positivist can explain disagreement about hard cases. Coleman distinguishes between the disputes about the rule of recognition and disputes about applications of the rules, saying that hard cases are about the latter. Dworkin then asks how Hartian legal positivists can explain legal disputes about the content of the rule of recognition.

IV. The Contours of the Challenge

Before proceeding to the responses, I want to explain what I believe to be the contours of the challenge. Dworkin's challenge is to provide a Hartian positivist explanation of how participants can: (1) discuss the current state of the law (and ***not*** what the law should be); (2) disagree about the particular grounds of the law; (3) believe that they are correct about the state of the law; (4) sometimes be correct about the law; and (5) maintain a Hartian positivist view about the law.

Thus, the Hartian positivist must plausibly explain how participants could have a genuine disagreement about the grounds of the law and yet still genuinely be talking about the law. Such an explanation must allow the participants to have differing views about the law, believe that they are correct, and sometimes be correct about the law, despite their disagreement. Dworkin's point is that participants in the legal system — including ourselves — do have such dialogues,

21–24. I agree with this, except that I think such convergent practice reveals that there is no such controversy in the rule of recognition.

yet the Hartian positivist commitment to law being a product of social facts and requiring sufficient consensus make this impossible.

I emphasize the fifth point. The challenge is to vindicate certain kinds of discourse that we see in our legal culture — that we genuinely disagree about the law and yet still think we are talking about the law, despite being Hartian positivists. That said, the challenge does not require the Hartian positivist to vindicate patently non-Hartian positivist discourse that treats certain propositions as being about the law. I have explained before,[44] this simply may not be possible, depending on what participant's view of the law is. For example, suppose someone says, "I know that judges and legislators don't agree with me, but taxation is morally unjust therefore the taxation system is legally invalid." That person is not operating under a conception of the law that is compatible with Hartian positivism and the Hartian positivist cannot explain how that statement would truly be ***about the current state of the law***.

V. Two Responses

A. Leiter

In *Explaining Theoretical Disagreement*, Leiter set forth a response to Dworkin's objection that, by design, rejected one of the premises of the challenge. Specifically, Leiter conceded that positivism cannot explain the "face value" of the theoretical disagreements. That is because the criteria of legal validity are empirical in nature and thus cannot allow for the variety of theoretical disagreement that Dworkin raises. Instead, Leiter contends that the legal positivist has two other responses: (1) that the participants in the so-called theoretical disagreement are disingenuous and are simply trying to make law; or (2) that the participants are

[44] Guha Krishnamurthi, *Don't Go Breaking My Hart*, 88 TEX. L. REV. 833, 846–47 (2010).

erring in thinking that they are engaged in a theoretical disagreement. Leiter first sets forth a set of explanatory virtues to assess competing explanations: (i) simplicity, (ii) consilience, and (iii) conservatism. Then Leiter examines the particular examples of theoretical disagreement and shows with textual evidence that there is reason to question whether these were genuine examples of theoretical disagreements. Appealing to the explanatory virtues, Leiter explains why the better explanations of the so-called theoretical disagreements are that they were disingenuous or erroneous. In light of that, and in taking into account the vast amount of agreement in the law, Leiter argues that legal positivism is the better theory, compared to Dworkin's own theory of law.[45]

Leiter makes a compelling case, but his response to the Dworkinian objection has a self-admitted weakness: it cannot explain the "face value" of theoretical disagreements. According to Leiter's own standards for judging explanations, it seemingly makes a worse showing than a theory that could explain the "face value" of theoretical disagreements, *all else being equal*. That is, those of us positivists thinking about the law sometimes (and perhaps often) do get into genuine disagreements about the grounds of the law. We can introspect and understand that there are times that we are not disingenuous. Leiter's contention is that we are simply wrong. While this might be true, a theory that can explain the phenomena without resorting to error theory is seemingly more *consilient* and *conservative*, in Leiter's terms.[46]

[45] Leiter, *supra* note 5, at 1227.

