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Taking Disagreement Seriously

Towards understanding the significance of disagreement in
judicial decision making

A thesis submitted to the University of Kent in
the subject of Law for the degree of
Doctor of Philosophy

By Marie Kerin
December 2018

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Abstract

This thesis concerns the understanding of disagreement, exploring what implications its study might possess for law. Specifically, I focus my attention on the recent Epistemology of Disagreement literature (ED), which seeks to identify what one should do when one finds oneself in disagreement with an ‘epistemic peer’. In applying ED, I use as a test site the UKSC – an elite forum of peers from which rulings are of great social importance, thereby providing a critical test of the insights offered by ED’s approach.

My findings lie across the disciplines. In philosophy, I suggest that ED fails a test of their making; that the theory can extend from the idealised instances of disagreement typical of the literature, to more complex ‘real-world’ disagreements such as those in law. Within my analysis two features warrant special mention. First, I identify deficits in the construction of peers in ED. Through application to UKSC Justices I argue that the definition employed is simply unattainable, failing to extend even to the narrow forum of the UKSC. Second, deficits are identified in the construction of ‘disagreement’ – I argue that unnecessary restrictions unduly limit our understanding of genuine disagreement. The identified deficits enable us to see that ED’s limited focus on circumscribed and artificial *instances* of disagreement offers little about disagreement itself, and little about disagreement in real-world cases.

In law, I conclude that ED fails to apply to the disagreements subject to analysis. I further argue that the deficits encountered are not in fact limited to ED, but rather betray a more foundational mistreatment of the notion of disagreement that is evidenced in wider jurisprudential literature. In this respect, I identify a gap that is faced in both philosophy and jurisprudence in the treatment of disagreement. Finally, in spotlighting deficits in the present literature, I begin to map out important clarifications and insights that can be brought together to fill the gap, so that we might begin to take disagreement seriously.

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Tables of Contents

List of Abbreviations	v
<i>Section A: The Case for Disagreement</i>	1
Chapter One – Introduction	2
1 The rationale and remit of the thesis	3
2 The structure of the thesis	12
Chapter Two – The Notion of Disagreement	17
1 Introduction	18
2 To define disagreement	19
2.1 Types of definition	19
2.2 Definition in context	24
2.3 Definitions of disagreement	29
3 Everyday occurrences	33
4 Use in technical disciplines: disagreement and medicine	42
5 Disagreement in the courts	47
6 How I proceed	56
Chapter Three – Judicial Decision Making: Disagreement, Dissent and Concurrent Opinions	58
1 Why examine UKSC decisions?	59
2 A brief note on how UKSC decisions are made	64
3 The cases	66
3.1 Case 1: when judges disagree over the meaning of ordinary words	70
3.2 Case 2: when judges disagree even when agreeing	79
3.3 Case 3: when judges disagree over the right question to ask	89
3.4 Case 4: when a lone voice dissents	94
4 Preliminary remarks	103
<i>Section B: The Epistemology of Disagreement</i>	106
Chapter Four – The Notion of Disagreement in the Epistemology of Disagreement	107
Literature	
1 Introducing the epistemology of disagreement	108
2 The scope of the epistemology of disagreement philosophy and its employment in this thesis	115
3 A word on real-life application	119

4	What it means to have a genuine disagreement	122
4.1	A genuine disagreement is one over the same proposition	127
4.2	The role of the concept-conception distinction in determining the same proposition	132
4.3	The role of truth in determining propositions of interest	140
5	Preliminary remarks	146
Chapter Five – To be a Peer in the Epistemology of Disagreement Philosophy		149
1	Introducing peers	150
2	What it means to be a peer in the ED literature	155
3	Ascertaining epistemic parity: UKSC Justices as peers	160
3.1	Assessing epistemic credentials	161
3.2	Determining one’s body of evidence	174
4	The necessity of peers: a possible defence	178
5	The limits of the ED question	184
Chapter Six – Reacting to Disagreement		187
1	Introduction	188
2	Conciliatory vs steadfast responses to disagreement	192
3	The role of belief in ED and in JDM	204
3.1	Belief and action	204
3.2	The matter of altering one’s belief	209
3.3	The epistemic and the pragmatic	219
4	Reflections on the scope of ED	228
Section C: Towards a Philosophy for Judicial Decision Making		232
Chapter Seven – Disentangling Disagreement		233
1	Introduction	234
2	Individuating disagreement and decision making	237
3	The pursuit of truth and right answers	243
4	The possibility of conceptual disagreements	252
4.1	Types of concepts	254
4.2	Sharing concepts: revisiting epistemic injustice and social practice	266
5	The move to clarity	269
Chapter Eight – Conclusion		272
Bibliography		282

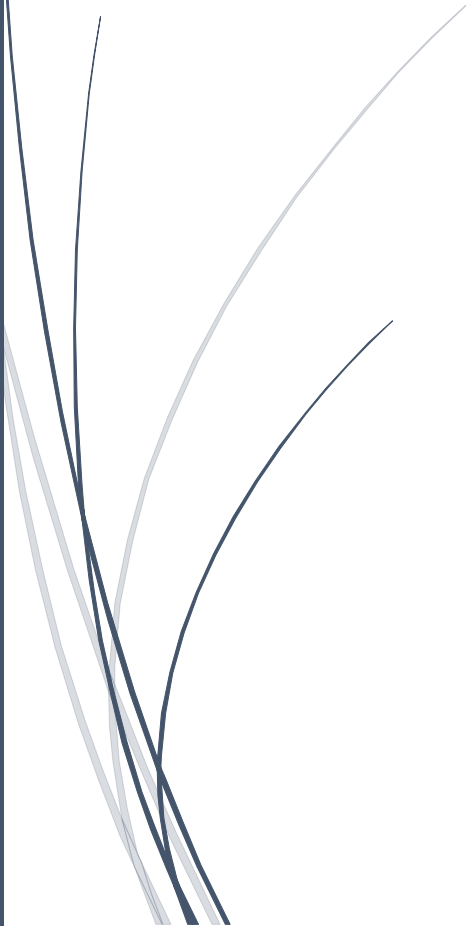
List of Abbreviations

Abbreviation	Meaning
CA	Court of Appeal
CSV	Common Sense View
ECC	Essentially Contested Concept
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ED	Epistemology of Disagreement
EqWV	Equal Weight View
ExWV	Extra Weight View
FOE	First Order Evidence
HOE	Higher Order Evidence
IBC	Independence-Based Conciliationism
JDM	Judicial Decision Making
LA	Local Authority
OLP	Ordinary Language Philosophy
SCOTUS	Supreme Court of the United States of America
TEV	Total Evidence View
UKHL	United Kingdom House of Lords
UKSC	Supreme Court of the United Kingdom



SECTION A

The Case for Disagreement





CHAPTER ONE

Introduction



SECTION A
THE CASE FOR DISAGREEMENT

“[T]he point of law is to enable us to act *in the face of disagreement*.”

Jeremy Waldron¹

“Whatever the pros and cons, it is historically the case that disagreement and dissent has always been a feature of the British appellate system.”

Frederic Reynold QC²

1. The rationale and remit of the thesis

There are those who assert that disagreement is not merely a feature of the legal system, or a reason we might turn to the law, but rather the reason why we have law at all. Indeed, for Jeremy Waldron *the point of law* is to enable us to navigate our disagreements. On the other hand we have Frederic Reynold’s claim; a claim that we might say was trivially true. After all, in a system which allows for appeals of judgments, there is bound to be disagreement – even if such disagreement is with the court from which the case was appealed.³ Between this span, and even limited to law, the phenomenon of disagreement is undoubtedly prominent in our discourse. Indeed, it could be said that disagreement is pervasive in our legal system, concerning not just when judges disagree over the outcomes of a case as Reynold alludes, but, say, when lawyers dispute matters of evidence, or when citizens disagree over rights to land. Mechanisms are even built into our legal processes to address disagreements between people, companies, and public bodies in order that we might

¹ Jeremy Waldron, *Law and Disagreement* (OUP, USA 2001) 7.

² Frederic Reynold, *Disagreement and Dissent in Judicial Decision-Making* (Wildy, Simmonds and Hill Publishing 2013) xiv.

³ As Reynold also alludes, in the UK judicial system it is possible for judges to write their own opinions – either dissenting from the majority view, or else submitting a concurrent view. This feature of the UK legal system shall be a focus in the present thesis.

find redress for our disputes outside of the courts.⁴ Yet in thinking about disagreement, we needn't limit our focus to law. After all, disagreements are encountered, engaged in, and navigated on a daily basis. We have disagreements between colleagues regarding administrative procedures, policy interpretation, and workloads; between friends regarding political allegiances, our favourite music, or what to watch on the television; and between partners regarding work-life balance, where to live, and whose turn it is to clean the dishes. Should we need advice on such matters, we can turn to a number of disciplines dedicated to supporting us in understanding and resolving our disagreements; from occupational health⁵ and counselling,⁶ to self-help guides,⁷ and marital guidance.⁸ Beyond our personal lives, we see a whole host of disciplines in which disagreements feature. In business, contracts are negotiated and disputed; in politics, wars are raged and ideologies divide nations; and in medical practice, specialists dispute diagnoses, and specialisms disagree over the efficacy of treatments. Here we see still further opportunities for expert assistance. Companies might

⁴ As a collection of interventions known as Alternative Dispute Resolution, such as negotiation, mediation, arbitration and disagreement resolution. See e.g. The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 which details requirements for certified ADR schemes for consumer-business disputes, and the Chartered Institute of Arbitrators, a professional body which trains arbitrators and mediators. 'Training' (Chartered Institute of Arbitrators) <www.ciarb.org/training/> accessed 20 November 2018.

⁵ See e.g. 'Occupational Health and Wellbeing' (Personnel Today) <www.personneltoday.com/occupational-health-and-wellbeing/> accessed 20 November 2018.

⁶ See e.g. 'Counselling' (NHS) <www.nhs.uk/conditions/counselling/> accessed 20 November 2018.

⁷ See e.g. Susan Quilliam, *Staying Together: From Crisis to Deeper Commitment* (Vermillion 2001).

⁸ See e.g. 'Relationship Counselling' (Marriage Care) <www.marriagecare.org.uk/how-we-help/relationship-counselling/> accessed 20 November 2018.

employ experts in negotiation,⁹ private individuals may turn to mediators,¹⁰ and even conflict resolution is available at an international level.¹¹

In light of the vastness of disagreements we might encounter in our personal and professional lives, it would be unsurprising to find a host of literature dedicated to disagreement itself. Indeed, one might imagine that the field would be so saturated with works seeking to grapple with and drive forward our understanding of disagreement, that any additional contribution to the sphere would seem excessive. Examination of the academic terrain however indicates that this is not the case. There has of course been some attention in the legal sphere to disagreement. Indeed, much of jurisprudence bears in some respects on disagreement, even when the phenomenon is not directly mentioned.¹² When disagreement does feature however, such treatment tends to use disagreement as an instrument for wider work, rather than as a main focus. We see this to be so even with works

⁹ There is also a wealth of literature on business negotiation, concerning practical advice (e.g. Juan Rodriguez, 'How to become a Successful Contract Negotiator' (The Balance Small Business, 25 September 2018) <www.thebalancesmb.com/how-to-become-a-successful-contract-negotiator-844810> accessed 20 November 2018) as well as interest in business negotiation as a type of discourse (Konrad Echlich (ed), *The Discourse of Business Negotiation* (Mouton de Gruyter 1995)).

¹⁰ Mediators are also used for e.g. workplace disputes. See e.g. 'Mediation' (ACAS) <www.acas.org.uk/index.aspx?articleid=1680> accessed 20 November 2018.

¹¹ Conflict is also used as a lens through which to study International Relations. See e.g. Charles Haus, *International Conflict Resolution* (2nd edn, Continuum 2010). And of course, other options are available. E.g. Online Dispute Resolution (ODR) is also an option available to consumers which can be facilitated through sellers' online platforms directly as well as (in the European Union) through an independent ODR platform. 'Online Dispute Resolution' (European Commission, 2018) <<https://ec.europa.eu/consumers/odr/main/?event=main.home.howitworks>> accessed 20 October 2018.

¹² See e.g. Timothy Endicott on vagueness. Endicott argues that laws are purposely vague, allowing judges to exercise control and discretion as to the applicability of different laws in different contexts. Timothy Endicott, *Vagueness in Law* (OUP 2001). Although such theories might have bearing on when judges disagree, for example, they do not take disagreement as their subject and therefore these discussions, though interesting, are outside the scope of the thesis.

we perceive to be principally *about* disagreement. For example, we will see that Waldron's *Law and Disagreement* is in fact concerned with decision making processes in law-making rather than disagreement,¹³ and Reynold's *Disagreement and Dissent in Judicial Decision-Making*, it turns out, uses discussions of disagreement in legal cases merely to explore potential legal and public policy influences in the decisions that are made in the courts.¹⁴ If we turn to the wider terrain, we see work which bears on the practice of law, legal argumentation and rhetoric,¹⁵ in addition to a particular focus on decision making in the courts; concerning why judges dissent in the common law tradition,¹⁶ whether or not judges should be allowed to show disagreement in their decisions,¹⁷ or under what grounds, if any, dissent should be permitted.¹⁸ Again, and quite reasonably, such works are not interested in the notion of disagreement itself, but rather its role in the field with which authors are

¹³ This point is returned to in Chapter Seven. Thus although Waldron's is presently the only text directly concerned with disagreement in law, its use is limited in this thesis, though the text is drawn on in Chapters Three and Four for his reflections regarding parliamentary intentions.

¹⁴ Reynold (n 2). In particular, see Chapter Three of the thesis.

¹⁵ See e.g. Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (OUP, USA 2005), Robert Alexy, *A Theory of Legal Argumentation* (OUP 2010), and Peter Goodrich, *Legal Discourse* (Palgrave Macmillan 1987).

¹⁶ See e.g. Michael Kirby, 'Judicial Dissent – Common Law and Civil Law Traditions' (2007) 123 (Jul) *Law Quarterly Review* 379, and Lord Kerr, 'Dissenting Judgments - Self Indulgence or Self Sacrifice?' (The Birkenhead Lecture, 8 October 2012) <www.supremecourt.uk/docs/speech-121008.pdf> accessed 21 January 2017. Indeed, it is worth noting that in some countries evident disagreement in judicial decisions is not permitted; a practice typical in civil law countries such as France, whilst in Germany, dissent is permitted but discouraged. Thomas Roe, 'Agreeing to Disagree' (2016) 166(7684) *New Law Journal* 15-16.

¹⁷ A pertinent question in Frederic Reynold's work is whether there *should* be judicial restraint. Reynold (n 2) 141. Reynold's text is used in this thesis for its analysis of UKSC decisions.

¹⁸ Lord Neuberger in his capacity as then President of the UKSC commented "While I am emphatically not suggesting banning dissenting judgments it may be that we could have fewer of them and they could be shorter". Lord Neuberger, 'No Judgment, No Justice' (First Annual BAILII Lecture, 20 November 2012) <www.supremecourt.uk/docs/speech-121120.pdf> accessed 26 August 2018.

concerned. However, this means that in looking for sustained reflection on disagreement, much of the work in law is inadequate because although disagreement features, it is not in fact the focus. Against the backdrop of the prominence and pertinence of disagreement to law, what we need, and to draw on the insights offered from legal philosopher Ronald Dworkin, is something that takes disagreement seriously.¹⁹

With limited works in law, we have already seen that a number of disciplines could be turned to.²⁰ A discipline that might be particularly helpful is philosophy, focussing as it does on the close and analytical examination of concepts. Furthermore, the purpose of rhetoric, after all, is to persuade one's audience, bringing those who disagree with one's ideas to a point. The method and interest in the philosophical terrain therefore aligns well to the pursuit of disagreement as a topic in and of itself. And in fact, there is an indication of interest in disagreement in the work of WB Gallie who, in 1956, introduced the idea of an Essentially Contested Concept; focussing on the nature of the concepts over which we tend to disagree.²¹ Although there has even been some purchase with this idea in law,²² emphasis is placed on the surrounding features over which one disagrees, rather than on disagreement itself; again

¹⁹ As per Dworkin's *Taking Rights Seriously* (Ronald Dworkin, *Taking Rights Seriously* (2nd edn, HUP 1977)). Indeed, Dworkin's treatment of disagreement shall be drawn on in this thesis. See text to n 31.

²⁰ In addition to those topics referenced above (Politics and International Relations, Business, ADR, Law), we also see works in e.g. linguistics. In addition to Echlich's text (n 9), which focusses on anthropological linguistics see e.g. Suzanne Scott, 'Linguistic Feature Variation within Disagreements: An Empirical Investigation' (2002) *Text* 22(2) 301.

²¹ See WB Gallie, 'Essentially Contested Concepts' (1956) 56(1) *Proceedings of the Aristotelian Society* 167.

²² See e.g. David Collier, Fernando Daniel Hidalgo, and Andra Olivia Maciuceanu, 'Essentially Contested Concepts: Debates and Applications' (2006) 11(3) *Journal of Political Ideologies* 211, Zenon Bankowski and Emiliios Christodoulidis, 'The European Union as an Essentially Contested Project' (1998) 4(4) *European Law Journal* 341, Kenneth M Ehrenberg, 'Law is not (best considered) an Essentially Contested Concept' (2011) 7(02) *International Journal of Law in Context* 209, and Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21(2) *Law and Philosophy* 137.

making such works of little use to any endeavour to hone in specifically on the notion of disagreement.

Yet, over the course of the past fifteen years, philosophy does appear to address the identified gap in the literature with the emergence of a new field, the Epistemology of Disagreement (henceforth ED). Interested in the rationality of the beliefs we hold, ED stages its enquiry through the analysis of disagreement. One might expect that in such a literature the notion of disagreement would be the starting point; particularly in light of the deficit in the wider terrain. Indeed, as ED theorist Bryan Frances observes, “[b]efore one is faced with the question of how to react to a disagreement one needs to have discovered the disagreement”.²³ With interest in rationality, ED targets instances of disagreement in which the parties are deemed to be ‘epistemic peers’.²⁴ ED theorists suggest that in interrogating our understanding of disagreement in this way, we can determine what the rational epistemic response to disagreement in any given situation is. That is, if, in light of the disagreement over the matter in question, one should alter or maintain one’s belief. ED claims to be relevant, not just as a philosophical pursuit, but for real-life application and employment; applying even to complex disagreements we engage in, such as those over religion, morality, and, the focus for this thesis, law.²⁵

²³ Bryan Frances, *Disagreement* (Polity Press 2014) 11. Indeed Section 1 of Frances’ text is devoted to genuine and illusory disagreement; what they are and how one can identify them.

²⁴ ‘Epistemic peer’ means one over whom you have no epistemic advantage. Though this definition suffices for now, the meaning of ‘epistemic peer’, and its relevance to the merit of the ED literature, will be a pertinent subject of discussion in this thesis, particularly in Chapter Five.

²⁵ In terms of application to such disagreements see e.g. Richard Rowland, ‘The Epistemology of Moral Disagreement’ (2017) 12(2) *Philosophy Compass*, which explores the applicability to moral disagreement of the responses called for in ED, and James Kraft, *The Epistemology of Religious Disagreement* (Palgrave Macmillan US 2012), which seeks to demonstrate that religious disagreements should not be treated differently from other instances of disagreement.

This thesis embraces ED's purported applicability to real-life, and offers a sustained and methodical test of its insights for law. In particular, I look to the Supreme Court of the United Kingdom (UKSC) as a test-site for exposition.²⁶ This forum is used for several reasons. First, the judgments of the court are published and accessible, allowing for robust and tangible case studies. Furthermore, a presumption that UKSC Justices²⁷ are peers in the legal hierarchy,²⁸ coupled with the arguable nature of the cases that reach the UKSC as a court of last resort, makes disagreement in their judgments both of great importance to society²⁹ and an appropriate test for ED theory.³⁰ Not only this, but as ED philosophy claims relevance to legal disagreements, the philosophy is primed to be both insightful and helpful for settling disputes in the highest court of the UK. Thus, in putting ED to the test I turn to the, arguably, quintessential forum of peers.

As a still young and growing body of literature, this thesis is poised at an opportune moment. Many questions ED provokes remain unanswered, and in some respects remain

²⁶ Cases will be utilised from both the UKSC and UKHL. When general reference is made to the court, for consistency and clarity it will be referred to as the UKSC.

²⁷ Prior to the introduction of the UKSC in 2009, judges in the UKHL were Law Lords. Although UKHL judgments are used in the thesis, for simplicity general reference will be to UKSC Justices, rather than both Justices and formerly Law Lords.

²⁸ That is, if we were to find epistemic peers in law, surely they would be found in our UKSC Justices who have undertaken rigorous legal training over a number of years in elite educational and professional establishments, in order to reach this exclusive and highly selective position – making them excellent subjects for putting ED theory to the test. For further discussion in relation to this point see Chapter Five, in particular Section 3.

²⁹ Indeed the UKSC claim to only hear cases “on arguable points of law of the greatest public importance”. ‘How does the UKSC fit into the UK’s Court System?’ (The Supreme Court of the United Kingdom) <www.supremecourt.uk/faqs.html#1b> accessed 1 October 2018.

³⁰ Other forums could have been chosen in law. For example, if charged with a criminal offence, one has the right to be tried by a jury of one’s peers. An obvious choice for examination, the insights to be offered from jury disagreement is however limited due to the secrecy required concerning the process by which verdicts are reached. See Chapter Three, n 7 for further discussion on this point.

unasked; particularly regarding the way in which this philosophy might be applied to legal issues. Furthermore, as an emerging field, I aim to offer pertinent and timely reflection on the areas in which ED philosophy can and, as I contend, should be developed. In undertaking my analysis of ED's application to the UKSC I also attend to the wider theoretical literature, as well as practitioner-led works; taking as my subject offerings which purport to take disagreement seriously. For example, Ronald Dworkin's work has particular relevance to the delivery of the thesis,³¹ due to both his sustained attention to disagreement itself, and how judicial disagreement can inform our understanding of law as a social practice. The cases chosen for analysis in this thesis were also purposefully selected from those attended to by Frederic Reynold QC.³² Examination of these cases demonstrate the insights that can be provided from my approach to the analysis of disagreement in cases which have already been subject to scrutiny in terms of the disagreement present, and by an accomplished practitioner in the field. Indeed, in this respect the exposition of the wide-ranging field undertaken is an important research outcome for this project in itself.

Through my analysis of disagreement in judicial decisions, I will argue that the present state of ED literature is ill-equipped to inform our understanding of such disagreements.³³ In fact, it will be my claim that disagreement, surprisingly, is *not* the subject of interest for ED, and that ED theorists conflate the concept with the philosophical creation of 'the epistemology of disagreement'. That is, theorists are, in practice, interrogating the requirements for rationality with regard to the views we hold in conflict with our peers.³⁴ This limited focus bears powerfully on the understanding of disagreement presented in the

³¹ In particular Dworkin, *Law's Empire* (n 1), Ronald Dworkin, *Justice for Hedgehogs*, (Belknap Press of HUP 2011), and, to a lesser extent, Ronald Dworkin, *Justice in Robes*, (Belknap Press of HUP 2006).

³² Reynold (n 2).

³³ And, although this thesis operates a limited remit of UKSC decisions, this claim stand for law more widely.

³⁴ I refer to this later as the misappropriation of disagreement. See e.g. Chapter Four, Section 5.

literature, as well as its applicability to real-life cases. It influences, for example, what ED theorists deem *genuine* disagreement to be. We will see too that the focus on rationality results in a notion of ‘epistemic peer’ that is simply too restrictive; unable to take hold even in such an elite and selective forum as the UKSC. As a result, I argue that that the ED literature does little *in itself* to advance our understanding of disagreement in judicial decision making (JDM). As a minimal conclusion then, my thesis stands as a prompt for further research.

However, this is a minimum ambition for the thesis, as I will further argue that in spite of such demonstrable limitations, an exploration of the potential application of ED to judicial decisions remains fruitful and instructive. In this respect, although the thesis itself acts as a call for further research, the thesis aims also to initiate the presentation of such research; mapping out what I see as the means for ascertaining a more informed and robust understanding of disagreement in judicial decisions. We gain, for example, a clearer understanding of what such disagreements are, and what they are not. In assessing the nature of the disagreements which take place in the UKSC we also come to see a highly diverse practice of disagreement. As such, through my analysis I advance a number of clarifications for both the philosophical and jurisprudential works on disagreement explored in this thesis. I, for example, argue that ED typically makes a simple yet far-reaching mistake in its treatment of disagreement. Simply put, disagreement is often confused with the circumstances in which it is used, with theorists attaching to the phenomenon of disagreement features of the circumstances in which it is found. For example, and alluded to previously, we will see that ED literature places limits on the instances of disagreement of interest due to its focus on peer disagreement.³⁵ This focus informs (I argue, mistakenly) the ED presentation of what a *genuine* instance of disagreement is.³⁶ I argue too that this mistake is not limited to ED and

³⁵ The role of peer disagreement will be the subject of Chapter Five.

³⁶ The distinction between genuine and illusory disagreement shall be the subject of discussion in Chapter Four. Here, Dworkin’s work on what he refers to as interpretive concepts shall also be drawn

can be found also in the surrounding works attended to in the thesis. Through my analysis I call for a wider understanding of genuine disagreement that would make better sense of the way in which we use and share the concept. Ultimately it will be my claim that more needs to be done if disagreement, along with its reach and its impact, is to be taken seriously in legal scholarship and judicial practice. These are all claims to be made, and defended, in the coming chapters.

A final note should be made regarding my style. The thesis is delivered at the intersection of philosophy and jurisprudence, as applied to real-life instances of disagreement in UKSC judgments. Engaging with analytic philosophy, I intend to match the literature I attend to in method and approach. In so doing, I weigh the merits of concepts and arguments, so what follows will be analytic in style. Such an approach enables the delivery of a thesis which clarifies its topic by asking questions that do not presently exist in the philosophical and jurisprudential literature on disagreement. In exposing the limitations of the current narrow approaches to disagreement (both in law and philosophy), my research provides the tools and analysis required to open up discussions of disagreement in law through the lens of judicial decisions. For what remains in Chapter One, I briefly map out what can be expected in each of the chapters that follow.

2. The structure of the thesis

In order to deliver on these ambitions, the thesis takes a comprehensive approach to the study and location of disagreement. The chapters are intended to build on one another, with insights and arguments in one providing foundations for those that follow. Although by no means exhaustive, what follows is an indication of what to expect as my arguments unfold

on in putting pressure on the ED limited presentation of genuine disagreement. See Chapter Four, Section 4.2.

throughout the thesis. Thus, Chapter Two ‘The Notion of Disagreement’, sees an examination of disagreement itself. Chapter Two therefore serves to provide important context for the thesis by establishing the relevance of disagreement in a wider social setting – acknowledging its significance in various aspects of social interactions and life, law being just one example of a plethora of instances. In this respect, Chapter Two also serves an important methodological purpose in the thesis by establishing my approach to disagreement; providing a rounded assessment of disagreement by analysing its use both in everyday practice and in specialised technical fields. This is important to the overall force of the thesis, which has as a central claim that ED does not present a clear enough grasp of the notion of disagreement.

Chapter Three, ‘Judicial Decision Making: Disagreement, Dissent and Concurrent Opinions’, locates my analysis directly in instances of disagreement in JDM. The four judgments to be examined present disagreements in a variety of forms and will be used as the reference points and case studies for my analysis of the ED literature. The judgments are introduced here so that the analysis of real examples of JDM further contextualises the research enquiry. Chapter Three concludes the first section of the thesis, Section A ‘The Case for Disagreement’, which aims to equip the reader with a command of how disagreement appears not only in law but in everyday life so that we might embark on an analysis of the ED literature with clarity of subject matter.

The thesis moves then to Section B, ‘The Epistemology of Disagreement’ which directs our attention to the application of ED to UKSC decisions through three progressive chapters; each presenting distinct yet interlinking themes. The first, Chapter Four (‘The Notion of Disagreement in the Epistemology of Disagreement Philosophy’), considers the way in which ED presents disagreement to the reader. That is, how the topic is introduced for discussion, what disagreement is taken to mean or be, and ultimately what the subject of enquiry in fact *is* in ED. In light of the contextual work done in Chapters Two and Three, we are equipped to perceive any weaknesses and concerns in the ED literature’s presentation of the notion of

disagreement itself, placing focus on ED's distinction between *genuine* and *illusory* instances. Here I argue, for example, that the ED account of genuine disagreement is overly narrow; bearing on my claim that rather than disagreement, much of the ED literature is in fact concerned instead with what it would be rational to do in an instance of disagreement.³⁷ The focus on rationality often goes unacknowledged in the literature, resulting in theorists attaching to disagreement what should in fact be attached to the ideas of rationality and reasonableness; reflected in the definitions of disagreement (including the distinction made between *genuine* and *illusory* disagreement) presented and defended in the literature. In these respects we will see that ED uses disagreement merely as the catalyst for wider epistemic reflection rather than providing the subject of interest in itself.

Chapter Five, 'To be a Peer in the Epistemology of Disagreement Philosophy', follows with an examination of the applicability of 'peer' disagreement to UKSC cases. This chapter further demonstrates that an important reason for ED's inadequate command of disagreement is its preoccupation with the narrow topic of *peer* disagreement. In applying ED insights to UKSC Justices it will be suggested that both the emphasis placed on peers and the restrictive requirements for what it means to be a peer, undermines the literature's utility for our understanding of disagreement in JDM by placing severely artificial limitations on cases of interest. In this chapter, for example, one of the conclusions drawn is that the stringent requirements imposed on what it means to be a peer in ED means that UKSC Justices cannot comfortably be considered peers in the ED sense. Furthermore, I argue that this phenomenon is by no means regrettable. Rather, it is suggested that the crucial role played by the UKSC in

³⁷ This argument is further reinforced by the discussion of ED's focus on peer disagreement offered in Chapter Five. The focus on rationality, and what we will see to be a resulting concern with when one alters and/or maintains a belief will too form part of my wider argument that ED's underlying concern with truth informs the understanding of disagreement presented in the literature.

establishing and developing UK laws demands a level of diversity in representation that could not be satisfied within the confines of ED 'peer' theory.

Section B is drawn to a close with Chapter Six, 'Reacting to Disagreement', in which I analyse several answers to the ED question (that is, what it would be rational for one to do when faced with a disagreement with a peer). The answers provide further evidence of the lack of rigor seen in ED's treatment of disagreement in and of itself. The chapter focuses in particular on ED's attention to belief-revision and retention as the primary remit for answers to the ED question. I claim, for example, that often disagreements in JDM require one to take action, sometimes irrespective of one's belief – a decision must be made. Drawing on the works of Jonathan Cohen and Catherine Elgin, I therefore make the case for framing ED discussions in terms of what it is rational for one to *accept* rather than *believe*.³⁸

The thesis then moves to the final section, Section C 'Towards a Philosophy of Judicial Decision Making', in which Chapter Seven 'Disentangling Disagreement' draws on the legal theory of Ronald Dworkin to demonstrate not only why the ED literature falls short in some areas with respect to developing our understanding of disagreement in JDM, but also how we might develop an approach to such disagreement going forward. In Chapter Seven then, an overarching claim in the preceding chapters is defended; that at least some disagreements in JDM are conceptual, concerning, for example, what the law *is* regarding the case at hand. In using Dworkin's distinction between different types of concepts,³⁹ I suggest that the potential for conceptual disagreement helps to articulate the reality of disagreement in JDM, as well as

³⁸ See Chapter Six, Section 3.

³⁹ Dworkin marks out these concepts by reference to the ways in which we use and share them. Criterial concepts are those which have clear criteria, such as a book or equilateral triangle, natural kind concepts make reference to the same natural kind, such as a lion being such by virtue of its biology. An interpretive concept, the main focus for this thesis' use of Dworkin's distinctions, are those such as law, justice and democracy, which, Dworkin suggests, we share a common understanding of though may disagree over their instances. See Dworkin (2011) (n 31) 158-160 and Dworkin (2006) (n 31) 9-12. These concepts are expounded in more detail in Chapter Seven Section 4.1.

intimating the way in which the philosophy and jurisprudence can be drawn together to advance our understanding of judicial practices. Importantly, in Chapter Seven I also consolidate the call for a distinction to be made between our understanding of disagreement and the circumstances in which it is deployed. It will be my argument that it is important to acknowledge and differentiate the influences we might have in our exploration of disagreement, in order that they do not colour our understanding of disagreement and miss the possibility of wider influences in JDM.

The thesis is drawn to a close in Chapter Eight, which consolidates the arguments advanced throughout the thesis. With a necessarily limited remit of determining the applicability of ED to disagreement in JDM, the conclusion will also offer several thoughts on how the arguments of the thesis can be developed further and what future research is prompted by my findings. In this respect the conclusion will show how the research undertaken in the course of presenting this thesis serves as a platform for future enquiry, not only into developing a robust theory of JDM, but more broadly into the significance of disagreement in other areas of the legal terrain. Yet for now, it is to the beginning of this enquiry and a grounding exploration of the notion of disagreement that we turn.



CHAPTER TWO

The Notion of Disagreement



SECTION A
THE CASE FOR DISAGREEMENT

1. Introduction

An important aim for this chapter is to establish the relevance, use and understanding of disagreement in a wider social context. My intention is to ground the narrower discussions of the thesis in an understanding of disagreement through an assessment of disagreement in a number of instances and practices. As mentioned in Chapter One, this contextual framing is important for an effective analysis of ED as the literature is intended to be relevant to disagreements encountered in everyday lives and practices; law being merely one example of a field in which disagreement is apparent. It is further, and more critically, important for the overall force of the thesis, which has as a central claim that ED presents a misleading account of the notion.¹ By the end of this chapter I aim to equip the reader with the beginnings of an understanding of disagreement, and importantly the sorts of questions we might wish to ask of instances encountered, in order that we might embark on the analysis of the ED literature and UKSC judgments.

The social and literary canvases from which one can draw, along with the limited space for discussion, provides a challenge in selecting examples for exposition in this chapter. In order to provide a fitting overview of how we understand disagreement, the chapter is divided into four main areas. First, Section 2 addresses definition; exploring the ways in which we might attempt to define disagreement, and how the thesis intends to approach the concept. In so doing this early section presents several reportive definitions of disagreement. This is done not in an attempt to find or develop ‘the’ definition of disagreement (an endeavour which lies beyond the aim of this thesis).² Indeed, this chapter is presented in the

¹ Chapter One, text to n 34.

² In the same way that HLA Hart was not trying to give us *the* definition of a concept of law (HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1997) 13-17), I am not attempting to provide *the* definition of disagreement in a realist fashion (see e.g. Gottlob Frege, ‘Sense and Reference’ (1948)

frame that such a definition would not be possible or fruitful, as an important part of our understanding of what such concepts mean come from their use in our social practices. Therefore, although definition is explored as part of my aim to provide a holistic approach to our understanding of disagreement, the chapter moves in Section 3 from definitions which, as Robinson notes, “abstract”³ the word from the world, to look at disagreement in context. Here everyday occurrences are offered, examining how we might encounter disagreement in practice. Section 4 offers an example from medical practice to demonstrate how disagreement is specifically employed in technical fields. Attention turns to law in Section 5, focussing on disagreement in the courts. This discussion is intended to enable us to approach ED and disagreement in the courts informed by the context of the way disagreement appears elsewhere in our usage – setting us up for the examinations of UKSC cases in Chapter Three.

2. To define disagreement

2.1 Types of definition

Definition is a means by which we develop or stipulate the meanings of words and phrases. Yet under the scope of definition there are many ways in which one can attempt to define words. For example a *reportive* definition, one that is typically found in a dictionary, is an attempt to simply report the meaning of a word or phrase.⁴ A *stipulative* definition on the other hand is often used when a precise meaning of a word is required for a given situation i.e. ‘for the sake of clarity, in my argument I take x to mean this...’ Stipulative definitions can

57(3) *Philosophical Review* 209 or Bertrand Russel, ‘The Philosophy of Logical Atomism’ (1919) 29(1) *The Monist* 32).

³ Richard Robinson, *Definition* (OUP 1963) 33.

⁴ Also known as a lexical definition or meaning.

also occur in the reverse, where a word does not currently exist to convey the precise meaning of what one wants to say; a kind of stipulative creation. Instead of using an old word for this new or more precise meaning, one creates a new word.⁵ For example, the word googol was invented by mathematician Edward Kasner to mean the number '10¹⁰⁰'.⁶ Thus the stipulative definition does more than just report the meaning, it in some respects creates it. An *ostensive* definition is definition by demonstration; typically employed when attempting to explain what colours, smells or tastes are. For example, in explaining the colour blue to B, A might show B a number of blue objects, in the hope that B would understand the unifying blueness of the objects. Alternatively, if B were to explain what a sweet taste was to A, B might have A taste, say, some caramel and candyfloss.⁷ Such ways of communicating meaning are typically used where experience of the object being defined is beneficial to understanding its meaning.⁸ A final means worth noting is the endeavour to establish meaning by *synonym*. So for example, A might attempt to explain disagreement to B by offering up synonyms (difference, divergence, dispute, etc.) in the hope that B would understand the meaning A has in mind without the offer of a formal definition. All four means

⁵ John Hospers, *An Introduction to Philosophical Analysis* (4th edn, Routledge 2005) 15.

⁶ *ibid.*

⁷ There are of course problems with such definition. E.g. by asking someone to taste foods to understand 'sweetness', they may also pick out other parts of the object in the process, such as sugar, artificial flavour etc., so a wide range of food may be required. Gorskij puts this well: "we show the child milk in a bottle, in a glass, in a saucer, etc., and call it 'milk'. Of course, seeing only the bottle of milk, the child cannot decide whether 'milk' indicates the bottle, the bottle of milk, or that which is in the bottle. Definition comes only by seeing the invariable to which the word applies in many different pointings." DP Gorskil, 'On the types of Definition and Their Importance for Science' in PV Tavanec (ed) *Problems of the Logic of Scientific Knowledge* (Springer Netherlands 1970) 322.

⁸ So much so in some cases that the experience is crucial for full understanding. E.g. whilst someone who is blind might understand the idea of the colour blue by description, they will not be able to fully understand the colour without experiencing it.

of definition noted here will be drawn upon in this chapter as we explore our understanding of disagreement.⁹

In law definition is, unsurprisingly, important. There are countless situations in which the definition of a term is fundamental in determining how and when a law is applied. As laws are intended to be universally applicable they need to be clear, often irrespective of personal or moral beliefs. This means that in practice many definitions used in legislation are akin to stipulative ones, i.e. we are informed of what a given term is to mean for the purposes of the legislation at hand. Furthermore, as will be seen in Chapter Three's discussion of UKSC cases, where confusions and disagreement arise in law, it is often in situations where stipulative definitions would be helpful as it is the applicability of terms that are being brought into question.¹⁰ This is easily recognised when we think of potentially emotive laws where moral beliefs could influence one's own perception of what words mean. A clear example is child destruction law under the Infant Life (Preservation) Act 1929 under which a human foetus, whilst referred to as a *child*, is not considered a *person* and therefore cannot be 'killed' or 'murdered'. Thus if defendant D were to harm a pregnant woman so as to cause the loss of her pregnancy, D would not be charged with murder or manslaughter, but rather with *child destruction*.¹¹ Many consider this law to present an uncomfortable expression of

⁹ There is of course a wealth of lexicographical literature on definition and our use of words. See e.g. Henri Béjoint, *The Lexicography of English* (OUP 2010) for a detailed account of the creation and use of dictionaries, and Philip Durkin, *The Oxford Guide to Etymology* (OUP 2011) exploring the influence of culture and social practice on our use and understanding of words.

¹⁰ We see this in particular with the case of *R v Gloucestershire CC and Another ex parte Barry* (Conjoined Appeals) [1997] UKHL 58, [1997] AC 584 in which the meaning of 'need' in the context of legislation is the subject of disagreement. Chapter Three text to n 44. We will see too in the thesis the importance of *who* is making these definitions and the power they have. See Chapter Five, Section 3.1.

¹¹ The Infant Life (Preservation) Act 1929 s1(1) states: "any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction".

both what it is to be a person and what constitutes murder. The Act further defines the limitations of the offence by stipulating that the offence must have occurred against an unborn child capable of surviving outside of the womb at the time of the incident. Here a stipulative definition is used as the Act specifies: “*For the purposes of this Act, evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be prima facie proof that she was at that time pregnant of a child capable of being born alive*”.¹² Although the Act specifies 28 weeks, this benchmark elsewhere in law has evolved since 1929 as advancing medicine has enabled the survival of premature births of as early as 24 weeks, as seen for example in the Abortion Act 1967.¹³ Thus, the 1929 Act is controversial for at least two reasons: first, for utilising the term ‘child destruction’ instead of murder, limiting the personhood of the unborn child, and second for stipulating the gestation required for the Act to be effective. It is beyond the scope of this thesis to engage in a discussion of any value judgements behind the stipulations of this legislation. Instead, it is presented here, along with surrounding contentions, to demonstrate how the terminology, definitions, and clarifications used in legislation can be the cause of disagreements. Furthermore, both Acts referenced here were enacted to safeguard the unborn child’s rights alongside the mother’s rights and personhood. Though many raise concerns regarding the stipulations as they currently stand, such stipulations enable us to know when and how to apply the law; even more so in fact when controversy and staunch moral judgements

¹² Infant Life (Preservation) Act 1929 s1(2) (emphasis added).

¹³ There are cases where babies born as early as 22 or 23 weeks have survived but this is rare as births under 26 weeks have increasingly lower survival rates. ‘Short term outcomes after extreme preterm birth in England: comparison of two birth cohorts in 1995 and 2006 (The EPICure Studies)’ (2012) <www.bmj.com/content/345/bmj.e7976> accessed 5 January 2016. Nonetheless, abortions are allowed in UK law up until 24 weeks; endorsing a threshold of four weeks earlier than the Infant Life Preservation Act’s requirement for survival. Section 1a Abortion Act 1967.

surround the terms being defined.¹⁴ We can see therefore that stipulating clear definitions and parameters for law has been considered an important ambition for the clear application of legislation, though our belief in their correctness may well be another question. This is merely an aim of course, for it is not to say that stipulating a definition means that all cases will be unambiguous. We can see this in Hart's, now classic, discussion of a rule 'no vehicles in the park', which suggests that whilst the definition of a rule may be clear in some respects, the context of a case in which it is applied can influence both its application and the resulting outcome.¹⁵ Thus through this brief discussion of legislation, we can see legislators have proceeded under the idea that it is beneficial to have and aim for definitions in our laws, as well as indicating the limitations, and disagreements, these bring when not placed in context, or indeed when new cases arise. It is for such a reason that Section 3 of this chapter focuses on disagreement in practice; so that we can see how the term is used in varying contexts. This analysis will also be important for our exploration of UKSC Justices in Chapter Three as

¹⁴ Indeed, the juxtaposition of pro-life and pro-choice campaigns illustrated the need for such clarity in the law, as it is such a controversial subject matter.

¹⁵ Hart uses an example of a rule 'no vehicles in the park' to explore what he calls the *open texture* of rules. It is of interest to note Hart's focus in relation to the limits of definition *in practice*, as Hart explores what constitutes a vehicle *for the purposes of this rule*. In Hart's example there are a number of cases which are plain in terms of whether the rule 'no vehicles in the park' is flouted, e.g. cars, buses, and motorcycles would be considered paradigm examples of vehicles for the rule. However, less clear are e.g. roller skates or bicycles. When deciding whether or not such examples do fall under the rule, Hart explains "All that the person called upon to answer can do is to consider (as does one who makes a precedent) whether the present case resembles the plain case 'sufficiently' in 'relevant' respects. The discretion thus left to him by language may be very wide; so that if he applies the rule, the conclusion, even though it may not be arbitrary or irrational, is in effect a choice". Hart demonstrates how even if we first perceive a rule to be straightforward, and the terms within readily understood, its application can result in unexpected situations and an element of choice. Hart (n 2) 126-129.

the Justices must attend to the meaning of statutory provisions within their legislative and social contexts.¹⁶

2.2 Definition in context

The analysis of concepts and a will to define them has been a preoccupation of philosophy over the centuries,¹⁷ and the means by which philosophers have attempted to do this has changed over time. The classical theory of concepts focuses on the definitional structure of concepts, often illustrated with the example of a bachelor being *by definition* an unmarried man. That is, the concept bachelor has definitional structure as it is composed of simpler concepts that are necessary and sufficient conditions for the concept; i.e. the essential parts of being a *man* who is *unmarried*.¹⁸ This classical approach to concepts has come to be widely disputed – indeed it is now commonly thought that it is not possible to provide absolute definitions for certain concepts we use, with exceptions abounding or else definitions being too wide-ranging to be helpful in presenting meaning. For example, Hans-Johann Glock suggests the following definition of a game is both too wide and too narrow: “a rule-guided activity with fixed objectives that are of little or no importance to the participants outside the context of the game”.¹⁹ Glock sees this as too wide because it allows for competitive running to be considered a game, and too narrow as games need not be

¹⁶ See in particular Chapter Three, Section 3.1.

¹⁷ Dating as far back as Plato and Socrates; key founders of Western philosophy, and further still to the Ancient Greece of the sixth century BC. Bertrand Russell, *History of Western Philosophy* (Routledge Classics 2004) 2.

¹⁸ Stephen Laurence and Eric Margolis, ‘Concepts’ (*Stanford Encyclopedia of Philosophy*, 17 May 2011) <<http://plato.stanford.edu/entries/concepts/>> accessed 23 January 2016.

¹⁹ Hans-Johann Glock, *What is Analytic Philosophy?* (CUP 2008) 216.

governed by rules.²⁰ Moreover, in attempting to define a concept one brings to the endeavour an initial understanding of what the concept means, which may influence what one goes on to articulate. As Glock suggests, “the way we use and understand a term is not only an innocuous starting point for elucidating its meaning, it is the only clue we have at the outset of our investigation”.²¹ Although a perhaps inevitable starting point and influence in such explorations of our understanding of concepts, in this thesis it will be seen that such starting points are not always innocuous, as they can lead one to misleading definitions of the concepts explored. This is important to mark for discussions in Section B and Section C of the thesis, when we turn to the understanding of disagreement that is presented both through the ED definition of genuine disagreement, as well as the wider academic literature explored.²²

Although a range of types of definitions are explored in the present chapter, this thesis does not intend to provide a reportive or ostensive definition of disagreement. Rather, the primary focus in elucidating our understanding of disagreement will be through an exploration of our social practices and the way we *use* disagreement. To further contextualise this focus, I use as an example Ludwig Wittgenstein’s exploration of the concept ‘game’ to both illustrate limitations of definition, and the focus on use offered in this thesis. In *Philosophical Investigations* Wittgenstein explores meaning and how we understand the world around us, suggesting that our inability always to provide definitions for the words we

²⁰ *ibid.* One might take issue here with the example of athletics not falling under the definition of games (think ‘Olympic Games’). However, without this example, the definition is still easily argued to be too wide, as one could think of other areas which could fall under the definition e.g. an office workplace, Quality Assurance guidelines at a University, or following a recipe. All such examples could be considered rule-guided with fixed objectives of little import outside of their own contexts, demonstrating the ineffectiveness of the definition at picking out games in particular. See also n 24 below.

²¹ *ibid* 13-14.

²² See e.g. Chapter Four Section 4, and Chapter Seven, Sections 2 and 3.

use, does not mean that we do not understand them.²³ He uses the idea of ‘games’²⁴ to explore this:

Consider for example the proceedings that we call “games”. I mean board-games, card-games, ball-games, Olympic games, and so on. What is common to them all? – Don’t say: “there *must* be something common, or they would not be called ‘games’” – but *look and see* whether there is anything common to all. – For if you look at them you will not see something that is common to *all*, but similarities, relationships, and a whole series of them at that. To repeat: don’t think, but look!²⁵

Wittgenstein suggests that an exploration of different games shows a “complicated network of similarities”²⁶ between them, which he calls “family resemblances”.²⁷ Such family resemblance is one of the reasons why defining ‘game’ is challenging, because each game shares some aspects with another, whilst being entirely different in other ways; just like members of a family in their similarities and differences in appearance, mannerisms, and so on. Wittgenstein explains that a further reason for this difficulty in articulating our understanding of such concepts is because we have not given them boundaries. He writes (with reference to both ‘number’ and ‘game’):

²³ See also the literature on conceptual competence, e.g. James Higginbotham, ‘Conceptual Competence’ (1998) 9 *Philosophical Issues* 149.

²⁴ Ludwig Wittgenstein, *Philosophical Investigations* (3rd edn, Blackwell Publishers 1967). Wittgenstein’s use of games in *Philosophical Investigations* has been widely adopted as a basis of discussion by philosophers in analytic philosophy more broadly, hence Glock’s use above.

²⁵ *ibid* 31.

²⁶ *ibid* 32.

²⁷ *ibid*.

... For I *can* give the concept 'number' rigid limits in this way, that is, use the word "number" for a rigidly limited concept, but I can also use it so that the extension of the concept is not closed by a frontier. And this is how we use the word "game". For how is the concept of a game bounded? What still counts as a game and what no longer does? Can you give the boundary? No. You can draw one; for none has so far been drawn. (But that never troubled you before when you used the word "game".)²⁸

Therefore, we find it difficult sometimes to articulate the meaning of certain concepts because there are no fixed boundaries to them. This does not mean that such concepts are unusable, that we have difficulty in using them, or indeed that we would even *want* boundaries for them. Thus whilst we *might* wish to draw boundaries for special purposes,²⁹ such as stipulative definitions in legislation noted in Section 2.1 of the present chapter, this does not mean that the lack of boundaries renders the concept unusable. Indeed, one of the reasons for implementing such boundaries through stipulation in law is that we often use concepts in our social practices without boundaries in place.

This insight helps the method of the thesis, but the conclusions are not bound to it. Rather, it influences the approach to disagreement in the thesis, presenting an examination of instances of disagreement in different spheres; exploring how disagreement works in the practice of our language, what is the same about instances of use and where (and how) they differ. This inclusive approach is helpful, especially when dealing with a complex social

²⁸ *ibid* 32-33. See also Hart (n 2) 13. We will see too in Chapter Seven that those concepts akin to games are those such as justice, truth, law, morality... indeed, those which we tend to disagree over. See Chapter Seven text to n 76.

²⁹ Wittgenstein (n 24) 32-33.

phenomenon. Motivating my method then is the idea that rather than closing the extension of concepts by limits,³⁰ in exploring the meaning of a concept we should look for its use. That is, our understanding of how we use disagreement in everyday and technical usage, can help us in deciding on new cases; using a descriptive understanding to inform a practical application of our findings. As Wittgenstein puts it; “For a *large* class of cases – though not for all – in which we employ the word “meaning” it can be defined thus: the meaning of a word is its use in language”.³¹ However, as has already been hinted in the present section, this does not mean that the use of a word means its *correct* use. A close examination of disagreement will also allow us to determine which aspects of a disagreement case are relevant to the meaning of disagreement, and which are contextual to the situation. Through the examination of instances of disagreement that follow in Sections 3 and 4 of the present chapter, and recurring throughout the thesis (in particular through the command of disagreement demonstrated by ED explored in Section B of the thesis), what we will come to see is that we often mistakenly attribute key features to disagreement that are in fact circumstantial; related to the situations at hand rather than disagreement itself.³² This thesis is therefore offered from an analytic, critical perspective. As already explained above, an argument for a certain definition of disagreement is not made. Instead, whilst definitions of disagreement are explored, so too are a range of practical examples of disagreement in social practice; exploring how, when, and where we use it, and what impact it has. It is hoped that by looking at disagreement in this practical way, we will come to better understand the way in which we use, and misuse, it. Such illumination will help us going forward in ascertaining

³⁰ *ibid* 32.

³¹ *ibid* 20.

³² See also Stephen Pethick, ‘On the Entanglement of Coherence’ (2014) 27(1) *Ratio Juris* 116 and Stephen Pethick ‘Solving the Impossible: The Puzzle of Coherence, Consistency and law’ (2008) 59(4) *Northern Ireland Legal Quarterly* 395 for a similar approach to the analysis and understanding of concepts.

instances of disagreement, laying important foundations to a central claim in this thesis that ED posits a limited definition of genuine disagreement.³³

2.3 Definitions of disagreement

We turn now to definitions of disagreement, focusing initially on the composition of the word, along with its origins. The verb *disagree* is made up of two parts; *dis-*, its prefix, and the verb *agree*. *Dis* means apart or away,³⁴ typically added to words for a negative or reversing force on the word. Thus, if I do not believe something to be true, I would *disbelieve* it. A definition of *agree* is to “have the same opinion about something”.³⁵ So combining these parts, we already see the idea of disagreement emerging as (intelligently) ‘to not have the same opinion about something’. Looking to the origins of *agree*, we see that it stems not just from the notion of having the same opinion:

When we agree to something, there is a core notion of trying to please; the word is from Old French *agreer*, based on Latin *ad-* ‘to’ and *gratus* ‘pleasing’. It took over a hundred years after the phrase ‘to agree’ first appeared in the writings of Chaucer for its opposite, *disagree*, to appear in writing during the 1490s.³⁶

This element of trying to please is an interesting one, as it indicates a sentiment behind the sharing of opinions. Indeed, if we look at a dictionary definition of *disagree*, in addition to

³³ See Section B, in particular Chapter Four, and as per Chapter One, Section 1.

³⁴ ‘dis-’ *Dictionary.com* (Dictionary.com 2014) <[http://dictionary.reference.com/browse/dis->](http://dictionary.reference.com/browse/dis-) accessed 12 December 2014.

³⁵ *Oxford English Dictionary* (3rd edn, OUP 2006) 14.

³⁶ *Oxford Dictionary of Word Origins* (2nd edn, OUP 2010) 9.

“have a different opinion”³⁷ or “to have or express a different opinion from someone else”,³⁸ we also see the idea of “to dispute or quarrel”³⁹ which indicates a negative sentiment behind the word akin to the positive origins of *agree*. The noun disagreement, in addition to the prefix *dis-* and verb *agree*, has a suffix, *-ment*, which stems from the Latin *mentum*, added to a verb to “represent the result or product of an action”.⁴⁰ Thus, by this etymological account a disagreement is the product of the action of disagreeing. Indeed in the *Cambridge Dictionary* disagreement is defined as: “an argument or a situation in which people do not have the same opinion”.⁴¹

In exploring dictionary definitions, it has already been noted that definitions vary depending on one’s source. For example, in the online resource *dictionary.com* disagreement is “the act, state, or fact of disagreeing; lack of agreement; diversity; unlikeness; difference of opinion; dissent; quarrel; dissension; argument”,⁴² whereas in the *Collins Dictionary* it is: “refusal or failure to agree; a failure to correspond; an argument or dispute”⁴³ and in the

³⁷ *OED* (n 35) 192. The word ‘disagree’ can also be used in other ways. As an example, the dictionary has a further phrase ‘disagree with’, which is defined as “make someone slightly unwell”. This is not the form of ‘disagree’ that we are interested in here. *OED* (n 35) 198.

³⁸ *Longman Dictionary of Contemporary English* (3rd edn, Pearson Education Ltd 1995) 381.

³⁹ *American Heritage Dictionary of the English Language* (5th edn, Houghton Mifflin Harcourt Publishing Company 2011).

⁴⁰ ‘-ment’, *Online Etymology Dictionary* (Douglas Harper 2015) <www.etymonline.com/word/-ment> accessed 2 January 2015.

⁴¹ ‘Disagreement’, *Cambridge Dictionaries Online* (CUP 2015) <<http://dictionary.cambridge.org/dictionary/british/disagreement?q=disagreement>> accessed 2 January 2015.

⁴² ‘Disagreement’, *Dictionary.com* (Dictionary.com 2015) <<http://dictionary.reference.com/browse/disagreement>> accessed 2 January 2015. Interestingly here we also see the lexical definition along with synonyms, showing again how definition can be an amalgamation of the different types.

⁴³ ‘Disagreement’, *Collins Dictionary* (Collins 2015) <www.collinsdictionary.com/dictionary/english/disagreement?showCookiePolicy=true> accessed 2 January 2015.

Longman Dictionary it is “a situation in which people express different opinions about something and sometimes quarrel”.⁴⁴ It is inevitable that such sources will vary, and indeed change over time. Yet from a number of sources we see a common idea of argument and differing of opinion or correspondence. Indeed many of these sources associate disagreement to some extent with the more negative notions of quarrelling or refusal. In associating disagreement with failure, the *Collins* definition reinforces the sense that disagreement is undesirable and the result of something not working. If agreeing finds its origins in positive notions of pleasing and sameness, it is perhaps unsurprising to find disagreeing associated with these more undesirable states. Indeed if we think of the turn of phrase ‘it disagreed with me’, we can see the conflict and unwelcome notions we have tended to associate with disagreement; the phrase is often used to mean that one ate something that made them feel unwell. The association of disagreement with conflict is a common theme in this investigation and will be revisited, and challenged, as we proceed.

A further observation to make regarding definitions concerns the similarity and interchangeability of the words *differ* and *difference* with *disagree*. For example, Webster’s Online Dictionary says of *differ*: “to be of unlike or opposite opinion; to disagree in sentiment”⁴⁵, and of *difference*: “Disagreement in opinion; dissension; controversy; quarrel; hence, cause of dissension; matter in controversy”.⁴⁶ Indeed, it is interesting that this definition uses the phrase “disagreement in opinion” when we have seen definition of disagreement to be to “have a different opinion”⁴⁷ and similar. One might, for example, say “we differed over x” or “we disagreed over x” intending (broadly) the same sentiment behind each phrase. Whilst also showing further signs of conflict in the meaning of the terms, this

⁴⁴ *Longman Dictionary of Contemporary English* (3rd edn, Pearson Education Ltd 1995) 381.

⁴⁵ *ibid* 147.

⁴⁶ *Ibid*.

⁴⁷ OED (n 35) 192.

similarity and apparent interchangeability, reminds us that when we look for disagreements it is not just for the terms *disagree* or *disagreement* that we must search. Indeed, the following words all have *disagree* or *disagreement* in their definitions in *Webster's Online Dictionary*: argument, brawling, clash, conflict, confrontation, contentious, contrariety, controversy, difficulty, disaccord, discomposure, disconcert, disconformity, incongruity, discord, discordancy, discordant, discrepancy, discrepant, dispute, disputed, dissension, dissent, dissentient, dissidence, dissident, dissonant, divergency, divergent, divide, heckling, incompatible, incongruity, incongruous, inconsistency, intolerant, irreconcilable, misunderstanding, protest, quarrel, resistance, and variance.⁴⁸ Whilst not an exhaustive list of words that are defined at least in part by disagreement, these words help to provide a base for what we typically seem to take as *disagreement* in some way. Some of these words we would see as synonyms for disagreement (argument, dispute), and thus are words we should keep in mind in this research,⁴⁹ whilst others have disagreeing as an aspect of their meaning (resistance, for example, is defined in the same dictionary as "The action of opposing something that you disapprove or disagree with"⁵⁰). Again overwhelmingly reinforced are the unappealing connotations of disagreement; arguments, clashing, conflicts, and protesting to name but a few.

In exploring definitions of *disagreement* we have noted that the word finds its basis in agreement. Before concluding this preliminary outline of definition, it therefore seems appropriate to mark *agreement* in its own right, so that we can set out the distinction

⁴⁸ Phillip Parker (ed) *Disagreements: Webster's Quotations, Facts and Phrases* (ICON Group International Inc. 2008) 140-167.

⁴⁹ In the course of, say, writing an essay or dissertation, students often resort to the thesaurus to avoid duplication or repetition. Though the suggestions cannot be called synonyms in the strictest sense of the word, ordinarily we come to use words interchangeably in this fashion, and it is this sense that I have in mind for our use and understanding of disagreement here.

⁵⁰ Parker (n 48) 161.

between the two notions, having already marked those between *disagree* and *agree*. Oxford Dictionaries defines agreement as “harmony or accordance in opinion or feeling”.⁵¹ Interestingly, one of the example sentence provided with this definition is “the government failed to reach agreement”.⁵² So, instead of noting that they disagreed we have here the negative sentiment of failure to agree. This shows that the way in which we use the word agreement can often be indicative of people coming together on a matter. In this respect, agreement becomes more tangible than just having the same opinion.⁵³ It is interesting too to see the notion of harmony used to explain agreement; that is, a much more uplifting understanding of the term.

In summary, we have noted a number of definitions of *disagree* and *disagreement*, and in the process have encountered words we might take to be synonymous with disagreement. This preliminary overview of definitions has therefore presented an understanding of disagreement that is concerned with having different opinions over something. The developing picture has seen a recurring relation to negative undertones of quarrelling, argument and conflict; seemingly mirroring an understanding of agreement as harmony, and we have seen that by definition disagreement is presented as the antithesis of agreement. We turn now to a discussion of disagreement in practice in which a number of examples of the concept as we use it are explored.

