Does virtue deepen disagreement in law?

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ABSTRACT

This paper examines the question of whether a virtue theory of legal reasoning has the resources to address the problem of disagreement in law. First, it provides an account of the varieties of disagreement that a theory of legal reasoning should be able to explain. Next, it explains the core tenet and main elements of a virtue theory of legal reasoning. With these in hand, it proceeds then to consider two questions: (i) Does a virtue theory of legal reasoning make room for disagreement? (ii) Does a virtue theory of legal reasoning help legal decision-makers deal with disagreement? With regards to (i), the paper articulates and counteracts an objection that may be raised against a virtue theory of legal reasoning according to which this theory only makes room for deep disagreement, which does not admit of a rational resolution. With regards to (ii), the paper suggests some ways in which some virtuous traits of character may help legal decision-makers deal with disagreement – including deep disagreement – in a productive way. The paper concludes with some considerations on the way in which reasoning virtuously in law in the face of disagreement is an important tool for character development.

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1 INTRODUCTION

Disagreement is ubiquitous in law. Legal decision-makers are routinely faced with disagreement, which comes in different forms and guises: they argue with themselves about

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how to solve a legal problem; disagree with their peers within collective decision-making bodies; have to adjudicate between disagreeing parties; and respond to the claims advanced by different groups and collectives who disagree, sometimes deeply, about which values are at stake, how they should be understood, what the relevant facts are and what the law is (or should be). Disagreement is the bread and butter of all those who are in different roles (from judges and prosecutors to lawyers and legislators) entrusted with the task of legal decision-making. Given the pervasiveness of disagreement in legal practice, it is a desideratum for any theory of legal reasoning that it has the resources to give an account of this phenomenon and guide legal decision-makers to appropriately deal with it. The aim of this paper is to examine whether a virtue theory of legal reasoning adequately satisfies this desideratum.

The structure of the paper is as follows. Section 2 gives an account of the varieties of disagreement in law, which a theory of legal reasoning should give an account of. Section 3 provides a sketch of the main outlines of a virtue approach to legal reasoning, with a view to determining whether a virtue theory of legal reasoning is in a position to give an account of disagreement, in its different varieties, (Section 4) and, if so, which tools it provides to adequately deal with it (Section 5).

2 THE VARIETIES OF DISAGREEMENT IN LAW

Disagreement presents itself in different forms in law, not all of which have received the same degree of attention in legal scholarship. It is a condition of adequacy of any theory of legal reasoning that it can give an account of the problem of disagreement facing legal decision-makers in all its complexity. Two main distinctions are helpful to map the varieties of disagreement in law: (a) intra-personal vs. interpersonal disagreement and (b) shallow vs. deep disagreement.

(a) Intra-personal vs. interpersonal disagreement.

A first variety of disagreement occurs at an intra-personal level. Judges, jurors, etc. often 'disagree with themselves,' they are of two minds as to what is that they should believe or do in the context of legal decision-making (Coliva, 2019; Bondy, 2020). In intrapersonal disagreement, or ambivalence, the person holds two conflicting attitudes towards the same object, i.e., two conflicting emotions, value judgments, beliefs or desires (Razinsky 2017, p. 10). The person experiencing ambivalence is in a distinctive 'both-and' epistemic condition, in which she endorses incompatible options – as opposed to 'undecidedness,' which involves a lack of commitment to either option. It is a synchronic kind of disagreement, unlike vacillation, which involves a diachronic one. It is also different from

'uncertainty' in that it persists after all evidence is in (Rorty 2009, p. 443). Intra-personal disagreement may have different sources: it can originate when there is a conflict between an explicit belief and an implicit one, as in cases of self-deception or bias; it can have its sources in the conflict between different values the individual is committed to that pull in different directions; it can be due to the fact that the person belongs to different communities, which have different values; or it can be traced back to membership within a collective decision-making body or originated in one's role (e.g., a juror believes that someone is guilty but as member of the jury believes that he is not) (Amaya, 2021). These different types of internal disagreement are an important part of the phenomenology of legal decision-making and, as such, they would need to be accounted for by a theory of legal reasoning.

In addition to intra-personal disagreement, legal decision-makers face inter-personal disagreement. Different kinds of inter-personal disagreement may be distinguished:

(i) Peer disagreement. A dialogic model of inter-personal disagreement, namely, peer disagreement, has been the prominent focus in the epistemology of disagreement, which has also been recently applied to the legal domain (Stein, 2018; Villanueva, 2020). Peer disagreement occurs when there are two disagreeing parties who are epistemic peers, i.e., agents who have the equal evidence and cognitive capacities. A primary aim of work on peer disagreement it that of clarifying the issue of what an individual is rationally required to do in the face of peer disagreement. Two main positions may be distinguished in the debate over peer disagreement: a conciliatory stance and the steadfast position. Whereas conciliationists claim that rational agents ought to decrease their confidence in their beliefs in the face of peer disagreement, steadfasters deny this claim. Peer disagreement is a central species of disagreement in law, given that collegiate legal decision-making bodies, such as the jury, courts of appeals or supreme courts, may be viewed as consisting of epistemic peers (Baude and Doerfler, 2018; Wright, 2017). Such dialogic model may also be profitably used to give an account of important instances of disagreement at trial, such as disagreement between the defense and the prosecution over questions of fact and law and disagreement between expert witnesses.

