POSITIVISM'S PROBLEM WITH THE PLENITUDE OF PRINCIPLES

By

NEVIN EDWARD JOHNSON

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ABSTRACT OF THE THESIS

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By NEVIN EDWARD JOHNSON

Thesis Director:
Dr. Douglas Husak

Ronald Dworkin's anti-positivist argument from theoretical disagreement (ATD) in *Law's Empire* (1986) was one of the most significant volleys levied against legal positivism in the twentieth century. Dworkin argues theoretical disagreements about law pose a serious problem for legal positivists (like H.L.A. Hart) and that Dworkin's theory of law accounts for the existence of these disagreements in a way the positivist cannot. Scott Shapiro, in his book *Legality* (2011), argues his positivist theory of law, the Planning Theory, meets the challenge posed by ATD. In this thesis I provide two main reasons why Shapiro has not met Dworkin's challenge. First, Shapiro does not address the full force of Dworkin's challenge, which is to give a metaphysical account of law in cases of theoretical disagreements, not just a practical or epistemological account of legal reasoning in cases of theoretical disagreements. Second, Shapiro's theory by its own terms does not address all types of theoretical disagreements. Shapiro identifies theoretical disagreements with what Shapiro calls *meta-interpretive* disagreements. In fact, some theoretical disagreements about law are *not* meta-interpretive disagreements (that is, they are just plain interpretive disagreements). Therefore, the Planning Theory of law does not fully address ATD as it purports to.

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1.) INTRODUCTION

Ronald Dworkin's place in jurisprudence is the subject of debate. Brian Leiter, in the paper version of a talk given at Rutgers University for the inauguration of the Rutgers Institute for Law and Philosophy, said Dworkin "deserves to go the way of Skinner in psychology or Derrida in literary theory, that is, the way of figures whose work, at one time, was a stimulus to new research, but who, in the end, led—or, in Dworkin's case, *tried* to lead—their field down a deeply wrong-headed path."[1] Elsewhere Leiter writes Dworkin so clearly lost the Hart-Dworkin debate that "even the heuristic value of the Dworkinian criticisms of Hart may now be in doubt."[2] Leiter thinks Dworkin's contribution to jurisprudence is so poor that Leiter even speculates as to what made Dworkin so popular, hypothesizing that perhaps Dworkin's status as a strong writer whose "glib" prose made him "a natural for *The New York Review of Books*" renders Dworkin "the quintessential 'sophist' of legal theory" whose "rhetorical gift carries the bold and implausible jurisprudential theses along."[3]

But another philosopher of law has recently taken Dworkin's arguments more seriously. Scott Shapiro thinks "positivism is particularly vulnerable to Dworkin's critique in *Law's Empire*"[4] and Shapiro sets out in his book *Legality* to create a theory of law which can respond to Dworkin's argument in a way no other positivist theory of law has been able to do. Shapiro's book has generated a lively discussion, but the response to Shapiro's *Legality* has not focused on what Shapiro himself takes to be one of the leading

1 Leiter 2004, 166.
2 Leiter 2003, 18.
3 Leiter 2004, 177.
4 Shapiro 2007, 54 (citations for Shapiro 2007 are to the digital version available on SSRN).

theoretical virtues of the Planning Theory, namely, his response to Dworkin's anti-positivist argument from theoretical disagreements about law (ATD) found in *Law's Empire*.[5] Jeremy Waldron writes Shapiro's discussion of "Ronald Dworkin and the role of judges" "stands a little apart from the main line of argument in *Legality*."[6] Frederick Schauer writes that Shapiro's treatment of Dworkin's anti-positivist argument, though "illuminating," is nonetheless a "digression[]."[7]

Shapiro argues no positivist theory of law, until his, has accommodated and properly responded to ATD. *Law's Empire* argues that theoretical disagreements about law, where judges disagree about what the law is, are incoherent under positivist theories of law. Since theoretical disagreements about law represent a lack of social consensus about law, positivist theories cannot account for them because for positivists, law is a matter of convergent social consensus. Dworkin argues a legal theory where law is partially determined by morality is needed to accommodate the existence of theoretical disagreements about law. Shapiro endeavors to respond to ATD by creating a positivist theory of law where theoretical disagreements about law can be made intelligible in the absence of social consensus, something that makes his positivist theory of law stand out from other positivist theories of law.

Five out of the fourteen chapters of *Legality* are about ATD, where Chapters 9 through 13 to address Dworkin's argument. The intellectual climax of *Legality* occurs in Chapter 13 ("The Interpretation of Plans") where Shapiro finally explains how his theory

5 Schauer 2010, Waldron 2011, and Hershovtiz 2014.
6 Waldron 2011, 900.
7 Schauer 2010, 601.

attempts to account for theoretical legal disagreements. Chapter 14 ("The Value of Legality") is denouement. By treating *Legality's* discussion of Dwokin as an aside, other commentators have committed a hermeneutical error.

But while some commentary misreads *Legality*, *Legality* misreads *Law's Empire*. I argue *Legality's* attempt to respond to ATD falls short in several respects. First, it falters as an exegesis of *Law's Empire* on two counts: (1) it misses ATD's true challenge, treating it as a call to show how it is intelligible or rational for lawyers to have theoretical disagreements, and (2) it identifies theoretical disagreements about law with what Shapiro calls meta-interpretive disagreements about law. With regards to (1), ATD's true challenge is to show how it is metaphysically possible for law to exist in the absence of social consensus, not to show how it is intelligible for lawyers to disagree about interpretive methodology. With regards to (2), in fact, theoretical disagreements about law can be both meta-interpretive and non-meta-interpretive (i.e., just plain interpretive) disagreements. Not only does Dworkin offer examples of interpretive theoretical disagreements about law, but this paper offers several cases which serve as examples of interpretive theoretical disagreements. Interpretive theoretical disagreements are problematic for Shapiro because his theory, as stated, does not account for them.

This paper has six parts. Part I is an exegesis of ATD as it is given in *Law's Empire*. In Part II, Shapiro's Planning Theory response to Dworkin's argument is presented. Part III offers an initial assessment of the Planning Theory's response, finding it lacking as an exegesis of ATD. Part IV is a case sequence which includes instances of

theoretical disagreements the Planning Theory does not have the apparatus to accommodate. Part V is an analysis of the case sequence and a discussion. Part VI concludes.

2.) DWORKIN'S ARGUMENT FROM THEORETICAL DISAGREEMENTS

Dworkin's main target in *Law's Empire* is H.L.A. Hart's positivist theory of law. Before diving into Dworkin's anti-positivist argument from theoretical disagreement (ATD) as it is presented in *Law's Empire*, I first briefly note Hart's view. Though the focus of this paper is Shapiro's positivist response to Dworkin's argument, it is worthwhile to include the view which first spurred ATD.

Scott Hershovitz has produced a particularly elegant description of Hart's positivism that is more concise and illuminating, I think, than anything Hart wrote in *The Concept of Law* (or, *a fortiori*, I myself could write about Hart):

> [Hart] argued that a legal system is constituted by two kinds of rules—primary rules that govern conduct and secondary rules for recognizing the rules of the system, changing them, and adjudicating disputes arising under them. One of those secondary rules—the rule of recognition—plays a foundational role in a legal system. Other rules of the system enjoy their status as law because they satisfy criteria that the rule of recognition sets out for identifying law. The rule of recognition, in contrast, is not validated by a further rule of the system. Instead, it is a social rule, that is, a rule whose existence and content is fixed by a social practice. And therein lies Hart's positivism: according to the model of rules, the content of the law—the set of rights, obligations, privileges, and powers in force in a legal system—is fixed (at least ultimately) by social facts about the practice that constitutes that legal system's rule of recognition.[8]

The notion of the "model of rules" was the subject of Dworkin's early responses to Hart, as for example in his article "The Model of Rules."[9] Scott Shapiro argues that positivists have not given Dworkin the attention he deserves because they have assumed the argument Dworkin makes in his early paper "The Model of Rules" is the same as his argument in *Law's Empire*, and because of the weakness of the former argument,

8 Hershovitz 2014, 152-153.
9 Dworkin 1967.

Dworkin's position does not pose a serious threat to positivism.[10] Dworkin, in "The Model of Rules," thought Hart was committed to viewing the law as being made up entirely of legal *rules*, and that Hart was thus denying the existence of legal *principles*. And since legal principles are moral in nature, Hart's positivism cannot be maintained in light of the existence of legal principles.[11]

However, Shapiro thinks Dworkin made two distinct anti-positivist arguments between "The Model of Rules" and *Law's Empire*, and while the former is a much weaker argument which allows two plausible responses from the positivist, the latter argument is much more difficult to respond to, and Shapiro claims (until him) no positivist has given an adequate response to Dworkin's anti-positivist argument in *Law's Empire*. Shapiro writes positivists "have made no attempt to show how theoretical legal disagreements are possible."[12] So if Dworkin's challenge in ATD is serious, and Shapiro's positivist theory is the only one that properly responds to it (or it is the one which has the *best* response to it), then this will be a significant virtue in favor of Shapiro's theory at the expense of the other theories of legal positivism.

Briefly, Shapiro takes Dworkin's argument in "The Model of Rules" to be that it "seeks to exploit the alleged fact that judges often take the grounds of law to be moral in nature."[13] So in *Riggs* (the court case where the New York Supreme Court refused to allow a murderer to inherit under the will of the person whom he murdered) the legal principle (which is moral in nature) that the court applied was something like "No one

10 Shapiro 2007, 38.
11 Shapiro 2007, 6-7.
12 Shapiro 2007, 39.
13 Shapiro 2011, 289.

shall be allowed to profit from their own wrong." The reason this argument is weak is that there are two ready routes for the positivist to take: an exclusivist route and an inclusivist route. The exclusivist route, the one favored by Joseph Raz, is to claim sometimes "judges are legally obligated to apply extralegal norms."[14] The inclusivist route is "simply admit that the grounds of law can be moral in nature, provided that there is a convention among judges to regard those facts as grounds of law."[15]

But Shapiro thinks Dworkin's ATD in *Law's Empire* is distinct from this challenge and is much stronger than the earlier anti-positivist argument made in "The Model of Rules." So following Shapiro I will move beyond Dworkin's early papers and discuss Dworkin's argument from theoretical disagreements (ATD) as it is presented in *Law's Empire*. Before getting to the argument itself, one must get a handle on what Dworkin means by a theoretical disagreement about law.

There are two ways lawyers and judges might disagree about propositions of law, or two ways lawyers could disagree about *what the law is*.[16] The disagreement might be either (1) empirical or (2) theoretical. An empirical disagreement about law occurs when lawyers[17] disagree about what the relevant political institutions have in fact done. So for example lawyers "might agree . . . that the speed limit is 55 in California if the official

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14 Shapiro 2011, 289.

15 Shapiro 2011, 289.

16 Propositions of law are "all the various statements and claims people make about what the law allows or prohibits or entitles them to have." (Dworkin 1986, 4).

17 I will hereafter, for the sake of brevity, often just use the word "lawyer" to refer not only lawyers in the ordinary sense of the word, but also to include judges, law professors, and indeed any student or practitioner of the law. This is following Shapiro: "Indeed, seasoned legal participants such as judges, litigators, and legal academics— whom I will refer to collectively as "lawyers" . . . " (Shapiro 2011, 331).

California statue book contains a law to that effect, but disagree about whether, in fact, the book does contain such a law."[18] These disagreements about law are "hardly mysterious" because "[p]eople can disagree about what words are in the statute books in the same way they disagree about any other matter of fact."[19]

A theoretical disagreement about law arises when lawyers, despite the fact of complete agreement at the *empirical* level about law, nonetheless disagree about what the law is. A theoretical disagreement about law can occur even when lawyers agree about what words are included in the relevant legal materials (like cases and statutes) and what the relevant legal officials in fact did (e.g., voting particular bills into law, making such-and-such statements on the floor, etc.). Dworkin provides four cases in *Law's Empire* as examples of theoretical disagreements about law: *Elmer's Case*,[20] the *Snail Darter Case*,[21] *McLoughlin*,[22] and *Brown*.[23] I will take each in turn.

Elmer murdered his grandfather by poisoning because he was afraid the old man would disinherit him from his will.[24] Despite Elmer's obvious guilt for homicide, he nonetheless sought to inherit the gift under the existing will. Unsurprisingly, "[t]he residuary legatees under the will, those entitled to inherit if Elmer had died before his grandfather . . . sued the administrator of the will, demanding that the property now go to them instead of Elmer."[25]

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18 Dworkin 1986, 5.
19 Dworkin 1986, 5.
20 Riggs v. Palmer, 22 N.E. 188 (1889).
21 Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).
22 McLoughlin v. O'Brian [1983] 1 A.C. 410, reversing [1981] Q.B. 599.
23 Brown v. Board of Education, 347 U.S. 483 (1954).
24 Dworkin 1986, 15.
25 Dworkin 1986, 15-16.

The relevant statute included a number of formal requirements for executing a valid will (e.g., the number of witnesses needed) but "said nothing explicit about whether someone named in a will could inherit according to its terms if he had murdered the testator."[26] Since it violated none of the statute's provisions, Elmer argued he should inherit under the will.

Over a dissent, the judges in *Elmer's Case* disagreed with Elmer. The majority opinion, written by Judge Earl, adopted a "theory of legislation, which gives the legislators' intentions an important influence over the real statute."[27] Judge Earl wrote "that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers."[28] Judge Earl thought "[i]t would be absurd" if the legislators who enacted the law under consideration "intended murderers to inherit, and for that reason [he held] the real statute they enacted did not have that consequence." [29]

The dissent, through Judge Gray, adopted a theory of interpretation which "proposes that the words of a statute be given what we might better call their acontextual meaning, that is, the meaning we would assign them if we had no special information

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26 Dworkin 1986, 16.

27 Dworkin 1986, 18

28 Dworkin 1986, 18. This statement appears in almost identical form, without citation, in the Supreme Court's landmark opinion on legislative intent in *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892): "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute because not within its spirit nor within the intention of its makers."