3. Everyday occurrences

⁵¹ ‘agreement’, *Oxford Living Dictionaries* (OUP 2015) <www.oxforddictionaries.com/definition/english/agreement> accessed 28 July 2015.

⁵² *ibid.*

⁵³ Indeed this is shown in our use of the word as meaning a binding arrangement between two parties, sometimes legally so.

If we think of our social practices, it is perhaps stating the obvious to suggest that disagreement is an everyday phenomenon. Evident in both private and public spheres, little reflection is required to conclude that instances of disagreement are both varied and far-reaching. A brief online search, for example, indicates a vast array of sources concerning 'disagreement': there are 'how to' guides to teach one to disagree without being disagreeable,⁵⁴ pages concerning how to disagree well whilst writing online,⁵⁵ top tips on how to handle disagreement effectively,⁵⁶ and a vast array of materials exploring the implications for couples who endeavour to 'agree to disagree'.⁵⁷ Whilst not circumstances we have in mind for our examination of disagreement in JDM, considering the vastness of sources available, and having an awareness that they exist, aids in locating the present investigation into the phenomenon by establishing that disagreement is put to use in a very wide range of contexts.

We begin our examination of everyday instances with an illustration of how people can express different views or ideas without being considered to disagree. For example, A and B are deciding what to have for breakfast.⁵⁸ A says 'let's have cornflakes' and B responds with 'we could have pancakes instead'. Here, although two views are at odds, A and B are not disagreeing. Rather they are parties to an exchange of suggestions through which they

⁵⁴ Suzette Haden Elgin, *How to Disagree without Being Disagreeable* (Wiley, John & Sons 1997).

⁵⁵ Paul Graham, 'How to Disagree' (Paul Graham, March 2008) <www.paulgraham.com/disagree.html> accessed 12 October 2018.

⁵⁶ Calvin Sun, '10 Ways to Handle Disagreements Effectively' (TechRepublic, 14th April 2008) <www.techrepublic.com/blog/10-things/10-ways-to-handle-disagreements-effectively/> accessed 12 October 2018.

⁵⁷ Molly Gun, 'Couples who Agree to Disagree' (The Telegraph, 3rd October 2010) <www.telegraph.co.uk/women/sex/8023257/Couples-who-agree-to-disagree.html> accessed 12 October 2018.

⁵⁸ A version of this example was offered by, and discussed with, Dr Stephen Pethick in a supervisory meeting on 21 January 2016.

are deciding what to do. A perhaps suggests cornflakes out of habit (they always have cornflakes), whereas B, perhaps as the result of always having cornflakes, suggests a change to pancakes. It is not really that their *opinions* differ but rather that they are offering up different possibilities in order to come to a decision. This is useful to mark out at this stage, because we can see that to have an opinion is different to expressing a suggestion. We could alter this scenario slightly, whereby to A's 'let's have cornflakes', B responds 'no, I think we should have pancakes'. B here expresses a judgement or view on the situation and we can more clearly see the potential for this to be an instance of disagreement. It can therefore be seen that the way that views are expressed or presented influences whether or not there is a disagreement.⁵⁹ In particular two points should be highlighted here: an opinion is different to a mere expression of option, and to exchange views and different options in making a decision is not the same as disagreement. We will return to these seemingly simple points during the course of this chapter, and wider thesis, as it shall be my claim that we often find these two themes mistakenly intertwined with an understanding of disagreement in the literature examined.⁶⁰

Let us proceed to a simple example of disagreement. Two economists are using the same data to assess the economic outlook of country X; A thinks there will be an economic downturn and B thinks there will not be. Both parties to the disagreement have different opinions and think that they are themselves correct, and the other party mistaken. There is an argumentative dynamic here; that is, the interaction amounts to 'I am right and you are wrong' or 'I believe myself to be right and you to be wrong'. This straightforward example is useful in showing how disagreements, through differences of opinion, often employ the ideas of right or wrong. By saying 'I disagree, I think this...', as A could say to B above (or vice versa),

⁵⁹ This too highlights the nature of decision making versus disagreement that will be explored in Chapter Seven.

⁶⁰ In particular in Chapters Four and Seven.

A is asserting their own belief and value judgement in their opinion; A thinks they are right. This is not something we saw drawn out in Section 2.3's exploration of definitions, yet it is important to our understanding of disagreement. Indeed as noted, both the ideas of being right, and one's belief that this is so, are pertinent to the critique of ED presented in Section B of the thesis.⁶¹ To elaborate their roles briefly here, if we think of the quarrels and arguments typically seen in an everyday scenario, the idea of someone being right and someone being wrong often plays a significant role. By expressing a different opinion to another, each party to the disagreement could be seen to suggest they believe themselves to be right and the other wrong.⁶² Disagreements are not often as straightforward in practice however, and through an exploration of the following scenarios, it will be seen that the notions of 'right' and 'wrong' present in varying ways. The examples used to illustrate this point will make use of how we might *resolve* such disagreements, i.e. determine which party is right. This use is marked here for clarity, in order that we do not improperly confuse characteristics of resolution with characteristics of disagreement.⁶³ We look at the following examples with reference to resolution only to the extent that it helps to illuminate our understanding of disagreement itself.

Let us take as an example the disagreements couples have in which they might choose to 'agree to disagree'. It is often the case that a 'right' or 'wrong' answer does not come into such a scenario *in practice*. A couple might disagree about, say, what to call their

⁶¹ See Chapter One, text to n 38.

⁶² This is irrespective of course of whether they are indeed right or wrong – they could both be mistaken. Indeed, it is enough that they are *assuming* these positions. This idea also plays a key role in ED, where some theorists argue for their own view to take precedent over another's by virtue of it being their own. See e.g. Chapter Six, text to n 30. This also has bearing on the discussions in Chapters Six and Seven regarding the roles that beliefs and right answers play in ED and our understanding of disagreement.

⁶³ One of my arguments in this thesis is that ED's focus on reactions to disagreement influences the understanding of disagreement advanced in the literature.

first born child; they know the unborn child is a boy and one wants to call him George after a grandfather, whilst the other wants Thomas, after a favourite uncle. They argue for some time over the merits of each name, neither budging in their conviction that they would like to call the baby the name they have each chosen. In such a situation some might be inclined to see not a right or wrong resolution or answer to the dispute, but two *different* ones (or indeed a third should they opt to settle the matter by choosing a different name all together). This does not mean that there can be no objectively right or wrong answer in the scenario. Rather in such situations it often seems that the couples, for the sake of their relationships, do not pursue a 'right' answer and choose instead to accept that they have different opinions over the matter in question. Moreover in such cases, it is not only the right or wrong resolution that is in question, but also whether the couple believe themselves to be correct. That is, whilst each might feel passionately that they would like to call the child X name, do they believe this to be the *right* name, or perhaps the right thing to do in the circumstances? That is to say, there is a difference between wanting something, preferring something, and believing it to be right. Furthermore, regardless of there being a 'right' or 'wrong' outcome to the case, it does appear in the present scenario that the couple are indeed *disagreeing* over what to call the child. This suggests that disagreements can take place over things we *want*, and not just over something or someone being correct, right or otherwise. A further example in which the ideas of right and wrong do not seem to quite fit disagreements *in practice* is a woman's choice and/or desire to have children. Take Laura and Eloise as an example.⁶⁴ Both in, say, their early-thirties, Laura has two children and Eloise has none. They are discussing the merits of having children, and Laura is concerned that Eloise's choice not to have children is *wrong* as she will be 'missing out' if she does not have a child. Eloise disagrees. She explains that whilst she might not share in the experience of certain aspects

⁶⁴ A version of this example was offered by, and discussed with, Dr Julia Tanney in a supervisory meeting on 12 May 2015.

of motherhood and raising children, these are not things she wants from her life. She firmly believes she is making the right choice for her and her circumstances as she would rather benefit in other areas of her life such as having greater flexibility (i.e. to go where she wants, when she wants to, without planning around and for children), more time to herself, her relationship and her career, and indeed more disposable income. Her life will not be poorer for the lack of children, she explains to Laura, only different. When making this kind of choice in life, it might be that 'right' or 'wrong' is not the appropriate vocabulary to use in practice. It was not *the* right choice to make; nor was Eloise in search of the objective truth regarding whether having children was better or worse than not having children. She had instead decided, given the circumstances of her life and goals that she did not want to include children in her plans. This is an important observation in our discussion about the notion of disagreement, as we often encounter disagreements in which it appears that the parties involved are arguing about the right or wrong of a question or decision to make, but this needn't be the case. The notion of *the* right thing to do is often not applicable or does not come into play, even when we think it might. What it is important for us to differentiate early in the thesis narrative then is the difference between theoretical reasoning (concerning the truth and/or falsity of a matter) and practical reasoning (concerning the justification for a decision made). Eloise's, for example, was not a decision regarding truth (theoretical reason), but rather concerning what she thought she ought to do all things considered (practical reason). Such examples of everyday instances of disagreement, and the difference between such reasoning, are again pertinent to this thesis' exploration of ED, which we will see limits the instances of genuine disagreement with the effect of excluding instances which do not pertain to truth claims.⁶⁵

⁶⁵ See in particular Chapter Four's exploration of genuine disagreement.

The examples above, in which two parties disagree over the course of action to take, are everyday occurrences. Instances of disagreement one might encounter in JDM can however be quite different, a reason for which lies in the way we come to resolve such disagreement. It was noted at the outset of this section that the present discussion is primarily concerned with the notion of disagreement, and not its resolution. It is important however to highlight some initial observations regarding how we resolve such disagreements, as it helps us to hone in on the circumstances we might be concerned with for JDM. That is, reflecting on the resolution of disagreement sheds further light on how we *use* disagreement. In Eloise's case, for example, we have already seen that no objective truth was sought.⁶⁶ The resolution to such a disagreement over whether to have children or not is relatively simple in practice; Eloise weighs her options, perhaps seeking various sources of advice and information, in order to make her decision; which too can be reached informed by, or indeed in spite of, a backdrop of disagreement from others. In JDM however, a decision *must* be made, and one that is agreed upon and that is, it is hoped, definitive. When it comes to JDM therefore, the everyday situations explored here are helpful to the extent that they have drawn out some nuances regarding the distinction to be made between theoretical and practical reason, and the ways in which our ideas of right and wrong manifest in disagreements. The instances in which we disagree with each other often involve how we communicate with one another; how we build relationships (as friends, partners, family, business acquaintances etc.) and how we keep these going. Indeed, it is often the case with couples that many of their disagreements have very little to do with the case at hand (say, whether one has done the laundry) and more to do with wider concerns or gripes in the relationship (say, the even spread of work in the home). As we have seen, this relationship-focus can often mean that we compromise in our disagreements. In law the stakes are

⁶⁶ It is another question entirely to consider whether there is an objectively right answer to the question 'should I have children?', and such a question need not be addressed in the present thesis.

different; a final decision simply has to be made and any conflict in views has to either be resolved, or else accommodated in a majority decision; there is no possibility of ‘agreeing to disagree’ as there needs to be an outcome to the case.⁶⁷ I will demonstrate in my argument in Chapters Six and Seven of the thesis, the prominent role that truth and a focus on right answers plays in the ED and jurisprudential treatment of disagreement. I shall further argue that such investment in truth and our access to it, should not be entangled with our understanding of disagreement. That is, it will be suggested that an unacknowledged overarching pursuit of truth influences, and limits, the understanding of disagreement found in the literature.⁶⁸ For now it is enough to see that our everyday disagreements may indeed be different in practice to the dynamics we find in the courtroom – at least to the extent of the emphasis we place on resolving the disagreements encountered.

Before turning to a discussion of disagreement in technical disciplines, a final word can be said of the role that conflict plays in our understanding of what it means to disagree. In light of the positive ‘pleasing’ origins of *agree*, one might expect that disagreement is to be associated with ‘displeasing’, as we saw with the negative connotations of the definitions presented in Section 2.3 of the present chapter. However, it does not seem necessary for someone to disagree with another for them to be quarrelling or *disliking* of their view, or indeed of them. In fact, the conflict provoked can often be a positive experience; allowing people to test their beliefs and theories. Margaret Heffernan illustrates this point through the working collaboration of Alice Stewart, an Epidemiologist, and her statistician collaborator, George Kneale.⁶⁹ Stewart and Kneale’s conflict was productive, whereby Kneale actively sought to disprove Stewart’s theories. This meant that when Stewart’s work on

⁶⁷ This is similar to the ‘action disagreement’ Bryan Frances uses, discussed in Chapter Six of the thesis.

⁶⁸ See in particular Chapter Six, Section 3.2 and Chapter Seven, Section 3.

⁶⁹ Margaret Heffernan, *Dare to Disagree* (TEDGlobal, YouTube 2012) <www.youtube.com/watch?v=PY_kd46RfVE> accessed 12 June 2015.

childhood cancer was released, to an unreceptive medical establishment (Stewart was suggesting that prenatal x-rays had been a cause of an increase in childhood cancer at a time when the nuclear industry was booming) Stewart remained confident in her findings. It was not until twenty-five years after publication that the x-raying of pregnant women was banned. As Heffernan explains, Kneale's job:

was to prove Dr Stewart wrong. He actively sought disconfirmation, different ways of looking at her models... in order to disprove her. He saw his job as creating conflict around her theories because it was only by not being able to prove that she was wrong that George could give Alice the confidence she needed to know that she was right.⁷⁰

Heffernan sees this as an excellent form of *collaboration*; by actively challenging one another they could be confident in the conclusions of their work.⁷¹ We will see in Chapter Three an emphasis placed on deliberation in JDM, and that the advancement of different views is an important part of the decision making process.⁷²

The examples of disagreement in the present section help to demonstrate that disagreement presents in different ways. Thus whilst the idea of quarrelling and the notions of right and wrong might be important in many cases of disagreement, they are not necessarily integral to disagreement *itself*. We can see this clearly in the discussion of

⁷⁰ *ibid* 4:40. Indeed this is similar to Karl Popper's ideas concerning falsification or refutation. See e.g. Karl Popper, *Objective Knowledge: An Evolutionary Approach* (OUP 1973) 14.

⁷¹ Indeed this is seen against the backdrop of philosophy of science in the twentieth century. See e.g. Donald Gillies, *Philosophy of Science in the Twentieth Century* (Blackwell 1993).

⁷² In Chapter Seven it will also be suggested that discussions concerning good decision making processes and/or deliberation should not be confused with the analysis of disagreement, or with genuine disagreement itself. See Chapter Seven, Section 2.

resolution we have engaged with here. The practical need to resolve disagreement can often overshadow any focus we might otherwise place on the 'right' or 'wrong' of the case, so that even when there is a right or wrong of the matter, in practice this is immaterial. This will be important to our understanding of ED, which we will see limits cases of disagreement that are considered to be genuine to those over truth-apt propositions.⁷³

4. Use in technical disciplines: disagreement and medicine

The decisions made in medicine have significant and lasting impacts, from which medicines to invest in, to how to diagnose a patient's ailment, and so on. It is unsurprising therefore that there is a wealth of interest and literature concerning disagreement in medical decision making, an example of which will be briefly illustrated here.⁷⁴ Such a sustained effort exploring disagreement in a technical field allows us to see not only how other disciplines view disagreement, but how experts in these fields propose to address the disagreements faced. To explain, Jerome Groopman and Pamela Hartzband explored the effects of disagreement in decision making and how physicians and their patients can decide a patient's treatment in the face of expert disagreement.⁷⁵ In order to explain their argument, one needs

⁷³ To be explored in Chapters Four and Six.

⁷⁴ See e.g. Glenn Bradford and David Meyers, 'The Legal and Regulatory Climate in the State of Missouri for Complementary and Alternative Medicine - Honest Disagreement among Competent Physicians or Medical McCarthyism' *UMKC Law Review* (2001) 70(1) 55, Jamie Staples King and Benjamin Moulton, 'Rethinking Informed Consent: The Case for Shared Medical Decision-Making' (2006) 32(4) *American Journal of Law and Medicine* 429, and Melissa Marks and Hal Arkes, 'Patient and Surrogate Disagreement in End-of-Life Decisions: Can Surrogates Accurately Predict Patients' Preferences?' (2008) 28(4) *Medical Decision Making* 524.

⁷⁵ Jerome Groopman and Pamela Hartzband 'When Experts Disagree: The Art of Medical Decision-Making' (Aspen Ideas Festival 2014) <www.aspenideas.org/session/aspen-lecture-series-when-experts-disagree-art-medical-decision-making> accessed 18 July 2015.

to contextualise their view with the dominant approaches to medical decision making. In order to make the best decision in a medical scenario, a formula based on the work of eighteenth century Dutch mathematician Daniel Bernoulli is often used: “Expected Utility = Probability of Outcome x Utility of Outcome”, where the highest expected utility is the best choice to make.⁷⁶ If, for example, a patient diagnosed with prostate cancer were to undergo treatment with a possible side effect of urinary incontinence, the patient must weigh how likely this side effect is to occur with the impact this outcome would have on their life.⁷⁷ This formula has been imported to medicine from economics, though its reliance on statistics and quantifying values in this way has caused some problems in applying it to medical decision making. For example, Groopman sees that one can estimate the probability of an outcome, such as the likelihood of urinary incontinence when having prostate cancer treatment, but it is far more difficult to ascertain how one could put a number on the second part of the equation; the utility or impact on the outcome. Groopman notes that three methods have been used. The first is the linear scale, from 0 (death) to 1 (perfect health), whereby the patient must determine where their life would be on the scale should they develop X (here urinary incontinence). The second method is Time Trade Off, whereby the patient has to consider how many years of their life they would be willing to give up to avoid the outcome (X), and the third is the Standard Gamble; one is to imagine there is a magic pill that, if taken, could eliminate the chances of the given outcome, but in some cases would immediately kill the patient. The patient must decide what odds they are willing to take to completely avoid the given outcome X, weighed against the chance that they might be killed instantly. Groopman explains that these methods are widely used in deciding what is best, both by experts in the field in determining medical policy, as well as in more local physician-patient decisions, though they are widely discredited due to the difficulty involved in predicting what

⁷⁶ *ibid.*

⁷⁷ *ibid.*

will happen in the future for a patient. For example, diseases change over time, so it is hard to put numbers on them that would still be relevant going forward, and moreover, as a patient lives with a disease they too change in terms of their outlook and what they are willing to cope with.⁷⁸ Groopman argues that it is difficult to use these methods to help patients make the best choice because they simply do not know what it is like to experience what it is they are deciding on, yet such methods are used to inform decision making, both in terms of patients making decisions, and healthcare priorities in general.

Groopman and Hartzband's insights are of interest to this enquiry due to the insights they offer regarding how one's outlook can influence the decisions that one goes on to make; bearing directly on not only what we will come to see as 'peers' in the ED literature, but also how we identify and weigh the evidence we use to make decisions. To explain, they believe that medical decision making should be approached differently because, they argue, both patients and doctors have different attitudes to medical intervention or what they call different 'medical mind-sets',⁷⁹ reflecting the common threads identified in their choices. Some are maximalists (wanting to take the treatments available to aim for perfect health), whilst others are minimalists (wanting to avoid treatments where possible and content with 'good enough'). Some prefer natural remedies where available (naturalism orientation), where others opt for the latest from advanced technology, even where the two are comparable in impact (technology orientation). Some are wary of interventions ('doubters'), whilst others have complete faith that the medications or course of action prescribed will

⁷⁸ Indeed Dan Gilbert in his 2005 TEDTalk concurs. He explains that one of the reasons we make bad choices is because "people are horrible at estimating both of these things" (i.e. the odds of the gain and the value of the gain as per Bernoulli's formula). Dan Gilbert, 'Why we make Bad Decisions' (TEDGlobal, July 2005) <www.ted.com/talks/dan_gilbert_researches_happiness#t-122739> accessed 25 July 2015, 2:14. Such a difficulty is also encountered in ED – See Chapter Six, Section 3.

⁷⁹ Groopman and Hartzband (n 75) 14:50. These mind-sets were identified based on nationwide interviews the pair conducted with patients.

work ('believers'). Groopman and Hartzband argue that where a person falls in these categories will go towards determining the decisions they make for their health and medical treatment, and these mind-sets apply to both patients and doctors. For example, the mind-set impact is reflected in the medical industry itself, argue Groopman and Hartzband, drawing on a situation in which three expert organisations provided three different recommendations for cancer screening based on the same data available. Hartzband observed that "Everyone is looking at the same data but they value the information differently due to different mind-sets".⁸⁰ This is pertinent to the present enquiry, offering the idea that the kind of person one is, or the background and motives one has, can influence one's opinion when forming a view or when faced with conflicting information and disagreement. Indeed, we will see in Chapters Three and Five of the thesis how the evidence one has can be at the heart of disagreements in JDM as it is understood and employed in different ways which, in time I will argue, is at odds with the deployment of 'epistemic peers' in the ED literature.

Thus Hartzband and Groopman suggest that in order to best support patients, both doctors and patients need to be aware of the individual mind-sets patients have, whilst patients also need to know that doctors have their own mind-sets too, which might affect their recommendations. Having an awareness of these mind-sets will aid the patient and doctor in making the right decision for them.⁸¹ We again here see the theme of resolving disagreements, but not in the same way observed previously in Section 3. In the present case, there is an added element of the attempt to decide on outcomes based on different sources of information available, whereas in the cases discussed in Section 3, the parties to the disagreement were parties to its resolution. By contrast, the patient is trying to make a

⁸⁰ *ibid* 44:07.

⁸¹ The emphasis on different mind-sets here is a useful one that we will return to when discussing the ED literature and the notion of peer disagreement.

decision based on the different and conflicted information presented to them. That is, they are trying to decide in light of disagreement between others.

Against this backdrop, Hartzband and Groopman ask how a person can decide on what course of action to take when faced with so much disagreement and differing of opinions by medical experts. They argue that matters such as one's mind-set, the statistical information, as well as stories from other people in similar situations can all help the patient and doctor make a sound decision.⁸² Whilst the resolution of disagreement has been referred to in this discussion of Groopman and Hartzband's work, they do not seem to be overly concerned with resolving the disagreements in the medical industry. That is, they are not trying to discern how we might find out who is right or wrong in disputes over treatments and options available to patients. They are instead trying to find a way to support individuals to make difficult decisions, in the face of disagreement and differing opinions. When a patient decides on their care options, they are not *resolving* the disagreement because the experts will in fact go on disagreeing (and providing conflicting information and advice). Instead, they are trying to make sense of what they should *do*, given their own life and experiences, in the situation. Again, this is an instance of practical reasoning in action. We have already seen that patients, just as with some of the 'everyday' examples in Section 3 of this chapter, are often trying to decide what is right for them, given their own circumstances. Again we see a decision required involving sources of conflicting views, though we note that the decision is not necessarily to be made by a party to the disagreement itself. Added to the picture we are forming is the idea that the kind of person we are (the beliefs we hold, how risk-adverse etc. we are) will often play a significant role in how we approach disagreement and how we move forward from it.⁸³

⁸² Gilbert (n 78) 47:30-49:50.

⁸³ This latter point will be particularly important to later discussions. We will see that ED focuses on the confidence we should have in our views but does little in helping us *move forward* from our

5. Disagreement in the courts

The law is complex and far reaching. Whilst contemporary media would have us believe that law in action is found in police stations, crime scenes and court rooms, this is but a small cross-section of the wider net of rules, regulations, procedures, instruments and safeguards that govern our daily lives.⁸⁴ Such governance is extensive; from how fast we can drive our cars,⁸⁵ what time of day or where we can buy alcohol,⁸⁶ and how we can develop and expand our own properties,⁸⁷ to how much paracetamol we can buy at one time,⁸⁸ how many hours a week we can undertake employed work,⁸⁹ and what happens to our estate when we die.⁹⁰ Furthermore, disagreements form the foundations of many reasons the law is referred to and directly encountered; A thinks they are driving at 50mph on a road with a 50mph speed limit, but is stopped by the police for speeding; B thinks the land at the bottom

disagreements. This limits the utility of ED as we see that often the practical realities of situations hinder what we choose to do in practice, irrespective of our belief in the right answer.

⁸⁴ One need only ask stage one undergraduate students to see the influence that US portrayals of the law in action can have on inspiring generations of crime scene investigators (see e.g. Anthony Zucker (creator), *CSI: Crime Scene Investigation* (USA: CBS 2000-2015)) and lawyers (see e.g. Aaron Korsh (creator), *Suits* (USA, USA Network 2011-present)). See also recent reviews of a BBC legal drama 'The Split' as an example of the misleading nature of media portrayals. Kate Landells, 'The BBC's new legal drama 'The Split' is a worryingly misleading take on how divorce really works' *Independent* (5 May 2018) <www.independent.co.uk/voices/bbc-the-split-legal-drama-lawyers-divorce-uk-a8337821.html> accessed 1 December 2018.

⁸⁵ Road Traffic Act 1988.

⁸⁶ The Licensing Act 2003.

⁸⁷ See e.g. 'Legislation' (Planning Portal, 2018) <www.planningportal.co.uk/directory/3/policy_and_legislation/category/9> accessed 20 October 2018.

⁸⁸ The Medicines Act 1968.

⁸⁹ Working Time Regulations 1998.

⁹⁰ Inheritance and Trustees Powers Act 2014.

of their garden belongs to them but C thinks it is theirs; D thinks E has breached their contract but E thinks D has breached, and so on. Because the primary focus of this thesis' exploration of ED relates to its applicability in JDM I focus here on disagreement in the courtroom, looking at the role of the courts, lawyers and judges in legal action, whilst acknowledging the wider legal context in which the courts sit.⁹¹

Where a case reaches the courts in the UK, one typically finds the following participants: the parties involved in the action (prosecution/claimant(s) and defendant/respondent(s)), and a judge presiding over the case to facilitate the process and rule on the outcome.⁹² A judge does not pursue agreement amongst the parties concerned;

⁹¹ Although I focus in this thesis on the courts, in particular the UKSC, it should be noted that increasingly in law focus is placed on *avoiding* the courts, due to factors such as time and financial costs. E.g. in 2014 the courts dealt with 370,700 new civil claims (a decrease of 13% compared to the previous quarter) and 11,100 hearings or trials (a 6% decrease). On average only 3-3.5% of all civil claims go to hearing or trial. 'Court Statistics Quarterly April to June 2014' (Ministry of Justice Statistics Bulletin, September 2014) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/358230/court-statistics-quarterly-april-to-june-2014.pdf> accessed 8 December 2015. Furthermore, the law actively provides for disagreement resolution outside of the court (known as Alternative Dispute Resolution), and in many circumstances one must be seen to first attempt to resolve a dispute outside of the court before it can be taken to court. We should therefore keep mind that although this thesis focuses on JDM huge volumes of disputes never reach the court.

⁹² Where juries are involved in cases, the jury will make the decision on the facts as the *triers of fact*, guided by the judge, whose role is to present them with the legal parameters of the case. See e.g. 'Criminal' (Courts and Tribunal Judiciary) <www.judiciary.gov.uk/about-the-judiciary/the-justice-system/jurisdictions/criminal-jurisdiction/> accessed 24 January 2016. Trial by jury is increasingly uncommon in the UK however, in part due to the expense and inconvenience involved, and is typically preserved for certain criminal cases. Indeed, in 2015 a review of so-called efficiency in criminal proceedings focussed in part on improving the effective utilisation of trial by jury. Sir Brian Leveson, 'Review of Efficiency in Criminal Proceedings' (Judiciary of England and Wales, January 2015) <www.judiciary.gov.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf> accessed 24 January 2016. The following discussion will primarily focus on judges rather than juries to help ensure clarity in the subject of discussion.

seeking instead to determine what the right decision should be in the given circumstances, or what the outcome should be based on the presented facts, evidence, and relevant law. Subsequently, should one of the parties to the dispute be unhappy with the decision made, it may be possible to appeal. After this, a different court and judge(s) hears the case and makes a further decision based on the grounds of appeal. This elementary process is highlighted here because it has the potential to introduce a different instance of disagreement; between judges, instead of just the parties to the case. Such disagreement shall be the subject of Chapter Three of the thesis in regard to disagreement between Justices in the UKSC. An example of such disagreement is illustrated in *FirstGroup PLC v Paulley*,⁹³ concerning a wheelchair user who had claimed that a bus company's policy of 'requesting not requiring' others to move from wheelchair areas on buses was discriminatory. Paulley initially won the case in the County Court. However, on appeal the Court of Appeal (CA) overturned the decision, with the view that such a matter was a question for Parliament and not the Court to decide.⁹⁴ Lewison LJ stated in the CA: "The judge seems to me to have thought that the needs of wheelchair users trumped all other considerations. If that is what he meant, I respectfully disagree".⁹⁵ Such cases are pertinent to our understanding of disagreement in practice, as they require judges to interpret a previous ruling and decide whether they agree or not with that ruling and why (within the confines of the issue(s) put to the court). The language used in *Paulley* is illustrative of the interpretation required by the CA in understanding the original judge's meaning. For example, Lewison LJ's turn of expression "the judge seems to me", shows such interpretation, and indeed lack of finality or certainty. The nature of the situation means that Lewison LJ cannot ask for clarification from the judge in the court of first instance, so he must use the judgment based on the way

⁹³ [2014] EWCA Civ 1573.

⁹⁴ This is an example of legal versus public policy – a focus in Chapter Three.

⁹⁵ *Paulley* (n 91).

in which he has understood and/or interpreted it. Indeed, the CA decision was then overturned by the UKSC,⁹⁶ further illustrating the dynamics of disagreement in the courts. The appeal process therefore adds an extra layer to the decision making process, as judges in these circumstances are not present at the time of the original decision, and so must acquire their knowledge of the case and matter in question largely through records of the case.

With regard to the decisions of judges, to be turned to in Chapter Three, dissenting judgments are in fact a good example of the productivity of disagreement, observed in the discussion of Alice Stewart's work in Section 3 of the present chapter. Some judges react to disagreement with their peers by maintaining their stance and producing a dissenting judgment. Such dissenting judgments serve the purpose of showing that a judge was not in agreement with the leading judgment, and are written evidence of this. By laying out the reasons for their differing view(s) on the case, dissenting judgments can be used to indicate that the issue under dispute might be one that the courts ought to address further at a later point. Moreover, dissenting opinions can also be useful for future cases should a judge deem it relevant.⁹⁷ Dissent and argument is also useful in determining the right answer in a case. Challenges to one's decision or argument, provide the opportunity to test the argument's

⁹⁶ *FirstGroup PLC v Paulley* [2017] UKSC 4.

⁹⁷ For example, in *McLoughlin v O'Brian* (a civil law case concerning the duty of care a defendant owed to persons not at the scene of an accident caused by the defendant's negligence) Lord Scarman used a dissenting opinion as an example in confirming the applicability of a reasonable foreseeability test, noting: "as has been made clear by Evatt J., dissenting, in *Chester v. Waverley Corporation*, 62 C.L.R. 1 in the High Court of Australia, by Tobriner J. giving the majority judgment in the Californian case of *Dillon v. Legg*, 29 A.L.R. 3d 1316, and by my noble and learned friend in this case, common law principle requires the judges to follow the logic of the "reasonably foreseeable test" so as, in circumstances where it is appropriate, to apply it untrammelled by spatial, physical, or temporal limits" ([1983] 1 AC 410, 430-431). Lord Scarman goes on to refer to Evatt J's dissent as a "powerful dissenting judgment, which I find wholly convincing" (at 439), noting it had also been drawn on in other cases since.

robustness through the need to defend it. As with Stewart, this defence provides the conviction needed to be sure of the decision made; crucial when the potential result is, for example, a criminal conviction.⁹⁸

In Section 4 of this chapter Groopman and Hartzband's account of how disagreements should be resolved in medical decision making was examined; an account which presents similarities with law. Comparable in some respects to the account given of a patient's decision making process, a judge's role is not to try to resolve the disagreements between parties to a case; it is quite conceivable that the two parties will continue to disagree even after the case is concluded. For example, the legal process may not change the belief of a purported victim of a crime that the defendant was guilty, even if the defendant were to be found not guilty.⁹⁹ Instead, the judge's role is to provide an answer to the dispute at hand based on the relevant information (evidence and law) available to them.¹⁰⁰ Indeed, a further similarity is found in the idea of mind-sets. Whilst in the UK, the legal system is intended to be impartial, with the law applied without recourse to the judge's own principles, it is widely argued that this is not the case in practice. Unlike in the UK, the influence of a judge's own principles is formally acknowledged in the Supreme Court of the United States (SCOTUS), with Justices being elected to their posts via means that includes rigorous questioning

⁹⁸ Although focus is placed here on decision making, it will be suggested in this thesis that disagreement and decision making should be demarcated in order that we do not confuse what we understand to be disagreement with processes of decision making. See Chapter Seven, Section 2.

⁹⁹ Indeed it is noteworthy that defendants in criminal law are to be found guilty or not guilty; innocent is not a verdict that can be reached. See the discussion of *Adams* in Chapter Three, Section 3.2.

¹⁰⁰ Or, in the case of a jury trial, to ensure that the law is followed. See e.g. 'Criminal Justice' (Courts and Tribunals Judiciary) <www.judiciary.gov.uk/about-the-judiciary/the-justice-system/jurisdictions/criminal-jurisdiction/> accessed 25 November 2018, 'Civil Justice in England and Wales' (Courts and Tribunals Judiciary) <www.judiciary.uk/about-the-judiciary/the-justice-system/jurisdictions/civil-jurisdiction/> accessed 25 November 2018, and Garry Slapper and David Kelly, *The English Legal System* (18th edn, 2015 Routledge) Chapters Twelve and Fourteen.

regarding their own political views.¹⁰¹ The political leanings and decision tendencies of each SCOTUS Justice is therefore widely known¹⁰² and, as with the mind-sets discussed by Gropman and Hartzband, can be used as an indicator of what the likely outcome of the case will be before the ruling is made. The difference of course here is that in law the political leanings can be used more as a predictor of what will happen, whereas Gropman and Hartzband use the mind-sets to help make the best decision for the patient. In this vein, a key consideration in Chapter Three will be the role of legal and public policy in JDM, and we will see that a range of factors, including personal bias and/or background influences (what we might say here are mind-sets) come to bear on disagreements in the court.

Reflecting then on judicial proceedings, we can see just how beneficial it would be to have a guide to disagreements and, as we will see is a focus for ED, “what we should do when we realize that there are people who disagree with us”.¹⁰³ Neil MacCormick notes in his work on legal reasoning that “Some arguments are genuinely better than others, although it is often possible for reasonable and highly experienced judges to differ about the right

¹⁰¹ Indeed, as Reynold observes, a reason disagreement occurs in SCOTUS is the fact that judges are elected to their positions, resulting in decisions that may split down ideological lines; in part because the appointment process endorses a more ideologically driven approach to decision making. Justices in the UKSC by contrast are not meant to be influenced by any political allegiances or leanings. Section 3.3 of the Guide to Judicial Conduct states: “Each Justice will refrain from any kind of party political activity and from attendance at political gatherings or political fundraising events, or contributing to a political party, in such a way as to give the appearance of belonging to a particular political party.” ‘Guide to Judicial Conduct’ (The Supreme Court of the United Kingdom, November 2017) <www.supremecourt.uk/about/judicial-conduct-and-complaints.html> accessed 23 October 2018. As such, and as Reynold too observes, the ideology of the UKSC, unlike SCOTUS, is not obvious, and nor can the individual Justices’ ideological views be so readily ascertained. Frederic Reynold, *Disagreement and Dissent in Judicial Decision-Making* (Wildy, Simmonds and Hill Publishing 2013) 136.

¹⁰² See e.g. Taylor Kate Brown, ‘Meet the Supremes: Who are the US Supreme Court justices?’ (BBC News, 27 June 2015) <www.bbc.co.uk/news/magazine-33103973> accessed 20 July 2015.

¹⁰³ Bryan Frances, *Disagreement* (Polity Press 2014) 3.

conclusion to make”.¹⁰⁴ Whilst there are often very ‘clear cut’ or, so-called “easy cases”¹⁰⁵ in which the decision to be made is considered obvious, there are many situations in which judges find it difficult to determine the outcome of a case or particular dispute. In such cases a decision still needs to be made (whether this be by unanimous or majority decision). It would be unacceptable, for example, for a judge to abstain from a decision. Thus, whilst it might be acceptable for you and I to ‘agree to disagree’ when it comes to deciding, say, what we should do in our free time, the same would not be acceptable when it comes to determining if D is guilty of manslaughter.¹⁰⁶ We touched upon this in Section 3 above, and herein lies a key difference between the everyday disagreements one might engage in, and those encountered in the courts. As MacCormick puts it;

In such cases, decisions must still be made, with finality but without infallibility, because it is in turn reasonable to use such methods as majority voting to settle a matter that has to be settled in the interest of justice and good order.¹⁰⁷

Thus, although it would be conceivable to think of law as striving for fact finding or perhaps even truth, this is not the same as saying the legal system is designed to seek truth.¹⁰⁸ The system itself balances sound decision making with the practicalities of governance. This is seen, for example, in criminal law safeguards for the protection of both defendants and

¹⁰⁴ Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (OUP, USA 2005) 2.

¹⁰⁵ This term is widely used in the literature, particularly in the works of those commenting on HLA Hart’s legal theory. See in particular Andrei Marmor, *Interpretation in Legal Theory* (2nd edn, Hart Publishing 2005), and Brian Bix, *Law, Language and Legal Determinacy* (Clarendon Press 1995).

¹⁰⁶ Frances makes this distinction between belief-disagreement and action-disagreement, discussed in Chapter Six, Section 3.1.

¹⁰⁷ MacCormick (n 104) 2.

¹⁰⁸ Again we will see in Chapter Seven that an overarching influence in Dworkin’s work is the idea that there can be truth in the decisions made in the courts.

victims of a crime, such as extensive evidence law to govern how evidence can be obtained and presented. A typical example of this is the hearsay rule, whereby the statement of a third-party is inadmissible in a legal case. Such laws can be seen as designed for the ends of fairness in legal proceeding, as Lord Normand noted in *Tepper v The Queen*:

The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost.¹⁰⁹

Finally, the role that belief plays in disagreement in the courts will be the subject of analysis in this thesis. It is often asserted that belief in the truth regarding the matter in question has very little to do with the disagreements faced in law or indeed with their settlement, and that instead value is placed on the rhetoric and persuasive capabilities of lawyers. Indeed, in order to become a Barrister in the UK one must sit the Bar Professional Training Course, which focuses significantly on the assessment of skills in advocacy.¹¹⁰ Furthermore, part of a lawyer's role in an adversarial criminal legal system such as that in the UK is to present the best defence for their client, often irrespective, though not by necessity,

¹⁰⁹ [1952] A.C. 480, 486.

¹¹⁰ Moreover there are countless publications focused on how lawyers can work to improve their persuasion and argument skills, such as Gerry Spence, *Win Your Case: How to Present, Persuade, and Prevail---Every Place, Every Time* (St Martin's Griffin 2006) and SL Brodsky, T Neal, RJ Cramer, and MH Ziemke 'Credibility in the Court Room: How Likeable should an Expert Witness be?' (2009) 37(4) *The Journal of the American Academy of Psychiatry and the Law* 525. Such resources not only demonstrate the business of legal action, but the nature of argument and persuasion in court.

of their own belief in the guilt or innocence of the client. As one American lawyer aptly puts it:

One simple answer [when a client asks the lawyer if they believe in their innocence] is “my belief is irrelevant.” I am here to defend you, to analyze all the evidence in your case, to see if there are legal or constitutional issues, and to determine if the case can be proved beyond a reasonable doubt. If I find some defense or legal issue, my job is to pursue that as far as I can to either mitigate the punishment or beat the charge. So my belief is irrelevant. It is up to a jury or a judge to ‘believe’ if you are innocent or guilty. If my beliefs intruded, I might not zealously defend you. You don’t want my beliefs—my personal prejudices or preferences—to motivate me, do you? No, you want an advocate who looks under every rock in the case to find a flaw, to push the envelope, and to work until every possibility is explored, not a lawyer who works on ‘belief.’ If lawyers had to ‘believe’ their clients were innocent to defend them, few people would be defended very well...¹¹¹

The above summarises one view commonly presented by and about lawyers in relation to defending clients. Thus, unlike in the examples discussed in Sections 3 and 4, the belief of the parties to the disagreement is not often a pertinent factor to disagreements in court. In a legal case, those advocating for clients do not present their own beliefs; rather they present a, hopefully, meticulously researched, reasoned account to best support their client. A matter for consideration in Chapter Three, and Section B of the thesis, will be the role that

¹¹¹ ‘Do lawyers need to believe their clients are innocent?’ (Seattlepi, February 2010) <<http://blog.seattlepi.com/defenseattorney/2010/02/09/do-lawyers-need-to-believe-their-clients-are-innocent/>> accessed 22 April 2015.

belief plays in the disagreements evident in JDM, as well as in the ED presentation of disagreement, with its emphasis on when and why one should revise one's belief in light of disagreement. It shall be my argument that, in addition to my claim that such belief-revision is unrealistic, beliefs are not in fact as pertinent to disagreements in the court as ED's emphasis would suggest of disagreements more broadly.

6. How I proceed

The exploration of disagreement in this Chapter has extended to disagreements between colleagues, partners, friends, in medicine, between lawyers, parties to a legal dispute, and judges. The examples presented show but a fraction of the situations in which we employ the term, and yet we can already see the diversity of its use. We saw in our exploration of definitions, that a common theme was argument and conflict (along with the often hostile connotations of these terms), yet in the examples of disagreement presented in this chapter, we have not seen such hostility as a typical feature. We have seen too a theme of 'right and wrong', though we also found this by no means systematically employed nor always accounted for. A further theme observed has been the idea of having a different opinion, though doubt too has been cast on the extent to which one needs to believe in the matter one is disputing in order for it to be a disagreement. And we have seen that although disagreement resolution is useful in establishing how we *use* disagreement, it is not core to the concept itself, and that to confuse the two can conflate disagreement with processes of decision making. We have seen, I argue, that a search for unity in these instances (in order to provide a singular and simple account of disagreement) is the wrong thing to hope or search for in this endeavour. Instead, what we are beginning to see is that it depends to a certain extent on the context in which disagreement is found, and for which purpose it is employed that influences what we take to be its meaning. However, this does not mean that

disagreement is a particularly complex concept, nor does it mean that disagreement has different meanings in different contexts. Rather, what we observe here is the caution Wittgenstein offered in *Philosophical Investigations* noted in Section 2.2, that the extension of disagreement should not be “closed by a frontier”,¹¹² and nor should such extension lead one to unreflectively attribute to disagreement that which is merely circumstantial to the context in which it features. It will be my argument that in both ED and jurisprudence these aspects are blurred, resulting in mistakenly attaching a meaning to disagreement that is in fact situational to the object or circumstances in which the term is employed. A consistent claim throughout this thesis is therefore a call to avoid mistaking certain elements of situations in which disagreement is used for properties of disagreement itself. If we proceed armed with the expectation that the concept of disagreement is richly used and diversely applied, whereby the circumstances in which it is employed influences the way in which it is used, we may proceed with the clarity hoped for in our subject matter.

¹¹² See n 28.



CHAPTER THREE

Judicial Decision Making: Disagreement, Dissent and Concurrent Opinions



SECTION A THE CASE FOR DISAGREEMENT

1. Why examine UK Supreme Court decisions?

This chapter is intended to embed the thesis in the language and content of the UKSC decisions, and the active nature of the disagreements taking place in the considered written judgments of the UKSC Justices. This will be achieved through the presentation and analysis of four judgments, each of which demonstrates disagreement amongst the Justices of the court, to varying degrees and in different ways. By contextualising the project in this way it is hoped that rather than merely applying the ED philosophy to law, we will first be able to see what work such theory needs to do. That is, in order to understand why judges, when presented with the same evidence, come to disagree; not just on outcomes, but on the weighting, focus and process of their decisions. It is therefore proposed that by starting with the disagreements we seek to take seriously, we will be better prepared to put the theory to the test; ultimately demonstrating significant weaknesses in the examples of disagreements offered by the philosophy for providing an insight into the nature and significance of disagreement in JDM.

Before presenting the selected judgments, it is worth pausing to expand upon why UKSC judgments are ideally placed to test the applicability of ED to law. I offer three related reasons, the first of which lies in the nature of the ED literature. As explained in Chapter One, ED typically focuses on the exploration of disagreements involving epistemic peers (that is, one or more people over whom one has no epistemic advantage or disadvantage).¹ As I argue in Chapter Five of the thesis, the requirements for one to be deemed a peer in the literature are very narrow, so in order to explore the real-world application of ED, the UKSC is well placed as an elite, highly selective forum. If peers are to be found, it would be here. The second reason concerns the arguable nature of the cases in a last resort forum such as the

¹ What it means to be a peer in ED will be the subject of discussion in Chapter Five.

UKSC, which makes disagreements in the decision making process or outcomes of great importance to society. As the highest court of the UK, an important function of the UKSC is to provide clarity on issues that have been contentious in the lower courts, and that could have significant implications for the wider public.² The cases that reach the UKSC are thus inevitably controversial and, in granting leave to appeal, the court only “hears appeals on arguable points of law of the greatest public importance”.³ It is perhaps unsurprising therefore that such arguable cases are not always resolved unanimously. In taking disagreement in the judgments of cases seriously, we see how disagreement is both overlooked and underestimated in law. As touched upon in Chapter Two, this is evident in the decision making structures of the UKSC,⁴ designed with the practical impetus of requiring an outcome, and one that society can be confident in, even when strong disagreement is evident in the process. This impetus for finality means that in practice disagreement *need not* be taken seriously by virtue of the majority decision making process. That is, any disagreement amongst the judges to a case is effectively undermined or overcome by a requirement for majority, rather than unanimous, agreement in the ruling of a case, which is secured by ensuring that an uneven

² Indeed it is of interest to note that the court is very selective regarding the cases it will hear, with less than half of the applications for appeals and hearings being granted in any given year. E.g. in April 2016-March 2017, the UKSC received 209 Permission to Appeal (PTA) applications, 91 cases were heard, and 76 judgments given. ‘The Supreme Court Annual Report And Accounts 2016-17’ (2017) 23 <www.supremecourt.uk/docs/annual-report-2016-17.pdf> accessed 3 February 2018. This is similar to the previous year in which 230 PTA applications were received, 92 cases were heard, and 84 judgments given. ‘The Supreme Court Annual Report and Accounts 2015-16’ (2016) 20-21 <www.supremecourt.uk/docs/annual-report-2015-16.pdf> accessed 3 February 2018.

³ ‘How does the UKSC fit into the UK’s Court System?’ (The Supreme Court of the United Kingdom) <www.supremecourt.uk/faqs.html#1b> accessed 1 October 2018.

⁴ As is made clear in the discussion of cases below, this thesis makes use of cases heard in both the UKSC and UKHL. For consistency and to avoid confusion, when general reference to the court is made it will be referred to as the UKSC, as this is the court in its present day form.

number of Justices hear each case.⁵ This structure does not however mean that disagreement is overcome or resolved. Rather, in practice the outcome of decisions where not all parties accede to the same opinion means that disagreement is not, and importantly *need not* be, dealt with because only majority agreement is required. To reiterate then, ultimate focus is placed on the outcome or final conclusion and not the process by which it is reached.⁶ In practice this means that a case could be concluded with, for example, two of five judges (where five judges sit) disagreeing with the conclusion. This is a well-known and accepted by-product of a system that demands a result. More than this however, of the three judges who agree with the final conclusion, each may have different views as to both how and why the conclusion is reached. That is, even when judges are in agreement regarding the conclusion, there are disagreements that may or may not be of import to our overall understanding of the law and its development, which go unaddressed and undealt with. This leads us to two questions. First, what does majority rule in a deliberative system mean for our understanding of disagreement in law, and second (and more specifically), when there is such disagreement in process, to what extent can we say there is agreement in outcome? These questions relate to the nature of the reasoning evident in UKSC judgments and will be explored both in the present chapter and throughout the thesis.

⁵ This impetus of finality and confidence is further evidenced by the fact that although decisions can be made by lone judges in the lower courts, in cases where an even number of judges sit and cannot make a decision, the case is reheard with an odd number of judges to ensure a decision. When decisions are appealed, that is when there is a contention in some permitted form over the decision made, panels of odd numbers of judges are required and a majority decision accepted, because final decisions need to be made over what are often difficult and contentious points of law or legal development.

⁶ Indeed this is clear when we distinguish between the ratio decidendi and obiter dicta of a judgment. In terms of engaging with the judgment as a whole, this is often only to determine that which is binding (the ratio of the case). E.g. in studying law, students are trained to read judgments in order to 'find' the ratio of the decision. Although encouraged to engage with full judgments, this is therefore often in the narrow frame of identifying what the legal precedent of a case is.

The third, more prudent, reason for using UKSC judgments as a focus in this study is the fact that judgments are complete, published and accessible, making disagreements in the UKSC judgments a more transparent platform for scrutiny of ED than some other instances of disagreement that could have been used, such as disagreement in a jury.⁷ Here an important clarification of the approach to disagreement to JDM in this thesis should be made. Namely, that as far as possible, it will be taken for granted that the written judgments represent the views of the Justices. Or more precisely, that they are the views that the Justices intended to express, for we will consider the influence of belief in decisions throughout this thesis; a significant focus due to the prominent role it plays in ED theory.⁸ For the purposes of contextualising the thesis with written UKSC judgments, it is understood that judges may present a 'united front' where disagreement might have taken place behind closed doors⁹

⁷ To expand, disagreement amongst jurors in a criminal trial would be a pertinent focus for exploring the application of ED due to ED's focus on *peer* disagreement because, after all, the purpose of a jury trial is to try a defendant by their peers. A problem with exploring jury decision making however is how little we know about such decision making processes due to the secrecy required. Juries do not have to justify their verdict, nor are they allowed to talk about their decision after the case has concluded; they could be charged with perverting the course of justice under the Contempt of Court Act 1981 if they were to do so. Under present UK law therefore, it is not possible to undertake research into how juries make their decisions (this is different to the USA where jurors are able to freely discuss their experiences of a trial, though there is little documentation of this). Work has been done in psychology concerning jury decision making and disagreement therein specifically. E.g. a 1993 publication concerning the psychology of juror decision making is contextualised with the question: "Why do jurors who hear the same evidence frequently disagree on the proper verdict?" Reid Hastie (ed), *Inside the Juror: The Psychology of Juror Decision Making* (CUP 1993). Such work makes use of mock jury trials and simulations, and although this would make for an interesting focus for ED's application, for the purposes of this thesis the written judgments of the UKSC are used to provide an authentic, less speculative focus for this study.

⁸ See e.g. Chapter Six, Section 3 regarding belief and acceptance, and my arguments concerning ED's misplaced attention on one's belief in a disagreement.

⁹ For example, Lee Epstein et al observe that this has historically been the case in SCOTUS. In examining the difference between conference votes (prior to judgment) and eventual case reports from a sample between 1874 and 1887 they note: "Even in civil liberties cases, in which the judges were more likely

and indeed there are differing views regarding whether or not the court should present a ‘united front’, as referenced in the Introduction to this thesis.¹⁰ As the written judgments are what we have to go by in terms of the views advanced, this thesis will not delve into speculation regarding the sincerity of the opinions posited, though consideration of policy influences will be made, and the potential reasons behind decisions and their formulation will be explored.¹¹ Thus, although other areas of law could be used to assess the utility of the philosophical and jurisprudential literature drawn upon in this thesis, and of course other examples of disagreement will be utilised in exploring the phenomenon, UKSC judgments have been chosen as a focus for this enquiry; for the importance such decisions have in society, and for the accessibility of the intricacies of decisions made. In presenting the cases, this chapter takes a simple structure. Section 2 provides contextual detail regarding how UKSC decisions are made. Section 3 follows with four subsections, each dedicated to an exploration of the chosen cases for examination in this thesis, and Section 4 concludes the chapter with an offer of preliminary remarks in preparation for the explication of the ED philosophy in Section B of the thesis.

to stick with their dissenting conference votes than in other areas, a similar trend emerges: the justices produced nonunanimous conference votes in fifty-eight of the 148 cases but, in 60 per cent of those fifty-eight cases, a unanimous report vote resulted.” Lee Epstein, Jeffrey Segal, and Harold Spaeth, ‘The norm of consensus on the U.S. Supreme court’ (2001) 45(2) *American Journal of Political Science* 367.

¹⁰ See Chapter One, n 10. As we saw in the Introduction, this relates not only to the UKSC, but to similar fora across Europe and the world, speaking also to the difference between common law traditions (which typically allow dissent) and civil law traditions (which typically do not allow dissent). See Chapter One, n 8 on this point. Undergraduate textbooks also speak to the role of the judge (see e.g. Section 2 ‘People Working in the Legal System’ in Catherine Elliott and Frances Quinn, *The English Legal System* (19th edn, Pearson 2018). For a more sophisticated exposition see e.g. Neil MacCormick, *Legal Reasoning and Legal Theory* (OUP 1994).

¹¹ This will be the case in particular in relation to Reynold’s book since he focuses on policy and whether or not disagreements in decisions were the result of legal and/or public policy disputes.

2. A brief note on how UKSC decisions are made

In providing context for the thesis and the decisions made in the UKSC, along with the disagreements that occur, it is helpful to establish the typical decision making process of the court. The process can be described as deliberative. In hearing an appeal, the UKSC Justices hold an initial private meeting to discuss the case and prepare for the hearing. This is then followed by the hearing, after which a further private meeting is held to deliberate. There is a hierarchy to proceedings by which views are shared starting from the most junior through to the most senior justices hearing the case.¹² In terms then of writing up the decision, the Justices will agree who will draft the decision of the majority, and Justices have the opportunity to write their own judgment if they see fit. Often this is a decision that is made during the course of sharing the drafts as, based on what is being produced, they can choose to sign up to the majority judgment, to another judgment (be that concurring or dissenting), or to write their own (again, be it concurring with or dissenting from the majority). It is only when the Justices are happy with the opinions written (i.e. the ones each has signed up to) that the judgment is confirmed (comprising the opinions) so further discussions may take place until consensus is reached.¹³ It should be noted that although this thesis is concerned

¹² Typically cases are heard by five Justices, always with an odd number. Although the most Justices to sit at any one time has in the past been nine, for the first time eleven Justices (i.e. all Justices appointed at the time) heard a case in 2017 concerning so-called Brexit, in which the Justices ruled on whether Parliament or Government needed to trigger Article 50 of the Treaty of the European Union. *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

¹³ 'The Supreme Court of the United States of America (SCOTUS) and the Supreme Court of the United Kingdom (UKSC)' The Supreme Court of the United Kingdom (2014) <www.supremecourt.uk/docs/scotus-and-uksc-comparative-learning-tool.pdf> accessed 6 March 2017.

with the exploration of disagreement in the courts, often the court will be unanimous in its decision and a singular judgment agreed.¹⁴

The process of producing the judgment(s) means that typically the decisions of the court have been discussed and agreed prior to the finalisation of the judgment. Notably a different route was taken by the UKHL in a 1987 case in which their Lordships agreed to publish their judgment before having the opportunity to read one another's draft opinions. They had agreed to do so because one of the judges to the case, Lord Bridge, was to be out of the country soon after the case was heard which would have delayed the publication of the judgment by two months. The court deemed this unacceptable in the circumstances as the case concerned injunctions restraining media publications from reporting on allegations made in an autobiography 'Spycatcher', and as such was time-sensitive.¹⁵ Lord Bridge, although agreeing to publish the judgment, noted in his dissenting opinion that he was at first reluctant because it meant, as he put it, "that I must accept the disadvantage of expressing my dissent before I have had a chance of reading and at least trying to understand the reasons which your Lordships in the majority are going to give in support of your decision".¹⁶ This case highlights the perceived importance of the ability to confer between one another when forming opinions and making decisions over cases. Indeed, at the end of his judgment Lord Bridge was compelled to add a postscript to confirm his opinion, noting: "I have now had the opportunity to read first drafts of the opinions of my noble and learned friends, Lord

¹⁴ In 2017, e.g., a single judgment of the court was issued in fifty-three (sixty-five per cent of) cases, with Justices expressing dissent in only twelve (sixteen per cent of) cases. Brice Dickson, 'In the Line of Duty: A Year in the Supreme Court' (New Law Journal, 12 January 2018) <www.newlawjournal.co.uk/files/article_files/017_nlj_7776_inside_court_dickson.pdf> accessed 24 November 2018. Of course then, extent of discord should not be overstated – and, as we saw in Chapter One, cases to reach the court are a small fraction of those resolved outside of the judicial arena. This does not however undermine the *significance* of the disagreements in the UKSC.

¹⁵ *Attorney General v Guardian Newspapers Ltd* (No.1) [1987] UKHL 13, WLR 1248.

¹⁶ *ibid* 1282.

Templeman and Lord Ackner. I remain in profound disagreement with them".¹⁷ We can see then from the decision making process of the court, and this example of deviation from process, that the ability to confer is considered important. This is significant to note, not only in contextualising the judgments to be discussed in this thesis, but for our understanding of the disagreements that take place. We will see in Chapter Four that such deliberation and conference is typically lacking in the examples of disagreements employed in the ED literature.¹⁸

3. The cases

In focussing on judgments from the UKSC in which disagreement is evident, it is apparent that the decision making process is complex. In the judgments analysed in this chapter, not only is disagreement present, but even where judges' opinions form the majority decision, they sometimes come to their own differently reasoned conclusion regarding what they perceive to be the right answer to the question before the court. That is, even with a majority agreement, each of the judges deemed to be in agreement articulate different reasons for coming to the same conclusion. These concurring opinions, or separate concurrences, are of interest to this thesis because they enable examination of what it means to agree and disagree.¹⁹

The cases chosen for this chapter were purposefully selected from those used by Frederic Reynold in his book *Disagreement and Dissent in Judicial Decision Making*.²⁰ Reynold,

¹⁷ *ibid* 1287.

¹⁸ See e.g. Chapter Four text to n 67.

¹⁹ They also bring into focus the question of what it means to have a 'right' answer; an idea which will be taken up in Chapters Six and Seven.

²⁰ Frederic Reynold, *Disagreement and Dissent in Judicial Decision-Making* (Wildy, Simmonds and Hill Publishing 2013).

having been called to the Bar in 1960, and appointed QC in 1982, has a wealth of experience in the UK court system. As such his text is useful for this thesis as he approaches judicial decision making from a practitioner's point of view.²¹ Furthermore, as his focus is disagreement and dissent, the cases that Reynold selects for his text present interesting and varied disagreements between the judges in each case, thereby comprising ideal case studies for this thesis. In addition to this simple reason of utility, Reynold's choices are used in order to demonstrate that although some attention in the legal arena is being placed on disagreement in judicial decisions, the attention is currently insufficient and often misplaced. For example, although the title of Reynold's text is *Disagreement and Dissent in Judicial Decision Making*, Reynold approaches disagreement in judgments in terms of the overall outcome of the cases because, from his practitioner's standpoint, Reynold is interested in the judicial decisions as *policy* decisions. Indeed, a prominent focus in Reynold's book is his assessment of the distinctions judges make, if any, between what he notes as legal policy (an area judges should be able to engage in) and public policy (an area that should be left for Parliament).²² This interest in policy is important to highlight because it indicates that disagreement is not in fact the chief interest in Reynold's work. Rather, he uses disagreement and dissent to facilitate his chief focus; the influence of policy in decisions made in the highest court of the UK.²³ Thus in using the cases drawn up by Reynold, in addition to his commentary, we see that his analysis appears to be driven through a lens of policy consideration rather than an interest in disagreement itself. Although this limits the use of Reynold's work in taking

²¹ 'Frederic Reynold QC' (Old Square Chambers) <www.oldsquare.co.uk/our-people/profile/frederic-reynold-qc> accessed 15 July 17. Indeed, the publication of Reynold's text during the course of the research for this thesis was a welcome practical addition to what will be demonstrated to be a densely theoretical literature. Reynold has been involved in several UKHL and UKSC cases so has first-hand experience in these fora.

²² Reynold (n 20) xv.

²³ This will be demonstrated in the analysis of the four cases presented in this chapter.

forward our understanding of *disagreement*, it stands as a useful comparison to the approach adopted in the present project; supporting the demonstration of not only why it is useful to reflect on the notion of disagreement, but how such attention can light up our understanding of the disagreements in the courts.