(ii). Group-disagreement. Despite its relevance, peer disagreement is hardly the only kind of interpersonal disagreement, as many interpersonal disagreements do not involve two parties. An exceedingly important kind of disagreement in law is group disagreement, which is prominent in instances of legal decision-making in which decision-making power is allocated to groups, such as regulatory bodies, or multimember courts. The model of peer disagreement frames the problem of inter-personal disagreement individualistically, but there are also important questions that need to be answered as to

what how groups should rationally behave when there is disagreement within the group (Carter and Broncano-Berrocal, 2021a, p. 1).

(iii). Inter-group disagreement. Groups can also disagree between themselves, as when there is disagreement between ideological clusters within courts or between political parties within parliaments, or conflicts between socio-political and religious groups that strive for legal recognition. Thus, inter-group disagreement is also prevalent in both instances of law making and law application.

(b) Deep disagreement vs shallow disagreement.

In addition to intrapersonal, peer, group, and intergroup disagreement, there is a kind of disagreement that is transversal to these categories, namely, deep disagreement. Deep disagreements are persistent, systematic, involve a clash of worldviews, are often heated, and present no clear path toward resolution (Lavorerio, 2021) – furthermore, in some views, such as Fogelin's, they are also rationally irresolvable (Fogelin, 2005). In this kind of disagreement, the object of disagreement is fundamental epistemic principles, hinge commitments, framework propositions, or forms of life. Examples of this kind of disagreement are disagreements over the morality of abortion, affirmative action quotas, and the dispute between evolutionists and creationists (Lavorerio, 2021, p. 418 and Ranalli, 2018). It is a main feature of deep disagreements that parties disagree not only about the truth-value of a proposition but also about what kind of method, evidence, or principle would adjudicate the dispute. In law, arguably, the so-called theoretical disagreements (disagreements about the grounds of legal validity) and severe kinds of interpretative disagreements may be viewed as a kind of deep disagreement (Villa, 2016). There may also be deep disagreements in law about factual, rather than normative statements, such as situations in which there is not a shared understanding of what counts as evidence or as a plausible hypothesis worth being considered. For example, disagreements over whether supranatural forces are relevant actors in a criminal case, as in the case against Dominik Ongwen, decided by the ICC recently, in which the defence argued that Ongwen was incapacitated at the time of the commission of many of the offences due to the overbearing supernatural powers exerted over him (*The Prosecutor vs. Dominic Ongwen* ICC-02/04-01/15) may be one such kind of deep disagreement. Less dramatically, disputes between probabilists and explanationists over whether non-particularized evidence provides sufficient grounds for conviction in a criminal process also seem to share some of the characteristics that are distinctive of deep disagreements.

Of course, there are important connections between the foregoing kinds of disagreement. For example, ambivalence (or intra-personal disagreement) can originate in-group discussions, which is referred to as 'collaborative ambivalence' (Rorty, 2014). Peer-disagreement can also escalate up and become group disagreement – as when the group as a group is unclear, after having listened to two disagreeing members, as to what should be done. There are also parallelisms and commonalities between these different types of disagreement. For instance, there are structural analogies, e.g., shared metaphors, between self-debate and interpersonal debate (Dascal, 2005). Conversely, some features of inter-personal disagreement, i.e., absence of personal coherence, may also be used to explain the structure of inter-personal disagreement, so that interpersonal disagreement arises when two disagreeing parties hold attitudes that it would be incoherent for a single individual to hold (Worship, 2019).

Given these similarities, it is tempting to use one model (most commonly, peer disagreement) to explain the other kinds of disagreement. However, the temptation to reduce all disagreement to peer disagreement should be resisted. This simplifying strategy would lead us to understand ambivalence as a case of 'two' people within one mind disagreeing with one another. This move would miss importantly the extent to which ambivalence and its resolution – in contrast to inter-personal disagreement – is constitutive of individual identity, which is forged in the course of self-deliberation (Hurley, 1989). This strategy would also lead to depict two sub-groups within a group as two people disagreeing with one another and to understand group disagreement as a summative of dyadic disagreements. This dialogic picture, however, fails to give an account of the distinctive social dynamics that impinge on disagreement within groups. For example, polarization radicalizes disagreement, in that members of the deliberating group end up having more extreme versions of their pre-deliberative tendencies; cascade effects are likely to lead to pseudo-agreements, i.e., agreement that is not responsive to the reasons available within the group, and domination prevents members of minorities from speaking up, thereby obfuscating dissent (Carter and Broncano-Berrocal, 2021, p. 4; Luskin, 2022).

Thus, it is important to examine these varieties of disagreement in law in their own terms. It is a challenge to any theory of legal reasoning that it can give and account of the diverse kinds of disagreement facing legal decision-makers and provide guidance about how to decide in the face of them. I proceed now to examining whether a virtue theory of legal argumentation is up to the task.

3 A VIRTUE THEORY OF LEGAL ARGUMENTATION

Virtue-oriented work in law has gained prominence in contemporary legal scholarship. Since Lawrence Solum's seminal work in virtue jurisprudence (a term he also coined)