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AMBIGUOUSLY STUNG:

Dworkin's Semantic Sting Reconfigured

Kenneth Einar Himma*

In *Law's Empire*,[1] Ronald Dworkin distinguishes two kinds of disagreement legal practitioners can have about law. Lawyers can agree on the criteria a rule must satisfy to be legally valid but disagree on whether it satisfies those criteria. For example, two lawyers might agree that a rule is valid if enacted by the state legislature but disagree on whether it was, in fact, enacted by the state legislature. Such disagreement is empirical in nature and poses no difficulties for positivism. There is, however, a second kind of disagreement that Dworkin believes is inconsistent with positivism. Lawyers can agree on the facts about a rule's creation but disagree on whether those facts are sufficient to endow the rule with legal authority. This sort of disagreement is theoretical in nature as it concerns the grounds of law, which, according to positivism, are exhausted by the rule of recognition.

Theoretical disagreement about the grounds of law, on Dworkin's view, is inconsistent with positivism because it explains the application conditions for the concept of law in terms of shared criteria for creating, changing, and adjudicating law. Because, according to Dworkin, lawyers in legal systems like that of the United States frequently disagree about the grounds of law, it follows that the application conditions for the concept of law cannot be exhausted by shared criteria. The semantic sting, then, implies there is more to the concept of law than can be explained by shared criteria contained in a rule of recognition.

In this essay, I argue that Dworkin's formulation of the semantic sting in *Law's Empire* conflates two distinct claims: (1) the application conditions for the concept of law are exhausted by shared criteria; and (2) the grounds of law are exhausted by shared criteria. While there is nothing in positivism that entails a commitment to (1), positivism is distinguished from other theories of law by its commitment to (2). Nevertheless, I argue that Dworkin

*Thanks to Brian Bix for his comments on an earlier draft of this essay; though I suspect he will continue to find my analysis less than fully persuasive, the paper is much better for his comments. Special thanks to Jules Coleman who continues to amaze me with his kindness, generosity, and patience. I cannot overstate the extent of his influence on my views or the debt that I owe him.

1. Ronald Dworkin, LAW'S EMPIRE (1986). Hereinafter referred to as *LE*.

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is mistaken in thinking that (2) is inconsistent with what he calls pivotal disagreement. Further, I show that, contra Dworkin, cases like Riggs v. Palmer do not involve pivotal disagreement about the grounds of law.

I. SOCIAL RULES AND THE CONVENTIONALITY THESIS

At the core of all forms of positivism is the thesis that legal validity is ultimately a function of social convention (the Conventionality Thesis). Exclusive and inclusive positivists differ on the details of this thesis, but the key idea is this: The criteria that determine whether a norm is legally valid are authoritative in virtue of a social convention.[2] As Scott Shapiro describes the view:

> [O]ne of the central theses of legal positivism is the claim that the existence of law ultimately depends on social convention. The law cannot exist independently of coordinated human agency; at some fundamental level, all law is positive law. Modern positivists have elaborated on this core idea by maintaining that the existence of the law depends essentially on the existence of a conventional "rule of recognition.". . . Legal rules are those rules which possess the mark of authority designated by the customary rule of recognition practiced by the courts.[3]

If legal standards are distinguished from nonlegal standards in that only the former possess the mark designated by the rule of recognition, then the criteria of validity are exhausted by the rule of recognition in the following sense: A proposition *P* is legally valid if and only if it satisfies the criteria in the conventional rule of recognition.

Dworkin has long believed that the Conventionality Thesis is inconsistent with certain kinds of disagreements about law, but his earliest criticism of it was directed at Hart's practice theory of social rules. According to this theory, a social rule is constituted by the conforming behavior of people who also accept the rule as a ground for criticizing deviations: "[T]he social rules of a group [are] constituted by a form of social practice comprising both patterns of conduct regularly followed by most members of the group and a distinctive normative attitude to such patterns of conduct which I have called 'acceptance.'"[4]

Hart's practice theory of social rules, then, attempts to give rigorous

2. It is important to note here that "Conventionality Thesis" is often used to refer to the claim that the conventional criteria of validity create obligations on the part of officials to conform to those criteria. Positivists disagree on this stronger thesis: Whereas Jules Coleman accepts it, Joseph Raz rejects it. I will be using "Conventionality Thesis" to refer only to the weaker claim that the criteria of validity are authoritative in virtue of a social convention. Nearly all positivists accept this weaker thesis.

3. Scott J. Shapiro, *The Difference that Rules Make*, *in* ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY 56 (Brian Bix, ed., 1998).

4. H.L.A. Hart, THE CONCEPT OF LAW 255 (2nd ed., 1994). Hereinafter referred to as *CL*.

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philosophical content to the notion of a convention. While Hart rejects the practice theory as an explanation of morality, he believes there is no other way to explain the conventional nature of law and hence characterizes the rule of recognition as a social rule: "[T]he [practice theory is] a faithful account of . . . certain important legal rules including the rule of recognition, which is in effect a form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts" (*CL* 256). Unlike an ordinary legal rule, which can exist before it is practiced, a rule of recognition cannot exist unless officials accept its requirements and converge in their behavior on satisfying those requirements.

Early in his dispute with positivism, Dworkin argued that this aspect of Hart's theory is inconsistent with disagreement about the content of the rule of recognition:

> Hart's qualification . . . that the rule of recognition may be uncertain at particular points . . . undermines [his theory]. . . . If judges are in fact divided about what they must do if a subsequent Parliament tries to repeal an entrenched rule, then it is not uncertain whether any social rule [of recognition] governs that decision; on the contrary, it is certain that none does.[5]

On this line of reasoning, the requirements of a social rule cannot be uncertain because a social rule is constituted by acceptance and conforming behavior by people in the relevant group: "two people whose rules differ . . . cannot be appealing to the same social rule, and at least one of them cannot be appealing to any social rule at all" (*TRS* 55).

To understand what was bothering Dworkin, it is helpful to take a closer look at Hart's account of a social rule. Hart explains the existence of a social rule in terms of a cognitive element and a behavioral element. The behavioral element consists in a convergent pattern of behavior; the behavior of people in the group tends to converge on conformity to the requirements of the rule. The cognitive element consists in *acceptance* of the rule as an appropriate standard of criticism; people in the group adopt a critical reflective attitude (i.e., the internal point of view) towards the rule and criticize deviations from its requirements.

These two elements find expression in Hart's account of the rule of recognition in the following way. The behavioral element that gives rise to the rule of recognition is convergent behavior on the part of the officials in making, changing, and adjudicating law. The cognitive element consists in the adoption by officials of the internal point of view towards this behavior. Hart, of course, does not require that citizens take the internal point of view towards the rule of recognition: "the reality of the situation is that a great proportion of ordinary citizens—perhaps a majority—have no general con-

5. Ronald Dworkin, TAKING RIGHTS SERIOUSLY 61-62 (1978). Hereinafter referred to as *TRS*.

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ception of the legal structure or its criteria of validity" (*CL* 111). All that is required of citizens is that they generally obey the primary rules that are legally valid according to the rule of recognition:[6]

> The ordinary citizen manifests his acceptance largely by acquiescence in the results of these official operations. He keeps the law which is made and identified in this way, and also makes claims and exercises powers conferred by it. But he may know little of its origin or its makers: some may know nothing more about the laws than that they are "the law." (*CL* 61)

Disagreement among citizens about the content of the rule of recognition presents no problem, then, because Hart's theory does not assume they accept or understand the rule. All Hart's theory requires of citizens is general obedience to rules valid under the rule of recognition—and this does not require knowledge of the rule of recognition's content. For as long as there is someone who can reliably identify legally valid standards, the citizen can obey rules validated by the rule of recognition without understanding its content.

