

Explaining Theoretical Disagreement

Brian Leiter†

Scott Shapiro has recently argued that Ronald Dworkin posed a new objection to legal positivism in Law's Empire, to which positivists, he says, have not adequately responded. Positivists, the objection goes, have no satisfactory account of what Dworkin calls "theoretical disagreement" about law, that is, disagreement about "the grounds of law" or what positivists would call the criteria of legal validity. I agree with Shapiro that the critique is new but disagree that it has not been met. Positivism cannot offer an explanation that preserves the "Face Value" of theoretical disagreements, because the only intelligible dispute about the criteria of legal validity is an empirical or "head count" dispute, that is, a dispute about what judges are doing, and how many of them are doing it (since it is the actual practice of officials and their attitudes towards that practice that fixes the criteria of legal validity according to the positivist).

*Positivism, however, has two other explanations for theoretical disagreement, which "explain away" rather than preserve the "Face Value" disagreement. According to positivists, theoretical disagreements are either (1) disingenuous, in the sense that the parties, consciously or unconsciously, are really trying to change the law—they are trying to say, as Dworkin puts it, "what it should be" not "what the law is," or (2) simply predicated on error because parties to the disagreement honestly think there is a fact of the matter about what the grounds of law are, and thus what the law is, in the context of their disagreement, but they are mistaken, because, in truth, there is no fact of the matter about the grounds of law in this instance precisely because there is no convergent practice of behavior among officials constituting a Rule of Recognition on this point. This Article explores the "Disingenuity" and "Error Theory" accounts of theoretical disagreement, with attention to the theoretical desiderata (for example, simplicity, concision, methodological conservatism) at stake in choosing between competing explanatory theories. Particular attention is given to the best explanation for *Riggs v Palmer* in light of the actual historical context of the decision and other opinions by the *Riggs* judges in contemporaneous cases.*

† John P. Wilson Professor of Law and Director of the Center for Law, Philosophy, and Human Values, The University of Chicago Law School.

Thanks to John Gardner, Leslie Green, Mark Greenberg, and Scott Shapiro for useful discussion of these issues on various occasions, and to Greenberg for quite helpful discussion of an early draft of this Article. I also benefited from questions and comments by students in my Spring 2007 Jurisprudence class at the University of Texas at Austin when we discussed this topic. Workshop audiences at a variety of venues provided valuable feedback and discussion: the Faculty of Law and Program in Social and Political Theory, Research School of Social Sciences, Australian National University; UCLA School of Law; the Institute for Philosophical Investigation, National Autonomous University of Mexico; the jurisprudence departments of the Faculties of Law at the Universities of Genoa in Italy and Girona in Spain, and the University of Chicago Law School. Of the many who helped me on these occasions, I should mention especially Peter Cane, Riccardo Guastini, Larry Laudan, Adam Muchmore, Martha Nussbaum, Giovanni Ratti, Jane Stapleton, and Ed Stein.

INTRODUCTION

Scott Shapiro agrees, “to some extent,”¹ with my verdict that the “winner” of the so-called “Hart-Dworkin debate” about the nature of law was H.L.A. Hart’s legal positivism.² Where he disagrees is that he thinks Ronald Dworkin posed a new kind of objection to positivism in *Law’s Empire*³ to which positivists have not adequately responded. According to this new objection, positivists have no satisfactory account of what Dworkin calls “theoretical disagreement” about law.⁴ “[P]ositivism,” says Shapiro, “is particularly vulnerable to Dworkin’s critique in *Law’s Empire*.”⁵ If that were true, Shapiro’s argument would, indeed, be significant. I agree with Shapiro that Dworkin’s critique in *Law’s Empire* is different from the earlier ones that have long ago been deflected or discredited.⁶ I disagree that the “new” critique is compelling or that positivists have failed to respond to it. Notwithstanding Shapiro’s heroic effort at resuscitation, my verdict on the “Hart-Dworkin debate” stands.

I. THEORETICAL DISAGREEMENT

When lawyers or judges have a theoretical disagreement about law in Dworkin’s sense, they are disagreeing about what most legal philosophers call the criteria of legal validity (and what Dworkin calls the “grounds of law”): that is, they are disagreeing about the criteria some norm must satisfy to count as “legally valid” (or, as I shall sometimes say, “legally binding” or “a norm of that legal system”). So, for example, judges might “disagree about whether statute books and judicial decisions exhaust the pertinent grounds of law”;⁷ that is, they might disagree about whether a legally binding norm must *necessarily* be found in a statute book or judicial decision. Perhaps the Koran or

¹ Scott J. Shapiro, *The ‘Hart-Dworkin’ Debate: A Short Guide for the Perplexed*, in Arthur Ripstein, ed., *Ronald Dworkin* 22, 49 (Cambridge 2007).

² See Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, reprinted in Brian Leiter, ed., *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* 153, 154 (Oxford 2007), originally published in 48 *Am J Juris* 17 (2003). For a shorter, punchier, and more polemical version of these doubts, see generally Brian Leiter, *The End of Empire: Dworkin and Jurisprudence in the 21st Century*, 36 *Rutgers L J* 165 (2004).

³ Ronald Dworkin, *Law’s Empire* 4–6 (Belknap 1986).

⁴ *Id.* (describing “theoretical disagreement” as a disagreement about law’s grounds).

⁵ Shapiro, *Short Guide* at 50 (cited in note 1).

⁶ See Leiter, *Beyond the Hart/Dworkin Debate* at 155–64 (cited in note 2) (providing an overview of the arguments in the Hart-Dworkin debate).

⁷ Dworkin, *Law’s Empire* at 5 (cited in note 3).

the New Testament of the Bible is also a pertinent ground of law? Perhaps what is morally obligatory is a ground of law? Perhaps economic efficiency is a ground of law? Insofar as jurists disagree about these questions, they are engaged in a theoretical disagreement.⁸

In fact, though, no participants in the theoretical disagreements to which Dworkin calls attention deny that statutes and judicial decisions are grounds of law, nor do they claim that judges must turn to sacred texts or economics journals to figure out what the law is. The theoretical disagreements that interest Dworkin presuppose that statutes and judicial decisions are, indeed, “grounds of law,” but deny that this settles the question of what the criteria of legal validity *really* are: the key theoretical disagreements for Dworkin concern the *meaning* of the acknowledged sources of law such as statutes and constitutional texts.⁹

Consider two of Dworkin’s central examples of theoretical disagreement. In *Riggs v Palmer*,¹⁰ the question was whether Elmer was entitled to inherit under the will of his grandfather whom he had murdered in order to claim his inheritance.¹¹ The majority of the New

⁸ I shall follow Shapiro in treating the argument from theoretical disagreement as independent of what Dworkin calls the “semantic sting” argument. See Shapiro, *Short Guide* at 41, 54 n 57 (cited in note 1). As Shapiro puts it:

The semantic sting [argument] is used to explain why positivists require the grounds of law to be determined by consensus [that is, by the social rule constituting the Rule of Recognition]. Dworkin hypothesizes that positivists insist on consensus because they tacitly subscribe to a criterial semantics, according to which concepts may be shared only if the criteria for the proper application of the concepts are shared.

Id. For a discussion of the Rule of Recognition, see text accompanying note 32. There is, as various writers have pointed out, no reason to think that the positivist theory of the concept of law is committed to criterial semantics. A *locus classicus* for this point is Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, 4 *Legal Theory* 249, 258–65 (1998). The argument from theoretical disagreement survives the refutation of the “semantic sting” argument because it calls our attention to cases in which people disagree about the “grounds of law” even in the absence of *any* criteria (even criteria unknown to the speakers) that settle what the grounds of law are.

⁹ There are two levels at which judges might disagree about the “meaning” of an authoritative legal source: they might, most obviously, disagree about the meaning of the text, or they might agree about the meaning but *disagree* about the correct theory of meaning or interpretation that explains why the text means what it means. This distinction proves important in Parts II and III.

¹⁰ 22 NE 188 (NY 1889).

¹¹ *Id.* at 189 (noting that Elmer poisoned his grandfather to prevent him from changing the favorable provisions of his will). Dworkin discussed the case in his famous *The Model of Rules I*, in Ronald Dworkin, *Taking Rights Seriously* 14, 23 (Harvard 1977), but in *Law’s Empire* refers to it as “Elmer’s Case.” See Dworkin, *Law’s Empire* at 15 (cited in note 3). The change in name probably is not accidental, since the features of the case that are important for Dworkin’s argument twenty years later in *Law’s Empire* are rather different than those he emphasized in 1967. See generally Ronald M. Dworkin, *The Model of Rules*, 35 U Chi L Rev 14 (1967). I shall return to that point in Part III.

York court held that he was not entitled to inherit; the dissent thought otherwise. But the two sides disagreed not simply about the result: “[T]heir disagreement—or so it seems from reading the opinions they wrote—was about what the law actually was, about what the statute required when properly read.”¹²

The dissent, says Dworkin, opted for “a theory of ‘literal’ interpretation,” according to which the words have “the meaning we would assign them if we had no special information about the context of their use or the intentions of their author.”¹³ Since the plain meaning of the statutes governing wills made clear that the grandfather’s will was valid, Elmer was entitled to inherit.¹⁴ The majority, by contrast, had “a very different theory of legislation” according to Dworkin.¹⁵ Since “it would be absurd . . . to suppose that the New York legislators who originally enacted the statute of wills intended murderers to inherit” and since “a statute does not have any consequence the legislators would have rejected if they had contemplated it,”¹⁶ the majority concluded that Elmer could not inherit, since the legislature never would have intended a murderer to benefit from his misdeed in this way. So in *Riggs*, the judges had a theoretical disagreement because they disagreed about the relevant criterion of legal validity: is it the *plain meaning* of the statute the legislature enacted, or is it the *counterfactual intention* of the legislators had they considered the application of the statute to the facts at hand?

Dworkin offers the Supreme Court’s decision in *Tennessee Valley Authority v Hill*¹⁷ as another central example of theoretical disagreement. The Endangered Species Act of 1973¹⁸ included within its scope an authorization to protect an obscure fish called the “snail darter.”¹⁹ The Tennessee Valley Authority (TVA) had already spent \$78 million building a dam, which, as fate would have it, threatened the snail darter’s habitat.²⁰ The question before the Court was whether construc-

¹² Dworkin, *Law’s Empire* at 16 (cited in note 3).

¹³ *Id.* at 17.

¹⁴ *Riggs*, 22 NE at 191 (Gray dissenting).

¹⁵ Dworkin, *Law’s Empire* at 18 (cited in note 3).

¹⁶ *Id.* at 19.

¹⁷ 437 US 153 (1978).