Through the analysis of four cases in this chapter I aim in the first instance to demonstrate the complexity of the disagreement present in the judgments, both *between* the majority and minority to the decision and *within* the majority and minority decisions to a case. Thus, a focus of analysis will be the disagreements evident in concurring opinions, where judges in coming to an overall agreement offer different reasons for reaching their common conclusion. This analysis will therefore begin to put pressure on our understanding of the ideas of agreement and disagreement by demonstrating the extent of discord in the process of creating outcomes that will function as precedents for future decisions. With regard to the cases selected for discussion, it should be noted that Reynold's text utilises cases from the preceding twenty-five years, thus drawing upon both UKHL and UKSC judgments. In this chapter two judgments have been selected from the UKHL and two from the UKSC. The equal divide is inadvertent as the cases were selected on the basis of the disagreement present rather than the forum in which they were heard. Nonetheless, this use of old and new is worth noting, and indeed Reynold does so, as academics and practitioners alike consider the extent to which the move from UKHL to UKSC has changed the court – if at all. A persistent question has been whether the change to UKSC has resulted in more or less disagreement in decisions.²⁴ Reynold observes that the amount of disagreement seen in the UKSC thus far is

²⁴ In the first three years of the UKSC (2009-2011), dissent rates averaged higher than in the UKHL at twenty-four per cent (compared to twenty-two per cent in the UKHL). Katie Dowell, 'All for one' (The Lawyer, 21 April 2014) <www.thelawyer.com/issues/tl-21-april-2014/all-for-one/> accessed 21 January 2017. It has also been suggested that the leadership of the court can effect dissent rates, with Lord Neuberger (President 2012-2017) encouraging what has been referred to as a "collegial working culture". Katie Dowell, 'Judicial Dissent wanes under Neuberger regime at UK Supreme Court' (The

comparable to that observed in the UKHL previously.²⁵ What he does note however is what he refers to as a “sharper edge” to the disagreement: “horns are locked and arguments are met head on – previously it had frequently been the case that no reference was made at all to the judgments of one’s colleagues, let alone to their arguments.”²⁶ This is certainly something we see in cases examined in this chapter, with Justices engaging directly with one another’s arguments. This is significant to note as the role that communication plays in disagreement will be explored in Chapter Four of the thesis.²⁷ In analysing the four cases that follow, the diversity and subtleties of the decisions advanced, in dissenting judgments as well as concurrent opinions, will be important in informing our overall impression of what it might mean to agree and disagree in judgments. That is, we will explore the extent to which a majority decision can be considered agreement when different reasons, rationales and weighting of such are advanced in reaching the decision made. This is important for our understanding of the overall force of the ED literature, which we will see demarcates between

Lawyer, 23 April 2014) <www.thelawyer.com/issues/online-april-2014/judicial-dissent-wanes-under-neuberger-regime-at-uk-supreme-court/> accessed 21 January 2017. See too Lord Neuberger’s 2012 lecture in which he suggested that he would like to see fewer, briefer, dissents. Lord Neuberger, ‘No Judgment, No Justice’ (First Annual BAILII Lecture, 20 November 2012) <www.supremecourt.uk/docs/speech-121120.pdf> accessed 26 August 2018 and Chapter One, n 18.

²⁵ Reynold states: “In fact the statistics show that up to May 2013, 26 per cent of Supreme Court decisions have been majority decisions, which happens to be a figure broadly in line with the decisions of the House of Lords Appellate Committee over the last 50 years of its existence.” Reynold (n 20) xiii.

²⁶ *ibid.* E.g. in *McDonald* Lord Walker made it abundantly clear that he disagreed with Lady Hale’s opinion in the case. He not only states that he felt “bound to say something” about her judgment, but used phrases such as “nothing short of remarkable”, “I totally disagree with” and “I deplore”. *R (McDonald) v Royal Borough of Kensington and Chelsea* [2011] UKSC 33, [2011] PTSR 1266, 1292 [29].

²⁷ In Chapter Four, e.g., we will see that a recurring feature in understanding disagreements is the role of communication between the parties to a disagreement. Chapter Four, Section 4.1, in particular text to n 67.

genuine and illusory disagreement and agreement (that is, what it means to say that we genuinely agree or disagree over a proposition).²⁸

Each of the four cases presented in this chapter demonstrates a different dynamic evident in judicial disagreement. In each of the cases, the majority decision involves the presentation of more than one opinion for the majority. Thus although the majority were in agreement as to the outcome of the case, they advanced different explanations, reasoning, and emphasis for their decisions. In order to provide sufficient material for the discussions which follow in the thesis, time is taken over each case not only to outline the facts and decision, but to provide the beginnings of detailed analysis of the disagreements present. The first case, *Barry*,²⁹ concerns the correct reading of a statutory provision, and demonstrates the disagreement that can arise when judges are in conflict regarding the meaning of ordinary words in the context of a statute. The second case, *Adams*,³⁰ is structurally the most challenging decision to engage with. This unwieldy judgment sees the positing of seven opinions from a panel of nine Justices, each excavating, often at length, different aspects of the facts and law. The third, *Brown*³¹ is infamous in the undergraduate law curriculum and is used to demonstrate that even in widely renowned cases, fundamental disagreements can either be buried or else dismissed as mere policy disputes. The fourth and final case, *Quila*,³² demonstrates circumstances in which a Justice feels compelled to submit a lone dissent.

3.1 Case 1: when judges disagree over the meaning of ordinary words

²⁸ This will be explored in Chapter Four.

²⁹ *R v Gloucestershire CC and Another ex parte Barry* (Conjoined Appeals) [1997] UKHL 58, [1997] AC 584.

³⁰ *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48.

³¹ *R v Brown* [1993] UKHL 19, [1994] 1 AC 212.

³² *R (Quila & Anor) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621.

Some of the particularly interesting cases discussed by Reynold concern the meaning of ordinary words.³³ It is through these cases that decisions influenced by policy considerations are arguably quite evident. That is, the idea that judges make sense of the words in such a way as to satisfy their idea of what they ought to mean for public, practical or legal interests. One such case concerns a UKHL judgment regarding the correct reading of section 2 of the Chronically Sick and Disabled Persons Act 1970 in relation to a Council's duty to provide for a person's *need(s)* of certain welfare services. According to the provision:

Where a local authority... is satisfied... that it is necessary in order to meet the needs of [a person who qualifies for assistance] for that local authority to make arrangements for the provision of: [practical assistance listed in (a)-(h)]... it shall be the duty of that authority to make those arrangements...³⁴

In this case Mr Barry had been granted support based on an assessment of his needs in the form of cleaning and laundry services that had since been withdrawn by the council as a consequence of funding cuts. In the court of first instance it had been ruled that the council *could* take its own resourcing into account in the assessment of needs. The CA overruled this decision, followed by the UKHL overturning the CA's ruling three to two in the council's favour. As Lord Nicholls noted at the beginning of his opinion, in coming to the UKHL view there had been "considerable difference of judicial opinion".³⁵ Lord Nicholls, Lord Hoffmann and Lord Clyde formed the majority, agreeing that the Local Authority (LA) *could* take their resources into account when assessing a need, though both Lord Nicholls and Lord Clyde wrote separate opinions. Lord Lloyd strongly dissented, with Lord Steyn in agreement with

³³ Reynold (n 20) 55.

³⁴ Section 2, Chronically Sick and Disabled Persons Act 1970.

³⁵ Barry (n 29) 604.

Lord Lloyd's dissent. As Lord Lloyd saw it, there were three stages to this provision: 1) assess if there is a need, 2) determine if it is necessary to make arrangements to meet the need, and 3) if arrangements are required, make arrangements to meet the need.³⁶ The question for the court concerned the first stage of the process; stages 2 and 3 were not in doubt because once those points were reached "the duty is absolute".³⁷ More specifically then, the court was being asked to determine whether or not a LA could take into account their own resources in assessing the needs of the individual concerned.³⁸ That is, they were ruling on the meaning of *need* and *necessity* in the context of the Act.³⁹

The majority view was that costs and resources can play a role in deciding whether or not the service was "necessary".⁴⁰ Lord Nicholls, for example, determined that the argument put forward on behalf of Mr Barry was flawed because it had failed "to recognise that needs for services cannot sensibly be assessed without having some regard to the cost of providing them. A person's needs for a particular level of service cannot be decided in a vacuum from which all considerations of cost have been expelled".⁴¹ Essentially the majority in the UKSC considered both 'needs' and 'necessary' to be relative terms for the purposes of the Act's application, in the sense that they could not be understood properly without recourse to contingent factors such as the LA's financial situation. In practice this would mean that if A and B lived in the same circumstances, and qualified for assistance, A might be found to have a *need* for assistance, where B would be found to have no such *need*, because A lived in a wealthy LA where B did not. The two dissenting judges were appalled by such implications

³⁶ *ibid* 597.

³⁷ *ibid* 598.

³⁸ As per the opening lines of Lord Nicholls' judgment. *ibid* 604.

³⁹ If we recall Chapter Two of the thesis, this is an instance in which the court is effectively being asked to provide a stipulative definition of these terms for the purposes of the Act.

⁴⁰ *Barry* (n 29) 604. The justices were not all of the view that they needed to play such a role.

⁴¹ *ibid*.

and strongly disagreed with such claims of contingency.⁴² They saw that whilst resources might limit the funds available to provide for the *need*, they could not be a factor in determining such a *need*. Lord Lloyd used the example of a child in need of a new pair of shoes: “Every child needs a new pair of shoes from time to time. The need is not the less because his parents cannot afford them”.⁴³ That is, one cannot determine a person’s *needs* (even if one reads into the notion *reasonable* needs) by factoring in whether or not the council can afford to provide for them. This simply does not change the *need*.⁴⁴

According to Lord Lloyd the meaning of *need* was “the lack of what is essential for the ordinary business of living”.⁴⁵ As such, it was clear to him that LA resources should not be a factor in assessing the need of an individual as resourcing is an external factor that does not relate to the individual’s circumstances. Furthermore, in terms of the language of the statute Lord Lloyd argued: “There is nothing in the language of the section which permits, let alone suggests, that external resources are to be taken into account when assessing the individual’s needs”.⁴⁶ Lord Lloyd supported this reading of the Act’s requirements by placing it in the wider context of other welfare provisions in law, arguing that Parliament did not intend for provision to be dependent on individual LA resources: “The intention was to treat disability as a special case. That is why the Act of 1970 has always been regarded as such an important landmark in the care of the disabled”.⁴⁷ Parliament’s intention to treat disability as a special case was further evidenced by the National Health Service and Community Care Act 1990 in which section 47 distinguishes between the assessment of general care provision and care provision

⁴² As Lord Lloyd puts it: “Parliament cannot have intended that the standards and expectations for measuring the needs of the disabled in Bermondsey should differ from those in Belgrave Square.” *ibid* 603.

⁴³ *ibid* 599.

⁴⁴ *ibid*.

⁴⁵ *ibid* 598.

⁴⁶ *ibid* 600.

⁴⁷ *ibid* 601.

assessment for the disabled.⁴⁸ In Lord Lloyd's view, this distinction would not have been made had Parliament not wanted to consider the "needs of the disabled as a special case".⁴⁹ Lord Lloyd emotively concluded: "the passing of the Chronically Sick and Disabled Persons Act 1970 was a noble aspiration. Having willed the end, Parliament must be asked to provide the means".⁵⁰

In reference to Reynold's reading of this case, Reynold concludes his section on the problems with the meaning of ordinary words with the idea that "the interpretation of critical words on which the argument is focussed tends to be governed by one's subjective sense of what the words *ought* to mean."⁵¹ Yet we see in *Barry* that this is not always the case. The language in this case makes it clear that the Law Lords were not presenting what they thought the word *need* ought to mean but rather what it does mean. We have already seen, for example, that Lord Lloyd provided a definition for *need* at the beginning of his judgement. With similar conviction, though in complete contradiction to Lord Lloyd, Lord Nicholls held it to be unquestionable that the resources of a LA were a relevant factor when assessing the *need* of an individual. He stated: "Once it is accepted, as surely must be right, that cost is a

⁴⁸ The idea of parliamentary intentions is a recurring theme in the cases to be discussed. It is pertinent to our discussion of the insights offered by ED because, as we will see in Chapter Four, one of the requirements for a disagreement to be genuine is that it be over a truth-apt proposition or fact. Disagreement over parliamentary intentions is a common thread in both the cases here, and Dworkin's work, and the question for present purposes is whether this could be deemed a fact or truth-apt. We will see e.g. that Waldron casts doubt on what it is to say that a body such as Parliament can be considered to have intentions. See Section 4 of the present chapter and Chapter Four, Sections 4.1 and 4.3.

⁴⁹ Lord Lloyd explains with reference to the provision of community care under the National Health Service and Community Care Act 1990 that the needs of the disabled are marked out as separate from ordinary care provision by suggesting that the Act demonstrates that in general a LA has *discretion* in providing for a person's needs (under section 47(1) of the 1990 Act, but has a *duty* to provide for the needs of the disabled under section 47(2). *Barry* (n 29) 601.

⁵⁰ *ibid* 604.

⁵¹ Reynold (n 20) 83.

relevant factor...”, and went on in the same paragraph to state “I can see no basis for reading into the section the implication that in assessing needs for disabled persons for the prescribed services, cost is to be ignored”.⁵² Such statements show that Lord Nicholls was clear that cost is part of the assessment, not something that the court is adding into the reading of the provision. The brevity and conviction with which Lord Nicholls expressed this sentiment adds further force to the impression that he is sure in his conviction: his opinion is far shorter than Lord Lloyd’s for example, and simply states that costs for provisions and resources available *are* to be taken into account in determining need.⁵³

By contrast however, Lord Clyde, in a lengthier opinion, made reference to what he saw as the relative nature of the words ‘necessary’ and ‘needs’, noting that they both have “a considerable range of meaning”.⁵⁴ It is in Lord Clyde’s judgment that one can most clearly see the policy considerations with which Reynold presents his reading of the cases under discussion in his book. In making reference to assessing “the degree of necessity”, for example, Lord Clyde conveniently concluded that it is “satisfactory that the view which I have taken avoids the considerable practical difficulties which the County Council would otherwise face in the provision of a coherent scheme of community care in its area”.⁵⁵ Lord Clyde’s opinion is presented with less certainty and conviction than Lord Lloyd’s and Lord Nicholls’, exhibiting a more pragmatic approach to the case, and one which suggests more scope for flexibility in understanding the statutory provision than allowed for by Lords Lloyd and Nicholls. For example, the following extract from Lord Clyde’s judgment demonstrates the flexibility with which he approached the ideas of *need* and *necessity*:

⁵² *Barry* (n 29) 606.

⁵³ *ibid.*

⁵⁴ *ibid* 610.

⁵⁵ *ibid* 612.

It is not necessary to hold that cost and resources are always an element in determining the necessity. It is enough for the purposes of the present case to recognise that they may be a proper consideration. I have not been persuaded that they must always and necessarily be excluded from consideration.⁵⁶

This is in clear contrast to Lord Lloyd's presentation of a definition for *need* and Lord Nicholls' assertion that *need* clearly required recourse to financial considerations. Although we saw at the start of this discussion that the case is perhaps influenced by policy, the wording of the judgments appears to demonstrate a difference in how the words should be used in the context of the legislation.⁵⁷ If one were still inclined to see this as disguised policy concerns, at minimum the judgments demonstrate a clear difference in how obvious the judges took the meanings of *need* and *necessity* to be.

The nature of disagreement regarding the understanding of *need* and *necessity* in this case, provides an insight into the complexity of the decisions that are made in the UKSC. The idea of what judges are really disagreeing about was something that interested legal philosopher Ronald Dworkin, whose work plays a role in this thesis, particularly in Chapters Four and Seven, as he reflects on what it means to be in genuine disagreement. For current purposes however it is worth drawing an initial comparison to Dworkin's discussion of "Elmer's Case"⁵⁸ in *Law's Empire*, a case in which there was a dispute regarding the law of inheritance whereby there was uncertainty as to whether Elmer, who had poisoned his grandfather in order to secure his wealth, should be able to claim his inheritance. The statute did not make specific reference to such profiting from misdeeds and the court was divided over the meaning of the law. Dworkin uses this case as part of his argument that when judges

⁵⁶ *ibid* 611.

⁵⁷ And indeed we saw the importance of context in Chapter Two. See e.g. Chapter Two, text to n 15.

⁵⁸ Ronald Dworkin, *Law's Empire* (Hart Publishing 1998) 15-20.

disagree in this way, they are not just disagreeing over whether they should “follow the law or adjust it in the interest of justice” but rather, they are disagreeing about what the law actually is; “about what the real statutes the legislators enacted really said”.⁵⁹ This is what Dworkin refers to as theoretical disagreement.⁶⁰ Certain comparisons can be drawn from Dworkin’s analysis of Elmer’s Case to what we have seen in *Barry*, as each opinion reflects on the intentions of Parliament and how the wording of the statute fits in the context of other statutes, with both Lord Nicholls and Lord Lloyd approaching the case in similar ways, though drawing profoundly different conclusions as a result. Yet my analysis has suggested that Lord Clyde’s approach to the case is different. In *Barry* the three judicial opinions present different understandings of what the law *is*. Although Lord Clyde and Lord Nicholls ultimately agree with regard to allowing the appeal, and that the resources available to a LA *should* play a role in determining whether or not an individual has a need, we have seen that they do so for different reasons. We saw that for Lord Nicholls, it was simply evident in the legislation that the resources were a factor for consideration in determining a need, just as for Lord Lloyd it was evident that resources should *not* be a consideration. By contrast, Lord Clyde demonstrated less conviction and expressed a view that resources may be a consideration, but saw no need to say that they always were. This reserved pronouncement reflects a more contextual approach to the meaning of the statute. Unlike Lords Lloyd and Nicholls therefore, Lord Clyde was not ultimately concerned with determining what the legislation really said, as Dworkin’s view was in Elmer’s Case, but rather what a prudent (or to use Lord Clyde’s choice of word, “satisfactory”⁶¹) outcome would be. Thus although I agree with Reynold’s sentiment that “it would be naïve to suppose that in this case the Law Lords fell out over what was simply

⁵⁹ *ibid* 20.

⁶⁰ *Ibid* 4-5.

⁶¹ *Barry* (n 29) 612.

a problem of language”,⁶² the language of the judgment suggests that it would be equally naïve to suppose that at the heart of the disagreement was simply a consideration of policy. Chapter Seven will see a focussed discussion of Dworkin’s work, in which it will be argued that instead of simply policy consideration, judicial disagreement is, at least sometimes, over what the law *is*. Presently, it is enough to demonstrate that the words used in statutory provisions can be understood and put to use in different ways; even in cases where they are, ultimately, in *agreement*. This should be borne in mind for our exploration of ED in Section B of the thesis, as it foregrounds my claim that in exploring our understanding of disagreement, it is important to also develop an awareness of agreement in JDM, both because for disagreement to exist, substantial agreement is required, and because often what appears to be agreement in JDM obscures substantial disagreements. Furthermore, this case also demonstrates what we will come to see as conceptual disagreement which, in a telling deficit, the current ED narrative does not account for.⁶³

We have therefore seen that *Barry* demonstrates dynamic ideas of how words can be understood very differently in the context of a wider body of law, and how such language can be manipulated to create an understanding of a piece of legislation that is more manageable for the changing budgetary realities of LAs. What is further pertinent to highlight in terms of the finality of judgments, particularly those involving disagreement, is that although this judgment was controversial at the time, the precedent set by this decision in the UKHL has been upheld in the UKSC since it was delivered in 1993. However, that is not to say that the matter has been considered settled. In 2011 when the precedent was again applied, Lady Hale commented in a dissenting judgment to a UKSC case: “I confess that I find the reasoning of the minority in *Barry* much more convincing, both as a matter of statutory construction and

⁶² Reynold (n 20) 59.

⁶³ See Chapter Four, Section 4.1.

as a matter of everyday life, than the reasoning of the majority”.⁶⁴ In Lady Hale’s view, the idea of a *need* was clear, though a need could be met in an economical way if resources required. For Lady Hale, this was an opportunity to consider if *Barry* had been wrongly decided; she saw it as an opportunity to overturn.⁶⁵ Although in this case the majority decision in *Barry* was followed, it shows that judicial opinion continues to differ on the reading of this statutory provision and disagreement in the court over the right answer endures.⁶⁶

3.2 Case 2: when judges disagree even when agreeing

The second case to be reviewed, *Adams*,⁶⁷ concerns the disagreement that arose when a panel of nine UKSC Justices convened to determine the intended meaning of ‘miscarriage of justice’ in the context of a compensation claim for a wrongful conviction. Although the court in 2011 unanimously agreed to dismiss Adams’ appeal, they divided five to four regarding the test to apply in such cases. Furthermore the judgment itself proved to be complex with seven of the nine Justices offering opinions in the ninety-seven page ruling. This unwieldy judgment, coupled with the fact that the opinions offered rarely engaged directly with the others presented, makes it difficult to assess the disagreement, let alone the legal principles therein. We see in the course of the judgment that a reason for the numerous, lengthy opinions advanced was in fact the strong disagreements encountered by the Justices. Lord Brown in his dissenting opinion for example, began by stating that although he agreed with Lord Judge’s dissenting argument, “so troubled am I... that apparently ours is the

⁶⁴ *McDonald* (n 26) [72]. Reynold also made reference to this case. See Reynold (n 20) 59-64.

⁶⁵ *McDonald* (n 26) [73].

⁶⁶ The idea of what the *right* answer to a question is will be an important consideration for our discussion of what it means to have a genuine disagreement in Chapter Four.

⁶⁷ *Adams* (n 30).

minority view on these appeals that I wish to add some additional thoughts of my own”.⁶⁸ We will see later in Section 3.4 a similar instance of discord resulting in additional material as the Justices attempt to justify their positions.⁶⁹

Turning to the judgment itself, the relevant statutory provision was section 133(1) Criminal Justice Act 1988 which states that the Secretary of State for Justice is required to pay compensation to individuals who have had their convictions overturned if the reason for overturning was “on the grounds that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice”. Much of the disagreement in *Adams* concerned the level of risk involved in the implications of a test for ‘miscarriage of justice’ and, in particular, the role that a person’s innocence should play. To explain, the Justices had to determine the threshold they deemed acceptable; either to create a restrictive test which would mean that some innocent people would go uncompensated, or a less stringent test which could mean that some people who were in fact guilty of a crime would receive compensation. Lord Judge in particular felt strongly that a claimant should be required to prove their innocence in order to receive compensation because, for him, the risk of compensating a guilty party was intolerable. However, the majority concluded that a test enabling more successful claims for compensation was preferable, ruling that a ‘miscarriage of justice’ would exist where “the new fact... so undermine[d] the evidence against the defendant that no conviction could possibly be based on it”.⁷⁰ The majority comprised of Lord Phillips, Lord Hope, Lady Hale, Lord Kerr, and Lord Clarke, all of whom wrote an opinion. As

⁶⁸ *ibid* [269]. Indeed, such strength of feeling is evident in the turn of phrase used by Lord Brown, such as Lord Phillips’ formulation being “apparently now subscribed to by the majority of the court”. *ibid* [273].

⁶⁹ This is with regard to Lady Hale’s additional comments in *Quila* being the result of the Justices being “not all of the same mind”. See text to n 137.

⁷⁰ *Adam* (n 30) [178].

noted previously, Lord Brown and Lord Judge wrote dissenting opinions, which were supported by Lord Walker. Lord Rodgers was noted to agree specifically with Lord Brown.

In an attempt to determine the intended meaning of the phrase ‘miscarriage of justice’ the court made reference to the inception and purpose of section 133(1) of the 1988 Act, highlighting that it was to give effect to Article 14(6) of the International Covenant on Civil and Political Rights 1966, ratified in the UK in 1976. Save the reference in Article 14(6) to “conclusively” where section 133(1) of the later 1988 Act uses “beyond reasonable doubt”, the provisions are the same, and the court was satisfied that the difference in wording was immaterial.⁷¹ This was significant for the majority in *Adams* as they utilised the discussions which took place at the time of Article 14’s creation to conclude that although it is clear that the intention of the provision was to allow for compensation of the innocent, they left it to “domestic legislation to identify the precise parameters of the miscarriage of justice that would give rise to a right to compensation”.⁷² This was further reinforced by the fact that although the parties to Article 14(6) had the opportunity to restrict the meaning of ‘miscarriage of justice’ to those who could prove their innocence, they had voted against the proposed amendment.⁷³ The majority was therefore not satisfied that the context of section 133(1)’s creation gave rise to a view that proof of innocence was required.

The first matter of interest for this thesis is the fact that, in his lead judgment, Lord Phillips was clear that the court was *creating* a test for ‘miscarriage of justice’, rather than ‘finding’ the law, as we saw was perhaps the case in *Barry* in Section 3.1. Lord Phillips surveyed previous case law, but dismissed it as unhelpful. For example, he concluded that the UKHL case *Mullen*,⁷⁴ in which the meaning of ‘miscarriage of justice’ was considered, did not help

⁷¹ *Adams* (n 30) [79].

⁷² *ibid* [23].

⁷³ *ibid* [49] and [114].

⁷⁴ *R (Mullen) x Secretary of State for the Home Department* [2004] UKHL 18.

to illuminate the meaning of the phrase. In the case Lord Bingham and Lord Steyn both agreed that section 133 had been enacted to give effect to Article 14(6), but Lord Bingham's judgment did not directly address the meaning of 'miscarriage of justice'. Furthermore, although Lord Steyn's view was that the test was "restricted to the conviction of an innocent person"⁷⁵ Lord Phillips saw that this was in fact an error as Lord Steyn had misread both "the French text of Article 14(6) and... the position in France",⁷⁶ an assessment with which Lord Hope agreed,⁷⁷ but with which Lord Judge in his dissent disagreed.⁷⁸ Secondly, although in the CA case *Adams* Lord Dyson offered four categories for determining whether a 'miscarriage of justice' had taken place, Lord Phillips dismissed the categories in favour of his own test which he considered to be a reformulation of Dyson's categories one and two.⁷⁹ Thus although Lord Phillips drew on both legislation and previous case law, it was of little use, by his assessment, in helping to determine what the correct reading of 'miscarriage of justice' was, thereby requiring an overt declaration of a new test.⁸⁰

⁷⁵ *Adams* (n 30) [34].

⁷⁶ *ibid.*

⁷⁷ *ibid* [93].

⁷⁸ This point is of interest in itself as we see an instance in which the majority decision of the court presents disagreement with a previous UKHL opinion, adding a further layer to the evident disagreement in the case. Indeed it shows further dynamics of disagreement as we see that Lord Judge is in agreement with Lord Steyn's view in *Mullen*, disagreeing with his colleagues in *Adams*. He commences his judgment: "As we are not agreed... I shall briefly explain the reasons why I agree with Lord Steyn". *ibid* [242].

⁷⁹ *Adams* (n 30) [56]. Lord Phillips notes "I would replace it [the categories listed by Dyson] with a more robust test of miscarriage of Justice". *ibid* [55].

⁸⁰ Apparent too here is the complicated nature of weighing and evaluating one's evidence in JDM – Lord Phillips is of the opinion that *Mullen* can provide no insight into the nature of a test to be applied, where Lord Judge defends agreement with Lord Steyn's position. This will be explored further in Section 2.4 of the present chapter where we see judges disagreeing over the relevance and weight of different cases.

Lord Hope's choice of words further suggests that rather than establishing the existing meaning of the law, he was recasting it. This is particularly evident when he moves from 'is' to 'ought' claims in discussing the role that innocence should play in determining when compensation should be provided. The passage will be quoted in full to place the use of language in context. Lord Hope began by stating:

The state should not, of course, subject those who are clearly innocent to punishment and it is *clearly right* that they should be compensated if it does so. But *it is just as clear* that it should not subject to the criminal process those against whom a prosecution would be bound to fail because the evidence was so undermined that no conviction could possibly be based upon it.⁸¹

These assertions ('of course', 'clearly right', 'just as clear') are robust in confirming Lord Hope's conviction that innocence is not the only factor that should be considered for payment of compensation. Yet he went on to state:

If the new or newly discovered fact shows conclusively that the case was of that kind, *it would seem right in principle* that compensation should be payable even though it is not possible to say that the defendant was clearly innocent. I do not think that the wording of article 14(6) excludes this, and *it seems to me* that its narrowly circumscribed language permits it.⁸²

The move to phrases such as 'seem right' and 'seems to me', and the idea of the language 'permitting' rather than *requiring*, indicates lesser conviction; it moves the language from

⁸¹ *ibid* [97] (emphasis added).

⁸² *ibid* (emphasis added).

what the law requires, to what it should, in Lord Hope's view, require (within the bounds of the language of the statute). Indeed, Lady Hale in agreement with Lord Phillips and Lord Hope commented "The phrase is clearly capable of bearing a wider meaning than conclusive proof of innocence"; further demonstrating the flexibility of the language in the statutory provision.⁸³ Such an approach is more akin to Lord Clyde's in *Barry* (discussed in Section 3.1), and demonstrates the contestable nature of the meaning of the law at the highest level of JDM.

As noted in Chapter One, the ED philosophy is concerned with disagreements which arise when peers with the same information available to them (such as background knowledge, evidence, expertise, and time) come to different conclusions over the matter in question.⁸⁴ In this context (discussed in relation to the ED literature in Chapters Four and Five), one matter of interest in the *Adams* judgment concerns the different weight that the Justices placed on the information available to them. For example, in *Mullen*, the utility of Article 3 of Protocol 7 to the European Convention on Human Rights (ECHR) was assessed very differently by the judges in the case.⁸⁵ Article 3 states: "The intention is that States would be obliged to compensate persons only in clear cases of miscarriage of justice, in the sense that there would be an acknowledgement that the person concerned was clearly innocent".⁸⁶ This provision had been relied upon by Lord Steyn in *Mullen* in assessing the meaning of 'miscarriage of justice'. Lord Hope believed such reliance to be a mistake because the UK had not signed or ratified Protocol 7 which, Lord Hope argued, suggested that it was not the intention of Parliament to give effect to the requirement for clear innocence.⁸⁷ Lord Brown, by contrast,

⁸³ *ibid* [114].

⁸⁴ Chapter One, text to n 25, to be expanded in Chapters Four and Five.

⁸⁵ See text to n 82 and 83.

⁸⁶ Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by protocol no 11 [1998] European Treaty Series No 117.

⁸⁷ *Adams* (n 30) [93].

saw no reason to dismiss Article 3 from consideration proposing that although it was not ratified, it “does surely show that this is both a permissible view to take of the extent of the Article 14(6) obligation undertaken by the UK and a perfectly possible construction of section 133(1) itself”.⁸⁸ The matter of how the Justices identify and weigh the relevant evidence to a case will be further elaborated in relation to *Quila* in Section 3.3 and taken up in Chapter Five in relation to the nature of *peer* disagreement, and the bearing that these UKSC judgments have on our understanding of what it means to be evidence to a case, how such evidence is weighed, and how we understand one another as peers.

A further area of disagreement in determining the role of establishing ‘innocence’ manifested in the significance placed by the majority on the fact that the UK does not in fact have the idea of innocence established in its justice system. Instead, a person is either guilty or not guilty. As Lady Hale therefore put it: “He does not have to prove his innocence at his trial and it seems wrong in principle that he should be required to prove his innocence now”.⁸⁹ The majority was of the view that the idea of innocence should not be relied upon in the provision of a remedy, when it was not a requirement for an acquittal at trial. For Lord Judge by contrast, not only did ‘miscarriage of justice’ concern the fact of innocence, rather than the presumption, but he presented a causal relation between innocence and the award of compensation, stating: “compensation within the statutory scheme is payable only when the defendant was convicted of an offence of which he was truly innocent, and therefore beyond reasonable doubt the victim of a miscarriage of justice”.⁹⁰ In making their assessment regarding proof of innocence, the Justices used the view advanced in *R v Mcllkenny*⁹¹ “that the court is not “entitled” to state that an appellant is innocent”.⁹² Lord Judge, in his dissenting

⁸⁸ *ibid* [271].

⁸⁹ *ibid* [116].

⁹⁰ *ibid* [263].

⁹¹ [1991] 93 Cr App R 287.

⁹² *Adams* (n 30) [251].

opinion and in disagreement with Lord Phillips, contended that although a judge cannot declare innocence through a verdict, they can recognize it in the language of the judgment. He therefore did not believe that because there is no verdict of innocence that innocence cannot be a requirement for compensation. To add a further layer of disagreement over this matter in the court's judgment, Lord Brown was of the opinion that the disagreement between Lord Phillips and Lord Judge regarding innocence as a verdict was in fact irrelevant because it is for the Secretary of State, and not the court, to decide.⁹³ Such layered disagreement is noteworthy, because the Justices have the opportunity to share their opinions before the final judgment is agreed. Thus to have such palpable unresolved disagreement over what is in fact a procedural matter of who makes the determination under section 133, is rather surprising in the final judgment.⁹⁴

Although in *Adams* the opinions rarely engage with one another, Lord Brown provides a noticeable exception to this in his, often, clear dismay at the majority decision. Some examples have been referenced to this point, yet the most striking arises when he uses Lord Phillips' assessment of Lord Dyson's 'category 1' to demonstrate why he thought it plainly wrong to extend the test to 'category 2' (and Lord Phillips' amended formulation). Lord Phillips suggested that 'category 1' was what the "ordinary man in the street" would think a miscarriage of justice was, and Lord Brown observed: "If I may revert to "the man in the street", he would, I think, be appalled at the construction which, on the contrary, would not infrequently result in the compensation of the guilty, sometimes; as already indicated, to the extent of hundreds of thousands of pounds".⁹⁵ Brown's direct engagement with other

⁹³ *ibid* [277].

⁹⁴ Justices have the opportunity to assess several drafts of judgments before the final one is confirmed, so there would have been opportunity to attempt to resolve this.

⁹⁵ *Adams* (n 30) [277].

Justices' arguments here is similar to that seen in the case of *Quila* discussed at Section 3.4 below.

As for Reynold's presentation of this case, the judgment was seen as a further example of a policy decision whereby the meaning of an imprecise phrase was "resolved by reference to a subjective policy decision as to what the word or phrase *ought* to mean".⁹⁶ For the majority, according to Reynold, the test should be wider so as to encompass those who were "wrongly convicted but were unable to prove conclusively their innocence",⁹⁷ whereas for the minority the test should be strict because they could not "run the risk of a significant number of applicants... [receiving] compensation whose convictions had been quashed but were in fact guilty".⁹⁸ We have certainly seen such dynamics in the above analysis of the judgment. Such strength in conviction regarding the outcome in a forum which is intended to be neutral raises doubt however as to whether the idea of 'policy' really does capture the nature of the disagreement in this case. At minimum, it masks the extent and dynamic nature of the numerous disputes at play in the judgment. For example, the case raises an interesting example of the complicated role of the judge's *belief* in decision-making, as demonstrated in the majority's eventual agreement regarding the test to use to determine a 'miscarriage of justice'.⁹⁹ As noted in the beginning of this section, the Justices agreed that a miscarriage of justice would be found where "the new fact... so undermine[d] the evidence against the defendant that no conviction could possibly be based on it".¹⁰⁰ Although the five Justices to the majority accepted Lord Phillips' formulation, Lord Kerr and Lord Clarke both disclosed that they had in fact favoured alternative formulations of the test. Lord Kerr put forward the following alternative: "whether on the facts as they now stand revealed, it can be concluded

⁹⁶ Reynold (n 20) 78.

⁹⁷ *ibid.*

⁹⁸ *ibid.*

⁹⁹ The role that belief plays in decisions will be a focus of Chapter Six.

¹⁰⁰ Reynold (n 20) 76.

beyond reasonable doubt that the [claimant] should not have been convicted".¹⁰¹ Lord Kerr nonetheless expressed himself to be "content" with Lord Phillip's formulation, believing that its formulation avoided concerns raised in other suggested formulations of the test.¹⁰² Furthermore, Lord Clarke explained that he favoured the 'category 2' test proffered by Lord Dyson in the CA, but was happy to accept Lord Phillips' test as he believed it encompassed Lord Dyson's 'category 2'; a view which Lord Phillips did not share.¹⁰³ This is of interest to this project for two related reasons. First, such disagreement in concurrent opinions again raises the question of the extent to which the majority can be said to be in *agreement* in such cases. Second, the Justices' evident difference in belief in coming to agreement over the test (each preferring their own formulation though agreeing to use Lord Phillips') is pertinent to our later examination of ED philosophy which places belief at the heart of disagreements examined.¹⁰⁴ As a practical endeavour where decisions need to be made, the role of belief in JDM will play an important role in demonstrating the shortcomings of ED's focus on beliefs in disagreements, as we see that the Justices need to make decisions; sometimes in spite of their beliefs.¹⁰⁵

¹⁰¹ *Adams* (n 30) [178].

¹⁰² This is a good example of compromise used in JDM. Lord Kerr, although preferring his own wording for the test, agrees to follow Lord Phillips' because it gets around concerns Lord Hope raised regarding a test that would require the Secretary of State to consider the imagined viewpoint of the jury properly directed, and Lord Clarke's concerns about the Secretary of State considering the decision to prosecute (a suggestion made by Lord Hope) because this would need to include evidence submitted by the defence during the trial, and thus would not provide an accurate consideration of whether the case would have been brought to trial in the first place. *ibid* [178]. This will be further discussed in relation to the role that belief plays in ED and JDM in Chapter Six.

¹⁰³ *ibid* [55].

¹⁰⁴ See Chapter Six, Section 3.2.

¹⁰⁵ This will be of particular importance to Chapter Six of the thesis, though will also be of raised in Chapter Four.

3.3 Case 3: when judges disagree over the right question to ask

Renowned in the undergraduate law school curriculum, *Brown* has been used for many years to engage students in discussions of the political and policy-focussed nature of judicial decisions. The case concerned a group of men who had been convicted of “assault occasioning actual bodily harm” (ABH) and “unlawful and malicious wounding” contrary to sections 47 and 20 of the Offences against the Persons Act 1861 (henceforth the 1861 Act). The nature of the activity resulting in conviction concerned sadomasochistic sexual acts that were performed consensually on the participants to the activities; those convicted were the appellants in this UKHL case. The appeal was on the grounds that the appellants had been privately engaging in the activities with the consent of the parties involved, and the question before the court was therefore whether or not consent was a defence to sadomasochistic acts which fell under sections 20 and 47 of the 1861 Act, or if lack of consent needed to be proven before guilt could be established.¹⁰⁶

The UKHL divided three to two in upholding the convictions of the appellants. For the purposes of this thesis, I will focus primarily here on the way the majority and minority understood the law in question.¹⁰⁷ The majority, comprised of Lord Templeman, Lord Jauncey,

¹⁰⁶ *Brown* (n 31).

¹⁰⁷ It is worth noting too that this judgment was deemed to be controversial due to the perceived different treatment of consenting homosexual and heterosexual adults, highlighting how social norms and beliefs can influence a decision made. Regarding the context of *Brown*, in *R v Wilson* [1996] Crim LR 573, a wife’s consent was deemed a defence to her husband’s act of branding her buttocks with a hot knife, resulting in his conviction for ABH under the 1861 Act being overturned. *Wilson* was controversial as it was seen as contrary to *Brown*, leading to the view that it had distinguished on the basis of the sexual orientation of the parties involved. It has been suggested that *R v Emmett* [1999] EWCA Crim 1710 demonstrated that the *Brown* ruling stands for both homosexual and heterosexual activity. However, the acts in *Emmett* (placing a plastic bag over the head, and pouring lighter fluid over a person and setting it alight) arguably demonstrate a far greater risk to life. The social implications of the *Brown* judgment spotlight the importance and influences of the social context of decisions made.

and Lord Lowry, were of the opinion that the question before the court was whether or not consent could be considered a defence to charges under sections 20 and 47 of the 1861 Act, and ultimately ruled that it could not. Similarly, Lord Slynn considered the same question and decided, in dissent, that consent was a defence, or that lack of consent needed to be proven by the prosecution to such a case for guilt to be established. Following, in stark contrast, Lord Mustill deemed the question of consent as a defence to be the wrong question to ask. Rather, he took the view that consensual sadomasochistic activity did not in fact fall under the legislation in question. As such, in Lord Mustill's view the appeal needed to be upheld and the convictions overturned because the consensual private acts in question were *not* "offences against the existing law of violence".¹⁰⁸ This case is therefore valuable to our exploration of JDM due to the remarkably different approaches taken by the judges and the evident disagreement concerning the very question that was being asked of the court.

First let us consider the majority's approach to the question of consent. As Lord Lowry explained, everyone was in agreement that consent is a defence to common assault and not a defence to grievous bodily harm, and so the disagreement between the appellant and respondent concerned whether consent could be a defence to ABH.¹⁰⁹ There were already certain activities which occasioned harm for which consent was a defence, such as tattooing, ear-piercing and the sporting activity of boxing.¹¹⁰ In Lord Templeman's view it was for Parliament to decide if the defence of consent should be extended to include sadomasochistic activities. Lord Templeman's strength of feeling is palpable as he asserted: "I am not prepared to *invent a defence* of consent for sado-masochistic encounters which breed and glorify

ED philosophy pays close attention to the background and context of the individual reasoner in a disagreement, yet we see here that the wider social context too plays an important role. Further exploration of social influences on decisions made will be taken up in Chapter Five.

¹⁰⁸ *Brown* (n 31) 275.

¹⁰⁹ *ibid* 248.

¹¹⁰ *ibid* 228.

cruelty and result in offences under sections 47 and 20 of the Act of 1861”.¹¹¹ It could not be plainer that he viewed such activities as offences in law (and indeed offensive in general), irrespective of the consent of the parties to them. Furthermore, the motivation of moral ramifications is clear when Lord Templeman strongly proclaimed at the conclusion of his judgment: “Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised.”¹¹² It is plain from this emotive language, and unwillingness to ‘invent’ a defence that Lord Templeman firmly believed this to be, at best, a matter of policy and certainly not one for the courts to interfere with.

Lord Jauncey’s contribution to the judgment is presented in more neutral language, displaying less emotion than Lord Templeman. In utilising the relevant case law he concluded that the “infliction of bodily harm without good reason is unlawful and that the consent of the victim is irrelevant”.¹¹³ Moreover, he made the observation that the language of sections 47 and 20 of the 1861 Act does not speak to whether “consent is either an essential ingredient of the offence or a defence thereto”.¹¹⁴ In terms of extending the “well known exceptions”¹¹⁵ to include sadomasochistic sexual activity Lord Jauncey agreed with Lord Templeman that it should be for Parliament to decide if such acts should be lawful; in addition making clear that in his view it would be against the public interest for such acts to be lawful.¹¹⁶ Lord Lowry framed his argument slightly differently, and though he disagreed with Lord Templeman and Lord Jauncey as to the extent to which some of the cases relied upon helped to inform the

¹¹¹ *ibid* 236 (emphasis added).

¹¹² *ibid* 237.

¹¹³ *ibid* 243.

¹¹⁴ *ibid* 242.

¹¹⁵ *ibid* 245.

¹¹⁶ *ibid* 247.

decision,¹¹⁷ he agreed that the wording of sections 20 and 47 of the 1861 Act along with the case law showed that consent is not a defence to ABH, whilst acknowledging there to be a “danger of applying to a particular situation cases decided by judges who, in reaching their decisions, were not thinking of that situation at all”.¹¹⁸ Again, consistent with Lord Templeman and Lord Jauncey, Lord Lowry goes further than concluding that Parliament should decide as to the extension of the ‘exceptions’ by noting his own feelings that the sadomasochistic sexual acts indicated a “perverted and depraved sexual desire”,¹¹⁹ and moreover the fact that Parliament legalised the homosexual sexual activity of buggery in the Sexual Offences Act 1967 was of no use to the appellant’s case because it was a “well-known vehicle for transmission of AIDS”.¹²⁰ From the judgments of the majority it is quite apparent, as Reynold concludes, that “in no sense was this remarkable case decided on purely legal principles”.¹²¹

For the minority, Lord Mustill was sceptical of the decision to bring charges under the 1861 Act, suggesting that the only reason charges were brought under the Act was because there was no other appropriate one available.¹²² Indeed, in coming to this view he noted that the title of the statute itself, “Offences *Against* the Person”,¹²³ is an indication the charges are “adventitious”¹²⁴ because however distasteful the sadomasochistic acts might have been they

¹¹⁷ *ibid* 250-256.

¹¹⁸ *ibid* 254.

¹¹⁹ *ibid* 255.

¹²⁰ *ibid* 256.

¹²¹ Reynold (n 20) 33. Of course there are always going to be factors other than purely legal principles at play in a decision. Judges, e.g., employ logic, rules of language and so on in identifying, and applying, law to facts. Here the key point is that Reynold’s discussion binds us to an interpretation of the judgments as being influenced either by legal or public policy considerations. We have begun to see in the present discussion, and to be defended further in the coming chapters, that the decisions can be more richly understood through the broader investigation of the evident disagreements.

¹²² *Brown* (n 31) 258.

¹²³ Emphasis by Lord Mustill. *ibid* 257.

¹²⁴ *ibid*.

were done with no “animosity”.¹²⁵ Fundamentally, Lord Mustill approached the case in a profoundly different way from the majority. He saw that the question before the court was not whether consent was a defence to ABH under the 1861 Act, but rather “whether these consensual private acts are offences against the existing law of violence”.¹²⁶ In fact, Lord Mustill agreed with the majority that sexual activities could not be considered a special case under the 1861 Act, and to add them would indeed be a decision for Parliament. That is, he acknowledged that he would answer the question of consent in the negative, just as the majority had, observing: “if I had begun from the same point of departure as my noble and learned friend Lord Jauncey of Tullichettle I would have arrived at a similar conclusion; but differing from him on the present state of the law, I venture to differ”.¹²⁷ He therefore formulates and answers his amended question for the court in the negative because he sees that the current state of the law does not permit such acts as those in question to in fact be chargeable under the 1861 Act. Furthermore, due to the private nature of the acts he shows sympathy with an argument under Article 8 ECHR that the appellants have “the right to conduct their private lives undisturbed by the criminal law”.¹²⁸ In another turn, Lord Slynn, in the second dissenting opinion to the case, does not comment on the matter of Article 8 ECHR, though he was focussed on whether the acts took place in public or private,¹²⁹ because his conclusion is that consent *is* a defence to ABH and that lack of consent needs to be proved by the prosecution to a case.¹³⁰

Thus this case shows a fundamental disagreement as to the state of the law at the time, a point which is underestimated by Reynold’s analysis which focuses on the case as a

¹²⁵ *ibid* 258.

¹²⁶ *ibid* 275.

¹²⁷ *ibid* 274.

¹²⁸ *ibid* 272.

¹²⁹ *ibid* 280.

¹³⁰ *ibid* 281.

“policy decision with a vengeance”.¹³¹ The majority in three separate opinions present the argument that consent is not a defence to ABH and that sadomasochistic sexual activities should not be added to the list of special exemptions. Although they differ as to the extent that they agree with the utility and interpretation of the case law to date, they show broad agreement in this outcome, and, as demonstrated in the present commentary, palpable agreement that the acts themselves were deplorable. The minority, although showing unity in their conclusion that they would allow the appeal, approached the case in very different ways: Lord Slynn within the confines of the original question regarding consent as a defence to ABH and reasoning that it was such a defence, and Lord Mustill in the belief that such acts conducted consensually and in private should not be interfered with by the criminal law. *Brown* relates directly to our understanding of peers in the ED literature (to be discussed in Chapter Five), and will be used to bring into question ED’s definition of a peer and whether it is possible to find peers in real-life situations. Moreover, this case raises questions regarding the reliability of our assessment of both one another (as potential ‘peers’) and the evidence we deem to be available to the dispute at hand.¹³² My analysis going forward therefore aims to light up the dynamics of the evident disagreement in this case in a way that is not captured by the legal-public policy concerns offered in Reynold’s account.

3.4 Case 4: when a lone voice dissents

The final judgment to be utilised in this chapter, *Quila*, is unique amongst the four cases presented in that it offers an example of a lone dissent. The 2011 case concerned a

¹³¹ Reynold (n 20) 33.

¹³² See Chapter Five, Section 3, in which I use Miranda Fricker’s insights to raise concerns regarding our fallibility in making such assessments and potential epistemic injustices that arise. This will then be further explored in Chapter Seven in relation to Dworkin’s interpretive concepts thesis.

change in immigration rules regarding “marriage visas”,¹³³ whereby the minimum age for both parties to the application for a visa, either as sponsor or to be sponsored, was increased from eighteen to twenty-one. The CA had declared that the Secretary of State’s application of the new rule, resulting in the rejection of two applications from couples under the age of twenty-one, was unlawful under Article 8 ECHR; the right to a private and family life.¹³⁴ The Secretary of State therefore granted the two visas in question, but appealed the decision of the CA. The UKSC case focused on the reasons why the Secretary of State increased the age requirement for applications, which was to deter forced marriages. The UKSC needed to determine if the ends (deterring forced marriages) justified the means (which involved prohibiting couples who were not in a forced marriage from residing together in the UK). That is, whether or not the interference with family and private life under Article 8 ECHR was justified.¹³⁵ As Lord Wilson put it:

The amendment had a legitimate aim: it was “for the protection of the rights and freedoms of others”, namely those who might otherwise be forced into marriage. It was “in accordance with the law.” But was it “necessary in a democratic society”? It is within this question that an assessment of the... amendment’s proportionality must be undertaken.¹³⁶

The case was heard by five Justices, with only Lord Brown dissenting from the majority decision that the Secretary of State’s increase to the minimum age of applicants was unlawful.

¹³³ This is described as “an application for a visa to enter or remain in the United Kingdom made by the spouse of a person who is present and settled in the UK”. *Quila* (35) [1].

¹³⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 8.

¹³⁵ *Quila* (n 32) [44].

¹³⁶ *ibid* [45].

The majority decision was articulated in the leading Judgment of Lord Wilson and in a concurring judgment contributed by Lady Hale. Lord Phillips and Lord Clarke were in agreement with Lord Wilson and Lady Hale. Interestingly, and in contrast to the cases discussed thus far, Lady Hale offered a concurring judgment due to the lack of panel consensus (rather than because she differed in her approach from Lord Wilson). Indeed Lady Hale noted that Lord Wilson’s judgment was comprehensive and that she added some comments “only because we are not all of the same mind”.¹³⁷ This idea of giving strength to the decision is similar to the situation observed in *Adams* in Section 3.2, where an extra opinion was added to the dissent due to the lack of agreement amongst the Justices.¹³⁸ This varying utilisation of concurrent opinions observed throughout all four cases discussed in this chapter demonstrates the complexity of the judicial approach to decision making, and their presentation as authority in law. Indeed, such evident complexity is an important reason for my suggestion that judicial decisions provide a fine platform for the explication and exploration of the ED philosophy in the context of furthering our understanding of law.

Turning to the judgment itself, the disagreement amongst the Justices concerned not just whether Article 8 rights were unjustifiably infringed, but whether the impact of the rule change was a concern for the courts or government. The majority saw no problem in this question being an area for the courts, whereas Lord Brown in dissent felt that the courts should only interfere with government policy in this way in very limited circumstances. As Reynold observed then, the disagreement was “symptomatic of an increasing tension and unease within the higher judiciary”¹³⁹ regarding the reach of the court’s decision making powers. As noted, the reason for the change was to deter forced marriages, with the rationale that if couples had to wait longer for visa applications this would give the party (or parties)

¹³⁷ *Quila* (n 32) [60].

¹³⁸ See text to n 68.

¹³⁹ Reynold (n 20) 105.

being forced into marriage more time to attempt to prevent it from happening. It was thought too that the length of time they would have to wait might act as a deterrent in itself. Lord Wilson’s judgment focused at length on the reasons and evidence to support the rule change. For example, in terms of previous rulings regarding proportionality under Article 8, Lord Wilson observed that “there is no “clear and consistent jurisprudence” of the ECHR which our courts ought to follow”.¹⁴⁰ Although the case of *Abdulaziz*¹⁴¹ decided in the European Court of Human Rights (ECtHR), and relied upon by the Secretary of State’s appeal, suggested that action was not possible under Article 8 in similar circumstances, Lord Wilson looked at four cases following the decision in the ECtHR, all of which indicated that the decisions were analogous to the case before the UKSC, only to conclude that the UKSC need not follow *Abdulaziz*.¹⁴² The reasons for this conclusion were: that the case was old (having been heard in 1985), cases in the ECtHR heard since were inconsistent with *Abdulaziz*, and, pertinent to our purposes here, “there was dissent from it even at the time”.¹⁴³ Although not discussed in the judgment itself, upon examination of the judgment in *Abdulaziz*, there are in fact no dissenting opinions but rather two substantive, though brief, concurring opinions; both of which claim that the right to private and family life had been breached in the case, though this had been justified under Article 8(2). This differed from the main judgment in which it was concluded that Article 8 had not been violated.¹⁴⁴ Thus Lord Wilson was making the point

¹⁴⁰ *Quila* (n 32) [43].

¹⁴¹ *Abdulaziz v United Kingdom* (1985) 7 EHRR 471.

¹⁴² Indeed, the CA had attempted to distinguish *Abdulaziz* from the present case, but Lord Wilson concluded that “the grounds of distinction favoured by the CA is untenable”. *Quila* (n 32) [33].

¹⁴³ *ibid* [43].

¹⁴⁴ *Abdulaziz* (n 143). The concurring opinion of Judge Thór Vilhjálmsson notes a difference of view regarding why Article 8 was not violated in the case; he believed that there was a lack of respect to private and family life, but it was justified under Article 8(2). Judge Bernhardt similarly notes that it is Article 8(2) that should be relied upon to justify the lack of respect to private and family life in this case, instead of Article 8(1) which was used in the main judgment where it was concluded that it had not

that the facts of *Abdulaziz* were analogous to the facts in *Quila*, and in *Abdulaziz* the court had not been in agreement as to whether Article 8 had been violated (or if it had been violated, that such violation was justified). The presence of ‘dissent’ in *Abdulaziz* was used in *Quila* as a reason for declining to follow *Abdulaziz* (particularly noteworthy as *Abdulaziz* was a decision made by the ECtHR regarding the ECHR). This demonstrates the significance a dissenting or concurrent judgment can have, as it enables a judge to make clear where and why they differ in approach and reasoning. Such judgments can be utilised in future cases too,¹⁴⁵ though this may undermine the reliability of a ruling, as was deemed to be the case in *Abdulaziz*. This should be borne in mind for our discussion of ED philosophy in Chapter Five in which the role that the opinions of others can have in shaping and justifying the beliefs we hold will be considered.¹⁴⁶

In relation to the facts presented in *Quila*, Lord Wilson saw that it was a “colossal interference with the rights of the respondents to respect for their family life”¹⁴⁷ that the two couples in this case had no option but to either live apart or to move to a different country. Regarding whether or not this was justified as a proportionate measure to deter forced marriages, Lord Wilson concluded to the negative, observing: “the Secretary of State has failed to demonstrate that, when she introduced it [the increase in age limit for marriage visas], she had robust evidence of any substantial deterrent effect of the amendment upon *forced marriages*”.¹⁴⁸ Furthermore, in Lord Wilson’s view not only did the evidence assessed give no strong indication that it would act as such a deterrent, it would obstruct far more

been breached. Judge Bernhardt also made clarifications regarding his view of the use of Article 13 (the right to a remedy), which were agreed with by Judge Pettiti and Judge Gersing, though this does not bear relevance to *Quila*.

¹⁴⁵ Indeed we saw this to be the case with Lady Hale’s later comments on the dissent in *Barry*. See text to n 64.

¹⁴⁶ See e.g. Chapter Five, text to n 57, and Section 3.1 more widely.

¹⁴⁷ *Quila* (n 32) [32].

¹⁴⁸ *ibid* [50].

unforced marriages than it would prevent those that were forced, and the Secretary of State had not addressed this imbalance. In drawing his judgment to a conclusion, Lord Wilson remarked: “on any view it is a sledgehammer but she has not attempted to identify the size of the nut”.¹⁴⁹ Similarly Lady Hale concluded in her concurring opinion that none of the evidence presented in justification of the rule change “amounts to a sufficient case to conclude that the good done to the few can justify the harm done to the many, especially when there are so many other means available to achieve the desired result”.¹⁵⁰

Lord Brown was deeply unhappy with the majority decision. He opened his judgment with the emotive statement “Forced marriages are an appalling evil”¹⁵¹ and later commented “It is my misfortune to disagree with what I understand will be the decision of the majority of the court on this further appeal to uphold the Court of Appeal’s conclusion”.¹⁵² Lord Brown disliked Lord Wilson’s reference to the idea that more unforced marriages would be interfered with than force marriages prevented, referring to the idea of putting a cost on such a thing:

What value, then, is to be attached to preventing a single forced marriage? What cost should each disappointed couple be regarded as paying? Really these questions are questions of policy and should be for government rather than us.¹⁵³

¹⁴⁹ *ibid* [58].

¹⁵⁰ *ibid* [77]. Indeed, Lady Hale was even doubtful that the change in rule was of benefit to those who might be forced to marry, claiming that it might make their lives worse if they were to be sent abroad to wait until they were old enough to sponsor their spouse. *ibid* [76].

¹⁵¹ *ibid* [81].

¹⁵² *ibid* [83].

¹⁵³ *ibid* [91].

This question of policy in *Quila* is relevant to our understanding of the dynamics of disagreement in JDM, because it offers a surprisingly rare instance of judges directly engaging with one another's arguments. The Justices disagreed over the extent of deference to be afforded to the Secretary of State's judgment regarding the proportionality of the infringement of ECHR rights, or, to put it differently, they disagreed over what the role of the court was. Lord Wilson noted: "Lord Brown's call, at para 91 below, for the courts in this context to afford to government a very substantial area of discretionary judgement is at odds with my understanding of the nature of their duty".¹⁵⁴ Here the judges differed regarding how Lord Bingham's statements in *Huang* should be understood. Lord Wilson argued that Lord Bingham suggested it was wrong to afford "deference" to the Secretary of State, whose view should be given weight only to the extent "that she was likely to have had access to special sources of knowledge and advice"¹⁵⁵ in relation to the proportionality of the measure in question. Lord Brown on the other hand argued for "accord[ing] government a very substantial area of discretionary judgment" on the very basis that Lord Bingham "expressly recognised the need to accord "appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice"". ¹⁵⁶ He argued:

That is precisely what I am suggesting should be done here: it is the Secretary of State who has the responsibility for combating forced marriages in the context of immigration and who should be recognised as having access to special sources of knowledge and advice in that regard.¹⁵⁷

¹⁵⁴ *ibid* [46].

¹⁵⁵ *ibid*.

¹⁵⁶ *ibid* [91], quoting *Huang v Secretary of State for the Home Department* [2007] UKHL 11, 2 WLR 581 [16].

¹⁵⁷ *Quila* (n 32) [91].

Such disagreement was not resolved and offers a reason why there was a dissenting judgment in this case: thus, the majority and Lord Brown were at odds regarding the extent to which government should be able to determine the appropriate steps to deter forced marriages when such steps interfered with the rights of couples in an *unforced* marriage.

In this case, Lord Brown made direct reference to the same evidence as Lord Wilson and Lady Hale and simply drew different conclusions. For example, as part of the evidence used to determine if an increase in the minimum age was warranted, concerns had been raised that there had been an increase in the forging of birth certificates so that applications for visas could be made. Lady Hale used this to highlight that there were still concerns regarding forced marriages after the rule change,¹⁵⁸ whereas Lord Brown weighed it quite differently: “Mr Afzal’s only concern appears to be in respect of forged birth certificates”.¹⁵⁹ The different weight placed on certain evidence is a matter that we have already encountered in relation to *Adams* and is one that we will return to throughout this thesis, particularly in Chapters Four to Six as we consider the utility of the ED philosophy in helping to shed light on how we might approach such instances where ‘peers’ are presented with the same evidence and come to different conclusions.¹⁶⁰ For the time being, it is sufficient to demonstrate that this is what appears to have happened in *Quila*. Whilst Lord Wilson, Lady Hale, Lord Phillips and Lord Clarke reviewed the evidence and determined that the Secretary of State’s rule change unjustifiably infringed Article 8 EHRC rights, Lord Brown concluded that in light of such evidence “I find it hard to see how this court can properly strike down the rule as incompatible with article 8”.¹⁶¹

¹⁵⁸ *ibid* [77].

¹⁵⁹ *ibid* [84].

¹⁶⁰ This will be the work of Chapters Four and Five of the thesis.

¹⁶¹ *Quila* (n 32) [90].