Disagreement among competent practitioners, however, is another story. Insofar as the internal point of view involves a critical reflective attitude towards a rule, it seems to entail recognition of its contents. Since officials take the internal point of view towards the *same* rule, it seems to follow that they share an understanding of the rule's contents. But if the rule of recognition exhausts the criteria for legal validity, it is not clear how there could be disagreement among officials—or among competent practitioners (who are presumably competent in virtue of sharing in the officials' understanding of the rule)—about those criteria.

Suppose, for example, that the officials of some legal system accept (in the Hartian sense) the following rule of recognition: *P* is a true proposition of law if and only if it satisfies C_1 and C_2 and . . . and C_n. Then it follows that the criteria expressed by C_1 and C_2 and . . . and C_n exhaust the grounds of legal validity; if a standard *S* is legally authoritative in that society, *S* is authoritative because and only because it satisfies C_1 and C_2 and . . . and C_n. Further, it follows that officials adopt a critical reflective attitude towards the same rule, which presupposes that each understands the rule's contents. The problem is that these two implications seem to preclude theoretical disagreement about the grounds of law. If the grounds of law are exhausted by C_1 and C_2 and . . . and C_n, and every official understands the content of C_1 and C_2 and . . . and C_n, it is not clear how there could be theoretical disagreement among the officials. Any disagreement about the grounds of law will be a disagreement about one or more of the criteria; because they

6. Nevertheless, obedience is more than just convergent behavior; it presupposes that such behavior is (at least sometimes) *guided* by the rule. Accordingly, Hart's characterization of the rule of recognition as a social rule has *two* cognitive elements: (1) the officials of a system take the internal point of view towards the rule of recognition; and (2) most of the population generally obey laws validated by that rule.

share an understanding of the contents of the criteria, there does not seem to be room for any disagreement about those criteria.

It is, thus, the cognitive element of Hart's practice theory of social rules that gives rise to the problem of accounting for certain kinds of disagreement.[7] Of course, the Conventionality Thesis does not imply Hart's account of social rules; Hart's account is just one way of fleshing out that thesis.[8] However, every plausible form of conventionalism implies a cognitive element because a convention can never be established by convergent behavior alone; the existence of a convention requires, at the very least, acquiescence—and this implies some awareness of its contents. Insofar as the Conventionality Thesis requires a shared understanding of the contents of the criteria of validity, disagreement among participants about the grounds of law presents a puzzle that requires a theoretical explanation—regardless of how the details are fleshed out.

Jules Coleman provides such an explanation. As Coleman points out, if the rule of recognition is a social rule, then Hart's view implies that there must be agreement among officials about what standards constitute the rule of recognition, but it does not imply that there cannot be disagreement as to what those standards require in any given instance:

> The controversy among judges does not arise over the content of the rule of recognition itself. It arises over which norms satisfy the standards set forth in it. The divergence in behavior among officials as exemplified in their identifying different standards as legal ones does not establish their failure to accept the same rule of recognition. On the contrary, judges accept the same truth conditions for propositions of law. . . . They disagree about which propositions satisfy those conditions.[9]

Coleman, then, distinguishes two kinds of disagreement practitioners can have about the rule of recognition: (1) disagreement about what standards constitute the rule of recognition; and (2) disagreement about what propositions satisfy those standards. On Coleman's view, Hart's analysis of social rules implies only that (1) is impossible.[10]

Under the U.S. rule of recognition, for example, a federal statute is

7. Indeed, as is readily evident, convergent behavior on the part of officials cannot, without more, preclude disagreements about the content of that behavior. Two people whose outward behavior appears identical can obviously disagree about the content of and motivations for that behavior.

8. One could, for example, flesh it out in contractarian terms. On such an account, an explicit or implied agreement on the authority of some set of propositions expressing standards for making, changing, and adjudicating law would be sufficient to establish a conventional rule of recognition.

9. Jules Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139, 156 (1982). Hereinafter referred to as *NAPP*.

10. Scott Shapiro characterizes Coleman's distinction here as between application and content disputes:

> Some courts might, for example, argue that the rule of recognition validates custom, while others might deny it. Let us call disagreements of this sort "content disputes." By

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legally valid if and only if it has been enacted in accordance with the procedural requirements described in the body of the Constitution and is consistent with the first fourteen amendments.[11] Since, on Hart's view, the U.S. rule of recognition is a social rule, U.S. officials must agree on the procedures the federal government must follow in enacting law, the set of sentences constituting the first fourteen amendments, and the requirement that federal enactments be consistent with those amendments.

But Hart's view of social rules does not imply there cannot be any disagreement about whether a given enactment is consistent with the first fourteen amendments. For example, there is considerable disagreement about whether compelling a defendant to undergo a psychiatric examination in order to increase her sentence is consistent with the Fifth Amendment right against self-incrimination. On Coleman's view, there is nothing in Hart's analysis of social rules that precludes such disagreements about whether a practice is consistent with the Fifth Amendment. Thus some forms of theoretical disagreement about the grounds of law are consistent with Hart's practice theory of rules.

II. PIVOTAL AND BORDERLINE DISAGREEMENT

Dworkin concedes in response to Coleman that positivism is consistent with theoretical disagreement about borderline cases: "people do sometimes speak at cross-purposes in the way the borderline defense describes" (*LE* 41). But Dworkin identifies a second kind of theoretical disagreement:

> You and I can sensibly discuss how many books I have on my shelf, for example, only if we both agree, at least roughly, about what a book is. We can disagree over borderline cases: I may call something a slim book that you would call a pamphlet. But we cannot disagree over what I called *pivotal* cases. If you do not count my copy of *Moby-Dick* as a book because in your view novels are not books, any disagreement is bound to be senseless (*LE* 45; emphasis added).

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contrast, certain disagreements presuppose consensus about the content of a rule, but involve disputes about its implementation. Courts might agree that custom is binding law, but disagree about whether some behavior should count as the custom of the community. Let us call these types of disagreements "application disputes."

Scott J. Shapiro, *On Hart's Way Out*, 4 LEGAL THEORY, 4, 484 (1998). The problem is that these two categories are not mutually exclusive. Some disputes about application are disputes about content. For example, you and I might disagree about how the Eighth Amendment applies with respect to a requirement that someone convicted of shoplifting wear a T-shirt that says "Convicted Thief" because we disagree on the content of the notion of unusualness. Of course, we might also agree on the content of unusualness but disagree on whether it applies to such a punishment because we disagree on whether it is unusual.

11. I am assuming that the Constitution states norms that make up part of the rule of recognition. The relation between written constitutions and the rule of recognition, however, may not be as straightforward as this. In any case, nothing turns on this characterization of the relationship between the two.