29 Dworkin 1986, 19. Since Dworkin thinks at the time of passing the law the New York legislators "had no active intention either way" with regards to whether murderers should inherit, what Earl actually meant with this above statement is that "a statute does not have any consequence the legislators would have rejected if they had contemplated it" (id.).

about the context of their use or the intentions of their author."[30] Since the statute contained no explicit "exceptions for murderers," Judge Gray would have held that Elmer should inherit.[31] Because the judges disagreed about the law in Elmer's Case but nonetheless agreed that the New York statute of will was duly passed by the New York legislature and also agreed about what words in fact are included in that statute, their disagreement about law was *theoretical* in nature.

The second example of a theoretical disagreement is *TVA v. Hill*, also known as the *Snail Darter Case*.[32] The Endangered Species Act of 1973 "empowers the secretary of the interior to designate species that would be endangered, in his opinion, by the destruction of some habitat he considers crucial to its survival and then requires all agencies and departments of the government to take 'such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species'."[33] Conservationists in Tennessee opposed the Tennessee Valley Authority's construction of a certain dam, not because it endangered an animal, but because the dam would "alter[] the geography of the area by converting free-flowing streams into narrow, ugly ditches to produce an unneeded increase (or so the conservationists believed) in hydroelectric power."[34] "The conservationists discovered that one almost finished TVA dam, costing over one hundred million dollars, would be likely to destroy the only habitat of the snail darter, a three-inch fish of no particular

30 Dworkin 1986, 17
31 Dworkin 1986, 18
32 Shapiro focuses on the Snail Darter case in his (2007, 31-33) and in *Legality* where he presents Dworkin's argument from theoretical disagreement.
33 Dworkin 1986, 20.
34 Dworkin 1986, 20-21.

beauty or biological interest or general ecological importance," and were able to "persuade[] the secretary to designate the snail darter as endangered and brought proceedings to stop the dam from being completed and used."[35]

A majority of the Supreme Court found for the conservationists.[36] Chief Justice Burger, for the majority, wrote "in words that recall Judge Gray's opinion in Elmer's case [that is, the dissenting opinion in *Elmer's Case*], that when the text is clear the Court has no right to refuse to apply it just because it believes the results silly."[37] Powell, writing for a two-justice dissent, adopted a different theory of legislative intent, holding it was the Court's duty to "adopt a permissible construction that accords with some modicum of common sense and the public weal."[38] Whereas "Burger said that the acontextual meaning of the text should be enforced, no matter how odd or absurd the consequences, unless the court discovered strong evidence that Congress actually intended the opposite," Powell instead thought "the courts should accept an absurd result only if they find compelling evidence that it was intended."[39] Once again this is a case of a theoretical disagreement about law because both the majority and dissent agreed the law should be followed and agreed about all "historical matters of fact" but "they disagreed about how judges should decide what law is made by a particular text."[40]

McLoughlin is Dworkin's third example of a theoretical disagreement. McLoughlin heard about her family's involvement in a car accident while she was at

35 Dworkin 1986, 21.
36 Dworkin 1986, 21.
37 Dworkin 1986, 21.
38 Dworkin 1986, 23.
39 Dworkin 1986, 23.
40 Dworkin 1986, 23.

home, and thereupon she "went immediately to the hospital, where she learned that her daughter was dead and saw the serious condition of her husband and other children."[41] Because McLoughlin "suffered nervous shock" from seeing the condition of her family, she sued the driver who caused the accident.[42] McLoughlin's "lawyer pointed to several earlier decisions of English courts awarding compensation to people who had suffered emotional injury on seeing serious injury to a close relative. But in all these cases the plaintiff had either been at the scene of the accident or had arrived within minutes."[43]

The trial judge distinguished the precedents because in all those the shock had "occurred at the scene of the accident while she was shocked some two hours later and in a different location" and was thus the injury was not foreseeable.[44] The Court of Appeals upheld the ruling, but on different grounds. The Court of Appeals found the injury was foreseeable, but for "policy" reasons, like that a contrary ruling "would encourage many more lawsuits for emotional injuries" or that it "would open new opportunities for fraudulent claims," nonetheless ruled against plaintiff McLoughin.[45]

On appeal again to the House of Lords, the high court reversed for a new trial. They found the risk of a "flood" of litigation not to be "sufficiently grave, and they said the courts should be able to distinguish genuine from fraudulent claims even among those whose putative injury was suffered several hours after the accident."[46] The judges at the various levels of review in *McLoughin* disagreed about the law in a way similar to

41 Dworkin 1986, 24.
42 Dworkin 1986, 24.
43 Dworkin 1986, 24.
44 Dworkin 1986, 26
45 Dworkin 1986, 27.
46 Dworkin 1986, 28.

Elmer's Case and the *Snail Darter Case*.

Brown is the fourth and final case offered by Dworkin in *Law's Empire* as an example of a theoretical disagreement. “In 1954 a group of black schoolchildren in Topeka, Kansas” raised again the question presented to the Supreme Court in *Plessy v. Ferguson*.[47] A unanimous Court, through Chief Justice Earl Warren, sided with the children from Topeka. Critics of *Brown* argued “the phrase 'equal protection' does not in itself decide whether segregation is forbidden or not, that the particular congressmen and state officials who drafted, enacted, and ratified the Fourteenth Amendment were well aware of segregated education and apparently thought their amendment left it perfectly legal, and that the Court’s decision in *Plessy* was an important precedent of almost ancient lineage and ought not lightly be overturned.”[48] This disagreement, despite it not occurring in the Court itself, is important to Dworkin because they “were arguments about the proper grounds of constitutional law, not arguments of morality or repair: many who made them agreed that segregation was immoral and that the Constitution would be a better document if it had forbidden it.”[49]

The existence of theoretical disagreements about law poses a twofold problem for positivism. According to H.L.A. Hart, Dworkin's main target in *Law's Empire*, a necessary condition for the existence of a legal system is that the legal system have an ultimate rule of legal validity, the rule of recognition. This rule “must be effectively accepted as common public standards of official behaviour by its officials.”[50] The rule of

47 Dworkin 1986, 29.
48 Dworkin 1986, 30.
49 Dworkin 1986, 30.
50 Hart 1994, 113.

recognition thus requires some type of "consensus" among legal officials about what makes a norm legally valid or not.[51] The idea that "it is a conceptual truth about law that legal validity can ultimately be explained in terms of criteria that are authoritative in virtue of some kind of social convention" is referred to as the *Conventionality Thesis*.[52] But if a number of judges can disagree about whether a norm is a legally valid and it still be the case that the norm is valid, then it seems social consensus is not a requirement of legal validity (as Hart and other positivists claim it is). So the first prong of attack from Dworkin is that, *contra* positivism (*a la* Hart), law can exist in the absence of social consensus.

The second prong of the attack is to challenge what is often in the literature called the *Separability Thesis*. This thesis has received many formulations,[53] but the main idea is that any connection between law and morality is contingent.[54] Dworkin accommodates the existence of theoretical disagreements by asserting that law is fundamentally an interpretive exercise and moreover that legal interpretation has an ineliminably normative character.[55] Because law is partially determined by normative considerations (or by

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51 "The plain fact view, according to Dworkin, consists of two basic tenets. First, it maintains that the grounds of law in any community are fixed by consensus among legal officials." Shapiro 2007, 30. Dworkin argues that legal positivists are committed to the "plain fact" view of law. "Positivism [according to Dworkin] is committed to the plain-fact view." Shapiro 2007, 37.

52 Kenneth Einar Himma, "Philosophy of Law," *Internet Encyclopedia of Philosophy*, available at http://www.iep.utm.edu/law-phil/.

53 Shapiro 2007, (stating the Separability Thesis "denies any necessary connection between legality and morality); See (Coleman 2011, fn 4 pg. 7) for different formulations of the Separability Thesis.

54 "The separability thesis is generally construed so as to tolerate any *contingent* connection between morality and law, provided only that it is *conceivable* that the connection might fail." Andrei Marmor, "Legal Positivism," *Stanford Encyclopedia of Philosophy*, available at http://plato.stanford.edu/entries/legal-positivism/.

55 *See* Andrei Marmor, "The Nature of Law," *Stanford Encyclopedia of Philosophy*, available at http://plato.stanford.edu/entries/lawphil-nature/ (noting, for Dworkin, legal "interpretation always involves evaluative considerations").

"value facts" in Mark Greenberg's terminology[56]) law can exist in the absence of social consensus. And because disagreement about moral and evaluative facts is not only possible but indeed common, Dworkin can account for the existence of theoretical disagreements about law.

The two anti-positivist prongs of ATD come together in the following way.[57] Law, for Dworkin, is comprised not just of the explicit *rules* set forth in statutes, constitutions, the holdings of judges in case law, executive orders, etc. (what I will follow Shapiro calling the "available legal materials"[58]), but law also includes those legal *principles*, which, though not explicitly stated in the available legal materials, nonetheless exists at something like a higher level of abstraction. These legal principles are inferred from the available legal materials by some non-deductive method of reasoning. The reasoning used to infer the existence of legal principles from the available legal materials is comprised of two main parts: (1) fit and (2) justification. (Dworkin refers to this two-step methodology as *law as integrity*.) "According to law as integrity, propositions of law are true if they feature in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."[59]

The first step, fit, is a consistency requirement. A legal principle fits the available

56 Greenberg 2004, 157.
57 I here department from the literal language of Dworkin and am giving my own interpretive gloss of what Dworkin says. If the reader thinks my "gloss" here of Dworkin is not a correct interpretation of Dworkin, then I will adopt what follows as a Dworkinian view distinct from what Dworkin himself says. Nonetheless, I take myself to be adopting Dworkin's view, albeit in my own words.
58 Shapiro 2011, 239.
59 Dworkin 1986, 225.

legal materials to the extent it is consistent with them. Say the available legal materials consist of only ten cases, and there are two plausible candidate principles, Alpha and Beta. Principle Alpha is consistent with all ten cases, Principle Beta is only consistent with eight. Principle Alpha better "fits" the available legal materials than Principle Beta because it accommodates or fits more cases.

The second step, justification, is where normativity or morality more strongly enters the picture. Since a number of competing legal principles could be consistent with the available legal materials, the thing that winnows down those numerous legal principles to one is justification. Only that *single* legal principle (at least that single principle in a particular domain) which *best justifies* the available legal materials is part of the law. It is the winnowing down of legal principles to a unique one on a particular issue in a hard case which allows Dworkin to assert the *one right answer thesis*: the idea that, for every legal question there exists a unique legal answer.

I said earlier that legal principles in a sense are at a higher level of abstraction, which is also to say they are more general than legal rules. It legal principles' higher level of generality which makes it the case that law can be what Dworkin calls a *seamless web*. Legal principles, being more latitudinous than legal rules, can range over a broader range of circumstances to cover factual scenarios not envisioned or disposed of decisively by the legal rules embodied in the available legal materials. Some refer to this as the *gap-filling* function of principles. (I myself do not much like the "gap-filling" terminology as it makes it seem as if legal principles serve an *ad hoc* function, but the term is apt

enough.)

One can now see the problem for positivism. The main problem is that if Dworkin is right, the law, in a constitutive, metaphysical sense, is determined by moral facts, particularly as embodied in the justification step noted above. This is inconsistent with positivism's “separation of law and morals” maintained in the Separation Thesis. Further, since the law exists “beyond” or “outruns” social consensus, it is false that law is determine only by social facts or social consensus (as the Conventionality Thesis holds).

Dworkin's denial of the Separation Thesis and the Conventionality Thesis are intimately related. If the law is not fixed by social convention, there must be something else that comes in to “pinch hit” for convention in order to determine the law. Dworkin's jurisprudential pinch-hitter is morality.

Dworkin anticipated two responses to ATD. The first response says legal practitioners are engaged essentially in a knowing fraud; judges and lawyers are deliberately masking their arguments about what the *law should* be as being arguments about what the law *is* in order to preserve the fiction that law is found and applied rather than made or invented. Dworkin refers to this first response as the “crossed-fingers” response.[60] The other response sees judges and lawyers as being confused about their practice; they genuinely think they are arguing about what the law is when there is none to be had and instead they are arguing about what the law should be. Theoretical disagreements about law are really borderline cases of law. Dworkin dismisses both of these responses: “The crossed-fingers response shows judges as well-meaning liars; the

60 Dworkin 1984, 40.

borderline-case defense shows them as simpletons instead."[61] Dworkin continues, "Law is a flourishing practice, and though it may well be flawed, even fundamentally, it is not a grotesque joke."[62] Brian Leiter, for his part, appears to endorse some combination of the two above responses in the form of an error theory about theoretical disagreements.[63]

Scott Shapiro agrees with Dworkin that the crossed-fingers and borderline case defenses are to be disfavored. Not only do judges engage in theoretical disagreements about law, but law professors do as well, and while "[j]udges may have a great political interest in hiding the true nature of their activities, [] scholars generally do not."[64] Shapiro will opt for a different strategy in response to ATD.

61 Dworkin 1986, 41.
62 Dworkin 1986, 44.
63 Leiter 2009.
64 Shapiro 2007, 40.

3.) SHAPIRO'S RESPONSE TO DWORKIN'S CHALLENGE

I now turn to Shapiro's attempt to accommodate ATD. I start with Shapiro's understanding of Dworkin's argument, as it plays a role not only in Shapiro's response to Dworkin's argument but also in my response to Shapiro.

Recall earlier that Shapiro separates Dworkin's earlier argument in the Model of Rules from his later argument in *Law's Empire*. Shapiro takes *TVA v. Hill* as the exemplar of Dworkin's argument from theoretical disagreement in *Law's Empire*, while *Riggs v. Palmer* is an example of the earlier critique in the Model of Rules which argued the grounds of law can be moral in nature. Shapiro thinks the theoretical disagreement in *TVA* cannot be accommodated by the posivists in the way Riggs can. Shapiro thinks his positivist theory of law, the Planning Theory, accommodates cases like *TVA*, something that no other positivist theory can do successfully.