A further example of the Justices engaging directly with one another's arguments in the decisions occurs where Lord Brown makes reference to Lady Hale's use of a specific case in her judgment, though in this instance Lady Hale did not reference Lord Brown's view (as was the case with Lord Brown and Lord Wilson's disagreement above). Here, Lord Brown observed: "I confess to the greatest difficulty in understanding the suggested relevance of *Hirst* in the present context".¹⁶² This difference of opinion highlights another interesting aspect of JDM that should be borne in mind in this enquiry: the nature of the common law system. In addition to the evidence put before the UKSC, Justices can also draw upon a wealth of judgments from previous cases to make their decisions. Lady Hale in her reference to *Hirst*¹⁶³ states (concerning the justification of "blanket" rules) "we know from cases such as *Hirst*... that a general, automatic, indiscriminate restriction (their word) on a vitally important Convention right falls outside any acceptable margin of appreciation",¹⁶⁴ demonstrating the reliance on past cases as a source of knowledge of the law. This adds two points for consideration in this enquiry. First, which cases should be drawn upon in a judgment, and when does one know when to stop in assessing the relevance of cases. We can see, for example, in *Quila* that Lord Brown profoundly disagreed with the relevance Lady Hale placed on *Hirst*. Second, when does there come the difference between *knowing* from a case as Lady Hale does in this instance, and declining to follow a case as we saw Lord Wilson do with *Abdulaziz*. In this respect, what does it mean to say that we *know* the law, and how can we adequately identify the body of evidence from which one should draw? This question will be taken up in Chapter Five because it is pertinent to our understanding of the ED question, which requires the parties to a disagreement to share the same body of evidence.¹⁶⁵ The

¹⁶² *ibid* [92].

¹⁶³ *Hirst v United Kingdom (No 2)* (2005) 42 EHRR 849.

¹⁶⁴ *Quila* (n 32) [74] (emphasis added).

¹⁶⁵ See Chapter Five, Section 3.2.

complexities of reasoning and deliberative decision making evident in this chapter's exploration of cases are important factors in assessing the kind of philosophy and/or jurisprudence required to further our understanding of JDM, and why it is that the ED philosophy ultimately fails in providing the requisite tools due to the unfortunately narrow remit it calls for.

4. Preliminary remarks

It has been my aim in this chapter to lay the foundations of this thesis' exploration of the applicability of ED to JDM. I have used as a basis for discussion four judgments, all of which showed signs of disagreement in many guises. The cases employed here will be used to explain and evidence the claims outlined in Chapter One; as indicated through this chapter's discussion. We saw for example in *Barry and Adams* that the meaning of statutory provisions can give rise to disagreement as judges endeavour to make sense of what words either *do* or *should* mean, and indeed that disagreement can often be over whether the judge's remit should be with regard to the '*do*' or the '*should*'. As noted, this will be pertinent to our understanding of the ED presentation of disagreement and the role that conceptual disagreements play in JDM; speaking directly to our understanding of what it means for us to disagree. A further common theme has been the weighing of evidence in the court. In *Quila* for example, we saw that the judges not only disagreed with regard to the weight and relevance of the evidence put before the court, but with that of the precedent and appropriate case law from which to draw. In this respect a question to be asked in the ED literature is how confident the Justices should be in such instances with regard to the weight they have placed on the evidence in light of the disagreement of their colleague.¹⁶⁶

¹⁶⁶ To be explored in Chapter Five.

Furthermore, a question we will ask of the ED literature is how reliable we are in making such assessments, both with regard to one another and what we deem to be the evidence available. Indeed, we saw in *Brown* the influence that the judges' views of homosexual and sadomasochistic activity had on how they viewed the requirements of the law at the time. In this regard, both *Quila* and *Brown* will be drawn on in later discussions to demonstrate the caution with which we should approach our understanding of how we use and share the concepts at our disposal.¹⁶⁷

We saw too in the above analysis, particularly in relation to *Barry* and *Adams* that often the disagreement between judges concerns deciphering what the intentions of Parliament were with regard to a piece of legislation. As Reynold comments: "the tendency is to attribute to Parliament the intention which appears to make the most sense, and unsurprisingly it is often the case that agreement cannot be achieved as to what that should be".¹⁶⁸ Indeed we saw such concerns with regard to the intentions of the judges themselves in *Brown* where Lord Lowry warned of the danger of applying a judgment of one case to the facts of another when the judges to the case being applied may not have been thinking of such circumstances of the present case when they made their decision.¹⁶⁹ Indeed, in his text *Law and Disagreement* Jeremy Waldron cautioned against even considering that Parliament had 'intentions'. To Waldron, this relic from the feudal origins of the UK's system of government is an unrealistic proposition because there are now so many people involved in creating legislation that to say there is a discernible 'intention' of Parliament makes little sense in practice.¹⁷⁰ For present purposes this raises an important question regarding the sense that can be made of such disagreements. That is, if there is no real intention to discern

¹⁶⁷ See text to n 132.

¹⁶⁸ Reynold (n 20) 53.

¹⁶⁹ *Brown* (n 31) 254.

¹⁷⁰ Jeremy Waldron, *Law and Disagreement* (OUP, USA 2001) 42. Waldron's views will be discussed further in Chapter Four, text to n 108.

then what can be sensibly said of the nature of such purported disagreement? This will be an important feature of discussion in Chapter Four in which the presentation of disagreement in ED is explored. We will see that for ED a requirement for genuine disagreement is that it must be over a fact or truth-apt proposition. Whether there can be said to be such a fact in the cases discussed in the present chapter will be subject to consideration in both Sections B and C of the thesis, and in Chapter Four in particular. Drawing on the analysis of disagreements in the court delivered in the present chapter, it will be my argument that the requirement for a disagreement to be over a truth-apt proposition is needlessly restrictive on the instances of disagreement that can be deemed genuine, as opposed to merely apparent.¹⁷¹

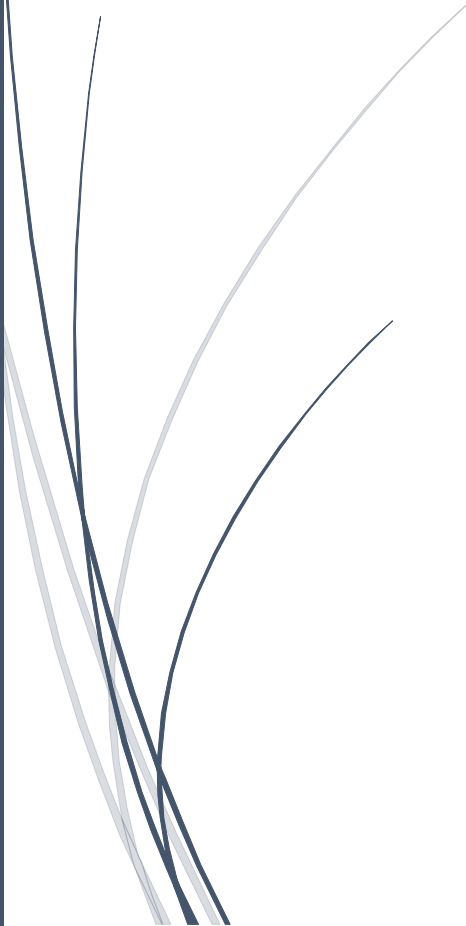
In order to seriously investigate the disagreements evident in judicial decisions we must first gain clarity over what it means to say that judges disagree. That is, what do we mean by disagreement? We have already begun to shed light on our understanding of the notion through Chapter Two's examination of disagreement in practice, as well as more specifically in the courtroom in the present chapter. Armed with these insights we turn now to the ED philosophy which promises not only a clear understanding of disagreement as a phenomenon, but how we should react to instances of disagreement.

¹⁷¹ See Chapter Four, Section 4.1 and 4.3.



SECTION B

The Epistemology of Disagreement





CHAPTER FOUR

The Notion of
Disagreement in the
Epistemology of
Disagreement Literature



SECTION B

THE EPISTEMOLOGY OF DISAGREEMENT

1. Introducing the epistemology of disagreement

Chapters Two and Three of this thesis have laid important foundations for the assessment of ED philosophy in JDM. We have begun to take the idea of disagreement seriously through an exploration of disagreement in practice, both in general social situations as well as within specialised fields, and, most pertinently, in the UKSC. It is time now to turn to the ED philosophy, so that we might begin to understand both the philosophy itself and its relevance and potential utility for JDM. Recalling the introduction to this thesis, attention to disagreement in philosophy in recent years has led to the emergence of new literature concerning what has been referred to as the Epistemology of Disagreement.¹ ED literature has developed with an emphasis on the analysis of disagreement in terms of what it is rational to believe if one finds oneself in disagreement with another. As Ernest Sosa puts it: “*when and how can a belief be sustained reasonably in the face of known disagreement?*”² This is a version of what I will refer to as the ‘ED question’, which encourages reflection on how the fact of disagreement over X might or should alter one’s belief regarding X.³ Yet, it is not quite

¹ Indeed, as noted in Chapter One, at least three substantial texts have been published since this thesis was embarked upon, in addition to numerous papers that were already in existence, and a collection of essays which had already been published in book form (see Richard Feldman and Ted Warfield (eds), *Disagreement* (OUP 2010). The first is a collection of essays on disagreement (David Christensen and Jennifer Lackey, *The Epistemology of Disagreement: New Essays* (OUP 2014), the second is the first ‘textbook’ on the subject (Bryan Frances, *Disagreement* (Polity Press 2014)), and the third is a monograph concerning the epistemic significance of disagreement (Jonathan Matheson, *The Epistemic Significance of Disagreement* (Palgrave Macmillan 2015)). In fact, Matheson’s text is part of the *Palgrave Innovations in Philosophy* series which seeks to provide overviews of the “‘hot’ new research areas in philosophy”, further demonstrating the momentum generated by this line of research in contemporary studies in epistemology. Matheson x. All three texts will be drawn on in this chapter.

² Ernest Sosa, ‘The Epistemology of Disagreement’ in Adrian Haddock, Alan Millar, and Duncan Pritchard (eds), *Social Epistemology* (OUP 2010) 278.

³ This question has been advanced in a number of ways in the literature, all amounting to whether or not one should alter one’s belief in the face of disagreement. E.g. Matheson offers the following

accurate to suggest that ED's focus is simply on disagreement merely with another, because in order to address the ED question the literature itself is often narrower still, concerning what is described as 'peer' disagreement. In using peer disagreement, ED theories are focussed on the analysis of disagreements which concern parties who have the same evidence available to them, the same training and knowledge, and the same intellectual faculties and abilities. Parties are therefore considered to be 'epistemic peers'.⁴ The notion of peer is used for simplicity. It is intended to help focus philosophical discussion by eliminating the potential variations between people, their beliefs and the evidence available to them. Thus the focus on disagreement between peers is intended to enable critical reflection on the epistemic significance of the disagreement itself without the need to take into account differences in the people disagreeing.⁵ To illustrate, an example commonly used by ED theorists is that of two meteorologists who have the same information available to them, with the same professional experience, and who generally make the same weather forecasts.⁶ On one occasion however they make conflicting forecasts; A thinks it will rain tomorrow, and B thinks it will not. The question the literature is concerned with is: can A or B reasonably or justifiably

questions: "how *should* we respond to disagreement? What is the rational reaction? What is epistemically called for on our part?" Matheson (n 1) 2. Similarly Christensen sees that "Most of the debate has revolved around the question of what, if any, effect the disagreement of others should have on the confidence with which one holds one's own beliefs". David Christensen 'Disagreement and Public Controversy' in Jennifer Lackey (ed), *Essays in Collective Epistemology* (OUP 2014) 143.

⁴ The idea of epistemic peer is refined during the course of this section of the thesis, particularly in Chapter Five.

⁵ We will see that not taking into account variation is problematic for the utility of the ED notion of peer disagreement in JDM – to be explored in the thesis.

⁶ This example is used throughout the literature. See e.g. Feldman and Warfield (n 1), David Christensen, 'Epistemology of Disagreement: The Good News' (2007) 116(2) *Philosophical Review* 187-217, Adam Elga, 'Reflection and Disagreement' (2007) 41(3) *Nous* 478–502, and Frances (n 1). We saw a variation of this example used in Chapter Two, where the idea of peer was omitted to avoid unnecessary complications. See Chapter Two, text to n 61.

hold their belief in the face of their peer's disagreement, or would one (or both) of them be required to adjust their belief?⁷ The main aim of ED is then to explore what one is justified in believing in the face of disagreement with a peer. That is, when A and B, who are considered epistemic peers, disagree over proposition p, does one (or both) beliefs held by A and B over p need revising? Would A or B in scenario X be unjustified in maintaining their beliefs when they become aware of the differing view of their peer? Similarly, can a body of evidence justify multiple beliefs or attitudes? Is it epistemically sustainable to have more than one justifiable belief regarding a body of evidence; as peers, can A justifiably believe p and B believe not-p at the same time?⁸ There are various answers to these questions explored in ED, all with the common aim of determining how one should react in a case of disagreement such as that observed between the two meteorologists and, we hope, more complex instances of disagreement too.⁹ Indeed, although typical examples used involve two parties in simplified disputes such as that seen between the two meteorologists, the ED literature is intended to be far reaching in the sense that it can apply to complex disagreements, such as those over religion, morality, and law. As David Christensen puts it:

The hope is that by understanding the rational response to disagreement in the simple cases, we will get some insight into what the rational response is in the

⁷ Feldman and Warfield (n 1).

⁸ For example, in his essay 'Reasonable Religious Disagreement', Feldman argues for the view that it is not possible for people to reasonably put forward different views based on the same evidence. Richard Feldman, 'Reasonable Religious Disagreement' in Alvin Goldman and Dennis Whitcomb (eds) *Social Epistemology Essential Readings* (OUP 2011) 147.

⁹ Indeed, to be explored in the present chapter is a concern that the focus in ED is often on highly simplified, often contrived examples of disagreement that cannot readily extend to the more complex instances observed in JDM.

more complex cases involving the public controversies among groups that give the issue much of its urgency.¹⁰

To be expanded in Chapter Six of the thesis, it is worth noting very briefly here that the scope of responses or answers to the ED question range across and between what have been referred to as conciliatory and steadfast views. Conciliationists argue that the fact of disagreement with a peer over p should give one cause to be less confident in one's belief over p . Thus the difference in views held by our meteorologists should give cause for A and/or B to be less confident in their predictions. They should either suspend judgment, lower their confidence in their belief, or indeed adopt the other party's view regarding the forecast.¹¹ By contrast, the steadfast approach to the ED question insists that disagreement with a peer should not cause one to change one's view about p .¹² Thus regarding the weather forecast, I should remain confident in my view because my peer's disagreement is not epistemically significant. So regardless of the view one adopts, ED is intended to inform us with regard to how we should react to disagreements we encounter. Beyond the scope of the present chapter, and to be explored in Chapter Six, these answers are briefly sketched here to provide context for the ED terrain and its focus on belief-revision, for this section of the thesis.

Finally, in terms of the location of the ED question in relation to disagreement as a philosophical topic of interest, Bryan Frances notes that there are two philosophical questions that typically arise in situations where one finds oneself believing p to be false where others think p is true. There is the epistemological question: "after the realization of disagreement, should you continue to believe [p]?", and what Frances refers to as the question of ethics:

¹⁰ Christensen (n 3) 143.

¹¹ Advocates for versions of conciliatory views include Richard Feldman, David Christensen, Hilary Kornblith, Stewart Cohen, Adam Elga, and Jonathan Matheson.

¹² Advocates for this approach include Thomas Kelly, Richard Foley, David Enoch, and Brian Weatherson.

“after the realization of disagreement, how should you act or behave (e.g. should you continue to act on the assumption that [p] is true)?”¹³ ED is concerned only with the question of epistemology. It is important to note this discrete focus from the outset of this thesis’ discussion of ED because, as will be my sustained argument during the course of this chapter and wider thesis, this narrow interest colours the literature’s presentation of what disagreement is and the instances deemed to be of interest for analysis.

For the purposes of clarity and to allow sufficient scope for discussion and application, this project’s analysis of ED will be undertaken in three distinct chapters of Section B of the thesis. The first, Chapter Four, begins an examination of the ED question itself, specifically in relation to the presentation of ‘disagreement’ in the literature. The second, Chapter Five, continues this examination through close attention to the ED notion of ‘peer’ disagreement and why it is ultimately unrealistic and unhelpful to consider UKSC Justices as peers in the ED sense. Finally, Chapter Six concludes Section B with an exploration of several purported answers to the ED question – i.e. how one should react to, or act in the face of, disagreement.¹⁴ All three chapters are used to demonstrate and explain the applicability and utility of ED philosophy to disagreements encountered in the UKSC. Specifically, they address the following questions:

- 1) Is the ED question, its remit and purpose, applicable to JDM (specifically for our purposes in the UKSC)? As an overarching question for Chapters Four and Five, this is further broken down into:
 - a. What is the understanding of disagreement presented in the literature? What are the requirements of a genuine disagreement? (to be addressed in Chapter Four)

¹³ Frances (n 1) 5-6.

¹⁴ These are the conciliatory and steadfast approaches to disagreement referenced previously.

- b. Can UKSC Justices be considered peers in the sense required of ED philosophy? (to be addressed in Chapter Five)
- 2) Do the answers advanced in response to the ED question aid this thesis' ambition to further our understanding of disagreement in JDM? (To be addressed in Chapter Six).

Although each question is the proper remit of a chapter in turn, the chapters are designed to build on each other. As such Chapter Four lays important foundations for an informed answer to the questions addressed in Chapters Five and Six, as does Chapter Five for Six. Thus for example, although the present chapter introduces the notion of *peer* disagreement, detailed contemplation of the UKSC Justices as peers will be left for the work of Chapter Five.

In addressing each question, my intention is to demonstrate significant limitations of the philosophy. It is my argument that the recent philosophical literature on disagreement presents an inadequate command of its subject, disagreement, which undermines the practical value it can have for JDM, though need not limit the development of our understanding of disagreement therein. It is argued that this is because the idea of genuine disagreement employed by the ED literature is needlessly restrictive. In making this claim I draw on the work of Ronald Dworkin to suggest a more generous understanding of genuine disagreement which allows for a wider range of instances to be applicable. It is further claimed that despite its protagonists' intentions, the reason for ED's conservative approach is that ED is really interested in the requirements of rationality and reasonableness rather than the phenomenon of disagreement itself. In fact, it could be said that disagreement is not, after all, the subject of interest for ED. These arguments entailed in my overall assessment of the typical ED approach to disagreement run through the course of Section B of the thesis, and will be referred to as the misappropriation of disagreement. Importantly, although it is argued that ED theory is not seamlessly applicable to JDM, it is further argued that the limitations

unearthed ultimately allow us to gain a more informed and rigorous understanding of the disagreements that take place in law and the UKSC specifically. Thus in important ways the answer to whether the ED question furthers our understanding of disagreement in JDM (a culmination of questions 1 and 2 outlined above), is that it does so, though at times indirectly, and often only through learning from ED's unnecessary restrictions. This argument, which lies at the heart of my project's ambitions, will be developed throughout Section B and into Section C of the thesis.

The first phase of my assessment of ED's applicability to JDM is presented here in Chapter Four in which I begin to outline my argument; i.e. that an important reason for ED's inadequate command of disagreement is its limited scope resulting from a preoccupation with the epistemic significance of disagreement in itself, which has resulted in a narrow focus in the literature on *peer* disagreement. More than this, in adopting such a narrow focus, the result is a lack of clarity in subject matter because what is depicted as a discussion of disagreement is often in practice a limited discussion of specific instances of disagreement; the result of a desire that the disagreement is genuine. The uncertainty regarding subject matter is often evident in the way in which disagreement is presented to the reader, (which is the focus of the present chapter).¹⁵ In order to present and defend these claims, the present chapter has the following structure. In Section 2 the scene is set with a brief explanation of the texts drawn on in this section of the thesis, the context in which they sit, and the rationale for their selection. Section 3 adds some comments on the intention that ED is to apply to real-life disagreements and thereby inform our practical understanding. Section 4 seeks to understand the distinction made between 'genuine' and 'illusory' or 'merely apparent' disagreement in ED. It will be demonstrated that rather than providing clarity for the concept of disagreement, the handling of these distinctions evidences the mishandling of the concept

¹⁵ The argument will then be built upon in Chapter Five in which the use of 'peers' in disagreement will be considered.

'disagreement' by ED. In this section, the way in which legal philosopher Ronald Dworkin distinguishes between illusory and genuine disagreement will be drawn on to demonstrate the needlessly restrictive (and possibly damaging) bounds ED places on the requirements for genuine disagreement which, I argue, is the result of the limited scope of the field itself. This limited scope is the result of an overbearing focus in the literature on what it is *rational* or reasonable to do *in light of* disagreement, rather than an interest in disagreement itself; a claim that is introduced in the present chapter, and further elaborated and articulated as the thesis progresses, in particular in Chapter Six. Section 5 draws the chapter to a close with some preliminary remarks regarding ED's remit in relation to the instances of disagreement it is interested in. Through my analysis of ED's presentation of disagreement, we begin to see difficulties emerge in ED's set-up of their project.

2. The scope of the epistemology of disagreement philosophy and its employment in this thesis

In order to make sense of how ED can be used in our understanding of disagreements in JDM, a number of texts on ED will be drawn on in this chapter, and in Section B of the thesis more widely. As a young and rapidly growing field, there is an increasingly large body of literature from which to draw, including a number of edited volumes, standalone texts, and copious journal articles.¹⁶ This scope and expansion has meant that the texts investigated in the thesis are selected in order to present the underlying and general themes drawn out in the literature. Much of the expanding literature concerns the development of increasingly refined answers to the ED question.¹⁷ Others address newly identified problems and

¹⁶ See n 1.

¹⁷ As noted in Section 1 of this Chapter, these answers will be the subject matter of Chapter Six of the thesis.

considerations that have developed from the initial ED investigation.¹⁸ The present chapter, however, is concerned with the more foundational question of how disagreement is understood in the ED literature. It is noteworthy that many texts, particularly in the more recent ED works, turn straight to the question of conciliatory versus steadfast approaches to the “ED question”. That is, they explore practical action in light of disagreement, taking for granted the established foundations for the ED question itself, i.e. what disagreements they are interested in. In their introduction to *The Epistemology of Disagreement New Essays*, for example, Christensen and Lackey go directly to this, stating:

Disagreement is a familiar part of our lives. We often find ourselves faced with people who have beliefs that conflict with our own on everything from the existence of God and the morality of abortion to the location of a local restaurant. Much of the recent work in the literature on the epistemology of disagreement has centered on how much belief-revision, if any, is required in order for belief to be rational in light of this disagreement.¹⁹

What follows in the text is a discussion of what might influence the view one took with regard to belief-revision based upon one’s assessment of the epistemic credentials of the parties to the disagreement, and their ability to evaluate the evidence available.²⁰ Attention is not placed on disagreement itself. Perhaps this is due to the foundational work already

¹⁸ For example, in *The Epistemology of Disagreement New Essays* a section of the text is dedicated to ‘New Concepts and New Problems in the Epistemology of Disagreement’. Christensen and Lackey (n 1) 203.

¹⁹ *ibid* 1. Indeed, this approach is reflected in the structure of the text which is split into three parts focussing on steadfast vs conciliatory approaches, disagreement in philosophy specifically, and new concepts and problems in ED. *ibid* v-vi.

²⁰ *ibid* 1.

undertaken in the literature, or due to the belief that the reader is familiar with the literature and so the brief examples of disagreement referenced suffice to establish context, though neither reason is unequivocal in the writing. Irrespective of the reasoning, the truncated approach indicates an established terrain which is being steadily developed, where the foundational matters of interest to the present chapter are increasingly being taken for granted.²¹ Thus the ED literature is growing with a focus on answering the ED question, rather than reflecting on or interrogating the ED question itself. Whilst such works will therefore not be the focus of present endeavours, it is important to acknowledge their part in the literature to contextualise my examination of the question and its underlying premises.

In terms then of the texts that will be the subject of discussions in Chapter Four, focus will be directed to works which articulate an understanding of the disagreements of interest to the field and the rationale for the central notion of peer disagreement in particular. To this end, Bryan Frances' *Disagreement* and Jonathan Matheson's *The Epistemic Significance of Disagreement* will be drawn on due to their introductory scope.²² *Disagreement* is the first, and presently *only*, textbook in philosophy on 'disagreement',²³ intending to provide students and those new to ED with the tools needed to understand the growing academic literature on disagreement.²⁴ A principal appeal of the text is therefore how accessible the material

²¹ As noted, this lack of attention to disagreement is a common occurrence in the literature. See for further examples Michael Thune, 'Partial Defeaters' and the Epistemology of Disagreement' (2010) 60(239) *The Philosophical Quarterly* 355 (in which Thune notes "Disagreement is a reality", before advancing some questions that might be asked of an instance of disagreement, to contextualise an immediate focus on the ED question), and Christensen D, 'Disagreement as Evidence: The Epistemology of Controversy' (2009) 4(5) *Philosophy Compass* 756 (in which Christensen delves straight into the reactions to disagreement without such (minimal) context).

²² Frances (n 1) and Matheson (n1).

²³ At the time of writing it is believed to be the only 'textbook' on disagreement, philosophical or otherwise.

²⁴ Interestingly, and at times to the detriment of clarity in the text, Frances is a little vague in respect of whether disagreement itself is the subject of the text, or the ED question. Though not a main focus

promises to be; presented in an exploratory format, peppered with practical, simple examples and study questions to direct and reinforce the reader's understanding.²⁵ As I evidence in this chapter – and throughout Section B of the thesis – the significant problem is that ED suffers in the way in which disagreement is presented and handled. Frances' offer of introductory clarity is therefore helpful to the argument of this thesis, because Frances' lack of precision and overly restrictive notion of genuine disagreement in a text in which simplicity and clarity is expected, emphasises the limitations of the field. This chapter draws in particular on Part I of Frances' text, "Basics of Disagreement" as a basis upon which to demonstrate and explore ED's presentation of what a genuine disagreement is. Published a year after Frances' textbook, Matheson's *The Epistemic Significance of Disagreement* aims similarly to provide an overview of the ED literature, explaining the prominent arguments that have emerged thus far and exploring the key examples used.²⁶ Matheson's text is particularly helpful for the number of definitions it provides for both disagreements and epistemic peers, and can thereby be put to use in making sense of the ED remit.²⁷

In addition to providing a conspectus of the field, what both texts also have in common is the aim to extend the ED remit from idealised, contrived cases of disagreement to 'real-life' or 'everyday' cases,²⁸ because, as Matheson observes, "While disagreement is

of this Chapter, this too indicates the lack of clarity in the subject of ED theory. Indeed, we see this also with the recent addition to the *Stanford Encyclopedia of Philosophy* an entry concerning ED (written by Frances) which is simply titled 'Disagreement'. Bryan Frances, 'Disagreement' (*Stanford Encyclopedia of Philosophy*, 23 February 2018)

<<https://plato.stanford.edu/entries/disagreement/>> accessed 30 November 2018.

²⁵ Frances (n 1) 101-104 and 205-207.

²⁶ Matheson (n 1) 2.

²⁷ As noted previously, the idea of peer will be left for Chapter Five. In addition to providing an overview of the ED terrain, Matheson also defends a heavily conciliatory, arguably sceptical, approach to the ED question. His work in this regard will also be made use of in Chapter Six.

²⁸ For example, Matheson dedicates a section of his book to 'Everyday Disagreements' in order to make the case that his response to the ED question can extend beyond the idealised cases often used in the

common, rationally idealized disagreement is not”.²⁹ This is important because one of the significant shortcomings of the ED literature’s applicability to disagreement in practice, and consequently disagreement in the UKSC, is the overly artificial and narrow range of instances in which the literature operates and to which it is applicable. Against this, I argue that there is significant work to be done if ED theory is to extend satisfactorily beyond the artificially constructed instances offered up by the ED literature, a claim that is demonstrable from two texts which seek to make such applications. Although other texts will also be drawn upon, in large part Frances and Matheson’s work is used in this chapter as a conduit for the examination of the wider ED philosophy. Thus the work done in this chapter lays important foundations for our understanding of how and why disagreement has come to be confused and misrepresented in the literature.

3. A word on real-life application

Many ED texts contextualise their subject matter by establishing the prevalence of disagreement in society and everyday lives.³⁰ Matheson, in his text ‘The Epistemic Significance of Disagreement’, for example, commences:

The world is rife with disagreement. Disagreements range from trivial matters – such as who will win next year’s Super Bowl, which vacation destination gives you the most bang for your buck, and what wine pairs best with dinner – to

literature. In fact it is his argument that an application to real-world examples only strengthens his argument for conciliation. This will be considered in Chapter Six of the thesis. Matheson (n 1) 113-135.

²⁹ *ibid* 17.

³⁰ Indeed we saw this with Christensen and Lackey’s introduction to their text in Section 2 of the present chapter, text to n 19.

matters of greater consequences – such as whether God exists, whether we have free will, and whether it is morally permissible to eat meat.³¹

Hilary Kornblith, in his essay ‘Belief in the Face of Controversy’ is pithier still, proclaiming “Disagreement is ubiquitous”, using as examples the USA presidential election and the moral and political issues over which the electorate was divided, disputes between atheists and theists, and the debate over evolution.³² The sense then, as we saw from Christensen’s comments in relation to public controversy at the outset of the present chapter,³³ is that the ED enquiry is intended to be about, and apply to, disagreements that we encounter in our daily lives, and which we consider to be of importance personally, socially, and politically.³⁴ Frances’ approach to framing his subject is similar to that of other writers in the field, though as an introductory text this is taken further by offering numerous examples of disagreements as well as some thirty-three questions “that provoke plenty of disagreement” concerning, among other topics, philosophy, politics and personal lives. The questions include “Should we raise the kids Catholic?”, “Do we have free will?”, and “Is capital punishment a significant deterrent of crime?”³⁵ It is clear then that range and generality of application is purposefully wide for ED’s enquiry. This is important to confirm because, as shall be seen, often the literature employs simplified, idealised examples of disagreement in order to focus discussions. As Matheson puts it, idealised cases “allow us to search for baseline responses

³¹ Matheson (n 1) 1.

³² Feldman and Warfield (n 1) 29.

³³ See n 10.

³⁴ Indeed, this is the case even where single disciplines are used as case studies. E.g. Peter van Inwagen in his essay ‘We’re Right, They’re wrong’ notes that even though his focus for much of the essay was on disagreement in philosophy, his discussion could equally apply to politics and religion. Peter van Inwagen, ‘We’re Right, They’re Wrong’ in Feldman and Warfield (n 1) 28.

³⁵ Frances (n 1) 3-5.

to disagreement that can be helpful once we move to the more muddled cases of everyday disagreement".³⁶

As noted above, ED is concerned with whether or not one should alter one's beliefs over *p* when one finds oneself in a disagreement with another over *p*. Frances frames this as the "question of what we should do when we realize that there are people who disagree with us", a question which he believes to be of great importance to us both personally and publically.³⁷ Yet more than just what to believe, the potential far-reaching consequences of exploring the ED question in this way are linked by Frances to the resolution of disagreements and how important this is due to the potential repercussions of certain disagreements that occur. For example, he observes that people in power disagree about what laws to enact and what wars to fight, noting: "If only we were better able to resolve our disagreements, we would probably save millions of lives and prevent millions of others from living in poverty. If only".³⁸ The scene is therefore set for just how important an answer to the ED question would be.

Frances moves on from his examples of disagreement and the questions that provoke it to where the book lies in epistemology, between the theoretical and applied. He explains:

Theoretical epistemology is the study of the relations among and natures of a group of closely related notions: knowledge, belief, truth, evidence, reason, certainty, rationality, wisdom, understanding and a few others. We will not focus

³⁶ Matheson (n 1) 14. The notion of idealised disagreement here includes the idea of peers in the disagreement, which is omitted from significant focus in the present chapter. It will be argued in Chapter Five however that Matheson's statement here is not quite an accurate representation of the use of peers in ED, because many in the field do claim that peers can be found in real-life instances, which is something Matheson doubts.

³⁷ Frances (n 1) 3.

³⁸ *ibid.*

on those highly theoretical issues. Our center of attention will almost always be on real-life disagreements and what one is supposed to do in *deliberating* how to react to the discovery of disagreement.³⁹

Thus we see that although theoretical issues are evident in Frances' work (he notes that he will not "shirk them entirely"⁴⁰) he is concerned more with how these subjects are applied in social practices and, importantly, real-life situations. As noted previously, this is welcome news to those familiar with the ED literature, where the examples used are often far removed from a typical situation one might find oneself in, in spite of the intention for the theory to extend in this way.⁴¹ The approach fits comfortably too with the disagreements evident in the UKSC, which we saw in Chapter Three arise from a deliberative decision making process.⁴²

4. What it means to have a genuine disagreement

Much of the ED literature focusses on what has been termed 'revealed disagreement' or 'revealed peer disagreement'.⁴³ That is, theorists have been concerned with instances in which the disagreement is known to the parties in question.⁴⁴ Indeed, Frances instigates his

³⁹ *ibid* 5.

⁴⁰ *ibid*.

⁴¹ *ibid* 6. The examples used in ED will be further explored in this section of the thesis. Furthermore, despite Frances' claims referenced above, we will see that these theoretical concepts Frances will *not* focus on in fact come heavily into play in the text. Far from being on the periphery, truth turns out to play a central role in Frances' presentation of disagreement to the reader. This will be seen below in Section 4.3 of this chapter with the discussion of genuine and illusory disagreement.

⁴² See e.g. Chapter Three, Section 2.

⁴³ Feldman and Warfield (n 1) 3.

⁴⁴ Typically ED suggests that the belief regarding *p* needs to be held by someone in order for it to be epistemically significant. However, some suggest the mere possibility of disagreement is significant. E.g. Thomas Kelly explains that an 'actual defender' of a view is not required in order to take that view

exploration of disagreement with the sensible observation that one needs to discover the disagreement before one can contemplate reacting to it. Yet, as Frances also observes, this is not always a straightforward matter because it is not always obvious that one is party to a disagreement.⁴⁵ One might think one is engaged in a disagreement with a friend over, say, the time a film starts at the cinema, only to discover that each party had been checking the showing times at different venues. What was thought to be a disagreement during the exchange, upon clarification was an instance in which the parties were speaking at cross purposes, or in ‘illusory disagreement’. In order to hone in on instances of interest therefore, and in order to articulate the rationale for rejecting such misunderstandings (as with the cinema times dispute), a common theme in the ED literature has been to make the distinction between ‘genuine’ and ‘illusory’, or genuine and ‘merely apparent’ instances of disagreement, so that focus can be placed on those that are deemed to be genuine.⁴⁶

Both the distinction made between genuine and illusory, along with the examples used in its execution are pertinent to our understanding of the shortcomings of the literature

seriously: “The existence of actual defenders can serve to overcome our blindspots by forcefully reminding us of just how formidable the case is for the thesis that they defend, just as actual counterexamples are sometimes needed to overcome our blindspots concerning modality. But the case for a given view itself is no stronger in virtue of the fact that that view has actual defenders—just as a genuine counterexample to a modal claim is no stronger in virtue of being an actual, empirically discovered counterexample”. Here Kelly is making the point that just because there are defenders of a view is not reason in and of itself to believe a potential view is stronger. Thomas Kelly, ‘The Epistemic Significance in Disagreement’ in Gendler T and Hawthorne J (eds), *Oxford Studies in Epistemology* (OUP 2005) 192.

⁴⁵ Frances (n 1) 11.

⁴⁶ Frances e.g. makes reference to both illusory and merely apparent disagreement, where Matheson uses merely apparent. See Frances (n 1) 11 and Matheson (n 1) 7. We see too that this is in fact a theme in other literature concerning disagreement, such as in the work of Ronald Dworkin, to be highlighted in this Section, and developed further in Chapter Seven of this thesis. For consistency, when reference is made to the distinction in general terms, the terms genuine and illusory will be used. The term merely apparent will therefore only be used when referencing an author who uses it.

and its consequent power in advancing our understanding of disagreement in JDM. Most ED texts, although making the distinction between illusory and genuine disagreement, do not detail examples of what such instances look like in practice, and where they do this is often cursory. Matheson, for example, makes a subtle distinction between ‘apparent disagreement’ and ‘merely apparent disagreement’ as follows:

Two individuals *apparently disagree* about a proposition just in case it appears that they genuinely disagree about that proposition. Two individuals *merely apparently disagree* about a proposition just in case they apparently disagree about that proposition, but they do not genuinely disagree about that proposition.⁴⁷

Surprisingly this esoteric distinction is common in the literature, where a felt requirement is the need for a genuine disagreement to be one in which the dispute is about the same proposition.⁴⁸ Richard Feldman, for example, in his discussion of reasonable disagreements uses the following case to support the idea that for disagreement to be genuine it must be with regard to the same proposition: “people arguing about such things as pornography may not have any real disagreement. Those “against” it may think that it has harmful social consequences. Those “for” it may think that it should not be made illegal. There may be no disagreement about any specific proposition”.⁴⁹ Which is not to say of course that there cannot be a genuine disagreement over pornography, but rather that for there to be a

⁴⁷ Matheson (n 1) 7.

⁴⁸ See e.g. the way in which Feldman makes the same distinction in his essay *Reasonable Religious Disagreement*, noting that we can either not be disagreeing over the same proposition though we think we are, or that we are alternatively using our words in different ways, whereby the “unnoticed ambiguity of the words masks our agreement about the underlying facts.” Feldman (n 8) 142.

⁴⁹ *ibid.*

genuine disagreement the parties must be talking about the same proposition in relation to pornography. Matheson takes this a step further in respect of one's employment of the concept within a proposition. He suggests that "if two individuals had different conceptions of God, then while one proclaimed to be an atheist, and the other proclaimed to be a theist, it may be that there is no one proposition toward which they adopt incompatible doxastic attitudes even though they take themselves to disagree".⁵⁰ As such, the situation is deemed a merely apparent instance for Matheson; they are using different conceptions of God and so cannot be said to be disagreeing because their different views are not about the same thing. The present section will put pressure on this idea, clarifying what it means to be 'the same proposition'.

Such few examples are typical of those used in the literature to mark the difference between genuine and illusory disagreement, which can leave the reader unsure of what this distinction might look like in practice. Can we take it from Matheson, for example, that the parties to a disagreement must share the same conceptions of a concept for a disagreement to be genuine? Would this mean that if two parties were in what they thought to be a disagreement over whether or not the implementation of a flat income tax rate (as opposed to progressive rates) was just, where party A's test for justice concerned protecting the free market, and party B's concerned peoples' overall suffering, they were not really disagreeing because they were employing different conceptions of justice?⁵¹ Requiring the parties to a disagreement to share the same conception in order for it to be a genuine dispute is, in practice, very limiting to what would be considered cases of interest. The distinction made between genuine and illusory, and what is considered to be the same proposition (including the role of concept-conceptions differences) is a matter to be explored in this section. In doing

⁵⁰ Matheson (n 1) 8.

⁵¹ This is similar to an example used by Ronald Dworkin to be discussed in Section 4.2 below. See text to n 77.

so, it will be argued that although the parties to a disagreement need to be in dispute over the same proposition in order for it to be meaningful, they need not share the same conception of a concept at play in order for the dispute to be deemed genuine. It is my argument here that the requirement for the same conception to be shared is needlessly restrictive for the cases of interest when it comes to legal disagreements in particular, and indeed in reflecting on the epistemic significance of disagreement as a whole. In delivering these claims, what follows is divided into three subsections. Section 4.1 clarifies what the ED literature means for a genuine disagreement to be ‘over the same proposition’, drawing on examples from the literature itself. Section 4.2 explores the possibility of conceptual disagreement, that is, disagreements in which different conceptions of concepts are employed. Section 4.3 introduces the role that truth plays in the disagreement over propositions – the requirement that a proposition must be truth-bearing or truth-apt in order for disagreement to be genuine. Along with examples from the wider literature, it is helpful to draw on Frances’ work in this section, as he bucks the trend of providing limited examples with what appears to be a comprehensive presentation of the distinction between genuine and illusory disagreement through a number of ‘stories’;⁵² each highlighting different features which can aid us in determining if a disagreement that we think looks genuine is in fact illusory. Frances’ examples will be put to work here to illustrate the ED understanding of disagreement, the instances of interest to the field, and to make the case for a widening of such interest.⁵³

⁵² Frances refers to the illustrative examples in his text as ‘stories’ and this term will therefore also be used here for consistency with the text. Frances (n 1) ix. Four of the six stories will be drawn on in this section.

⁵³ It should be noted that whilst Frances’ examples will be used here, at this stage he does not use the same terminology as the wider ED literature, so I discuss them in relation to how they fit in the wider literature. E.g. I note them in terms of propositions over which the parties have different beliefs, which is not something that Frances articulates in this way, though the sentiment of the examples remain the same.

4.1 A genuine disagreement is one over the same proposition

According to ED then, the requirement for there to be a genuine disagreement is that A and B have “incompatible doxastic attitudes toward the same proposition”.⁵⁴ By doxastic attitudes it is generally meant that they either believe, disbelieve, or withhold judgment regarding the proposition, though commentators take this further by acknowledging different degrees to which the attitude is held.⁵⁵ Although one might think it is obvious that such a condition is met – you say p is wrong and I say p is right – in practice it is not always clear what p is. Frances illustrates this point in story 1 in which Bo and Po are discussing whether or not abortion is wrong; Bo says “Abortion is wrong” where Po says “Abortion isn’t wrong”.⁵⁶ Although their views are on first appearances at odds, thus echoing Feldman’s pornography

⁵⁴ Nathan King, ‘Disagreement: What’s the Problem? or A Good Peer is Hard to Find’ (2012) 85(2) *Philosophy and Phenomenological Research* 253.

⁵⁵ Matheson (n 1) 7. Matheson elaborates on this idea of incompatible doxastic attitudes noting that there are typically two stances on this in the literature. There are those who use the “tripartite doxastic taxonomy” approach outlined above, and those who see such attitudes in terms of degrees of beliefs, which are determined on a scale of 0-1. The latter approach is adopted in order to acknowledge that the holding of beliefs tend not to be “all or nothing affairs” – and indeed it makes more sense of the called-for approach to disagreement regarding maintaining or lowering one’s confidence in one’s belief. Furthermore, as Matheson notes, the use of degrees of belief allows for more disagreement to be acknowledged, where people can be seen to agree over a proposition, but to different degrees, raising the question of the extent to which this can be seen as agreement or disagreement. A problem however with such an approach is how one can quantify one’s belief over p (and indeed rely on another’s qualification of their own belief over p). Matheson calls for a qualitative approach to doxastic attitudes, acknowledging the limitations of the rigidity required for both the tripartite and degrees system. In his work however he uses them in the belief that the tripartite framework is sufficient for most discussions, and the 0-1 degrees is typically used by ED theorists so it is helpful to use the terminology employed. Matheson (n 1) 7. The matter of belief revision will be addressed further in Chapter Six of the thesis.

⁵⁶ Frances (n 1) 11.

example,⁵⁷ Frances suggests that it depends on the further details of the case as to whether or not Bo and Po are in fact disagreeing. If, for example, Bo is suggesting abortion to be *morally wrong*, whereas Po is suggesting it is not *legally wrong*, Frances suggests there would be no genuine disagreement, even though “their language, the sentences they used, made it look like they disagree”.⁵⁸ This, according to Frances, is because Bo and Po were using the word ‘wrong’ with “different meanings”,⁵⁹ though for clarity and consistency in the thesis such a phenomenon will be referred to as being put to use in different ways.⁶⁰ Instead of a

⁵⁷ See text to n 49.

⁵⁸ Frances (n 1) 11. Frances also observes here that the same could be said for their use of abortion. Bo and Po could agree that they are talking about morality, but give different meanings to ‘abortion’ and the length of gestation required for the abortion to be considered wrong.

⁵⁹ *ibid* 12. The same is the case had they been using the word ‘abortion’ as in n 58 above – Frances sees that the meaning of ‘abortion’ would be different to the parties to the discussion.

⁶⁰ The difference between the words having different meanings, and being understood or applied in different ways is important for our understanding of the way we interact in disagreements (apparent or otherwise). I suggest here that the references made to legality and morality do not change the *meaning* of the word ‘wrong’. Bo and Po may mean different things in using the word wrong, but this does not change the meaning of ‘wrong’. Rather, a more accurate description of the circumstances of this case would be that the word wrong had different *referents* in the case of Bo and Po. A classic example of this is the idea of the Morning Star and the Evening Star. Both have the same referent; the planet Venus, but are put to use in different ways. By framing the dispute in terms of the different things the word wrong denotes, i.e. legal wrongness and moral wrongness, it is possible to clarify that rather than ‘wrong’ having completely different *meanings*, Bo and Po were simply referring to different means by which the ‘wrongness’ of abortion could be judged. See Stephen Pethick, ‘On the Entanglement of Coherence’ (2014) 27(1) *Ratio Juris* 116 for an example of the impact this distinction can have on our understanding of concepts (here Pethick suggests that the reason why ‘coherence’ has been deemed an elusive and complex concept is because theorists do not distinguish between the intension of the concept and features of the referents to which it extends). In the present thesis, I draw on the difference between a word’s intension and extension in relation to the potential for conceptual disputes. I will argue that we can share the same concepts but employ them differently, without changing the meaning of the words used, and as such having the potential for genuine dispute.

disagreement about abortion here, the real disagreement concerns how the word wrong is being used in the discussion of abortion.⁶¹

Story 1 is of interest to this discussion of illusory and genuine disagreement as it highlights the difficulty that can arise in ascertaining what the subject of dispute really is in a given case. As the case is outlined above, the disagreement could be deemed illusory as ‘wrong’ is being put to use in different ways. If or once this was understood between Bo and Po, the apparent disagreement would be explained away or dissolved.⁶² This is an instance in which the parties could be considered to be “talking past each other”.⁶³ Another instance of talking at cross-purposes in this way can result in a disagreement; just not about what one first perceived to be the matter in question. Let us take Frances’ story 4 in illustration, in which two people are in what appears to be disagreement over whether or not the famous basketball player Michael Jordan is tall for a man; A believes no and B believes yes.⁶⁴ A and B are in agreement over who Michael Jordan is, and that the discussion concerns his height in relation to men as a comparison class (rather than, say basketball players). On the face of it then, they are disagreeing over the same proposition. However, it turns out that A and B are using different standards for assessing tallness: A takes it to mean in the 95th percentile, where B takes it to be in the 75th percentile. Here then the disagreement is not over Jordan’s

⁶¹ Frances notes that the participants to cases such as this come to realise “that they are really disagreeing about what their words mean or should mean, the words they use to talk about X”. Frances (n 1) 14.

⁶² The idea of dissolving disagreements is not one used by Frances. I employ it to usefully mark the distinction between a resolution of a disagreement (a genuine dispute that has been settled) and an illusory disagreement that has been understood to be as such.

⁶³ Frances (n 1) 13. This is a commonly used way of expressing a disagreement that is illusory, or “merely verbal”, because once it is understood that the words are being used to denote different objects the disagreement is dissolved. D Cohnitz and T Marquez, ‘Disagreements’ (2013) 79(S1) *Erkenntnis* 2. We will also see the reference to talking past one another in Ronald Dworkin’s work in Section 4.2 of the present chapter.

⁶⁴ Frances (n 1) 13.

tallness, but rather over the appropriate standard for tallness. Once this is understood, the disagreement regarding *Jordan's* tallness dissolves (that is to say it was illusory), though the disagreement regarding the standard for tallness may remain as a genuine disagreement regarding how the word tall should be understood in the context of men's height.

At the beginning of story 1, Frances hints at the importance of context when he notes that just because Bo and Po seem to be disagreeing when one says abortion is wrong and the other says it isn't, they might not be disagreeing – it all depends on further details. Could we imagine a situation however in which Bo and Po above were in fact disagreeing about the wrongness of abortion? To do so, let us recall the case of *Barry* discussed in Chapter Three. We saw here that the judges were disagreeing over how the words need and necessary were to be understood in the context of the Chronically Sick and Disabled Persons Act 1970. Yet, in putting forward their different views regarding how the words should be understood, is it really the case that Lord Clyde, Lord Lloyd and Lord Nicholls were talking past each other? It would be odd indeed to think that the different approaches advocated by the judges in *Barry* was not to be considered a genuine disagreement over the use of the words in the Act and their effect. One way to make sense of the disagreement here is to see it as a dispute over how the words should be understood and used in the context for which they were being employed.⁶⁵ Indeed, if we return to Frances' illusory disagreement between Bo and Po, one could easily imagine a further discussion in which Bo and Po discover that they are focussed on morality and legality respectively and still believe that they are disagreeing about the wrongness of abortion, because each party is placing different emphasis on what aspects are relevant for them to determine wrongness. This changes the nature of the disagreement

⁶⁵ Notice too that in seeing this as the way words are to be understood in their context, we can make sense of why Lord Lloyd was insistent that the meaning of the word 'need' does not change simply because a council cannot afford to meet the need of a resident. See Chapter Three, text to n 43, where Lord Lloyd draws a comparison to a child in need of a new pair of shoes: "Every child needs a new pair of shoes from time to time. The need is not the less because his parents cannot afford them".

because the parties are no longer talking at cross-purposes (one about legality and one about morality), but rather about what matters in determining the wrongness (one believing the legality to trump morality perhaps, and the other vice versa). The difference here is important to mark because it highlights the significance of the context and surrounding circumstances of a disagreement in determining if it is genuine or merely illusory.

In respect of the importance of context, a brief word should be said too regarding the role discussion and communication has in determining if a disagreement is genuine. Returning to our UKSC cases, as referenced in Section 2 of Chapter Three, an important part of the decision making process is the sharing of opinions prior to confirming what will be handed down in judgment.⁶⁶ We can be fairly confident therefore that when the judges have confirmed different views and disagreements in their judgments this was purposeful and the result of reflection, if not discussion, after which they still believe they are in disagreement over matter X in question, even if they focus on different aspects of X.⁶⁷ Drawing on *Barry* as an example, Lord Lloyd and Lord Nicholls took the ideas of need and necessity to have very different requirements in the context of the legislation. They were not talking at cross-purposes. One of the considerations for this section of the thesis is the extent to which it is helpful or indeed appropriate to view such disagreements as illusory. The judges having discussed the case, and making the choice to write separate opinions which were shared and ultimately confirmed, to consider such disagreement as anything other than genuine between the judges does not make satisfactory sense of what is taking place in the court. In keeping examples in their simplified, idealised states, ED commentators often leave out the role such discussions can play in everyday disagreements.

⁶⁶ See Chapter Three, text to n 17.

⁶⁷ As explained in Chapter Three, we know that the Justices confer, but the precise extent and nature of the discussions is unknown, hence the reference as 'fairly' here.

The use of story 1 and *Barry* in this section raises doubt concerning whether or not the parties to a disagreement need to share the same conceptual criteria or idea in order for there to be a genuine dispute. Although in Frances' construction of story 1 Bo and Po were talking past each other (and as such the disagreement was illusory), we have reconstructed this to suggest a case in which Bo and Po are in fact knowingly employing different criteria for wrongness, and to suggest that in comparison to the dispute in *Barry*, it seems as though this should be a genuine disagreement. Unlike the precision that can be called for with the standards of height by which to test Jordan's tallness, this moves us to a more challenging assessment of moral concepts and whether or not the parties to a dispute can hold different conceptions of a concept and still be in disagreement with one another. In order to explore this, we turn to story 5 which demonstrates some of the shortcomings of the restricted understanding of what constitutes 'the same proposition' in the ED literature.

4.2 The role of the concept-conception distinction in determining the same proposition

Story 5, concerning a discussion of whether or not Julia Roberts is a great actress, will be quoted here in full for accurate reference in the following discussion:

Ugh, Mug, and Bug are debating whether Julia Roberts is a great actress. Ugh insists she is, saying that the fact that Roberts won a Best Actress Oscar award is all you need to know. Mug says he doesn't know what to think on this issue because he doesn't know what experts in acting think about her work; Mug is unimpressed by the fact that she won an Oscar award since he thinks such awards have little to do with acting talent. Bug is with Ugh, but for a different

reason: he says the mere fact that her movies have made so much money is all the proof you need that she's a great actress.⁶⁸

Frances presents story 5 as a case of illusory disagreement because, again, the parties to the discussion are judging Roberts' acting greatness in different ways. Ugh is judging Roberts' success on the views of her peers, whereas Bug's judgement is based on the monetary success of the films she has starred in. Frances observes that Mug perhaps only values the opinions of those who formally study acting, whilst a fourth participant, Jug, is then introduced to the commentary of the story believing that the greatness of Julia Roberts can be determined only by taking into account all factors noted thus far.⁶⁹ So, although Ugh and Bug arrive at the same conclusion that Roberts is a great actress, they do so for different reasons. They are therefore not in agreement, but nor is theirs, according to Frances, a genuine disagreement due to the different standards by which they are judging greatness here. We will see in the discussion that follows that such a disagreement could be considered genuine. To see this, three points are of note:

1. that story 5 is presented as an example of illusory disagreement;
2. that the concept *agreement* is utilised in identifying an instance of *disagreement* when Frances begins his commentary on this case with the question "Are Ugh and Bug agreeing with each other when they both affirm "Julia Roberts is a great actress"?"⁷⁰ and;
3. that Frances introduces the notion of truth and the correctness of the views in assessment of the disagreements, concluding: "in reality there are multiple questions

⁶⁸ Frances (n 1) 14.

⁶⁹ *ibid.*

⁷⁰ *ibid.*

flying around; it may well be the case that each person is entirely correct in his or her conclusions, but the four of them never discover this fact”.⁷¹

Points 1 and 2 will be discussed here, with point 3 to be addressed in section 4.3.

First, let us take the idea that Ugh, Mug, Bug, and indeed the newly added Jug, were involved in an illusory disagreement. To reiterate, Frances’ argument is that because the participants to the discussion are using different measures or standards against which to judge Roberts’ greatness, similar to the different indicators of rightness and wrongness utilised in story 1, they are not really disagreeing. And indeed, because Ugh and Bug are using different standards in coming to the same conclusion, they too are not really agreeing. Instead, they are again “talking past one another”.⁷² This is the same phrase used by Dworkin in his work concerning interpretive concepts. Dworkin’s ideas will be utilised here to put pressure on the conclusions drawn by Frances and to defend a more forgiving understanding of what is required for a disagreement to be genuine and, consequently, of interest for discussion.

Indeed it is worth reiterating that ED is not novel in drawing a distinction between genuine and illusory disagreement. In jurisprudence this division has been of great importance for Dworkin for example, whose work drew often upon a widely used scenario in which two people arrange to meet at a bank; where A thinks he is meeting B at the river bank, all the while B thinks he is meeting A at the financial bank.⁷³ Dworkin notably utilises this

⁷¹ *ibid* 15.

⁷² *ibid*, and as per n 64.

⁷³ This scenario is also noted in the wider ED literature where it is used in the same way as Dworkin to illustrate how ambiguity in our words can lead to misleading instances of merely apparent disagreement (see e.g. Feldman (n 8) 142). In his discussion of systematic ambiguity, Gilbert Ryle refers to such words as ‘pun-words’ (see e.g. Gilbert Ryle, ‘Philosophical Arguments’ in *Collected Papers Volume Two: Collected Essays 1929-1968* (Routledge 2009) 216).

example in *Law's Empire*,⁷⁴ as well as more recently in his defence of interpretive concepts in *Justice for Hedgehogs*.⁷⁵ Dworkin's explanations of genuine and illusory disagreement are employed here alongside those used in ED to provide greater insight into the potential for this distinction.⁷⁶ For current purposes, reference will be made here to Dworkin's most recent discussion of illusory disagreements in *Justice for Hedgehogs*. In this text, Dworkin refers to concepts such as law and justice as 'interpretive concepts' with people offering up different interpretations of what they take to be, taking justice as an example, just and unjust. He argues that people do not need to share the same criteria for a concept to have a meaningful discussion and disagree about it. That is, just because people have different standards for a concept such as justice, it does not follow that any disagreement they have about the concept cannot be genuine. For example, Dworkin sees that politicians and philosophers often disagree regarding whether or not progressive income tax is just: "one side takes the progressive income tax to be a firm requirement of justice, while the other calls it plainly unjust".⁷⁷ And more than this, "they have no temptation to accept, once they see how different their criteria are, that their disagreement is not genuine".⁷⁸ Dworkin utilises this example to advance his argument for interpretive concepts. Although discussed in greater depth in Chapter Seven of this thesis, Dworkin's handling of the distinction between genuine and illusory disagreements is introduced here to suggest that disagreements *can* exist beyond the restrictive limits presented in the ED literature; namely the requirement that the participants to a disagreement share the same criteria against which to judge their answer to the question posed. Although we saw that this made sense in the example of the standards

⁷⁴ Dworkin 1998 (n 73).

⁷⁵ Dworkin 2011 (n 73).

⁷⁶ Interestingly, whilst in a discussion of disagreement, Dworkin's banks example is in practice a case of illusory *agreement*; something that will be touched upon in the discussion of point 2 below.

⁷⁷ Dworkin 2011 (n73) 166.

⁷⁸ *ibid.*

by which to judge Jordan's height, it need not extend to instances in which different conceptions of concepts are being used, as Matheson suggests it should.⁷⁹ The repercussions of this claim are far-reaching, putting pressure on the understanding of disagreement presented in the literature, and how it could be deemed meaningful in practice. Dworkin concisely observes that if this is not so, i.e. if such concepts cannot be employed with different conceptions or criteria in this way, then "we would have to accept what seems ludicrous: that the most fervent and passionate of our political arguments are just silly misunderstandings".⁸⁰

In relation to story 5 then, it is my suggestion that although the matter of Julia Roberts' greatness may appear to be trivial, the notion of 'greatness' could fit comfortably into the interpretive category offered by Dworkin i.e. those concepts we often find difficult to articulate clear remits for, often differing in our views of what certain instances might be.⁸¹ As Dworkin notes, it would be a mistake to suggest that "philosophers can provide an "analysis" of justice or liberty or morality or courage or law that is neutral about the substantive value or importance of these ideals".⁸² Perhaps not a moral concept in the strong sense suggested by Dworkin here, we have still seen 'greatness' to have a subjective quality whereby it is susceptible to numerous criteria against which one can judge.⁸³ Indeed, in story

⁷⁹ As above, text to n 50. Indeed Dworkin too makes such a distinction in his work between criterial concepts (which would include those such as Jordan's height) and interpretive concepts (which would include concepts such as greatness). See Chapter Seven, Section 4.1.

⁸⁰ Dworkin 2011 (n 73) 162.

⁸¹ The concept of beauty is such a concept, with interlocutors holding different views as to what is considered beautiful e.g. whether Pablo Picasso's controversial piece *Les Femmes d'Alger (O. J. R. M.)* is beautiful or not. This painting is displayed in the Museum of Modern Art in the USA. 'Pablo Picasso. *Les Femmes d'Alger (O. J. R. M.)*. Paris, June-July 1907', (2016) <www.moma.org/collection/works/79766> accessed 14 November 2016.

⁸² Dworkin 2011 (n 73) 166.

⁸³ There are those, such as Cohnitz and Marques, who would in this respect see disagreements over concepts such as greatness as 'faultless' due to the open quality of the concepts employed, meaning that "different, apparently incompatible, views are equally true." This idea will be drawn on in Section

5 we saw Ugh, Mug and Bug discussing whether or not Julia Roberts is a great actress based on significantly varying criteria; each placing different weighted importance on what is to be conceived as “acting greatness”.⁸⁴ Frances uses these differing criteria to call into question the genuineness of the disagreement. However, in utilising Dworkin’s argument for interpretive concepts, we have seen that this need not follow. In fact, if we are to draw upon Dworkin’s understanding of such rich concepts, it rather strengthens the case for genuine dispute.⁸⁵

In summary, Dworkin and ED theorists use illusory disagreement in different ways. Both agree that illusory instances of disagreement include those in which there is ambiguity over the object which a word is to denote, such as the case of the banks; an example used both by Dworkin and ED theorists.⁸⁶ They differ however with regard to the employment of concepts which may be understood through different conceptions. We saw in the introduction to this section for example, Matheson’s assertion that two parties discussing the existence of God who had different conceptions of God, would not be in genuine disagreement. In *The Epistemic Significance of Disagreement*, Matheson sets up his claim regarding conceptions with the suggestion that “It is likely that some disputes about politics, religion, philosophy and science are merely verbal disputes resulting from parties using their terms in different ways or not correctly understanding their opponents”.⁸⁷ Drawing on Dworkin’s treatment of illusory and genuine disagreement we can immediately see the potential for softening and clarifying Matheson’s restrictive parameters for genuine

4.3 below where we will consider the need for propositions to be truth-apt for disagreement to be genuine. Cohnitz & Marques (n 63).

⁸⁴ Frances (n 1) 15.

⁸⁵ Another way of thinking about this would be from Gilbert Ryle’s perspective. Ryle put forward the idea that concepts have inflections of meaning or elasticity that cannot be erased from our use of language, as referenced also in Chapter Seven, text to n 101.

⁸⁶ See n 73.