¹⁸ Endangered Species Act of 1973, Pub L No 93-205, 87 Stat 884, codified as amended at 16 USC § 1531 et seq.

¹⁹ See Endangered Species Act § 7, 87 Stat at 892, codified at 16 USC § 1536 (authorizing the Secretary of the Interior to designate endangered species and their critical habitats). See also *Hill*, 437 US at 159–60 (explaining how the snail darter came to be designated as an endangered species).

²⁰ *Hill*, 437 US at 166, 171.

tion must stop because of the danger to the protected fish.²¹ The majority said yes, the dissent no; but, as with *Riggs*, the crux of their purported theoretical disagreement concerned the meaning of the Endangered Species Act. The majority, though giving a nod to the relevance of legislative intention, took the view, according to Dworkin, “that when the text is clear the Court has no right to refuse to apply it just because it believes the results silly.”²² The dissent, by contrast, thought that the statute must be read so as to “accord[] with some modicum of common sense and the public weal,”²³ which Dworkin glosses as meaning “that the courts should accept an absurd result only if they find compelling evidence that *it* was intended.”²⁴ The *Hill* dissent, then, shares with the *Riggs* majority the view that *legislative intention*—including hypothetical or counterfactual legislative intention—controls the meaning of a statute, hence controlling what the law is.

Now, theoretical disagreements are not the only disagreements lawyers and judges have about the law. Some disagreements are, in Dworkin’s terms, merely “empirical”;²⁵ that is, the parties agree about the criteria of legal validity—for example, being approved by a majority of the legislature and not vetoed by the executive suffices to make a norm legally binding—but disagree about whether those criteria are satisfied in a particular case. (Did a *majority* really approve the legislation? Did the executive veto the legislation in a timely way?) Certain kinds of empirical disagreements are relatively few and far between in court decisions: it is rare to find the courts debating, for example, whether a statute was or was not vetoed, or whether it received enough votes to pass. More common, of course, are empirical disagreements about the *intentions* of the legislature: even when judges agree that intention is controlling, they may disagree about what the intention *really* is or would have been given legislative history, the reasonable meaning of statutory language, contemporaneous events and legislation, and the like. These empirical disagreements are, in any case, not at issue in Dworkin’s new objection to legal positivism.

Dworkin describes *Law’s Empire* as a book “about theoretical disagreement in law” that “construct[s] and defend[s] a particular theory”

²¹ Id at 173.

²² Dworkin, *Law’s Empire* at 21 (cited in note 3).

²³ Id at 23, quoting *Hill*, 437 US at 196 (Powell dissenting).

²⁴ Dworkin, *Law’s Empire* at 23 (cited in note 3), citing *Hill*, 437 US at 196 (Powell dissenting).

²⁵ Dworkin, *Law’s Empire* at 5 (cited in note 3).

of law that explains such disagreement and how it is possible.²⁶ He declares that “[i]ncredibly, our jurisprudence”—by which he means legal positivism—“has no plausible theory of theoretical disagreement in law,”²⁷ and that, in consequence, this jurisprudence “distorts legal practice”²⁸ and is therefore “an evasion rather than a theory.”²⁹

II. THE POSITIVIST ACCOUNT OF THEORETICAL DISAGREEMENT

Before turning to the positivist account (and why Dworkin deems it inadequate), it is worth pausing a moment to notice the curious dialectical structure of Dworkin’s argument. Why should a theory of law be organized around the phenomenon of theoretical disagreement about law, absent some showing—nowhere to be found in Dworkin’s corpus—that it is somehow *the* central (or even *a* central) feature of law and legal systems? And why think a competing theory, positivism, should be abandoned because it fails to have an account of theoretical disagreement? No physicists, after all, have abandoned the theory of gravity, even though no one knows how to square it with the fact that the universe is expanding.³⁰ The reason, of course, is that the expansion of the universe is one of only a multitude of empirical phenomena to which a theory of gravity must answer, and the theory answers quite well to almost all the others. So even if we agreed with Dworkin that legal positivism provided an unsatisfactory account of theoretical disagreement in law, this would be of no significance unless we thought that this phenomenon was somehow central to an understanding of the nature of law and legal systems. I return to this issue below.

But what do legal positivists say about theoretical disagreement and why is their account inadequate on Dworkin’s view? Recall the

²⁶ Id at 11. In order to explain theoretical disagreement, Dworkin argues we must treat law as an “interpretive concept,” and that his theory, “Law as Integrity,” provides the best interpretation of that concept. Id at 87, 94–95. But notice that the central rationale for treating law as an interpretive concept is that doing so is necessary to make sense of theoretical disagreement. See id at 87.

²⁷ Id at 6.

²⁸ Id at 15.

²⁹ Dworkin, *Law’s Empire* at 11 (cited in note 3) (“If [we] have no good answer to the question how theoretical disagreement is possible and what it is about, we lack the essentials . . . for intelligent and constructive criticism of what our judges do.”).

³⁰ There are, to be sure, competing theories, see, for example, Brian Greene, *The Fabric of the Cosmos: Space, Time, and the Texture of Reality* 230 (Knopf 2004), but not one of them is well established. See Margaret Warner, *Expanding Universe*, PBS Online NewsHour (Feb 27, 1998), online at http://www.pbs.org/newshour/bb/science/jan-june98/universe_2-27.html (visited Sept 1, 2009) (discussing the disjunction between the implications of gravity and the data on the nature of the universe and the lack of any commonly accepted explanation).

basic contours of the positivist theory as developed by Hart. Law, according to Hart, is the “combination of primary and secondary rules,” that is, of primary rules that tell people what they can and cannot do, and of secondary rules that instruct officials how to create, change, identify, and resolve disputes about rules, both primary and—with one exception—secondary.³¹ The exception is the secondary rule Hart calls the “Rule of Recognition,” which specifies the criteria of legal validity (the “grounds of law” in Dworkin’s terminology) all *other* rules must satisfy if they are to count as rules of that legal system.³² That a Rule of Recognition is the rule for any particular legal community cannot itself be established by reference to other criteria, on pain of infinite regress.³³ Rather, Hart says, the Rule of Recognition is constituted by a certain kind of social practice which gives rise to what Hart calls a “social rule.”³⁴ Social rules exist when there is a practice of convergent behavior by people who evince a certain attitude towards that behavior: they do not simply converge mindlessly, as it were, but instead take themselves to have obligations to engage in that behavior.³⁵ The Rule of Recognition, in turn, is just the social rule constituted by the actual practice of officials deciding questions about legal validity, insofar as they evince an attitude of having an obligation to decide questions of legal validity by reference to the criteria they actually employ.³⁶ Judges in the United States, for example, engage in a convergent practice of behavior of invalidating statutes forbidden by the Constitution. But it is not just an accident that they engage in such behavior; rather, they take themselves to have an obligation to do so. Ask the chief justice of the Supreme Court, “Why do you invalidate statutes inconsistent with the Constitution?” and, after he is done being puz-

³¹ H.L.A. Hart, *The Concept of Law* 80–81 (Oxford 2d ed 1994):

[W]e have already seen . . . the need, if we are to do justice to the complexity of a legal system, to discriminate between two different though related types [of legal rules]. Under the rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify new ones, or in various ways control their incidence or control their operations.

³² *Id.* at 106.

³³ *Id.* at 107–10.

³⁴ *Id.* at 109.

³⁵ Hart, *The Concept of Law* at 91 (cited in note 31).

³⁶ This is the “positive” aspect of the positivist theory of law: what the Rule of Recognition is in a community, hence what the law is, is just a complicated psychosocial fact about the practice of officials and their attitudes towards that practice. See Hart, *The Concept of Law* at 97 (cited in note 31).

zled, he will reply roughly as follows: “Because that is what I have an obligation to do as a federal judge.”³⁷ In offering that kind of answer he would be evincing what Hart calls acceptance of the Rule of Recognition of the American legal system—which includes “constitutionality” as one of its criteria of legal validity—from an “internal point of view,” that is, acceptance of it as an obligation-imposing rule.³⁸

In what sense, then, does the Hartian positivist have difficulty explaining theoretical disagreement about law? Recall 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. But the Rule of Recognition, on Hart’s view, is a social rule, meaning its content—that is, the criteria of legal validity—is fixed by a complex empirical fact, namely, the *actual practice* of officials (and the attitude they evince towards the practice). So it looks like the only dispute about the criteria of legal validity that is possible, on Hart’s view, is an empirical or “head count” dispute: namely, a dispute about what judges are doing, and how many of them are doing it, since it is *the actual practice of officials and their attitudes towards that practice* that fixes the criteria of legal validity according to the positivist.

Yet this latter kind of disagreement is manifestly not at issue in Dworkin’s examples of theoretical disagreement. The claim of the dissent in *Riggs*, after all, is not that the majority is mistaken because *in fact* most judges do not apply the counterfactual intention test favored by the *Riggs* majority. It is, rather, that the *plain meaning* of the statute controls disposition of the case, and it is not the court’s business to override the will of the legislature.³⁹ Judges engaged in Dworkinian theoretical disagreements are disagreeing about the *meaning* of the authoritative sources of law, and thus about what the law requires them to do in particular cases; they are not engaged in an empirical

³⁷ Perhaps, as Mark Greenberg suggested to me, the chief justice’s first response would be, “Because the Constitution is the highest law.” But then if we replied, “Yes, we agree it is the highest law, but so what? Why invalidate lower laws just because they are contradicted by the highest law?” At some point, we would elicit a version of the (perplexed) reply I described in the text.

³⁸ A more striking, recent example involves former Alabama Chief Justice Roy Moore, who refused to comply with a federal court’s order that the Alabama Supreme Court’s display of the Ten Commandments violated the Establishment Clause and should be removed. See *Moore v Judicial Inquiry Commission of Alabama*, 891 S2d 848, 852–53 (Ala 2004). His refusal to recognize the legal validity of that higher court’s decision resulted in his being removed from office by a state judicial ethics commission. See *id.* at 854. Other legal officials, in short, manifested their acceptance from an internal point of view that part of the Rule of Recognition in the United States requires lower courts to abide by the decisions of higher courts, and they did so by (severely) sanctioning Moore for his divergence from the normal practice embodied in the rule.

³⁹ I will return to the details of what the judges *actually* said in *Riggs* in Part IV.

dispute about how their colleagues on the bench *typically* or *generally* resolve disputes.

So the positivist theory fails to explain theoretical disagreement in the following precise sense: it fails to explain what I will call the “Face Value” character of the disagreement, that is, what it appears the judges are disputing when we take at Face Value what they actually say in the opinions they write and publish.⁴⁰ They write *as if* there is a fact of the matter about what the law is, even though they disagree about the criteria that fix what the law is. The positivist explanation for this “disagreement” cannot vindicate what it *appears* they are disagreeing about.

