

Disagreement and Adjudication

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William Baude and Ryan Doerfler, [Arguing with Friends](#), 117 *Mich. L. Rev.* 319 (2018).

In the mid-aughts, philosophers began to seriously consider the following question: how should you revise a belief, if at all, upon learning that you disagree with someone you trust? This has come to be known as the problem of peer disagreement. It's a vexing problem. In the face of disagreement, our inclination is to remain confident. Yet, it is difficult to say why we should: if you think your friend is equally smart, and she reviewed the same information, what reason do you have to think that, in this particular case, you're right and she's wrong? On the other hand, if we should become much less confident, this seems, as philosopher [Adam Elga](#) puts it, rather spineless. And, while disagreement may prompt you to recheck your math on a split bill, it's unlikely you'd rethink the morality of abortion. What, if anything, about the cases licenses distinct treatment?

Philosophers have proposed various responses. But, until recently, a search for "peer disagreement" in the legal literature would have yielded few results. Thankfully, a slew of articles has remedied this. [Alex Stein](#) writes on tribunals whose members come to the same conclusion, but for different reasons, and, separately, about post-conviction relief in light of conflicting expert testimony. [Youngjae Lee](#) writes about disagreement and the standard of proof in criminal trials. And, although they do not explicitly engage with the philosophical literature, [Eric Posner](#) and [Adrian Vermeule](#) discuss how judges on multimember courts ought to take into account the votes of their colleagues. [William Baude](#) and [Ryan Doerfler](#)'s article, in part a response to Posner and Vermeule, is required reading for anyone interested in disagreement and adjudication. Baude and Doerfler discuss what judges should do when they find out that other judges, or academics, disagree with them about a case. They land upon a moderate conciliationist position: become less confident when the disagreeing party is a "methodological friend," and not otherwise.

This is in line with what some philosophers propose. The thought is something like this: if you think, before hearing some case, that a certain colleague on the bench would be as likely as you to get the right answer, then, upon disagreeing with her, it would be irrational (in the strict, philosophical sense) to think that you are right and she is wrong. After all, you share the same interpretative method and you heard the same legal arguments. This is why you thought you'd be equally likely to come to the right answer. When you disagree, it's surprising. Thus, you ought to count the disagreement with the methodological friend as evidence, but not necessarily decisive evidence, that you've erred.

Baude and Doerfler's view is moderate because it treats the disagreement as evidence that you've erred only when the disagreement is with a methodological friend. A disagreement with a non-friend provides no new evidence. Of course your originalist friend disagrees with you if you think [originalism is bunk](#). As Baude and Doerfler put it while discussing the deep disagreement between Justices Scalia and Breyer, "...judges have had ample opportunity to rationally update themselves on the basis of those fundamental disputes. Hearing, one more time, that their colleagues have a different approach tells them nothing new." (P. 12.)

Baude and Doerfler do a service to the discipline by contributing to a small but seemingly growing literature that attempts to draw applicable lessons from abstract work of contemporary analytic philosophers.

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