⁸⁷ Matheson (n 1) 5.

disagreement. We needn't accept the requirement that parties to a disagreement must share the same criteria for a word in order that we might have a meaningful discussion, or indeed disagreement. Similarly, the use of terms, although sometimes resulting in illusory disputes, needn't always. We saw in the discussion of Story 1 that the ED distinction between illusory and genuine instances is committed to a requirement for the conceptions of (or criteria for) words *to be shared* in order for a disagreement to concern 'the same proposition' and thus be genuine. Using Dworkin's distinctive idea of illusory disagreement, we can entertain the idea that more of our disagreements are genuine. We can begin to see here why the ED parameters are both problematic and needlessly restrictive for the instances of disagreement to which ED can apply, and why we can take as serious more of the disagreements over beliefs that mean so much to us.

The second point Story 5 raises is the matter of utilising *agreement* in the identification and understanding of cases of illusory (or genuine) *disagreement*. Frances' answer in relation to the question "Are Ugh and Bug agreeing with each other when they both affirm "Julia Roberts is a great actress"?"⁸⁸ is that just because both might answer 'yes', does not mean they are agreeing with one another. This is pertinent to our exploration of disagreement in JDM, because we saw in Chapter Three instances in which the judges presented concurring opinions, i.e. agreement with the overall decision made, but for sometimes very different reasons. Questions were therefore raised as to whether this could be considered agreement between the judges. The importance of agreement to our understanding of disagreement, as seen in Chapters Two and Three as well as the presentation of ED here, lies in the fact that in order for there to be a disagreement, numerous matters must be agreed upon, often with little or no deliberation.⁸⁹ Of particular interest in

⁸⁸ Frances (n 1) 14.

⁸⁹ See e.g. Chapter Two, text to n 52 and Chapter Three text to 109. Feldman in his discussion of genuine disagreement also comments "It is important to emphasize the existence of genuine disagreement

story 5 is the manner in which agreement is introduced. We see that two of the participants to the discussion come to the same decision that Julia Roberts is a great actress, and the question posed is whether they are actually agreeing, introducing the idea of illusory agreement. This is in fact the same agreement we see in Dworkin's banks case utilised above – both parties think they have come to an agreement (that they shall meet at the bank or that Roberts is a great actress) but they are talking about different things (meeting at the money bank or river bank, or greatness due to awards or revenue).⁹⁰ In discussing point 1 above, we have already brought into question the illusory agreement in story 5, and how this could in fact be considered genuine rather than illusory disagreement (though indeed unknown to the parties to the case), because they are employing different criteria for determining greatness. It is important to highlight the role that apparent agreement can have in disagreements, as apparent agreement can hide a number of disagreements. For example, we saw in *Adams*, that although the Justices ultimately agreed by majority to Lord Phillips' formulation for the miscarriage of justice test, each believed their own formulation to be preferable.⁹¹ In light of the present discussion emphasis can be placed on the role of belief in such disagreement and decision making. That is, although the judges believed that another test was preferable, they agreed to reach a compromise in order for a decision to be made; emphasising again the deliberative nature of JDM.⁹² In this respect, the Justices reached their agreement whilst holding different beliefs regarding the proposition – but not the task – in question. Yet in respect of the precedent set, it seems inaccurate to consider this illusory disagreement as the parties, ultimately, *affirmed the same test*. This raises questions with regard to the role that

does not rule out significant areas of agreement" Feldman (n 8) 143. We saw too in Chapter Three how limited the number of disagreements in UKSC cases are.

⁹⁰ Indeed, Dworkin refers to this as "pseudo-agreement". Dworkin 2011 (n 73) 172.

⁹¹ Chapter Three, text to n 104.

⁹² Again, it is of note that they felt it necessary to record such differences in the written judgment, highlighting the difference of views.

belief plays in the agreements and disagreements encountered in the courtroom; a matter to be touched upon in the following section, and explored directly in Chapter Six.⁹³

4.3 The role of truth in determining propositions of interest

Through this discussion doubts have been raised regarding what a disagreement over the same proposition can mean in practice, and how one can understand a disagreement to be such where different conceptions of a concept are employed. The final consideration for this chapter is the role that truth plays in determining cases of interest. We saw in story 5 that Frances noted “it may well be the case that each person is entirely correct in his or her conclusions, but the four of them never discover this fact”.⁹⁴ What was unclear however was the bearing this idea of correctness has on the identification of genuine and/or illusory disagreements. Frances utilises his sixth story to draw this idea out, introducing a link between genuine disagreement and truth. In this example, Lee, Bee, and Gee are discussing answers to the question “who was the greatest baseball player of all time?”⁹⁵ Gee thinks Babe Ruth, Bee thinks Ty Cobb, and Lee thinks Cy Young. It is in this case that Frances illuminates and utilises the idea of truth. He notes that each player had their own strengths and could be considered the greatest as a result – it depends on the “value systems”⁹⁶ used to make the decision. For example, if one were to value home runs highly, then Ruth is likely to win over Cobb, whereas if one valued hits highly then Cobb is likely to win over Ruth.⁹⁷ Here the idea of finding a correct or true answer is introduced. Frances observes that although one might

⁹³ Chapter Six, Section 3.

⁹⁴ Frances (n 1) 15.

⁹⁵ *ibid* 16.

⁹⁶ *ibid*.

⁹⁷ Ruth had 714 lifetime home runs compared to Cobb’s 117, whereas Cobb had a lifetime batting average of 366 compared to Ruth’s 342. *ibid* 16-17.

think that the answer depends on how one values greatness in baseball, this is not in fact the case. Even though the measures used by Lee, Bee and Gee are all reasonable, there is a truth of the matter which is that Babe Ruth would come out on top because he was both excellent at hitting and pitching. Frances suggests this case teaches us the following about genuine and illusory disagreements: *“even if the disagreement concerns some vague, ambiguous matter that is open to several reasonable yet differing interpretations, there can be genuine disagreement and an absolutely true answer”*.⁹⁸ What needs to be clarified then is the role that the “truth of the matter”⁹⁹ plays in genuine disagreements. Here, we need to add to our test for genuine disagreement that the proposition in question must be capable of being truth-bearing. As Matheson notes: “Genuine disagreements require incompatible doxastic attitudes, and doxastic attitudes towards a proposition can be incompatible only when the proposition in question is truth-apt”.¹⁰⁰ That is, the proposition in question must be with regard to an objective fact. So, for example, a disagreement about the existence of God is one in which there is an objective fact in dispute – it is either true that God exists, or it is not true. As such, if A believes in God and B does not believe in God, then both parties have incompatible doxastic attitudes towards the proposition (that God exists), and it cannot be the case that both are right. If it is true that God exists, then A’s belief is correct, and if it is not true, then B is correct.¹⁰¹ Our access to this truth need not be a factor in the identification

⁹⁸ *ibid* 17.

⁹⁹ *ibid* 16. Frances discussion of story 6 begins with “At first, this looks like a case in which there is no truth of the matter”.

¹⁰⁰ Matheson (n 1) 8. This is a typical approach to such propositions in the ED literature. E.g. Feldman notes that a difference in customary practices in religious faiths (such as where they worship) are not “disagreements about the truth of any specific proposition”, which we take to be a requirement for genuine disagreements. Feldman (n 8) 142.

¹⁰¹ Matheson (n 1) 5.

of a genuine disagreement. As Matheson rightly cautions: “we need to be careful to distinguish the existence of an objective fact from our epistemic access to that fact”.¹⁰²

What we can take from this enquiry then is the link made between belief and truth, and their impact on our understanding of what disagreement is. In drawing the chapter to a close, we are able to clarify a rough definition of genuine disagreement according to ED philosophy:

An instance of disagreement is genuine when at least two parties hold incompatible doxastic attitudes over a fact or truth-apt proposition, where the concepts at play in the fact or proposition are shared between the parties to the disagreement.

In this chapter’s analysis, clarifications have already been called for with regard to the requirement that the same concept be shared between the parties to the dispute. It has been argued (and will be further defended in Chapter Seven), that sharing the same concept need not require the same conception to be shared in order for a genuine disagreement to occur. However, it is further argued here that the requirement for the disagreement to be over a truth-apt proposition in order for it to be genuine is a needless restriction to place on genuine disputes.

There are those, such as Cohnitz and Marques, who would argue that disagreements over concepts such as greatness are ‘faultless’ because the open quality of the concepts employed mean that “different, apparently incompatible, views are equally true”.¹⁰³ An example of such a disagreement would be one over taste. Cohnitz and Marquez utilise David Hume’s discussion of taste thus:

¹⁰² *ibid.*

¹⁰³ Cohnitz and Marquez (n 63).

To seek in the real beauty, or real deformity, is as fruitless an enquiry, as to pretend to ascertain the real sweet or real bitter. According to the disposition of the organs, the same object may be both sweet and bitter; and the proverb has justly determined it to be fruitless to dispute concerning tastes.¹⁰⁴

There may be no truth over matters of taste. A might contend that marmite tastes good where B insists it tastes bad. It is my argument however that this does not mean that it is not possible for us to disagree over taste. I argue that a wider account of genuine disagreement can be comfortably employed in making sense of disagreements we encounter, which need not rely on genuine disagreements to be only those that consist of beliefs over truth-apt propositions. I have in mind too, disagreements we might encounter and engage in at inevitable borderlines of concepts. For example, although it may be clear that a person with no hair on their head is bald, we might find ourselves in disagreement regarding the baldness of a person with little hair on the top of their head – ‘is X bald yet?’ Torfinn Huvenes, for example, suggests we can make better sense of such disagreements if we do not restrict our understanding of disagreement to concern the beliefs one holds over the matter in question, and instead consider that one can disagree where one’s preference or desire differs, rather than one’s belief. That is, it needn’t be the case that one is making a mistake in order for there to be a disagreement, and indeed it needn’t be the case that a disagreement has to be over a truth-apt proposition.¹⁰⁵ Reflecting comments already made in Chapter Two of this thesis, taking this approach makes better sense of how the notion of disagreement is employed in our social practices, allowing for interactions we perceive to be disagreements to remain as such. For example, in Chapter Two, we explored instances of disagreement in everyday scenarios in

¹⁰⁴ *ibid.*

¹⁰⁵ Torfinn Thomesen Huvenes, ‘Disagreement without Error’ (2014) 79 *Erkenntnis* 143.

which it seemed uncomfortable to consider that there was a ‘right’ answer to the question at hand (in the sense of there being a truth of the matter) – whether one should have cornflakes or pancakes for breakfast, what to name an unborn child, or whether a woman should have children.¹⁰⁶ By the ED account, such disagreements would not be considered genuine, yet this seems a needlessly limited account of what can often involve strongly defended and contested views. By understanding that we can have disagreements that are not just limited to beliefs over truth-apt propositions, and instead that disagreements can be encountered over matters of preference and desire too, we are able to retain how the notion is meaningfully employed in our social interactions and practices. Further still, such an account makes better sense of the disagreements encountered in the UKSC in which parliamentary intentions form the subject matter of dispute.

Recalling Chapter Three’s analysis of judgments, in particular the cases of *Barry* and *Adams*, it was suggested that commonplace disagreements in the court are those over what Parliament intended when enacting legislation.¹⁰⁷ Yet, doubt was also raised over what this actually means. That is, can we meaningfully consider that Parliament *intended* a specific understanding or interpretation of a given measure? As indicated in Chapter Three, Jeremy Waldron persuasively argues that the plurality of the legislature makes this unlikely, raising doubt over whether there is such a thing as parliamentary intention. In *Law and Disagreement* Waldron argues that we should not view statutes as one source from one voice as they are in fact constructed by assemblies of typically hundreds of people with vastly different views on the matters over which they legislate. He sees that “statutes, we should say, are *essentially* – not just accidentally – the product of large and polyphonous assemblies”.¹⁰⁸ This view is part

¹⁰⁶ Chapter Two, Section 3.

¹⁰⁷ See e.g. Chapter Three, text to n 47 and 71.

¹⁰⁸ This is part of his argument that “we should make the large numbers and the facts of diversity and disagreement central to our philosophy of legislation”, seeing the diverse makeup of the bodies legislating as an important feature for how we understand and interpret the laws made. Jeremy

of a wider understanding of government structures whereby disagreement is part of the decision making process in reaching decisions over wording for statutes enacted:

We do not wait for disagreements about social justice to be settled *outside* the legislature before we begin our activities. Instead, we do our work by *internalizing* those disagreements, by building them into the institutional structure of our assembly (with arrangements like government benches, and opposition benches, majority and minority parties, debates, rules of order, whips, and roll-calls), indeed by making them part of the process of our law-making.¹⁰⁹

Doubt then is raised with regard to whether such a thing as Parliament's intention exists, and as such whether disagreements over such intentions can be considered to be over truth-apt propositions – is it possible to speak rationally of the intentions of Parliament if not such intentions exist – whilst further acknowledging the layers of disagreement that may lie in reaching the final provisions enacted. Yet this does not, and need not, mean that such disagreements must be considered to be merely apparent. It is clear from cases such as *Adams* that the disagreement was neither merely apparent nor indeed faultless, as the judges attempted to determine what the right answer to the question at hand was (i.e. how miscarriage of justice was intended to be understood). That is, even though the disagreement

Waldron, *Law and Disagreement* (OUP, USA 2001) 10. Waldron too uses an example of HLA Hart making reference to the Queen in Parliament – the focus is on law as a single source which misses the plurality of the legislature. Waldron in explaining this makes reference to the USA motto *e pluribus unum* – or *out of many, one*, explaining that jurisprudence is more interested in the one, rather than whether or not it came from many. 42-45.

¹⁰⁹ *ibid* 23. In this respect Waldron is making the claim that government is actually designed to accommodate and work with disagreement.

may not be considered to be over a truth-apt proposition, it was *still disagreement*. The idea of right answers to such legal disputes will be further explored in Chapter Seven. For now, it should be apparent that upon investigation, it is perhaps more accurate to say that the instances of disagreement ED theorists are interested in are those over a truth-apt proposition (and particularly those in which there is an identifiable truth of the matter, though this is not needed for a truth-apt proposition to be the subject of disagreement),¹¹⁰ rather than suggesting that such disagreements are the only genuine disagreements to be had.

5. Preliminary remarks

This chapter has seen the beginnings of an analysis of the ED question, in order that we might assess its remit, purpose, and applicability to JDM in the UKSC. It has done so by first taking seriously the construction and understanding of disagreement employed in the literature. In this respect the chapter has sought to clarify the subject matter of the ED literature. After all, as we saw Frances note, one needs to know there is a disagreement before one determines what one should do in the face of it.¹¹¹ We saw that a distinction typically made is that of genuine and illusory disagreements, by which contributors seek to clarify instances of disagreement that are of interest for purposeful reflection. Through analysis of examples used in the literature, we have begun to see that *disagreement* itself surprisingly plays a limited role in the ED literature. Rather, we are beginning to see a picture of a very specific, narrow set of instances of disagreement which are of interest in the field, in order to satisfy the epistemic question. Or, to put it differently, such instances are the focus because they are the only ‘genuine’ ones on these theorists’ accounts. Although writers in the

¹¹⁰ This point will be picked up on in Chapter Seven in which the role of truth in ED, and our wider enquiry into disagreement, will be explored further.

¹¹¹ See Section 2 of the present chapter above.

field have endeavoured to extend their enquiries to real-world cases, the limits required often mean that such instances are rare, which we saw was the result of the requirement for parity in conceptions of the concepts employed in propositions that are the subject of disagreement. This, coupled with a requirement for genuine disagreement to be one in which a truth-apt proposition is the subject of dispute, results in a misleading and needlessly limited account of what disagreement is, and the instances that are of interest to the genre.

Through Frances' stories and the wider ED examples of disagreement drawn on in this chapter we have seen that ED appears to conflate the phenomenon of disagreement with the philosophical creation of the 'epistemology of disagreement'. It is my argument that this asymmetry has serious repercussions for clarity in subject matter and undermines the instructional value of the ED literature. It is put forward here, and further defended in Chapters Five and Six of the thesis, that this narrow focus is symptomatic of a wider problem in the ED literature – namely the misappropriation or mishandling of the concept *disagreement*. Thus it will be seen that the mishandling is not peculiar to the examples employed in this chapter. Rather, in treating disagreement as a special case, many in the ED field attribute to disagreement what they ought to attribute more specifically to the constructed topic of ED, and indeed the circumstances in which the disagreement is encountered. This appears to be a modest claim – theorists need to be careful in distinguishing between what they attribute to the concept and what they attribute to wider features of the ED literature. However the repercussions of this finding are such that we will see that both Frances' and Matheson's texts, and the wider ED literature, have little to do with disagreement after all. Instead, it will be argued that rather than a focus on the concept *disagreement*, the ED literature is in fact far more concerned with the ideas of *rationality* and *reasonableness*, and that disagreement is simply a catalyst for this work, which explains too why genuine disagreement has been so narrowly constructed. Indeed, David Christensen observes that ED philosophy has been focussed on "what sort of purely epistemic role

disagreement should play".¹¹² We have seen from this chapter that this limited focus is having the effect of informing their understanding of disagreement. Yet if we are to understand the significance of disagreement, we need to ensure that the epistemic questions *being asked of* disagreement, or the topic 'ED', is not confused with the phenomenon of disagreement itself. From an examination of the ED literature's representation of genuine and illusory disagreement we have seen that it is not simply a case of theorists identifying cases of interest for discussion. Rather they are identifying cases which they deem to be genuine, and further stipulating that such cases are of interest to ED. It is important for this thesis, and indeed our understanding of disagreement, that this difference is acknowledged and the recurring entanglement undone.¹¹³

A start has been made in the present chapter to explore and clarify the understanding of disagreement presented in the literature, and to clarify the requirements for a genuine disagreement. Although an alternative definition of disagreement is not offered, we can see that in order for a genuine disagreement to take place, it need not be a situation in which the parties to a dispute share the same conception of a concept, the dispute need not be over a truth-apt proposition, and in this respect need not concern only the beliefs of the parties in question. This suggests on all counts that the requirements for genuine disagreement often posited by ED philosophy are mistaken restriction to place on genuine disputes. Having established the narrow scope for ED cases of interest, we turn now to a further refinement of the ED question with a consideration of the role that peers play in ED philosophy.

¹¹² Christensen (n 3) 142.

¹¹³ We have seen e.g. and will go on to see further, that a substantial focus of this literature is the very narrow topic of 'peer disagreement' which in many cases construes disagreement in such a way that case studies subject to analysis may well involve 'peers' who are so similar that they may as well be the same person. Then, what it comes down to is in fact a discussion of rationality rather than disagreement, because the focus is on what one should rationally do/believe in such circumstances, rather than an analysis of the phenomenon of disagreement itself.



CHAPTER FIVE

To be a Peer in the
Epistemology of
Disagreement Philosophy



SECTION B

THE EPISTEMOLOGY OF DISAGREEMENT

1. Introducing peers

Recalling the introduction to Chapter Four, two themes were marked for exploration in Section B; the first regarding the ED question, its scope and purpose, and the second concerning the responses advanced to the ED question, the latter theme being the remit of Chapter Six.¹ Regarding the ED question, in Chapter Four we established what ED theorists typically identify as the requirements for a genuine dispute (that it be over a truth-apt proposition, whereby the same concept is shared between the parties to the disagreement), and doubts have been raised about how accurately or helpfully this depicts what disagreement is through reflection on instances of disagreement in social situations and everyday instances, as well as in the UKSC. We have seen that a reason for the overly restricted scope of the ED depiction of disagreement is due to the narrow lens through which ED operates (though Frances (and others) in the ED literature do not imagine that the requirements for genuine disagreement are restricted, nor argue for its narrowness). That is, I have suggested that ED has appropriated the notion of disagreement and constructed a limited conception in order to suit the purpose of reflecting on the notions of rationality and reasonableness. This claim will be further defended in the present chapter, where it will be established that part of this narrow lens is the ED preoccupation with epistemic peers.

Briefly, we have seen already in Chapter Four that an epistemic peer is a party with whom one shares the same evidence, the same training and knowledge, and the same intellectual faculties and abilities.² In using the notion of peer disagreement the thought is that whilst finding another person disagrees with my view over p might give me cause to reflect on whether I am right in my thinking on the matter, if I believe that the person disagreeing with me is in fact as “equally informed and equally smart” as I am, then the case

¹ See Chapter Four, text below n 14.

² This idea will be refined in Section 2 of the present chapter.

for reconsidering my view is much stronger; the disagreement is epistemically significant in requiring me to check my belief is sound.³ The idea of peers can further be seen to serve two purposes in ED. First, as will be explored in Section 2 of the present chapter, peerhood acts as a ‘leveller’ to allow for reflection on what should be considered a rational or reasonable reaction to disagreement. As Lackey and Christensen explain, it allows the exploration of “how much belief-revision, if any, is required in order for belief to be rational in light of this disagreement”.⁴ Second, and relatedly, some ED theorists claim that disagreement from a peer acts as evidence for the disagreement itself.⁵ That is, the fact of disagreement from a party one regards to be a peer on the matter in question serves as evidence that one may be required to alter one’s view of it.⁶ In elucidating the notion of peers as the final component of the ED question, the UKSC Justices along with the instances of disagreement outlined in Chapter Three will be used as test cases for the application of peer disagreement from the controlled, simplified cases often found in ED examples to real-life cases.⁷ As explained in Chapter One, the use of UKSC Justices is pertinent here, as the UKSC represents an elite, highly selective forum, offering a generous test case for real-world applicability of the notion of peers proffered in ED. Yet even in this narrow setting it will be argued that the Justices cannot be considered peers in the sense required by the ED philosophy due to the demands of

³ As Cohnitz and Marques note: “Learning that somebody disagrees with you might sometimes be important. Perhaps your interlocutor is right and you have been wrong all along. The significance of such a disagreement seems especially strong in case you find out that your views are in disagreement with the views of someone that you take to be equally well informed and equally as smart as you are”. Cohnitz D and Marquez T, ‘Disagreements’ (2013) 79(S1) *Erkenntnis* 1, 8.

⁴ Jennifer Lackey and David Christensen (eds), *The Epistemology of Disagreement: New Essays* (OUP 2014) 1.

⁵ See e.g. Kelly’s Higher Order Evidence argument, to be discussed below at text to n 100.

⁶ This will be pertinent to the discussion of the evidence available to parties to a disagreement, as well as regarding how realistic disagreement between peers is/is intended to be.

⁷ Identified as question b under theme 1 of Chapter Four: Can UKSC Justices be considered peers in the sense required of ED philosophy?

equality in both personal faculties and exposure to the evidence available that is required if parties to a dispute are to be considered peers. The requirements are simply unattainable in practice. Thus it will be seen that ED's emphasis on peers, and the restrictive requirements for what it means to be a peer, undermine the literature's utility for our understanding of disagreement in JDM as it fails to extend beyond the idealised examples typically offered in the literature. Furthermore, the role that peers plays in ED will further demonstrate the philosophy's limited remit, and why it is not in fact chiefly interested (or perhaps even helpful) in elucidating our understanding of disagreement itself. In understanding the deployment of peers in the literature then, we can strengthen the call for greater attention to be paid to disagreement as a phenomenon in its own right; something that is currently missing from the academic terrain. In so doing, through the examination of peers I aim to shed further light on the phenomenon of disagreement itself by highlighting important questions that remain unanswered and unasked in ED philosophy. For example, in considering an application of the notion to the UKSC we raise the question of whether or not one's gender can or does play a role in determining peers and in shaping our beliefs and, consequently, disagreements; a matter which is not presently explored in the relevant literature.

In order to make and defend my claims, the chapter is structured as follows. Section 2 explores what a peer is, with reflection in particular on the criteria provided by Thomas Kelly, who is credited with introducing the notion to the ED discourse, as well as Frances' "disagreement factors",⁸ which are demarcated to determine the reasons why two people have come to different answers to the same question. Frances' focus on these factors is indicative of the practical approach he endeavours to take – focussing on real-life scenarios, to support our understanding of how and why people come to disagree.⁹ Again, as was the

⁸ Bryan Frances, *Disagreement* (Polity Press 2014) 26. Section 2 of *Disagreement* is dedicated to outlining these factors.

⁹ See Chapter Four, Section 3's discussion of real-life focus in the literature.

case in Chapter Four, this work is therefore helpful for my argument because we will see that even in work which does aim to apply to real-world instances, important questions remain unanswered and unasked. It is then in Section 2 that an initial understanding of what is required to be a 'peer' emerges and some early concerns are raised regarding the applicability of ED theory to 'real-life' instances of disagreement.

Section 3 further develops this initial understanding of what it means to be a peer with an application of the notion to UKSC Justices, using the criteria offered by Kelly as the basis for assessment. Here, pressure is put on both what peers would look like in practice, and how challenging it can be to determine what a peer is in complex real-life instances of disagreement to which it is hoped that ED theory will extend. It will be suggested that the notion of peer utilised by ED is simply too restrictive for real-world application. This is important because one of the recurring themes in the ED literature is the attempt to move away from simple two-person scenarios, such as that sketched at the outset of Chapter Four between the meteorologists, to more complex everyday examples involving important social issues.¹⁰ As noted, the UKSC provides an apt test case for the finding of peers, as it offers an elite environment, with Justices appointed from a narrow pool of the judiciary, itself an exclusive field.¹¹ Despite this accommodating location for applicability, it will be seen that the UKSC Justices cannot realistically be considered peers in the exacting way called for by ED. It is my argument that the emphasis placed on peers therefore regrettably undermines the literature's utility for our understanding of disagreement in JDM, by placing severely artificial

¹⁰ See e.g. Jonathan Matheson, *The Epistemic Significance of Disagreement* (Palgrave Macmillan 2015) 14, and Chapter One, n 25.

¹¹ It is possible too to become a UKSC Justice with at least 15 years' experience as a qualifying practitioner (solicitor or barrister), a route which still calls for rigorous training and strong experience in practicing law. 'Procedure for Appointing a Justice of The Supreme Court of the United Kingdom' (The Supreme Court of the United Kingdom, April 2016) <www.supremecourt.uk/docs/appointments-of-justices.pdf> accessed 15 September 2018. Indeed, this was the route for Lord Sumption, who was appointed directly to the UKSC from the Bar.

requirements on cases of interest. Furthermore, in this section we will begin to see that the restrictive notion of peer limits insight into disagreement; an argument that runs throughout this section of the thesis.

Before drawing the chapter to a close in Section 5, Section 4 offers two possible defences to ED's presentation and use of peers. The first is that in order to be a peer, the idea of equality therein is more attainable than one first perceives. Indeed, rather than being equals, some argue that rough approximations are sufficient. Here I suggest that such a relaxation still leaves open important questions regarding how one is to determine whether parties to a disagreement have roughly the same faculties, abilities, and evidence. That is, such a lowering of the bar does not alleviate the challenges of determining comparable sameness. The second defence is the suggestion by Matheson that the use of peers in ED was only ever intended to allow for reflection on idealised instances, and so need not have real-world application. Here I turn to the literature to refute Matheson's claim. Not only do some theorists argue that the criteria for peers is attainable for real-life application, for some such as Christensen, peer disagreement is *the* type deemed epistemically significant or interesting. Far from being only a 'leveller' the notion of peers is in fact used by many in the literature to pinpoint instances of disagreement worthy of reflection. As such, it will be my argument that both defences fail to satisfactorily account for the inadequate command of disagreement demonstrated in the literature. Ultimately, in identifying the misleading premise of ED theses, it is argued that the utilisation of 'peers' results at best in a focus on one contrived discrete instance of disagreement, at odds even with the perception of those whose construction it is.¹²

¹² Chapter Six then adds to this through an examination of potential answers to the ED question.

2. What it means to be a peer in the ED literature

It is often the case that we find ourselves in disagreements with others where the fact that our interlocutor disagrees with us does not give us cause for concern. Say, for example, I find myself disagreeing with another over whether or not X should be convicted of murder or of manslaughter. If I were to have reason to believe that the person disagreeing with me was not as informed on the subject as I was (for example did not have the same training), had not considered the evidence carefully enough, or indeed did not have the same evidence available to them as I did, then the fact that they disagree with me would not give me cause to reconsider my view on X's fate.¹³ If however, I believe there to be no such apparent disparity between myself and my interlocutor, should the fact of their disagreement with me raise doubt over my belief, or indeed require me to doubt my belief? That is, as Thomas Kelly puts it, "can one rationally hold a belief while knowing that that belief is not shared (and indeed, is explicitly rejected) by individuals over whom one possesses no discernible epistemic advantage?"¹⁴ In asking this question in his 2005 essay *The Epistemic Significance of Disagreement*, Kelly introduced the notion of epistemic peer to discussions about disagreement in social epistemology, questioning whether retaining one's view in light of having evidence that one's 'peer' disagrees, is defensible.¹⁵ At this point, we know this to be the ED question introduced to discussion in Chapter Four. Focus now is turned directly to what it means to be a peer in the sense called for in ED. Kelly suggested that in order for parties to a disagreement to be epistemic peers they need to meet two conditions in relation to the question at hand:

¹³ Thomas Kelly, 'The Epistemic Significance in Disagreement' in John Hawthorne and Tamar Gendler (eds), *Oxford Studies in Epistemology* (OUP 2005) 168.

¹⁴ *ibid.*

¹⁵ *ibid.*

- (i) they are equals with respect to their familiarity with the evidence and arguments which bear on that question, and
- (ii) they are equals with respect to general epistemic virtues such as intelligence, thoughtfulness, and freedom from bias.¹⁶

As such, an epistemic peer in ED philosophy is generally understood to be one over whom you have no epistemic advantage or disadvantage to the matter at hand. In this respect, the notion of peer is determined in a context-specific way, relating to a question at hand, rather than the general assessment of individuals. That is, A and B could be considered peers with regard to question X but not question Y as their familiarity with the evidence or epistemic virtues may differ in ways that are pertinent to the matter in question. It should be clarified that most in the ED literature focus on peers who are in good epistemic positions. That is, they are interested in those who are, for example, equally well-informed on a matter, rather than being poorly informed.¹⁷ A question left poorly attended to, however, is how one knows

¹⁶ *ibid* 175. Thomas Kelly is typically credited with the introduction of epistemic peers to the literature on the epistemic significance of disagreement in 2005. Feldman for example notes that he borrows the term from Kelly (Richard Feldman, 'Reasonable Religious Disagreement' in Alvin Goldman and Dennis Whitcomb (eds), *Social Epistemology Essential Readings* (OUP 2011) 157, n 5). Kelly notes that he has borrowed the term from Garry Gutting, *Religious Belief and Religious Skepticism* (University of Notre Dame Press 1983). Kelly however develops the term further than Gutting to not only refer to persons who are comparable in respect of "intelligence, perspicacity, honesty, thoroughness, and other relevant epistemic virtues", as Gutting referred to, "but also with respect to their exposure to evidence and arguments which bear on the question at issue." Kelly (2005) (n 13) 168-174.

¹⁷ See e.g. Bryan Frances, 'Disagreement' (Stanford Encyclopedia of Philosophy, 23 February 2018) <<https://plato.stanford.edu/entries/disagreement/>> accessed 30 November 2018 and Jonathan Matheson, 'Disagreement and Epistemic Peers' (Oxford Handbooks Online, OUP 2015) <www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935314.001.0001/oxfordhb-9780199935314-e-13> accessed 24 July 2018.

if one is in an epistemically good or bad position. One way this question has been addressed is to focus on one's *perception* that one's interlocutor is a peer. That is, it is sufficient that A perceives B to be their equal in respect of (i) and (ii) above, rather than for B to actually be A's equal. Enoch takes such an approach, explaining: "the epistemically appropriate response to disagreement with someone you take to be your peer may not be identical to the epistemically appropriate response to disagreement with someone you do not take to be either your inferior or your superior".¹⁸ Matheson, by contrast, suggests that the requirement for peers is that they *are* equals, and not simply that they take themselves to be so.¹⁹ Generally in the literature one finds that the notion of acknowledged peer disagreement prevails.²⁰ We will see in Section 3.1 of the present chapter the impact this difference can have in relation to our capacity to assess epistemic credentials.

Due to the call for equality there are several exacting requirements to be met if the parties to a disagreement are to be considered 'peers'. Feldman and Warfield observe for example that "peers literally share all evidence and are equal with respect to their abilities and dispositions relevant to interpreting that evidence".²¹ The notion of peer is typically used for simplicity in the literature. It is intended to help focus philosophical discussion by eliminating the potential variations between people, their beliefs and the evidence available to them, in order to enable critical reflection on the epistemic significance of the disagreement itself – without the need to take into account differences in the people disagreeing.

¹⁸ David Enoch, 'Not just a Truthometer: Taking oneself seriously (but not too seriously) in cases of peer disagreement' (2010) 119(476) *Mind* 953, 956.

¹⁹ Matheson 'Disagreement and Epistemic Peers' (n 17).

²⁰ This is similar to the disparity between whether or not an 'actual defender' is required for a view in order for it to be epistemically significant. Chapter Four, n 44.

²¹ Richard Feldman and Ted Warfield (eds), *Disagreement* (OUP 2010) 2.

In order to show how Kelly's criteria for epistemic peers might be applied in practice, it is helpful to draw on Frances' work because, as noted in the introduction to this chapter, he provides a set of what he calls 'disagreement factors' which, although not exhaustive, can be used to provide the basis for determining peers in a situation, namely that they share the same data, evidence, time, ability, background knowledge, and circumstances of investigation.²² If one of these factors is not shared equally between the parties to a disagreement then this could explain why the disagreement has arisen, or indeed could *explain away* or dissolve the disagreement. Although reactions to the ED question are the proper subject of Chapter Six, in identifying the utility of the disagreement factors in determining whether or not the disagreement is deemed epistemically significant, it is helpful here to briefly consider how one might react. For example, if A and B had different data available to them this could explain why both, as reasonable people, come to different answers to the same question.²³ Frances illustrates this point with an example of a trial in which party A, Pro, has only heard evidence for the prosecution, whilst Party B, Con, has only heard evidence for the defence. Pro thinks the defendant is guilty, where Con thinks he is innocent. The fact that both Pro and Con have different data available to them explains why they have come to disagree and as such the disagreement is epistemically uninteresting; once it is determined that the parties have different data available to them the disagreement is dissolved.²⁴ The disagreement factors can also provide reasons for having different answers – that is, they can “justify one in sticking to one's beliefs”.²⁵ For example, if we return to our two meteorologists from Chapter Four,²⁶ if A was informed of an updated weather report at 10pm and knew that B had finished work at 8pm, missing the report, the fact that B disagreed

²² Frances (n 8) 26.

²³ *ibid* 18-19.

²⁴ Indeed, on the ED account such a scenario would be disagreement but merely *illusory* disagreement.

²⁵ Frances (n 8) 32.

²⁶ See Chapter Four text to n 6.

with A over the forecast for the following morning, would not be epistemically significant, because A and B are no longer peers in this instance – A now having more relevant evidence than B. As such A would be justified in maintaining their belief. The role that one’s evidence can play will be further explored in Section 3.2 of the present chapter.

Essentially then, the disagreement factors can “lead reasonable people to divergent yet reasonable answers to a single question”.²⁷ In this respect, it is not that B’s answer to whether it is going to rain was unreasonable, it was simply that A had more relevant information or evidence than B at the time of making the forecast (i.e. Kelly’s first criterion is not met – they are not equals with respect to their familiarity with the evidence). Frances uses similar examples to explain each of the disagreement factors. For example, he illustrates *background knowledge* with the case of Pro and Con who are working on a homework problem in which they have to determine whether a chemical will exceed 200° Celsius in an experiment. Pro has relevant background knowledge of chemistry that Con does not have, and so correctly answers ‘yes’, where Con answers ‘no’. The other disagreement factors are the same between the two; i.e. they have the same data and evidence available to them, and are given the same time to complete the task in the same circumstances, and have the same ability. Frances stresses the following:

Con has done nothing stupid or otherwise unreasonable. She just didn’t have the one piece of background knowledge necessary to see that her way of solving the problem, although it certainly looked utterly straightforward, was mistaken.

Con’s solution is incorrect but reasonable enough to get a B grade on the

²⁷ Frances (n 8) 54. The terminology of *peer* disagreement is not used until later in the text, but nevertheless, sharing the same disagreement factors can be indicative of peers in a disagreement, just as an imbalance in the factors can explain why a disagreement has occurred.

assignment. Without having the key piece of background knowledge, Pro would have done the same thing as Con did.²⁸

So, by having different background knowledge to the question at hand, we can see how there can be circumstances in which “two reasonable people can come to different yet reasonable answers to a single question... providing one has key *background knowledge* the other lacks and there is a reasonable yet mistaken way of trying to answer the question from that set of data”.²⁹ Using the terminology Frances later employs, Pro can be said to be Con’s “epistemic superior” and Con is Pro’s “epistemic inferior”.³⁰ By seeing how such factors help to explain why the disagreement has occurred, we can come to see what ED theorists consider to be the more interesting predicament of disagreement where the factors are indeed shared by the parties to the dispute. These are, that is, instances in which the parties are to be considered neither epistemic superiors nor inferiors, but *peers*.

3. Ascertaining epistemic parity: UKSC Justices as peers

As has now been established, there are several exacting requirements to be met if the parties to a disagreement are to be considered ‘peers’. A concern then is how far this can extend from the simplified examples offered in the ED literature to real-world instances of disagreement, to which ED is intended to apply. That is, how likely are we to encounter peers in the sense called for in ED philosophy? In order to explore this further, we turn now to an application of the ED notion of peer to UKSC Justices, considering how one determines

²⁸ *ibid* 20.

²⁹ *ibid*.

³⁰ *ibid* 43. As an introductory text, Frances first uses terminology-free examples and explanations of the ideas at play in the ED literature in order to aid the novice reader in their understanding of the ideas advanced. Both the initial ideas and specific terminology are used directly here for clarity.

whether parties to a disagreement are in fact peers. In order to do so, this section is divided into two subsections which examine the UKSC Justices using Kelly's criteria as a basis for discussion whilst drawing on Frances' disagreement factors. We will begin by examining the equality of epistemic virtues ((ii) in Kelly's criteria), followed by (i), the evidence available to them.

3.1 Assessing epistemic credentials

The UKSC has three female Justices on a bench of twelve.³¹ The court has typically consisted of white, middle-class, private schooled and Oxbridge educated men. Presently, with no representation from ethnic minority groups, and only three Justices who did not attend Oxbridge, if we were to find epistemic peers, it would surely be in such a selective, and narrow forum.³² And indeed, in an ordinary understanding of the notion of 'peers' it seems reasonable to suggest that the judges are such. After all, they are well educated, intelligent individuals, of similar age, and qualification, with comparable and extensive experience in the courts. If we take Frances' disagreement factors – data, evidence, time, ability, background knowledge, and circumstances of investigation – it would appear on the face of it that these are met. They hear the same evidence and information relating to a case and in the same circumstances. They assess this information over roughly the same time, and presumably have comparable ability having reached this elite position. Thus, according to Kelly's two conditions for peers, we could reasonably make the argument that both are met, as they have

³¹ Indeed this is a very recent change in the court, as up until 2017 there had only ever been one female member of the court.

³² It is worth noting however that even in this forum, there is a form of hierarchy in place, with Justices holding junior and senior roles, as well as the President and Deputy President who are appointed to these positions (i.e. such roles are not based on how long they have served in the court), though this should not affect the weight of their decisions.

“familiarity with the evidence and arguments which bear on that question” (here being the legal case, to be discussed under Section 3.2), and that having reached the pinnacle of the legal hierarchy “they are equals with respect to general epistemic virtues such as intelligence, thoughtfulness, and freedom from bias”.³³

However, a problem exists in relation to the direct applicability for ED philosophy in regard to the meaning of “equals” in this context i.e. the extent to which such factors need to be the *same* or *equal* between the parties. ED places emphasis on sameness rather than comparableness because, as we have seen, they want to be able to account for the differences between individuals that might explain why the disagreement has occurred so that focus can be placed on the fact of disagreement in and of itself and its epistemic significance. The resulting narrow eligibility therefore requires two people to be engaged in a dispute who are extraordinarily similar in their upbringings, outlooks, intelligence, and knowledge of the topic in question. One may indeed be inclined to think that such persons would either be unlikely to exist or indeed unlikely to disagree in the first place. Feldman and Warfield acknowledge this concern, suggesting: “Of course, in actual cases there will rarely, if ever, be exact equality of evidence and abilities. This leaves open questions about exactly how conclusions drawn about the idealized examples will extend to real-world cases of disagreement”.³⁴ This statement is put to the test here where the extent to which UKSC Justices are ‘peers’ will be assessed.

Satisfactorily determining whether parties to a disagreement are ‘peers’ is a matter that is underestimated or else omitted from much of the ED work.³⁵ This is surprising given

³³ See n 16 above.

³⁴ Feldman and Warfield (n 21) 2.

³⁵ See e.g. J Adam Carter, ‘Group Peer Disagreement’ (2016) 29(1) Ratio 11 in which Carter Provides a brief footnote on peers (“Epistemic peerhood is typically thought to involve both a cognitive and an evidential condition; as Lackey puts it, say someone is your epistemic peer, vis-a-vis p (or, more carefully: vis-a-vis the matter of whether p) just when (roughly) that individual and you are on a

the complexity and scrutiny required to be assured of such parity, for the purpose of this requirement to take effect for the reactions called for.³⁶ If we take the requirement of background knowledge as an example, to decide whether the parties to a disagreement have the same background knowledge may not in practice be a straightforward matter. And of course, part of this assessment involves determining an acceptable judgement of ‘sameness’ or equality; a matter which we will see in Section 4 that continues to be grappled with in the literature.³⁷ Let us take the matter of background knowledge of our judges as an example of how this can apply to real-world cases. For the judges to be considered to have the same background knowledge of law, would it be enough, for example, that they had comparable experience in the field, studied at reputable universities and had similar academic performance? Or would it matter which courses they took at university, or perhaps even the ethos of the institution? Although this may seem trivial, the literature points to the idea that the training and experience one has had can inform the beliefs one maintains. For example, Kelly explains that “that the Oxford-trained philosophers of... [Cohen’s] generation are almost unanimously of the opinion that there is a philosophically important distinction between analytic and synthetic truths” where those who studied at Harvard reject such a division.³⁸ Cohen suggests that a reason for the difference in view lies in the way the theories were presented at each institution – “with all the added persuasiveness of personal presentation,

cognitive and evidential par, as your cognitive abilities and evidence bear on the matter of whether p”) before proceeding to focus on conciliatory responses to disagreement. This is similar to the approach we have already seen to disagreement in ED, whereby the notion itself was seen to be taken for granted in the literature, with predominant focus placed on the reactions called for. See Chapter Four text to n 21.

³⁶ As noted, the reactions are called for in light of the perception that one’s interlocutor is one’s peer. Reactions to disagreement will be the subject of Chapter Six.

³⁷ We will see e.g. that theorists approach the idea of what it means to be equals in different ways. See text to n 94.

³⁸ Thomas Kelly, ‘Peer Disagreement and Higher Order Evidence’ in Feldman and Warfield (n 21) 147.

personal relationship and so forth”.³⁹ In this light, although most of our Justices attended either Oxford or Cambridge University,⁴⁰ one might wish to consider the potential differences both between these institutions, and between ‘Oxbridge’ and those attended by others. Indeed, in this respect, in extending ED to the UKSC, we need to take into account the potential sameness and difference between up to eleven individuals at any one time, rather than just the two parties ED tends to explore. Similarly, would it matter if the courses undertaken by the Justices were different? For example, Lord Sumption is the only member of the court who read History at university, where all others read law.⁴¹ Having studied another subject (and indeed taken this further as a renowned historian⁴²), Lord Sumption may have different academic training and perspectives from his earlier educational experiences to draw on, and indeed is the only member of the court with no previous experience as a full-time judge in the HC or CA. How far do we need to delve into the nuances of educational experience in order to determine whether or not they have satisfied the background knowledge requirement to be ‘peers’? And indeed, need we reflect too on professional experience? Each judge after all has their own area of specialisation. Could this too be an influencing factor in decisions made in the court, and disagreements encountered? If a case before the court related to a family law matter, for example, would Lady Hale’s extensive

³⁹ *ibid* 148.

⁴⁰ Lady Arden, Lord Carnwath, Lady Hale, Lord Hodge, Lord Kitchin and Lord Lloyd-Jones attended Cambridge University, and Lord Briggs, Lord Reed, Lord Sumption, Lord Wilson attended Oxford University (NB Lord Hodge went on to obtain an LLB from Edinburgh University and Lord Reed studied Law at Edinburgh University, followed by doctoral research at Oxford). ‘Biographies of the Justices’ (The Supreme Court of the United Kingdom) <www.supremecourt.uk/about/biographies-of-the-justices.html> accessed 28 November 2018.

⁴¹ This is correct as of 2018, a year which saw three new appointments to the court.

⁴² During his career Lord Sumption has published several texts, including a thus far four volume series on the Hundred Years War. See e.g. Jonathan Sumption, *Trial by Battle: The Hundred Years War, Volume One* (Faber and Faber 1999), through to Jonathan Sumption, *Cursed Kings: The Hundred Years War, Volume Four* (Faber and Faber 2016).

professional experience in this area mean that her view should be afforded extra weight in deliberations, or indeed should she be considered an epistemic superior in such matters.⁴³ Albeit brief, this sketch of possible considerations calls for reflection on what is required to be a peer and the impact such factors might have on decisions made. After all, if judging a colleague to be an epistemic peer is deemed to have the potential to influence one's belief over the matter in question, it is important to understand what the requirements are for making such a determination in a given situation. As Thomas Kelly observes, "outside of a purely mathematical context, the standards which must be met in order for two things to count as equal along some dimension are highly context-sensitive".⁴⁴ The discussion thus far isolates only one of the six disagreement factors suggested by Frances, that of background information. If the assessment of sameness (and therefore peer-ness) is not approached in a realistic way, what it can often amount to in the ED literature is an A and B who, for all intents and purposes, might as well be the same person. That is, they share all the same characteristics to such a degree that there is no noticeable difference between them. Indeed, the characters to Frances' stories were so similar they even shared almost identical names.⁴⁵ In this respect, even those who hope to provide real-life examples, as Frances does, are confined by the limited practical application of 'peer' disagreement due to the rigorous demands of sameness between the parties disagreeing.

Thus far we have seen that focus in ED is placed on whether the same characteristics and information is shared between the parties to a dispute as a key part of determining peers in a given case. One 'sameness' that remains unexplored in the literature is the role gender

⁴³ See e.g. Frances (n 8) 57-64 for a discussion of epistemic superiors, in which he suggests that those considered experts in a field are 'epistemic superiors' to those who are not. In cases of disagreement then, it would not be rational to maintain one's belief in light of disagreement with an epistemic superior.

⁴⁴ Kelly (2005) (n 13) 175.

⁴⁵ Bo Po, Pro, and Con... Ugh, Bug, Mug and Jug.

might play in determining whether or not the parties to the disagreement are 'peers'. That is, could gender affect our sameness? Thomas Morawetz, in his paper *Understanding Disagreement* places emphasis on the individual reasoner, in the context of JDM. He observes that even though we live within community practices, the individual reasoner "derives the ingredients from the pre-existing strategies of others and melds and modifies them in her own experience".⁴⁶ This emphasis on unique experiences and the background of the individual, although not focussing on ED, highlights the need to reflect on the complexities of people as reasoners that ED tends to overlook. Indeed this has already been touched upon in reflecting on the potential influence educational experience might have on beliefs held and decisions made. In a literature overwhelmingly dominated by male, white academics, it too presents a motivation to at least consider whether people of different genders could be considered peers in the sense called for in the ED context.⁴⁷

We saw in Chapter Three Reynold's assessment that UKSC judgments are not concerned solely with legal reasoning. Instead, he argues, "individual a priori assumptions, moral judgments and instinctive responses all played a crucial role"⁴⁸ in the decisions made by the court. In his assessment of the cases he explores, including those which form the subject matter of this thesis, Reynold concludes that they indicate no real ideological or philosophical differences – unlike the judgments seen in SCOTUS.⁴⁹ He concludes that, "leaving aside the vexed question of gender", the only relevant question of diversity is to ensure that there is a balance of legal expertise in the court because there is no evident divide

⁴⁶ Thomas Morawetz, 'Understanding disagreement, the root issue of jurisprudence: Applying Wittgenstein to positivism, critical theory, and judging' (1992) 141(2) *University of Pennsylvania Law Review* 383 n 34.

⁴⁷ And indeed, the same stands for a consideration of race. See also n 62 and n 67.

⁴⁸ Reynold (n 8) 141.

⁴⁹ We saw in Chapter Two that SCOTUS is more openly political due to the nature of the USA system, which is designed to have such ideological and philosophical differences. See Chapter Two, n 101.

along ideological or philosophical lines (legal or otherwise).⁵⁰ This is a problematic and disappointing conclusion to draw. Firstly, and perhaps most obviously by Reynold's own admission, the matter of gender representation in the UKSC is indeed a vexed one. During the course of research for this thesis, the UKSC saw a second and third female appointment, meaning that for the first time three women sit in the twelve member court. At the same time Lady Hale was also the first female appointment to the President role. Whilst a laudable outcome from what will be six new appointments over the course of 2017-2018 this still leaves the court with a pitiful gender imbalance of one female to every three males. Reynold would have us believe that this is of no concern for the reliability of the decisions made in this forum because the decisions tend to be made (and divided) along the same lines as we see for public opinion.⁵¹ However, one ought to be sceptical of drawing such a conclusion for two main reasons. The first is that there is evidence in the UKSC decisions to suggest that gender *does* have an influence on the decisions that are made. For example, in *Granatino*,⁵² a case regarding the enforcement of prenuptial agreements, Lady Hale tellingly observed in her lone dissent:

there is a gender dimension to the issue which some may think ill-suited to a decision by a court consisting of eight men and one woman. It is for that reason I have chosen to write a separate judgment.⁵³

⁵⁰ Reynold (n 8) 145.

⁵¹ This is intriguing because Waldron concludes the opposite for the same reason. That is, Waldron's *Law and Disagreement* is dedicated to arguing against judicial review on the basis that it is undemocratic, and needlessly so because judges tend to disagree along the same lines as the general public. See Chapter Seven, n 21.

⁵² *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42.

⁵³ In fact, Reynold makes reference to this case as a "striking instance" of lone dissent, though he goes into no further detail, and the case is not subject to his analysis. Reynold (n 8) 99.

We saw too in the discussion of *Brown* in Chapter Three that the court could be seen to demonstrate bias in its treatment of heterosexual and homosexual sexual activity.⁵⁴ Although one may suggest this was merely a reflection of society's views at the time,⁵⁵ such cases and comment highlight the need to have a more *socially* representative court, beyond reconciling evident gender disparity, because one's social experiences and backgrounds can influence the decisions one makes. Miranda Fricker in her work on epistemic equality makes a similar point in relation to how our views can be informed by stereotypes and social constructions we are unaware of, which can lead to what she refers to as testimonial and hermeneutical injustice.⁵⁶ Fricker suggests for example that testimonial injustices take place where one is unknowingly prejudiced in one's view of a person's testimony, or the evidence/arguments they advance. To illustrate this Fricker uses an example of making an assessment of politicians' views and evaluating their authority on the subject matter presented. I could, for example, consider myself to be a feminist and not hold sexist beliefs but, unknown to me, stereotypes of 'male political authority' have influenced my views regarding the speakers so that I form the opinion that the female politician's authority on the matter in question is 'lesser' than the male politician's.⁵⁷ If this happens, then my view – that the female politician's view is not as reliable

⁵⁴ See Chapter Three, Section 3.3 e.g. text to n 112.

⁵⁵ For example, there are those who suggest that had *Brown* been decided today, there may have been a different outcome as books and films such as the 'Fifty Shades of Grey' franchise have pushed the ideas around sadomasochistic sexual activity into the public arena. Indeed, this view is supported by cases brought to court as the result of activities undertaken inspired by the franchise. E.g. in *R v Lock* (Ipswich Crown Court, 22 January 2013) a jury found the defendant not guilty of alleged offences under section 47 of the Offences Against the Person Act on the basis that the harm (in this case from tying up a person and beating them) had been consensual; both parties to the activities had signed a contract inspired by the story. 'Fifty Shades' sex-session assault accused cleared' (BBC News, 22 January 2013) <www.bbc.co.uk/news/uk-england-suffolk-21145816> accessed 22 July 2018.

⁵⁶ Miranda Fricker, *Epistemic Injustice Power & Ethics of Knowing* (OUP 2007).

⁵⁷ SocialEqualityUCT, 'Miranda Fricker – Epistemic Equality?' (YouTube 2014) <www.youtube.com/watch?v=u8zoN6GghXk> accessed 22 July 2018.

as the male's – means that I do her a testimonial injustice. Fricker refers to this as “the stealthy nature of prejudice”, suggesting that “it works on us below the level of belief without our permission”.⁵⁸ This raises important questions not only of the evidence advanced in relation to a given matter (to be discussed in Section 3.2) but of our perception of the one who advances it. This is particularly important to our understanding of ED, which speaks to not merely if A is B's epistemic peer, but if B perceives them to be so. The fallibility of such perceptions is articulated well through Fricker's illustration of hermeneutical injustice, which she considers to be a deficit of intelligibility owing to a form of hermeneutical marginalisation. By this it is understood that certain groups of people “participate unequally in the practices through which social meanings are generated” (the marginalisation), such as the concepts that we share across social space, which can lead to injustice.⁵⁹ So, for example, if a woman were suffering from what is now understood to be sexual harassment in a time before we had this shared concept, she would not be able to “properly comprehend her own experience, let alone render it communicatively intelligible to others”.⁶⁰ Fricker develops this example further by suggesting that even if it were at a time in which there was a rise in feminist groups who were beginning to use such language, because it was not part of the wider social practice, this would still entail epistemic injustice because there would remain a gap in “our shared tools of social interpretation”.⁶¹ For Fricker, epistemic justice is an important aspect of seeking knowledge in society because in order for knowledge to be obtained, one must be heard without prejudice (i.e. without testimonial or hermeneutical injustice). In this respect, one could be subject to pre-emptive testimonial injustice if one's view is not even sought because it is not perceived to be a possible source of knowledge from the outset. We can see too how

⁵⁸ *ibid*, 06.30.

⁵⁹ Fricker (n 56).

⁶⁰ *ibid* 6.

⁶¹ *ibid*. As Fricker further explains “she cannot use it in a speech act to the powers that be to make a complaint” about the acts against her. SocialEqualityUCT (n 57) 10.57.

this can easily extend to a legal context with Fricker's example of the Stephen Lawrence Inquiry, an investigation into the racially motivated murder of Lawrence, in which it was found that Lawrence's friend Duwayne Brooks, who was both a key witness to Lawrence's murder as well as a victim of crime himself, was not treated as such at the scene. Brooks' views were therefore not sought as part of the initial investigation, because rather than a source of knowledge, he was stereotyped and consequently deemed part of the problem.⁶² In addition, the report findings led to an explicit understanding of institutional racism, which to this point had not been articulated as a distinct form of racism that could be separate from one's personal beliefs. In this respect, this concept was seen as filling a space in our conceptual understanding, providing the tools and language to enable people to articulate the injustices that had taken place. We saw too in the language of the judges in *Brown* an expression of the prejudices at play, although they were noted to be apparently inconsequential to the decision made.⁶³ We saw for example the judges deem the appellants to have "perverted and depraved sexual desire",⁶⁴ and their acts "breed and glorify cruelty".⁶⁵ It was noted in Chapter Three that clear biases were in play in the judgment. Although such judgements do not go to the assessment of epistemic peers directly, Fricker's articulation of epistemic equality demonstrates the potential fallibility of one's judgement of others and how they can be informed by unreflective stereotypes and presuppositions that may go unnoticed as

⁶² The inquiry report notes: "We are driven to the conclusion that Mr Brooks was stereotyped as a young black man exhibiting unpleasant hostility and agitation, who could not be expected to help, and whose condition and status simply did not need further examination or understanding. We believe that Mr Brooks' colour and such stereotyping played their part in the collective failure of those involved to treat him properly and according to his needs." William MacPherson, 'The Stephen Lawrence Inquiry' (Cm 4262-I, 1999) para 5.12.

⁶³ Chapter Three, Section 3.3.

⁶⁴ *R v Brown* [1993] UKHL 19, [1994] 1 AC 212, 255.

⁶⁵ *ibid* 236.

influencing one's assessment of other people, their characteristics, and the testimony or evidence they can provide.⁶⁶

This leads on to the second reason to be sceptical of Reynold's conclusion, namely the important social function a court plays in society. Even if it could be demonstrated that a person's characteristics did not influence a decision, on which the present analysis has cast doubt, it is important for the public's trust in the legal system that the general population see themselves reflected in those making decisions. Again, this has epistemic ramifications, as we have seen through Fricker's work, in ensuring that those who encounter the legal system have confidence that they will be understood.⁶⁷ At a basic level this can be achieved by ensuring that the ultimate determinations of law are not handed down solely by Oxbridge, White upper-middle class males. Little progress has been made to ensure that the court is more reflective of the general population, although for the first time it will now be possible for a female majority to sit on a UKSC case. At the time of writing, in addition to the three women, the UKSC has no representation from ethnic minority groups, and only two Justices who did

⁶⁶ We will see in Chapters Six and Seven that if what we are justified in believing depends on our assessment of others, then more scrutiny is required with regard to the quality, and fallibility, of such an assessment.

⁶⁷ Leslie Thomas QC made such a point representing the victims of the Grenfell Tower fire: "Even to an extent, look at those of us who represent the victim core participants. Fairly homogenised group, wouldn't you agree? Apart from the odd exception here and there. What must [the victims] be thinking in terms of: 'Are we going to get justice? Do they understand us?'" Conor James McKinney, "Do they understand us?' Grenfell victims' lawyers attack inquiry for lack of diversity' Legal Cheek (12 December 2017) <www.legalcheek.com/2017/12/do-they-understand-us-grenfell-victims-lawyers-attack-inquiry-for-lack-of-diversity/> (accessed 20 July 2018). For Fricker, this could be viewed as epistemic inequality stemming from hermeneutic injustice, as she explains "the social experiences of members of hermeneutically marginalized groups are left inadequately conceptualized and so ill-understood, perhaps even by the subjects themselves; and/or attempts at communication made by such groups, where they do have an adequate grip on the content of what they aim to convey, are not heard as rational owing to their expressive style being inadequately understood." Fricker (n 56) 6-7.

not attend Oxford or Cambridge for part of their education.⁶⁸ Case such as *Granatino* and indeed *Brown* demonstrate how a lack of diversity in the court can be troubling for the integrity of the rulings passed down by the highest court of the UK.⁶⁹ In using Fricker's understanding of epistemic inequality and injustices, we see too that for ED's notion of epistemic peers to be an effective tool in understanding the rationality of our responses to disagreement, we need to be clear with regard to the potential limitations of our assessment of other individuals. This matter will be taken up further in Chapter Seven.

A consideration of diversity in the UKSC and the composition of the bench is therefore important in regard to the relevance and applicability of the ED philosophy to UKSC judicial disagreement. Some in the literature, such as Lackey and Christensen, do acknowledge the weight that one's own personal experience and knowledge can have on a disagreement, and indeed what one ought to believe in light of a disagreement, making reference to what they call "personal information".⁷⁰ This is information I know about myself, and can have high

⁶⁸ As of November 2018. The two Justices that did not attend Oxbridge went to Durham University and Queens University Belfast – both elite establishments.

⁶⁹ Indeed it seems unlikely that more diverse representation will be realised in the near future as senior roles in legal fora are still dominated by white males. E.g. of the 119 QC appointments confirmed in December 2017, only 32 were women, with only 50 applications from women, suggesting that far more needs to be done to encourage female appointments. 'Lord Chancellor welcomes promotion of new skills' (Gov.UK, Ministry of Justice, 21 December 2017) <www.gov.uk/government/news/lord-chancellor-welcomes-promotion-of-new-silks> accessed 3 February 2018. Furthermore, judicial diversity statistics confirm that "from 1 April 2014 to 1 April 2017, the percentage of female judges has increased from 18% to 24% in the Court of Appeal; 18% to 22% in the High Court and 24% to 28% in the courts judiciary." See: 'Judicial Diversity Statistics 2017' (Courts and Tribunals Judiciary, 2017) <www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/diversity/judicial-diversity-statistics-2017/> accessed 3 February 2018. Although an increase, these numbers are still low. As UKSC Justices often have CA appointments prior to selection, it is therefore unsurprising that the UKSC is disproportionately representative of the population as the fora from which they are recruited are typically male dominated.