The problem for positivism in *TVA*, Shapiro contends, is that in *TVA* the majority and dissents were applying different methodologies in interpreting the Endangered Species Act, and there was thus no established social convention with regards to proper interpretive methodology: "According to Burger, the plain meaning of the text determines the law even when absurdities follow, unless compelling evidence can be found to show that Congress did not intend the absurd result. Powell, on the other hand, argued that plain meaning does not determine the law when absurdities follow unless compelling evidence can be found that Congress did intend the absurd result. Burger and Powell disagreed, in other words, about when the plain meaning of a statute is a ground of law."[65]

65 Shapiro 2011, 288.

And since "exclusive and inclusive legal positivists both insist that the grounds of law are determined by convention"[66] they accordingly "must deem theoretical disagreements conceptually incoherent" because "they hold that the grounds of law are determined by social convention" or more concisely positivists hold that "controversiality is inconsistent with conventionality"[67] The two positivist responses to cases like *Riggs* (discussed above) are not available in cases like *TVA*. Accordingly, Shapiro will endeavor to give a positivist account where there can be a correct interpretive methodology in spite of the lack of a social consensus regarding proper interpretive methodology.

Before getting into the substance of his response to Dworkin, Shapiro first addresses what he calls a terminological issue. Shapiro does not like the language of "grounds of law." Recall that disagreeing about the grounds of law for Dworkin amounts to disagreeing about the existence or content of legal principles. Shapiro says he does not like the language of "grounds of law" because moral facts under the Planning Theory can never be a ground of law as the Planning Theory is an *exclusive* positivist theory of law. As such, Shapiro wishes to switch to a "more neutral vocabulary" that relies on the notion of interpretive methodologies.[68] Shapiro defines an interpretive methodology as "a method for reading legal texts."[69] Examples of interpretive methodology include textualism, purposivism, and law as integrity.[70] Shapiro sees the majority and dissents in *TVA* as applying different interpretive methodologies. "According to Burger, absurd

66 Shapiro 2011, 289.
67 Shapiro 2011, 302.
68 Shapiro 2011, 304.
69 Shapiro 2011, 304.
70 Shapiro 2011, 304.

results never defeat unless Congress intended that they do so. According to Powell, absurd results always defeat unless Congress intended them not to do so."[71] This is also a reasonable reading of Dworkin's own understanding of *TVA* because Dworkin writes the judges in that case "disagreed about how judges should decide what law is made by a particular text."[72]

For Shapiro "[t]he advantage of talking about 'interpretive methodologies' [instead of grounds of law] is that it is neutral as to whether their outputs are preexisting law and hence whether the facts that they countenance are grounds of law."[73] So, whereas "Dworkin would understand his interpretive methodology as one that outputs preexisting law and that treats moral considerations as grounds of law," under Shapiro's Planning Theory, the interpretive theory "always creates new law when applied by a court, insofar as it requires judges to" engage in a moral assessment when determining the output law.[74]

Shapiro's focus in his response to Dworkin's argument is not *interpretive* methodology, but what Shapiro calls *meta*-interpretive methodology. A theory is a meta-interpretive theory "insofar as it does not set out a specific methodology for interpreting legal texts, but rather a methodology for determining which specific methodology is proper."[75] So lawyers use meta-interpretive theory to determine whether, in deciding cases, they should "endorse textualism, living constitutionalism, originalism, pragmatism, law as integrity, and so on."[76] An interpretive theory is a theory used to *directly* interpret

71 Shapiro 2011, 303.
72 Dworkin 1986, 23.
73 Shapiro 2011, 304.
74 Shapiro 2011, 304.
75 Shapiro 2011, 305.
76 Shapiro 2011, 305.

legal texts (i.e., "available legal materials"). A *meta*-interpretive theory is a methodology used to determine which interpretive theory is proper.

Shapiro, having defined interpretive theory and meta-interpretive theory, then equates what Dworkin calls theoretical disagreement about law with meta-interpretive disagreements about law.

> With this new terminology in mind, we can redescribe the plain fact view and the argument from theoretical disagreements. The plain fact view, it turns out, is a meta- interpretive theory. It claims that interpretive methodology is determined by the methodology accepted by all legal officials in a particular system. The problem with the plain fact view, as Dworkin points out, is that it rules out the possibility of meta- interpretive disputes. If officials disagree about interpretive methodology, then according to the plain fact view, there exists no proper methodology. However, since meta-interpretive disagreements are not only possible but common, the plain fact view cannot be a correct meta- interpretive theory. This is the argument from theoretical disagreements.[77]

I should say a few things about what Dworkin calls the "plain fact" view of law. Dworkin argues legal positivism is committed to a mistaken view of a law, the plain fact view of law, which is forced to see theoretical disagreements about law as an "illusion."[78] According to the plain-fact view "[t]he law is only a matter of what legal institutions, like legislatures and city councils and courts, have decided in the past."[79] The question of what the law is "can always be answered by looking in the books where the records of institutional decisions are kept"; law is a plain, descriptive fact and does not depend on what is *should* be.[80]

So Shapiro, by saying Dworkin argues positivism (via the plain fact view of law)

77 Shapiro 2011, 305-306.
78 Dworkin 1986, 7.
79 Dworkin 1986, 7.
80 Dworkin 1986, 7.

cannot account for theoretical disagreements because it cannot account for meta-interpretive disagreements, equates theoretical disagreements about law with meta-interpretive disagreements about law. Shapiro, in what will follow, argues *his* positivist theory, unlike *any other* positivist theory offered so far, can account for meta-interpretive disagreements. Because of this, Shapiro's Planning Theory of law is responsive to Dworkin's argument from theoretical disagreements in a way superior to every other positivist theory offered so far.

Shapiro's discussion of theoretical disagreements occurs in Chapter 10 (“Theoretical Disagreements”). In Chapter 11, Shapiro offers a reason to affirmatively doubt Dworkin's theory. (I will not discuss this attack on Dworkin in any detail). It is in Chapters 12 (“Economies of Trust”) and 13 (The Interpretation of Plans”) that Shapiro offers the Planning Theory's account of meta-interpretation. In the remainder of this section I summarize Chapters 12 and 13 of *Legality*. As we will see, for Shapiro, considerations of trust are central to determining proper interpretive methodology.

To recapitulate, Shapiro understands Dworkin's argument from theoretical disagreement to be that, when judges are using different interpretive methodologies, there is therefore no consensus on the part of legal officials with regards to what the proper interpretive methodology is. If there is no such consensus on the part of legal officials, then there cannot be law in that circumstance, because the requirements of the rule of recognition have not been satisfied.

Shapiro, in what follows, is going to provide an account of how to determine

proper interpretive methodology in the absence of judicial social consensus. Dworkin, recall, uses moral facts to determine the law when social facts "run out." Shapiro, since his theory is a positivist theory of the exclusivist variety, cannot ever appeal to moral facts. Instead Shapiro will, in good positivist fashion, use social facts to determine proper interpretive methodology. The challenge Shapiro takes up is to ground proper interpretive methodology in social *facts* without relying on judicial social *consensus* (i.e., the thing which was missing in the *Snail Darter Case*).

Before I get to Shapiro's account of legal interpretation under the Planning Theory, I should say a few things about the Planning Theory itself. Relying on Michael Bratman's account of plans, Shapiro argues essentially that legal systems are planning systems. Laws, by and large, are plans. The law sets out a "plan for raising revenue, a plan for protecting endangered species, and a plan for income security in retirement."[81] The constitution is a plan for planning; it is a plan setting out how other plans will be made.[82] Finally, because the existence of plans is determined entirely by social facts, the Planning Theory of law is a positivist theory of law.

With regards to the Planning Theory's account of legal interpretation, "[r]oughly speaking, the Planning Theory demands that the more trustworthy a person is judged to be, the more interpretive discretion he or she is accorded; conversely, the less trusted one is in other parts of legal life, the less discretion one is allowed. Attitudes of trust are central to the meta- interpretation of law, I argue, because they are central to the meta-

81 Hershovitz 2014, 156.
82 Id.

interpretation of *plans*—and laws are plans, or planlike norms."[83]

Shapiro thinks philosophers (especially Dworkin), detached from real practice as they are, are insufficiently attentive to issues of trust.[84] To show the role of trust in the interpretation of plans, Shapiro offers an analogy with a financial planner. Imagine a financial planner who creates an investment plan for two different clients. The first client, let's call her Clueless Claire, "is completely clueless about financial matters and seeks out the advisor for extensive help."[85] Because of this, the financial planner would draft a very detailed investment plan which "specifies in great detail every stock that the client should buy, the dates on which she should purchase them, and the target prices at which to sell."[86] This plan "leaves virtually nothing to the client's discretion."[87] The financial planner's distrust of the client results in the client having less discretion in interpreting and applying the plan. "Because the advisor does not trust the client, she judges that the best allocation accords the lion's share of decisionmaking authority to the plan, while reserving a tiny remainder for the client."[88]

Now imagine another client, Trustworthy Tammy. Tammy has much greater knowledge of financial matters, and therefore the financial planner places a much greater degree of trust in Tammy than she does Clueless Claire. Since the planner trusts Tammy more, "she drafts a far less detailed document" that gives Tammy more discretion than

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83 Shapiro 2011, 331.
84 Chapter 11 of *Legality*, "Dworkin and Distrust," is Shapiro's main substantive attack on Dworkin's theory of law. He thinks Dworkin's theory of law is not sufficiently attentive to issues of trust because it affords judges too much discretion in using morality to interpret the law. Shapiro 2011, 307-330.
85 Shapiro 2011, 333. The example is Shapiro's but the whimsical names are mine.
86 Shapiro 2011, 333.
87 Shapiro 2011, 333.
88 Shapiro 2011, 333.

Claire in interpreting and applying the plan.[89] So, for example, instead of setting out precisely which stocks to buy and exactly at which prices to buy and sell those stocks, the plan for Tammy only gives a general list of stocks and ranges of prices at which to buy and sell them.[90]

So whereas the plan *compensates* for the planner's *lack* of trust in the case of Clueless Claire, it *capitalizes* on the *existence* of trust in the case of Trustworthy Tammy. "Because the advisor places greater trust in this second client, she drafts a plan that accords him greater discretion. Such a plan will enable the client to take greater advantage of information that might arise in the future."[91] Because of the ways in which plans can distribute trust by variously *capitalizing on* or *compensating for* the presence or absence of trust, "plans are sophisticated tools for managing trust and distrust."[92] Shapiro refers to the distribution of trust in a plan as that plan's "economy of trust."[93] Clueless Claire's "investment plan has an economy of trust that is stingy to the client but generous to the advisor; [the] economy of trust [for Trustworthy Tammy's plan], by contrast, is more egalitarian, in that it bestows much greater faith on the client."[94]

In order for a plan to play the role it is meant to play, the interpretive methodology used to apply the plan should not be inconsistent with the economy of trust set forth in the plan. "[T]he interpretive methodology must not allocate decision- making

89 Shapiro 2011, 334.
90 Shapiro 2011, 334.
91 Shapiro 2011, 334.
92 Shapiro 2011, 335.
93 Shapiro 2011, 335.
94 Shapiro 2011, 335.

power in a manner inconsistent with the attitudes of trust presupposed by the plan."[95] This gestures towards the way in which Shapiro will use the financial planning example to illuminate how planning considerations illuminate the selection of interpretive methodology in law: "the more generous a plan's economy of trust, the more discretion the applier should have to depart from the literal meaning of the text in the name of the plan's purpose; conversely, a more distrustful set of attitudes should lead to a more restrictive methodology, demanding greater adherence to the text or to the planner's specific intentions or expectations."[96]

It would be inconsistent with the purpose of the financial plan in the case of Clueless Claire for Claire to "depart from the plan's literal language."[97] "Conversely, a radically textualist approach to the second investment plan would be inconsistent with its economy of trust."[98] Extending the analogy, Shapiro thinks just as the interpretation of the financial plan should be guided by the economy of trust in the financial planning example, the interpretation of "legal texts should be determined in a similar manner, namely, by deferring to economies of trust."[99]

A legal system whose economy of trust puts a lot of trust in particular officials is consistent with those officials using an interpretive methodology that allows them a large degree of discretion. Likewise, a distrustful system where "authority is widely dispersed" is more consistent with an interpretive methodology that limits the discretion of those

95 Shapiro 2011, 335.
96 Shapiro 2011, 335-336.
97 Shapiro 2011, 336.
98 Shapiro 2011, 336.
99 Shapiro 2011, 336.

officials.[100] It would frustrate the purpose of the financial plan if Clueless Claire were to exercise *too much* discretion, or if Trustfulworthy Tammy were to exercise *insufficient* discretion in applying the financial plan.

As in the financial planning case, so with legal plans. If officials in a distrustful legal system were to use a method of interpretation that gave them a lot of discretion, this would provide those officials "with opportunities to expand their powers, reduce restrictions, and further increase their discretion beyond the level contemplated by the designers" and therefore would result in a "distribution of power and authority" that "is incompatible with the distrustful views" of the legal system.[101]

There are two general ways to determine a legal system's economy of trust: the God's-eye Method and the Planners Method. Shapiro uses Richard Posner as an example of the God's-eye Method, and uses Antonin Scalia as an example of the Planners Method. Posner thinks "it is proper to accord courts the discretion to decide cases in accordance with their judgments of the general welfare because judges are generally trustworthy"[102] and because judges are "well above average" when it comes to "age, intelligence, disinterest, and sobriety."[103] Scalia, on the other hand, thinks judges should not have discretion in interpreting the constitution in accordance with evolving mores because the founding Fathers were "skeptical that 'evolving standards of decency' always 'mark progress,' and that societies always 'mature,' as opposed to rot."[104] On Scalia's view

100 Shapiro 2011, 339.
101 Shapiro 2011, 340.
102 Shapiro 2011, 343.
103 Shapiro 2011, 343 (quoting Richard Posner).
104 Shapiro 2011, 343 (quoting Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press 1998)).