[46] *Id.*

B. Shapiro

In a precursor to his planning theory of law,[47] Shapiro sets forth a schema of how the legal positivist may respond to Dworkin. Shapiro focuses on interpretive methodology — as the point of departure for the participants in a disagreement about the grounds of law. The idea is that we want to determine the proper interpretive methodology by appealing to social facts. Shapiro explains that to do so, we must first acknowledge that what is the proper interpretive methodology will be based on the goals and purposes of the legal system. Ascertaining the goals and purposes of a legal system is a matter of social facts. The next step is to determine what interpretive methodologies will best further the goals and purposes of the legal system. This may not be a matter of social facts — it is simply a question of what will do the trick. Here, Shapiro claims that legal positivists must drop the conventionality thesis, because what is the best interpretive methodology may not be a matter of social fact. But this shows how the participants can be legal positivists and still engage in a theoretical disagreement. The participants are legal positivists because what is the law is tethered to social fact, about the purposes and goals of the legal system. They can engage in a theoretical disagreement because they can disagree about what interpretive methodology will best satisfy the purposes and goals may be a theoretical question that does not look to empirical fact.[48]

Shapiro's proposal is also compelling, but he states that his response to Dworkin requires the Hartian to give up a principal commitment, namely the conventionality thesis. Thus, in this sense, Shapiro's proposal does not meet our challenge for the Hartian legal positivist.

[47] SCOTT J. SHAPIRO, LEGALITY (2011); Scott J. Shapiro, *The Planning Theory of Law* (Yale Law School, Public Law Research Paper No. 600, 2017), https://ssrn.com/abstract=2937990.

[48] Shapiro, *supra* note 4, at 43–49.

VI. A Hartian Legal Positivist Response

I think that the Hartian legal positivist can account for the "face value" of theoretical disagreement — that is, disagreement about the grounds of law or the rule of recognition — while maintaining the core commitments of Hartian legal positivism. In terms of the contours of the challenge, recall we must satisfy the following conditions:

(1) discuss the current state of the law (and ***not*** what the law should be);

(2) disagree about the particular grounds of the law;

(3) believe that they are correct about the state of the law;

(4) sometimes be correct about the law; and

(5) maintain a Hartian legal positivist view about the law.

The key to understanding how a Hartian legal positivist can account for theoretical disagreement is understanding the role of inference and the norms of reasoning in the Hartian account of law. Even in the simplest case, in the Hartian framework, a person considering and applying the law utilizes inference and the norms of reasoning.

For example, consider a park-goer who thinks about whether they may drive their Fiat 300 into the park. They see the sign with the prohibition, "No Vehicles in the Park."[49] They might think, "Well, my Fiat 300 is a 'vehicle' and so it is not allowed in the Park, ergo I should not drive it into the Park." This involves a fairly simple rule of substitution and a shared lexicon. But it is inferential. The officials are not there to weigh in on, for example, whether the Fiat 300 counts as a "vehicle" and there may be no exhaustive list. Even this simple application of a rule

[49] THE CONCEPT OF LAW, *supra* note 7, at 124–27.

requires the person applying the law to utilize inference and the norms of reasoning to make a decision about the law. That much is inescapable for the Hartian legal positivist.

Importantly, as we have just seen, using the rule of recognition framework, one could infer that a consensus of legal officials will agree with her legal derivation and conclusion, even if legal officials do not have a present view on the legal matter before her. And it is not necessary that anyone have considered the particular legal matter prior to her.

Consider an example from mathematics. Mathematics has strict rules about what is considered a theorem — it must be a proposition that has a proof deriving from the axioms (most commonly the Zermelo-Frankel Axioms with the Axiom of Choice (ZFC)) based on application of the licensed rules (modus ponens, *etc.*). Now, for hundreds of years, mathematicians were stumped as to whether Fermat's Last conjecture was a theorem, *i.e.*, whether there was a proof for the conjecture starting with the ZFC axioms. So, when Andrew Wiles and his team worked out a proof for the theorem, they knew that nobody else knew whether Fermat's Last conjecture was true or false, yet they still knew that a consensus of mathematicians, after going through their proof, would agree that it was a theorem. And at a level of relative anonymity, mathematicians all over the globe know that, when they are working on something that nobody else is, if their derivation has a conventional proof, then they have a theorem that will be accepted by a consensus of mathematicians.