The particular character of the explanatory failing bears emphasizing precisely because there are multiple contexts in which the Face Value character of a phenomenon is not what cries out for explanation. Sigmund Freud’s Rat Man,⁴¹ to take an extreme case, can give elaborate explanations for why he must purge all the fat from his body, but Freud’s account *explains away* the Face Value of what he says: it shows that he is obsessed with getting rid of his body fat (*Dick* in German) not because the Rat Man has any interest in being slim, but because of a repressed wish to get rid of (that is, kill) his cousin Dick, his competitor for the affections of the woman he loves.⁴² If there is a failing of Freud’s account it surely is *not* that it fails to take the Rat Man’s statements at Face Value: it would be, rather, that it has identified the wrong causal and psychological mechanism by which the Rat Man became consciously obsessed with losing weight.

The Rat Man case is extreme, however, in the sense that the consciously articulated reasons he gives for wanting to purge the fat from his body cannot figure in any remotely plausible reconstruction of his motives: the reasons are bad; they do not rationally support his obsession; and they cannot be intelligibly integrated into a general account of his actions and motivations. The Face Value reasons of the Rat Man are, in short, not plausibly taken as his *real* reasons. Matters are not so stark, by contrast, in the case of Dworkin’s examples of theoretical disagreement. We might think that taking those disagreements at Face

⁴⁰ As Jane Stapleton correctly reminds me, Dworkin is silent on the many cases where common law judges explicitly (that is, at Face Value) acknowledge making law and weighing considerations of policy. That fact already considerably reduces the universe of cases for which the Dworkinian theory purportedly has the better explanation.

⁴¹ See Sigmund Freud, *Notes upon a Case of Obsessional Neurosis* (originally published 1909), in James Strachey, ed, 10 *The Standard Edition of the Complete Psychological Works of Sigmund Freud* 151, 188–89 (Hogarth 1955) (James Strachey, trans).

⁴² *Id.* at 189.

Value is warranted precisely because it seems possible to reconstruct them as rational disagreements on their own terms. Or so, in any case, someone sympathetic to Dworkin's complaint must argue.

So how do positivists explain theoretical disagreement? There are two candidate explanations, neither of which attempts to vindicate the Face Value disagreement.⁴³ According to positivists, either theoretical disagreements are *disingenuous*, in the sense that the parties, consciously or unconsciously, are really trying to *change* the law—parties to a theoretical disagreement about law are trying to say, as Dworkin puts it, “what it should be” not “what the law is.”⁴⁴ Or parties to theoretical disagreements are simply in *error*: they honestly think there is a fact of the matter about what the grounds of law are, and thus what the law is, in the context of their disagreement, but they are mistaken, because in truth there is no fact of the matter about the grounds of law in this instance precisely because there is no convergent practice of behavior among officials constituting a Rule of Recognition on this point.⁴⁵ Call the first possibility the “Disingenuity” account and the second the “Error Theory” account. Notice that the Disingenuity account presupposes the *truth* of the Error Theory: a judge cannot be disingenuous in arguing *as if* there were a clear criterion of legal validity operative in a dispute without knowing that, in fact, there is no such criterion. The Error Theory account, by contrast, attributes a pure mistake to the parties: they *genuinely* think there is a right legal answer about the applicable criteria of legal validity, even though there is no convergent practice (no social rule) supporting such an answer. On the Disingenuity account, by contrast, the parties to the dispute know, at some level, that it would be a mistake to genuinely believe there is a right answer as a matter of law.

The Disingenuity account can be put in terms that are either more or less accusatory. In the harsher version, the Disingenuity account claims that judges engaging in theoretical disagreements know

⁴³ More precisely, the positivist accounts do not try to vindicate the Face Value of the disagreement in the sense that positivist explanations for theoretical disagreement do not rely on the assumption that there is a fact of the matter about what the law is. Yet this latter assumption is one that is either explicit or can be reasonably imputed to the parties based on the Face Value of their disagreement.

⁴⁴ Dworkin, *Law's Empire* at 7 (cited in note 3).

⁴⁵ Dworkin puts this second possibility somewhat misleadingly: he says that positivists “say that theoretical disagreement is an illusion, that lawyers and judges all actually agree about the grounds of law.” *Id.* at 7. It is true that on this second account, theoretical disagreement is a kind of illusion, but nothing requires the positivist to claim *in addition* that lawyers and judges all actually agree about the grounds of law. If they did, then they would not think they were disagreeing!

full well (that is, consciously) that there is no “law” to be found, that the issue is very much up for grabs, and that their purportedly theoretical disagreement about what the law requires is nothing more than rhetorical posturing designed to facilitate acquiescence to their preferred quasi-legislative outcome. In the milder version, the Disingenuity account claims only that judges have an unconscious or pre-conscious awareness that there is no “law” to be found—that is, under optimal conditions for rational reflection they would be able to acknowledge that there is no binding criterion of legal validity in the case at hand. But, because of the various familiar psychological and emotional influences on human decisionmaking in the heat of a legal dispute,⁴⁶ they come to believe, at least occurrently, that there is a right answer as a matter of law, and it is an answer that favors their view of the case.

Error Theories are familiar in many areas of philosophical inquiry, from ethics⁴⁷ to the philosophy of mathematics.⁴⁸ In all cases, they are motivated by the need to reconcile some part of our thinking and discourse with what we take to be well-established theories about what there is.⁴⁹ So, for example, in the case of ethics, J.L. Mackie argues that if there were ethical properties, they would have the extraordinary feature of constituting categorical imperatives for action for those who acquired knowledge of them.⁵⁰ Since nowhere else in our picture of the world and its component parts do we find any evidence of properties with such remarkable action-guiding powers, it seems incredible that they should exist in the ethical case. Mackie’s conclusion is that ethical judgments—judgments that systematically ascribe such action-guiding properties to states of affairs—are all in error.⁵¹

A standing puzzle about Error Theoretic accounts is why a particular discourse persists when all its judgments are false. Religious discourse is our paradigm case of an ongoing discourse that nonetheless invites Error Theoretic treatment, since its persistence (notwith-

⁴⁶ Judge Richard Posner’s account is illuminating in this regard. See Richard A. Posner, *How Judges Think* 105–07 (Harvard 2008).

⁴⁷ See, for example, J.L. Mackie, *Ethics: Inventing Right and Wrong* 35 (Penguin 1977).

⁴⁸ See, for example, Hartry H. Field, *Science without Numbers: A Defence of Nominalism* 1–2 (Princeton 1980).

⁴⁹ Error Theories are, strictly speaking, semantic theories, that is, theories to the effect that certain expressions or judgments (for example, about ethical or mathematical properties) are genuinely referential, and thus truth-evaluable, yet systematically fail to refer because the properties in question do not exist. In the text, I prescind from the particulars of the *semantic* account, since I do not see them as at issue in Dworkin’s critique of positivism.

⁵⁰ Mackie, *Ethics* at 33 (cited in note 47).

⁵¹ *Id.* at 35.

standing its systematic falsity) seems explicable by the powerful psychological satisfactions it affords sincere participants.⁵² The case of moral discourse is more complicated, since it also obviously serves to coordinate and regulate social interactions, which have led many philosophers sympathetic to Mackie's picture of what there is to conclude that ethical talk should be construed noncognitively instead, that is, as expressing attitudes that help shape social interaction.⁵³

Theoretical disagreements about law present a special case, precisely because the range of claims to which the Error Theory applies is rather limited within the total scope of disputes one might have about law. It is one thing to say that *all* mathematical judgments or *all* ethical judgments are false; it is quite another to say that *all judgments about the grounds of law in the absence of a social rule constituting a Rule of Recognition* are false. After all, the latter class of judgments represents only a fraction of the disagreements lawyers and judges have. More importantly, theoretical disagreements about law represent only a minuscule fraction of all *judgments* rendered about law, since most judgments about law involve *agreement*, not disagreement. This bears emphasizing, given the mysterious centrality assigned theoretical disagreements by Dworkin in his later theory of law.

One may think of the universe of legal questions requiring judgment as a pyramid, with the very pinnacle of the structure captured by the judgments of the highest court of appeal (where, one may suppose, theoretical disagreements in Dworkin's sense are rampant), and the base represented by all those possible legal disputes that enter a lawyer's office. This is, admittedly, a very strange-looking pyramid, as the ratio of the base to the pinnacle is something like a million to one.⁵⁴ 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

⁵² For a more complex account of the motivations for religious belief, see Friedrich Nietzsche, *On the Genealogy of Morality* 66–71 (Cambridge 1994) (Carol Diethe, trans). See also Brian Leiter, *Nietzsche on Morality* 235–44 (Routledge 2002). But Nietzsche's account is also quite compatible with the Error Theoretic treatment of religious discourse.

⁵³ The classic contemporary noncognitivist treatment of moral discourse is Allan Gibbard, *Wise Choices, Apt Feelings: A Theory of Normative Judgment* (Harvard 1990).

⁵⁴ Consider Administrative Office of the US Courts, *Statistical Tables for the Federal Judiciary* 37 table C-4 (Dec 2007), online at <http://www.uscourts.gov/stats/dec07/C04Dec07.pdf> (visited Sept 1, 2009) (reporting that out of 236,256 cases in 2007, 53,581 were resolved without court action, and only 9,858 were resolved by the court at trial); Administrative Office of the US Courts, *Judicial Case Load Indicators: 12-month Periods Ending March 31, 1998, 2003, 2006, and 2007* (Mar 2007), online at <http://www.uscourts.gov/caseload2007/front/IndicatorsMar07.pdf> (visited Sept 1, 2009) (reporting that in 2007, 254,850 cases were terminated in the US district court system and that only 60,668 appeals were filed in the US court of appeals system).

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 result in litigation settle by the end of discovery; that *most* cases that go to trial and verdict do not get appealed; and that *most* cases that get appealed do not get appealed to the highest court, that is, to the court where theoretical disagreements are quite likely rampant.