⁷⁰ David Christensen, 'Disagreement and Public Controversy' in Lackey J (ed), *Essays in Collective Epistemology* (OUP 2014) 148 and Jennifer Lackey, 'A Justificationist View of Disagreement's Epistemic

confidence in, but can be less sure of in the person with whom I am disagreeing. So, for example, I know myself to be sober, not under the influence of drugs, and not overly tired.⁷¹ Whilst I can be sure of these factors for myself, the suggestion is that I can be less sure of them in my interlocutor, as I lack access to their personal information. Lackey suggests this asymmetry means that my knowledge of my own personal state can serve as extra weight in maintaining my confidence in p when someone I consider to have as good a track record as myself over such matters disagrees with me.⁷² However, Christensen suggests that although such asymmetry may have an effect on a disagreement encountered on a one-to-one basis, the significance of personal information decreases on a group scale, as it would be absurd to claim that those in disagreement with me are cognitively impaired or drunk (not to mention that such an approach assumes those who agree are correct, and indeed that one had access to their personal information).⁷³ Moreover, this approach relies on one starting out with rationally high confidence in one's belief. For example if the disagreement concerned basic mathematics (such as $2+2 = 4$), I could have rational high confidence in my belief, even where my interlocutor suggests otherwise.⁷⁴ This means that although there are those in the literature who have begun to think about the role that our personal differences might play in understanding the disagreements we encounter, it is done in a limited way, and is more concerned with justifying whether or not one ought to consider one's interlocutor a peer in the given instance (i.e. whether or not they are equal or the same), rather than how one's

Significance' in Adrian Haddock, Alan Millar, and Duncan Pritchard (eds), *Social Epistemology* (OUP 2010) 310.

⁷¹ *ibid.*

⁷² This is what has been seen in the literature as an Extra Weight View which encourages one to be steadfast in maintaining one's view having discovered a peer disagrees with it. Such reactions to disagreement will be discussed in Chapter Six, Section 2.

⁷³ Christensen (n 70) 149. This is part of Christensen's wider argument that conciliationist-based theories for responding to disagreement are stronger in group settings.

⁷⁴ *ibid* 148.

personal information might affect one's view. The view of what constitutes personal information to Lackey and Christensen is also limited, as it does not acknowledge that such personal information can be wider than factors affecting cognitive functioning. More than could be done by way of accounting for the different experiences that can make us react to matters in different ways, and inform (perhaps unknowingly) our perceptions of those with whom we engage in disagreements, as we have seen with the gender example and the ideas of epistemic equality and inequality in this section. In short, ED needs to do more regarding the identification, and indeed defence, of their starting points.

3.2 Determining one's body of evidence

The second of Kelly's requirements for peer disagreement is that the parties to the dispute are found to be equals regarding their "familiarity with the evidence and arguments which bear on that question".⁷⁵ We have seen already in Section 2's discussion of disagreement factors, for example, that having different evidence to the party you are disagreeing with can explain clearly why you have come to disagree. Thus with our meteorologists, it is unsurprising and, for ED, epistemically uninteresting that they have come to different conclusions regarding the weather forecast, as they have received different weather reports (i.e. evidence) upon which to base their decisions. The evidence available to the parties to the disagreement is therefore an important factor in determining peers, as it goes a substantial way to explaining how and why a disagreement may have occurred. Indeed, there are those in the literature who argue that if the same evidence is shared, then any resulting disagreement is unreasonable. Feldman, for example, argues that "since peers share the same evidence, and a given batch of evidence justifies exactly one doxastic attitude

⁷⁵ See n 16.

(belief, disbelief and agnosticism) towards a proposition, peers cannot reasonably disagree".⁷⁶ If we think back to our UKSC Justices then, who hear the same evidence (even in the same way and along the same timeframe), Feldman would suggest that disagreements over the right outcome are therefore unreasonable, as only one outcome is justified. Such an approach to disagreement raises serious doubt over the reliability of the decisions made in the UKSC as a court of last resort.

However, before we reach the conclusion that judicial decisions featuring both dissent and majority decisions are unreasonable or unjustified, there are certain questions that remain unasked in the literature. The first is how we can determine what constitutes the same body of evidence. Although the answer may seem obvious, we will see that when it comes to the potential evidence available in the court setting, it may not be as straightforward as one would initially suspect. Second, and similarly, attention is not given to the possibility that the parties to a disagreement are disagreeing over what the evidence is in the first place, or over the weight that should be placed on certain pieces of information; as can often be the case in legal disputes. If we take the matter of determining the body of evidence, the information available to individuals is undoubtedly vast. We have already seen from our narrow discussion of UKSC Justices' background knowledge that the variety of information and experience from which one can draw is potentially very different even where we deem individuals to have similar backgrounds.⁷⁷ We saw too in Chapter Three that the common law system can provide complications in terms of the vastness of resources that may be considered relevant to a case. We may say then that an important question to ask in narrowing down relevance is what information is pertinent and significant, and thus

⁷⁶ Goldman and Whitcomb (n 16) 5. This is referred to in the literature as the Uniqueness Thesis. See e.g. Ernest Sosa, 'The Epistemology of Disagreement' in Haddock, Millar, and Pritchard (n 70) 279, and Kelly (2010) (n 36). Just as with the range of views referred to above, views in the field do differ with regard to whether or not such disagreement would be unreasonable.

⁷⁷ Section 3.1 of the present chapter.

considered evidence, to the matter in question. So, using simple examples, we might say that where X is walking on the pavement and slips, falling over, the fact that it was raining could be considered evidence that the ground was slippery, causing X to fall. If A and B were from the Local Council and tasked with identifying why X fell, if they both knew it had been raining, this would be shared evidence regarding the cause of X's fall. Just as plainly, if A and B were tasked with determining if Y is guilty of Z's murder last Monday, the fact that they both knew that it had rained last Tuesday would not be considered relevant evidence to the case; although it is information shared between the parties it simply has no bearing on Y's alleged actions. In many instances then we may consider it obvious what information is deemed *evidence* to the case at hand, and what is not.⁷⁸ Yet if we turn from these simplistic instances to the cases discussed in Chapter Three we can see that the identification of relevant evidence is not always a straightforward matter, even where we might think the evidence available is definitive, such as in the courts where there are extensive requirements for evidence to be submitted to proceedings.⁷⁹ Often, the Justices grapple not only with identifying relevant evidence, but with assessing its importance and strength for the case at hand. For example, we saw in *Quila* that judges can disagree over what evidence is significant for the decision to be made, and similarly what weight should be placed on certain evidence, or even in some instances what the evidence actually *is*. In *Quila* we saw that Lady Hale and Lord Brown disagreed regarding the relevance of the case *Hirst* to the decision to be made. Lady Hale drew on *Hirst* as a source of knowledge of the law in determining whether or not the Secretary of State's decision to increase the age requirements for marriage visas was in accordance with the law (deciding it was not).⁸⁰ By contrast, Lord Brown could not see the relevance of *Hirst*

⁷⁸ And indeed we see that it applies across examples relating to potential civil (here tort) claims and potential criminal charges.

⁷⁹ For both criminal and civil cases. See e.g. Colin Tapper, *Cross & Tapper on Evidence* (12th edn, OUP 2010) and Richard Glover, *Murphy on Evidence* (15th edn, OUP 2017).

⁸⁰ See discussion in Chapter Three, text to n 164.

to the case at hand, so rather than declining to follow *Hirst* in presenting his dissenting judgment (with the view that the Secretary of State *did* have the power to make the age requirement change), he rejected Lady Hale's assertion of knowledge of the law in this instance. In this case then, the judges were presented with the same information (in the form of *Hirst*), and one viewed it as a relevant source of law and therefore relevant evidence (and indeed *authority*) for deciding the case, where the other saw it as no such source and therefore irrelevant to the decision to be made; it was not evidence.

Determining whether or not the evidence put before the court is relevant to deciding the outcome is a key part of the deliberative decision making process in the court. We have seen already in Section 3.1 the suggestion that one's perception of the person providing testimony can colour one's view of the testimony itself. Although it has been suggested that this has significant ramifications for our understanding of others as our peers, it also highlights the influence our perceptions of others as knowledge bearers (and the extent to which we take them to be so) can have on what we deem to be evidence in the first place, particularly in a court setting in which evidence can be presented through testimony and through argument.⁸¹ In terms then of the assessment and weighing of evidence, we saw, for example, in *Adams* that similar discussions to those seen in *Quila* took place regarding the relevance of the case of *Mullen* to determining a test for "miscarriage of justice": Lord Phillips' lead judgment dismissed the case as unhelpful in formulating a test for a number of reasons, where Lord Judge in his dissent presented agreement with the court in *Mullen*, arguing for a more

⁸¹ And indeed sometimes evidence is merely submitted in writing. In any case, when it comes to the court of first instance, it needs to be deemed admissible. E.g. with regard to criminal cases, even where evidence is admissible, it is possible to exclude it if it is deemed unfair under section 78 Police and Criminal Evidence Act 1984. Such discussions then, are held against a backdrop of evidence rules (see n 79 above) and in light of training advocates receive on presenting arguments, evidence, and questioning witnesses (see e.g. Robert McPeake (ed), *Advocacy* (19th edn, OUP 2018)).

stringent test to be formulated on this basis.⁸² Similarly, with regard to whether or not proof of innocence should be a requirement for a “miscarriage of justice”, the majority used the context of the creation of Article 14(6) (which was to be given effect in UK law by section 133(1) Criminal Justice Act 1988), as evidence that proof of innocence was not a requirement, where the minority saw no such relevance.⁸³ It is clear then that in accounting for the role that one’s evidence plays in formulating a decision made, it is challenging to determine whether or not *one’s evidence is indeed shared* with one’s peer, as what one person takes to be pertinent in determining an outcome, and therefore evidence, another sees as wholly irrelevant to the matter in question. Indeed, we have seen that many of the disagreements present in the judgments introduced in Chapter Three, take root in the judges’ deliberations over the information presented to the court; what is relevant, what is not, and what ultimately is considered to be evidence of the law on the matter in question. The disagreement over the outcome then stems from a disagreement over the relevance of certain information as evidence, demonstrating the complex nature of the decision making process in the court, and raising doubt over what it means in practice to be “equals with respect to their familiarity with the evidence and arguments which bear on that question”.⁸⁴

4. The necessity of peers: a possible defence

Thus far I have suggested that the demands of equality between individuals are too high for practical application. The reasoning involved in legal decisions for example, is often too complex for us to be confident that the same evidence is drawn upon, or that the epistemic virtues or credentials of the reasoners can be considered equal. It is my argument

⁸² See Chapter Three, text to n 87.

⁸³ Chapter Three, text to n 78 and n 88.

⁸⁴ See n 16.

then that it is highly unlikely that our UKSC Justices could be considered peers in the sense called for in the ED literature which, as explained in Section 3, is thereby problematic for ED which is intended to extend to real-world disagreements.⁸⁵ This in turn is part of a wider argument that the limited construction of the ED question (including the employment of peers therein) restricts insight to be gained from disagreement's analysis through the ED lens due to the resulting limited understanding of disagreement at play. This section offers two potential responses to this argument. I address in turn the following possible defences for ED's construction of peers: first, that the idea of equality inherent in the notion of epistemic peers is more attainable than one first perceives, and second, Matheson's claim that the use of peers in ED was only ever intended to allow for reflection on idealised instances, and so need not have real-world application.

I have outlined in Sections 2 and 3 of the present chapter my claim that the equality called for in the ED notion of epistemic peer is too restrictive for real-life application, particularly those complex disagreements which we have seen take place in the UKSC. This is not a particularly controversial claim in the ED discourse, as many also suggest that the notion encounters difficulty in the move from idealised examples of disagreement to 'real-life'. Adam Elga (for example) concedes that in "messy real-world cases"⁸⁶ of disagreement we are often not in dispute with someone we would consider a peer, a thought echoed in the work of Nathan King who comments: "Real-world disagreements concerning issues we care about are not peer disagreements. Or at any rate, they seldom are. As a result, it is not clear to what extent the contemporary discussion of peer disagreement is relevant to the rational status of

⁸⁵ As noted, I suggest that if one *were* to find peer disagreements in the sense called for in ED it would surely be in such a narrow forum.

⁸⁶ Adam Elga, 'Reflection and Disagreement' in Goldman and Whitcomb (n 16) 172. Recall at the beginning of this chapter the difference between perceived peers and actual peers.

our most cherished beliefs”.⁸⁷ However, many in the literature maintain that the ED notion of peer disagreement *can* generalise more widely. For example, Michael Thune, agreeing with Kelly, thinks that the criteria for peers can be found in practice. He notes: “[Kelly] thinks (and is surely right to think) that the standards we employ in assessing things such as this [peers] are both robust enough to provide determinate information and relaxed enough to allow for people to qualify as equal along the relevant lines”.⁸⁸ Similarly in Christensen’s 2014 essay *Disagreement and Public Controversy*, whilst peers are not referenced directly, it is clear that the notion is of importance to his work, which defends a conciliatory response to disagreement, explaining: “one thing that makes the conciliationist argument so strong in philosophy is that I think of my opponents as being just as fair-minded, unbiased, honest and well-informed as I am”.⁸⁹ In Christensen’s work, the notion of peer is not used merely as part of a broader idealisation, but rather in the belief that those he disagrees with (he often uses other philosophers as examples) are his peers: “in a general sense I think I have very good reason to think of my philosophical opponents as my peers with respect to aptitude, informedness, and intellectual virtue”.⁹⁰ Christensen refers to parties to a disagreement being “equally-confident disputants”, “equally well-informed and equally likely to have reasoned correctly”, and having “exact parity of informedness”.⁹¹ Not only then does Christensen believe that the ED notion of peers can apply to ‘real-life’, he believes that it can do so with the idea of equality intact. Doubt has already been cast on the application to real-life

⁸⁷ Nathan King, ‘Disagreement: What’s the Problem? or A Good Peer is Hard to Find’ (2012) 85(2) *Philosophy and Phenomenological Research* 249, 250. And indeed we have already seen Feldman and Warfield’s caution regarding how widely the notion of epistemic peer will generalise.

⁸⁸ Michael Thune ‘Partial Defeaters’ and the Epistemology of Disagreement’ (2010) 60(239) *The Philosophical Quarterly* 355, 360.

⁸⁹ David Christensen, ‘Disagreement and Public Controversy’ in Jennifer Lackey (ed), *Essays in Collective Epistemology* (OUP 2014) 154.

⁹⁰ *ibid* 155.

⁹¹ *ibid* 145-146.

instances. As the field has developed, others have argued that rather than a requirement for equality, rough or approximate sameness will suffice for parties to a dispute to be considered epistemic peers. For example, Feldman suggests that epistemic peers are those who are “roughly equal in respect to intelligence, reasoning powers, background information etc.”⁹² Christensen and Lackey introduce their book with the claim that “Much of the literature concentrates on cases where the agent has reason to think that the other person is roughly equally well-acquainted with the relevant evidence and arguments” (Kelly’s second requirement for epistemic peers), and with regard to one’s ability to reach a conclusion from the evidence and arguments (the second requirement), that the “two people are roughly equal”.⁹³ Although this move from ‘equals’ to ‘roughly’ and ‘approximately equals’ seems to acknowledge the fallibility of the term’s application, it does not help in practice because important questions are left unanswered and underdeveloped. We still need to ascertain, for example, what constitutes ‘roughly’ in practice, and what would be significant factors in determining equivalency in this regard. That is, irrespective of the caveats introduced to the parameters of epistemic peer’s definition, more is still needed to determine what this might look like in practice.⁹⁴

The second claim to consider is the suggestion that ED only ever intended for the idea of peers to be used for simplicity in the initial stages of the philosophical enquiry into disagreement. That is, it does not matter that doubt has been raised, both in the literature and the present chapter, regarding the existence of epistemic peers in real-life, because it was never the intention of ED theorists for this to be so. Matheson takes this view, referring to disagreements between peers as “highly idealised – so much so that it is doubtful whether

⁹² Richard Feldman, ‘Reasonable Religious Disagreement’ in Goldman and Whitcomb (n 16) 144.

⁹³ Christensen and Lackey (n 4) 1.

⁹⁴ Axel Gelfert raises similar concerns about the overly restrictive construction of peer in the literature, “as they offer no guidance as to how best to judge whether someone is an epistemic peer or not.” Axel Gelfert, ‘Who is an Epistemic Peer’ (2011) 2(4) *Logos & Episteme* 512.

it ever actually occurs".⁹⁵ He suggests that it is helpful to look at idealised peer disagreements in order to "isolate the epistemic significance of *disagreement* itself".⁹⁶ Thus, although Matheson maintains that reflection on instances of peer disagreement is useful in order to understand disagreement more widely (he suggests that the "idealized cases of disagreement can set the 'baseline' for the epistemic significance of disagreement in general"⁹⁷), he takes the view that such instances are unrealistic. Yet if we look to the wider literature, Matheson is wrong to suggest that peer disagreement is intended to be merely a tool to make reflection on disagreement easier. Many ED theorists suggest that peer disagreement is *the* sort of disagreement that is epistemically interesting, so rather than being a tool to "neutralize other muddying epistemic factors that might cloud the significance of the evidence about disagreement itself",⁹⁸ as Matheson puts it, such instances are in fact the ones of interest in and of themselves. We have already seen this to be the case for Christensen, for example, for whom peer disagreements are not only those that are of interest to his research, but those that he deems to be widely found in practice. Kelly's approach too demonstrates a sincere use of peers in the assessment of disagreement. Kelly advocates what he calls the Total Evidence View (TEV), whereby one's evidence for the view they form over *p* is distinguished between Higher Order Evidence (HOE) and First Order Evidence (FOE).⁹⁹ FOE is the original evidence that has led to one's initial view on *p*, where HOE is evidence independent of the disputed matter such as the agreement or disagreement of one's peers over *p*. In this respect, the more peers one has who are in disagreement with one's view over *p*, the more evidence one has against one's view. Thus the TEV calls for one to take into account both one's original FOE and resulting HOE in determining whether or not one is justified in maintaining one's

⁹⁵ Matheson 'The Epistemic Significance of Disagreement' (n 10) 33.

⁹⁶ *ibid.*

⁹⁷ *ibid.*

⁹⁸ *ibid.*

⁹⁹ See e.g. Kelly (2010) 139-142.

view over *p*. Although proposed reactions to disagreement are the proper realm of Chapter Six, Kelly's TEV is introduced here to demonstrate an approach to peer disagreement that treats peers as a genuine feature of disagreements rather than merely an idealisation. In fact, Kelly takes the role of a peer's view as evidence so seriously that he suggests that even if one's reasoning regarding one's FOE is sound, one should lower one's confidence in one's belief over *p* in light of the peer's contrary view as HOE.¹⁰⁰ So, although we have seen that the idea of epistemic peer is employed in the literature for simplicity in idealised scenarios, it does not follow that it is wholly taken to be an artificial notion.

It is evident then that the notion of peers plays a dynamic role in the literature. Indeed, there are those who argue that another's disagreement with you is evidence that they are not in fact your peer, and that as such you need not alter your view in relation to the matter you are disagreeing over, as their evidence is not epistemically significant.¹⁰¹ Although Matheson claims peers are used only as an aid, we have seen that this is not the case. This has been important to clarify because it informs our understanding of the ED question and the instances of disagreement that ED theorists are interested in examining; those they deem to be epistemically significant. ED theorists have been preoccupied with epistemic peers not solely because they hope to construct idealised examples of disagreement that will eventually be extended to real-life examples, but rather because they are interested in possible rational responses borne out of differences of views that arise from a background of sameness.

¹⁰⁰ He notes: "when one possesses higher order evidence to the effect that one is currently in circumstances in which one is more likely than usual to have made a mistake in responding to one's first order evidence, one has a reason to temper one's confidence – even if that confidence is in fact an impeccable response to the first order evidence". *ibid* 139. We will see in Chapter Six that Kelly originally endorsed a view whereby one's peer's views, although considered HOE, is effectively cancelled out by one's own view, and therefore need not have the effect of lowering one's confidence. See Chapter Six, text to n 26.

¹⁰¹ See e.g. Elga (n 86) 172-174.

5. The limits of the ED question

In the emerging literature ED theorists are increasingly attempting to grapple with a) what a peer is, and b) what role it should play in their epistemic discourse. We have seen in the present chapter the notion of peers has been treated in different ways across the literature. Some theorists, for example, treat it as a core idea for ED theory, some as a 'leveller' to create idealised cases for examination, where others have worked to refine the notion to make it more attainable in real-world instances. Many in the literature acknowledge that it will be rare, if ever, that parties to a dispute satisfy the requirements to be peers.¹⁰² However in doing so they often contend that it can extend to real-life cases, and to find peers in the sense required *is possible*.¹⁰³ We have seen others such as Matheson claim its role is purely to aid our understanding of disagreement in controlled circumstances so that this might go on to inform our understanding in practice.¹⁰⁴ What remains consistent across the literature however is the central role epistemic peers plays in ED philosophy and the ED question.

It was suggested at the outset of this chapter that the notion of epistemic peer was used for simplicity in ED.¹⁰⁵ This claim can now be clarified. Although the intention is broadly one of simplicity, in practice we have seen that it is in fact out of necessity because the interest of the ED literature is so narrow. Rather than a practical difficulty to overcome as Feldman and Warfield suggest, it is my argument, both here and in the wider thesis, that the disparity between theory and reality is in fact demonstrative of the weaknesses of the ED genre raising serious doubts over its purpose, scope, and ambition. To be precise, the epistemological

¹⁰² As we saw with Feldman and Warfield – see text to n 34.

¹⁰³ As we saw with Feldman – see text to n 92.

¹⁰⁴ See text to n 95.

¹⁰⁵ See Chapter Five, Section 2, in particular text to n 21.

parity with one's peer required by much of the ED literature suggests that the ED question is not really helpful in consideration of disagreement after all. ED theorists have pinpointed the phenomenon of disagreement as their subject of interest, but in focusing on 'peers', we see instead that the ED literature is primarily concerned with the ideas of rationality and reasonableness. That is, theorists explore if it would be rational or reasonable, or indeed justified, for one to maintain a belief knowing that another disagrees, if one body of evidence can rationally or reasonably justify more than one belief, and if such disagreement in and of itself ought to be epistemically significant in relation to the alteration of belief. As such, ED needs to be able to account for variations between persons, so that these variations cannot be taken into account in the consequent views regarding the disagreement. It has been my argument in this chapter that the notion of epistemic peers is both too restrictive and underdeveloped to be satisfactorily employed in real-life cases of disagreement, such as those encountered in the UKSC. Here we saw the challenges inherent in understanding what would constitute equals in relation to epistemic credentials. We saw, for example, not only that there are potential differences between people that should be explored in relation to our understanding of disagreement, such as any influence or role one's gender might play, but that one's reliability in assessing others as credible epistemic agents requires further exploration in the literature and how epistemic injustices might influence our understanding of disagreements we engage in. We further saw that the employment of peers in the ED question limits the utility of the literature's work on disagreement due to the resulting limited conception of disagreement and cases of interest for reflection. This has contributed to our discussion of the narrow definition of disagreement a further narrow construction of peers, ultimately caused by the specific purpose of the literature – i.e., a reflection on reasonableness and rationality, not disagreement.

Reflecting once more on Christensen's claim that ED philosophy is motivated by a desire to understand what the rational response is to disagreement in challenging cases

concerning public controversies,¹⁰⁶ in this chapter I have briefly sketched a picture of the complexities with which ED needs to grapple. If it is to extend to such real-life cases it needs to be more responsive to and accommodating of the differences between people. In an increasingly diverse and complex society, such differences are not going away. In this respect, it is perhaps no bad thing that our judges are not ED epistemic peers, if we are to aim to produce a court that is representative of the people for whom it makes monumental decisions. That being said, the question remains as to how then we might account for the difference in beliefs over important points of law. ED has the potential to provide important insights into the epistemic significance of such disagreements, but needs to do more to apply to instances in which the parties to the dispute are not, essentially, the same. For now, I draw this chapter to a close with a suggestion from Gelfert, calling for a re-examination of the employment of epistemic peers in the ED literature:

Rather than taking epistemic peerhood for granted and battling over the correct normative response to prima facie instances of disagreement, epistemologists would be well-advised to pay greater attention to the causes of disagreement and its persistence, and to the many ways in which peerhood can be undermined by tacit commitments or failure of reflective awareness of one's own epistemic predicament.¹⁰⁷

¹⁰⁶ Chapter Four, text to n 10.

¹⁰⁷ Gelfert (n 94) 514.



CHAPTER SIX

Reacting to Disagreement



SECTION B

THE EPISTEMOLOGY OF DISAGREEMENT

1. Introduction

This thesis moves now to the analysis of several answers to the ED question (i.e. answers to the question of what one ought to do when one realises one is in disagreement with another, particularly one deemed an epistemic peer). The reactions to disagreement offered in the literature are underpinned by the instances of disagreement of interest to ED, which have been explored in Chapters Four and Five through an examination of the notions of disagreement and epistemic peerhood. Through the preceding analysis it has become plain that such notions are carefully constructed (and, it is my argument, limited) due to the focus ED has on what is rational or reasonable to do in light of known disagreement. That is, through analysis of the ED method we have begun to see the interest in rationality has actually informed and shaped what the literature takes disagreement to be, and why it is so focused on acknowledged peer disagreement. As my objections to the foundations of ED are now evident, it may be thought unnecessary to pursue the ED literature further for insights into how we might develop our understanding of disagreement in JDM. After all, if it is deemed that the ED understanding of disagreement itself is misguided, and that the idealised cases of acknowledged peer disagreement cannot extend to even the most highly-structured and formal of decision making forums, then focus on the reactions to disagreement that are subsequently called for may well appear to be fruitless. However, an analysis of the reactions proposed still has much to offer this thesis' pursuit of disagreement, and how ED can inform our understanding. First, and in order to ensure I provide a robust and comprehensive argument, my analysis of the reactions advanced in the literature provides further insight into how and why ED offers a limited account of disagreement. In particular, from the theorists' approaches to the reactions they deem appropriate we can more clearly discern why ED applies a deficient account of what disagreement is, as the approaches demonstrate that the subject of interest is in fact the rationality of belief revision and retention. It will become clear

in the course of this chapter that what ED theorists' advocate we do when faced with disagreement is intertwined with the understanding of disagreement and peers presented in the literature. Thus in exploring reactions proposed I not only add further detail to the account of ED, but strengthen and develop the claims made in Chapters Four and Five regarding the account of disagreement offered. Second, my analysis continues this thesis' exploration of a range of instances of disagreement that take place in the courts, noting too that such instances are outside the scope of ED's vision. In this way, the analysis presented further contributes to the thesis' aim to explore what a theory regarding disagreement requires if it is to extend fruitfully to JDM. Here the thesis turns to an answer to question 2 outlined in Chapter Four; i.e., 'Do the answers advanced in response to the ED question aid this thesis' ambition to further our understanding of disagreement in JDM?'¹ It will be my argument that a) an account of disagreement that focuses solely on belief revision cannot extend to the court due to the nature of decision making that takes place in this forum, and b) a theory of disagreement in JDM needs to be able to incorporate a wider and more dynamic range of instances, such as conceptual disagreements, which presently lie unaccounted for in ED. The latter argument will be set out in the present chapter, and developed further in Chapter Seven. Importantly then, the exploration of the reactions called for in ED forms the basis of my argument that the nature of JDM requires reflection on the importance of *taking action* in disagreements.² This is something that the ED literature, with its focus on the rationality of belief revision in the face of disagreement, is ill-equipped to provide.

It is therefore not my intention in this chapter to explore the merits and/or demerits of the ED reactions themselves; nor do I set out to provide a complete account of the possible reactions advocated. Instead, I outline some of the dominant responses advanced in the literature in order to give a sense of the insights and approaches taken. It is hoped that this

¹ Chapter Four, text below n 14.

² As introduced in Chapter One, text to n 38.

will provide sufficient context for my claims, without necessitating a burdensome account of the expanding philosophical terrain. It should be noted too that in presenting my claims in this chapter, the reactions as responses will be presented using the framework of idealised peer disagreement in order to demonstrate what is called for if such scenarios were to be encountered (i.e. irrespective of my claim that they are founded on clear misunderstanding of disagreement, as presented in Chapters Four and Five of the thesis). My use of the ED lens here will show that even if the problems I have thus far identified in both the notions of disagreement and epistemic peers were not apparent, ED still ends up offering little to our understanding of disagreement in JDM due to its preoccupation with belief and belief-revision and the limited account of disagreement entailed. In this chapter then, I further defend my claim that whilst the ED question may be considered intellectually stimulating,³ it simply cannot extend to real-world disagreements such as those which take place in the UKSC. At the risk of further repetition, it is important to highlight that this is significant not only for the insights to be gleaned for JDM, but for the success of the ED literature's intended relevance to disagreements beyond the idealised instances currently explored.⁴

In order to deliver these claims the chapter will be structured as follows. Section 2 will outline the difference between conciliatory and steadfast responses to disagreement as the two dominant attitudes towards our subject matter in this field. Having established the main reactions advanced, attention can then be placed on some of the difficulties that arise in and from the literature regarding how one is to react to disagreement. These problems

³ We saw e.g. in Chapter Five that Matheson was doubtful of the extension of peer disagreement beyond idealised instances. See Chapter Five, text to n 95.

⁴ Indeed, as Feldman and Warfield observe "As the disagreement literature continues to mature, we expect that part of the evolution of the literature will include more reflection on the methodology employed in thinking about real-world epistemological disagreements with the help of various philosophical idealizations that have been put to work for this purpose." Richard Feldman and Ted Warfield (eds), *Disagreement* (OUP 2010) 3.

revolve primarily around the practical aspect of the disagreement literature; specifically what one ought to *do* when in a disagreement, which for ED concerns if and how one ought to change one's belief.⁵ Section 3, the role of belief in ED and JDM, is divided into three subsections. Section 3.1 clarifies ED's position with regard to belief revision; drawing in particular on the distinction Frances makes between belief and action disagreement. Here I suggest that the instances of disagreement encountered in the court are in fact typically more akin to the latter type. Section 3.2 puts further pressure on the ED focus of belief revision, where it is my argument that the literature's attention to belief revision makes little sense of what one can realistically do in the face of disagreement. Here I offer a distinction between belief and acceptance, suggesting that a focus on the latter would be more fruitful for exploring reactions to disagreement; in particular for JDM, though the claim extends more generally. Discussion up until this point will allow for reflection in Section 3.3 on the difference between epistemic and pragmatic justifications. It is my claim that arguments advanced in relation to the reactions to disagreement presented in the literature often demonstrate a confusion between epistemic and pragmatic reasons for defending or rejecting certain arguments. This is in spite of the insistence that has been observed in the literature thus far that ED is focused exclusively on epistemic justification. This will call for a brief reflection on Chapter Four of the thesis and what has been more firmly ascertained in relation to the instances of disagreement, and the reactions called for, that are of interest to this thesis' focus on law. It will be my suggestion that the misgivings I have articulated thus far are best expressed through this epistemic-pragmatic distinction (or between theoretical and practical reason), and any theory of disagreement for JDM needs to account not just for a quest for

⁵ It should be kept in mind that although ED often speaks to what one should do in disagreement, this is in regard to the potential alteration of one's belief, rather than what one should do practically. We will see however in Section 3.3 that although ED calls for a clear distinction between the epistemic and pragmatic, i.e. between what one should believe and what one should do, this is not always the case in practice.

truth in law (the focus on justified beliefs), but a quest for results (the focus on the pragmatic, or action).⁶ The chapter then culminates in Section 4 with some final thoughts on the literature and its place in the thesis. It is my conclusion that in exploring the ways in which ED advocates reacting to disagreement, along with the foundational understanding of disagreement and epistemic peers employed, it becomes plain that the ED literature allows only for a very narrow range of disagreements to be deemed genuine and therefore of interest for their enquiry.⁷ This limitation means they do not allow for the possibility of, among other instances, conceptual disagreement. It is my argument that not only does this go towards explaining the present shortcomings in this burgeoning field, it enables us to articulate why this philosophy does not extend to disagreements encountered in the courts. That is, as indicated at the outset of this thesis in Chapter One, it is my claim that at least some of the disagreements encountered in JDM are in fact conceptual, regarding, for example, what law actually *is* and what it subsequently requires.⁸ The fact that ED is limited in advancing a reaction to such disagreements is significant therefore as we again see not only the repercussions of ED's narrow scope, but what is wanting in a theory for judicial disagreement, and that in addressing disagreement we need more than just a focus on beliefs.

2. Conciliatory vs steadfast responses to disagreement

⁶ The role of truth will be further explored in Chapter Seven.

⁷ Recall in Chapter Four a theme in the literature of deeming others outside this range uninteresting – Chapter Four, Section 4.

⁸ Chapter One, text to n 39. On conceptual disagreements and ED see also Simon Kirchin and Stephen Pethick who note that conceptual disagreements cannot be accounted for by using a typical ED analysis. Simon Kirchin and Stephen Pethick, 'Conceptual Disagreement and the Epistemology of Disagreement' (Deep Disagreements: Philosophical and Legal Perspectives, Berlin, June 2015).

This section will examine the views presented in the ED literature regarding how one ought to react in the face of disagreement with a peer; that is, if and when one should alter one's belief. It is important to explain the philosophy in a little detail here in order that we are able to clearly and accurately articulate its practical application in Section 3. It is important too for this chapter's discussion to reiterate that the reactions concern epistemic and not pragmatic justifications for reactions to disagreement. As Enoch observes, the question "is epistemological, about what to believe, not practical, about what to do".⁹ *How* one should then go about altering one's belief is the subject of Section 3.

To begin then, in Chapter Five a number of factors that ought to be considered if one is to determine whether a 'peer' disagreement is in play were explored. Discovering the disagreement is only the first step in the literature, which is primarily concerned with how one then ought to react when one realises one is in disagreement with a peer. As we saw in Chapter Five, the disagreement itself is potential evidence for one's view regarding *p*, and so in this respect, one could consider the ED question to concern whether "the disagreement itself gives you epistemic reason to lower your confidence in *p*, and by how much".¹⁰ The ED literature has two main and opposing responses in articulating the role disagreement might play in shaping one's view. On the one hand one could be conciliatory in response to disagreement with a peer; believing that the known disagreement *should* have an impact on one's belief i.e. it is significant evidence to be taken into account regarding *p*.¹¹ Alternatively,

⁹ David Enoch, 'Not just a Truthometer: Taking oneself seriously (but not too seriously) in cases of peer disagreement' (2010) 119(476) *Mind* 982.

¹⁰ *ibid* 957.

¹¹ It is worth reiterating that ED typically requires the disagreement to be known to the disputing parties. Some in the literature refine their arguments through the distinction between merely possible and actual disagreements. Thomas Kelly, 'The Epistemic Significance in Disagreement' in Tamar Szabó Gendler and John Hawthorne (eds), *Oxford Studies in Epistemology* (OUP 2005) 167, and Brandon Carey, 'Possible Disagreements and Defeat' (2011) 155(3) *Philosophical Studies* 371. Beyond the scope of the present thesis, I will not discuss such intricate responses at length, and will present my discussion

one could be steadfast; maintaining one's view in the belief that the known disagreement should *not* impact on the view already formed; i.e. the disagreement does not act as further evidence regarding p.¹² In this section these views will be briefly outlined in order to contextualise the discussions that follow by explaining some of the ways in which theorists in the literature advocate retaining or revising one's belief and why. Before doing so, we should be reminded that when referring to the alteration of belief there are, broadly speaking, two taxonomies at play in the literature. There is the tripartite doxastic taxonomy by which contributors speak of believing, disbelieving and withholding a view on some matter, and there is the 0-1 scale of belief (expressed sometimes in percentages) which endeavours to reflect the degree to which beliefs can be held.¹³ Some in the literature make use of both categorisations.¹⁴ As this chapter engages with reactions from across the literature, both

in terms of known disagreement. However, it is of interest that the distinction between merely possible and actual disagreements arose in the literature in response to concerns that to be conciliatory (i.e. to lower one's confidence in one's belief) in response to disagreements that are merely possible would result in widespread scepticism. A distinction was therefore drawn between merely possible and actual disagreements, with the view that the epistemic significance of the latter (i.e. when one knows one is in disagreement) was more powerful than the former (such is Carey's approach). The desire to avoid scepticism plays a significant role in our understanding of ED, and will be discussed in the present section and Section 3 (particularly Section 3.3).

¹² For example David Christensen, 'Disagreement as Evidence: The Epistemology of Controversy' (2009) 4(5) *Philosophy Compass* 756–767. There are other ways of presenting these views. E.g. Lackey uses non-conformism, the view that one can still rationally believe p when one knows a peer believes not-p, and conformism, the view that disagreement itself *is* epistemically significant and that one could therefore not continue to believe p when knowing a peer believes not-p. Jennifer Lackey and David Christensen, *The Epistemology of Disagreement: New Essays* (OUP 2014) 243. For simplicity, I make reference to conciliatory and steadfast views.

¹³ See discussion below, text to n 18.

¹⁴ For example, Christensen refers to degrees of belief in relation to low-high confidence, thus although he speaks of quantification, he does not put a number on the degree to which the belief is held: "I want to focus first on degrees of belief because I want to look carefully at the rational effects of evidence, and evidence may change degrees of belief even when it doesn't change all-or-nothing beliefs". David Christensen, 'Epistemology of Disagreement: The Good News' (2007) 116(2) *Philosophical Review* 188.

taxonomies will be used as required, and for present purposes it simply suffices to be aware of the difference.¹⁵

Turning now to the reactions themselves, let us start with what it means to be conciliatory. There are two main ways by which one could be conciliatory in the face of disagreement. One could either suspend belief or judgement on the matter at hand, on the basis that it would not be rational to favour one's own belief over that of a peer's,¹⁶ or alternatively, one could moderate one's belief, because disagreement with a peer should have the effect of lowering one's confidence in one's belief.¹⁷ With regard to why one ought to be conciliatory, there are many approaches advanced. One of the prominent arguments is the Equal Weight View (EqWV). Under this approach, if A and B discover they disagree with one another over p, both parties to the dispute should accord as much weight to each other's belief as to their own. The rationale for the EqWV is that in acknowledging my disputant to be a peer, I am acknowledging that they are equally as likely to be right on the matter as I am, so it would be irrational for me to accord my own belief more weight than that of my peer. By this view then, the discovery of disagreement should result in A (and indeed B) moderating their view, or lowering their confidence in their belief regarding p, in order to bring their views more in line with one another's. With 'all or nothing beliefs' (where A believes p and B believes not-p, as per the tripartite doxastic taxonomy), the EqWV would call for suspension of judgment. With degrees of belief (represented in the literature on a 0-1 scale), the EqWV

¹⁵ The difference between approaches has significant bearing on our wider understanding of degrees of belief due to the varying standards of proof required in law.

¹⁶ We have seen e.g. that Feldman supports the Uniqueness Thesis, arguing that it would not be reasonable to disagree when all relevant information is disclosed to each party, as the body of evidence only justifies one doxastic view. Richard Feldman, 'Epistemological Puzzles about Disagreement' in Stephen Hetherington (ed), *Epistemology Futures* (OUP 2006) 235. This view will be discussed further in Section 3.1.

¹⁷ See e.g. Jonathan Matheson, *The Epistemic Significance of Disagreement* (Palgrave Macmillan 2015).

would require the parties to the dispute to 'split the difference'. So, for example, if A's confidence in p was 0.8, and B's confidence in p was 0.6, the parties would moderate their confidence to 0.7 and effectively, in this sense, come to agree over p.¹⁸ A typical example used in the literature to demonstrate circumstances in which a strong conciliatory response is called for is Christensen's tipping case in which friends are calculating a tip at a restaurant:

You and your friend have been going out to dinner together regularly for many years. You always tip 20% and split the check... and you each do the requisite calculation in your head upon receiving the check. Most of the time you have agreed, but in the instances when you have not, you have taken out a calculator to check; over the years, you and your friend have been right in these situations equally often. Tonight, you figure out that your shares are \$43, and become quite confident of this. But then your friend announces that she is quite confident that your shares are \$45. Neither of you has had more wine or coffee, and you do not feel (nor does your friend appear) especially tired or especially perky. How confident should you now be that your shares are \$43?¹⁹

¹⁸ In this respect an acknowledged shortcoming of this view is that it requires both parties to the disagreement to uphold it. If they do not it is one sided and the other party would automatically 'win' the disagreement; referred to in ED as the problem of stubbornness. See e.g. Carlo Martini, Jan Sprenger and Mark Colyvan, 'Resolving Disagreement through Mutual Respect' (2013) 78(4) *Erkenntnis* 881, 885-886, and Catherine Elgin 'Persistent Disagreement' in Feldman and Warfield (n 4) 57-58.

¹⁹ Christensen (2009) (n 12) 757. In fact this case is one that has been regularly utilised by Christensen. First in 2007, then in 2009 (in the article referenced here) and again in 2010 and 2011. Although the wording of the case differs over the course of its use in Christensen's and others' work, its sense does not change.

This simple scenario demonstrates the sort of circumstances in which Christensen, among others,²⁰ believes one should markedly decrease confidence in one's own view in light of disagreement from a peer. In fact, in light of my track record with my friend, and knowledge thereof, in this case I should now be equally confident that \$45 is the right answer as I am that it is \$43.²¹ Thus the conciliationist response to peer disagreement is that if I do take my interlocutor to be my equal regarding *p*, *and therefore equally as likely to be right regarding p*, it would be irrational for me not to treat their view with the same regard I treat my own. In this respect, a peer's disagreement acts as important evidence for reacting to the disagreement. Christensen notes: "in evaluating the epistemic credentials of another's expressed belief about *P*, in order to determine how (or whether) to modify my own belief about *P*, I should do so in a way that doesn't rely on the reasoning behind my initial belief that *P*".²² Thus one's belief that *p* should be reconsidered in light of one's peer's disagreement. However, similar to Kelly's distinction between FOE and HOE outlined in Chapter Five, this should be independent from one's reasoning regarding the FOE that led to the belief regarding *p*.²³ Thus we see that whether or not you recognise your interlocutor to be your peer can have a profound effect on the belief that it is then rational for you to hold in a disagreement. This is particularly important in light of our discussion of the role that peers plays in ED, the relevance of which will be examined in Section 3 where the reason for such

²⁰ See e.g. Jennifer Lackey 'What Should we Do When we Disagree?' in Tamar Szabó Gendler, John Hawthorne (eds), *Oxford Studies in Epistemology Volume 3* (OUP 2010) 274-293, Han Van Wietmarschen, 'Peer Disagreement, Evidence and Well-Foundedness' (2013) 122(3) *Philosophical Review* 395, and Bryan Frances, *Disagreement* (Polity Press 2014) 21.

²¹ Christensen (2009) (n 12) 757.

²² *ibid* 758. This is referred to as independence, and is part of Christensen's defence of what he calls independence-based conciliationism.

²³ David Christensen, 'Disagreement and Public Controversy' in Jennifer Lackey (ed), *Essays in Collective Epistemology* (OUP 2014) 145.

restrictions in the ED literature are explored further.²⁴ The EqWV is just one example of a conciliatory response to disagreement – others will be introduced and discussed in Section 3.

By contrast to the conciliatory view, a steadfast response to disagreement offers the case for remaining confident in one's view, despite peer disagreement. They defend this resilient answer to the ED question with various arguments to explain why the discovery of disagreement should not in itself influence one's view over *p*, once that view is already formed. That is, a staunchly steadfast response would be the claim that once the evidence has been assessed and a view formed regarding *p*, A should not regard B's view as evidence bearing on *p*. Kelly's initial response to the ED question in 2005 presented such an approach. To explain, in Chapter Five reference was made to Kelly's TEV, whereby a distinction was made between FOE, one's initial evidence regarding *p*, and HOE, evidence which is independent of the disputed matter such as the views of one's peer(s) over *p*; a distinction through which Kelly suggests the amount of HOE one has can cause one to lower one's confidence in one's belief over *p*. As the HOE (i.e. the fact of peer disagreement) ought to cause one to re-evaluate one's view, the TEV lies at the conciliatory end of responses.²⁵ In its initial conception however, Kelly argued that one's peers' views of *p*, although HOE, needn't cause one to revise one's belief in respect of *p*.²⁶ The thought goes that if A formed their view that *p*, at time *t*₁, based on E (the FOE), only to discover at time *t*₂ that B, A's peer, had reached the conclusion not-*p* based on E, this would not have the effect of requiring A (or B) to change their view regarding *p*. The reason for this lies in the fact that both A and B's views are based on their

²⁴ See discussion of belief vs acceptance, text to n 55 below.

²⁵ Notice it is not as conciliatory as the EqWV however, as TEV calls for one's total evidence to be taken into consideration. I.e. one can still take into account the FOE, and one's initial view thereof, as well as the new HOE in the form of one's peer's disagreement. Under the EqWV this would not be possible as the view calls for a focus on the HOE itself, not accounting for the evidence one initially had in forming that belief regarding *p*.

²⁶ Kelly (n 11) 167-196.

reasoning about the same FOE, prior to any knowledge of disagreement, and this FOE remains an important part of determining what one is justified in believing regarding p, even when the new HOE is discovered.²⁷ He explains this with reference to the two bodies of evidence that are then at play, where E is the original FOE and E' is as follows:

- (i) the original, first order evidence E,
- (ii) the fact that you believe H on the basis of E, and
- (iii) the fact that I believe not-H on the basis of E.²⁸

Kelly suggests that even though the beliefs regarding the FOE may well be evidence (HOE), the FOE remains decisive in determining what it is rational to believe in regard to the given proposition:

Our original evidence E does not simply vanish or become irrelevant once we learn what the other person believes on the basis of that evidence: rather, it

²⁷ Kelly explains that if A were forming their view of the FOE in relation to p, with B having already formed their view, there is a strong case for suggesting that A should not take into account B's view as evidence for the FOE because B's view is simply a reasoned view in relation to the FOE. This is a clear call to consider the role that a peer's view might play in forming one's own belief regarding p. If A takes B's view into account as part of their FOE, it is what Kelly suggests to be "double counting" of the FOE B based their view on because "if I treat the fact that you believe as you do as an additional piece of evidence which bears on the truth of H, then, when I enumerate the considerations which tend to confirm H, I will list not only the various first-order considerations that speak in favor of H, but also the fact that you believe that H is true", which is not something that B takes into account when forming their view based on the FOE. I.e. when B forms their view, they do not take into account their belief in p to be true (or otherwise) as evidence that it is so. Kelly (n 11) 187-188. This bears relation to Enoch's CSV which focuses on the nature of one's own belief in relation to p (i.e. 'that p' rather than 'that p, as I believe') as evidence that one's own view should be given weight in relation to a disagreement with a peer. See text to n 33.

²⁸ Kelly (n 11) 190.

continues to play a role as an important subset of the new total evidence E' . In general, what one is and is not justified in believing on the basis of E' will depend a great deal on the character of the first-order evidence E .²⁹

Thus we see an approach by which one's peer's disagreement, though acknowledged to be evidence regarding p , is weak evidence compared to the FOE and need not have the impact on belief-revision suggested by the conciliatory approach.

A slightly different approach to justifying steadfastness is taken in the Extra Weight View (ExWV) which, as the name suggests, advocates the position that each party to a dispute is allowed to give 'extra weight' to their own view.³⁰ We have already seen something akin to an ExWV approach to disagreement in Chapter Five in relation to the 'asymmetry of personal

²⁹ *ibid.* A reason for quoting this in full is that Matheson views Kelly's use of FOE and HOE as suggesting that A and B's views regarding the FOE cancel each other out, leaving A with E upon which to base their view, thus making it rationally justified to maintain p , knowing that B asserts not- p . One problem with this approach, as Matheson suggests, is that A's initial view regarding p should be counted as part of one's initial evidence, because it forms HOE before A realises that B disagrees. In this respect, Matheson suggests that B's HOE should cause A to at least somewhat lower their confidence in their view. Whilst I agree with Matheson that B's HOE should cause A to re-evaluate their view regarding p , this is not incompatible with Kelly's approach, because Kelly does suggest that the HOE is part of evidence E' , he just does not see it as particularly weighty in relation to undermining the FOE. Jonathan Matheson, 'Disagreement and Epistemic Peers' in (Oxford Handbooks Online, OUP 2015) <www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935314.001.0001/oxfordhb-9780199935314-e-13> accessed 24 July 2018. The more troubling approach Kelly takes is the suggestion that the peer who had reasoned correctly and rationally regarding p should maintain their view, and the peer who made the mistake should revise their confidence (Enoch calls this the Right Reasons View. Enoch (n 9) 967). I.e. Kelly's approach calls for taking into account what the right answer is; something which is outside of the remit of the ED question, and involves having access to knowledge of what the right answer is; the very matter the parties to the disagreement are disputing. Kelly (n 11) 189-190. This is taken up below in relation to right answers.

³⁰ Adam Elga, 'Reflection and Disagreement' (2007) 41(3) *Nous* 478, 485 – though as Elga notes, there are few to be found who endorse this view.

information', whereby it is argued that one's knowledge of their own personal state, and lack of insight into their peer's personal state can justify one being confident in one's own view, in light of disagreement.³¹ Another steadfast approach is offered by Enoch who suggests, in what he calls the Common Sense View (CSV), that the disagreement itself acts as evidence that the person with whom one is disagreeing may not in fact be one's peer, meaning that one's interlocutor's view may not need to be taken into account as evidence for one's view over p (or where it is taken into account, is not as weighty as the EqWV suggests).³² Briefly, the reason for this lowering effect, as Enoch claims, is not because A believes that B is wrong, or that the two differ over p. Instead it is due to the role that belief plays. Enoch sees that the reason A can demote B in a disagreement (i.e. no longer consider B a peer) is "that p rather than that one believes that p".³³ Thus instead of saying 'I believe that B is wrong' A is saying 'B is wrong (as I believe)'. As such, from A's perspective, A does not 'demote' B because A and B differ, but rather because B is wrong and A does not take themselves to be wrong. To explain the difference in approach to belief that Enoch is advocating, he uses an example of one forming a belief that the Soviet Union collapsed because it was unjust. He suggests that in such a situation "what I take to explain the collapse of the Soviet Union — what I take to be the explanatorily relevant features of the circumstances — is not that *I believe that it was unjust*, but rather that *it was unjust*".³⁴ In terms of the EqWV response to such a situation, proponents would acknowledge that the disagreement is evidence that your interlocutor is

³¹ See Chapter Five, text to n 72. Peter van Inwagen also offers a case for appealing to one's private evidence. Peter van Inwagen, 'It is Wrong, Always, Everywhere, and for Anyone, to Believe Anything, Upon Insufficient Evidence' in Jeff Jordan and Daniel Howard-Snyder (eds), *Faith, Freedom, and Rationality* (Rowman and Littlefield 1996) 137–154.

³² Enoch (n 9) 981.

³³ *ibid* 982-3.

³⁴ *ibid* 984. ED theorists are not alone in exploring beliefs and the potential for disagreement in this way. See e.g. Ronald Dworkin, *Law's Empire* (Hart Publishing 1998) 65-76 in which Dworkin explores what he refers to as the stages of interpretation.

not as reliable as you had thought. However, they would say that the same applies to casting doubt on one's own reliability (i.e. the disagreement acts equally as evidence that I have gotten things wrong as it does as evidence that my peer has). This would mean that the EqWV would still come into play because symmetry endures between the parties (each having had to lower their confidence in their *own* belief as a result of the disagreement).³⁵ However Enoch's approach rejects such a balanced effect because, turning to A and B again, there is no symmetry where A takes B to be wrong and not themselves to be wrong. Thus, A can use their belief that p as evidence that B is not a peer (as can B for A).³⁶ This is part of Enoch's argument that one should take oneself seriously regarding one's own view, highlighting the significance of the first person perspective.³⁷ A further difference then between the EqWV and the CSV is that the EqWV often calls for parties to a dispute to 'split the difference' in relation to their belief regarding p, resulting in the symmetry referenced above. The CSV, on the other hand, calls for symmetry, but only in how the parties to the disagreement assess the disagreement itself, "without neglecting the significance of the asymmetrical nature of the first-stage evidence".³⁸ Thus, as with the TEV, one's peer's view is evidence pertaining to one's belief regarding p, but the weighting of such evidence is not equal in the respect called

³⁵ Enoch (n 9) 975.

³⁶ *ibid* 984. And this is irrespective of whether or not one is right regarding p.

³⁷ As per the title of the article "...Taking Oneself Seriously (but not too Seriously)..." Enoch notes on this point that a reason for taking ourselves seriously concerns the difference between a seeming, which is an unreflective and a-rational immediate response (e.g. I put my hand in the water and note that it is hot), and a "full-blooded belief", which is "based on a reflective consideration of the evidence... [where] the believing self is fully engaged". He notes: "Once you reflect on a question, asking yourself, as it were, what is the truth of the matter, and so what is to be believed — once the believing self is fully engaged — you can no longer eliminate yourself and your reflection in the way apparently called for by the truthometer view". *ibid* 963. By Enoch's view this engagement means that we should trust ourselves due to the nature of beliefs and how they are formed; in believing something we are taking it to be true. *ibid* 980.

³⁸ *ibid* 994.

for in the EqWV, nor as steadfast as in the ExWV. Enoch explains that the weight is not easily determined, nor is there a general rule that can be applied, for what one does depends on the circumstances of the case:

...depending on other things you (justifiably) believe, on other evidence you have, on the epistemic methods you are justified in employing, on the (perhaps known) track record of...[the parties to the disagreement], for some p s in some circumstances you should reduce your confidence in p more, for others less.³⁹

Thus whilst we have seen that Enoch advocates a steadfast approach to disagreement through what he sees as the role that peers plays, CSV does allow for a range of responses – even suggesting there may be cases in which ‘splitting the difference’ (as required by the EqWV) is appropriate. Finally, it should be noted that there are views in the literature which advocate a ‘middle ground’ approach to peer disagreement. For example, Michael Thune advocates what he calls partial defeaters to one’s belief regarding p . He argues that where conciliatory approaches require the full defeat in belief, and steadfast approaches require no defeat, there are circumstances in which one should lower one’s confidence, but need not change the overall belief regarding p (i.e. one might still, all things considered, believe p , but with less confidence than before). Thus the effect of the peer’s disagreement is to partially defeat one’s belief regarding p . Thune, as with Kelly’s initial conception of the TEV, has in mind instances in which the FOE outweighs the HOE.⁴⁰

There are of course a number of objections that could be raised against each of the views outlined here, and indeed much of the literature is focussed on critiquing and defending

³⁹ *ibid.*

⁴⁰ Michael Thune, ‘Partial Defeaters’ and the Epistemology of Disagreement’ (2010) 60(239) *The Philosophical Quarterly* 355, 360.

the views advanced, in pursuit of articulating what the correct, rational response to the ED question is.⁴¹ For the purposes of this thesis however, I will not directly pursue the pitfalls of the views themselves. Rather, in exploring the ED presentation of disagreement and how it might inform our understanding of and response to disagreement in law, my focus in Section 3 concerns the epistemic foundations of the literature itself. Thus, through a discussion of the reactions, I will examine the role that beliefs and belief-revision plays in ED (the primary focus of Section 3.1 and 3.2), and the relation between epistemic and pragmatic justification; both in ED and JDM (the subject of Section 3.3).

3. The role of belief in ED and in JDM

3.1 Belief and action

As has been emphasised throughout this thesis' discussion of ED, the literature is concerned with exploring if and why one might be required to alter one's belief in a disagreement. The matter of altering one's belief is subject to scrutiny in Section 3.2 of this chapter. Before addressing the matter of belief revision, I turn first to reflect a little further

⁴¹ Though they are not directly pursued in this thesis, for context, I offer some comments on such objections. The ExWV suffers from the same stalemate seen in the EqWV whereby if each party gave extra weight to their own view, this could result in one according more and more weight to one's own view, with no resolution. Similarly, Elga puts forward the objection of 'bootstrapping', whereby if A gives extra weight to their view regarding p, A is gaining evidence that they are more reliable than B, which could be used in the next case (should one arise) for A to add even more weight to their view over B's. Adam Elga (2007) (n 30) 486-488. A further concern regarding steadfast positions is the reliance that is typically placed on the first-person perspective and the self-trust implicit in such a stance. E.g. if I were to hold a view and discover that my epistemic superior thought differently, I should favour their view over my initial view; it would be irrational for me to do otherwise due to their epistemic credentials. This raises doubt regarding how significant my first-person perspective is to begin with. Matheson 'The Epistemic Significance of Disagreement' (n 17).

on the role that belief might play in a disagreement. In Chapter Five we saw that Feldman defends what he calls the Uniqueness Thesis by which he argues that peers cannot reasonably disagree because there can only be one “rationally justified” attitude to a proposition in light of a body of evidence.⁴² So, for example, Feldman suggests that if one believes that the evidence indicates there to be a 50:50 chance that the correct answer is A, and a 50:50 chance that the correct answer is B, the only rational attitude to take is to suspend judgment, because if one opted for A, one would be suggesting that B is wrong, which is not a reasonable conclusion to reach (as one believes that the evidence suggests a 50:50 chance that each answer is correct). It would therefore not be *rational* to make a choice between A and B in such a situation. What, however, if one *needed* to make a choice in such a scenario? That is, what if one’s rational attitude was suspension of judgement regarding whether A or B was the best approach to take, but one needed nevertheless to adopt A or B. In order to articulate this predicament further it is helpful to draw on the distinction Frances makes between belief and action disagreement. Like Feldman, Frances would require one to suspend judgement in such a situation. Yet this does not mean that one needn’t act in such a case. Indeed, there may be circumstances in which one *must* act; where inaction amounts to picking a side anyway. To illustrate this Frances draws on an example of a doctor, Laksha, who has to make a decision in a difficult case to either A) continue with a non-surgical course of treatment for her patient, or B) perform surgery on the patient. As the case is challenging Laksha consults her colleagues, and whilst some suggest A, and others B, none are sure, and all agree that “it’s

⁴² Richard Feldman ‘Reasonable Religious Disagreements’ in Alvin Goldman and Dennis Whitcomb (eds), *Social Epistemology* (OUP 2011) 148. Christensen refers to this assumption that there is a single rationally justified response as “Rational Uniqueness”. Christensen (2007) (n 14) 211. Although a widely held view in the literature, it is by no means uncontroversial. E.g. there are those who argue for evidential permissiveness, suggesting that a single body of evidence *can* justify more than one view. The possibility of multiple justified responses to disagreement will not be taken up in the present chapter, but will be reflected on in Chapter Seven’s discussion of right answers. See Chapter Seven, Section 4.

a close call".⁴³ Based on the information available to her then, including the views of her colleagues, she reaches the conclusion that it's a tie.⁴⁴ This means that in relation to forming a belief as to whether A or B is the best course of treatment, Laksha should suspend judgement.⁴⁵ However, it does not follow that she cannot or need not choose a course of action with regard to her patient's treatment. And, as Frances points out, even if Laksha was to then flip a coin to decide her course of action, the amount of research she has undertaken to reach the view that it really is 50:50, would mean that her decision making process was still thorough.⁴⁶

In Chapter Two of this thesis the role of belief in relation to disagreement in law was discussed. It was observed that although it might be acceptable for A and B to 'agree to disagree' as to how we should spend our free time, the same would not be acceptable in determining if D is guilty of manslaughter.⁴⁷ Frances' distinction between belief and action disagreement helps to explain the instances of disagreement we have in mind when it comes to JDM. A disagreement over, say, the proposition that basketball is better than football, is a clear instance of belief disagreement; there is no action to take here and the options available are to a) believe the statement, b) disbelieve the statement, or c) abstain from judgement. It may seem that the matter of whether D is guilty of manslaughter is a belief disagreement (the question subject to disagreement being something akin to 'do I believe D to be guilty?'), it is in practice an action disagreement ('is there enough evidence to convict D of this crime?'). In

⁴³ Frances (n 20) 72.

⁴⁴ *ibid.* This then is in keeping with Feldman's example, as the one uniquely justified answer could indeed be that it's a tie.

⁴⁵ It is interesting that this patient care decision is used by Frances to highlight the difference between a belief and action disagreement because it really looks like a case of *agreement*. I.e. everyone is in *agreement* that it's 50:50 as to whether the treatment should be (non)surgical. Here again we see Frances appearing to suggest that the disagreement is what is actually the decision making process.

⁴⁶ Frances (n 20) 72.