Similarly, with the example of vehicles in the park, it was not necessary for anyone to have considered whether a Fiat 300 (or a blue Fiat 300 or a blue Fiat 300 with a "Michigan Go Blue" sticker) is a vehicle for the driver to determine that a consensus of legal officials would think it is a vehicle that is forbidden in the park. This is just always how it works according to the Hartian framework. Every particular case is novel in some way and it requires the legal

thinker to determine what legal effect those novelties will have — that is, how other legal officials (and, in particular, a consensus of them) will apply the law to the novel case.[50]

Now consider *Henningsen*, assuming that the participant judges are Hartian legal positivists and that they believe their decision is an application of the law (and not judicial legislation). *Henningsen* is a difficult case, because there are different potential sources of law at play. As the judges saw it, there were the following salient sources of law: the text of the contractual warranty waiver, the legal principle favoring the freedom of parties to contract, the legal principle that certain contractual provisions should be avoid if they have a detrimental impact on public safety, and the legal principle about the special obligations of auto manufacturers.

To determine the result of this case, the Hartian legal positivist judge appeals to inference and the norms of reasoning — including analogy, counterfactual reasoning, hypotheticals, and inductive and abductive inference — to derive a conclusion, and all of that reasoning is expressed in the opinion. The opinion has two potential functions, among others: first, it is to convince the reader that the result is supported by law; and second, it is to set forth for the reader what the law is going forward. But there is more preliminary work that the opinion does: it convinces the judges — even the authoring judge — that the result is supported by law. It is a proof of the result for the adjudicator herself. For the Hartian legal positivist, that proof consists of showing the adjudicator herself that her decision would be accepted by other officials — *i.e.*,

[50] Mitchell N. Berman, *Constitutional Theory and the Rule of Recognition: Toward a Fourth Theory of Law*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, at 269, 277–80 (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

that there is consensus for that result. Again, the adjudicator is making a judgment based on the knowledge base of the law, combined with inference and the norms of reasoning.

Importantly, the judge cannot appeal to any kind of inference and reasoning she wants. The inferences and norms of reasoning she appeals to must be *legal* reasoning. For the Hartian, this simply means that those forms of reasoning must be accepted by other officials. That is, they must be part of the convergent practice of officials — and thus be part of the rule of recognition.

So, a judge in a hard case like *Henningsen* can believe that she is properly discussing the law because she might believe that her decision represents a consensus determination of the outcome of the case. That is, she might think that, though not obvious at first, if other legal officials apply the accepted forms of inference and the norms of reasoning to the facts and legal principles at hand, they will come also come to the same result that she has arrived at. That may not be easy or obvious, but that legal analysis is easy is not necessarily a requirement of the rule of recognition.

However, when a judge in such a situation is confronted with the fact that a number of legal officials (sufficient to undermine consensus) would disagree with her reasoning, then as a good Hartian legal positivist, she must relent from her claim that she is discussing the current state of the law. And that actually seems to be in accord with the phenomena. For example, suppose a lawyer is writing an internal memorandum to the client about a question in securities law. Suppose there is a split among the Circuits and states and the lawyer has no real sense of how the Supreme Court's Justices would decide the issue. In writing the memo, the lawyer should forthrightly explain that there is no current state of the law with respect to the securities-

law issue, even if the lawyer believes that a particular rule is better, say, in terms of economic efficiency, or whatever.

I contend that *TVA* can be similarly explained. As Leiter has convincingly argued that the Justices did not genuinely believe there was a consensus supporting their positions, let us shift perspectives to two educated Hartian legal positivist lawyers, Abraham and Michael, who genuinely did believe in the majority and dissenting positions, respectively. According to Abraham, there is no principle in our law that the textual application of a statute gives way in the face of absurd results. Michael disagrees and contends that there is such a principle in our law. How would their disagreement proceed?

Among other things, Abraham might appeal to the prior case law, contending that the Supreme Court has never struck down a statute on that basis before. He might appeal to the fact that such an exemption is unworkable. He might appeal to the slippery slope to contend that it risks democratic operation.