Why the preceding is true is familiar to anyone knowledgeable about law and litigation: there is *massive* and *pervasive* agreement about the law throughout the system.⁵⁵ It is precisely because just about everyone agrees about the law that lawyers can tell most prospective clients who wander through the doors that they have no claim and should go home; it is precisely because just about everyone agrees about the law that most cases settle after discovery, since by then the facts are clear and both sides know what the legally required result will be (and so the only question is putting a price tag on the resolution); it is precisely because just about everyone agrees about the law that most cases are not appealed; and so on. To be sure, there are a variety of strategic and other considerations that may explain why some parties litigate and appeal verdicts quite independent of agreement about the law; but if there were not massive convergence about *what the law is*, we should expect the universe of legal cases to look less like a pyramid and more like a lopsided square, whose base was perhaps somewhat bigger than its top.⁵⁶

⁵⁵ The point was made in the jurisprudential literature against reckless claims about legal indeterminacy by the Critical Legal Studies writers a generation ago. See, for example, Frederick Schauer, *Easy Cases*, 58 S Cal L Rev 399, 429–30 (1995); Brian Leiter, *Legal Indeterminacy*, 1 Legal Theory 481, 488 (1995); Ken Kress, *Legal Indeterminacy*, 77 Cal L Rev 283, 296–97 (1989). There is a certain irony in now needing to reemphasize a similar point against Dworkin, the true believer in global legal determinacy! The difficulty, of course, is that Dworkin's belief in the determinacy of legal reasoning is only a *metaphysical* thesis, not an *epistemological* one—were it epistemological, then there would be no room, of course, for theoretical disagreement.

⁵⁶ I simplify, unavoidably, the complexity of considerations that influence parties in a modern legal system. My colleague Adam Muchmore has emphasized to me three other important scenarios, though ones consistent with the basic hypothesis about massive agreement about the law. First, large law firms are less likely to tell their corporate clients to “go home,” as opposed to give them odds on their chances of success—and corporate clients, even with low odds, may for all kinds of reasons proceed with litigation. Second, even where the law is not clear, pretrial rulings may “clarify” it—at least for purposes of the dispute at hand—such that parties can calculate what they are willing to pay given what juries are likely to believe about the facts. Third, and finally, criminal defendants have more compelling reasons for appeal, even in the face of relative clarity about the law and the facts, than others, and so their rate of appeal would not count against the hypothesis that there is massive agreement about the law.

One of the great theoretical virtues of legal positivism as a theory of law is that it explains why the universe of legal cases looks like a pyramid—precisely because it explains the pervasive phenomenon of *legal agreement*. Legal professionals agree about what the law requires so often because, in a functioning legal system, *what the law is* is fixed by a discernible practice of officials who decide questions of legal validity by reference to criteria of legal validity on which they recognizably converge. Only as we approach the pinnacle of the pyramid do we approach those cases where the practice of officials breaks down, and the “law” is up for grabs. Indeed, there is an obvious “selection effect”⁵⁷ in favor of appealing the cases where the law is not clear, and so judges have room for theoretical disagreement, and thus room for siding with the appellants’ version of the case.

When we put the phenomenon of theoretical disagreement in this kind of realistic perspective, the oddity of Dworkin’s dialectical tact in *Law’s Empire* becomes apparent. Dworkin would have us focus on the pinnacle of the pyramid, and construct a theory that explains *it*—explains it, moreover, in the sense of taking discourse at the pinnacle at Face Value! That legal positivism makes happy sense of *the overwhelming majority of legal phenomena* appears to count for naught.⁵⁸ It would be as if the adequacy of a theory of gravity were measured by its comportment with the expansion of the universe rather than with its ability to predict the observable behavior of midsize physical objects as they fall to earth, or the movement of the planets, and so on.

But perhaps this way of framing the dispute is too facile.⁵⁹ To be sure, we must concede the obvious: massive agreement about the law—not disagreement—is the norm in modern legal systems. But this apparent agreement, a Dworkinian might assert, belies a deeper disagreement: namely, about the law itself. Perhaps “plain meaning” theorists and “counterfactual intentionalists” end up agreeing about the resolution of most cases. But that is just because the plain meaning and the counterfactual intention converge most of the time, and so

⁵⁷ Leiter, 1 *Legal Theory* at 490–91 (cited in note 55).

⁵⁸ A defender of Dworkin’s view might say that even if theoretical disagreements are not *frequent*, they are *qualitatively* important to a legal system since, for example, they arise in cases where the courts must license the exercise of the coercive power of the state, as well as in cases that attract considerable attention because of their overlap with ethical matters that are the subject of public controversy. Of course, no legal positivist accepts the idea that a general jurisprudence must explain how the exercise of coercive power by the courts is generally justified or the idea that cases that attract attention in the newspapers are a central datum to which a theory of law must answer. To be sure, the positivist explanations for theoretical disagreement explain such cases, though not in terms congenial to Dworkin’s theory.

⁵⁹ Here I benefited from discussions with Mark Greenberg.

lawyers and jurists who would *otherwise* have a theoretical disagreement about the *real* grounds of law avoid such disagreements simply because their competing theories of statutory or constitutional meaning yield the same result in so many cases.⁶⁰

This is, I suppose, a possibility, but the first question to raise about it is *evidential*: namely, what reason is there to suppose that this is the actual state of affairs? Certainly from the standpoint of Dworkinian earnestness about the Face Value of legal discourse, there is no support for this supposition: agreement is agreement, and surely one might think, only someone presupposing the truth of Dworkin's view would *impute* to these agreements abstract, and hidden, theoretical disagreements lurking in the background.

On the other hand, one might argue that since apparent theoretical disagreements—for example, between plain meaning theorists and counterfactual intention theorists—do emerge explicitly in other contexts (for example, towards the pinnacle of the pyramid), it is reasonable to suppose that these same views about the *meaning* of authoritative legal sources inform lower-level agreements about the law, even if not explicitly articulated. Let us call this the “Consistency Supposition”—namely, the supposition that those jurists who will mount an explicit theoretical disagreement about the law (based on some theory of legal meaning), in some cases like *Riggs* or *Hill*, may be supposed to operate with the same theory of legal meaning even in those cases that elicit agreement among all parties.

Unfortunately, the Consistency Supposition seems unwarranted by any evidence of what courts do, at least in America.⁶¹ Judges and especially lawyers tend to be *opportunistic* when it comes to their approach to the meaning of authoritative sources in contested cases, a point famously made by Karl Llewellyn in his article on the canons of

⁶⁰ To be clear, *mere* silence does not show there is no theoretical disagreement: the parties have a theoretical disagreement if they have conflicting beliefs about the grounds of law, whether those are clearly expressed. But, of course, what the parties say will be our evidence for imputing such conflicting beliefs to them, so the absence of explicit disagreement creates a serious evidential problem for the claim that there is a genuine theoretical disagreement. I take up that issue in this Part.

⁶¹ Since Dworkin's central examples of theoretical disagreement are drawn from the US context, I am going to focus on the American legal system, which, arguably, will present the strongest case for Dworkin's view. It is worth noting, of course, that in many legal systems, among the authoritative rules binding on officials are rules of interpretation, which eliminate much of the theoretical disagreement familiar in the American context. See, for example, Interpretation Act, Rev Stat Brit Colum, ch 238 (1996). One possibility that needs to be considered is that as we move up the pyramid of cases in the US legal system, there is simply less and less law and more and more lawmaking—more so, perhaps, than in those legal systems with judiciaries more disciplined by binding rules of interpretation.

statutory interpretation,⁶² and confirmed in a different way by Philip Bobbitt in his well-known study of the six “modalities” of constitutional argument and interpretation, where Bobbitt found none of the six approaches dominated the others.⁶³ Moreover, when eminent jurists—even those on appellate courts—profess what Dworkin would call theoretical disagreements, these turn out to have little impact on the actual outcomes of the cases.⁶⁴ The theoretical disagreements appear, as it were, to be epiphenomenal to the process of decision, though the Face Value approach would have us treat them as nonetheless central.

Someone familiar with mundane legal practice—the ordinary problems and issues that arise, most of which do not lead to litigation—might reasonably conclude that if there is a governing rule of interpretation at work in law, it is something like “ordinary meaning controls, except when its import is absurd or repugnant, at which point interpretive opportunism takes hold.”⁶⁵ Bearing in mind that the universe of

⁶² Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 Vand L Rev 395, 398 (1950).

⁶³ Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 93–94 (Oxford 1982) (explaining that judges often use the six modalities—the historical, textual, doctrinal, prudential, structural, and ethical arguments—in combination).

⁶⁴ See Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 Nw U L Rev 1409, 1410 (2000). Farber examined statutory interpretation decisions by Judges Richard Posner and Frank Easterbrook of the Seventh Circuit, noting that “[i]n terms of their theoretical writings about interpretation, Posner (a leading pragmatist) and Easterbrook (a leading textualist) are as far apart as two judges could be.” *Id.* at 1409. Yet Farber found that

the cases in which Posner and Easterbrook disagree also provide a test of how closely theories of interpretation are linked to outcomes. Somewhat to my surprise, I have concluded that the effect is quite limited. Posner and Easterbrook are as serious about legal theory (and certainly as capable of theoretical analysis) as any two judges we are ever likely to see. Their theories of interpretation are sharply opposed. In the four opinions that I examine in detail, however, these theoretical differences seem to have had only a marginal relationship with outcomes. Moreover, it turns out that Posner and Easterbrook are somewhat less likely to dissent from each other’s opinions than is typical for judges on their court, the Seventh Circuit.

There is, in short, a resounding absence of evidence that these judges’ sharp theoretical difference has any substantial effects on their judicial votes. This means either that their theoretical difference does not matter or that it is precisely offset by their similarities in other respects. Like other federal appellate judges, they agree on the outcome in the vast majority of the cases on which they sit. At the very least, it seems fair to say, the differences in their work as judges are dramatically smaller than the differences in their jurisprudential writings.

Id. at 1410–11. See also Posner, *How Judges Think* at 346 (cited in note 46).

⁶⁵ For the classic example of statutory construction to avoid absurdity, see *Holy Trinity v United States*, 143 US 457, 460–61 (1892):

If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity. . . . [T]he Bolognian law which enacted “that whoever drew blood in

legal cases is a pyramid, this should hardly be surprising. At the base of the pyramid, ordinary language and ordinary meaning hold sway, which, together with the convergence of officials on criteria of legal validity, render most cases clear and produce massive agreement in legal judgments. Only as we move up the pyramid—either because parties are motivated by strategic considerations or because the clear legal doctrine as applied to the facts leads to absurd or repugnant results—does what Dworkin calls theoretical disagreement become more and more common. In opposition to Dworkin’s Consistency Supposition—which is supposed to show that theoretical disagreement, though rarely apparent, is in fact (latently) omnipresent—we might propose what I call the “Plain Meaning Default Supposition,” according to which ordinary meaning (or stipulated technical meaning by reference, for example, to statutory preambles or contractual terms), together with the criteria of legal validity, gives us the content of law, *except in a narrow range of cases*.⁶⁶ If it were otherwise, we should expect almost every legal ques-

the streets should be punished with the utmost severity,’ did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit.”

Peter Cane suggests to me that in common law jurisdictions there is a related rule for cases of ambiguity: if the plain meaning is ambiguous, then consult the purpose. See William Blackstone, 1 *Commentaries on the Laws of England* *58–62 (Chicago 1979).