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On Dworkin's view, then, Coleman's argument provides only a partial defense of Hart's views. For while Dworkin concedes that the practice theory of rules can be reconciled with borderline disagreement, he denies that it can be reconciled with the frequent occurrence in appellate cases of "pivotal" disagreement about the grounds of law.

Dworkin does not offer a theoretical account of the two kinds of disagreement—a curious omission given that so much turns on it—but we can use Hart's own views about language to make sense of this important distinction. As is well known, Hart argues that the general terms in which laws must be framed have an open texture: "[w]hichever device, precedent or legislation, is chosen for the communication of standards of behavior, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*" (*CL* 127–128). On this view, there is a range of cases over which the applicability or nonapplicability of a general term is uncontroversial; these cases comprise the *extensional core* of the term's meaning. For example, an automobile is clearly a vehicle; an orange is clearly not. But there is a range of cases over which the applicability or nonapplicability of a general term is unclear: It is not readily evident, for example, whether a motorcycle is a vehicle. These borderline cases comprise a "penumbra of uncertainty" with respect to the applicability of a general term; it is this penumbra of uncertainty that forms the term's open texture.

Disagreement between competent speakers about the application of a general term in borderline cases is unproblematic and indeed inevitable. Two speakers with a competent grasp of the general term "book" can disagree about whether a twenty-page story bound in hard cloth is a book without calling into question the competence of either. Since general terms are vague, applicability questions naturally arise at the borderline among competent speakers.

However, disagreement between competent speakers about the application of a general term to a core case is more difficult to explain. Competence with respect to a general term does not require being able to articulate the term's meaning without pointing to examples, but it does require understanding the term's extensional core. Ordinarily, if someone claims that the hardback copy of *Moby-Dick* on my bookshelf is not a book, we are generally warranted in concluding that she does not grasp the meaning of the word "book." Of course, a competent speaker might make such a claim as a way of being ironic or of saying something about the quality of *Moby-Dick*.[12] But in the absence of such intentions, it is reasonable to conclude that anyone who doubts my copy of *Moby-Dick* is a book simply does not grasp the meaning of the term "book."[13]

12. For a discussion of this point, *see* Timothy A.O. Endicott, *Herbert Hart and the Semantic Sting*, 4 LEGAL THEORY 3, 283-300 (1998).

13. One interesting issue in this connection concerns the relationship between core meanings and paradigms. Initially, one might be tempted to equate the two in the following way: for

For this reason, disagreement among two speakers on ostensibly core meanings of a term seems difficult to reconcile with the idea that they *share* the same criteria for correct application of the term. If two speakers disagree on whether my copy of *Moby-Dick* is a book, it seems clear that they are employing different criteria for applying the term "book." But insofar as they employ different application criteria for "book," it seems to follow that each means something different from the other when she uses that term. Thus, while disagreement among competent speakers on borderline issues involving a general term is easily understood, disagreement on core issues is problematic.

As legal norms, like any other kind of norm, are expressed in general terms, there can arise two kinds of issue with respect to the applicability of a law: borderline and core issues. Two competent practitioners can disagree, for example, on the borderline issue of whether a rule prohibiting vehicles from entering a park applies to motorcycles. The rule that incorporates the term "vehicle" imports the penumbra of uncertainty that arises in connection with the application of that term. In contrast, disagreement on core issues seems improbable among competent practitioners because such issues are easily resolved. Any competent practitioner who grasps the content of the rule prohibiting vehicles from entering a park knows, for example, that automobiles are not allowed in the park under that rule. For this reason, core disagreement about legal norms will be comparatively rare.

Core disagreement about the grounds of law will likewise be infrequent among competent practitioners, but it is important to realize that such disagreement is not always inconsistent with the idea that the disputants *share* criteria of legal validity. In Brown v. Board of Education, for example, the Court considered whether race-based segregation in public schools violates the Equal Protection Clause, which prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." Despite a series of cases beginning with Plessy v. Ferguson in 1896, allowing public segregation in a variety of settings, the *Brown* Court held that segregation in public schools violates the Equal Protection Clause:

> Does the segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal,

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all *x*, *x* is a paradigm instance of a term *t* if and only if *x* clearly belongs to the extension of *t*. Paradigms, however, seem to be distinguished as a class in virtue of performing an epistemic function. While core meanings may pick out a large number of objects that clearly have the property expressed by the term, paradigms seem to be limited to those instances of a term that can be used to impart the meaning of the term. For example, there are a large number of shades of red that belong to the extensional core of "red," but considerably fewer shades serve as paradigms. Pure shades of red, like the color of a fire engine, serve well as paradigms because, so to speak, they instantiate unambiguously. Shades of red that have tinges of yellow instantiate ambiguously because they incorporate more than one color and, for this reason, are less likely to impart a clear understanding of the word. For this reason, the class of a term's paradigms seems to form a *proper* subset of the extensional core of the term; in any case, all of a term's paradigms belong to its extensional core.

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> deprive the children of the minority group of equal educational opportunities? We believe that it does. . . . To separate [children in grade and high schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.[14]

The Court concluded, "separate educational facilities are inherently unequal."[15]

The movement from *Plessy* to *Brown* produced a major change in constitutional law by relocating public school segregation from the extensional core of what is permissible under the Equal Protection Clause to the extensional core of what is not. Here it is important to note that the *Plessy* and *Brown* courts agreed on the applicable standard but disagreed on how it applied to school segregation. For example, the *Plessy* Court acknowledged that: "[t]he object of [the Equal Protection Clause] was undoubtedly to enforce the absolute equality of the two races before the law,"[16] but claimed that: "[l]aws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other."[17] The *Brown* Court, of course, accepted the *Plessy* Court's view of the object of the Equal Protection Clause, but rejected its substantive conclusion, arguing that "[s]egregation with the sanction of law . . . has a tendency to [retard] the educational . . . development of negro children."[18] Despite the profound change in constitutional law, then, there was no dispute about the identity of the relevant standard. All parties agreed that the Equal Protection Clause was the applicable constitutional standard and hence *shared* recognition of the Equal Protection Clause as belonging to the criteria of legal validity.[19]

Nevertheless, there are limits on the extent to which competent practitioners can disagree on core issues pertaining to a standard and still be said to share that standard as a criterion of validity.[20] The Fifth Amendment provides that: "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The core meanings are sufficiently flexible that two competent practitioners can share recognition of that standard while disagreeing about whether it prohibits the police from questioning a defen-

14. *Brown*, 347 U.S. 483, 494 (1954).
15. *Brown*, 347 U.S. 483, 495 (1954).
16. Plessy v. Ferguson, 163 U.S. 537, 544 (1896).
17. Plessy v. Ferguson, 163 U.S. 537, 544 (1896).
18. *Brown*, 347 U.S. 483, 494 (1954).
19. Dworkin cites the *Brown* case in LAW'S EMPIRE as an example of the kind of disagreement that is inconsistent with positivism (*LE* 28-29), but it is clear that all parties shared the Equal Protection Clause as the relevant criterion of legal validity. The dispute was over whether public school segregation is consistent with the requirements of this clause.
20. Endicott makes a similar point. Endicott believes that many paradigms are subject to revision, but not all. Some of them have a conceptual flavor: "[i]t seems that no conception of epic poetry could account for other instances of the genre, if it excluded the *Odyssey*." Endicott, *Hart and the Semantic Sting* at 294.