On the other side, Michael might *inter alia* also make appeals to prior case law, contending that other courts — Circuit courts and State Supreme courts — have before this employed the *reduction ad absurdum*. He might argue that this is not unlike other canons of interpretation. He might also argue that looking to the underlying purpose is what gives effect to the democratic decision making.

This is all standard fare. What is also clear is what they will not do: They will not make arguments that appeal to what they recognize to be idiosyncratic beliefs or commitments. Suppose Abraham believes that all textual interpretation should follow the interpretation of the religious scriptural texts in his particular tradition — that, say, interpretation must follow the words as written, regardless of anything. And let us assume that he knows a consensus of legal

officials in the United States do not have that particular view of statutory interpretation. Then Abraham will not try to justify why his view of what the law ***is*** to Michael based on his religious view.

Similarly, suppose Michael has a particular hedonist utilitarian commitment that does not care a wink about any aspects of the environment that do not generate pleasure for humans. Suppose also that most other legal officials do not have such a view. Knowing this, Michael will not try to justify his legal view based on his brand of utilitarian ethics.

The reason Abraham and Michael won't make these arguments in their justifications of their view of the current state of the law is that these arguments are idiosyncratic, they do not represent anyone else's view of the current state of the law, and thus they will not sway anyone with respect to the current state of the law. (And, if they're good lawyers, that's true whether they are Hartian legal positivists or not.) The arguments that they will make to justify their view of the current state of the law are ***conventional*** arguments. They are ones that form part of the rule of recognition — precisely what Hartian legal positivism contends.

So, does this account answer the challenge? I contend yes.

(1) Both Abraham and Michael are discussing the current state of the law, and not what it should be.

(2) They disagree about what are the grounds of the law — Abe thinks that the principle that absurdities don't defeat text is part of the law, while Michael does thinks that the principle that absurdities can defeat text is part of the law.

(3) They both may believe they are correct about the law. Each of them may believe that their view best fits with the rest of the legal framework, as enunciated by their conventional

arguments. Now, upon hearing each other's arguments, they may rethink that. But it is not obvious that they must. Under the Hartian legal positivist framework, they are making a judgment about whether their view would be the consensus view of the legal officials, given the conventions of legal practices that others agree to. They do not know exactly what others believe, but they do know the foundational commitments. For example, they know that the officials agree that the law should be consistent, be rational, preserve logical corollaries, preserve certain moral precepts, *etc.* So, each of them can appeal to inference and the norms of legal reasoning to derive certain conclusions. Abraham may believe that his view is a consensus view and Michael's is not; and vice versa for Michael.

(4) Indeed, one of them could be correct. That depends on what the consensus actually is, if such a consensus exists.

(5) Finally, and most importantly, none of this contravenes the Hartian positivist view about the law. In this discourse, law is still a product of social facts; it is about the convergent practices of officials; and is separable from morality, insofar as the convergent practice of officials is not dependent on moral precepts.

A. Objections

First, one might object that this fails to preserve our intuitions about how we question officials' conduct. For example, suppose a wise judge notices systemic bias among his colleagues that results in a failure to properly apply the law correctly. And we would think it acceptable for the wise judge to say, "You all have the law wrong."[51] But, so the objection goes, if the wise judge is alone is so thinking, under this account, the wise judge would be mistaken —

[51] That particular statement is simply a placeholder and other statements — like "You have misunderstood the law"; You have misapplied the law"; etc. — are all acceptable assertions.

because a consensus of officials disagree with the wise judge and that consensus dictates what the law is.[52]

The first step is to explicate what the wise judge's statement means. It could mean that all of the other judges ***should*** make different decisions, in which case there is nothing wrong with it even under the Hartian account as it is not a statement about the current state of the law. What if she is making a statement about the current state of the law? Then, on the Hartian picture, she is incorrect. It is simply a part of Hartian positivism that the wise judge cannot say that consensus of judges is incorrect about the current state of the law. According to the positivist, the consensus of legal officials defines the current state of the law. So, while the wise judge can lament the current state of the law, the wise judge cannot refute it with her better view, if that view is not (or would not be) shared by a consensus of judges.[53]

Indeed, I contend that this makes sense. Imagine a colloquium of well-educated scholars and practitioners on the current contours of the Second Amendment and how this will impact a host of proposed regulations aimed at the current scourge of gun violence. Suppose most of the colloquium attendees are there to come up with a definite strategy on batting gun violence. One dogged scholar repeatedly raises their hand to assert that the Second Amendment allows

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[52] I thank Alon Harel for calling my attention to this objection.