⁶⁶ Theoretical disagreement is also possible, of course, about case law: what it means, which case is controlling, and so on. If there is an analogue to the Plain Meaning Default Supposition in this context, it would be something like what Hart said about precedent:

First, there is no single method of determining the rule for which a given authoritative precedent is an authority. Notwithstanding this, in the vast majority of decided cases there is very little doubt. The head-note is usually correct enough. *Secondly*, there is no authoritative or uniquely correct formulation of any rule to be extracted from cases. On the other hand, there is often very general agreement, when the bearing of a precedent on a later case is in issue, that a given formulation is adequate. *Thirdly*, whatever authoritative status a rule extracted from precedent may have, it is compatible with the exercise by courts that are bound by it of . . . two types of creative or legislative activity. On the one hand, courts deciding a later case may reach an opposite decision to that in a precedent by narrowing the rule extracted from the precedent, and admitting some exception to it not before considered, or, if considered, left open. . . . On the other hand, in following an earlier precedent the courts may discard a restriction found in the rule as formulated from the earlier case, on the ground that it is not required by any rule established by statute or earlier precedent. . . . Notwithstanding these two forms of legislative activity, left open by the binding force of precedent, the result of the English system of precedent has been to produce, by its use, a body of rules of which a vast number, of both major and minor importance, are as determinate as any statutory rule.

Hart, *The Concept of Law* at 134–35 (cited in note 31). Even though, as I have argued, this is not an adequate response to the Realist arguments for indeterminacy in appellate cases (towards the pinnacle of the pyramid, as it were), see Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, in Leiter, *Naturalizing Jurisprudence* 59, 74–79 (cited in note 2), originally published in 111 *Ethics* 278 (2001), this seems wholly apt for describing, even in the American system, how case law functions on the vast majority of occasions when legal judgments are required—hence

tion that arises to look like the disputes in *Riggs* and *Hill*, when, of course, they do not.

If the Plain Meaning Default Supposition is correct as a characterization of one part of the Rule of Recognition, then Error Theory treatments of theoretical disagreements will not raise the kinds of puzzles that afflict Error Theory treatments of, for example, moral discourse. The latter, recall, face the burden of explaining why a discourse that is systematically mistaken nonetheless persists. But the Error Theory of theoretical disagreements does not claim that legal discourse is *systematically* mistaken, only that it falls into error at the pinnacle of the pyramid. That should hardly be surprising, given that the mistake involved is a fairly abstract and theoretical mistake—misunderstanding the conditions of the possibility of legal validity itself—and the opportunities for the mistake arise only in a miniscule range of cases. Systematic mistakes at the margins of any social practice are hardly surprising, especially when avoiding them would require a degree of reflective theoretical awareness that practitioners have no reason to acquire.

So the positivist has two straightforward explanations of theoretical disagreement: the Disingenuity account and the Error Theory account. *Why are these explanations not wholly adequate to the phenomenon in question?* That is the key question, and the answer to it will determine the success of Dworkin's argumentative strategy in *Law's Empire*. But before we can adequately address that question, we need to revisit his central examples.

III. THE FACE VALUE OF *RIGGS* AND *HILL* REVISITED

If Dworkin's account has anything to commend it, it is supposed to be that it does justice to the Face Value of theoretical disagreements. But does it? Attention to what the judges were really saying in *Riggs* and *Hill* casts some doubt on this claim.

On Dworkin's view, the judges in *Riggs* are disagreeing, as Shapiro puts it, about "the proper method for interpreting the law,"⁶⁷—that is, about whether the literal reading of the statute or the counterfactual intention theory is controlling. There is a sense in which such a disagreement might be *imputed* to the judges, but there is no sense in which that disagreement is central to the Face Value of the majority and dissenting opinions. Neither opinion engages the "method of in-

the massive agreement about the law, to which I have already alluded. See notes 54–55 and accompanying text.

⁶⁷ Shapiro, *Short Guide* at 35 (cited in note 1).

terpretation” employed by the other opinion, let alone assesses its validity or merits—let alone argues for its own preferred method of interpretation. The *Riggs* opinions are far more mundane, in ways that are familiar to lawyers, if not to those motivated by antecedent jurisprudential axes to grind.

The majority opinion in *Riggs* is written in the classic “shotgun” fashion of many opinions and lawyers’ briefs: canvass all possible arguments in support of a position, repeat them for emphasis, and present them all without any regard for how they actually hang together as a coherent, principled position. The majority concedes that the statute “literally construed” favors Elmer.⁶⁸ (It even concedes—nowhere noted by Dworkin—that case law supports Elmer’s position, but simply proclaims that the majority is “unwilling to assent to the doctrine of that [earlier] case.”⁶⁹) But then it makes two *different* arguments: first, that “a thing which is within the [counterfactual] intention of the makers of a statute is as much within the statute as if it were within the letter”;⁷⁰ and second,

[b]esides, all laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong . . . These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.⁷¹

The first argument is an argument about statutory interpretation, which invokes what we have been calling the counterfactual intention theory of the meaning of a statute. The second simply abandons the first argument—hence the “besides,” which, in the lawyers’ brief, would have been “in the alternative”—for a natural law-style argument to the effect that there is a binding legal principle which trumps the statute and precludes inheritance by Elmer.⁷²

It is worth noting that the second argument was the *only* one emphasized by Dworkin thirty years ago in his first systematic critique of Hart in *The Model of Rules I*,⁷³ whereas in *Law’s Empire* he calls at-

⁶⁸ *Riggs*, 22 NE at 189.

⁶⁹ *Id* at 190–91 (declining to follow *Owens v Owens*, 6 SE 794 (NC 1888)).

⁷⁰ *Riggs*, 22 NE at 189.

⁷¹ *Id* at 190 (emphasis added).

⁷² What I am calling the “natural law” argument could ground different kinds of theoretical disagreements, to be sure; my point here is only that in *Law’s Empire*, Dworkin does not so utilize it.

⁷³ Dworkin, *The Model of Rules I* at 23 (cited in note 11).

tention only to the first, the counterfactual intention argument. (So much for taking the opinion at Face Value!) But there is an obvious reason for Dworkin's selective attention to the actual opinion, namely, that the earlier objection to positivism that it could not accommodate "principles" like "no one shall be permitted to . . . take advantage of his own wrong"⁷⁴ was decisively met,⁷⁵ requiring Dworkin to shift grounds from this objection to one based on theoretical disagreement, which is our focus here.

In its first "shotgun blast," the *Riggs* majority hammers home the idea that the legislature never could have intended someone like Elmer to inherit. The court says, variously:

[I]t never could have been [the legislature's] intention that a donee who murdered the testator to make the will operative should have any benefit under it.⁷⁶

If the lawmakers could, as to this case, be consulted, would they say that they intended by their general language that the property of a testator or of an ancestor should pass to one who had taken his life for the express purpose of getting his property?⁷⁷

What could be more unreasonable than to suppose that it was the legislative intention in the general laws passed for the orderly, peaceable, and just devolution of property that they should have operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate? Such an intention is inconceivable.⁷⁸

This legislative intention, though, is easily conceivable, as long as we frame it at the right level of generality: not as the intention to let Elmer benefit from his wrongdoing but as the intention to make it a matter of clear "public policy" (as the dissent puts it⁷⁹) to enforce wills in accord with the intent of their makers—even those testators who, foolishly, leave property to their nascently felonious descendants! The majority's repetitious, rhetorical overkill on behalf of the counterfactual intention theory is, perhaps, indicative of awareness that the ar-

⁷⁴ *Riggs*, 22 NE at 190.

⁷⁵ See Leiter, *Beyond the Hart/Dworkin Debate*, reprinted in Leiter, *Naturalizing Jurisprudence* at 155–58 (cited in note 2).

⁷⁶ *Riggs*, 22 NE at 189.

⁷⁷ *Id.*

⁷⁸ *Id.* at 190.

⁷⁹ *Id.* at 192 (Gray dissenting).

gument has problems.⁸⁰ That impression is confirmed by the way in which the majority abruptly abandons the counterfactual intention argument—with the remarkable “besides” passage quoted above—in favor of the natural law argument.

Even more striking is the dissenting opinion, which does not even deign to consider the counterfactual intention theory, let alone respond to it! “We are bound by the rigid rules of law, which have been established by the legislature, and within the limits of which the determination of this question is confined,” the dissent announces.⁸¹ And since the legislature has clearly “prescribed exactly when and how wills may be made, altered, and revoked,” there is “left no room for the exercise of an equitable jurisdiction by courts over such matters.”⁸² Since the law is clear, there is no call for a judgment of equity; in any case, the equities are not entirely clear—or so the dissent seems to suggest in the following three representative observations:

[T]he demands of public policy are satisfied by the proper execution of the laws and the punishment of the crime.⁸³

Practically the court is asked [by the plaintiffs] to make another will for the testator.⁸⁴

The law has punished [Elmer] for his crime, and we may not say that it was an insufficient punishment.⁸⁵

From the standpoint of an equitable remedy, permitting the inheritance has as strong a claim as the alternative. The legislature does not want courts rewriting wills and Elmer is already in jail for his crime: how could it be equitable for the court to substitute its own version of the will for the testator’s or to deem Elmer’s punishment insufficient?

The merits of the dissent’s arguments do not really concern us. What is striking is that the dissent is not, at Face Value, having a disagreement about “what the statute required when properly read.”⁸⁶ To disagree about *that* would be to disagree about competing readings of the statute; but there is none of that in the dissent’s opinion. Its posture is far closer to what I earlier called the Plain Meaning Default

⁸⁰ The historical context of the decision, discussed in Part IV, confirms this worry.

⁸¹ *Riggs*, 22 NE at 191 (Gray dissenting).

⁸² Id (noting that the court could not ignore the legislature’s rules that were meant to provide safeguards for “grave and important acts”).

⁸³ Id at 192.

⁸⁴ Id. This second observation is in tension with the public policy of enforcing the intentions of testators as written.

⁸⁵ *Riggs*, 22 NE at 193.

⁸⁶ Compare Dworkin, *Law’s Empire* at 16 (cited in note 3).

Supposition: the statute is clear and the result is not absurd or outrageous, all things considered. Since the statute's meaning is plain, the *only* question is one of the equities—not of the merits of competing theories of statutory meaning.

Hill, on examination, is even more clearly mischaracterized by Dworkin.⁸⁷ Recall that on Dworkin's rendering, the *Hill* majority in an opinion by Chief Justice Warren Burger, though giving a nod to the relevance of legislative intention, took the view "that when the text is clear the Court has no right to refuse to apply it just because it believes the results silly."⁸⁸ The dissent, in an opinion by Justice Lewis Powell, by contrast, thought that the statute must be read so as to "accord[] with some modicum of common sense and the public weal,"⁸⁹ which Dworkin glosses as meaning "that the courts should accept an absurd result only if they find compelling evidence that *it* was intended."⁹⁰ In fact, it seems far more plausible to construe Chief Justice Burger and Justice 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. Their dispute concerns the intention of Congress and *not* the criterion of legal validity.