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dant at police headquarters without informing her of her right to remain silent. But two competent practitioners who disagree on whether a defendant can be tortured at trial to induce a confession on the stand cannot be said to share recognition of the Fifth Amendment as a criterion of legal validity. The only plausible characterization of such disagreements is that the two sides disagree about whether the Fifth Amendment is a criterion of validity.[21]

We can thus distinguish two kinds of disagreement about core cases. A disagreement between two competent practitioners about a standard is *benign* if and only if such disagreement is consistent with mutual recognition of the standard as legally authoritative. A disagreement between two competent practitioners is *malignant* if and only if it is not benign. Malignant disagreement will obviously include situations in which one practitioner affirms, while another denies, that a standard is legally authoritative, but it will also include disputes about core meanings that imply disagreement about the legal authority of the relevant standard—such as the second disagreement about the Fifth Amendment in the last paragraph. Dworkin's notion of pivotal disagreement, then, can fairly be defined as follows: A disagreement is *pivotal* if and only if it is a malignant disagreement about a core case.

While Coleman's argument succeeds in reconciling borderline disagreement with Hart's view of the rule of recognition as a social rule, it does not address the issue of *pivotal* disagreement among competent practitioners.[22] But Dworkin never presses the point against Hart's practice theory of social rules presumably because he realizes it is extraneous to positivism's core commitments—and Dworkin is after bigger game. What Dworkin ultimately wants is an argument that strikes at what he takes to be the heart of positivism's theoretical core.

III. THE SEMANTIC STING

A. The Basic Framework

While the semantic sting bears considerable resemblance to Dworkin's earlier criticism of Hart's practice theory of social rules, it takes aim at a

21. All sides (with the exception of critical legal theorists) acknowledge that there are limits on the range of reasonable interpretations of a law. Brian Leiter, for example, argues that legal realism is not committed to the view that the law is *always* radically indeterminate: "the evidential base of cases actually litigated could not support the inference that the law is *globally* indeterminate, for it would omit all those 'easy' cases in which a clear-cut legal rule dictates a result." *See* Brian Leiter, *Legal Realism, in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 267 (Dennis Patterson, ed., 1996). While it would be difficult to provide a plausible account of where those limits fall, disputes about an interpretation of standard *S* that fall clearly outside those limits must be construed as being about whether *S* is an authoritative standard.

22. A more recent argument by Coleman addressing this issue is discussed in Subsection IV.2, *supra*.

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deeper target. Dworkin's semantic sting targets not so much a particular theory of law as a particular theory of meaning (the criterial theory of meaning) that holds: "[w]e follow shared rules . . . in using any word: these rules set out criteria that supply the word's meaning" (*LE* 31). Applied to law, the criterial theory of meaning asserts that: "the very meaning of the word 'law' makes law depend on certain specific criteria, and that any lawyer who rejected or challenged those criteria would be speaking self-contradictory nonsense" (*LE* 31).[23] Dworkin's semantic sting argument in *Law's Empire*, then, purports to refute all theories of law that incorporate the criterial theory of meaning.

On Dworkin's view, these semantic theories of law mistakenly assume that meaningful disagreement is impossible unless "we all accept and follow the same criteria for deciding when our claims are sound, even if we cannot state exactly, as a philosopher might hope to do, what these criteria are" (*LE* 45). Since meaningful disagreement about law indisputably occurs, it follows, on this flawed assumption, that legal practitioners follow the same criteria for deciding when a claim about the law is sound. For this reason, semantic theories of law focus on "digging out shared rules [for applying the concept of law] from a careful study of what lawyers say and do" (*LE* 43).

But Dworkin believes semantic theories of law are fatally flawed. According to his semantic sting argument, semantic theories of law are inconsistent with the existence of pivotal disagreement about the grounds of law. As Dworkin puts it: "If legal argument is mainly or even partly about pivotal cases, then lawyers cannot all be using the same factual criteria for deciding when propositions of law are true and false. Their arguments would be mainly or partly about which criteria they should use" (*LE* 43).

This poses a problem for semantic theories of law, on Dworkin's view, because appellate cases like the notorious Riggs v. Palmer case commonly involve pivotal disagreement. In *Riggs*, Elmer murdered his grandfather Francis to prevent him from changing the terms of his will after he remarried. When Elmer sought his share under the will, Francis's daughters sued to enjoin distribution of the proceeds to Elmer, arguing that a person may not take under the will of his murder victim.

At the time the case was decided, the statute of wills provided that "[n]o

23. Though Dworkin describes the objectionable theory as being about the meaning of the term "law," he also regards it as applying to explications of the concept of law in terms of shared criteria:

> For a long time, philosophers of law packaged their products as definitions of law. . . . When philosophers of language developed more sophisticated theories of meaning, legal philosophers became more wary of definitions and said, instead, that they were describing the "use" of legal concepts, by which they mean, in our vocabulary, the circumstances in which propositions of law are regarded by all competent lawyers as true or as false. This was little more than a change in packaging, I think; in any case I mean to include "use" theories in the group of semantic theories of law, as well as the earlier theories that were more candidly definitional (*LE* 32-33).

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will in writing, *except in the cases hereinafter mentioned*, nor any part thereof, shall be revoked or altered otherwise."[24] By its own terms, then, the statute of wills provided the only grounds on which a court could refuse to enforce the terms of a will. And nowhere did it prohibit a murderer from taking under the victim's will. Since the statute provided the only grounds for refusing to enforce a will and did not expressly prohibit a murderer from taking under the victim's will, the doctrine of legislative supremacy seemed to require the court to give Elmer his share under his grandfather's will. And this was exactly the position Judge Gray took:

> We are bound by the rigid rules of law, which have been established by the legislature. . . . The words of the statute are: "No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked or altered otherwise," etc. Where, therefore, none of the cases mentioned are met by the facts, and the revocation is not in the way described in the section, the will of the testator is unalterable.[25]

On Judge Gray's view, courts are bound to respect unambiguous legislative enactments even when they dictate objectionable results.

Nevertheless, the court refused to allow Elmer to take under the will on the ground that allowing him to do so would be inconsistent with the principle that no person shall profit from her own wrong:

> We need not . . . be much troubled by the general language contained in the laws. . . . [A]ll laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his iniquity, or to acquire property by his own crime.[26]

As Dworkin reads *Riggs*, the court decided the case by giving more weight to a normative principle than to the legal rule with which it conflicted: "the court cited the principle that no man may profit from his own wrong as a background standard against which to read the statute of wills and in this way justified a new interpretation of the statute" (*TRS* 29).

Dworkin believes that Coleman's defense of Hart cannot explain the disagreement in *Riggs* because it was about a pivotal case:

> The various judges who argued about our sample cases did not think they were defending marginal or borderline claims. Their disagreements about legislation and precedent were fundamental; their arguments showed that they disagreed not only about whether Elmer should have his inheritance, but about why any legislative act, even traffic codes and rates of taxation, impose

24. Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188, 192 (1889); emphasis added.
25. *Riggs*, 22 N.E. 188, 191-192.
26. *Riggs*, 22 N.E. 188, 190.