"granting judges the power to interpret the constitutional text in accordance with changing conceptions of morality would, in effect, permit future generations to change the constitution and thereby defeat its raison d'etre."[105]

"The God's-eye method pegs proper interpretive methodology to *actual* competence and character."[106] The Planners method, in contrast, "defer to the views of the system's planners regarding her competence and character" at the expense of the meta-interpreter's[107] own assessment of her own trustworthiness.[108] "Insofar as the Planners method requires meta- interpreters to defer to *imputed,* rather than actual, competence and character, its recommendations may diverge from the God's-eye approach whenever the legal system is founded on false beliefs about the abilities and dispositions of actors."[109] "Scalia thinks that judges ought to be denied the discretion to appeal to current views of morality based on skepticism about the moral character of future generations; Posner believes judges should be accorded such discretion based on confidence in their expertise."[110] But while both Posner's and Scalia's arguments are meta-interpretive in that they argue for a specific methodology, they differ in an important respect. Where Posner appeals to his own judgments about the trustworthiness of judges, Scalia appeals to the Founder's (or "designer's") judgments regarding the trustworthiness (or lack thereof) of judges.[111]

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105 Shapiro 2011, 343.
106 Shapiro 2011, 343.
107 A meta-interpreter is a person "who attempt[s] to discover which interpretive methodology is appropriate for an actor in a given legal system to use" (Shapiro 2011, 356).
108 Shapiro 2011, 345.
109 Shapiro 2011, 345.
110 Shapiro 2011, 344.
111 Shapiro 2011, 344 (or at least what the meta-interpreter takes the Founder's assessment of trust to be

Shapiro thinks whether one should use the God's-eye Method or the Planners Method to determine a legal system's economy of trust depends on whether one is situated in an Authority System or in an Opportunistic System. In Authority Systems, "the reason why the bulk of legal officials accept, or purport to accept, the rules of the system is that these rules were created by those having superior moral authority or judgment."[112] In Opportunistic Systems, in contrast, officials accept legal rules "because they recognize, or purport to recognize, that these rules are morally good and hence further the fundamental aim of law."[113] Shapiro thinks the Planners Method is appropriate for Authority Systems while the God's-eye method is appropriate for Opportunistic Systems.[114]

Shapiro maintains it is an empirical question whether a legal system is an Opportunistic System or an Authority System. For his part, he thinks "the United States legal system strongly resembles an authority system."[115] As such, Shapiro thinks legal interpreters in the American system "must be sensitive to the attitudes of trust held by those who designed" the American system.[116]

While Shapiro thinks "the principal disagreement over interpretive methodology has always been between those who favor stricter forms of interpretation versus those who prefer looser ones"[117] and that the meta-interpretive debate between textualism and

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(insofar as reality can differ from perception).

112 Shapiro 2011, 350.

113 Shapiro 2011, 350.

114 Shapiro appears to re-name the God's-eye method applied in the case of Opportunistic Systems: the "Participants method of meta-interpretation" (Shapiro 2011, 351).

115 Shapiro 2011, 351.

116 Shapiro 2011, 352.

117 Shapiro 2011, 353.

purposivism can be seen "as a dispute about the economy of trust of particular legal systems,"[118] he also thinks determining a legal system's economy of trust is not sufficient to pick out a unique interpretive methodology, since certain forms of textualism and purposivism give the interpreter the same degree of discretion.[119]

Because of this, ascertaining the economy of trust in the legal system must be supplemented with the *goals* of the legal system to pick out a unique interpretive methodology: "proper interpretive methodology is determined not only by the level of trust accorded actors, but by their roles as well. An interpretive methodology is proper for an interpreter in a given legal system just in case it best furthers the objectives actors are entrusted with advancing, on the supposition that the actors have the competence and character imputed to them by the designers of their system."[120]

So after the first step (viz., determining the whether a legal system is an Authoritative System or an Opportunistic System) the meta-interpreter must then engage in another three steps.[121] Under the Planning Theory, the three remaining steps for determining correct interpretive methodology are:

1. *Specification*: Assess the features of rival interpretive methodologies by looking at "[w]hat competence and character are needed to implement different sorts of interpretive procedures."[122]
2. *Extraction*: Extract two things "from the institutional structure of the legal

118 Shapiro 2011, 355.

119 "But since different methodologies may grant interpreters similar degrees of discretion, simply deferring to the system's trust economy may not yield a unique interpretive methodology. For example, as I show later on, certain types of textualism confer roughly the same degree of discretion on interpreters as some purposive ones." (Shapiro 2011, 358).

120 Shapiro 2011, 359.

121 Shapiro goes through these three steps in the case of an Authority System, but in order to "adjust" for Opportunistic Systems, "it will usually suffice to replace "official" for "planner" in the discussion that follows." Shapiro 2011, 358.

122 Shapiro 2011, 359.

system" under examination: (a) "the planners' attitudes regarding the competence and character of certain actors," and (b) "the objectives that they are entrusted to promote."[123]

3. *Evaluation*: Determine "[w]hich procedure best furthers and realizes the systemic objectives that the actors were intended to further and realize, assuming that they have the extracted competence and character."[124]

The first stage involves specifying the candidate interpretive procedures and assessing what the relevant features of those methodologies are and what those interpretive methodologies require of those who would apply them. Regarding the first step, Shapiro writes "Meta- interpretive battles are often fought and won at the specification stage."[125] The reason for this is that, for example, purposivists will argue that inquiries into legislative intent are relatively easy, whereas the textualist will play up the difficulties which confront the purposivist. "Insofar as it is easier to justify a less demanding methodology, advocates of particular hermeneutical styles tend to minimize, while critics emphasize, the degree of competence and character needed for successful implementation."[126]

In the second stage the meta-interpreter looks at the legal system itself to see what that system's economy of trust is. In Authority Systems, the economy of trust is examined from the point of view of the planners of the legal system, or, in other words, from the "system's point of view."[127] "The meta- interpreter attempts to show that a system's particular institutional structure is due, in part, to the fact that those who designed it had certain views about the trustworthiness of the actors in question and therefore entrusted

123 Shapiro 2011, 359.
124 Shapiro 2011, 359.
125 Shapiro 2011, 360.
126 Shapiro 2011, 360.
127 Shapiro 2011, 361.

actors with certain rights and responsibilities."[128] On Shapiro's model, the planner's views of the legal system's economy of trust are relevant only insofar as they are realized and embedded in the system itself. This is why the meta-interpreter examines the system itself to understand the planner's attitudes about the economy of trust.

After determining the legal system's economy of trust in the first part of the second step, the second part of the second step requires meta-interpreters to "extract[] the objectives that various actors are entrusted with serving."[129] So the first part of the second step involves determining the *amount* of trust certain actors and institutions have in the legal system, while the second part of the second step involves determining, given the *amount* of trust, the *objectives* or *what it is* the actor or institution is entrusted with pursuing or doing. The objectives are the "roles" or "parts" the legal actor is "meant to play in the shared activity of social planning" or the "ends" the legal actors are entrusted with pursuing.[130] Some actors' objectives are uncontroversial, for example the role of the bailiff is to maintain order in the court. Others are more controversial, for example, "the role of the judge in a democratic society."[131] The answers to these questions must be answered before proper interpretive methodology is selected.

Evaluation is the third and final step. Here, the meta-interpreter must take the objectives of the legal system and then see which interpretive methodology best furthers the extracted objectives of the legal system. One methodology could be appropriate for different parts of the legal system or different actors within the legal system depending on

128 Shapiro 2011, 361.
129 Shapiro 2011, 368.
130 Shapiro 2011, 369.
131 Shapiro 2011, 369.

the amount of trust the actor or institution is accorded, and also depending on the objective the actor or institution is entrusted with pursuing. "The interpretive methodology that is ranked highest when all methodologies are considered is the correct one for the particular legal system."[132]

All things being equal, the more an actor is trusted, the more likely a highly discretionary interpretive methodology will be consistent with that conferral of trust. Shapiro includes several examples of the interplay between trust and discretion: "[t]he deference that is normally shown administrative agencies in statutory interpretation is justified, at least in part, by the greater experience and expertise of administrative agencies as compared to courts with respect to the underlying issues at stake" and "juries are required to defer to the interpretation of the law given by trial courts, given the comparative expertise of the court over the lay juror."[133]

With Shapiro's positivist apparatus for determining correct interpretive methodology in place, Shapiro is now ready to show how his positivist theory accounts for the intelligibility of theoretical disagreements about law and thus respond to ATD. Shapiro's theory, if successful, can account for theoretical disagreements about law by relying on social *facts* without relying on social *consensus* about interpretive methodology, a mistake he thinks is made by other positivist theories of law:

> The commitment to the social foundations of law, I have tried to show, can be satisfied in the absence of a specific convention about proper interpretive methodology just in case a consensus exists about the factors that ultimately

132 Shapiro 2011, 370.

133 Shapiro 2011, 373-374. Alec Walen (correspondence) points out that, while it is generally true jurors cannot decide the law, this was not always the case, and it is not the case everywhere now.

> determine interpretive methodology. In authority systems, the law will be grounded in social facts whenever there is a consensus among the bulk of the current officials concerning which texts are legally authoritative, as well as a consensus among those who created and adopted these texts about the competence and character of legal actors and the objectives they ought to pursue. The fact that interpretive methodology is determined by these factors not only renders theoretical disagreements possible but explains why such disagreements are so prevalent. For it is highly likely that meta- interpreters will disagree with one another about the content of the planners' shared understandings and which methodologies are best supported by them.[134]

So meta-interpreters could disagree about proper interpretive methodology because they could disagree at "any of the three steps of meta-interpretation."[135] Because it is "highly likely" for people to disagree on these points, disagreement about interpretive methodology is accounted for being being rendered intelligible.[136] Further, this account of meta-interpretive disagreement is positivist, because proper interpretive methodology is determined by empirically ascertainable social facts about the objectives and allocation of trust embedded in a legal system in conjunction with the interpretive methodology that best furthers those objectives in light of that legal system's economy of trust. "The legal system in question, for example, may exist in order to promote racial inequality or religious intolerance; it may embody ridiculous views about human nature and the limits of cognition. Nevertheless, the positivist interpreter takes this ideology as given, and seeks to determine which interpretive methodology best harmonizes with it."[137]

But what if it is *not* the case that a "consensus exists about the factors that

134 Shapiro 2011, 383.
135 Shapiro 2011, 382.
136 Shapiro 2011, 383.
137 Shapiro 2011, 382.

ultimately determine interpretive methodology"? What if there is *no* "consensus among the bulk of the current officials concerning which texts are legally authoritative, as well as a consensus among those who created and adopted these texts about the competence and character of legal actors and the objectives they ought to pursue"[138]?

To this Shapiro responds "it is a consequence of th[e Planning Theory] approach that, in the absence of the relevant shared understandings, disagreements about proper interpretive methodology will be irresolvable."[139] Shapiro argues that, in the absence of complete shared understanding, a *partial* shared understanding could be enough to rule out some interpretive methodologies, or in some cases a thin shared understanding could be enough to endorse a particular methodology.[140] Additionally, and crucially, Shapiro on this point argues

> a theory of law should account for the *intelligibility* of theoretical disagreements, not necessarily provide a resolution to them. An adequate theory, in other words, ought to show that it makes sense for participants to disagree with each other about the grounds of law. Whether a unique solution to these disputes actually exists is an entirely different, and contingent, matter, and a jurisprudential theory should not, indeed must not, demand one just because participants think that there is one.[141]

For a disagreement to be intelligible means for it to be rational or expected in some sense. Resolving a disagreement means to show how one side or the other is correct.

Shapiro argues his account of meta-interpretation shows how it is intelligible for lawyers to have theoretical disagreements, but it does not necessarily provide a resolution to those disagreements. But even though there may not a *resolution* to the question of

138 Shapiro 2011, 383.
139 Shapiro 2011, 383.
140 Shapiro 2011, 383.
141 Shapiro 2011, 384.

correct interpretive methodology (because there is no fact of the matter on his view), Shapiro argues he has done enough by providing for the *intelligibility* of there being a disagreement about interpretive methodology.

4.) ASSESSMENT OF SHAPIRO'S EXEGESIS OF ATD IN *LAW'S EMPIRE*

Legality's exegesis of ATD falls short for two main reasons. First, it understands Dworkin's challenge in *Law's Empire* to be to show how it is intelligible or rational for judges and lawyers to have a theoretical disagreement about law. This is incorrect because Dworkin's challenge with ATD was not to create a theory of law which shows how theoretical disagreements are *intelligible*, but rather to show *metaphysically* how law can exist in the face of theoretical disagreements. The second reason *Legality's* exegesis of *Law's Empire* falls short is that it identifies theoretical disagreements about law with what Shapiro has defined as meta-interpretive disagreements about law. This is incorrect because Dworkin himself takes at least some (and perhaps the most significant) theoretical disagreements about law to be what Shapiro defines as interpretive disagreements about law (as opposed to meta-interpretive disagreements about law).