⁴⁷ See Chapter Two, text to n 106.

such cases the decision to be made is to either a) convict D or b) not convict D; an action would need to be taken, and suspending judgment here would be to effectively take the action of not convicting D. The distinction between belief and action disagreement usefully marks the cases we have in mind for our discussions, because in law some of the most important instances of disagreement are those in which an action is required. In such cases, preferably the action taken in, say, convicting D of a crime would coincide with a belief in D's guilt. However, such convergence is not always the case in practice as laws of criminal evidence are put in place as safeguards from prejudice. Let us take, for example, a member of a jury who has a 'gut instinct' that D is guilty of crime X. It might be in such a case that the prosecution has failed to satisfy the burden of proof, or it is deemed that evidence is not of sufficient weight, and so on, so that a conviction based on the evidence is not possible.⁴⁸ In such a case, the belief in guilt should not correspond to a guilty verdict. A further safeguard is to ensure that members of the jury do not conduct research of their own regarding the case, so that D is tried on the facts as presented to the court, and not on the basis of information that has been deemed irrelevant to the facts of the case under consideration.⁴⁹ Whilst undoubtedly fallible, such legal processes help to protect against unsubstantiated

⁴⁸ In criminal cases, the defendant is presumed innocent and it is for the prosecution to prove the elements of the offence (*Woolmington v DPP* [1935] AC 462). Where the prosecution must prove the elements of the offence, the standard of proof is beyond reasonable doubt (*Miller v Ministry of Pensions* [1947] 2 All ER 372) – in some cases the defendant might have the burden of proof (e.g. for cases regarding insanity), in which case the standard of proof is the balance of probabilities (*R v Carr-Briant* [1943] 2 All ER 156).

⁴⁹ Research by jurors is an offence under section 20A Juries Act 1974, and this includes research into a person relevant to the case, the judge, the law or the evidence (section 20A(3)). E.g. in 2012 a juror was convicted of contempt of court for researching a defendant's history whilst acting as a member of the jury for his grievous bodily harm trial. In the juror's research she discovered that the defendant had previously been acquitted of rape. This information had not been disclosed to the jury, and it is clear that such information about a defendant might sway a juror's view of them. *Attorney General v Dallas* [2012] 1 WLR 991.

belief and potential bias. Thus, although one would hope that belief (in guilt or not) and action coincided, it is not a necessary requirement in law. Indeed we saw in Chapter Two that it is not always to be hoped for in other areas of a case, such as a lawyer's belief in their client's guilt or innocence.⁵⁰ Frances' distinction has therefore narrowed down much of our focus as such: when it comes to disagreements in law we are concerned mainly with action-disagreements in which "there are just *two options* with respect to X: do X, don't do X".⁵¹

In highlighting the distinction between belief and action disagreements we see the limited scope of the ED literature's potential insights into disagreement in JDM – it is concerned with belief, not action. Frances does suggest that action disagreements can be formulated as belief disagreements, in order to allow for more instances to fall within the ED frame. For example, he notes: "if we disagree over whether to do an action X, we are disagreeing over the truth of the claim "We should do X," (or "I should do X" or "X is the best thing for us to do" ...)".⁵² Yet even if the question is reformulated, as Frances suggests, to focus on belief, doubt is raised in this section as to how adequately this captures what is happening in the courts, with regard to the role that one's beliefs plays. This will be developed in Section 3.2 where we examine further the nature of beliefs through a discussion of if and how one *can* alter one's belief in light of disagreement. In proceeding it is important to bear in mind this distinction between belief and action disagreement, as we will see that the difference between the epistemic (belief) and pragmatic (action) is pertinent to our understanding of disagreement in law.

⁵⁰ Chapter Two, text to n 111.

⁵¹ Frances (n 20) 72.

⁵² *ibid* 76.

3.2 The matter of altering one's belief

A question that remains underexplored in the literature concerns the prominent role that belief plays in both the reactions proposed, and the general discourse concerning disagreement. As a self-proclaimed epistemological enquiry, ED is concerned with the justification of beliefs. That is, they are concerned with the *pursuit* of knowledge and, accordingly, truth. This has meant that the views advanced have been articulated in terms of the beliefs of the participants to a disagreement. Yet a question insufficiently explored in the literature is how this relates to our social practices and what we as individuals both do and *can* do in relation to the beliefs we have. To explain, in outlining the reactions to disagreements called for in Section 2 of the present chapter, we observed that theorists attempt to answer this ED question with principles concerning maintaining, suspending, and adjusting belief. Those arguing for a steadfast approach assert that in the face of disagreement with an epistemic peer one should stick to one's belief. Those who, on the other hand, argue for conciliatory reactions assert that one's belief regarding *p* should be altered in some way as a result of the discovered disagreement. We have seen that within this latter approach there are broadly two ways in which the belief should be altered. Feldman on the one hand asserts that in light of known disagreement with a peer one may be required to suspend one's belief, whilst Christensen suggests that one may need to moderate one's view.⁵³ Missing then, is an indication of the means by which one ought to, or indeed *can*, go about changing one's belief in the way that is called for. Drawing in particular on the works of LJ Cohen and Catherine Elgin (who draws too on Cohen's work), it is my argument that there

⁵³ In relation to the moderation of one's view, Elgin observes that this would then amount to a "convergence of opinion" as each party adjusted their views, and indeed we saw this as a concern relating to stalemate in Section 3 of this chapter. Elgin (n 18) 56. We noted too a third option above regarding the adoption of the other party's view. This however is not a main view advocated for in the literature.

is an important distinction to be made between belief and acceptance, that this helps to articulate not only why the ED focus on belief revision is misplaced, but why it might be more fruitful in JDM to think in terms of what one ought to accept, rather than how one ought to revise one's beliefs in the face of disagreement.

In reflecting on ED's emphasis on belief revision, Elgin sees the alteration of belief to be an elusive goal in the literature, suggesting that even if one wanted to change one's belief, the desire does not necessarily mean that change will follow.⁵⁴ Elgin uses Cohen's distinction between what one believes and accepts to suggest that the latter is a more appropriate expression of what one is capable of altering in a disagreement. This is due to the nature of belief, which according to Cohen's distinction, is a passive, involuntary state, compared to acceptance which is by contrast a voluntary, active policy that we can employ.⁵⁵ According to Cohen then, and as we have seen thus far in this thesis' presentation of ED, belief relates to truth-apt propositions. So belief (in all-or-nothing terms) is "to feel it true that p and false that not-p".⁵⁶ However, Cohen specifies further that this is the case "whether or not one is willing to act, speak, or reason accordingly".⁵⁷ If on the other hand one accepts that p, one "treats it as given that p".⁵⁸ Belief is then distinct from acceptance, the latter being actively employed: "to accept that p is to have or adopt a policy of deeming, positing, or postulating that p—i.e. of including that proposition or rule among one's premises for deciding what to do or think in a particular context, *whether or not one feels it to be true that p*".⁵⁹ Simply put, the difference between Cohen's presentation of belief and the one evident in much of the ED literature, is

⁵⁴ Elgin (n 18) 64.

⁵⁵ L Jonathan Cohen, *An Essay on Belief and Acceptance* (OUP 1995) 1-2. Note that Cohen's discussion of reconsidering the difference between acceptance and belief is twenty years prior to Kelly's introduction of the notion of epistemic peers and belief revision to the ED discourse.

⁵⁶ *ibid* 4.

⁵⁷ *ibid*.

⁵⁸ *ibid*.

⁵⁹ *ibid* (emphasis added).

that ED theorists treat belief as an active policy that one can employ, where Cohen's distinction between belief and acceptance rejects the interweaving of one's disposition relating to a proposition with one's subsequent use of a proposition.

Elgin, drawing on Cohen's work, articulates this difference with an example of having a fear of frogs as a result of a childhood experience. She explains that "even though I cannot help but feel that frogs are dangerous, I refrain from using 'frogs are dangerous' in any cognitively serious inference".⁶⁰ In such a situation, Elgin argues, we can see a distinction made between what one believes and what one accepts. Thus in regard to the frogs "I accept that frogs are not dangerous, when I include 'frogs are not dangerous' among the premises I am prepared to use when deliberating about the perils of summer camp, and when I allow my toddler to wade in a frog pond".⁶¹ As such Elgin argues that focus on the alteration of belief in ED would be more accurately explained as concerning acceptance because to believe something is not a voluntary action in the way that much of the ED works suggests. That is, because beliefs are involuntary feelings they cannot be actively moderated, altered, or indeed suspended, in the way that theorists such as Feldman and Christensen argue for.⁶² Elgin observes: "Although evidence or other epistemic considerations can move me, since belief is not voluntary, my reaction is not anything I can *do*".⁶³ In distinguishing between the rationality of belief and the rationality of acceptance then,⁶⁴ it can be persuasively argued that one would be mistaken to claim that one should alter one's beliefs in the face of disagreement with an epistemic peer, because belief revision is not something one has active control over.⁶⁵ Enoch

⁶⁰ Elgin (n 18) 64.

⁶¹ *ibid.*

⁶² *ibid* 61.

⁶³ *ibid.*

⁶⁴ Cohen notes these are often mistakenly intertwined. Cohen (n 55) 2.

⁶⁵ Elgin (n 18) 61. Elga similarly sees that one cannot force oneself to change a belief. He argues that one could have, e.g., a "conciliatory nature" whereby A may indeed change their view when disagreeing with B, but simply because it is the way A is inclined (on this point see also the similarity to Chapter

shares a similar concern with Elgin, as seen through the distinction he makes between what he calls a seeming and a belief.⁶⁶ Enoch observes that when one has reflected on the truth of a matter, and therefore what one should believe in relation to that matter, one cannot disentangle oneself from the reflection and belief arrived at.⁶⁷ Enoch does not use this distinction as a reason to *not* focus on belief in the literature. In fact, quite to the contrary he is using the distinction to make a special case for one's own belief in a disagreement; noting that belief is intertwined with the self and therefore cannot be treated as separate from the self in the way that much of ED discourse calls for.⁶⁸ In making this point however, Enoch in fact aids in the reinforcement of Elgin's view that belief is the wrong epistemic subject to focus on in the literature because we cannot distance ourselves from the "full-blooded beliefs"⁶⁹ we form.

Acknowledging a difference between belief and acceptance does not mean that the alteration of belief cannot take place. Indeed Elgin suggests that in spite of the lack of choice one has in altering a belief there are strategies that can be employed for acquiring beliefs, referred to as a kind of "practical rationality",⁷⁰ which allows for a measure of indirect control in the adjustment of our beliefs. For example, this could be achieved through education: "by learning about the cognitive force of evidence, argument and expertise, students can be put

Two's (text to n 79) discussion of mind-sets). It is of note that Elga here uses the term "adviser" which seems a little out of place in a literature that is concerned with 'peers'. Adam Elga, 'How to Disagree about How to Disagree' in Feldman and Warfield (n 4) 175-186.

⁶⁶ See n 37 above related to this distinction.

⁶⁷ Enoch discusses this idea in relation to his view that one cannot be merely a 'Truthometer' in disagreement because one forms a unique role in forming one's own beliefs. He notes: "Once you reflect on a question, asking yourself, as it were, what is the truth of the matter, and so what is to be believed – once the believing self is fully engaged – you can no longer eliminate yourself and your reflection..." Enoch (n 9) 963.

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ Elgin (n 18) 63.

in a position to be moved by considerations of one sort or another”.⁷¹ We therefore have at least some control over the sort of character we form (Elgin calls this “cognitive character formation”⁷²) which will in turn have an impact on how and why our beliefs are influenced.⁷³ Put differently, this exposure to influences means that we can potentially become more or less susceptible to belief alteration in certain situations and the question then for Elgin is “whether she should put herself in a position to be moved by such disagreement”.⁷⁴

The difference between belief and acceptance, as outlined by Raimo Tuomela (and in line with Cohen’s insights, and as emphasised by Elgin), are as follows:

- 1) “Beliefs are involuntary, and are not normally subject to direct voluntary control, [and] beliefs aim at truth”,⁷⁵ compared to;
- 2) “Acceptance is voluntary or intentional... [and] acceptance aims not at truth but at utility or success. (One can accept things one believes to be false.)”⁷⁶

⁷¹ *ibid* 62.

⁷² *ibid* 63.

⁷³ The question of course still remains as to the sort of character *we ought to* form.

⁷⁴ Elgin (n 18) 63. This question is not fully addressed by Elgin, however if cognitive character formation is to be utilised, it is a significant issue that would need to be addressed. As it stands, the main idea to be taken from Elgin’s work for this thesis is that of the difference between belief and acceptance, to be discussed in this section. Cohen’s work shows support for such an approach to belief formation. He suggests that although belief is involuntary, and one can therefore not simply decide to believe a proposition to be true, one can *accept* p, and a belief may follow. Cohen (n 55) 21.

⁷⁵ Raimo Tuomela, 'Belief versus acceptance' (2000) 3(2) *Philosophical Explorations* 123.

⁷⁶ *ibid* 124.

In positing the two in this comparative way we can see the difference that exploring disagreement in terms of acceptance would make to the field.⁷⁷ On this account, belief is not something one can control, and therefore alter (as is required by the ED literature). Instead, in acknowledging the difference between belief and acceptance, one could continue to believe *p* and accept not-*p*. In relation to the courts, let us return to our jury member introduced in Section 3.1, who we shall call jury member C. C believes D to be guilty; there is at least some evidence which could be construed as indicating D committed the crime, and D did not present themselves well in the courtroom, making C doubt the sincerity of their testimony.⁷⁸ However, the burden of proof in the case requires that C support conviction if they believe D to be guilty beyond reasonable doubt, or that they are *sure*.⁷⁹ Although the jury member has a 'gut feeling' that D committed the crime, the burden of proof cannot be satisfied due to the insufficient evidence supporting their belief. Thus, the jury member may continue to believe D to be guilty but should accept they are not; based on the evidence

⁷⁷ For example, Tuomela observes: "Acceptance is typically voluntary or intentional, unlike belief. However, acceptance can also be non-intentional, viz., it can be a process or state which is not arrived at or held fully on purpose. The mental state of acceptance based on one's having accepted a proposition and in which one is when one continues to accept the proposition accordingly need not be an intentional "state-keeping" action, although that seems often to be the case". *ibid* 126.

⁷⁸ Perceptions of others in relation to how reliable and authoritative testimony is deemed to be was discussed in Chapter Five, Section 3.1.

⁷⁹ Or to put it differently, that all of the elements of the offence are proven by the prosecution to the standard of proof required. In directing juries, reference is typically made to the jurors being "sure". E.g. the guidance provided for directing juries in crown court trials states "the prosecution proves its case if the jury, having considered all the evidence relevant to the charge they are considering, are sure that the defendant is guilty", going on to note that if an advocate has referred to "beyond reasonable doubt", the jury should be told that this means the same thing as being sure". Picton and others (eds), 'The Crown Court Compendium, Part I: Jury and Trial Management and Summing Up' (Courts and Tribunals Judiciary, Judicial College, December 2018) <www.judiciary.uk/wp-content/uploads/2016/06/crown-court-compedium-part1-jury-and-trial-management-and-summing-up-dec2018.pdf> accessed 10 December 2018. See also n 48 above.

available and the burden they must satisfy. Indeed, this is comparable to the situation observed in *Adams* in which the Justices each believed their formulation of the test to be better, but accepted the test proffered by Lord Phillips.⁸⁰

A possible objection to this approach to decision making in the court could stem from a reluctance to think of such decisions not being aligned with one's belief regarding p. i.e. one's belief that it was true that D was guilty of a crime etc. Cohen on this note asks the following questions:

...what does justice, or the public good, require? Or, if such an unqualified question is too simplistic, we can ask instead: what conditions are relevant here to the requirements of justice, the public good, etc. with respect to the belief/acceptance issue? Should belief that it has been proved that p be sufficient for a verdict that p? Should it even be necessary for such a verdict?⁸¹

In reflecting on the difference between belief and acceptance, we can reflect more clearly on the role that truth plays in the courts. Drawing again on *Adams*, we saw in Chapter Three how the Justices grappled with whether or not proof of innocence was required in order to receive compensation for a miscarriage of justice. For Lord Judge the presumption of innocence was insufficient and in his view one must be "truly innocent" of the crime for which they were convicted in order to receive compensation.⁸² The prevailing view in *Adams* however was that because there is no verdict of innocence (one is either guilty or not guilty), and because nor is a defendant required to prove their innocence, proof of innocence could not be a

⁸⁰ Chapter Three, text to n 104.

⁸¹ Cohen (n 55) 118-119.

⁸² *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48 [263].

requirement for a miscarriage of justice.⁸³ In this case, the Justices by majority made the decision to construct a test for miscarriage of justice which would allow for more people to qualify for compensation. This case is a clear instance in which the role of truth in justice was called into question. For Lord Judge and Lord Brown it was simply unacceptable to contemplate a test for miscarriage of justice that would allow compensation for someone who may have committed the crime for which they were convicted. For these Justices then, ascertaining truth was paramount, and justice would not be done by other means.⁸⁴ By contrast, the majority decision evidenced a more pragmatic approach to justice as it acknowledged that the standards of proof required by UK law are not designed with truth in mind.⁸⁵ So, in addition to speaking to Cohen's belief/acceptance distinction, the disagreement evident in *Adams* highlights the fact that truth, in practice, is not a requirement for a conviction in criminal prosecution, although it may be a desirable pursuit. This of course does not mean that belief does not have a part to play in JDM. We saw in *Brown*, for example, that in coming to the conclusion that it was not for the courts to extend the exceptions to sections 20 and 47 of the 1861 Act to consensual sadomasochistic activities, the majority were palpably of the belief that such activity was wrong, and that indeed this belief informed the decision made.⁸⁶ Yet, in light of the strong views evidenced by the judges to this case, it was therefore just as clear that the disagreement advanced from Lord Slynn and Lord Mustill for the minority would not have had the ability to alter the belief of any party to the majority –

⁸³ *ibid* [116].

⁸⁴ Recall Lord Brown's reference to the everyday man in the street: "he would, I think, be appalled at the construction which, on the contrary, would not infrequently result in the compensation of the guilty, sometimes; as already indicated, to the extent of hundreds of thousands of pounds". *ibid* [277].

⁸⁵ Although criminal law has been the main focus of the present discussion, this pertains also to civil proceedings which typically requires only proof on the balance of probabilities (*Miller* (n 48)), with the legal burden regarding the facts in issue lying with the claimant (*Dickinson v Minister of Pensions* [1953] 1 QB 228).

⁸⁶ Chapter Three, text to n 112.

even if it were the rational reaction called for. In this respect, *Brown* usefully illustrates the complicated role belief plays in shaping judges views of both the question and answer to the case at hand,⁸⁷ as well as how unrealistic it is in practice to speak of the alteration of belief.

The concerns Elgin raises regarding the ED literature and its preoccupation with belief are not a dismissal of the literature's value. Instead, Elgin's is an argument for a change in perspective, and one which this thesis supports. The ED literature is predominantly focussed on the circumstances in which one should alter one's belief(s), and the degree to which one should do so, with little to nothing said regarding the means or process by which one can in fact alter one's belief. In drawing on the difference between belief and acceptance we can see how the alteration of belief is far easier said than done, raising doubt over the possibility of one even having control over such a feat. Instead, it is my argument, in line with Elgin's view, that ED theorists should take seriously the difference between what one believes and accepts, and perhaps the ED question could be more fruitfully expressed in terms of when it is rational to *accept* a view, based on the information available in the circumstances. Such an approach seems to be a more achievable response to disagreement, and remains consistent with the ED literature's focus on what it is rational to do in the face of disagreement.

The present section has demonstrated a case for considering the peer disagreement question to be more usefully aligned with what to accept in a case of disagreement, than how, and by how much, one should alter a belief. However, the main purpose of the present section has been to highlight an important persisting gap in the present literature on disagreement pertaining to how one can go about altering one's belief as a response to disagreement. Cohen's emphasis on the distinction between acceptance and belief, between the voluntary

⁸⁷ Recalling Chapter Three's discussion of *Brown* it was noted that an intriguing aspect of this judgment was Lord Mustill's reliance on an entirely different question to that of the majority in order to come to the conclusion that sadomasochistic activity did not even fall under sections 20 and 47 in the first place. Chapter Three, text to 127.

and involuntary, is, as he argues, an important part of our pursuit for knowledge and our understanding of how we obtain it. Indeed, he suggests that “An epistemology that does not at some point explore the differing roles of active and passive cognition is radically defective”.⁸⁸ It is my claim that such an exploration is currently wanting in the ED literature. I offer too the suggestion that examining JDM in terms of acceptance could make better sense not only of the decision making processes we can engage in, and are capable of engaging in, but of the requirements of the legal process.

An objection to the use of acceptance over belief may be the concern that this relies more on pragmatic rather than epistemic justification. To explain, Cohen suggests that acceptance is more aligned with action than the truth of a matter. That is, if one accepts that p, one acts in line with that proposition, irrespective of whether it is true that p; referred to by Cohen as adopting the policy of positing that p.⁸⁹ By contrast, one’s belief that p is aligned with one’s belief in the truth of p, and has no particular link to how one will act as a result. One may therefore object to the contemplation of acceptance over belief as it does not sufficiently satisfy the ED pursuit of the epistemic significance of disagreement. After all, ED is concerned with belief over action. An initial response to this is to reiterate the doubts raised in the present section regarding the possibility that one can alter one’s belief on command, irrespective of how rational it may be to do so. A further response will now be turned to, in which we explore an overarching tension in the literature between epistemic and pragmatic justification.

⁸⁸ Cohen (n 55) 3.

⁸⁹ *ibid* 4.

3.3 The epistemic and the pragmatic

As has now been established, ED is concerned with the influence that peer disagreement should have on epistemic, as opposed to pragmatic, justification; i.e. it focusses on what to believe, rather than what to do.⁹⁰ In this section I use the concerns raised in the literature regarding the implications of conciliatory responses to disagreement to highlight the important distinction between epistemic and pragmatic justification. It is my claim that although we have seen theorists in the literature go to great lengths to focus solely on the epistemic significance of disagreement (evidenced by the strict parameters imposed on what peers and disagreement are), there is a noticeable and damaging tension between epistemic and pragmatic justification in the responses called for. Here I use as an example concerns raised in the literature regarding the EqWV's potential effect of widespread scepticism to demonstrate this tension, and suggest that more needs to be done to demarcate the different means of justification. Furthermore, I conclude that this tension in fact represents an important challenge in articulating a theory of disagreement in JDM, namely the intersection of finding truth through legal process (the epistemic), and making decisions that we can action (the pragmatic).

The EqWV is a popular approach to disagreement advocated in ED. A strong reason for this appears to be that in a literature concerned with rationality, it seems intuitively right to suggest that if I were to consider another to be my equal in respect of our ability to form a reliable belief on the matter in question, then I should give my interlocutor's view the same weight as my own. In other words, it would be irrational for me to not reconsider the confidence with which I hold my view as I know that someone who I think is equally as likely to get the answer right as myself has advocated for a different answer. Now, the difficulty

⁹⁰ Enoch (n 9) 958.

with this approach, as perceived in the literature, is that it has the potential to bring into doubt a number of our dearly held beliefs (bearing in mind that such a view is typically underpinned by the assertion that epistemic peers can be found in real-life cases).⁹¹ This is referred to in the literature as the “threat of scepticism”,⁹² or the problem of spinelessness, so called because it requires “suspension of judgment on virtually all controversial issues”.⁹³ This is seen to be a serious deficiency of the EqWV, as theorists do not want to believe that disagreement with a peer should lead one to suspend judgment on the beliefs they hold regarding controversial matters.⁹⁴ Enoch, for example, observes that the EqWV “seems to give rise to highly implausible consequences”, and that “If the Equal Weight View does entail the requirement to be epistemically spineless, this seems to count heavily against it”.⁹⁵ This is seen by many in ED as a basis upon which to reject the EqWV in favour of a more steadfast approach to disagreement, whilst others see it as a problem to overcome, or indeed explain away, so that we might be able to retain the intuition noted regarding the rationality of the EqWV, whilst at the same time remain confident in the beliefs we hold regarding complex issues, such as those concerning, religion, law and morality. Elga provides one such defence of EqWV. In defending the view he distinguishes between the “clean, pure cases” (i.e. the artificial or idealised instances we have come to be familiar with in Section B of this thesis, such as those involving mental arithmetic) and “messy real-world cases” of disagreement

⁹¹ As we saw that many in the ED literature assert – see e.g. Chapter Five, text to n 91.

⁹² See e.g. Christensen (2007) (n 14) 189.

⁹³ Elga (2007) (n 30) 492. For consistency, reference going forward is made to scepticism.

⁹⁴ It is typical of the literature to speak in terms of controversy. We saw in Chapter Four Christensen refer to controversies, and we will see presently Matheson’s reference to controversial propositions. As a reminder, when reference is made to controversies we should have in mind disagreements over morals, politics, ethics, law etc.; those matters that are at the root of much debate and over which strength of feeling abounds.

⁹⁵ Enoch (n 9) 954-5.

(concerning, for example, questions of political leanings or ethics).⁹⁶ As Elga views it, although the EqWV might seem a sensible approach in the former cases (if I consider us both to be equally good at mental arithmetic and we disagree over the answer to a sum, why should I favour my answer over yours?), in the latter it “seems to lead to absurdity” (even if I see you as “just as thoughtful, well-informed, quick-witted, and intellectually honest” as me, if you have a different view to mine on some ethical claim “it seems obviously wrong that... [I am] thereby required to suspend judgment on the claim, as the equal weight view seems to entail”).⁹⁷ Elga’s reasoning here is based on the assumption that I will think many are my equals in respect of such controversial issues, so it would require me to suspend judgment on most such issues. Why this therefore makes it wrong is not fully explained.⁹⁸ However, Elga defends the EqWV by drawing on the role that peers play in disagreements. He suggests that in the ‘clean’ cases one’s peers can be identified “based on reasoning that is independent of the disputed issue”.⁹⁹ So, for example, I consider you my peer in mental arithmetic based on previous experience of us having made such calculations and having seen that we are equally as likely as each other to get such calculations right. This means my view of you as my peer can be formed independent of the present dispute we have regarding a calculation.¹⁰⁰ In “messy real-world” instances of disagreement however, one’s reasoning about the disputed issue often lacks such independence, as the views formed are typically tied to a number of similar issues. Elga uses the example of two people, Ann and Beth, with different political leanings disputing the moral permissibility of abortion. As Elga views it, if Ann and Beth have

⁹⁶ Elga (2007) (n 30) 492.

⁹⁷ *ibid.*

⁹⁸ It is in fact typical of those who are damning of the approach for reasons of scepticism to simply state that widespread suspension of judgment would be an absurd result for the ED enquiry. See e.g. Enoch (n 9) 954–955 and 991–992, and Thune (n 40) 369–370. The reasoning for this and the problems it entails will be taken up below.

⁹⁹ Elga (2007) (n 30) 492.

¹⁰⁰ *ibid.*

discussed similar ethical matters in the past, and come to different conclusions, Ann is unlikely to consider Beth her peer in this instance because in her view Beth was wrong in respect of the related issues they have discussed, so it would be unlikely that she would be right regarding the present dispute.¹⁰¹ This distinction between how we can consider one another peers in relation to different matters, allows Elga to make the case for keeping the rationality of the EqWV intact without requiring one to suspend judgment on all issues that are controversial, as in many such instances we do not consider those who we are in disagreement with to be our peers. Indeed, in Section 2 we saw Enoch take a similar approach to disagreement with his argument that disagreement with another can be evidence that one's interlocutor is not one's peer, and thus one can remain steadfast in one's approach to the matter at hand.¹⁰²

Matheson takes a different approach to the EqWV arguing for its veracity, but rather than calling for a narrow remit for its extension, he then suggests that it warrants epistemic caution regarding many of the beliefs we hold about controversial issues. To explain, we saw in Chapter Five that Matheson takes the view that the notion of peer disagreement is highly idealised and so is unlikely to apply to real-world disagreements, which often involve many actors, a range of expert opinions and evidence from which to draw, and in which it is unlikely that participants will be peers in the strict sense called for in ED.¹⁰³ Yet rather than arguing that the EqWV need not apply to real-life instances of disagreement (because one is not arguing with an epistemic peer), Matheson uses the challenge of identifying peers in real-life cases as a reason for adopting the EqWV more widely. He does so by suggesting that whilst it

¹⁰¹ *ibid* 493. Just as in Chapter Five (Section 3), we see here the view that those with differing political leanings are unlikely to consider one another peers. We see too how one's prior knowledge of an individual and their 'track record' might shape one's belief of their likelihood to get things right going forward.

¹⁰² See n 32.

¹⁰³ Chapter Five, text to n 95 and Matheson 'The Epistemic Significance of Disagreement (n 17) 33.

is unlikely that two people are equals in respect of relevant evidence and ability to process it, it does not follow that we are always able to identify who is in fact in the inferior epistemic position.¹⁰⁴ So, for example, I might be confident that we are not equals in terms of the quality of our eyesight, but that does not mean that I can be confident that my eyesight is better than yours if I have no evidence to suggest that it is.¹⁰⁵ Rather than demarcating the EqWV as Elga does, so that the view applies in idealised cases but rarely in real-life scenarios, Matheson's approach extends the EqWV to real-world disagreements by focussing on the justification that one has for considering another to be a peer or otherwise. Matheson's argument is that even though it is unlikely that one's interlocutor is one's peer, this does not mean that one can therefore treat them as an epistemic inferior – one needs justification to discount their view: "Without good reason to locate the inferior epistemic position, or the error, with one party over the other, such an actual inequality fails to make an epistemically significant difference from our idealized cases".¹⁰⁶ Matheson too notes that those considerations which motivate theorising around peer disagreement and the EqWV do not disappear in real-world cases. That is, the widespread disagreement faced regarding controversial matters acts as HOE that calls for questioning the confidence with which we hold p to be true (or otherwise).¹⁰⁷ This means that when it comes to what Matheson calls controversial propositions (i.e. those relating to politics, law, etc.), we are often aware of numerous views regarding p. As Matheson explains:

there are real-world cases of disagreement such that while it is unlikely that the parties are exact epistemic peers, it is unclear which party is in the better

¹⁰⁴ *ibid* 116.

¹⁰⁵ *ibid* 117.

¹⁰⁶ Matheson 'The Epistemic Significance of Disagreement' (n 17) 117.

¹⁰⁷ Matheson 'Disagreement and Epistemic Peers' (n 29).

epistemic position. Such real-world cases of disagreement plausibly have the same epistemic significance as peer disagreement even though strictly speaking peerhood does not obtain. After all, it is the evidence of peer disagreement that bears the real epistemic weight.¹⁰⁸

Matheson's then is a call for us to be more epistemically cautious in the beliefs we hold regarding controversial propositions over which disagreement abounds. To the charge of scepticism, Matheson explains that this is because we are "fallible epistemic agents", and agnosticism as such is a fitting response, and not a matter of being spineless.¹⁰⁹

I have detailed here some of the main attempts in the literature to defend the EqWV which appear to be motivated by a widespread yet underexplored concern of scepticism. Here it is my suggestion that those who are resolutely against the sceptical consequences of the EqWV confuse pragmatic with epistemic reasons for doing so. It was noted at the beginning of the present section that although Elga was explicit in his assertion that it was obviously wrong that the EqWV should result in my giving up on many of my beliefs, no explanation as to why this was then a reason to reject EqWV was offered. Elga is not alone in his inattention here, as such an approach is a recurring phenomenon in ED discourse, whereby scepticism is deemed to be so clearly objectionable that no justification for its dismissal as a possible outcome is required. Indeed, we have seen presently that even those who endorse EqWV are compelled to provide defences to the challenge of scepticism. A simple reason for the lack of justification appears to be that scepticism is so obviously wrong that an explanation as to why

¹⁰⁸ *ibid.*

¹⁰⁹ Matheson 'The Epistemic Significance of Disagreement' (n 17) 140. Christensen expresses similar concerns regarding human fallibility when he notes in relation to his defence of independence-based conciliationism: "the more radical seeming consequences of IBC simply represent the natural precautions suggested by this more thorough going acknowledgment of our fallibility". Christensen (2014) (n 23) 153.

needn't be offered. Indeed, as Diego Machuca observes in relation to Enoch and Thune's presentation of scepticism: "the falsity or implausibility of scepticism is so evident that they are exempt from offering arguments in support of its outright rejection. In other words, since scepticism is clearly untenable, there is no need of refutation".¹¹⁰ In Chapter Four we saw a similar approach taken in the literature to disagreement itself. We saw that often understanding of disagreement was considered obvious; indeed so much so that reflection on what it is was not required. Yet we saw too that such simple reflection was much needed, for when we probed further for an understanding of disagreement we found such understanding to be inadequate, and indeed problematic for the force of the literature – in fact concluding that 'the epistemology of disagreement' is not, after all, concerned with disagreement. In this respect this thesis has called for reflection on our understanding of disagreement itself, without which we see works misconstruing disagreement for the purposes of their investigation. Similarly here we see that in taking for granted the conclusion that scepticism is to be spurned the status of such refutation is unclear.

When we do see explanations for the rejection of conciliatory approaches for reasons of scepticism, focus is placed on the impact that scepticism would have on our personal and social lives. Peter van Inwagen, for example, notes emotively at length:

¹¹⁰ Diego E Machuca, 'Conciliationism and the Menace of Scepticism' (2015) *Dialogue* 54(3) 472. Indeed, understanding this to be a belief that it is so obvious that scepticism is to be avoided that it need not be articulated is evident in Machuca's articulation of Hilary Kornblith's work on the difference between actual and merely possible disagreements. Machuca inserts a premise into what he takes to be Kornblith's argument ("Global scepticism is unacceptable (because it is false, or implausible, or absurd, or incoherent)"), because he sees it as the only way to explain Kornblith's focus on avoiding scepticism. Machuca confirms that "In personal communication, Kornblith has now confirmed that my reconstruction of his argument is right, since he was indeed taking it for granted that global scepticism is unacceptable." 474.

Here I confess my predicament – as a philosopher who holds particular views, as a citizen who casts his vote according to the dictates of certain political beliefs, as an adherent of one religion among many... I am unwilling to become an agnostic about everything but empirically verifiable matters of fact... And I am unable to believe that my gnosticism, so to call it, is irrational.¹¹¹

And here we see another example from Sosa, in his discussion of avoiding what he calls “a dispiriting ‘spinelessness’ whenever we disagree with apparent peers”:

The importance of this issue is shown by how broadly it would bear on questions that matter to us in politics, religion, philosophy, and other such domains. It would be bad to have to suspend judgment on just about any controversial issue.¹¹²

We see from such expressions that a view which leads to scepticism is not being rejected simply because it is intuitively or formally wrong, but rather because of the “deeply negative implications for our intellectual and social lives”.¹¹³ This is an important point for our understanding of the responses called for as we see that in fact theorists are using pragmatic reasons (i.e. the concern for our social lives) for rejecting scepticism, which is plainly at odds with the insisted focus on the epistemic justifications for responding to disagreement. That is, we may be satisfied that scepticism should be avoided due to the impact it would have on our firmly held beliefs regarding matters that are deeply important to us, or due to the value

¹¹¹ Peter van Inwagen, ‘We’re Right, They’re Wrong’, in Feldman and Warfield (n 4) 28.

¹¹² Ernest Sosa, ‘The epistemology of Disagreement’ in Adrian Haddock, Alan Millar, and Duncan Adrian Haddock, Alan Millar, and Duncan Pritchard (eds), *Social Epistemology* (OUP 2010) 283-284.

¹¹³ Machuca (n 110) 479.

of believing that *p* is a social good, but in a discussion of epistemic reasons for altering belief this is an insufficient basis for rejection.¹¹⁴ As Machuca suggests “even if... [scepticism] hinders the attainment of (some of) our practical and intellectual goals, this by itself does not entail that scepticism is epistemically unjustified, but only that it is instrumentally unjustified”.¹¹⁵ To reiterate, in Chapter Four we saw that an understanding of disagreement was taken for granted, and that upon closer inspection, the demonstrated understanding of disagreement was limited and in places misleading. Similarly here we see that scepticism as an unthinkable outcome is taken for granted, yet on review this is seen to be based on pragmatic, not epistemic, grounds.

In this section I have drawn on the ideas of scepticism and the EqWV in order to demonstrate the palpable tension in the literature between epistemic and pragmatic justification, further highlighting the challenges faced in delivering a theory of disagreement. This is all the more powerful in a literature which, in order to hone in on the epistemic significance of disagreement, has employed an artificial construct of both disagreement and peers, and yet even in this sterile environment, the concerns raised against scepticism have demonstrated that challenges remain in the endeavour to explore the purely epistemic implications. Thus, although we have seen that the literature focuses on belief, and not what one should, pragmatically or otherwise, *do*, and have identified pressing concerns regarding the consequent impact findings can have in instances where action is called for (as per discussion in Section 3.2), we see here that pragmatic considerations in fact do underpin some of the key views and defences advanced. As noted at the beginning of the present section, I suggest that the reservations I have advanced thus far in the thesis’ discussion of ED’s relevance to law are in fact best articulated through this epistemic-pragmatic distinction, and an awareness of the difference between what each requires, and contributes, to our

¹¹⁴ *ibid* 482.

¹¹⁵ *ibid* 484.

understanding of disagreements as both intellectual challenges and social interactions. To recapitulate my introduction to the present discussion, we see through the reluctance to give in to uncertainty in ED a representation of the balance to be achieved between finding truth through legal process (the epistemic), and providing answers we can action (the pragmatic). Indeed, as will become increasingly apparent in what remains of this thesis' exploration of disagreement in JDM, it is my claim that as law involves practical rather than theoretical reasoning, it is not possible, nor desirable, to view JDM in terms of only epistemic justifications. The present discussion serves then not only as a call for precision and clarity in the terms employed in the literature, but as laying the groundwork for understanding the nature of the disagreements that take place in the courts.

4. Reflections on the scope of ED

This chapter has presented the view that the ED literature's focus on belief retention and revision makes it ill-equipped to provide insight into disagreement in JDM. Section 3 saw a focussed examination of the distinction made between belief and action and how many theorist place focus only on the former; namely when and how one should change one's belief. We saw further that alteration of belief is a difficult (if indeed it is a possible) feat to accomplish. A call has been made to take seriously the difference between belief and acceptance, with my suggestion that it may be more appropriate to explore the impact disagreement might have with regard to what one accepts, rather than how it might require one to change what one believes. In examining the interaction of epistemic and pragmatic justifications in the literature we saw too just how prominent pragmatic justifications can be, even in a literature intent on the epistemic. Such insights demonstrate just how challenging it is to isolate how one should act from discussions of reacting to disagreement.

However, perhaps the most significant limitation of the ED literature in developing our understanding of disagreement in JDM concerns the culmination of insight that has developed over the course of the last three chapters of the thesis, namely the narrow remit in which disagreement is explored in ED. We saw in Chapter Four that ED provides a cumbrously restrictive definition of disagreement which leads the reader to the mistaken conclusion that genuine disagreement concerns only those instances in which at least two people are disagreeing over the same truth-apt proposition. We saw further in Chapter Five another limit on instances of disagreement of interest through the preoccupation with peer disagreement. In relation to the role that peers plays, we have seen that in focusing on whether or not it is rational to disagree with a peer, and providing illustrative cases of peer disagreement, the ED literature has been limited in scope and consequently misleading in its offering to the exploration of disagreement as a phenomenon in its own right. Indeed, it is interesting that in a literature which uses peers in order to be able to “isolate the epistemic significance of the disagreement itself”,¹¹⁶ that we have seen how their use further muddies an already under-examined concept (disagreement). Finally, in the present chapter through an examination of the reactions to disagreement that ED calls for, we have seen that a reason for such limitations has been the focus on belief-revision. It has been my argument that there is limited scope for applying ED (with its present parameters and insights) to disagreement in JDM.

Section B’s discussion of ED has therefore shaped the basis for my argument, to be briefly sketched here, and defended further in Chapter Seven, that the formulation of the ED cases allows for only certain concepts to be at play in a disagreement, which limits the overall impact the arguments for ED can have, especially in relation to JDM. That is, it is my argument that ED commentators do not account for the idea that the disagreement between peers

¹¹⁶ Matheson ‘Disagreement and Epistemic Peers’ (n 29).

could be with regard to the concepts at play in the dispute.¹¹⁷ Instead of placing disagreement as a broader social phenomenon under examination, the ED theorists focus on cases in which everything is the same or comparable. This shields the reader from the potential that the disagreement could be in and over different concepts themselves. That is, in limiting the cases to ‘peer’ disagreements in which an ascertainable truth can be determined, the literature misses the possibility that at least some disagreements worth considering are conceptual disagreements. Indeed, this is in keeping with what was observed in Chapter Two of this thesis in which we saw that when considering what disagreement meant, we were attaching meaning to the notion that should have been attached to the instance in which the notion arose.¹¹⁸ By contrast, in the ED literature we see it taken for granted that the concepts at play are one and the same. While it is quite understandable that many are indeed understood on a par, it is my argument that we can and do encounter disagreements in which the parties to the disagreement have different conceptions of the concept subject to dispute. Furthermore, in setting up a bank of cases in which it is taken for granted that the evidence is established and known to the parties prior to the disagreement, one misses the potential that the parties to the disagreement may well be disagreeing regarding what the body of evidence in fact is, as we saw can be the case in Chapter Five.¹¹⁹ ED therefore eliminates the possibility of conceptual disagreement at play in the disagreement between peers. We saw at the beginning of Chapter Five that the notion of peer was used for simplicity in the literature, so that how one should epistemically react could be the main focus without getting ‘bogged down’ in complications and intricacies of real-world cases. We see now that this is, if not a mistake, certainly a disappointing restriction to the scope of the literature. The ED notion of

¹¹⁷ As noted above, Kirchin and Pethick also explore this weakness in the ED literature. For their views on conceptual disagreement see Kirchin and Pethick (n 8).

¹¹⁸ See Chapter Two, Section 6.

¹¹⁹ See Chapter Five, Section 3.2.

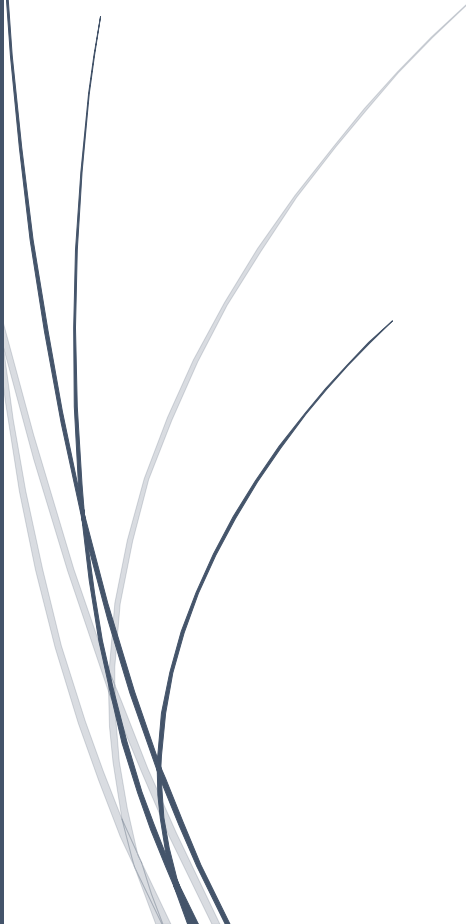
peer disagreement only applies in a restricted set of circumstances, and can only have a restricted impact as a result.

The ED literature focuses on rational reactions to peer disagreements. It is my argument that this remit does not go far enough because the instances focused on are simply too narrow. Instead, I suggest that disagreement as a phenomenon in itself should be the initial basis for such philosophical inquiry, in the belief that a wider range of instances of disagreement should be taken seriously. In order to better articulate and defend this claim, I turn now to draw on the work of Ronald Dworkin, who explores disagreement and what he refers to as the different kinds of concepts; usefully outlining possible ways in which we disagree about concepts we use in everyday life as well as in technical fields. Although we move to a discussion of Dworkin, it is important to note that this does not end the discussion of ED. Instead Dworkin's work will be used to further articulate how ED's insights can apply to law as well as more clearly express some of the pressing and persistent questions to be grappled with in our move towards a better understanding of disagreement in JDM. It is thus to the final section of this thesis' exploration of disagreement that we now turn.



SECTION C

Towards a Philosophy for Judicial Decision Making





CHAPTER SEVEN

Disentangling Disagreement



SECTION C

TOWARDS A PHILOSOPHY FOR JUDICIAL
DECISION MAKING

1. Introduction

This thesis has endeavoured to take the notion of disagreement seriously. To this end, through the research presented in Sections A and B an exploration of disagreement has been undertaken. We have examined the ED philosophy in addition to reflecting on the notion's meaning – exploring its origins as well as use in our language and everyday lives. Through this study I have demonstrated that the ED literature is presently ill-equipped to provide direct insights into legal disagreements. We have seen that the notion of *peer* disagreement is too rigid and unrealistic to be evident in the interactions and intellectual engagement of the Justices of the UKSC, or indeed in any court. Furthermore, we have seen that the reason for this disappointing fit is that the ED literature is not really concerned with disagreement after all. Rather its chief interest is rationality and what it would be *rational* for one to do when faced with a peer who has reasoned, and concluded, differently from oneself. In order to deliver on this motivation we have seen that the rigidity of the peer construct, as well as the narrow definition of genuine disagreement deployed, are imposed as necessary limitations in the literature. This has to be so in order to remove any features from the disagreement and its interlocutors that might dissolve or resolve the disagreement, so that attention may be given solely to the epistemic significance of the disagreement itself. However, although directly limited in applicability, an examination of the ED literature has proven to be far from fruitless. Rather it has provided an excellent catalyst for exploring our understanding of disagreement, in theory and in practice, and has helped to demonstrate the diverse nature of the disagreements seen in the courtroom.

The discussion in Section B of the thesis has illuminated disagreement in large part by demonstrating how the present ED literature misinforms our understanding of the notion; a perhaps inevitable consequence of exploring a literature that is found to be not quite suitable for real-world application. In the present chapter I take the lessons learned from the ED

literature to explore the insights that it offers legal theory. It is my hope that by considering our understanding of disagreement from a variety of perspectives, we can begin to move our understanding of disagreement from what it is not, to articulate what it is. In order to do this, the present chapter must first address two final calls for caution in our approach to disagreement. The first, addressed in Section 2, concerns a distinct entanglement of disagreement and decision making in both ED and legal theory.¹ It is important for our understanding of disagreement that the two be individuated; i.e. delineating decision making, the disagreement(s) that might take place during decision making, and those which persist once a decision has been reached. The second, more intricate decoupling concerns a persistent intertwining of disagreement with the pursuit of truth and right answers. Later in Section 3 we will see in Dworkin's work, for example, that in addition to his treatment of disagreement in judicial decisions he is concerned too with whether or not his theory means that right answers are possible.² Others, such as Jeremy Waldron (in his work on the role of judicial review in tackling persistent disagreement regarding the rights of citizens), deny the possibility of right answers.³ In ED, what we have seen in the course of Section B of the thesis is a preoccupation with ascertaining the truth and right answers for decisions made that is intrinsic to the understanding of disagreement presented. The second objective for this chapter is then to explain why this is problematic for our understanding of disagreement and to advocate a clearer individuation of disagreement and the pursuit of truth.

¹ See e.g. Stephen Pethick, 'On the Entanglement of Coherence' (2014) 27(1) *Ratio Juris* 116 for a similar approach to the analysis of concepts – indeed, as per the title to the piece, Pethick advocates a clearer and cleaner understanding of coherence by distinguishing the notion's intension and its extension to its referents. On intension and extension see also Chapter Four, n 60. In the present case, I focus on instances in which the subject of interest or motivations behind enquiries (namely truth and decision making here) inform the notion of disagreement deployed.

² Ronald Dworkin, *Law's Empire* (Hart Publishing 1998) and Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press of HUP 2011).

³ Jeremy Waldron, *Law and Disagreement* (OUP, USA 2001).

Having established the final two difficulties evident in the approaches to disagreement taken in the philosophical and legal literature, the chapter moves towards a more affirmative articulation of what disagreement in JDM is. Thus in Section 4 I will further develop my argument at the close of Chapter Six (that a major limitation of the ED literature is the inflexibility of the notion of disagreement employed) by advocating more robustly a wider understanding of genuine disagreement. To do so I develop my use of Dworkin's work in relation to genuine and illusory disagreement introduced in Chapters Three and Four, where we saw Dworkin's theory of interpretive concepts put pressure on what it means to be a genuine disagreement in ED.⁴ Specifically, I draw on Dworkin's distinction between different types of concepts to make the claim that an important instance of disagreement to account for in a fruitful epistemology of disagreement (and indeed for our general understanding of the notion), is conceptual; without which we cannot hope to understand the disagreements which take place in the courts, or over controversies in politics and everyday lives.⁵ Building on the wider understanding of genuine disagreement argued for in Chapter Four,⁶ I use Dworkin's account to suggest that at least some disagreements encountered in judicial decisions are indeed conceptual, about law or the concepts employed in cases; rather than merely disputes concerning legal and public policy (as we saw in Chapter Three was Reynold's account).⁷ This is an important point therefore not only for our understanding of the present shortcomings in ED's relevance and application, but for the wider exploration of disagreement in JDM. In advocating a wider account of genuine disagreement, and establishing clarity over evident and recurring confusions concerning what disagreement is, we endeavour to take disagreement in the courts seriously.

⁴ Chapter Four, text to n 80.

⁵ As per David Christensen – see Chapter Four, text to n 10.

⁶ Chapter Four, text to n 104 regarding taste and preference.

⁷ Chapter Three, text to n 22.

2. Individuating disagreement and decision making

As an enquiry into understanding disagreement with a primary context of JDM, attention in this thesis has been given to decision making focussing on the disagreement in the decisions made in the UKSC. And indeed, in focussing on the insights offered from ED, a focus on decisions has been necessitated because we have seen that the purpose of ED is in fact to explore how one should react to disagreement – exploring what to believe and what it would be rational to decide. However, there is a danger when talking about disagreement in decision making that disagreement is confused *with* decision making, and it is important to recognise the two are not synonymous. This may seem to be an obvious claim to make, yet when we look to the literature we see often that the two notions are intertwined, or else used interchangeably, which can have the effect of wrongly informing our understanding of what disagreement is. Let us first take as an example Frances' stories in *Disagreement*, reference to which have been made throughout the thesis for their professed offer of real-life motivation and application.⁸ Yet not all stories put to use by Frances present what one would consider to be disagreement in an everyday context. One such story concerns Bryan, who is making a salad and realises he does not have an onion; an important though non-essential ingredient for the meal. Bryan needs to decide whether to a) go to the shop to buy an onion, or b) to make the salad forgoing the onion.⁹ Frances uses this story as part of his discussion of belief and action disagreements, referred to in Chapter Six, noting such a case to be an example of action-disagreement as Bryan effectively has two action options, “do X, don't do

⁸ See in particular Chapter Four, Section 4 in which four such stories were employed.

⁹ Bryan Frances, *Disagreement* (Polity Press 2014) 73.

X”¹⁰ (as we may recall, abstaining in such a situation amounts to not doing X).¹¹ Yet it is difficult to see how this constitutes a disagreement, and not simply a decision to be made by Bryan. To elaborate, let us recall Laksha’s story, made use of in Chapter Six’s discussion of belief and action. Laksha was a doctor required to make a decision regarding which course of treatment to pursue for her patient.¹² Aside from marking the difference between belief and action-disagreement, what both Bryan and Laksha’s stories demonstrate is a question over the difference between making an informed choice and being a party to a disagreement. Where for example is the *disagreement* exhibited in Laksha’s case? We saw in Chapter Six that the parties involved in the discussion of whether to opt for surgical or non-surgical means of treatment for the patient were, if anything, in *agreement* that it was a close call; even where some eventually advised for either route.¹³ Frances explains that Laksha could in fact make her choice by flipping a coin at this stage: “she has to make a choice even though which option she takes will be somewhat arbitrary”.¹⁴ Whilst it is clear that the circumstances mean a difficult decision has to be made, and Laksha has been painstaking in her research to determine which action to take, it is not clear what makes it a disagreement, rather than a process of decision making. In other words, although it is clear from both Bryan and Laksha’s stories that a decision will need to be made, it is not clear why this means there is a disagreement. For example, in Bryan’s situation he is “weighing the pros and cons and figuring out whether he *should* go to the store”.¹⁵ As Frances notes, it is not *just* about whether the salad will taste better or worse, as other factors need to be taken into consideration, such as

¹⁰ *ibid.*

¹¹ See Chapter Six’s discussion of belief and action, Section 3.1.

¹² Chapter Six, text to n 43.

¹³ *ibid.*

¹⁴ Frances (n 9) 72.

¹⁵ *ibid* 73.

Bryan not wanting to go out to the store because he would rather continue writing his book.¹⁶ Plainly, we see Bryan in a process of deliberation. Yet deliberation is not the same as disagreement. This is a simple yet important point to make in understanding disagreement in a court setting, as it is clear from the judgments examined in Chapter Three that the judges engage in thorough and wide-ranging deliberation in reaching their decisions. It does not however mean that exploring the options available, required of a good decision making process, means that it is disagreement. It is important in identifying instances of disagreement that we keep in mind the role that belief, opinion and/or acceptance have in individuating disagreement from deliberation or decision making.¹⁷ For example, if the circumstances of Bryan's story were changed so that he was having a discussion with his partner about whether or not to go to the store; Bryan suggesting they do not need to, his partner insisting they should, it seems that this could be a disagreement. So, what is the difference between these situations? Recalling Chapter Two's exploration of definitions, a common theme was the idea of having an opinion about something that is in conflict with an interlocutor's view.¹⁸ In reference to Bryan's initial case, he does not have a discernible opinion at this stage in order to find himself in an instance of disagreement. He does of course have different options, and different factors to take into account, but as Frances points out he is "trying to figure out what [he] should do, all things considered".¹⁹ That is, he is still in the process of weighing his options: he is in the process of making a decision, not in an (action-) disagreement. In holding a different view to his partner we may say that this is a disagreement, as the two are at odds regarding their opinions as to what Bryan should do. Indeed we may say too that irrespective

¹⁶ *ibid.*

¹⁷ See Chapter Six's discussion on belief and acceptance at text to n 54.

¹⁸ See Chapter Two, Section 2.3.

¹⁹ Frances (n 9) 73.

of a belief that may form, at least one perhaps would be required to accept that they should (not) go to the store.

If we turn to the works directly focussed on disagreement in JDM, we might recall from the Introduction to the thesis that typically focus is not placed on the disagreement itself but rather on the practicalities of the decision making process, or what the disagreement might mean for wider society.²⁰ Where attention is placed on the disagreement itself, we see a focus on what is deemed to be the quality of debate had in the courts, and often in comparison to what one would see in Parliament. For example, Waldron's *Law and Disagreement* is in practice a sustained argument for rejecting the court's power of judicial review. In Waldron's view judges and the general population tend to disagree along the same lines, so judicial review is a needlessly undemocratic means of settling disputes over contested matters such as rights.²¹ As we saw in Chapter Three, Waldron approaches disagreement in law from the view that the construction of our institutions is predicated on sustained and far reaching disagreement. To recall his explanation, he suggests that the reason why we have arrangements such as political parties, debates, and whips is because we have internalised disagreement into the process of making law.²² Yet, although Waldron's

²⁰ Chapter One, text to n 18.

²¹ Indeed Waldron is very clear in his rejection, commenting "When citizens or their representatives disagree about what rights we have or what those rights entail, it seems something of an insult to say that this is not something they are to be permitted to sort out by majoritarian processes, but that the issue is to be assigned instead for final determination to a small group of judges". Waldron (n 2) 15. Published in 1997, Waldron's text in fact acted as a sustained warning against the introduction of the Human Rights Act 1998, due to a concern that the legislation would strengthen the court's power in an unfavourable way.

²² *ibid* 23. Such a view supposes that disagreement is prior to the political institutions. However, an alternative approach would be to consider that such structures exist because we seek agreement. This is a subtle but potentially important change in perspective. Instead it could be viewed that the procedures and processes are there because we seek a good way forward through the means of practical reasoning and argument. That is, rather than viewing it as being set up for disagreement, it

view is that "It is the function of law to build frameworks and orchestrate collective action in circumstances of disagreement",²³ disagreement in decision making itself is not explored in great depth. Waldron is principally concerned with in which forum decisions over rights should take place, and which form of decision making is best in light of the fact that people disagree over rights. Thus it can be seen that because Waldron's premise is "that the point of law is to enable us to act *in the face of disagreement*,"²⁴ he in practice focussed on the decision making process and where it should take place, rather than the disagreement itself. Whilst it is not my intention to explore the merits or demerits of his argument regarding judicial review, I use Waldron's work here as an example of how it can be easy to conflate what seems to be a discussion of disagreement in law with a discussion of good decision making processes in light of the existence of disagreement. As a further example, Rob Goodman examines what he considers to be the quality of disagreement evident in the courts and government decisions, in order to explore Waldron and Dworkin's arguments regarding the appropriateness of judicial review for resolving disputes over rights. In focusing on the quality of the debate (he uses for example the fact that decisions in Congress can be made by private vote as a reason for supporting judicial review) he inadvertently focuses on the quality of the decision making process rather than disagreement itself. He comments, for example: "Courts do in fact raise public debate to a higher level, because they speak in the language of principle; they are the only branch of government regularly prepared to deal with rights rather than efficiency".²⁵ Goodman further makes reference to the 1966 UK parliamentary debate

could be argued that the adversarial structures actively encourage, or indeed require, the offer of different views in order for a sound conclusion to be drawn. (This is similar to Heffernan's views about disagreement – see Chapter Two, text to n 70).

²³ Waldron (n 2) 7.

²⁴ *ibid.*

²⁵ Rob Goodman, 'Serious Disagreement: Same-sex Marriage, Judicial Review, and the Quality of Debate' (2010) ExpressO <https://works.bepress.com/rob_goodman/1/> accessed 20 July 2018

regarding abortion, noting that “Rather than burrowing into textual minutiae, a legislature brought real moral disagreement to the forefront and conducted that disagreement respectfully”.²⁶ In focussing on the quality of debate regarding the issue in question, we are misled as to the notion of disagreement because whilst debate may *involve* disagreement they can also simply be part of deliberation in the decision making process. Thus we need to ensure clarity, which is currently missing in the literature on this area, regarding the difference between two (or more) propositions being at odds and two (or more) people disagreeing.

In law it is often the case that one may find oneself presenting a view that one does not hold. One could, for example, be required to vote as per one’s political party requirement, or defend a policy one does not agree with, or one might be presenting a defence for a defendant one suspects may well be guilty. In such cases, one does not disagree with an alternative position, even though one’s actions might lend themselves to such a conclusion. Alternatively one might, as we saw in the example offered by Heffernan in Chapter Two, be called on to present counter-views, irrespective of one’s belief regarding them, in order to explore the strengths and weaknesses of the proposition being defended.²⁷ In such a case, whilst different possibilities are explored and different views defended, genuine disagreement may not be evident. Such examples demonstrate only some of the ways in which it might be possible to present different views without there being a genuine disagreement, and how there are circumstances in which different views are presented not only as part of the decision making process, but to ensure the conclusion reached is sound. This does not of course mean that disagreement is not evident in the courts (or regarding Waldron and Goodman, wider law-making processes), but rather is a suggestion that we ought to look to the circumstances of individual cases to ascertain what is disagreement and what is merely part of the reasoning process.

²⁶ *ibid* 5.

²⁷ See Chapter Two, text to n 70.

Legal reasoning is undoubtedly an important key to understanding the decisions of the courts. As Joseph Raz observes, open debate and the pooling of views is a good way to learn and reach agreement.²⁸ And indeed, in this thesis I have argued that a reason why ED is unhelpful for gaining insight into disagreement in JDM is due in no small part to the lack of focus placed on reasoning. We have seen in the written judgments explored in this thesis that JDM is a deliberative practice and the decisions presented evidence reflection and consideration over the possible outcomes in presenting the final decision reached, and defence thereof. In understanding disagreement in JDM the role of reasoning and deliberation in the decision making process cannot be ignored. However, although reasoning is an important feature of this process, and often a prominent feature of disagreement, it should not be confused with disagreement. Indeed it has been through the same drive for clarity in our terms that I have suggested we should not limit what we deem to be genuine instances in order to satisfy the requirements for an investigation into rationality. Thus, although disagreement and decision making may interact, it is my view that a fruitful discussion of disagreement in JDM is one which recognises the difference between the two so that focus can be placed on the significance of disagreement itself.

3. The pursuit of truth and right answers

Epistemic disagreement according to Luke Tomlinson is where “actors disagree about whether or not something is correct”.²⁹ Indeed when we reflect on the instances of disagreements discussed in this project thus far, they tend to concern the right or correct

²⁸ Joseph Raz, 'Disagreement in Politics' (1998) 43(1) *The American Journal of Jurisprudence* 25, 51.