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> the rights and obligations everyone agrees they do. . . . They disagreed about what makes a proposition of law true not just at the margin but in the core as well (*LE* 42–43).

The judges in *Riggs*, on Dworkin's view, differed on the status of some putatively fundamental criterion itself: The majority believed, while the dissent denied, that courts have power to construe an unambiguous legislative enactment to conform to common-law maxims. Thus they disagreed about whether the proposition "courts may construe an unambiguous legislative enactment to conform to common-law maxims" belongs to the criteria of legal validity. The dispute dividing majority and dissent, then, was a pivotal disagreement about the criteria of validity.

Disagreement about pivotal cases like *Riggs* is inconsistent with semantic theories of law, on Dworkin's view, because it shows that shared criteria do not exhaust the proper conditions for the application of the concept of law. For the majority and dissent in *Riggs* were having a sensible disagreement about law even though it centered on a pivotal case involving the criteria of validity. Thus, Dworkin concludes, the concept of law cannot be explained by so-called criterial semantics. To the extent that positivism attempts to explain the concept of law in terms of such semantics, it fails as a theory of law. Accordingly, Dworkin's semantic sting can be summarized as follows:

1. Semantic theories of law are inconsistent with pivotal disagreement among competent practitioners about law.
2. Positivism is a semantic theory of law.
3. Therefore, positivism is inconsistent with pivotal disagreement among competent practitioners about law.
4. The *Riggs* case involved pivotal disagreement among competent practitioners about law.
5. Therefore, positivism is false.

B. The Criterial Thesis

At the most abstract level, the semantic view Dworkin attributes to positivism makes a general point about communication: two people with different concepts of *x* cannot really communicate with each other about *x* and hence cannot have meaningful disagreements about *x*. On this view, then, the only way to explain meaningful disagreement about some particular topic is to suppose that: "we all accept and follow the same criteria for deciding when our claims are sound." What follows from this general semantic theory is the claim that all concepts can be explained in terms of shared application criteria (the Criterial Thesis).

The idea that *all* concepts must be explained criterially is an odd claim to attribute to positivism—or, for that matter, any theory purporting to be an explanation of *just* the concept of law. But positivists have been as much

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mystified by Dworkin's attribution to positivism of the more specific point that the concept of law must be explained criterially. For example, in remarks that evince puzzlement and annoyance, Hart denies both that his theory is a semantic theory and that it assumes a criterial account of what makes disagreement possible:

> [N]othing in my book or in anything else I have written supports [a semantic account] of my theory. Thus, my doctrine that developed municipal legal systems contain a rule of recognition specifying the criteria for the identification of the laws which courts have to apply may be mistaken, but I nowhere base this doctrine on the mistaken idea that it is part of the meaning of the word "law" that there should be such a rule of recognition in all legal systems, or on the even more mistaken idea that if the criteria for the identification of the grounds of law were not uncontroversially fixed, "law" would mean different things to different people (*CL* 246).

Similarly, Joseph Raz finds it "surprising that Dworkin saw a need to argue for [the thesis that law cannot be given a semantic account] and even more surprising that he thought that in doing so he was rebutting the conceptions of legal philosophy endorsed by many philosophers who did not think of themselves as in the business of explaining the meaning of the word 'law.'"[27]

Part of what is probably troubling Hart and Raz here is that criterial explanations of concepts are partly empirical in character. As Raz describes it, a criterial explanation "(1) states a rule setting out conditions for the (correct) use of a concept; and (2) is a true explanation by virtue of the fact that it is a correct statement of the conditions for the correct use of the concept actually used by those who use it" (*TV* 259). A criterial explanation of a concept, thus, has an empirical and a metaphysical dimension. The empirical dimension consists in the claim that those who use the concept share criteria for its correct use. The metaphysical dimension consists in the claim that those shared criteria *constitute* the correct criteria for proper use of the concept. Thus the claim that the concept of law has a criterial explanation asserts that, as an empirical matter, those who use the concept-word "law" share criteria for its correct use.

The idea that positivism is committed to this empirical claim is problematic for two reasons. To begin with, positivists generally follow Hart in characterizing positivism as "a descriptive account of the distinctive features of law in general as a complex social phenomenon" (*CL* 246). On this view, the point of positivism is to give a conceptual account of what distinguishes systems of law from other systems of norms. The idea that positivism seeks

27. *See* Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, 4 LEGAL THEORY 3, 250 (1998). Hereinafter referred to as *TV*. *See also* Endicott, *Hart and the Semantic Sting* at 285 ("Hart did not have a criterial semantic theory—or any semantic theory at all, if a semantic theory is a general explanatory account of what makes an application of an expression correct").

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to provide an *empirical* account of how people use the concept of law has no logical connection to the *conceptual* task of distinguishing law from other normative systems.

More important, the empirical claim about the concept of law is so obviously implausible that it cannot charitably be attributed to any reasonably sophisticated theory of law. Indeed, the very existence of a conceptual dispute between positivism and classical naturalism shows immediately that there is no unique set of criteria shared by everyone who uses the concept of law. For the naturalist affirms, while the positivist denies, that there are necessary moral constraints on the content of law. Thus, if the correct explanation of a concept is a matter of agreement on criteria that exhaust its application conditions, then neither positivism nor naturalism (nor, for that matter, any other conceptual theory of law) constitutes the correct explanation of the concept of law. As any pervasive conceptual dispute about law shows, there is no unique exhaustive set of application criteria that commands general agreement.

Here it is important to understand that a pivotal disagreement about the concept of an artifact involves a dispute about the existence conditions for such artifacts. Consider, for example, Dworkin's description of such a disagreement:

> One group argues that (whatever others think) photography is a central example of an art form, that any other view would show a deep misunderstanding of the essential nature of art. The other takes the contrary position that any sound understanding of the character of art shows photography to fall wholly outside it, that photographic techniques are deeply alien to the aims of art. (*LE* 42)

On Dworkin's view, this kind of disagreement cannot be characterized as borderline because what is at issue is the very core of the concept of art: "The argument would be about what art, properly understood, really is; it would reveal that the two groups had very different ideas about why even standard art forms they both recognize—painting and sculpture—can claim that title" (*LE* 42).[28]

28. Dworkin contrasts this example with an example of a borderline dispute among art critics about whether photography constitutes an art form:

> [The critics] might agree about exactly the ways in which photography is like and unlike activities they all recognize as "standard" uncontroversial examples of art like painting and sculpture. They might agree that photography is not fully or centrally an art form in the way these other activities are; they might agree, that is, that photography is at most a borderline case of an art. Then they would probably also agree that the decision whether to place photography within or outside that category is finally arbitrary, that it should be taken one way or another for convenience or ease of exposition, but that there is otherwise no genuine issue to debate whether photography is "really" an art (*LE* 41-42).

In this example, there is agreement about the core instances of what constitutes an art form, but disagreement about a borderline case.

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Pivotal disagreements about the concept of an artifact *x* are ultimately, then, disagreements about the existence conditions for *x*. The critics who differ on whether photography is a "central example" of an art form disagree about the characteristics an entity must have to qualify as an art form; in other words, they disagree on the necessary and sufficient conditions for the application of the *concept* of art itself. One critic affirms, while the other denies, that possession of some characteristic *c* instantiated by photography is a sufficient condition for the application of the concept of art to an artifact; it is for this reason that the affirming critic characterizes photography as a central example of an art form. What divides these critics, then, is a disagreement about the existence conditions for art.