Shapiro understands the challenge presented by ATD to show how it is rational for theoretical disagreements to exist:

> Dworkin's ambition [with ATD in *Law's Empire*], therefore, was to develop a meta- interpretive theory that created logical room for meta- interpretive disagreements. Constructive interpretation, he believed, made this possible. If interpretive methodology is fixed by the principles that present legal practice in its best light, then disputes could center either on which principles place legal practice in its morally best light or which methodology is required by such principles. Disputes between conventionalists and proponents of law as integrity — both interpretive methodologies— could thus be made intelligible by imagining that meta- interpreters disagree about the proper constructive interpretation of particular legal systems.[142]

Regarding the theoretical disagreement which occurred in *TVA*, Shapiro writes

142 Shapiro 2011, 306.

> On the Planning Theory, therefore, when Powell held that the Endangered Species Act did not bar the completion of the dam because halting its completion would have been morally absurd, *he was not finding preexisting law*. Rather, he was following (what he took to be) a suspension policy of not applying the Endangered Species Act when it gives absurd and unintended results. When Powell determined that the conditions set out in this implicit policy did obtain in TVA [. . .] he was attempting to increase the guidance provided by the law and hence to *create new law* in the process.[143]

More generally, Shapiro, after presenting ATD but before getting to his response to ATD, writes "Whether we should understand interpretive methodologies as always outputting preexisting law or, in certain circumstances, new law will be of no moment going forward."[144]

So according to *Legality's* exegesis of ATD, Dworkin's challenge is to show how theoretical disagreements about law can be intelligible or rational for legal participants to have. And in order for a theory of law to do this it needs to show how it is rational for legal participants to find themselves in theoretical disagreements about law, but it need not *resolve* these disputes by showing which side is correct. Because a response to ATD only needs to show how it is rational to have a theoretical disagreement, it is acceptable for a theory of law to have the consequence that, in cases of theoretical disagreements, new law is created as opposed to pre-existing law being found (as Shapiro states in the immediately preceding quotes). And because Shapiro takes the goal of responding to ATD to be to show the *rationality* of theoretical disagreements, in Shapiro's attempt to respond to ATD, "the main focus will be on the intensely practical issue of choosing

143 Shapiro 2011, 303-304.
144 Shapiro 2011, 304-305.

interpretive methodologies."[145]

The problem with Shapiro's exegesis here is that Dworkin's challenge was *metaphysical*, not practical or epistemological.[146] That there is pre-existing law to be found in the face of theoretical disagreements is a central premise in ATD, something Shapiro ignores, or at least is indifferent to. Dworkin, in his presentation of *Riggs v. Palmer* (his first example of a theoretical disagreement) writes while there are a number of points the case is meant to illustrate, "*the most important is this*: the dispute about Elmer was not about whether judges should follow the law or adjust it in the interests of justice . . . *It was a dispute about what the law was*, about what the real statute the legislators enacted really said."[147]

At the end of his discussion of *TVA*, the same case Shapiro says created new law according to the Planning Theory, Dworkin writes the majority and dissent "[b]oth accepted that the Court should follow the law" but "they disagreed about how judges should decide what law is made by a particular text . . . ."[148] About *McLoughlin*, the third theoretical disagreement in *Law's Empire*, Dworkin writes "their lordships disagreed about what they called the true state of the law."[149] Of the fourth and final example of a theoretical disagreement in the opening chapter of *Law's Empire*, *Brown*, Dworkin writes the arguments made in *Brown* "were arguments about the proper grounds of

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145 Shapiro 2011, 305.

146 While there are certainly epistemological and practical elements to what Dworkin says in *Law's Empire*, the central nature of the debate between positivists and anti-positivists is metaphysical, and thus Dworkin's central claims in the context of ATD are metaphysical.

147 Dworkin 1986, 20 (emphasis added).

148 Dworkin 1986, 23.

149 Dworkin 1986, 27.

constitutional law, not arguments of morality or repair . . . This case, like our other sample cases, was fought over the question of law."[150]

Dworkin thus repeatedly presses the point that the central feature of theoretical disagreements about law, at least as it relates to ATD, is that the judges thought they were finding pre-existing law, not making or repairing it. Yet depending on which part of *Legality* one looks at, Shapiro either rejects the idea that there is pre-existing law to be found in theoretical disagreements, or he is indifferent to that fact. He rejects it at least in the context of *TVA*, where he explicitly writes that under the Planning Theory, the judges in that case were not "finding preexisting law" but where instead "creat[ing] new law."[151] He is indifferent to the issue of whether there is preexisting law when he writes "Whether we should understand interpretive methodologies as always outputting preexisting law or, in certain circumstances, new law will be of no moment going forward."[152]

But Dworkin presents ATD as a challenge to show how law can *actually exist* in the face of theoretical disagreements. Shapiro's exegesis of ATD sees it as a challenge to show how it is rational for judges and lawyers to *think* that law exists in the face of theoretical disagreement. Dworkin's challenge is metaphysical; the challenge Shapiro addresses is practical or epistemological. These are distinct challenges.

Of course, just because Dworkin makes an argument does not mean everyone has to take what he says at face value. Accordingly, it might not *per se* be a problem for a jurisprudential theory to refuse to take Dworkin's challenge seriously so long as that

150 Dworkin 1986, 30.
151 Shapiro 2011, 303-304.
152 Shapiro 2011, 304-305.

jurisprudential theory were to provide other reasons why ATD should not be taken seriously and that theoretical disagreements should be explained away. As Shapiro writes, "What the positivist must show [if she wants to explain away theoretical disagreements], however, is that there are compelling theoretical reasons to either dismiss or reinterpret the self-understanding of these experts" in cases of theoretical disagreement.[153]

The two main ways to explain away theoretical disagreements are the incoherence and insincerity responses. The incoherence response says that judges and lawyers are simply misled about the practice they are engaged in. The insincerity response says that, while judges and lawyers *themselves* are not misled about their practice, they are misleading others (namely, the lay public) about the nature of their practice (Dworkin refers to the insincerity response as the "crossed-fingers" response). So the insincerity and incoherence responses do not attempt to address the full brunt of Dworkin's challenge in ATD because both of them do not take theoretical disagreements about law at face value.

It is because positivist theories of law cannot account for the existence of law in the face of theoretical disagreements that Dworkin says they are forced into either the incoherence or insincerity responses. Dworkin writes "according to positivism . . . there was no law to discover" in the cases of theoretical disagreement and the disagreements between the lawyers in those cases "must therefore have been disguised argument about what the law should be."[154] The two versions of this "disguised argument" response are

153 Shapiro 2007, 41.
154 Dworkin 1986, 37.

the incoherence and insincerity responses. It because judges think there to be (or at least talk as if there is) law in instances of theoretical disagreements yet positivism would say there is no law which forces the positivist into either the incoherence or insincerity responses.

So Shapiro, in denying that law exists in the case of theoretical disagreements, is forced into either the incoherence or insincerity responses, something that he himself says he does not want to do. Shapiro says he does not endorse the incoherence response because "any theory that imputes that much irrationality and ignorance to experts should be severely penalized and deemed presumptively unfit."[155] He rejects the insincerity response because "it is hard to understand why anyone would dare try such a strategy"[156] and also he writes while "Judges may have a great political interest in hiding the true nature of their activities, [] scholars generally do not."[157]

Shapiro, to respond to ATD in a way that avoids adopting either the incoherence or crossed-fingers responses, must do more (or, indeed, much *other*) than show it is rational or intelligible for lawyers to disagree about interpretive methodology. He must show how law exists metaphysically in the absence of social consensus on the part of judicial officials. He has not done this.

Not only does Shapiro's exegesis miss the true force of ATD, but it is not even clear Shapiro has succeeded at his much more circumscribed task. Above I included in a block quote where Shapiro declares his success at responding to ATD, asserting that,

155 Shapiro 2011, 290.
156 Shapiro 2011, 291.
157 Shapiro 2007, 40.

because interpretive methodology is set by "the competence and character of legal actors and the objectives they ought to pursue," this fact "renders theoretical disagreements possible but [also] explains why such disagreements are so prevalent."[158] "For it is highly likely that meta- interpreters will disagree with one another about the content of the planners' shared understandings and which methodologies are best supported by them."[159]

Showing how it is rational for lawyers to disagree about which interpretive methodology is proper is different than showing how it is rational for judges and lawyers to think law exists in the face of theoretical disagreements. Just because it is rational for lawyers to disagree which interpretive methodology is proper does not mean it is rational for lawyers to think that the *output* of those interpretive methodologies is *pre-existing law*. These are entirely distinct concerns.

Judges and lawyers can disagree about what interpretive methodology is proper and also agree or disagree on the issue of whether the output of those interpretive methodologies is pre-existing law or whether is it new law. So showing how it is rational for judges and lawyers to disagree at the meta-interpretive level does nothing to show it is rational for judges and lawyers to think pre-existing law is found in cases of theoretical disagreements.

Not only this, but recall where Shapiro says, of TVA, that "On the Planning Theory, therefore, when Powell held that the Endangered Species Act did not bar the completion of the dam because halting its completion would have been morally absurd,

158 Shapiro 2011, 383.
159 Shapiro 2011, 383.

he was not finding preexisting law."[160] So since under the Planning Theory the outputs of interpretive methodology in instances of theoretical disagreements do not appear to be pre-existing law, it is manifestly *irrational* and *unintelligible* for the person who accepts the Planning Theory to *think* there is pre-existing law in these cases. It seems *more* irrational for the judge who accepts the Planning Theory to think pre-existing law is found in theoretical disagreements than the judge who rejects the Planning Theory. Shapiro appears not only to have failed at his very circumscribed task, but Shapiro's cure is worse than the disease.

Given this lack of success at even the limited task, it is not clear Shapiro's theory is superior to other positivist theories on the issue of ATD (as he claims it is). Since Shapiro's account has made no progress on the issue of making it rational for legal participants to think there is pre-existing law in cases of theoretical disagreements, he is left similarly situated to the positivist theories of law which have come before his. The Planning Theory, since it, just like other positivist theories (such as, for example, Brian Leiter's) must impart incoherence or insincerity to judges and lawyers engaged in theoretical disagreements, the Planning Theory is not superior to other positivist theories on the issue of ATD (as Shapiro contends it is).

Accordingly, it seems that another positivist theory, even one which thinks that interpretive methodology in cases of theoretical disagreement is fixed by *morality*, could account for the existence of disagreements about interpretive methodology in the manner Shapiro does. Let's take a pet exclusive positivist theory which holds that, in instances of

160 Shapiro 2011, 303-304.

theoretical disagreements, the judge has an extra-legal duty to apply an extra-legal norm, namely, morality, to determine which interpretive methodology is proper. Just as Shapiro claims it is likely for lawyers to disagree about the trustworthiness or goals of legal actors (and thus it is rational or intelligible for them to disagree about interpretive methodology, i,e., have a meta-interpretive disagreement), so also could lawyers disagree about morality in the contexts of theoretical disagreements. So our pet exclusive positivist theory of law, which explicitly uses morality to serve an extra-legal "gap-filling" function, works just as well as Shapiro's theory in giving an account of the intelligibility or prevalence of disagreements about interpretive methodology.

But again, giving an account which explains how it is *possible* for disagreements about interpretive methodology to arise, or how such disagreements are *intelligible*, does not make progress towards showing how it is *rational* for judges or lawyers to *think* that the law in cases of theoretical disagreements about law is *pre-existing* law. Note that under our pet exclusive positivist theory, it would still be irrational for legal participants to think they are finding law in cases of theoretical disagreement, since that theory holds, just like under Shapiro's exclusive positivist theory, that new law is created in cases of theoretical disagreement. The only difference between Shapiro's exclusive positivist planning theory and our pet theory is that Shapiro wants interpretive methodology to be fixed by social facts, whereas under our pet theory interpretive methodology it is set by morality. Both Shapiro's theory and our pet theory stand on a par with regards to their account of the coherence of theoretical disagreements.

Given this, it is not clear why it is any advantage for Shapiro's theory (over other positivist theories) that interpretive methodology is fixed by social facts rather than moral facts. The work that Shapiro's theory of interpretation is doing by his own lights in responding to ATD is showing how it is rational or intelligible for lawyers the have theoretical disagreements. Since lawyers could disagree about moral facts in just the same way or to an approximately similar disagree as they would disagree about the social facts that are relevant under Shapiro's theory, there is nothing special about the fact that Shapiro's theory of interpretation relies only on non-moral facts.

This also shows Shapiro is wrong to think that, because his theory of law is an exclusive positivist theory of law, that he can only appeal to social facts in his theory of legal interpretation. It is just as open to him, given that he appears to accept the idea that new law is created with the application of interpretive methodologies in instances of theoretical disagreements, to have the inputs of interpretive methodology include moral facts. Having moral facts as inputs is only a problem for a positivist theory if the output is metaphysically pre-existing law. If the output is new law, this is not a problem for the positivist, since the appeal to moral facts is not done in the service of an account of the *metaphysical* constitution or grounds[161] of the law. Under both the Planning Theory and our pet exclusivist theory, the appeal to moral facts is done in the service of a procedural or practical concern with creating new law.

Indeed, given the way Shapiro has set up his theory, it does not seem possible to go through the steps he says are required for legal interpretive without engaging in any

161 Or whatever the proper metaphysical relation is between law and the grounds of law.

normative or moral enterprise. Recall that the third and final step of Shapiro's account of interpretation under the Planning Theory is *evaluation*, which requires the meta-interpreter to evaluate "[w]hich procedure best furthers and realizes the systemic objectives that the actors were intended to further and realize, assuming that they have the extracted competence and character."[162] The notion of "best" clearly has heavy normative connotations. Indeed, it seems very implausible that one could figure out which interpretive theory best furthers the objectives of the legal system without engaging with any normative questions *at all*.[163]

Even if the problems I have just pointed out with Shapiro's exegesis of *Law's Empire* and his account are wrong (or can be overcome) there is another serious problem with Shapiro's exegesis and consequently with his response to ATD. Shapiro (if everything he says is right) has only provided for the intelligibility of *one type* of theoretical disagreement about law. Shapiro, recall, identifies theoretical disagreements about law with meta-interpretive disagreements about law. This is because Shapiro understands ATD to hold that even where judges disagree about interpretive methodology, the judges still think there is a fact of the matter about what the law is (recall *TVA*). But, if positivism is committed to the idea that legality is a function of consensus, then there cannot be determinate law in instances where judges disagree about interpretive methodology and thus there is no social consensus on the part of judges about what proper interpretive methodology is (and the judges thus have a meta-interpretive

162 Shapiro 2011, 359.

163 Alec Walen (correspondence) has also pointed out that it seems normative considerations enter at even the second step, e*xtraction*, which involves extracting "the objectives [the actors in the legal system] are entrusted to promote" from "the institutional structure of the legal system." Shapiro 2011, 359.

disagreement). Shapiro then goes on the use the Planning Theory to develop an account of how proper interpretive methodology can be determined in the absence of a judicial consensus about interpretive methodology. If successful, Shapiro can account for the existence of meta-interpretive disagreements about law.