²⁹ Luke Tomlinson, *Procedural Justice in the United Nations Framework Convention on Climate Change* (Springer International Publishing 2015) 31.

answer to a given question (what is the correct tip to leave at the restaurant?³⁰ Is Julia Roberts a great actress?³¹ Who is the greatest baseball player of all time?³²). Turning to our UKSC cases, we see a similar focus on right answers with disagreements concerning what the correct meaning of words in statutes are,³³ if the actions of the Secretary of State were necessary in a democratic society,³⁴ if consent is a defence for sadomasochistic acts falling under the 1861 Act,³⁵ and what is the right threshold for miscarriage of justice.³⁶ As disagreement is typically associated with the pursuit of right answers and whether or not we believe that the answers are such, it is perhaps unsurprising then that the matter of right answers plays an important role in the literature on disagreement, both in ED and legal theory. Feldman, for example, starts a discussion on genuine disagreement noting that “When there is a disagreement it is not possible for both sides to be right”,³⁷ whilst Raz considers disagreement to be a “reason to double check one’s own views. Disagreement is proof that at least one of the parties is wrong, and one must wonder whether it is not oneself who is in the wrong”.³⁸ In a similar vein, there are those in ED who contend that evidential permissiveness is favourable over Feldman’s uniqueness thesis,³⁹ where Reynold rejects the

³⁰ Chapter Six, text to n 19.

³¹ Chapter Four, text to n 68.

³² Chapter Four, text to n 95.

³³ *R v Gloucestershire CC and Another ex parte Barry* (Conjoined Appeals) [1997] UKHL 58, [1997] AC 584.

³⁴ *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48.

³⁵ *R v Brown* [1993] UKHL 19, [1994] 1 AC 212 – not forgetting of course that some of the judges here thought this was the wrong question to ask.

³⁶ *R (Quila & Anor) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621.

³⁷ Richard Feldman, ‘Reasonable Religious Disagreement’ in Alvin Goldman and Dennis Whitcomb (eds) *Social Epistemology Essential Readings* (OUP 2011) 141.

³⁸ Raz (n 28) 50.

³⁹ See e.g. Thomas Kelly, ‘Evidence can be Permissive’ in Matthias Steup, John Turri and Ernst Sosa (eds), *Contemporary Debates in Epistemology* (2nd edn, Wiley Blackwell 2013) 298-311.

idea of there being one right answer.⁴⁰ With a focus on right answers – am I correct in my view based on the evidence? Is it rational for me to retain my view in light of HOE pointing to my being mistaken? How can I be confident that I have the correct understanding of justice when it is understood so differently in another community?⁴¹ – we find that the notion of truth comes into play. Again, this is unsurprising, particularly in the ED literature, in which we have seen that the disagreements of interest concern truth-apt propositions, so typically the disagreement is framed as being over one’s belief in the truth of p.⁴² Indeed, we see a similar focus in Dworkin’s work on conceptual disagreement (to be discussed in Section 4 of the present chapter), in which he moves from his discussion of genuine disagreement concerning moral concepts to a focus on the truth conditions of judgments about such concepts, and further questions “what makes it true that we all mean the same thing?”⁴³ And whilst Enoch acknowledges that “the appropriate epistemic response to peer disagreement cannot fully depend on who is right”,⁴⁴ we saw in Kelly’s work an approach to disagreement that required one to take into account what the right answer to the questions regarding the truth of p was in determining which party to the disagreement should lower their confidence in their

⁴⁰ Frederic Reynold, *Disagreement and Dissent in Judicial Decision-Making* (Wildy, Simmonds and Hill Publishing 2013) 145.

⁴¹ This is an example offered by Dworkin to be discussed in Section 4 of the present chapter.

⁴² See Chapter Six, Section 3.

⁴³ Dworkin (2011) (n 2) 170. Dworkin sees truth as playing a vital role in his discussion of disagreement. Indeed he argues that if external skeptics (i.e. those who are deemed to present “scepticism *outside* and *about* that enterprise”) do not share the same concept of truth with him, for example, then the discussions, as he puts it, have just been “as illusory as the pseudo-agreement we had about the bank”. Dworkin (1998) (n 2) 78. We speak in many ways about truth and our understanding of it, and Dworkin argues that this is because philosophers actually disagree about what truth is. He therefore sees that “we can rescue philosophical arguments about the nature of truth if we can understand truth as an interpretive concept”, and “reformulate the different theories of truth... by treating them as interpretive claims”. Dworkin (2011) (n 2) 172-173.

⁴⁴ David Enoch 'Not just a Truthometer: Taking Oneself Seriously (But Not Too Seriously) in Cases of Peer Disagreement' (2010) 119(476) *Mind* 953, 984.

belief.⁴⁵ In Chapter Four, the role of truth was introduced in the discussion of disagreement insofar as I argued against the typical ED restriction of genuine disagreements to be limited to beliefs over truth-apt propositions.⁴⁶ In that discussion it was noted that in fact some ED work goes further than the suggestion that genuine disagreement is over truth-apt propositions, by signalling beyond the truth-apt quality of the propositions subject to dispute that there is some identifiable truth of the matter. Here it is my intention to take up this point in order to further clarify the potential role of truth in an enquiry into disagreement.⁴⁷ I advocate strong caution regarding the way in which truth and disagreement are entangled in discussions of disagreement, spotlighting the limiting influence such a pursuit can have on one's understanding of disagreement; as is the case with ED.

It is my argument therefore that truth and disagreement are not adequately delineated in the literature. As noted above, we saw in Chapter Six that truth is a consistent point of reference in the ED literature due to the focus placed on disagreements concerning beliefs over truth-apt propositions, i.e. beliefs concerning the question 'is it true that p?' and 'how confident can I be that my answer is right in light of evidence to the contrary?'. If we turn to the literature, a clear influence of truth is seen in Christensen's defence of what he calls Independence-based Conciliationism (IBC), a view whereby the evidence one has that is independent of the disagreement regarding p should influence the view one ought to take regarding p. Christensen suggests that "the more radical seeming consequences of IBC simply represent the natural precautions suggested by this more thorough-going acknowledgment

⁴⁵ See Chapter Six, text to n 26. Kelly refers to p as H in his 2005 work which features this reliance on what the right answer is.

⁴⁶ Chapter Four, Section 4.3.

⁴⁷ See also Chapter Six, Section 3.

of our fallibility".⁴⁸ This is so because even after careful consideration we still have different views:

we... often err in coming to settled, all-things-considered judgments, *even after the most careful reflection and conscientious engagement with our opponents.*

This is obvious, when one looks at the mutually incompatible opinions stably held by various groups in philosophy – it is undeniable that a lot of us have failed to reach the truth on a lot of issues we study.⁴⁹

The difference in views does lend itself to such a conclusion. Still, caution is required because we must be careful not to confuse consensus, and what the group takes to be right, with what is right, or what the truth of the matter is. This is a theme not limited to ED, as we see a similar mistake in the works of Dworkin. We will see in Section 4 of this chapter that Dworkin explores how disagreement is possible through exploring the ways in which we use and share concepts.⁵⁰ Yet again such an approach focusses on the potential power of group consensus in determining what we take to be true, or what answer is deemed to be right, as emphasis is placed on the justificatory force of their widely acknowledged social use. Yet not all of our everyday experiences lend themselves to this conclusion. That is, the fact that a group believes *p*, does not mean that not-*p* is false. One might, for example, have a sound grasp of legal positivism, yet find oneself with the minority view in a packed lecture theatre of students who incorrectly grasp the separation of law and morality posed by the traditional positivist thesis. Or to draw on an example offered by Dworkin, one might live in a community in which

⁴⁸ David Christensen, 'Disagreement and Public Controversy' in Jennifer Lackey (ed), *Essays in Collective Epistemology* (OUP 2014) 153.

⁴⁹ *ibid.*

⁵⁰ See text to n 78.

it is common place to discriminate against women, yet one may feel that such practices conflict with rather than conform to the meaning of justice.⁵¹ The fact that we have group consensus in such a case does not mean that the group is right. Although this may seem like an obvious point to make, it is one that is needed if we are to adequately individuate disagreement from the exploration of, or the motivation for, truth.

One might seek to claim that such individuation is not possible – that disagreement is necessarily intertwined with truth by virtue of the fact that we disagree over what is true, or over what we believe to be correct. However, the fact that one’s belief may be related to what one thinks is true does not mean that an exploration of disagreement should be confused with an exploration of truth. It is my note of caution that we should not impose a theory of truth on our understanding of what disagreement is, so as to avoid clouding one’s understanding of disagreement and its scope, with what we deem to be the role that truth might play in such instances. To explain, as has been my argument in Section B of the thesis, ED is primarily concerned with rationality and the justification of beliefs, which has led to a narrow understanding of disagreement being deployed throughout the literature. I develop this argument here to suggest that the focus on rationality and the justification of beliefs has also led to a desire in the literature to surreptitiously defend a theory of truth, which has also influenced both the presentation of genuine disagreement and acceptable reactions to disagreement. We saw this plainly in Chapter Six in the desire to avoid scepticism evident in many of the reactions to disagreement defended in ED. It was clear that many in the ED literature took for granted the idea that scepticism was to be avoided, which meant that the epistemic reasons for such a rejection were underdeveloped, or else missing entirely from discussion.⁵² We therefore saw that the desire to have right answers in disagreement, access to truth, and confidence in what we might be justified in believing, greatly influenced what a

⁵¹ Dworkin (2011) (n 2) 171 – see also text to n 112 below.

⁵² See Chapter Six, text to n 110.

justifiable reaction to a disagreement was taken to be.⁵³ Indeed, similarly Dworkin in his discussion of interpretive concepts goes to lengths to avoid relativism, as he wants to be clear that having an interpretive thesis does not require one to commit to there being no right answers to the disagreements we have. He argues that there can be truth in interpretation, and that moreover, if one were to take a sceptical approach to right answers, one would still be committing oneself to there being a truth, just as any positive answer regarding p would have one do.⁵⁴ It is not my intention in this chapter or thesis to dismiss the discussion of truth, which indeed has an important role to play in our understanding of disagreement, as well as wider social interactions and grander endeavours to understand the world in which we live. Rather, it is my intention to clarify and spotlight the dominant role that truth has come to play in discussions of disagreement, so dominant indeed that it often goes unstated, for the influence it has had on misunderstandings of disagreement, and its effect of overshadowing the wider dynamics of disagreement, particularly evident in the UKSC cases underpinning this thesis' enquiry.

Thus, if we look to the role that truth plays in our understanding of disagreement in JDM, it is quite apparent that it is not always a prominent factor.⁵⁵ In Chapter Six it was suggested that through the reluctance to give in to uncertainty in ED we see the need for balance between finding truth through legal process (the epistemic), and providing answers we can action (the pragmatic). In focusing on the role that truth plays in disagreement we therefore miss the full scope of many of the decisions made in the courts. That is, that they

⁵³ See e.g. Chapter Six, text to n 113.

⁵⁴ Ronald Dworkin, 'Is there Truth in Interpretation? Law, Literature and History' (Library of Congress, YouTube, 17 December 2009) <www.youtube.com/watch?v=742JyiqLhuk> accessed 1 August 2018.

⁵⁵ Indeed we know, as has been highlighted earlier in the thesis, that Reynold's book was written from the perspective that there are not always right answers to be had in legal cases. See e.g. Chapter Three text to n 51 and the focus on the subjective meaning of words, and text to n 131 regarding policy decisions.

often concern practical, and not theoretical reasoning. We can see this in the cases of *Barry* and *Adams* in which we see the source of disagreement as the intentions of Parliament. As noted previously, doubt has been raised over such a notion being truth-apt. As Dworkin, perhaps rather cynically, once put it, to speak of intention in law is nonsensical because what a congressman really intends is to get re-elected.⁵⁶ To consider the court as seeking truth in such an instance does not capture the realities of such disagreements. Turning to the cases, in *Barry*, whilst Reynold framed the dispute as being over the meaning of ordinary words, if we consider the focus placed on parliamentary intentions, it can be seen instead that the judges' focus was placed on what they hope such words do for us. In *Barry* to determine the meaning of 'need' in section 2 of the Chronically Sick and Disabled Persons Act 1970 the court focused in part on whether or not it was Parliament's intention to treat disability as a special case for the provision of LA support. We saw for example the view that the 1970 Act was evidence in and of itself that Parliament had intended disability to be treated as a special case, further supported by section 47 of the National Health Service and Community Care Act 1990 which distinguished between the assessment of general care provision and care provision assessment for the disabled.⁵⁷ This view was roundly discarded by the majority to the decision which placed more emphasis on the affordability of a narrower interpretation of 'need' in the Act. In this judgment, it was plain that the disagreement was conducted through a process of practical reasoning – weighing the legislation, its purpose and remit, along with the practical ends of the provision being workable across LAs. Similarly, in *Adams* we saw the court make use of the discussions that took place at the time of Article 14's creation to elucidate the possible intentions surrounding the provision of compensation for the innocent. The view that these discussions had indicated that the decision regarding the role of innocence was to be left to domestic legislation was supported by the fact that the parties to the creation of Article

⁵⁶ Dworkin (2009) (n 54).

⁵⁷ See Chapter Three, text to n 47.

14 voted against an amendment to restrict the meaning of ‘miscarriage of justice’ to those who could prove their innocence. Contrary to the majority’s view in *Barry*, the majority here drew on this apparent indication of intention to allow for them to conceive of a wider remit of proven innocence in finding a miscarriage of justice. Whilst, just as in *Barry*, we saw that disagreement persisted to the final judgment in *Adams* as to the role that innocence should play.⁵⁸

In Chapter Three it was suggested that disputes over intentions brought into doubt the extent to which such disagreements as observed in *Barry* and *Adams* can ever really be resolved, if we are to understand that in practice there is no real intention to discern.⁵⁹ We can see however that such a view relies on taking only discussions of intention into account, and considering only the possibility of identifying what might be called the truth. Instead, what we saw in *Barry* and *Adams* was a multitude of factors at play in the disagreements regarding the meaning of need and the role of innocence, demonstrating the practical, and indeed multifaceted dynamic reasoning taking place in such judgments.⁶⁰ It is my argument that by intertwining theories of truth with reflection on disagreement in the first instance, we miss the possibility of wider influences and pursuits at play in JDM. In calling for a disentanglement of truth from initial explorations of the notion of disagreement, it should be reiterated that I am not rejecting the possibility of truth to be found in judicial decisions, nor the possibility of right answers.⁶¹ Rather, I am arguing that in the first instance we should

⁵⁸ See Chapter Three, Section 3.2.

⁵⁹ See Chapter Three, text to n 170.

⁶⁰ In fact, if we consider the role that evidence plays in the courts, we saw in Chapter Five that in the common law tradition the information made available to the court, and that which can be used in the court’s decision, is governed by comprehensive rules of evidence, casting further doubt on the extent to which one can talk of the role of truth in disagreements in JDM.

⁶¹ For example, if we focus only on the works of Dworkin, he argues in *Law’s Empire* for the view that there are right answers to be had in hard cases (see e.g. Dworkin (1998) (n 2) Chapter Six.). He too suggests that law is a truth-seeking practice and that “when we are disagreeing over interpretation of

endeavour to treat disagreement separately so that mistakes are not made by positing theories of truth on our understanding of the scope of, and possibility for, genuine disagreement.

4. The possibility of conceptual disagreements

Having made the final two clarifications for our discussion of disagreement we move now to focus on a wider possibility for our understanding of genuine disagreement. Recalling the conclusion to Chapter Six, it was my suggestion that a reason for the limited applicability of ED to JDM is that ED cases only allow for certain concepts to be at play in the literature, which limits the overall impact the arguments for ED can have, especially in relation to JDM. It is my argument that ED commentators ignore or else refute the possibility that genuine disagreement could actually centre on the meaning of the concepts at work in the dispute.⁶² To explain, it has been established that ED is concerned with a specific set of circumstances whereby to be a case of interest in the literature, and to be a peer, entails that the disagreement concerns parties who are equals in terms of their access to the evidence and

law it feels like we are making a judgement about what the truth is". Dworkin (2009) (n 54) 15:00. Furthermore, in his argument for truth regarding moral questions Dworkin puts forward an abstract view of truth as being "what counts as the uniquely successful solution to a challenge of inquiry", a view which could then be tailored according to each domain. Dworkin (2011) (n 2) 177. The exploration of truth and right answers in relation to disagreement is an additional research project in itself, and as such will not be pursued further in the present enquiry.

⁶² Ignored because many simply say over the same proposition, and do not discuss the possibility of different conceptions, and refuted as we saw in Chapter Four's exploration of the notion of disagreement employed in ED that there are those in the literature who are explicit that for a disagreement to be genuine requires the parties to the disagreement to share the same conception of the concept at work. See e.g. Matheson's example regarding a disagreement over the existence of God, Chapter Four, text to n 50.

epistemic credentials regarding p (where p is a truth-apt proposition).⁶³ Yet more exacting than this, and at risk of repetition, the idealised cases of disagreement employed in the literature typically concern situations in which there is not only a truth-apt proposition, but an identifiable truth of the matter. We have seen in Section B of this thesis cases involving weather forecasts,⁶⁴ chemistry problem questions,⁶⁵ what the correct calculation for a tip at a restaurant is,⁶⁶ and so on – all cases representative of the literature’s focus, and all cases in which the truth can be easily ascertained.⁶⁷ Thus, not only does the literature present cases in which the parties to the dispute have the same evidence and ability and so on, it uses cases in which it is possible to *definitively settle* the dispute. That is, once the facts of the case are clear, and the concepts at play agreed upon, the disagreement can be resolved (irrespective of the fact that we have seen the theorists are not concerned with actually resolving the dispute). For example, in Christensen’s tipping case, there is nothing vague in the situation. Once all the facts are agreed upon (if the parties have agreed to split the bill, adding a tip, the bill’s total, how many people to divide the bill between, and so on) the answer is definitive and can be easily ascertained – even if one needs to resort to using a calculator.⁶⁸ What if the concepts at play in a disagreement *are* vague, and so not as clearly identified and applied? What if, for example, A and B disagree over whether or not C is bald? A takes baldness to mean no visible hair on the head whatsoever, where B takes it that as long as the top of the head is nearly free from hair C should be considered bald. Although there may indeed be questions regarding the requirements for baldness, it would be possible to agree on a

⁶³ See in particular Chapter Four, Section 4, and Chapter Five, Section 2.

⁶⁴ Chapter Four, text to n 7.

⁶⁵ Chapter Five, text to n 28.

⁶⁶ Chapter Six, text to n 19.

⁶⁷ Kirchin and Pethick also introduce this as a limitation of ED cases. See Stephen Pethick and Simon Kirchin “Concepts, Conceptions and the Epistemology of Disagreement” (August 2012).

⁶⁸ For a reminder of the case see Chapter Six, text to n 19.

definition, from which the question regarding the status of C's pate could be answered.⁶⁹ Yet there are other concepts over which it seems unlikely that such agreement could be reached. Concepts such as justice, beauty or art; all concepts one might consider vague in the sense that clear definitions, parameters, application and interpretation are difficult to come by. Indeed, Ronald Dworkin refers to such concepts as interpretive.⁷⁰ It is now my intention to demonstrate that the ED model of disagreement cannot extend to many of the disagreements we find in the UKSC because it does not adequately account for the possibility of the differing conceptions of concepts which could make sense of such cases. Thus the ED literature misses a key possibility in the case of disagreement; that the disagreements to be had could be over and about the concepts themselves.

4.1 Types of concepts

Gallie's idea of an Essentially Contested Concept – that is that some concepts such as law are inherently contestable by nature – was referred to in Chapter One of this thesis in relation to the history of philosophical discussions concerning disagreement.⁷¹ Dworkin's interpretive theory can be seen as a response to the same dilemma Gallie attempted to address in 1956: how to account for the idea that people using words such as justice can be talking about the same thing even though it turns out that they have, often strikingly, different ideas of what they amount to in practice. As Dworkin puts it "I may think a law is unjust if it disturbs the upshot of a free economic market and you if it increases overall suffering".⁷²

⁶⁹ This example is what Dworkin refers to as a criterial concept (albeit a vague one), and will be referred to again in Section 4.1 where Dworkin's distinction between concepts will be examined. Dworkin (2011) (n 2).

⁷⁰ *ibid.*

⁷¹ Chapter One, text to n 21.

⁷² Dworkin (2011) (n 2) 158.

Dworkin demonstrates that the reason why we can have purposeful and genuine disagreements in such cases is because despite our apparent differences we *share* an underlying understanding of what they are and mean. In short, Dworkin's theory of conceptual interpretation can be seen as an attempt to explain this dilemma of the concept-conception distinction. In *Law's Empire*, he uses the analogy of a tree to explain the difference between concept and conception (with reference to the concept of courtesy):

People by and large agree about the most general and abstract propositions about courtesy, which form the trunk of the tree, but they disagree about more concrete refinements or subinterpretations of these abstract propositions, about the branches of the tree. For example, at a certain stage in the development of the practice, everyone agrees that courtesy, described most abstractly, is a matter of respect. But there is a major division about the correct interpretation of the idea of respect.⁷³

Here, respect accounts for what the *concept* of courtesy is, where the different views regarding what respect requires are the *conceptions* of the concept.⁷⁴ This idea differs to the idea of intension and extension of words referred to in Chapter Four.⁷⁵ For Dworkin, we can interpret concepts at different levels of abstraction – the trunk of the tree being the first, uncontroversial level, with the branches subject to more disagreement. Thus the concept-conception distinction utilised is a matter of interpretation, rather than semantics. That is, it involves our collective interpretive practices rather than the ground rules of the way we use language. In this way, Dworkin notes that the interpretive understandings we have are not

⁷³ Dworkin (1998) (n 2) 70.

⁷⁴ *ibid* 71.

⁷⁵ Chapter Four, n 60.

timeless: “it holds in virtue of a pattern of agreement and disagreement that might... disappear tomorrow”.⁷⁶

Under Dworkin’s interpretive thesis we need not claim that law is essentially contestable and we do not as a result have to draw the conclusion that we have different understandings of the concept itself. Instead, law, and other concepts aligned to discussions about and in law such as justice, morality, reasonableness, equality and responsibility, amongst many others, can be understood as interpretive concepts.⁷⁷ To explain this idea we must first outline the distinction Dworkin makes between types of concepts: criterial, natural kind and interpretive, all of which can be differentiated by understanding the ways in which we collectively use and share them, and how we agree and disagree over them.⁷⁸ It is through this demarcation that Dworkin argues that we in fact have a toolbox of concepts-types from which to draw, and so can account for genuine agreement and disagreement about moral

⁷⁶ Dworkin (1998) (n 2) 71.

⁷⁷ Singling out moral concepts in particular, Dworkin provides an extensive list of the moral concepts he has in mind for the interpretive concept type; reasonableness, honesty, trustworthiness, tactfulness, decency, responsibility, cruelty, shabbiness, insensitivity, deceit, and brutality. He also includes “the special political concepts of legitimacy, justice, liberty, equality, democracy, and law” Dworkin (2011) (n 2) 151. Indeed, in this respect it is noteworthy that Dworkin identifies law as a moral concept, because the idea of law as a moral concept is one that has divided jurisprudence. There are those who articulate and defend the nature of law as separate from morals (such is the pursuit of legal positivism) and those who suggest that law and morality are necessarily intertwined (as we might see from a natural law theory). The nature of law in this respect however lies beyond the scope of the present thesis, though the thesis could be considered to present foundations for a wider discussion of how disagreement in JDM informs our understanding of what law is. Indeed, this is in part the driving influence of Dworkin’s *Law’s Empire*, which started with the premise that a sound theory of law must account for judicial disagreement.

⁷⁸ This is a distinction that he draws upon both in *Justice in Robes* and *Justice for Hedgehogs*. Dworkin does utilise the notion of an interpretive concept as a key feature of *Law’s Empire* however he does not discuss the other types of concepts he later distinguishes in *Justice in Robes*. Dworkin (2011) (n 2) and Ronald Dworkin, *Justice in Robes* (Belknap Press of HUP 2006) 9-12.

issues by understanding that not all of our concepts are the same and should therefore not be treated as such.

The first type of concept to be distinguished by Dworkin is criterial, which is shared “when, but only so far as, we use the same criteria in identifying instances” of the concept; for example, a bank, a book, or an equilateral triangle.⁷⁹ When we share such a concept it is often mere illusory disagreement that we fall into when we disagree about the concept’s ‘proper’ use in certain circumstances, which tends to be the result of the criteria that we have for the concept in question not being precise enough. Such was the case in the disagreement regarding Michael Jordan’s height referenced in Chapter Four; the notion of tallness was not disagreed over, it was merely the standard of tallness that needed to be clarified.⁸⁰ Similarly, regarding the example of baldness in the introduction to Section 4 of the present chapter, we might agree on how much hair a friend has on his head but disagree as to whether or not he is bald.⁸¹ For Dworkin, this is a vague criterial concept, because although people agree over the correct criteria for its application they might disagree over a range regarded as marginal. The second type of concept is the natural kind, which has a fixed identity in nature, such as a chemical compound or animal. Natural kind concepts are shared simply if they are used to refer to the same ‘natural kind’. With such different types of concepts Dworkin explains: “We must accept what Wittgenstein pointed out: that concepts are tools and that we have different kinds of tools in our conceptual toolbox”.⁸² This idea of concepts as tools emphasises the social practice regarding our use of words and the ideas they denote. Not at odds with the ED portrayal of disagreement at this point, the difference in approach by Dworkin will become clear when we turn to how we account for disagreements over moral concepts; those

⁷⁹ Dworkin (2011) (n 2) 158.

⁸⁰ See Chapter Four, text to n 64.

⁸¹ Dworkin (2011) (n 2) 158.

⁸² *ibid* 160.

which Dworkin classifies as interpretive. Thus at present the key point in identifying types of concepts in this way is the *commonality* that natural kind and criterial concepts share: “[we] do not share a concept of either kind unless [we] would accept a decisive test – a kind of decision procedure for finally deciding when to apply the concept”.⁸³ The exception to this is in cases that we agree are marginal, such as the baldness conundrum discussed above. Even in such a case however, one could agree with one’s interlocutor the parameters for which baldness were to be judged. According to Dworkin then, a key condition for sharing such concepts is therefore that once the facts are agreed, genuine disagreement about the concept’s application is ruled out.⁸⁴

The third type of concept is interpretive, which as noted at the outset of the present section includes moral and political concepts we tend to disagree over. As Dworkin sees it, we have values, such as justice, that we agree are important to be upheld, but we disagree as to their character. We agree that things should be just, but disagree when it comes to what precisely makes an act just or unjust:

But we agree sufficiently about what we take to be paradigm instances of the concept, and paradigm cases of appropriate reactions to those instances, to permit us to argue, in a way intelligible to others who share the concept with us, that a particular characterization of the value or disvalue best justifies these shared paradigms.⁸⁵

⁸³ *ibid.*

⁸⁴ *ibid.* Reference to genuine being important here as we’ve already seen in this thesis how imprecise this is in practice.

⁸⁵ *ibid.* 160-161.

In other words, Dworkin argues that we can share concepts such as justice, even though we, often profoundly, disagree over them, because we have a bedrock of agreement regarding such concepts.⁸⁶ Whilst the agreement for natural kind or criterial concepts lies in setting a decision procedure or test for the concept, with interpretive concepts we must have agreement on a shared paradigm of the concept.⁸⁷ That is, one could not have a disagreement over the value of a concept without sharing a basic understanding of the concept itself, as we saw with the example of courtesy above; otherwise we would simply be back to arguing about money banks and river banks.⁸⁸ The 'shared' part of any given interpretive concept is left purposefully open here. He explains:

...we cannot say just how much or what detail of agreement about paradigms is required in a community to justify treating a concept as interpretive for that community... The question always remains, in spite of even very radical disagreement, whether the pattern of that disagreement is better explained by the hypothesis that those who disagree share a single interpretive concept and disagree about its character, or by the alternative hypothesis that the disagreement is illusory like our agreement to meet at the bank.⁸⁹

Accordingly, by treating a concept as interpretive one presupposes that this way *better interprets* the practice than an alternative view that the interlocutors are not really talking

⁸⁶ As Dworkin notes of justice as an interpretive concept in *Justice in Robes*: "people can share such a concept even when they disagree dramatically about its instances". Dworkin (2006) (n 78) 12.

⁸⁷ Dworkin (2011) (n 2) 161. This is something that Dworkin refers to elsewhere in his writings on interpretive concepts. E.g. Dworkin (1998) (n 2) 72.

⁸⁸ *ibid* and Dworkin (2011) (n 2) 161, and Chapter Four text to n 73.

⁸⁹ Dworkin (2011) (n 2) 161.

about the same thing.⁹⁰ Thus sharing an interpretive concept of justice, for example, would allow us to recognise a vast number of political theories of justice as “competing conceptions of that concept”.⁹¹ Each of these political theories can then be seen as an interpretation (or conception) of the shared concept of justice. Indeed Dworkin argues that if this is not accepted, then we would have to alternatively “accept what seems ludicrous: that the most fervent and passionate of our political arguments are just silly misunderstanding”.⁹²

An important difference then between interpretive concepts and the other types available in our toolbox is that interpretive concepts do not have decisive tests. Instead, we share interpretive concepts “not because we agree in their application once all other pertinent facts are agreed upon, but rather by manifesting an understanding that their correct application is fixed by the best interpretation of the practices in which they figure”.⁹³ This means that by arguing for an understanding of such concepts as interpretive, rather than suggesting that disagreements to be had over such concepts are illusory,⁹⁴ they manifest genuine disagreements regarding the correct application of the concept in the social practice. As Dworkin explains: “We share an interpretive concept when our collective behaviour in using that concept is best explained by taking its correct use to depend on the best justification of the role it plays for us”.⁹⁵ Thus the interpretive concept is a social phenomenon, by which we can see that the social *use* of the concept is bound to the social

⁹⁰ See also Dworkin (1998) (n 2) Chapters One and Two.

⁹¹ Dworkin (2011) (n 2) 162.

⁹² *ibid.*

⁹³ *ibid* 168.

⁹⁴ Illusory either because the participants to the disagreement are not really talking about the same thing, or else it is not really a disagreement because both answers can be correct due to a resulting relativism or sceptical consequences of an interpretive thesis.

⁹⁵ Dworkin (2011) (n 2) 158.

understanding or meaning of the concept.⁹⁶ By this account therefore, instead of disagreements over moral concepts being a ‘matter of opinion’, or merely illusory due to there being different acceptable interpretations, such concepts have fixed meanings that we all create and share, resulting in the possibility that disagreements we have regarding them are indeed genuine.

Although my thesis draws on Dworkin’s insights here for what they have offered to legal enquiry, he is not alone in focusing on the way in which we use and share concepts.⁹⁷ For example, one could also view disagreements over moral concepts as genuine by drawing on the insights from Ordinary Language Philosophy (OLP) which too presents a use-focussed understanding of the nature of concepts, focussing instead on semantics, the use of language, over interpretive practice. OLP is a school of thought which sees that the philosophical problems we have in philosophy are simply linguistic ones that are in fact created by our philosophical use of language.⁹⁸ That is, the problems are caused through a lack of appreciation of what our words actually mean in our lives and in our social practices. Wittgenstein, for example, argued in *Philosophical Investigations* that the meaning of our words can only be understood by placing them in the context in which we use them. That is, the meaning of the words and sentences we use are given by their use in the contexts in which

⁹⁶ This also means that through interpreting such concepts we are also helping to create them through the very act of interpreting them. The contextual-focus of the interpretive concept does not preclude there being a correct use of such a concept. As indicated in Section 3, the ability to arrive at right answers is an important theme in Dworkin’s work; inevitably so as a criticism of an interpretive thesis is resulting relativism or scepticism. For present purposes, focus in this section will be placed on how understanding certain concepts in this way can allow us to conceive of a wider understanding of genuine disagreement than that which is offered in much of the ED literature.

⁹⁷ In addition to Dworkin (1998), see e.g. HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1997) and John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) Chapter One.

⁹⁸ See e.g. Ludwig Wittgenstein, *Philosophical Investigations* (3rd edn Blackwell Publishers 1967) and Gilbert Ryle, *The Concept of Mind* (University of Chicago Press 2000).

they are deployed. As Wittgenstein notes early in his thesis: “For a large class of cases - though not for all - in which we employ the word “meaning” it can be defined thus: the meaning of a word is its use in the language”.⁹⁹ Meaning and language is therefore seen as part of a social practice, understood by placing language in the context in which it is used. Dworkin’s thesis appears to be similarly influenced, whereby he views our concepts such as law as social practices in which we together create the concepts we use. The public nature of these interpretive concepts also shows similarity to Wittgenstein’s assertions throughout *Philosophical Investigations* that language and therefore meaning is part of a social practice. Wittgenstein goes further to state that “... obeying a rule is a social practice. And to *think* one is obeying a rule is not to obey a rule. Hence it is not possible to obey a rule ‘privately’: otherwise thinking one was obeying a rule would be the same thing as obeying it”.¹⁰⁰ The public nature of Wittgenstein’s thesis can be seen as having a similar effect to Dworkin’s assertions that the interpretive concepts are created and used in social practices. The simple ‘use’ required of OLP, seems to be similar to that required of the interpretive account: both offering an implicit understanding of our use of concepts, meaning and language. Through utilising Dworkin’s focus on the analysis of concepts and employing Wittgenstein’s idea of a conceptual toolbox, we need not be committed to the *interpretive* thesis offered by Dworkin. Instead of viewing understanding as a matter of interpretation as Dworkin does, we might just say that it is a matter of collective understanding. Disagreements then can be genuine because we argue over the correct use of the concepts, with such a determination being a matter of understanding rather than interpretation. As Ryle noted, concepts have inflections of meaning or “elasticity of significance” that cannot be ironed out of our use of language.¹⁰¹

⁹⁹ Wittgenstein (n 98) 20.

¹⁰⁰ *ibid* 81.

¹⁰¹ See e.g. Gilbert Ryle, ‘Philosophical Arguments’ in *Collected Papers Volume Two: Collected Essays 1929-1968* (Routledge 2009) 215.

For present purposes, in proceeding reference will be made to interpretive concepts for the ends of consistency in the thesis. However, it should be noted that the discussion of the rich nature of our concepts and their employment in our discourse and understanding of social interactions and society more broadly is the important emphasis of the present section.

Having outlined the impact of understanding moral concepts as interpretive, we turn briefly again to the ED literature to elaborate on the impact that viewing disagreements over such concepts as genuine can have. Some ED theorists argue that the ED cases *can* extend to what Dworkin takes to be interpretive concepts, and in particular use examples of disagreement about religion, morals, and taste, where interpretive concepts abound.¹⁰² However, this seems to be rather limited in practice as the literature grapples with how to make sense of peer disagreement in complex real-life scenarios. For example, in Chapter Six we saw Elga's EqWV draw on a distinction between "clean, pure" cases of disagreement (such as Christensen's tipping case which has its basis in mathematics) and "messy, real-world cases" (such as those pertaining to religious or moral disputes).¹⁰³ In the 'clean' cases, one can look to factors outside the disagreement to determine whether or not A and B are peers. Thus, in the tipping case, if A is disagreeing with B, whom they would normally take to be as good at arithmetic as themselves, then the EqWV should apply, as there is no reason to doubt that one's interlocutor is wrong in this instance. However, this differs for Elga when it comes to the 'messy' cases and he notes as follows with regard to his example of whether abortion is morally permissible:

With respect to many controversial issues, the associates who count as peers tend to have views that are similar to one's own. That is why – contrary to initial

¹⁰² E.g. Andy Egan, 'Disputing about Taste' in Richard Feldman and Ted A Warfield (eds), *Disagreement* (Oxford University Press 2010) 247–286.

¹⁰³ Adam Elga, 'Reflection and Disagreement' (2007) 41(3) *Nous* 494.

impressions – the equal weight view does not require one to suspend judgement on everything controversial.¹⁰⁴

Thus Elga suggests that one will rarely need to alter one's view regarding controversial issues because in such cases A will rarely consider B to be a peer in the first place, thus the issue of what to believe when faced with disagreement with a peer never really arises.¹⁰⁵ This limited view of disagreement makes little sense of the disagreements that we often see take place in everyday cases, in academic discourse concerning law, and in the courts themselves (to name but three broad areas of interest to the present study). By Elga's account, we need not be concerned by the EqWV's call for parity with peers, because on controversial matters we are unlikely to deem our interlocutor's peers, and thus needn't relent on our closely held views. That is, such disagreements needn't be taken seriously. Yet this misses a key opportunity for consideration, which ED theorists seem set on avoiding due to what we have seen to be the necessary limits in play for the focus on belief-revision. That is, that such disagreements may be conceptual. Let us take as an example, the infamous (in legal theory circles) Hart-Fuller debate. The debate concerned an exchange between HLA Hart and Lon Fuller in the Harvard Law Review through which the two disagreed over the positivist separability thesis; that is, whether it is possible to separate law from morality.¹⁰⁶ By Elga's account, either the theorists would need to suspend judgment on the separability thesis, based on the understanding that they took one another to be peers, or else (as Elga seems to think more likely), remain steadfast in their views on the basis that they do not consider one another peers by virtue of

¹⁰⁴ *ibid.*

¹⁰⁵ Elga notes "friends like these – friends who agree with you on issues closely linked to the one question – will very often agree with you on the one question as well". *ibid.*

¹⁰⁶ See H. L. A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593 and Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71(4) *Harvard Law Review* 630.

their disagreement. Yet neither option captures what was really taking place between Hart and Fuller. It was clear both that Hart and Fuller considered themselves to be peers in the field, and that the dispute in which they engaged was not merely a matter of talking past one another. Instead, they differed over the nature of law;¹⁰⁷ theirs was a conceptual disagreement.¹⁰⁸ It is my argument that ED commentators do not account for the idea that such disagreements could centre on the meaning of the concepts at play in the dispute. Instead of entertaining this possibility, we saw in Section B of the thesis that ED theorists focus on cases in which everything is the same or comparable. This shields the reader from the potential that the disagreement could be with regard to the concepts themselves. Indeed, this is in keeping with what was observed in Chapter Two of this thesis in which we saw that when considering what disagreement meant, we were attaching meaning to the notion that should have been attached to the instance in which the notion arose.¹⁰⁹ By contrast, in the ED literature we see it taken for granted that the concepts at play are one and the same. Whilst undoubtedly many of the concepts we employ are simply understood, it is argued here that we can and do encounter genuine disagreements in which the parties to the disagreement have different conceptions of the concept subject to dispute, which can be understood if we

¹⁰⁷ Simply put, Hart argued that law was to be understood as separate from morality. That is, a law needn't be moral to be law (though of course a law could be moral). By contrast, Fuller saw that there was a necessary link between law and morality – a law needs to comply with certain moral principles if it is really to be considered law.

¹⁰⁸ As Pethick and Kirchin note, it appears that “Elga completely misses the possibility of there being conceptual disagreement, prompting him to deny the status of many genuine disagreements through a forced and counter-intuitive deployment of the notion of an epistemic peer”. See Pethick and Kirchin (n 67). We have seen too in the course of Section B of this thesis, that this denial of conceptual disagreement extends beyond the employment of peers, to the misleading presentation of what it means to be a genuine dispute.

¹⁰⁹ See e.g. Chapter Two, Section 6.

take a broader view of the diverse nature of the concepts we have to hand in our conceptual toolboxes, thereby widening the scope for the possibility for genuine disagreement.

4.2 Sharing concepts: revisiting epistemic injustice and social practice

We saw in Section 4.1 that in articulating how we share interpretive concepts, Dworkin suggests that their correct application or use is determined by the “best interpretation of the practices in which they figure”.¹¹⁰ Although the remit of this thesis does not extend to identifying the correct use of the concepts over which we disagree, this phrase is pertinent to our wider understanding of the disagreements encountered in the courts as it requires us to pay attention to the social use of the ideas that are subject to disagreement. That is, it calls for reflection on *whose* best interpretation this might be. That is, does the ‘we’ refer to the global community, or nation, or class, or the English speaking world? In fact, we find that for Dworkin it is both the global community and, broadly it seems, western culture. Dworkin refers to “people [who] participate in social practices”,¹¹¹ and we have seen that interpretive concepts are socially, or collectively, used and made. However, the global community is made up of many social groups, each in turn with its own beliefs, commitments and decision procedures. Indeed the same could be said of western society. In light of the rich and diverse nature of the world’s multiple societies, an important question to consider is how we are to account for the claim that we collectively and universally share values in this way as we know that social practices and views differ, and often quite dramatically so. In explaining why we can still be disagreeing over the same concept of justice Dworkin uses an example of a community in which systematic discrimination against women is practiced. He questions whether we should consider this to be correct or acceptable in light of the fact that

¹¹⁰ Dworkin (2011) (n 2) 168.

¹¹¹ *ibid* 160.

the community's social practices deem it so by their understanding of justice; even though it goes against our understanding of that concept (where 'our' here can be considered, broadly, western culture).¹¹² Dworkin thinks not. Instead, he sees that because we share the same concept of justice, we can deem the community at odds with our view to have simply misconceived it. Dworkin explains at length:

We can count a great proportion of the substantive claims other cultures make about justice as mistakes; we do this when we suppose that the best available justification of the paradigms of attribution and response we share justifies rejecting those claims. We must judge for ourselves what justification of these shared paradigms and structures is adequate, and no justification that approved gender discrimination would be. They share the concept of justice with us, but at least so we can sensibly suppose they misunderstand that concept profoundly.¹¹³

Thus we see that the way we use and understand justice in social practices, and the underlying collective agreement this entails, has strong justificatory force in what we take to be an acceptable account of justice. If this is so, what must not be forgotten are the insights from Chapter Five's discussion of how such shared understanding manifests in social practices. That is, in making sense of the disagreements we have over interpretive concepts, we need to be mindful of who the 'we' is, and whether there are certain members of the community who might be excluded from this sharing. We saw in Chapter Five through Fricker's depiction of hermeneutical injustice that some groups of people in what is considered to be a single social

¹¹² *ibid* 170-171. Although Dworkin is not explicit on this point, it can be assumed that the 'we' or 'our' here is in reference to western society.

¹¹³ *ibid* 171.

practice (i.e. western culture, or even more refined as the UK territory) do not participate equally in the practices which create social meanings.¹¹⁴ This can lead to situations in which concepts are not shared across social spaces in the way that we might initially perceive. The example used in Chapter Five to illustrate this was the, relatively recent, understanding of sexual harassment, whereby before this idea had come to be articulated, women's suffering was not adequately understood in this regard, even by women themselves. Indeed we saw the ability to develop such concepts as "our shared tools of social interpretation".¹¹⁵ We saw too the gap in understanding this can create through a discussion of the judgment in *Brown*. A further illustration of the potential for epistemic injustice is evident in *Barry*, in which we saw an agreed interpretation of a person's *need* of welfare services in a way which marginalised the experiences of those in receipt of such services.¹¹⁶ Furthermore, the issue in *Quila* was whether an increase in the age requirement for marriage visas in order to protect women from arranged marriages, at the expense of some couples' rights to a private and family life, was "necessary in a democratic society".¹¹⁷ The potential for groups within the community to either be excluded from consideration in determining the best understanding of what is required in a democratic society, or else be misunderstood or misrepresented in such discussions, is plain. Similarly, questions are raised regarding how a judge can value aspects of a case in this way if they are not aware of them. We see the importance of those who bear the impact of judgments, or are subject to judgments, not only being able to share the tools of social interpretation, but to be understood by those, and those institutions, making such decisions. Thus, in addition to the concerns raised in Chapter Five regarding the notion of peers and what an awareness of the potential for epistemic injustice has for our

¹¹⁴ See Chapter Five, text to n 59.

¹¹⁵ Miranda Fricker, *Epistemic Injustice Power & Ethics of Knowing* (OUP 2007) 6, and Chapter Five, text to n 61.

¹¹⁶ See e.g. Chapter Three, text to n 64.

¹¹⁷ *Quila* (n 36) [45] and Chapter Three, text to n 136.

assessment of others in our community practices, in understanding the collective and social nature of the concepts over which disagreement in the court is apparent, and often far reaching, we need to be aware of the wider social context in which such decisions are made. In simply stating that 'we' are right and 'they' are wrong, we posit an idealistic and simplistic account of how such concepts are developed.

5. The move to clarity

As we move to the close of this enquiry into the utility of ED and disagreement generally in relation to JDM, this chapter has served two purposes. Firstly, it has been my intention to strengthen and refine my call for clarity regarding our understanding and use of disagreement, by endeavouring to ensure that we are not confusing the notion itself with the context in which we find it. This has been done by suggesting that we need to acknowledge the difference, and indeed relationship, between disagreement and decision making, as well as raising awareness that the theories and views of truth we hold can influence our understanding of what disagreement is. Such extrication adds to the clarity achieved in Section B of the thesis regarding the entanglement of genuine disagreement with ED cases of interest. It has been my hope throughout this thesis that in highlighting such imprecision in our treatment of disagreement we can begin to take the notion itself seriously, rather than continue to confuse it with the instances in which we find it. The second purpose of this chapter has been to more clearly articulate and defend a wider understanding of genuine disagreement than that which is typically found in ED. Here I have argued that genuine disagreement can be had over the concepts at play in our discussions about and in law. Furthermore, in presenting a view of the way in which we create and share such concepts, I have raised an important question regarding consequent doubts to be had over some of the disagreements evident in the judicial decisions presented in this thesis. That is, in reflecting

on Chapter Five's discussion of epistemic injustices along with the composition of the court in which such decisions are made, significant questions are left unanswered regarding the wider social context in which the court sits, and, simply put, who the 'we' is that creates and shares the concepts at play.

As Dworkin notes with regard to the scale, complexity and reach of disagreement in law:

We must explain the scope and intractability of the disagreements we have and our judges have about what the law is... we must explain it by pointing to the very elaborate substructure of any interpretive approach, hidden typically from the interpreter, but so dense and so ramified into a thousand other values that the opportunity, if we might put it that way, for disagreement is endless. The attempt to recapture the nodal points of that disagreement I think is a great project for legal philosophy and legal history.¹¹⁸

Dworkin's was an enquiry into disagreement in law in the belief that it is of the utmost import to our understanding of the way that judges, and therefore law, operates in society. Whilst the motivation for the present project was borne out of a similar belief that understanding disagreement in law may lead to important insights for our understanding of such social structures, it has been offered with a more modest view that one should first take a holistic approach to disagreement itself. My project has therefore endeavoured to begin a clarification of the mistakes, inconsistencies and omissions in the current terrain of enquiry into disagreement in order that we might be able to hone in on the notion itself. In advocating for an intersection of ED with legal practice it is my view that we are able to understand more

¹¹⁸ Dworkin, (2009) (n 54) 1 hour 1 minute.

clearly how we put theory to use and how it is borne out in our understanding of disagreement in practice, so that we might proceed to Dworkin's grand ambition for legal philosophy with a clearer understanding of our central term.



CHAPTER EIGHT

Conclusion



SECTION C

TOWARDS A PHILOSOPHY FOR
JUDICIAL DECISION MAKING

“For we take an interest in law not only because we use it for our own purposes, selfish or noble, but because law is our most structured and revealing social institution.

*If we understand the nature of our legal argument better,
we know better what kind of people we are.”*

Ronald Dworkin¹

We come now to the end of this research enquiry; an enquiry which has had at its heart the ambition to develop our understanding of, and approach to, disagreement in JDM. To this end, the thesis sought to determine how the present philosophical and jurisprudential literature concerning disagreement could further our understanding of this far-reaching social and linguistic phenomenon. Yet in exploring the ED philosophy and in drawing on legal theory (in particular on the insights offered by Ronald Dworkin), it quickly became plain that the present literature is unfit for such a purpose. Instead, through the course of the preceding seven chapters, we saw that there are certain deficits in the literature that serve not only to undermine the insights that can be gleaned for JDM (the particular test site for this enquiry), but that, more fundamentally, demonstrate a mistreatment of the notion of disagreement itself. In this respect, a significant finding for this research enquiry has been the identification of a gap that is faced in both philosophy and legal theory in the treatment of disagreement. Yet this has not been merely a damning tale. Through my analysis I have not only highlighted certain deficiencies in the present literature, but have also begun to map out important clarifications and insights that can be brought together to fill the gap and articulate what a theory for disagreement in JDM might look like. In this concluding chapter then, it is not my intention to offer a restatement of the nuances of critique presented during the course of the thesis narrative. Instead, I seek to bring together the strands of the thesis, reinforcing what I

¹ Ronald Dworkin, *Law's Empire* (Hart Publishing 1998) 11.

see to be the main insights my analysis has delivered – for ED, for JDM, and for wider legal theory. In so doing, I not only spotlight the conclusions to be drawn from the thesis, but offer some thoughts on where this research can lead us.

For ED then, through the analysis of both the ED literature and the notion of disagreement I identified two significant problems. First, I established that ED’s potential for illuminating our understanding of disagreement is stifled from the outset because of the narrow understanding of peers deployed in the literature. We saw that peers are dealt with in a number of ways, with some theorists suggesting that peers needed to be equals,² where others suggest they need to be *roughly* equals,³ and whilst some see peers as merely an idealisation for philosophical reflection,⁴ others see peer disagreements to be *the* cases of interest.⁵ In all such cases the construction of epistemic peers was simply too narrow, undermining any potential for extension to real-world instances of disagreement. Indeed, in using the UKSC Justices as a test case for application we saw that, even in such an elite forum, equality as expressed in ED works was unattainable. Second, I argued that ED philosophy presents an impaired, and at times absent, treatment of the notion of disagreement. We saw, through the articulation of illusory and genuine disagreement employed in ED (with the latter being instances of interest), that when disagreement *is* attended to in the literature, unnecessary restrictions are put in place which unduly limit the disagreements that can be deemed genuine. Through the analysis of the disagreements presented, we further saw that the *distinction* between illusory and genuine disagreement very quickly fails due to the contrived demarcation in place. These problems meant that ED says little about *disagreement* at all, focusing instead on limited *instances* of disagreement which, as we have seen, do not

² See Chapter Five, text to n 16.

³ *ibid*, text to n 93.

⁴ *ibid*, text to n 96.

⁵ *ibid*, text to n 90.

extend to the instances of disagreements encountered in the judgments examined in the thesis – consolidating the undermining of ED’s applicability to real-world disagreements.

Going beyond the identification of the two flaws in the literature, I further explained the unifying reason for their construction. Namely that the ED literature uses disagreement merely as a tool to provide insight into rationality – a motivation which has misleadingly informed both what epistemic peers and disagreement are understood to be in the literature. For peers, we saw that the scope of peers *needs* to be limited; otherwise it would not be possible to identify and work with the underlying motivation of determining the rational response to disagreement. If those party to the disagreement had relevant, discernible differences then these would need to be accounted for and would not enable reflection on the rational response to the disagreement itself. We saw too that the boundaries placed in limiting the scope of genuine disagreement were also necessary to ED’s ambitions, so that focus could be placed on rational reactions to disagreement. So although theorists contextualise their discussions with talk of disagreement in general terms, they only investigate overly-specific instances of disagreement (namely acknowledged-peer disagreements) due to the methodological remit of the ED enquiry itself. In relation to the ED literature then, this thesis stands as a call for more serious reflection on the literature’s subject matter. Indeed, this is so both for the notion of disagreement and for rationality, because in addition to the consistent call in the thesis for disagreement to be more generously understood, we have seen an underlying doubt emerge as to what such a narrow, contrived analytical project can really say even of rationality.

In this respect, it is worth reiterating here that the thesis has served to develop the ED enquiry through an application to JDM. That is, ED theorists intend for ED to apply to real-life instances of disagreement.⁶ In exploring UKSC judgments, which provide documented

⁶ See Chapter Four, Section 3.

evidence of the disagreements and reasoning behind them, I have endeavoured to undertake such an application – offering a clear articulation of the limitations encountered. We have seen in particular that much work is now focussed on the answers to the ED question, with new work focussing primarily on the defence of conciliatory or steadfast views. The ED question itself is often taken for granted in the literature. In relation to the development of the ED literature then, at minimum I suggest that the descriptor employed needs amending in order to avoid the mistaken suggestion that instances of disagreement lying outside ED's scope are illusory. As a grander ambition however, this thesis urges ED theorists to reflect on and reappraise the parameters of their research question, the clarity with which the subject of interest is articulated, and the notion of disagreement's place in ED discourse.

In identifying that disagreement has been misappropriated for ED's own purposes, this intervention is not limited to the ED terrain. Through the examination of JDM and legal theory we saw that whilst the ED motivation to explore rational reactions to disagreement resulted in the conflation of disagreement with the creation 'ED', this was in fact indicative of a much wider approach to disagreement in the literature. Thus we saw in Chapter Seven a similar confusion regarding disagreement and decision making, with instances in both the ED literature and jurisprudence in which disagreement was being confused *with* decision making. That is, the reasoning process undertaken in making a decision was not treated as distinct from disagreement, leading to an entanglement of our perceptions of disagreement with what may well be simply processes of sound decision making.⁷ And the confusion did not end there. An underlying occupation with truth was also discerned as a recurring factor in the presentation of disagreement in both ED and the legal theory. In ED we saw that the reactions to disagreement called for, in particular those seen as steadfast, were motivated by a desire to ascertain truth and/or a right answer regarding the proposition over which the

⁷ See Chapter Seven, Section 2.

disagreement was to be had.⁸ We saw it too in Dworkin's attention to our understanding of disagreement over and through law. Indeed, in his enquiry into conceptual disagreement he notes: "I have argued... that interpretive judgements can be true... Truth has been my subject all along".⁹ I have not suggested that truth is to be ignored in an enquiry into disagreement (either broadly, or in relation to JDM). Instead, I have made the case that any such focus should be acknowledged (as Dworkin eventually does), and clearly demarcated from the understanding of disagreement presented (which Dworkin does not do). Above all, it has been my caution that if we do not treat disagreement as distinct from our wider ambitions (be they enquiries into rationality, investigations into sound decision making, or a desire to ascertain truth), we risk their mistakenly, and detrimentally, informing our understanding of the scope of, and possibility for, genuine disagreement.¹⁰

This research has delivered on a purposefully narrow research question – providing an examination of the ED literature and the insights it offers for our understanding of the disagreements evident in judgments of the UKSC, and indeed the insights that such disagreements offer ED. As should now be plain from the presentation of my findings, through this focussed frame the insights gleaned have been far from narrow. We have found the ED question to be flawed, contriving a distorted account of disagreement, and it has therefore not been possible to simply extend ED's application to *disagreement in law* because we have seen that we are in fact looking at different things. Yet although direct applicability to JDM has been limited, through my analysis we have also begun to articulate what an account of or theory for JDM might look like in relation to disagreement, together with the directions in which research into disagreement and JDM should proceed. Firstly, I have argued for a wider understanding of genuine disagreement. Through the examination of cases and legal theory

⁸ See e.g. Chapter Six, text to n 95.

⁹ Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press of HUP 2011) 172.

¹⁰ As per Chapter Seven's enquiry (see Sections 3 and 4).

it was clear that the disagreements that take place are more dynamic than that suggested in ED. We saw too that they do not merely amount to legal and/or public policy decisions as suggested by Reynold. Not only are they sometimes about law, and what law requires, they also pertain to multifaceted processes of practical decision making. Indeed it is for such a reason that ED cannot be directly applicable to instances of disagreement in JDM because it does not allow for such disagreements to be considered genuine. Although we saw that disagreement needs to concern a proposition held jointly in sight, I suggested that, contrary to the ED construct, such propositions need not be truth-apt and that different conceptions of concepts can be entertained in a proposition whilst still leaving the disagreement genuine. In drawing on the works of Ronald Dworkin, we have available to us a wide range of concept-types. Understanding how we share and use these different concepts enables us to see that at least some of our genuine disagreements concern the meaning and employment of the concepts themselves. Not only does this approach allow for a more generous understanding of genuine disagreement, it makes better sense of how we interact with one another; enabling us to treat disagreements over important matters, pertaining to personal lives, politics and legality, seriously. In exploring conceptual disagreement, we also saw that an important and recurring theme was the need to further explore the ways in which we create and use the concepts over which we disagree, if we are to fully understand the scope and power of JDM.

In reflecting on the way in which we create, share, and use concepts, we further saw how this can impact not only our understanding of disagreements to be had in law, but our confidence in legal processes.¹¹ We saw too that the way in which we perceive others, in particular the extent to which we see them as knowledge-bearers and the trust we place in those we regard as epistemic peers or superiors, can influence our knowledge acquisition. In

¹¹ See e.g. Chapter Seven, text to n 117.

taking this thesis' ambitions forward then, the role of testimony (in regard to, for example, legal advocates, witnesses, and expert witnesses) is a worthy pursuit. Such lines of enquiry bear directly on our understanding of disagreement in JDM, as they go to the heart of the way in which relevant evidence is discerned.

In addition, through the analysis of JDM we saw that an account of disagreement would need to go beyond reactions which focus on belief-revision due to the realities of the decisions to be made in the court; in particular the need to take action. An exploration of the epistemic and pragmatic justifications evident in the ED literature's account of reactions to disagreement enable us to reflect on the deliberative nature of decision making in the courts, and the prominent role that practical reasoning plays. We saw that although the motivation to avoid scepticism in ED was influenced by pragmatic rather than epistemic reasons, the decisions in the court can be seen to take place at the intersection of such justifications; with Justices marrying the quest for truth (the epistemic) with a need for results (the pragmatic). In a similar way, such influences on decision making in the court mean that a theory which focuses solely on belief-revision is ill-fitting in a forum which requires determinate and timely answers, and indeed of which answers are demanded. In this respect, not only do I suggest that ED take seriously the difference between what one believes and what one accepts, but that a focus on what one accepts could shed meaningful light on the approaches taken to disagreement in JDM; better reflecting the processes we are capable of engaging in, and the requirements of the legal process when disagreement is encountered.

In taking forward an account of disagreement in JDM, a prominent gap to be filled concerns our understanding of the role agreement plays. Much of the focus in the literature is, understandably, placed on instances of disagreement. However, rarely is it acknowledged that in order for one to encounter or engage in a disagreement, a bedrock of agreement is

required.¹² In exploring the disagreements in the UKSC we saw a number of instances in which concurrent opinions were presented. That is, the Justices assented to the overall decision made, but offered a different opinion to that of the lead judgment. On occasion this was simply the result of offering additional support and justificatory force to the decision made.¹³ However, on other occasions, concurrent opinions are advanced due to a difference in views regarding the means by which the overall outcome is to be reached.¹⁴ I suggest that it is important then to explore our understanding of agreement in relation to an examination of JDM, because agreement as to the outcome can mask disagreement as to the means. This not only will enable a thorough exposition of disagreement in JDM, but acknowledges the important role that the court's decisions play as precedent for future decisions. That is, in this frame we can assess the significance of encountering disagreement in the construction of legal authority.

Finally, and in line with the sentiment of reflecting on agreement in our exploration of disagreement, this thesis stands as an argument for taking a holistic approach to disagreement – one which grounds our understanding of the concept in the breadth of our social practices as well as in nuanced, specialised settings. As part of this approach we have also seen that it is important not to let the questions being asked of disagreement to be confused with or inform our understanding of the notion itself, to avoid disagreement being misconstrued for the purposes of a given investigation. I have endeavoured to bridge a gap between the work done in philosophy and jurisprudence, marrying the insights offered from

¹² We saw, e.g., in Chapter Four that Feldman acknowledged this. See Chapter Four, text to n 89.

¹³ For example, we saw that Lady Hale in *Quila* offered a concurrent opinion, not because she disagreed with the lead judgment, but instead in offer of support of it “because we are not all of the same mind.” *R (Quila & Anor) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621 [60].

¹⁴ For example, in *Adams* we saw that although one test for miscarriage of justice was eventually agreed upon, each Justice noted a preferred, and different, test, raising questions regarding the extent to which decisions can be considered agreement when different reasons, rationales and weightings are advanced. See Chapter Three, text to n 104.

Careful analytical reflection and real-world application. In this respect, my ambition has been to make a unique contribution both to the ED literature and jurisprudential enquiry into JDM. I have called for a more careful reflection on the ED approach to, and understanding of, disagreement, and in applying the ED literature to JDM have also shed light on the nature of disagreement in JDM. Not only will such reflective analysis enable us to better understand the decisions of the highest court in the country, it has the potential to aid in the advancement and enhancement of the decision making process.

It has been my hope that this thesis serves as a catalyst for more incisive and fruitful interdisciplinary work on disagreement. It has called for revisionary research in relation to present works on disagreement, in addition to indicating possible new directions for enquiry. In light of the deficits and need for further reflection identified, and in drawing this thesis to a close, it could be said that rather than the conclusion of this research project, the foundations have merely been laid for the beginning. That is, in arguing that we should re-appraise disagreement, both in philosophy and jurisprudence, this project has delivered the groundwork for what I believe to be the potential for a new body of literature which seeks to explore and understand the role that disagreement does and can play in the courts. I look therefore to the future with the ambition of setting a different course for the nature of academic scholarship on disagreement, in the belief that much can be offered from research which first seeks to understand better the notion itself. In short, the thesis sits at the very start of this endeavour to take disagreement in JDM, and in law, seriously.

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