This, of course, is the sort of disagreement that divides the positivist and the classical naturalist. For example, the positivist regards the system of institutional norms in apartheid South Africa as a central example of a legal system because it has a characteristic that warrants the application of the concept-word "law" to that system of rules: an efficacious rule of recognition that is accepted by officials. In contrast, the classical naturalist denies both that possession of a working rule of recognition is sufficient to warrant the application of "law" and that an institutional system of unjust norms represents a central example of a legal system. Accordingly, what divides the positivist and classical naturalist is a pivotal disagreement *about* the concept of law; for they differ on what distinguishes systems of rules that count as law from those that do not.

This characterization of conceptual disagreement poses a problem for Dworkin's analysis because the disagreement dividing the *Riggs* judges has nothing to do with the *concept* of law. The relevant disagreement was not about whether, at a conceptual level, law is created according to criteria contained in a rule of recognition; nor was it about whether the meaning of the word "law" is "standards created according to a set of criteria contained in a rule of recognition." Rather the disagreement concerned how the law of wills applies to a case where the claimant seeks to take under the will of someone he murdered. And even if Dworkin is correct that every claim about what the law requires presupposes a view about the nature of law (*LE* 90), it does not follow that every disagreement about what law requires involves a disagreement about the concept of law.

The problem here is that Dworkin runs together two different claims: (1) the claim that the grounds of law are exhausted by shared criteria of legal validity; and (2) the claim that the conditions for the correct application of the concept of law are exhausted by shared application criteria. Indeed, he writes: "[i]f two lawyers are actually following different rules in using the word 'law,' using different factual criteria to decide when a proposition of law is true or false, then each must mean something different from the other when he says what the law is" (*LE* 43).

Dworkin clearly thinks that the first two clauses of the sentence are

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equivalent—but they are not.[29] The sentence "if two lawyers are following different rules in using the word 'law' then each must mean something different from the other when he says what the law is" seems plausible if the meaning (or concept) of law is constituted by an exhaustive set of rules for use of the term. After all, if the meaning of the word "law" is exhausted by the rules for using the word, then two people with different rules for using "law" would appear to assign different meanings to it.

In contrast, the sentence "if two lawyers are using different factual criteria to decide when a proposition of law is true or false, then each must mean something different from the other when he says what the law is" is false even if the grounds of law are exhausted by shared criteria of validity. Two persons licensed to practice law in two countries with different rules of recognition can still mean the same thing by "law." There is no reason to think, for example, that such persons cannot agree that positivism provides the best conceptual theory of law—even though, being practitioners in different legal systems, they recognize different sets of validity criteria. And this is true, of course, even if Dworkin is correct in thinking that positivism attempts an account of the meaning of "law." Thus, contra Dworkin, disagreement on the set of validity criteria does not preclude agreement on the meaning of "law" or on the concept of law.

Conversely, there is no reason to think competent practitioners from the same legal system who share the same criteria of validity cannot disagree on the concept of law. For example, two practitioners can agree that a standard invalidating any statute that impinges on reproductive privacy is contained in the set of validity criteria, but disagree on the reasons for its inclusion. A positivist practitioner could argue that it is there because of a social convention, whereas a naturalist practitioner could argue that it is there, at least in part, because its content conforms to certain moral standards. It is likewise possible that two such practitioners agree on the status of every proposition purporting to be a criterion of validity—just as it is possible (though perhaps unlikely) that a deontologist and a rule utilitarian agree on what propositions belong to the set of correct moral standards. Conceptual agreement is, thus, logically independent from agreement on the criteria of validity—perhaps in much the same way that normative ethics is thought to be logically independent of metaethics.

Still, it is not difficult to see why someone might conflate the two notions. At first blush, the two clauses in the sentence quoted above appear to be equivalent. To say that a conjunction C_1 and . . . and C_n represents a correct statement of the shared criteria for the application of the concept of law to an object x is to say the following: people apply the concept-word "law" to x if and only if x satisfies that conjunction. To say that a conjunction F_1 and . . . and F_m represents a correct statement of the shared criteria

29. Coleman makes a similar argument in Jules L. Coleman, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF THE PRAGMATIST APPROACH TO LEGAL THEORY (2001).

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of validity is to say that people regard a propositional object *x* as legally valid if and only if *x* satisfies F_1 and . . . and F_m. Since all and only laws have the property of legal validity, it seems to follow that for any proposition *P*, *P* is a shared criterion of legal validity if and only if *P* is a shared criterion for the correct application of the concept of law.

Nevertheless, the matter is not as simple as this makes it seem. As the examples above show, the concept-locution "law" has global scope in the sense that its use is not limited to a particular national or cultural context; thus the application criteria for that locution are not tied to any particular legal system. Indeed, assuming that positivism seeks to give an account of the application criteria for the concept-locution "law," those criteria are general, to quote Hart, "in the sense that [they] are not tied to any particular legal system or legal culture" (*CL* 239). And this, of course, is borne out by Hart's own account. On his view, the distinguishing feature of law is the presence of a social rule of recognition that defines criteria for making, changing, and adjudicating law; thus every possible society that has a system of law has it in virtue of having a social rule of recognition. Thus, if Hart's theory of law constitutes a criterial account of the correct application for the concept-locution "law," those application conditions cut across possible worlds and legal systems.

In contrast, the scope of the concept-locution "legally valid" is local in the sense that its use is typically limited to the context of a specific legal system. Positivism does not claim that there are shared criteria of legal validity that cut across possible legal systems. On Hart's view, it is a conceptual truth about law that the rule of recognition contain provisions for making, changing, and adjudicating laws, but there are no necessary restrictions on the *content* of those provisions. Indeed, the identification of a substantive criterion common to all possible legal systems would require some kind of explanation from the positivist because such a criterion would imply the existence of a necessary restriction on the content of the criteria of validity. Thus, whereas the locution "the criteria for the correct application of the concept of law" cuts across all possible worlds, the locution "the criteria of legal validity" does not; the latter refers to a particular society's set of validity criteria. For this reason, Dworkin is mistaken in thinking the locutions "actually following different rules in using the word 'law'" and "using different factual criteria to decide when a proposition of law is true or false" can be substituted for each other without altering truth-value.

Hart senses that Dworkin's semantic sting runs together two distinct issues, but expresses the problem in different terms:

> The argument seems to me to confuse the meaning of "law" with the meaning of propositions of law. A semantic theory of law is said by Dworkin to be a theory that the very meaning of the word "law" makes law depend on very specific criteria. But propositions of law are not typically statements of what "law" is but of what *the law* is, i.e., what the law of some system permits or

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> requires or empowers people to do. So even if the meaning of such propositions of law was determined by definitions or by their truth-conditions this does not lead to the conclusion that the very meaning of the word "law" makes law depend on certain specific criteria. . . . But there is no trace of such a doctrine in my work (*CL* 247).

Hart comes close to seeing what the problem is. But it is not that Dworkin confuses the meaning of propositions of law with the meaning of "law." Rather, to put the point roughly in the terms that Hart uses, the shared criteria for determining the truth-value of propositions of law are relative to a particular legal system; their point is to determine not what "law" is but what counts as law *in a given legal system*. Positivism explains legal validity—and not the concept of law—in terms of shared criteria.