[53] But it might be that the wise judge thinks that her view will reform the consensus. Suppose the wise judge thinks that the original meaning of the Second Amendment did not protect a personal right to bear arms, but rather simply required the establishment of militiae not under the control of the federal government. The wise judge recognizes a consensus of judges disagrees, but she thinks, by setting forth her compelling conventional case, appealing to historical meaning, etc., she can convince a consensus of judges to share her view. If she does so, then she has righted the ship of the law. And she may be subjectively confident that she will do so.

In such a case, I think there are two plausible outlooks on the nature of the wise judge's statement: ***First***, the Hartian could say that, when she makes her claim, because a consensus of legal officials disagrees, she is making a statement about how the law ***should be***. Her act of informing others of her view, which then changes the consensus, seems like an act of amending the state of the law. ***Second***, the Hartian could say that she is making a claim about the current state of the law, which takes into account her own public statement about the law. That statement's genuineness depends on the genuineness of her belief that a consensus of officials will agree with her, and that statement's truth depends on whether she is correct in that belief.

sweeping regulation of personal firearms, because it does not protect a personal right to bear arms. The rest of the crowd would be justified in their groans. They might all agree that the dogged scholar is correct — as a historical, moral, and policy matter — in how they interpret the Second Amendment, but ***it simply isn't the law*** and that's because of the lack of consensus for that view.

Next, the Dworkinian might object that this understanding simply turns the "theoretical" question into an empirical one — albeit more circuitous and complex. That is, in fact, correct. The question is still *in some sense* about "head-counting" — *i.e.*, whether other legal officials would agree with the result. But the answer uses conventional inferences and the norms of legal reasoning and argumentation, along with the conventional commitments, to derive an answer to the question. And, indeed, this is no strike against the Hartian legal positivist. The Hartian legal positivist is under no obligation to preserve room for disputes about the law which are divorced from a consideration of social facts. Indeed, the Hartian ***cannot*** do so. But what the Hartian must do to meet the Dworkinian challenge is account for "theoretical" disputes — where "theoretical" has a technical meaning that the dispute relates to ***what the "grounds of the law" are***. And that the Hartian can do — understanding that the participants' disputes about the grounds of the law are based on conventional arguments.

B. A Distinct Account

One lingering question is how this account differs from Leiter's and Shapiro's. This response on behalf of the Hartian is distinct from Leiter's response in that it explains how Hartian legal positivists can engage in theoretical disagreement — disagreement about the rule of recognition — without being disingenuous or erroneous. This account still describes a practice of trying to ascertain the convergent practices of officials, but does so in a way that plausibly

models our common discourse in legal disagreement. Of course, nothing in this account is meant to contravene Leiter's contentions about the likely description of the behavior of many participants in so-called theoretical disagreement. Leiter may still be correct that many participants in such theoretical disputes are being disingenuous or are simply in error, and indeed I find his explanation of judicial behavior in *TVA* convincing and as explicating that there was indeed no genuine theoretical disagreement as a factual matter. But my account shows that the positivist need not rely on the (contingent) fact that there is no genuine theoretical disagreement in these cases, as it explains how genuine theoretical disagreement is possible for Hartian legal positivists.

My account, on behalf of the Hartian, shares a number of similarities with Shapiro's response. Just like Shapiro's proposal, this proposal relies on social facts about the commitments of legal officials. Shapiro's proposal would then take social facts about the objectives and purposes of the legal system to devise an interpretive methodology that would best further those goals and purposes. Shapiro says that this is where his proposal parts ways with the Hartian picture, because this formulation of an interpretive methodology will not satisfy the conventionality thesis — because it will not be in accord with the convergent practices of officials.