The majority opinion by Chief Justice Burger spends some time rehearsing in detail the various versions of the Endangered Species Act and the objections registered against each one, before concluding:

The plain intent of Congress in enacting this statute was to halt and reverse the trend towards species extinction, *whatever the cost*. This is reflected not only in the stated policies of the Act, but in literally every section of the statute. . . . In addition, the legislative history undergirding [the pertinent section of the Act] reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species. The pointed omission of the type of qualifying language previously included in endangered species legislation re-

⁸⁷ Dworkin's account is also usefully contrasted with the more realistic account of *Hill* by Richard Lazarus, based on a study of Justice Harry Blackmun's papers. See Richard Lazarus, *Human Nature, the Laws of Nature, and the Nature of Environmental Law*, 24 Va Envir L J 231, 255 (2005) (indicating that both the majority and dissent were concerned with the policy implications of upholding the injunction).

⁸⁸ Dworkin, *Law's Empire* at 21 (cited in note 3).

⁸⁹ *Hill*, 437 US at 196 (Powell dissenting).

⁹⁰ Dworkin, *Law's Empire* at 23 (cited in note 3).

veals a conscious decision by Congress to give endangered species priority over the “primary missions” of federal agencies.⁹¹

Although Dworkin characterizes Chief Justice Burger’s assertion as indicating “that when the text is clear the Court has no right to refuse to apply it just because it believes the results silly,”⁹² Dworkin fails to appreciate fully that both before and after this declaration, the majority opinion engages in an extensive consideration of the possible intention of Congress, and does not rest its opinion solely on “plain meaning.” Moreover, Burger explicitly deems the congressional intent to be to protect endangered species “whatever the cost,”⁹³ which plainly encompasses counterfactual possibilities as well.

One would not know from reading Dworkin’s account that the dissenting opinion agrees with the majority’s understanding of the relevant criterion of legal validity! Justice Powell, writing for the dissent, says that he cannot

believe that Congress could have intended this Act to produce the “absurd result”—in the words of the District Court—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. It is not our province to rectify policy or political judgments by the Legislative Branch, however egregiously they may disserve the public interest.⁹⁴

So the majority and dissent, in fact, accept the same criterion of legal validity: the statute and the intent of Congress are controlling, and if Congress intended an absurd result, it is not for the Court to undo it. Their disagreement is, in Dworkin’s terms, purely empirical, namely, about the evidence bearing on congressional intent, actual and possible. When Dworkin says that “if we take the opinions of these two justices at face value, they did not disagree about any historical matters of fact,”⁹⁵ he exactly misstates what a fair reading of the opinions shows them to be disagreeing about, namely, the *actual* and *possible* intentions of Congress as evidenced by the legislative history and the facts about the words Congress chose to enact.

⁹¹ *Hill*, 437 US at 184, 185.

⁹² Dworkin, *Law’s Empire* at 21 (cited in note 3).

⁹³ *Hill*, 437 US at 194.

⁹⁴ *Id* at 196 (Powell dissenting).

⁹⁵ Dworkin, *Law’s Empire* at 23 (cited in note 3).

IV. THEORETICAL VIRTUES AND THE BEST EXPLANATION OF THEORETICAL DISAGREEMENT

Let us recall Dworkin's charges against legal positivism with respect to the phenomenon he dubbed theoretical disagreement. "Incredibly," he says, legal positivism "has no plausible theory of theoretical disagreement in law,"⁹⁶ and that, in consequence, positivism "distorts legal practice"⁹⁷ and is "an evasion rather than a theory."⁹⁸ One might expect that such dramatic pronouncements might be accompanied by at least a gesture towards articulating what constitutes a *good explanation* or what theoretical virtues are at stake. Such expectations will, alas, be disappointed. Even though positivism has two rather obvious explanations for the phenomenon Dworkin dubs theoretical disagreement—the Disingenuity and Error Theory accounts that Dworkin himself acknowledges in passing—Dworkin spends little time explaining why they are not, in fact, quite "plausible" accounts of the phenomenon in question.⁹⁹

Even his defender, Shapiro, finds Dworkin's objections to these accounts rather feeble. As Shapiro writes:

Dworkin objected to the repair argument [that is, what I have been calling the Disingenuity account] by wondering why, if the positivist is correct, the public has yet to pick up on the judicial ruse. But the explanation for such a fact—if it is indeed a fact—is simple: the law is a professional practice and lay persons are either ignorant of its ground rules or too intimidated by legal officials to challenge them.¹⁰⁰

⁹⁶ *Id.* at 6.

⁹⁷ *Id.* at 15.

⁹⁸ *Id.* at 11.

⁹⁹ See Dworkin, *Law's Empire* at 37–43 (cited in note 3).

¹⁰⁰ Shapiro, *Short Guide* at 42 (cited in note 1). Shapiro, however, thinks there is a stronger argument available to Dworkin. He writes:

One need notice only that judges are not the only ones who engage in theoretical disagreements—legal scholars do so as well. The law reviews, after all, are filled with articles arguing for the legal propriety of one interpretive methodology over another. Indeed, the great disputations of legal theory—those between originalism and dynamism, textualism and purposivism, documentarianism and doctrinalism—have been precisely about theoretical disagreements in the law. Judges may have a great political interest in hiding the true nature of their activities, but scholars generally do not.

Id. at 42–43. Put to one side the fact that academic debate about law must count as an even more marginal phenomenon for a theory of law than debates at the pinnacle of the pyramid by courts. The crucial (but unsupported) claim here is that these academic debates are about the "legal propriety" of these interpretive methods, as opposed to their *moral* and *political* virtues. So, to

Even if one thought Dworkin's kind of argument had some merit, it would still not suffice for the issue at hand; for what we need to know is what makes one explanation of the phenomenon better than another, not simply that one account (arguably) has some deficiencies.

Borrowing a bit loosely from the philosophical literature that examines the rationality of belief and theory choice in the sciences,¹⁰¹ we may try to articulate some of the theoretical virtues or desiderata that should lead us to prefer one explanation of a phenomenon—like theoretical disagreement in law—to another. In order to avoid being hopelessly derailed into the question of what an “explanation” is, I assume—unhelpfully, but hopefully with enough intuitive resonance so as to be adequate here—that a basic theoretical desideratum for an explanation is that it helps us “understand” or “make sense” of some data, however it is “understanding” or “making sense” is ultimately to be cashed out. But what happens when we have more than one explanation that “makes sense” of a phenomenon: Say, by hypothesis, Dworkin's explanation of theoretical disagreement versus the positivist account articulated above? Why prefer one account to the other? Here are three familiar theoretical desiderata often thought relevant:

1. *Simplicity*. We prefer simpler explanations to more complex ones, *all else being equal* (that is, without cost to *other* theoretical desiderata).
2. *Consilience*. We prefer more *comprehensive* explanations—explanations that make sense of more different kinds of things—to explanations that seem too narrowly tailored to one kind of datum.
3. *Conservatism*. We prefer explanations that leave more of our other well-confirmed beliefs and theories intact to those that do not, *all else being equal* (that is, without cost to *other* theoretical desiderata).

take but one current, and much-noted, example, Randy Barnett argues for *originalism*, not on the grounds that “the law” requires it, but on the grounds that it is morally required given a certain conception of individual rights and the constraints they impose upon morally legitimate government. See, for example, Randy Barnett, *Scalia's Infidelity: A Critique of Faint-hearted Originalism*, 75 U Cin L Rev 7, 17–19 (2006). The merits of the argument do not matter here; the point is that Barnett is typical of how legal scholars more generally often debate these questions, namely, not in terms of their “legal propriety” but in terms of the moral and political considerations that favor or disfavor competing approaches.

¹⁰¹ See, for example, W.V. Quine and J.S. Ullian, *The Web of Belief* ch 6 (Random House 2d ed 1978); Paul R. Thagard, *The Best Explanation: Criteria for Theory Choice*, 75 J Phil 76 (1978); Lawrence Sklar, *Methodological Conservatism*, 84 Phil Rev 374 (1975), reprinted in Lawrence Sklar, *Philosophy and Spacetime Physics* 23 (California 1985).

The earlier objections to the Face Value explanation of the Rat Man illustrate the intuitive role of these considerations.¹⁰² The Rat Man's reasons for his obsession, I said, did "not rationally support his obsession, and they cannot be intelligibly integrated into a general account of his actions and motivations." At the most basic level, the Face Value explanation failed to "make sense" of the Rat Man's extreme obsession, but it also failed along the dimension of *consilience*; that is, it did not allow us to understand how the Rat Man's obsession could be squared with all the other evidence about the Rat Man's values, goals, actions, and motivations. To be sure, the psychoanalytic account of the Rat Man's obsession was not, at least when proffered, especially conservative, since it required us to revise standing folk-psychological views about conscious motivational structures and their role in action. And by the same token, it also *complicated* the necessary picture of the mind and its psychic economy—but this just illustrates the tradeoffs that are possible between the desiderata when we evaluate competing theories and try to decide what we ought to believe. There will be no simple metric showing us how to make the trade-offs and comparisons.

As we saw in Part III, Dworkin's theory has the immediate difficulty that it does not even make sense of the *actual* Face Value of the decisions that are offered as central examples of the phenomenon in question. We may put *Hill* to one side, since if I am correct, it is not even a case of theoretical disagreement. *Riggs* is the stronger candidate for the Face Value explanation, though even here, as we saw, Dworkin cannot point to any *actual* disagreement about the merits of competing interpretive approaches, and he also now brackets that aspect of the majority opinion (the natural law argument as I called it) that he had made central to his account of *Riggs* in 1967.¹⁰³ Yet Dworkin can fairly claim that the judges in *Riggs* do appear to have conflicting beliefs about the correct way to read statutes, even if they fail to engage that conflict directly in the opinions.

In any case, let us suppose the deficiencies of Dworkin's purportedly Face Value account of *Riggs* are in equipoise with the deficiencies of the Disingenuity or Error Theory accounts. We would still be handicapped by looking at the majority and dissenting opinions in *Riggs* in a vacuum, for the *best* explanation of these opinions would have to show how they fare along dimensions of *consilience* and *con-*

¹⁰² See notes 41–42.

¹⁰³ Compare Dworkin, *Law's Empire* at 15–20 (cited in note 3), with Dworkin, 35 U Chi L Rev 14 (cited in note 11).

servatism: for example, how they fit with our other theoretical beliefs about law, about the behavior of these jurists in other cases, and so on.