It is, of course, true that positive's explanation of legal validity in terms of shared criteria amounts to, in some sense, an analysis of the concept of law but it is not, contra Dworkin, a criterial analysis. To see this, consider the following claims: (1) a law is a standard enforced by the state; and (2) a law is a standard that satisfies the criteria of validity contained in a conventional rule of recognition. In one sense, they are very much alike: Both sentences seem to express claims that, if true at all, are true of every conceptually possible legal system. Accordingly, both sentences purport to express truths about the concept of law.

But there is an important difference between the two sentences. There is little controversy about (1) because it seems to be true simply as a matter of definition. Most people would accept the first as being, at least, roughly correct. And this is not just true of laypersons; it is also true of philosophers of law. Dworkin, for example, believes the conceptual function of law is to justify state use of police power—a view that makes sense only if we assume there is some conceptual connection between legal standards and state enforcement. Likewise, John Finnis identifies the use of coercion by the state as one of the distinguishing features of a legal system: "Law needs to be coercive (primarily by way of punitive sanctions, secondarily by way of preventive interventions and restraints)."[30]

Positivists have been less forthcoming about the conceptual role of state enforcement in law since Hart pointed out Austin's mistake in *reducing* the notion of legal obligation to the coercive ability of the state, but they also call attention to the ubiquitous presence of enforcement mechanisms. Hart, for example, points out that one of the reasons for skepticism about whether what is called international law is really law is that "there is no centrally organized effective system of sanctions" (*CL* 4). Raz is more explicit: "the backing of the state power is a defining characteristic of municipal law."[31] Even if one does not regard the backing of the state power as necessarily involving "coercion," an ethically thick term connoting moral

30. John Finnis, Natural Law and Natural Rights 266 (1980).
31. Joseph Raz, The Authority of Law 101 (1979).

impermissibility, the role of state enforcement in distinguishing law from other systems of social rules cannot be ignored.

Intriguingly, the widespread agreement on (1) among both philosophers and laypersons makes it a plausible criterial account of how people use the concept-locution "law." As will be recalled, a criterial account of the word "law" purports to be an explication of the criteria that people *actually* use in applying the word. For this reason, any plausible criterial account must, as (1) does, command widespread agreement among both philosophers and laypersons.

Notice, however, that there is considerable controversy among philosophers of law over whether (2) is true. But, even more telling, the vast majority of laypersons would have no idea whether (2) is true—either as a conceptual truth or as a contingent claim about the legal practices of their own societies. For, as Hart points out, "the reality of the situation is that a great proportion of ordinary citizens—perhaps a majority—have no general conception of the legal structure or its criteria of validity" (*CL* 111). And a person who does not have a reasonable understanding of her society's most fundamental legal practices is simply not in a position to evaluate or, for that matter, fully understand the claim expressed by (2). Thus, if Hart is correct about what ordinary citizens typically know about their own legal systems, they could not have an informed opinion about the truth of (2). For this reason, (2)—which is, of course, the defining conceptual thesis of positivism—*could not* be a plausible criterial account of the concept of law.[32]

Once we untangle the idea that there exist shared criteria of legal validity from the idea that there exist shared criteria for the application of the concept of law, we can see how Dworkin's formulation of the semantic sting in *Law's Empire* trades on a conflation of the two. As will be recalled, I expressed Dworkin's argument as follows:

1. Semantic theories of law are inconsistent with pivotal disagreement among competent practitioners about law.
2. Positivism is a semantic theory of law.

32. This should not be taken to mean that positivism has *nothing* to do with the application conditions for the concept-word "law," but the relationship between the conceptual analysis that positivism provides and a criterial account of the application conditions for "law" is more complex than Dworkin seems to realize. Hart struggled with the issue to little avail. In the Preface to THE CONCEPT OF LAW, for example, Hart characterizes his project as "an essay in analytical jurisprudence" in which he is sometimes concerned with "questions which may well be said to be about the meaning of words" (*CL* v). A few lines down, he states that "[n]otwithstanding its concern with analysis the book may also be regarded as an essay in descriptive sociology" (*CL* v). Hart seems to sense the tension between the two descriptions and tries to relieve it by adding "the suggestion that inquiries into the meanings of words merely throw light on words is false[;] . . . we may use a sharpened awareness of words to sharpen our perception of the phenomena" (*CL* v). (*See* Brian Bix, *Conceptual Questions and Jurisprudence*, 1 LEGAL THEORY 4 (1995) for a recent discussion of these issues.) In any event, this much, I think, is clear. If conceptual analysis is, as Dworkin believes, "the project of digging out shared rules from a careful study of what lawyers say and do" (*LE* 43), then people who put together dictionaries—and not legal philosophers—are engaged in conceptual analysis.

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3. Therefore, positivism is inconsistent with pivotal disagreement among competent practitioners about law.
4. Pivotal disagreement among competent practitioners about law occurred in *Riggs*.
5. Therefore, positivism is false.

If by "pivotal disagreement about law" Dworkin means "pivotal disagreement about the shared criteria for application of the concept of law," then (1) appears plausible; if competent practitioners disagree about the status of some putative criterion for the application of the concept of law, then they do not share criteria. But then (4) is false; as we have seen, it is implausible to think the judges in *Riggs* were having a conceptual disagreement about the nature of law. On the other hand, if by "pivotal disagreement about law" Dworkin means "pivotal disagreement about the shared criteria of legal validity," then (4) seems plausible, but (1) is false. That two competent practitioners share *global* criteria for the application of the concept of law does not imply they cannot have a *local* disagreement about some particular legal system's criteria of validity. In either case, the semantic sting argument fails.

IV. THE SEMANTIC STING RECONFIGURED

A. Dworkin's Intended Target: The Conventionality Thesis

As we have seen, Dworkin conflates the claim that the concept of law can be explained in terms of shared criteria with the claim that the grounds of law are exhausted by shared factual criteria of legal validity. Consequently, philosophers have construed the semantic sting as a criticism of the claim that the concept of law can be explained criterially—a problematic claim implausibly attributed to positivism—and thus missed its most likely target. Dworkin's intended target is (or should be) the other half of that flawed equation: "[i]f legal argument is mainly or even partly about [the properties that make a proposition of law true], then lawyers cannot all be using the same factual criteria for deciding when propositions of law are true and false" (*LE* 43). Thus construed, Dworkin's semantic sting is directed at the claim that it is a conceptual truth that the grounds of law are exhausted by conventional criteria of legal validity. Schematically, the reconfigured semantic sting argument can be represented as follows:

1. If positivism is true, then the grounds of law are exhausted by shared criteria of legal validity.
2. If the grounds of law are exhausted by shared criteria of legal validity, then there cannot be pivotal disagreement among competent practitioners about the grounds of law.
3. There occurred pivotal disagreement among competent practitioners about the grounds of law in the *Riggs* case.
4. Therefore, positivism is false.