But if some theoretical disagreements about law are not meta-interpretive in nature, then Shapiro has really only addressed one type of theoretical disagreements about law. By identifying theoretical disagreements about law with meta-interpretive disputes and then going on to only account for meta-interpretive disputes, Shapiro's theory will not have fully addressed ATD if there are theoretical disagreements about law which are not meta-interpretive in nature. In other words, if there are theoretical disagreements about law which are interpretive in nature, Shapiro's Planning Theory, at least given what is said so far, has not provided a sufficient response to ATD.

Shapiro has identified *theoretical* disagreements about law with *meta-interpretive* disagreements about law. This is to say theoretical disagreements about law occur when judges apply different theories of legal interpretation. (Recall TVA, where the majority and dissent had different ideas about how to interpret the Endangered Species Act.) And after making this equivalence, Shapiro went on to provide an account which attempts to explain the intelligibility of judges disagreeing about legal interpretation, and also provided a framework for empirically determining proper interpretive methodology in the absence of judicial consensus (by relying on social facts about how the designers of the legal system view that system's economy of trust and the objectives of the various actors

in the legal system).

So Shapiro has only accounted for meta-interpretive disagreements. But if there are theoretical disagreements about law which are *non-meta-interpretive* disagreements (or in other words if there are theoretical disagreements which are interpretive disagreements), then the Planning Theory (at least given what Shapiro says) does not have the resources to account for even the *intelligibility* of interpretive theoretical disagreements (much less provide a way to *resolve* them).

So if everything Shapiro says is to be believed (and he can overcome the problems mentioned earlier) this is still not enough to respond to Dworkin's argument from theoretical disagreements if theoretical disagreements about law arise even in the absence of a disagreement about interpretive methodology. In what follows I provide Dworkin's own example of theoretical disagreements in *Law's Empire*, and then I provide new examples of my own.

Contrary to Shapiro, I submit there are two ways for lawyers to have a theoretical disagreement about law, or, in other words, for lawyers to disagree about the existence or content of legal principles (or to disagree about the grounds of law). The first way to have a theoretical disagreement about law is the one Shapiro focuses on, namely, to have a meta-interpretive disagreement and thus have a theoretical disagreement about law as a result of applying different theories of legal interpretation. So Shapiro is correct to say that people who disagree about what the correct interpretive methodology is can certainly have a theoretical disagreement about law. Thus, one way to disagree at the level of legal

principle is caused by having a disagreement about what the proper interpretive methodology is. Indeed it should not at all be surprising for two judges who are applying different theories of interpretation to reach different conclusions about what the law is. Shapiro appears to be correct that *TVA* is an example of a meta-interpretive disagreement about law (and Dworkin appears to agree with him on this count[164]).

The second way to have a theoretical disagreement about law occurs even when two judges are applying the same theory of legal interpretation. They can have a disagreement about the grounds of law (viz.,, about the existence or content of legal principles), even though they are applying the same interpretive methodology.

So say two judges are both using law as integrity to interpret the available legal materials (law as integrity is an interpretive methodology by Shapiro's own admission). These two judges, despite their both applying law as integrity, could disagree about the existence or content of legal principles because they disagree about which legal principle(s) best fits and justifies the available legal materials.

Dworkin himself appears to believe that judges, all applying law as integrity (an interpretive methodology) could still disagree about what the law is. In his discussion of Hercules, the omniscient judge who always gets the right answer to legal questions, Dworkin writes "law as integrity consists in an approach, in questions rather than answers, and other lawyers and judges who accept it would give different answers from [Hercules] to the questions it asks."[165] The cause of this difference appears to be the

164 Of *TVA*, Dworkin writes the judges in that case "disagreed about how judges should decide what law is made by a particular text." Dworkin 1986, 23.
165 Dworkin 1986, 239.

peculiarities of each individual judge and/or general human fallibility. Different judges will have different degrees of expertise and wisdom with regards to the law. Additionally, given the complexity of the law, there are a number of ways in which judges could be incorrect about the law. If law is partly determined by morality, and there is more than one way to be incorrect about morality (even when applying the same interpretive methodology), then there is more than one way to be incorrect about the existence or content of legal principles.

Dworkin himself gives no fewer than two examples of theoretical disagreements where the judges are nonetheless applying law as integrity, and thus the theoretical disagreement is not occurring at the meta-interpretive level (since law as integrity is an interpretive methodology). The first, *McLoughlin*, is not mentioned once in *Legality*. But *McLoughin* is arguably Dworkin's main example of a theoretical disagreement about law in *Law's Empire*. Dworkin repeatedly refers to *McLoughlin* throughout the work, and in the chapter "Integrity in Law" (where Dworkin sets forth his preferred theory of interpretation, law as integrity) Dworkin uses *McLoughlin* to illustrate how he thinks legal reasoning should proceed under law as integrity.

In his discussion of *McLoughlin*, Dworkin includes six candidate principles considered by Hercules (the omniscient judge "of superhuman intellectual power and patience who accepts law as integrity"[166]). Dworkin goes through the candidate principles[167] and assesses their various degrees of fit and justification. Since judges will

166 Dworkin 1986, 239.
167 Listed at Dworkin 1986, 240-241.

of course occasionally (or even frequently) disagree with Hercules ("other lawyers and judges who accept [law as integiry] would give different answers from [Hercules] to the questions it asks"), Dworkin imagines theoretical disagreements about law (that is, disagreement at the level of legal principles) can occur even when judges are applying the same interpretive theory (viz., law as integrity).

In addition to *McLoughlin*, Dworkin provides another possible example of a theoretical disagreement about law which is not a meta-interpretive disagreement. The case is *Bakke*.[168] It is not offered in the initial chapter as an example of a theoretical disagreement, but *Bakke* appears in Dworkin's chapter on constitutional interpretation.[169] First, in discussing *Brown*, Dworkin outlines three "theories" about what the constitutional law of discrimination is. Dworkin names these the suspect classification, the banned categories, and the banned sources theories.[170] The content of these theories is not important, but these theories clearly correspond to different legal principles, because, while Hercules need not select one to decide *Brown* (because the best two, the banned sources and the banned category theories both prescribe the same result), Hercules must winnow down the theories to one in order to decide *Bakke*. Dworkin writes "Hercules must choose between the two theories, and he will prefer the banned sources to the canned categories theory" because the banned sources category betters fits "constitutional or political practice."[171] Since it is Hercules deciding the case, we know that the interpretive theory being applied is law as integrity. So since there can be a disagreement

168 Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
169 Chapter Ten, "The Constitution." Dworkin 1986, 355-399.
170 Dworkin 1986, 382-384.
171 Dworkin 1986, 394.

at the level of principle even using the same interpretive theory (or in other words, a disagreement about what the law is even when applying law as integrity), Dworkin imagines that at least some theoretical disagreements about law can occur despite agreement at the level of legal interpretation (and thus the disagreement is not meta-interpretive).

Since Dworkin clearly imagines that judges, all applying law as integrity, could disagree about the existence or content of legal principles, it is possible for judges to disagree about the grounds of law and thus to have a theoretical disagreement about law despite the fact they are applying the same interpretive methodology. Thus, at the very least, *Legality* is not a correct interpretation of ATD as presented in *Law's Empire*.

Shapiro's error occurred at the start, when he sought to adopt a more “neutral vocabulary” which led him to identify theoretical disagreements about law with meta-interpretive disagreements. Not only did Dworkin himself provide examples of interpretive theoretical disagreements (and thus *Legality* stumbles as an exegesis of *Law's Empire*), but in what follows I provide new instances of interpretive theoretical disagreements. I go on to argue the Planning Theory does not have the resources to account for these (and Dworkin's) interpretive theoretical disagreements.

5.) THE CASE SEQUENCE: OTHER EXAMPLES OF INTERPRETIVE THEORETICAL DISAGREEMENTS

Not only did Dworkin give several examples of interpretive disagreements about law, but in what follows I will give more examples of theoretical disagreements where the judges appear to be applying the same interpretive methodology. In fact, arguably the judges in the following cases are applying law as integrity. First a note about Dworkin's project. Dworkin's project in *Law's Empire* is both descriptive and prescriptive, and this can be seen in the example of law as integrity. Dworkin thinks law as integrity succeeds as a description of law judges and lawyers think about the law, but it is also a prescriptive theory in because it is Dworkin's preferred theory of legal interpretation.

Dworkin's use of law as integrity can be seen as an instance of reflective equilibrium. The features of legal practice are the data which inform the creation of law as integrity as a theory of interpretation. But then, once the theory is constructed and refined, it "comes back down" to modify the practice itself. So while I think law as integrity can be used to understand the theoretical disagreements which follow in this line of cases, it is not necessary to my argument that the judges in these cases best be seen as applying law as integrity. I discuss law as integrity to stay in what follows to stay as close as I can to the spirit of Dworkin's ATD in *Law's Empire*.

So in what follows I hope to provide real life examples of theoretical disagreements about law where the judges are nonetheless applying the same interpretive methodology.[172] The nine cases that follow are a line of tort cases out of California and

172 My thanks to Doug Husak for pointing me towards the case sequence that follows.

concern what is sometimes referred to as the *attractive nuisance* doctrine.

The march through the nine cases that follow might be seen as tiresome, but I think it is worthwhile. Legal argumentation is and can be very complex. It is not unheard of for appellate briefs and judicial decisions (even those that concern a single legal issue) to cite dozens of cases. Following Dworkin, I think a thorough and sober appreciation and understanding of legal reasoning is necessary in the philosophy of law. Though Dworkin included some instances of real world legal argumentation, even his account falls short of the full richness of legal practice and the complexity of legal reasoning and argumentation. The discussion that follows is a step in that direction.

The first, foundational case is *Barrett*.[173] In *Barrett*, the plaintiff, an eight year old boy, sued the defendant for negligence for injuries the plaintiff received on defendant's unguarded turn-table,[174] located on defendant's property. The plaintiff was playing with his younger brother when they "saw other boys playing with the turn-table, and, giving them some oranges for the privilege of a ride, got upon it, and while it was being revolved plaintiff's leg was caught [. . .] and so severely injured that it had to be amputated."[175] Plaintiff was awarded a judgment of $8,500.

The defendant argued the plaintiff was a trespasser and thus the defendant owed plaintiff no duty. The California Supreme Court in *Barrett* disagreed and upheld the plaintiff's award. It stated "It is a maxim of the law that one must so use and enjoy his property as to interfere with the comfort and safety of others as little as possible

173 Barrett v. Southern Pacific, 91 Cal. 296, 27 P. 666 (1891).
174 A turntable is a large device used to rotate railroad cars.
175 Herz et al. 1994, 93.

consistently with its proper use."[176] The court stated the issue of liability is a question of fact for the jury, and that if the defendant reasonably could have anticipated the unguarded turn-table would cause the injury which occurred, then it should be held liable for "negligence in thus maintained [the turn-table] in its exposed position."[177] In prose only a student of the law can love, the court elaborated on why it rejected the defendant's trespass argument:

> It is a matter of common experience that children of tender years are guided in their actions by childish instincts, and are lacking in that discretion which, in those of more mature years, is ordinarily sufficient to enable them to appreciate and avoid danger; and, in proportion to this lack of judgment on their part, the care which must be observed toward them by others is increased; and it has been held in numerous cases to be an act of negligence to leave unguarded and exposed to the observation of little children dangerous and attractive machinery which they would naturally be tempted to go about or upon, and against the danger of which action their immature judgment interposes no warning or defense.[178]

The Court accordingly affirmed the plaintiff's judgment.

Five years after *Barrett* the Supreme Court of California decided *Peters v. Bowman*.[179] Here, plaintiff sued because his infant son "drowned in a pond of water upon a lot of land owned by the defendant."[180] Defendant at one point operated a residence on the land on which the pond was located, but the city of San Francisco graded the land and created an embankment, preventing the flow of water from the lot. Because of this a pond would form in the rainy season on the defendant's land. Defendant accordingly had to

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176 Herz et al. 1994, 93.
177 Herz et al. 1994, 94.
178 Herz et al. 1994, 94.
179 115 Cal. 345, 47 P. 113 (1896).
180 Herz et al. 1994, 95.

move his residence, a consequence of which the defendant "did not often visit the lot."[181] The decedent child was not invited to enter the premises.

The *Peters* court ruled in favor of the defendant. While the plaintiff in *Peters* conceded "the rule of the Turntable Cases has [n]ever been applied to facts like those in the case at bar," the plaintiff nevertheless argued "that the reasoning and philosophy of the rule ought to extend it to a case like the one at bar."[182]

In Dworkinian terminology, the *Peters* plaintiff argued that the legal principle embodied in Barrett extends from cases involving machines to cases involving bodies of water. Though the plaintiff conceded that no prior court had held that a plaintiff in their circumstances could recover (and thus that no explicit legal *rule* exists which would permit their recovery), the plaintiff nonetheless contended that the law entitled them to recover. So even though no court had explicitly held the plaintiff could recover for this sort of injury, the legal principle (or the "reasoning and philosophy of the rule" in the words of the *Peters* court) associated with that legal rule justifies a finding in the plaintiff's favor (or so the plaintiff's lawyer argued). This understanding of the nature of the plaintiff's argument in *Peters* accords with what Dworkin says about law as integrity, which "insists that the law—the rights and duties that flow from past collective decisions and for that reason license or require coercion—contains not only the narrow explicit content of these decisions but also, more broadly, the scheme of principles necessary to justify them."[183]

181 Herz et al. 1994, 96.
182 Herz et al. 1994, 97
183 Dworkin 1986, 227.

The plaintiff and the defendant disagreed about what the law of attractive nuisance was. Perhaps the plaintiff did (or could have) argued that *Barrett* embodied the following principle:

> *Plaintiff's Peters Principle*: Where a child is attracted to a dangerous, artificial condition on a person's land, the landowner must exercise ordinary care to protect the child from injury.

If the court were to apply such a principle, then the court would state a rule which held that plaintiffs could recover for injuries incurred in artificial bodies of water because they are "dangerous, artificial conditions." But the *Peters* court rejected this principle in favor of something along the following:

> *Peters Principle*: Where a child is attracted to a dangerous, uncommon, artificial condition on a person's land, the landowner must exercise ordinary care to protect the child from injury (so long as the artificial condition merely replicates the danger of a natural condition).