That the best explanation of *Riggs* is not, in fact, the Face Value explanation becomes quite apparent when we turn to an illuminating account by Kim Lane Scheppelle of the historical background to *Riggs*.¹⁰⁴ Cases like *Riggs* had not arisen previously because they had been dispensed with by the courts using the legal fiction of “civil death,” according to which, “[i]f a person were convicted of a serious crime, the law would consider the person to be civilly dead, incapable of existing at law. And if a person were dead to the law, then this would surely affect the ability to inherit.”¹⁰⁵ In 1870, however, England passed a statute that addressed, among other things, the civil consequences for conviction of a serious crime.¹⁰⁶ As Professor Scheppelle explains:

[A convict’s] property was not to be forfeited any longer—and this was an important alteration in the English law—but it would instead be put under the control of an administrator. . . . Under this new statute, convicts were allowed to retain ownership of their property, even though it fell under the control of someone else. But the statute was silent about an important matter: it did not say explicitly whether a convict could inherit or not. It even implied that the convict *could* now inherit, by referring to real and personal property that might come into the convict’s possession after his conviction, which, since the convict could no longer contract, was most likely to occur through inheritance. For American courts that still looked to English law as a source of inspiration for American practices and standards, these new views about convicts’ property represented a major change.¹⁰⁷

As Professor Scheppelle goes on to note, a year before *Riggs*, in *Avery v Everett*,¹⁰⁸ the New York Court of Appeals had occasion to consider “the English statute and the issue of civil death.”¹⁰⁹ The case raised “the question of the status of a convict’s property,”¹¹⁰ in particular, whether a convict could designate an heir of his choosing.¹¹¹ The majority, citing the

¹⁰⁴ See Kim Lane Scheppelle, *Facing Facts in Legal Interpretation*, 30 *Representations* 42, 49–54 (1990).

¹⁰⁵ *Id.* at 50.

¹⁰⁶ *Id.* at 51–52.

¹⁰⁷ *Id.* at 52.

¹⁰⁸ 18 NE 148 (NY 1888).

¹⁰⁹ Scheppelle, 30 *Representations* at 52 (cited in note 104).

¹¹⁰ *Id.*

¹¹¹ See, *Avery*, 18 NE at 150.

English statute of 1870 (among other sources), answered the question in the affirmative, finding, as Professor Scheppele puts it, that a convict “was allowed to keep his property, even though he was civilly dead.”¹¹²

Far more notable for our purposes, however, is that the dissenter in *Avery*, who wished to maintain the rule that civil death meant a convict lost his property rights—was the same judge (Judge Robert Earl) who wrote the majority opinion in *Riggs*!¹¹³ If Judge Earl’s view had prevailed in *Avery*, then there would have been no need for recourse to the counterfactual intention of the legislature or to natural law in *Riggs*.¹¹⁴ But having lost in *Avery*, Judge Earl needed a new way to reach the preferred result.

Knowing now what we do about Judge Earl’s views regarding inheritance by convicts, how should we view his interpretive moves in *Riggs*? Should we accept them at Face Value, as reflecting his deep theoretical commitments about interpretation, or as interpretive opportunism, designed to change the law to undo the effects of *Avery* at least in certain kinds of egregious cases, like those involving convicts whose crimes facilitate an inheritance? One might think there is a certain unreality—a kind of naïveté about legal practice—involved in selecting the former option. Yet charity towards the innocent is no doubt a virtue in scholarship as in life, so we should, at least, entertain the Face Value interpretation a bit further.

We need look no farther, however, than the very same volume of the case reporter in which *Riggs* appears to find pertinent evidence bearing on the extent to which Judge Earl (of the *Riggs* majority) and Judge John Gray (of the *Riggs* dissent) were *really* having a theoretical disagreement about the merits of intentionalist versus plain meaning interpretations. Handed down on the very same day as *Riggs*, we have the case of *Bockes v Wemple*,¹¹⁵ regarding statutory compensation

¹¹² Scheppele, 30 Representations at 53 (cited in note 104).

¹¹³ *Id.*

¹¹⁴ Professor Scheppele suggests that a case like *Riggs* could have been distinguished from *Avery* on the grounds that “[d]epriving people of property they already have in their possession [at issue in *Avery*] is a very different matter from restricting the ways in which they can come by property in the first place [at issue in *Riggs*].” *Id.* at 53–54. In that event, Judge Earl could have simply appealed in *Riggs* to “a quite straightforward view of legislative intent” since the “statute of wills was undoubtedly drafted against a background where the civil death fiction was assumed to be part of the existing law,” and so there was no need to *explicitly* address the question of inheritance by convicted murderers. *Id.* at 59–60. The distinction suggested by Professor Scheppele might well have been drawn, but it is far from obvious that it marks a relevant difference between the cases against the background of a repudiation of the principle that convicts forfeit their property rights. One suspects that is why Judge Earl in *Riggs* opted for a different approach.

¹¹⁵ 22 NE 272 (NY 1889).

for retired trial court judges, in which Judge Gray, writing for the majority, seems to have wholly forgotten the literalism of his *Riggs* dissent:

It is an elementary rule that statutes are to be interpreted according to their intent. The intention of the legislature is undoubtedly the great principle which controls the office of interpretation; but, as Chancellor Kent says, . . . “The words of a statute, if of common use, are to be taken in their natural, plain, obvious, and ordinary significance.” It is only where the literal acceptance of the words used will work a mischief, or some absurd result, or where some obscurity in the sense compels it, that we need resort to extrinsic aids of interpretation.¹¹⁶

It was, to be sure, a contention of the *Riggs* majority that a great “mischief” and “absurd result” would follow from permitting a murdering grandson to profit from his crime, which is why the majority opinion by Judge Earl demanded consideration of legislative intention. But the reader will recall that Judge Gray did not even deign to respond to the majority’s argument, let alone acknowledge the relevance of legislative intention, in that context—and notwithstanding his resounding endorsement of intentionalism in *Wemple*!

So, notwithstanding the literalism of his *Riggs* dissent, Judge Gray was obviously not above deeming statutory provisions “too literally construed.”¹¹⁷ Indeed, in *Post v Weil*,¹¹⁸ involving the interpretation of the terms of a deed that was part of a trust, Judge Gray declared, “Mere words should not be, and have not usually been, deemed sufficient . . . to entail the consequences of forfeiture of an estate,” the fate that would befall *Riggs*

unless, from the proof, such appears to have been the distinct intention of the grantor, and a necessary understanding of the parties to the instrument. Nor should the formal arrangement of the words influence us wholly in determining what the clause was inserted to accomplish; but in this, as in every other, case, our judgment should be guided by what was the probable intention, viewing the matter in the light of reason.¹¹⁹

¹¹⁶ Id at 273.

¹¹⁷ See *Warner v Fourth National Bank*, 22 NE 172, 173 (NY 1889).

¹¹⁸ 22 NE 145 (NY 1889).

¹¹⁹ Id at 145.

To be sure, this case did not involve a matter of statutory interpretation, though it is not obvious why the intentionalism—indeed counterfactual intentionalism (“the probable intention . . . in the light of reason”)—endorsed here should not also be applied in a context like *Riggs*.

Judge Earl, who regularly authored decisions involving probate issues for the New York Court of Appeals, generally took the familiar view of probate courts that the intention of the testator must be upheld. Thus, for example, in *Haynes v Sherman*,¹²⁰ decided not quite two months after *Riggs*, Judge Earl wrote, regarding the creation of trusts, some of which arguably violated the rule against perpetuities: “The courts will strive to uphold so much of a will as they can, without frustrating the main intention of the testator, or violating any rule of law.”¹²¹ That sentiment, alas, was nowhere in evidence in *Riggs*, where the intentions of the grandfather counted for naught in the majority opinion (the argument, recall, was that the legislature would not have intended the grandson to inherit). And while Judge Earl did argue in *Riggs* that the inheritance would violate a natural law prohibition on benefiting from criminal wrongdoing, the core argument (the crux of the theoretical disagreement as Dworkin would have it) pertained to the correct theory of statutory interpretation, a topic that figures rather little in Judge Earl’s many other opinions for the court.¹²²

This kind of interpretive opportunism of appellate courts was documented decades ago by the American Legal Realists and is familiar to every lawyer. But it still leaves the explanatory question unanswered: *why* the opportunism, and why in the pattern that we find it? Short of a comprehensive biographical and historical study, we may not know the answer. And yet even within the confines of Volume 22 of the *Northeastern Reporter* some possibilities leap out. In a quite lengthy decision in *People v Budd*,¹²³ the New York Court of Appeals upheld the constitutionality of the power of the legislature to regulate

¹²⁰ 22 NE 938 (NY 1889).

¹²¹ Id at 939 (holding that the deceased’s will was invalid because it suspended the absolute power of alienation required by state law).

¹²² See, for example, *O’Brien v Home Benefit Society of New York*, 22 NE 954, 955 (NY 1889) (setting aside the language of a contract without discussion based on common law doctrine and thus rejecting the defendant’s defense of breach by the plaintiff); *People v Charbineau*, 22 NE 271, 272 (NY 1889) (resolving the case on a literal reading of the relevant statute without attempting to justify his interpretive method). On the other hand, in *Wood v Mitchell*, 22 NE 1125 (NY 1889), Judge Earl’s rather brief opinion did appeal to the idea that “[i]t may also be supposed that it was the purpose of the legislature” in interpreting a statute. Id at 1126 (relying on a literal reading of the text as well as hypothetical legislative intent to find the case to be an easy one).

¹²³ 22 NE 670 (NY 1889).

private grain elevators, since the commerce in which they figured affected, so the legislature thought, the public interest.¹²⁴ To the modern ear, the decision, of course, resonates with the issues central to the *Lochner* era at the turn of the twentieth century (when the Supreme Court held unconstitutional, for example, New York's attempt to regulate the hours worked by bakers¹²⁵) and to its undoing thirty years later during Roosevelt's New Deal.¹²⁶ As Judge Gray wrote (in terms echoed in *Lochner v New York*¹²⁷ by his colleague Justice Rufus Peckham¹²⁸):

This legislation . . . is said to fall within the scope of the police power of the state. If this is true of this measure, then I fail to see where are the limits within which the exercise of that power can be confined. This act undertakes to regulate the prices which can be charged by an individual in the prosecution of his private business. . . . This plea for the extension of the police power to the extent named, of interfering with the conduct of a legitimate private business enterprise, seems to me to find no support in reason, and it certainly tends to nullify that provision of the constitution which is supposed to guaranty to each individual that he shall not be deprived of his life or liberty or property without due process of law. . . . I understand it to be the general rule that the individual has absolute liberty to pursue his avocations, and to contract with respect to his property, subject only to the restriction that he may not interfere therein with his neighbor's rights or use of property. . . . That liberty I take to be guarantied by the constitution to him, and to be a most valuable right.¹²⁹

Since Judge Gray clearly subscribed to the view that so-called “economic liberty”—the “absolute liberty” to do what one wants with one's property, subject only to the constraints of the John Stuart Mills's Harm Principle¹³⁰—is constitutionally inviolable, it should hard-

¹²⁴ Id at 674–75.

