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Deep Disagreements



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Philosophical and Legal Perspectives

People are frequently at odds over issues that equally concern them. Many disagreements that are central to political, social, ideological or religious conflicts are *deep* in the sense that they can neither be resolved through a compelling argument nor by gathering further information, nor do they arise from readily discernible misunderstandings.

The phenomenon of deep disagreement raises issues for many areas, especially within philosophy (e.g. epistemology, metaethics, philosophy of religion) and law (e.g. legal theory). Deep disagreements often have an extremely complex structure, in which different sources of disagreement intersect and in which it is difficult to trace the real source of dissent.

Epistemological aspects of disagreements have been tackled in philosophical debates surrounding *peer disagreement*. Epistemic peers are persons who share the same level of information on a given subject and are equipped with similar intellectual capacities. The debated question is how they should rationally react to disagreements: Is it rationally required to conciliate by according the disagreeing opinion of the peer some weight, perhaps even equal weight, or is it advisable to remain steadfast, or to suspend judgment and adopt an agnostic stance?

Deep disagreements pose not only theoretical but also significant practical challenges. Often decisions have to be made even in cases in which the resources for a rational consensus seem to have been exhausted. In the field of law, this problem can be studied with particular advantage. First, law is a cross-sectoral phenomenon: all socially relevant cases of deep disagreements accumulate in the field of law. Second, the legal system is the most advanced and socially most powerful institution for handling disagreements. Since, in law, disagreements must come to decisive conclusions, and since the arguments and positions exchanged are meticulously documented in legal proceedings, the law provides a highly relevant body of material for research on deep disagreements.

A disagreement may be called 'deep' on different considerations. One aspect is that it is not easily settled, for one reason or another. Another aspect is that the matter is of considerable importance, in the way that, say, the question of whether rhubarb is delicious is not. Disagreements about matters of taste are a major strand in the epistemological debate on the possibility of *faultless disagreements*, i.e., cases of disagreement in which no participant makes a mistake. In the literature on peer disagreement, one of the most-discussed examples is the dispute on whether your share of a restaurant bill is 43 dollars or 45 dollars, as your friend has calculated. It is not easy to explain the relevance of such examples to non-philosophers. One advantage of focusing on legal disagreements in so-called hard cases is that these come with built-in social significance. Supreme Court split verdicts are of particular interest: There is much at stake, they are based on elaborate argumentation, and they constitute disagreements among peers. (If high court justices do not count as epistemic peers, who else would we take to be?)

In legal theory, the debate about the *right answer thesis* centers around the question whether all legal disputes have a single right answer. If we do not presuppose a right answer, Ronald Dworkin's famous argument of the *semantic sting* seems to force us into an implausible conclusion: that disagreements in law are merely based on linguistic misunderstandings and that it cannot be explained what we argue about in law.

The legal debate on the right answer thesis stands in noticeable, but up to now disregarded, parallel to the epistemological debate on what Richard Feldman has called the *uniqueness thesis*, the view that for any proposition p and any body of evidence E , exactly one doxastic attitude is the rational attitude to have toward p on the basis of E .

A number of legal theorists who reject the right answer thesis have insisted on the indeterminacy of the law and the ideological character of disagreements in hard cases. These authors claim that when there is not enough common ground between the parties and the law is indeterminate, the exchange of legal arguments is merely window-dressing that covers up the political nature of the dispute. While this may be true for some cases, it seems promising to look beyond ideological explanations of legal disagreements even in cases of indeterminacy of the law. Notwithstanding, if there is a no fact of the matter to disagree about, our argumentative practice might serve second-order purposes like ensuring us of the remaining common ground, testing our hypotheses and not at least winning in court or in the realm of public or professional opinion. These purposes would be second-order reasons in the sense of Joseph Raz, except that they would not be exclusionary in Raz's sense but in a way the opposite: they would give us reasons to argue even if there is no fact of the matter to argue about.

For law the question arises, what consequences would follow if legal disagreements turned out to be insurmountable at least in some cases. It has been argued that the insurmountability of legal disagreement speaks against constitutional jurisdiction in general (Jeremy Waldron), or at least limits constitutional courts to strict legal interpretation (Keith Whittington). In administrative law the Chevron Doctrine already tries to limit the power of the courts along

these lines by restricting them to legal interpretation and giving administrative agencies discretions in cases of legal indeterminacy. The Chevron Doctrine, however, has proven to be a highly contested concept of administrative law and anything but easy to set into work, which puts the idea of limiting judicial powers along the lines of deep legal disagreements into question.

- The conference brings together researchers from philosophy and from legal theory who work on the topic of disagreement.
- It aims to discuss theoretical and practical challenges that arise from deep disagreements and to explore parallels and differences between philosophical and legal approaches to the various aspects of the phenomenon.
- Deep disagreements are those that can neither be resolved by argument, further information, nor semantical clarification.
- The epistemological debate on peer disagreement focuses on the question of whether it is rational to stick to one's opinion if someone of equal competence and well-informedness holds a contrary one.
- As deep disagreements about topics of common interest are normally decided by law, the legal system provides a highly relevant body of research material on those disagreements.
- There is a yet under researched parallel between the legal debate on Dworkin's right-answer thesis, according to which all legal disputes have a single right answer, and the epistemological debate on the uniqueness thesis, according to which a given body of evidence justifies exactly one doxastic attitude toward any particular proposition.
- Even if there is no right answer to find, legal disputes might be justified for second-order reasons such as testing hypotheses or exploring common ground.
- If legal disagreements turned out to be insurmountable in hard cases, this could be a reason to allocate legal discretion to other branches of government than the courts. Such a consequence, however, would be highly controversial.