In rejecting the plaintiff's interpretation of the Doctrine of the Turntable cases, the *Peters* court noted this exception to this general rule set forth in *Barrett* (that no duty is owed to trespassers) has generally only been applied to "cases where the owner of land had erected on it dangerous machinery, the consequences of meddling with which are not supposed to be fully comprehended by infant minds."[184]

The *Peters* court refused to extend Doctrine of the Turntable cases because the danger associated with machinery, unlike the danger associated with bodies of water, is "an apparent open danger" which is "found in or close to nearly every city or town in the

184 Herz et al. 1994, 97.

land."[185] Additionally, it would be very costly to protect against bodies of water: "To compel the owners of such property either to inclose it or to fill up their ponds and level the surface, so that trespassers may not be injured, would be an oppressive rule."[186] (That oppressive principles should be disfavored could reasonably be taken as another, distinct legal principle, but in this analysis I treat oppressiveness as being part of the justification prong of law as integrity.)

Thus, even if the *Plaintiff's Peters Principle* is consistent with *Barrett* to some extent (i.e., "fits" with *Barrett*) it fits *Barrett* less than the principle the majority applied because the reasoning of *Barrett* required the condition to be uncommon and the danger to be hidden. Not only does the *Plaintiff's Peters Principle* fit *Barrett* less, but the *Plaintiff's Peters Principle* is less justified, because the application of such a principle would be, in the *Peters* court's words, "oppressive." The theoretical disagreement about law in *Peters* was only between the plaintiff and the court (and thus also presumably the defendant). We will have to continue the case sequence for a theoretical disagreement between judges to emerge.

Next is *Sanchez*, decided almost thirty years after *Peters*.[187] In *Sanchez* an infant boy fell into a canal and drowned. The canal was created by the defendant and included a syphon which connected the canal to another canal. "The water in the canal was muddy and the opening of the syphon could not be seen. The body of the child was recovered from a place some 15 feet down in the syphon."[188] While the court recognized there is no

185 Herz et al. 1994, 97.
186 Herz et al. 1994, 98.
187 Sanchez v. East Contra Costa Irrigation Co., 205 Cal. 515, 271 P. 1060 (1928).
188 Herz et al. 1994, 102.

duty to guard the "canal against the danger of children falling into it," this case presented a different scenario, because the syphon, which "might have been easily guarded," was a "concealed danger," and while children assume the risk of "open, obvious, notorious danger[s] incident to the canal," the infant "did not assume the risk of an unknown, concealed, and unguarded danger."[189] This case was thus distinguished from *Peters* because, though *Peters* also involved a body of water, the danger in *Peters* was the open and common danger of drowning, whereas *Sanchez* involved the hidden danger of a syphon.

In *Copfer*,[190] a California Court of Appeals case, plaintiff, a six year old, sued defendant for injuries sustained as a result of playing on a "tubular frame" which on it had "[p]ieces of lumber [] tied by wire across the top," along with some loose lumber.[191] The materials were located on a vacant lot owned by the defendant.[192]

The case was tried without a jury and judgment rendered for plaintiff. The *Copfer* court stated the following rule: "[o]ne who maintains upon his property a condition, instrumentality, machine, or other agency which is dangerous to children of tender years by reason of their inability to appreciate the peril therein, and which is one he knows or should know and which he realized or should realize involves an unreasonable risk of death or serious bodily harm to such children, – is under a duty to exercise reasonable care to protect them against the dangers of the agency."[193] Recognizing this rule and the

189 Herz et al. 1994, 103.
190 Copfer v. Golden, 135 Cal. App. 2d 623, 288 P.2d 90 (1955).
191 Herz et al. 1994, 105.
192 Herz et al. 1994, 106.
193 Herz et al. 1994, 106.

role of the trial court as the finder of fact, the *Copfer* court affirmed.

The year after *Copfer* the California Court of appeals decided *Wilford*.[194] Here, plaintiff sued because of the death of their four-and-a-half year old son, who drowned in the defendant's pool located on their residential property. "The pool was so constructed that it was difficult for a child to hold onto the sides of the pool."[195] A fence could have been constructed at relatively little cost. Nonetheless, the court of appeals affirmed the trial court's pretrial dismissal of the complaint.[196]

The *Wilford* court stated "There is no liability for drowning of children in ponds or reservoirs under the attractive nuisance doctrine."[197] The Restatement, in asserting the immediately preceding proposition of law, cited *Peters*, discussed above. With approval, the *Wilford* court quoted a Washington state case which reasoned "a natural watercourse is not an attractive nuisance, and that an artificial one is not if it has natural characteristics," which is to say that if an artificial watercourse "present[s] no danger by reason of being artificial that was different in any way from that of a natural watercourse," there is no duty to guard the watercourse against small children (as by erecting a fence).

Knight[198] was decided by the California Supreme Court a year after *Wilford*. In *Knight*, a ten-year old boy was killed when he was playing amongst unguarded piles of

194 Wilford v. Little, 114 Cal. App. 2d 477, 301 P.2d 282 (1956).
195 Herz et al. 1994, 110.
196 The trial court sustained the defendant's demurrer to the complaint, meaning the plaintiff's allegations were insufficient as a matter of law, and therefore there is no reason to allow the complaint to go to a jury. Herz et al. 1994, 110.
197 Herz et al. 1994, 111 (quoting the California Annotations to the Restatement of the Law of Torts).
198 Knight v. Kaiser Co., 48 Cal. 2d 778, 312 P.2d 1089 (1957).

sand and gravel which were created by the defendant with the assistance of a conveyor belt. The boy was digging near one of the piles when it collapsed and the boy was asphyxiated. The trial court, on these facts, sustained the defendant's demurrer to the complaint. The California court of appeals, over a dissent, affirmed the trial court.

The *Knight* court stated the question presented was "Does a sand pile constitute an "attractive nuisance," i.e., a fact which places liability upon the owner of property for injuries to a trespassing child?" The *Knight* court stated the general governing rule as: "in the absence of circumstances which bring a case under the "attractive nuisance" doctrine, an owner of land owes no other duty to a child trespassing on his premises than he owes to an adult trespasser" (citing *Peters*). Writing "[i]t is settled that a body of water, natural or artificial, does not constitute an 'attractive nuisance'," the *Knight* court reasoned by analogy that piles of sand are sufficiently similar to bodies of water such that piles of sand, just like bodies of water, cannot constitute attractive nuisances.

The *Knight* court asserted "[s]and piles may be attractive to children, but they are also of a common and ordinary nature and are found in numerous places."[199] The court reasoned that "[n]ature has created cliffs and embankments which attract children" and a "common danger in cliffs and embankments is that of cave-ins from excavation below the surface."[200] Since children are warned against these common dangers, there is no liability for a landowner who creates an "artificial cliff or embankment" so long as such cliff or embankment "merely duplicat[es] the work of nature without adding any new

199 Herz et al. 1994, 115.
200 Herz et al. 1994, 116 (internal quotation omitted).

dangers."[201] "As far as attractiveness to children is concerned, there is no significant difference between a body of water and a sand pile. Pools of water and sand piles duplicate the work of nature and are not uncommon."[202]

The *Knight* dissent, a lonely Judge Traynor, argued that *Barrett*, the first, foundational case discussed earlier, set forth an "ordinary negligence principle" to decide cases concerning trespassing children and dangerous conditions, such that defendant's conduct is assessed "in view of all surrounding circumstances and conditions." Traynor argued there was a conflict between water and non-water attractive nuisance cases, where in water cases the courts categorically refuse to find liability so long as the body of water is "natural"[203] (as in the *Wilford* swimming pool case) but does allow liability when the danger is not found in nature and is thus uncommon (as in the *Sanchez* siphon case), whereas in non-water cases there is no such categorization at all and the case is decided in accordance with general negligence principles (looking at the totality of the facts, etc., as for example in *Copfer*). Judge Traynor thinks the conflict between water and non-water cases should be resolved by "disapproving" (i.e., reversing) the categorical rule in water cases. Short of this Judge Traynor at the very least thinks the categorical rule of water cases "should not be extended" to cases not involving water, like the sand case at issue in *Knight*.[204]

In arguing the categorical rule of the water cases should not be extended to non-

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201 Herz et al. 1994, 116.
202 Herz et al. 1994, 115.
203 At least in the sense that the body of water, if artificial, does nothing more than replicate the danger of non-man-made watercourses.
204 Herz et al. 1994, 120.

water cases (like sand piles), Traynor wrote "There is no basis, however, for concluding that every sand pile necessarily duplicates the work of nature or holding as a matter of law that no defendant should reasonably foresee that the dangers connected with and inherent in its sand pile are not obvious to children old enough to be permitted to play unattended."[205] Accordingly, Traynor would not have set forth a categorical rule like the Knight majority did: "Whether the maintenance of a sand pile can give rise to liability for harm to trespassing children must necessarily turn on the facts of the particular case."[206]

The judges in *Knight* disagreed about what the law is despite the fact they agreed about what cases have gone before and what words are contained in those cases. Despite the lack of an empirical disagreement about law, the judges in *Knight* nonetheless disagree about the law; they had a theoretical disagreement about law. Another way of stating this is that the judges disagree about the existence or content about law at the level of legal principles. The following principles were arguably in issue in *Knight*:

> *Knight* Majority Principle (KMP): Apply ordinary negligence rules in all cases involving trespassing children and dangerous conditions (i.e., "attractive nuisance cases"), regardless of the type of dangerous condition, unless the dangerous condition is of a common type ordinarily found in nature, in which case the landowner owes no duty to trespassing children (and so long as the nuisance merely replicates the ordinary dangers of nature).
>
> *Knight* Majority Principle* (KMP*): Apply ordinary negligence rules in all attractive nuisance cases, regardless of the type of nuisance, unless the nuisance is a body of water or a pile of sand, in which case the landowner owes no

205 Herz et al. 1994, 119.
206 Herz et al. 1994, 119.

> duty to trespassing children (so long as the body of water or pile of sand merely replicates the ordinary dangers of nature).
>
> *Knight* Dissent Principle (KDP): Apply ordinary negligence rules (i.e., decide each case on its facts and the totality of the circumstances) in all attractive nuisance cases, regardless of the type of nuisance.
>
> *Knight* Dissent Principle* (KDP*): Apply ordinary negligence rules in all attractive nuisance cases, regardless of the type of nuisance, unless the nuisance is a body of water, in which case the landowner owes no duty to trespassing children (so long as the body of water or pile of sand merely replicates the ordinary dangers of nature).

I refer to the above norms as principles and not rules because the above principles are more general than the rule (viz., the holding) set forth in *Knight*, and they are inferred from the holdings or rules set forth in *Knight* and the prior case law. I take the holding (or rule) of *Knight* to be something like *Sand piles which replicate the dangers of nature are not attractive nuisances as a matter of law.* This rule, in conjunction with the rules of the prior cases, are then used as the premises in inferring the above legal principles. KMP and KMP* are accordingly more general than the rule noted above.

Kenneth Ehrenberg in correspondence notes Dworkin distinguishes rules from principles by noting the former have binary operation (they either apply or they do not) while principles do not have binary operation; instead they have *weight*. He further notes that the above norms I refer to as principles seem to have the binary operation that rules have. But I disagree with the way Dworkin distinguishes rules from principles. My issue with this is that principles, just like rules, seem to have binary operation. Take for

example the principle in *Riggs v. Palmer* (the case where the murderer sought to inherit): *One shall not profit from their own wrongdoing*. This principle either applies or it does not. If you apply the principle to the facts in *Riggs*, the would-be legatee will not inherit; if not, then he won't. Alec Walen in conversation has proposed the distinction between rules and principles be cashed out in terms of an explanatory relation, where principles explain rules. This is very plausible to me, though I wonder which direction the explanatory relation goes. The reason I am cautious about holding that principles explain rules is that principles are *inferred from* rules, and in that sense it seems the rules explain the principles. But since principles are broader than rules, and principles (at least for Dworkin) justify the rules, to that extent it seems reasonable to say the principles justify the rules. Perhaps the explanatory relation between rules and principles is bi-directional.

KMP is, on my reading, the most reasonable interpretation of the principle applied by the *Knight* majority. KMP* is another reasonable interpretation of the majority opinion. It is narrower than KMP because it restricts the exception to attractive nuisance cases to those involving piles of sand and bodies of water, whereas KMP creates an exception for *all* dangerous conditions of a common type found in nature (of which piles of sand and bodies of water are particular instances).

To illustrate the different between KMP and KMP*, imagine a court after *Knight* which is presented with a natural, dangerous condition other than a pile of sand or a body of water, say, fire or a cave. KMP would in principle allow for the possibility that landowners have no duty with regards to caves or fires, since caves and fires are

dangerous conditions ordinarily found in nature. A faithful application of KMP*, though, since it is limited to piles of sand and bodies of water, would not exclude liability for caves or fires because caves or fires are not piles of sand or bodies of water.

Both KMP and KMP* are consistent with the *Knight* majority. The question is which principle is better justified. The advocate of KMP could argue that KMP* is arbitrarily limited to piles of sand and bodies of water, and that it makes more sense to have exceptions for all dangerous conditions, and not just piles of sand and bodies of water. The advocate of KMP* could argue that KMP, since it is so broad, is so vague that it creates uncertainty in the law, and thus does not do well when it comes to guiding landowners into how they should arrange their property. KMP*, the advocate would continue, as a categorical norm is easy to apply and hence easy for potential defendants to understand and act in accordance with.

It is not essential to my argument that KMP is the best interpretation of the majority opinion. In fact, it is almost certain that reasonable minds would disagree about the proper interpretation of the case law presented (since the judges themselves in the above cases disagree!). My only point in presenting these principles is to flesh out how Dworkin's account of theoretical disagreements would account for the theoretical disagreement in these cases.