¹²⁵ See *Lochner v New York*, 198 US 45, 53 (1905).

¹²⁶ See, for example, *West Coast Hotel Co v Parrish*, 300 US 379, 396–97 (1937).

¹²⁷ 198 US 45 (1905).

¹²⁸ Id at 53–55.

¹²⁹ *Budd*, 22 NE at 680–81 (Gray dissenting).

¹³⁰ See John Stuart Mill, *On Liberty* 13 (Bobbs-Merrill 1956):

[The Harm Principle] is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.

ly be surprising that he objected to the effort of the majority in *Riggs* to undo a testator's liberty to dispose of his property as he had intended. Judge Gray's opportunistic literalism in *Riggs* in all likelihood has more to do with his ideological opposition to state interference with property rights than with a considered view of statutory interpretation.

Judge Earl, on the basis of his published opinions, is somewhat harder to pin down. We may at least note that in one of his longest authored opinions in Volume 22 of the *Northeastern Reporter*, namely his majority opinion in *Moller v Moller*,¹³¹ he agrees with the lower court's "low estimate of the value in divorce cases of the evidence of prostitutes and private detectives" but goes to great lengths to repudiate its application in this case.¹³² Indeed, Judge Earl provides extraordinary detail documenting the evidence of Mr. Moller's dalliance with a prostitute. Although "the illicit amours of faithless husbands" were "clandestine" and "hidden from public observation," Judge Earl concludes that "corroboration gives such strength and weight to the evidence of the prostitute and detective as to induce belief in its truth."¹³³ In *Moller*, one senses the powerful indignation of a jurist who is repulsed by immorality, so much so that he would overturn the verdict of a trial court, notwithstanding the ordinary norms of appellate deference. If this diagnosis is correct, should we be surprised that Judge Earl was equally eager to "punish" the felonious and self-serving grandson, beyond the punishments already prescribed by the criminal law?¹³⁴

¹³¹ 22 NE 169 (NY 1889).

¹³² *Id.* at 169 (finding the defendant guilty of engaging in adultery with a prostitute based on the testimony of the prostitute).

¹³³ *Id.* at 169–70.

¹³⁴ Perhaps there is a final way for Dworkin to redeem his preferred account against the Realist explanation of the decision. For could not Dworkin argue that the moral and political visions that animate Judges Gray and Earl are really just the touchstones for their conflicting constructive interpretations of the law in *Riggs*? In other words, the correct reconstruction of their differing approaches to statutory interpretation in *Riggs* is that each judge is relying on a principle that he judges to be the morally best of those that have some dimension of fit with prior decisions—where the determination of which is morally best grows out of the moral and political visions that the purportedly Realist interpretation of their behavior makes explicit. This is an intriguing, though I fear ultimately fanciful, proposal. Most obviously, there is not even the pretense in *Riggs* that the argument is explicitly motivated by competing moral principles, a significant problem for a theorist emphasizing the Face Value of the disagreement. More importantly, though, it is unclear how Judge Earl's moralistic prudery translates into a principled argument against inheritance by felons. Equally importantly, we would need some evidence that the moral and political visions evidenced in the cases noted in the text are actually operating across a range of cases in a way that could be described as "constructive interpretation" in the Dworkinian sense. Finally, even if we could reconstruct the evidence adduced by the Realist in support of a Dworkinian account of the

These Realist explanations for the disagreement in *Riggs*, dispensing as they do with the Face Value of the dispute, are the flipside of the Disingenuity account noted earlier. They do not necessarily suppose that the jurists are aware that there is no settled law in support of their view; rather, the jurists may simply be motivated subconsciously by their moral view of the merits, such that they convince themselves of the legal propriety of their preferred outcome. Or perhaps they lack even a subconscious awareness of the absence of settled law? In that case, the Error Theory account explains why they talk *as if* there were a fact of the matter about the applicable criteria of legal validity. Of course, given their moral views of the merits, it should hardly be surprising that they make a systematic mistake about the nature of law at a certain rarefied level of abstraction. In any case, what the preceding shows, rather clearly, is that when Dworkin declares “there is no positive evidence of any kind that when . . . judges seem to be disagreeing about the law they are really keeping their fingers crossed”¹³⁵ (as the Disingenuity account would have it), what he really ought to have said is, “There may be lots of evidence, but I have made no effort to consider any of it.”

That the debunking explanation—the Disingenuity or Error Theory account—squares with other behavior by the jurists in question is only one of its virtues: the virtue of consilience noted earlier. That it also does not require us to do violence to a theoretical account of law which explains the pervasive agreement about what the law is may be its primary virtue. If theoretical disagreement were something other than a marginal phenomenon—if it were not primarily the provenance of the pyramid of the universe of legal phenomena—then the claims of a theory, like Dworkin’s, that give it pride of place¹³⁶ might be theoretically significant. But when the most striking feature about legal systems is the existence of massive *agreement* about what the law is, then any satisfactory theory has to do a good job making sense of that to be credible. Not only does positivism have such an

behavior of the judges in *Riggs* and other cases, we would still have to show that the explanatory power of that account is such that it warrants including within the class of valid legal norms moral and political principles that lack any recognizable pedigree in authoritative sources. In any case, let this footnote stand as a challenge to Dworkin’s remaining defenders to offer an account that meets the explanatory burden.

¹³⁵ Dworkin, *Law’s Empire* at 39 (cited in note 3).

¹³⁶ Recall that Dworkin describes *Law’s Empire* as being “about theoretical disagreement in law. It aims to understand what kind of disagreement this is and then to construct and defend a particular theory about the proper grounds of law.” *Id.* at 11.

explanation, noted earlier,¹³⁷ but Dworkin's theory makes the massive agreement about law, at best, surprising, since for Dworkin, the positive history of institutional actions and decisions (for example, by courts and legislatures) does not exhaust a community's law. Rather, on Dworkin's view, the law includes the moral principles that figure in the best explanation and justification of that history, as well as whatever concrete decisions follow from those principles. Thus, the law, on Dworkin's view, is in principle esoteric, since much, indeed all, of the "law" in a community might be unknown, indeed never known, by members of that community insofar as they fail to appreciate the justificatory moral principles and their consequences. If this were the true nature of law, the existence of massive agreement might seem puzzling indeed.¹³⁸

We need not stop with appeal to the phenomenon of massive agreement about what the law is, for the positivist theory explains more than that: it purports to explain how the ordinary person familiar with a modern municipal legal system understands law; it purports to explain how the distinction between legal and moral norms is drawn; it purports to explain the *general* concept of law, not just the idea of law in any *particular* legal system; and so on. Dworkin's theory, by contrast, is far less consilient. It can only make sense, for example, of legal systems whose institutional history falls above the threshold required for *moral* justification of that legal system to be possible, since Dworkin's theory aims to "explain how what it takes to be law provides a general justification for the exercise of coercive power by the state."¹³⁹ Dworkin's theory is also less simple than its positivist competitor, since it demands that we assume the existence of *legally right answers* that no one knows, as well as the existence of *moral facts* that determine what these answers are. Its apparent primary virtue—at least as presented in *Law's Empire*—is that it explains something of the Face Value of theoretical disagreements, treating them as interpretive disputes about the point or purpose of our legal practices.¹⁴⁰ Why this explanatory

¹³⁷ On the positivist account, legal professionals agree about what the law requires so often because, in a functioning legal system, *what the law is* is fixed by a discernible practice of officials who decide questions of legal validity by reference to criteria of legal validity on which they recognizably converge. See text accompanying notes 59–60.

¹³⁸ Dworkin would be forced to appeal to *epistemic* considerations to explain why there is this massive agreement, notwithstanding the strange metaphysics of the situation (that is, that what the law is might be unknown by all existing jurists and lawyers). Dworkin's theory has, of course, long depended on this distinction. But Dworkin has never given an explanation for why the epistemic constraints under which jurists and lawyers operate should lead to massive convergence.

¹³⁹ Dworkin, *Law's Empire* at 190 (cited in note 3).

¹⁴⁰ Notice that even Dworkin's "interpretivist" reading of theoretical disagreement goes far beyond the Face Value of the opinions, even in *Riggs*.

achievement (if that is what it is) should trump positivism's greater ones is nowhere explained by Dworkin.

CONCLUSION

There is, to repeat, no simple formula for deciding how to tally up the theoretical and explanatory virtues of competing accounts. We may, at least, sum up the conclusions about the debate defended here:

1. Dworkin explains some of the Face Value of some theoretical disagreements, for example in *Riggs*. Even Dworkin's account goes beyond, or ignores parts of, the Face Value disagreement.
2. The positivist has an explanation of theoretical disagreement in cases like *Riggs*, which explains away the Face Value of the disagreement, but is also more consilient with an account of other behavior by the jurists in question.
3. That Dworkin's explanation of the theoretical disagreement in *Riggs* is less plausible than the positivist account does not, of course, establish that the positivist explanations are generally superior. Perhaps Dworkin's example was ill chosen, even though he has made it central to his attack on positivism.
4. Theoretical disagreements are relatively marginal phenomena within the scope of a general theory of law, emerging primarily at the pinnacle of the pyramid of legal questions that arise. Massive agreement about the law is a far more common phenomenon that a theory must address.
5. Positivism fares better at preserving the Face Value of massive agreement about law than does Dworkin's theory.
6. There are other legal phenomena for which positivism has a prima facie plausible account, which are untouched by Dworkin's objections to the positivist account of theoretical disagreement.
7. Dworkin's own account of theoretical disagreement is embedded in a theory of law and adjudication which is both less consilient and more complex than the positivist account.

It is true, as Shapiro argued, that the objection to legal positivism in *Law's Empire* is different from the objections on which Dworkin built his reputation as a critic of Hart. Yet, as I have argued, the objection does not appear to amount to much, either when it is considered on its own terms (as an account, for example, of *Riggs* or *Hill* in competition with the positivist account), or when considered in light of the plethora of theoretical desiderata that should inform a plausible theory of

law. To the extent readers disagree with that conclusion, I hope this Article at least succeeded in framing the theoretical issues at stake for a critic of positivism who is impressed by the phenomenon of theoretical disagreement.