This point requires specific attention. First, it could be that what Shapiro envisions as the construction of an interpretive methodology is actually untethered to the convergent practices of officials. And surely participants *could* engage in this practice. But I question whether this would constitute a discussion ***of the law***, if it is detached from convention. As discussed above, if this interpretive methodology is idiosyncratic, even if it would in fact best satisfy the

underlying goals and purposes of the legal system, that will not constitute a discussion of the law.

Second, it could be that Shapiro has essentially the same thing in mind as my Hartian picture, but does not think that this meets the conventionality thesis. Shapiro might think that it fails to meet conventionality because the particular interpretive methodology is not necessarily put into practice by other legal officials.[54]

But, as discussed above,[55] I think this is mistaken. The fact that a specific methodology has not yet been put into practice does not negate the conventionality thesis. The critical points are how the interpretive methodology is generated and whether it will accurately model the behavior of a consensus of officials in the domain of that interpretive methodology. If the methodology is generated through inference and norms of reasoning that are employed or licensed by a consensus of legal officials and the methodology will model the behavior of a consensus of legal officials, then that is enough for this process to be grounded in the convergent practices of those officials — and thus enough to satisfy the conventionality thesis. It is not requisite that the officials have previously employed the interpretive methodology, just as it is not necessary that legal officials have considered a novel case for the Hartian positivist to have a genuine, correct view about the current state of the law with respect to that novel case.

Of course, that said, the fact that the legal officials have employed a particular interpretive methodology will be good evidence that the methodology will model those legal

[54] Shapiro does not say much about why conventionality is not met by his proposal. He only says that "[b]ecause theoretical disagreements abound in the law, interpretive methodology may be fixed in ways other than specific social agreement about which methodologies are proper." Shapiro, *supra* note 4, at 43. Thus, it sounds like the lack of "specific social agreement" — the fact that people do not in fact use a particular interpretive methodology — is the reason he thinks conventionality is lacking.

[55] *See supra* note 50 and accompanying text.

officials' behavior. But it isn't necessary. That is, consider any novel model of the law, which uses data points from the law to generate a principle that explains those data points as well as future ones. Some that come to mind are Robert Cooter's famous price–sanction distinction,[56] Guido Calabresi's groundwork on law and economics,[57] and Mitchell Berman's explanation of the blackmail paradox.[58] Each is conventional in that it is constructed based on the convergent practices of officials. But each is also novel, such that officials have not put them into practice. Yet each, insofar as they are successful, will model the behavior of the officials with respect to their domain and thus make true claims about the current state of the law.[59]

CONCLUSION

In *Law's Empire*, Dworkin laid the claim that Hartian legal positivism cannot account for theoretical disagreement in the law. That is, because Hartian legal positivism contends that law is a product of social facts and the convergent practices of officials, it cannot explicate how people might both disagree about what are the grounds of the law and genuinely and veridically assert their positions about the law ***as it is***. Unlike prior accounts of how the legal positivism can explain theoretical disagreement, I have offered an account of how the Hartian legal positivist can both explain the face value of theoretical disagreement and maintain the core commitments of Hartian legal positivism. I have shown that this is possible by understanding the role of

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[56] Robert D. Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984).

[57] Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

[58] Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795 (1998).

[59] Jules Coleman makes a similar point: "If . . . judges as a general rule look to moral principles in resolving controversial features of the rule of recognition, then there exists a practice among them of resolving controversial aspects of the rule of recognition in that way . . . ." Coleman, *Negative and Positive Positivism*, *supra* note 29, at 24. Generalizing Coleman's point, if we are referencing the convergent practices of officials and developing an interpretive methodology that will conform to and preserve those convergent practices, that is enough to preserve the conventionality thesis. This proposal on how to explain theoretical disagreement as a Hartian positivist is fully in the spirit of Coleman's theory of law as convention.

inference and the norms of reasoning in legal reasoning. Participants in a theoretical disagreement, who are committed to Hartian legal positivism, can agree about all the ground facts about the law, but disagree about the grounds of the law because they arrive at their positions by differing legal inferences. Nevertheless, they need not give up any of the core Hartian commitments in the social facts, separability, and conventionality theses, because their legal inferences can be grounded in social facts and the convergent practices of officials.