The *Knight* dissent instead would endorse KDP. This principle rejects the categorical approach entirely. It would not create any exceptions to the application of the attractive nuisance doctrine. KDP of course has a lower degree of fit than do either KMP

or KMP* (since, for example, it is inconsistent with *Peters* and thus KDP does not "fit" *Peters*), but the *Knight* dissent argues that KDP is better justified. In other words, the KDP advocate would argue KDP's greater degree of justification outweighs KMP's greater degree of fit with the prior case law. Naturally, since the KDP is in the minority, KMP wins the day (for now).

The *Knight* dissent, though it most prefers KDP, thinks a second-best next to KDP is KDP*. KDP* adopts a categorical approach for water, but a non-categorical approach to all other cases. This reflects the *Knight* dissent's statements that the categorical principle (embodied in KMP and KMP*) should at the very least not be extended from water cases to non-water cases.

The Supreme Court of California decided *Reynolds*[207] one year after *Knight*. The plaintiff, a boy who was two years and three months old at the time of the accident, received non-fatal but life-altering injuries as a result of being unconscious while in the defendant's pool. At the close of the swimming season, the pool owners partially drained the water "in order to prevent his and other children from playing therein and injuring themselves on the concrete surface."[208] The pool had "accumulated dirt, decayed leaves from nearby trees, and other decomposed material" as well as algae, causing the concrete surface of the pool to become slippery.[209] After the boy sneaked out of his house, he was found "lying face down in the water" and became afflicted with brain and nervous system damage as a result.[210]

207 Reynolds v. Willson, 51 Cal. 2d 94, 331 P.2d 48 (1958).
208 Herz et al. 1994, 124.
209 Herz et al. 1994, 126.
210 Herz et al., 1994, 126.

The *Reynolds* majority upheld the judgment in favor of the plaintiff. It wrote "It is established in this state that a private swimming pool is not an attractive nuisance as a matter of law" but that "the manner of its maintenance and use may, however, be such as to impose the duty of ordinary care on the possessor toward children of tender years notwithstanding they may technically occupy the position of trespassers at the time."[211] The *Reynolds* majority distinguished *Knight* on the grounds that *Knight* involved an open and obvious danger whereas this case involved a danger which was hidden and thus constituted a "trap."[212]

The *Reynolds* dissent was of the opinion that *Knight* is not distinguishable from the present case. "[T]he majority opinion here cannot be reconciled with the prior decision, and the labored but futile attempt of the majority opinion to bring them into harmony has the unfortunate result of leaving the law in hopeless confusion."[213] The *Reynolds* dissent would have acted in accordance with the "settled rules" (that is, the categorical rule of *Peters* and *Wilford*) and reversed the finding of liability for the injury sustained in the defendant's pool.

Garcia was decided a year after *Reynolds*.[214] Plaintiff, a twelve year old girl, received a cut on her ankle when she stepped on a pile of panels with windows. Plaintiff recovered damages after a bench trial. The court stated "The question of liability must be decided in the light of all the circumstances and not by arbitrarily placing cases in rigid categories on the basis of the type of condition involved without giving due consideration

211 Herz et al. 1994, 127-128.
212 Herz et al. 1994, 128-129.
213 Herz et al. 1994, 130.
214 Garcia v. Soogian, 52 Cal. 2d 107, 338 P.2d 433 (1959).

to the effect of all the factors in a particular situation. There is no inflexible rule which would exclude liability in every case involving building materials or buildings under construction, and each case much be judged on its own facts . . . The circumstances that a condition giving rise to injury is common in character does not necessarily exclude liability."[215]

Referring to *Knight*, the *Garcia* court stated "[u]nfortunately, several cases, both in allowing and denying recovery, have used broad language which could be understood as meaning that a common condition can never give rise to liability."[216] Somewhat surprisingly, the *Garcia* court reversed the finding in favor of the plaintiffs on the facts, holding "defendants could not reasonably be required to foresee that there was any substantial likelihood that a normal child of more than 12 would not appreciate the danger of jumping over a large pile of building materials when darkness prevented sufficient perception of the nature of the obstacle."[217]

The *Garcia* dissent (written by the same judge as in the *Reynolds* dissent, viz., Justice Spence) argued the categorical principle of *Knight* (that is, either KMP or KMP*) should continue to be applied, and that the majority's decision is not consistent with the categorical rules of the prior case law. Justice Spence writes "[i]f the well-considered rules established by the "former cases" are to be disregarded upon the ground that they put cases 'in rigid categories on the basis of the type of condition involve,' then the majority should expressly disapprove [i.e., reverse] those cases, rather than being content

215 Herz et al. 1994, 137.
216 Herz et al. 1994, 138.
217 Herz et al. 1994, 138-39.

with giving them passing reference and leaving to possible conflicting implications the question of whether those cases are being approved or disapproved."[218]

Expressly using the language of principles, Spence writes "[t]he guiding principle established by the 'former cases' prevented the imposition of liability upon the landowner in favor of the trespassing child when the risk encountered was one which was 'common and obvious'."[219] Spence's dissent continues by arguing that the majority's principle finds in the former cases "[n]o support for this view" and not only this but the majority's rule "place[s] upon the landowner the wholly unjustifiably burden of making his premises safe for trespassing children who are of insufficient age or mental capacity to be allowed at large."[220] So the *Garcia* dissent argues the principle endorsed by the majority (which appears to be the same or substantially similar to the Knight Dissent Principle which completely rejected the categorical approach) is inferior to the principle the dissent would endorse on both counts under law as integrity. The *Garcia* majority's principle, the *Garcia* dissent argues, not only fits the case law less but is also less justified than the dissent's principle.

King is the final case in the sequence.[221] *King* involved a one-and-a-half year old boy who drowned in the defendants' swimming pool. The specific facts of King are immaterial for our purposes because the significance of King is that it makes explicit what was already implicit in the reasoning of Garcia, namely, that it expressly overrules the prior cases which apply categorical rules. The *King* majority first reiterated the rule

218 Herz et al. 1994, 139.
219 Herz et al. 1994, 140.
220 Herz et al. 1994, 140.
221 King v. Lennen, 53 Cal. 2d 340, 348 P.2d 98 (1959).

and reasoning of *Garcia*, stating attractive nuisance cases never turn on the application of categorical rules, "that the circumstances that a condition giving rise to injury is common in character does not necessarily exclude liability . . . and that what is important is not whether conditions are common in character but whether their dangers are fully understood by children."[222]

The *King* majority wrote that the cases decided before *Garcia* (namely *Knight* and *Peters*) which reasoned that bodies of water, because they are common dangers, "do not subject the possessor to liability for the drowning of a trespassing child" as a matter of law, are "disapproved [i.e. overruled] insofar as their language or holdings are contrary to the views expressed herein."[223] Judge Spence (along with two other justices who joined his dissent in *King*) for his part would have continued to adhere to the categorical rules set forth in *Knight* and *Peters*.

222 Herz et al. 1994, 143.
223 Herz et al. 1994, 143.

6.) ANALYSIS OF CASE SEQUENCE

Theoretical disagreements about law happened at several notable points in this case sequence. Initially, the plaintiff argued the rule of the *Barrett* turntable case should be extended to bodies of water, but the court rejected this argument, holding bodies of water are not attractive nuisances. This developed into another theoretical disagreement about law, significantly in *Knight*, where the majority and dissent disagreed about whether categories should be created which exclude liability as a matter of law. They disagreed not only about whether categorical rules should be used at all, but also whether categorical rules should be extended to cases other than bodies of water. And finally in the reasoning of *Garcia* and the explicit holding of *King*, the majority came to agree with the *Knight* dissent. Thus, this case sequence presents an instance where a view that was once in the dissent eventually finds itself in the majority.

The disagreements in cases like *Knight* and *King* are theoretical disagreements because the judges in these cases disagreed about what the law is despite the fact that they agreed on the empirical level about law. That is, the judges agreed about what cases had come before and what words were contained in those judicial opinions, but they disagreed about the legal significance of those cases. The judges disagreed at the level of principle. Above I have offered a number of principles which were given as interpretations for understanding what was going on in the disagreements in the above cases. Dworkin's theory of law was referred to throughout the discussion of the case sequence and provides a nice account of the nature of the disagreements which occurred.

Note also it does not appear that the judges in the case sequence where engaged in meta-interpretive debate. That is, it seems the judges in the above cases were all using the same theory of legal interpretation. As I argued above, they were arguably relying on law as integrity (by this I mean a plausible rational reconstruction of what happened in the case sequence sees the judges as applying law as integrity).

Shapiro's apparatus, since it was constructed to account for meta-interpretive, as opposed to interpretive, theoretical disagreements about law, does not seem to have the materials to account for the existence of the theoretical disagreements in the case sequence. These cases do not present a confrontation of textualism with purposivism, the paradigm example of an interpretive disagreement that Shapiro repeatedly discusses and tailors the Planning Theory to address. The issues central to Shapiro's discussion of interpretive metholdogy (namely, disagreements about the legal system's economy of trust, or a debate about a choice between a highly discretionary as opposed to a highly constraining methodology) do not appear in the case sequence. The Planning Theory seems to misfire when it comes to addressing these theoretical disagreements.

One possible response here would be to argue that the judges actually are using different theories of legal interpretation because they reached a different result. My response to this is that it would be very strange if every time two judges disagreed about what the law is the judges were *necessarily* applying different theories of legal interpretation. It seems a theory of law would want to account for the possibility, for example, that two textualists or two purposivists, or two living constitutionalists could

nonetheless disagree about what the law is on a particular issue.

Another possible response from Shapiro could be to try to analyze the preceding case sequence in the terms of trust that Shapiro sets forth in his interpretive theory. This response could say that what the judges disagreed about in the case sequence was the extent to which the judges should trust the decisions of the prior judges in the precedents, or to what extent judges should trust the precedents themselves. The judges in the case sequence who were more prepared to reverse the prior cases were less trusting of the previous judges, while the judges who were more reluctant to reverse the prior cases were more trusting of the previous judges. One defect of this argument is that it relies on the success of the previous argument, namely that it requires that judges who come out differently in cases where *stare decisis* is a consideration are necessarily adopting different theories of interpretation, a position which is unattractive for the reasons discussed above. But this argument is defective for another reason.

Trust does not some to be the operative, or even an important, concern in determining the weight to be given to *stare decisis*. Rather, considerations of stability and change seem to be the primary motivating forces behind adopting a particular attitude toward *stare decisis*. In general, the more one is inclined to gradual as opposed to sudden change, the more partial one will be towards adopting a strong disposition to stay in line with the prior case law.

The preceding case sequence stands as a good example of what Dworkin calls the *chain novel* of law. Dworkin writes in *Law's Empire* that judges “are authors as well as

critics."[224] Under the chain novel view of law, a judge, in deciding a case like *McLoughlin* or *Knight* or *Garcia*, "adds to the tradition he interprets."[225] Dworkin compares the law to a genre of literature he calls the chain novel. In this genre, "a group of novelists writes a novel *seriatim;* each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on."[226] (229). Just as the chain novelist seeks to accommodate what has previously occurred in the story but also make the story the best that it can be, so the judge, in deciding a case, must try to account what has gone before (*stare decisis*) but also make the "story" of the law the best it can be.

I argue the chain novel view of law does not make sense if theoretical disagreements about law are entirely meta-interpretive. The changing and crafting of principles in the common law chain of cases (for example in the case sequence above) does not amount to a change in theories of legal interpretation. Rather, the law evolves through the chain novel because, as the case law progresses, different principles come to be seen as having a greater or lesser degree or fit or a greater or lesser degree of justification. Hold the theory of legal interpretation fixed, and it can still be the case that judges have a theoretical disagreement about law (as I tried to show it can reasonably be held the judges were all applying law as integrity, yet they disagreed about what the law is). For example, the *Knight Dissent Principle* of course started in the dissent, but as it came to prominence in the reasoning of *Garcia*, it finally became appropriate for the

224 Dworkin 1986, 229.
225 Dworkin 1986, 229.
226 Dworkin 1986,

judges in *King*, the final case, to overrule the prior cases which were inconsistent with the KDP.

7.) CONCLUSION

The Planning Theory falls short as a response to Dworkin's ATD in several respects. First, it sees the central issue presented by ATD to be the intelligibility of judges having theoretical disagreements about law (a practical or epistemological question), when the real issue is the metaphysical possibility of law in the absence of social consensus. Since Shapiro addresses the wrong problem and has the consequence that judges and lawyers are wrong to think they are finding rather than making law, Shapiro is forced to impart incoherence or insincerity on the part of lawyers. Therefore, Shapiro's theory is no better off with regards to ATD than the other positivist theories which have come before him.

The second reason *Legality* falls short as an exegesis of the ATD in *Law's Empire* because it treats all theoretical disagreements about law as meta-interpretive disagreements, whereas Dworkin imagines at least some theoretical disagreements occur at the interpretive level. *McLoughlin*, one of the central examples of a theoretical disagreement about law in *Law's Empire*, was an example offered by Dworkin as an interpretive theoretical disagreement.

This incorrect exegesis of *Law's Empire* leads the Planning Theory down the wrong path in responding to ATD. By only attempting to account for the existence of meta-interpretive disagreements, it is not capable of accounting for even the intelligibility of interpretive theoretical disagreements. This was illustrated using a case sequence which illustrated theoretical disagreements about law where the judges were nonetheless

applying the same theory of legal interpretation. Throughout the case sequence, Dworkin's preferred theory of law, law as integrity, was invoked to show how readily it handles such disagreements.

I hope to have convinced the reader of at least two things, and to have made progress towards a third. First, I think *Legality* misses the mark as an exegesis of the ATD in *Law's Empire*. Second, I hope the foregoing is enough to persuade the reader to disagree with Brian Leiter where for example he says that even the “heuristic value” of Dworkin's ATD is in doubt; to the contrary, Dworkin deserves his revered place in jurisprudence. Third and finally, I agree with Shapiro that ATD is a “serious threat” to positivism, but this paper has provided reasons to think ATD is an even more serious threat to positivism than Shapiro (the positivist who takes ATD more seriously than any other and tailors his theory of law to address) himself appreciates.

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