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This version of the semantic sting incorporates Dworkin's long-standing reservations about positivism's Conventionality Thesis that motivated his earlier criticism of Hart and would, if sound, refute Hart's practice theory of social rules. But notice that it takes aim at a broader target than just Hart's account of social rules. It is directed at the view, which represents the theoretical core of legal positivism, that the grounds of law are exhausted by conventional criteria of legal validity.

B. The Compatibility of Disagreement and Conventionality

Premise (1) of the reconfigured semantic sting argument seems to be a logical consequence of the claim that the rule of recognition is purely a matter of social convention together with the claim that the rule of recognition exhausts the criteria of legal validity—both core commitments of positivism. For, as we have seen, the existence of a convention has a cognitive element that seems to presuppose a shared understanding of the content of the convention. Insofar as competent practitioners share an understanding of the content of the criteria of validity, it follows that the criteria of validity are shared. Moreover, since the rule of recognition exhausts the criteria of validity, it seems to follow that the grounds of law are exhausted by shared criteria of validity.

At first blush, premise (2) seems trivially true. Given its role in the semantic sting argument, a pivotal disagreement about the grounds of law is most plausibly construed as a disagreement about whether a particular standard belongs to the set of validity criteria. Thus construed, pivotal disagreement about the grounds of law seems straightforwardly inconsistent with the idea that the grounds of law are exhausted by shared criteria of validity. For, as we have seen, if two people disagree about whether some proposition *P* belongs to the set of validity criteria in that one person claims, while the other denies, that *P* belongs to that set, they cannot be said to share the same set of validity criteria.[33]

Nevertheless, there are a number of problems here. The first is of minor significance and easily remedied: insofar as the semantic sting is directed at the Conventionality Thesis, pivotal disagreement is problematic only to the extent that it undermines the existence of a convention regarding the criteria of validity. But, as far as most positivists are concerned, the only essential parties to this convention are those persons who function as *officials* of the legal system.

What this means, then, is that Dworkin's formulation of premise (2) is too strong. Pivotal disagreement among competent practitioners about

33. I defined the notion of pivotal disagreement with an eye to Dworkin's view that it is inconsistent with the Conventionality Thesis. The idea was to give it a definition that excludes disagreements that can easily be reconciled with the Conventionality Thesis and thus to make Dworkin's argument as strong as possible.

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the grounds of law presents no problem for the Conventionality Thesis unless those practitioners are officials of the legal system. A pivotal disagreement between two private lawyers does not implicate the Conventionality Thesis because, strictly speaking, the lawyers are not parties to the convention establishing the criteria of validity. One might think that pivotal disagreement among *competent* lawyers signals the presence of pivotal disagreement among officials, since lawyers are presumably competent in virtue of sharing the official understanding of these criteria, but this is problematic. For a lawyer needs no deeper reason to argue for a particular construction of a criterion of validity than that it advances her client's interests.

At most, then, the Conventionality Thesis precludes pivotal disagreement among the officials of a legal system; it does not preclude disagreement among competent lawyers or competent legal scholars because, again, they are private citizens and hence not parties to the relevant convention. For this reason, Dworkin's premise (2) in the above argument must be replaced by:

(2*) If the grounds of law are exhausted by shared criteria of legal validity, then there cannot be pivotal disagreement among *officials* about the grounds of law.

But the more modest (2*) is still too strong to be plausible. For (2*) assumes it is a necessary condition for the existence of a convention establishing *S* as a norm for group *G* that *every* member in *G* agree on the status, if not the content, of *S* as binding members of *G*. For, literally construed, Dworkin's elaboration of the semantic sting assumes that *one* official's dissent about a putative criterion of validity is sufficient to falsify the claim that the grounds of law are exhausted by conventional criteria of validity. If, on this construction, every competent judge in the country except one agreed on some pivotal issue regarding the Second Amendment, the existence of that *one* dissenting opinion is enough to defeat the claim that the Second Amendment is authoritative in virtue of a social convention. And that is surely false: Even if Dworkin is correct in thinking that the grounds of law are not exhausted by conventional criteria, it is nonetheless true that some such grounds, like those expressed by the Second Amendment, are conventional in nature.[34]

There is nothing, of course, in the Conventionality Thesis that commits positivism to the implausible claim that one dissenting opinion among officials about a criterion of validity is sufficient to threaten the existence of a convention regarding that criterion. For, broadly construed, the Conventionality Thesis asserts only that the criteria of validity are authoritative in

34. I have chosen the Second Amendment because I think Dworkin is most likely to accept it as a purely conventional criterion of validity, apart perhaps from the procedural provisions.

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virtue of some kind of social convention. And this does not say or imply anything about the distinguishing properties of a convention; in particular, it does not say or imply that an agreement or understanding must be *unanimous* to constitute a convention.[35]

Whether the presence of pivotal disagreement among officials about a criterion of validity is inconsistent with the Conventionality Thesis will depend, I think, on the pervasiveness of the disagreement. Exactly how pervasive is a difficult issue beyond the scope of this essay, but it is clear that (2*) must be modified to reflect that the Conventionality Thesis does not require unanimity among officials and is hence compatible with even some pivotal dissent about the criteria of validity. Thus, premise (2*) must be replaced by:

(2**) If the grounds of law are exhausted by shared criteria of legal validity, then there cannot be *sufficiently pervasive* pivotal disagreement among *officials* about the grounds of law.

Nevertheless, Coleman shows that even the considerably more modest (2**) is problematic.[36] On Coleman's view, it is a necessary, though not sufficient, condition for the existence of a conventional rule of recognition that there be agreement among the officials on a fairly large number of

35. This line of reasoning should be distinguished from an argument recently made by Matthew Kramer. Kramer argues that theoretical disagreement about the grounds of law is incompatible with positivism only insofar as it is inconsistent with law's essential function of guiding behavior; thus theoretical disagreement becomes a problem in a legal system only when it is pervasive enough to interfere with the efficacy of that legal system in guiding behavior:

> Though criterial divergences may always be present, they cannot go beyond the point where they would bring about substantial indeterminacy and erraticism in the law at the level of concrete results. At any rate, they cannot go beyond that point if the officials are to maintain a functional legal system. . . . Hence, given that a legal system is not sustainable as such unless officials are indeed in accord with one another to a considerable extent about the law's specific implications, it is likewise not sustainable unless the officials are unanimous or virtually unanimous in their acceptance of the precepts that make up the bedrock of the Rule of Recognition.

Matthew H. Kramer, *Coming to Grips with the Law*, 5 LEGAL THEORY 2, 183, 184 (1999). While Kramer attempts to show that pivotal disagreement is consistent with Hart's efficacy requirement for the existence of a legal system, the point I make here is quite different. It is concerned with the *conceptual* issue of how much in the way of convergent understanding about a standard *S* is necessary to constitute a convention concerning *S*.

This difference is important, as Dworkin's argument is not directed at Hart's view that it is a necessary condition for the existence of a legal system that the valid norms be generally obeyed. Rather it is directed at semantic theories that claim the application conditions for the concept of law are exhausted by shared criteria: "if legal argument is mainly or *even partly* about pivotal cases, then lawyers cannot all be using the same factual criteria for deciding when propositions of law are true and false" (*LE* 43; emphasis added). For this reason, Kramer's argument that theoretical disagreement does not "impair the vitality of a legal system" as long as "officials generally converge in their assessments of the concrete legal implications of most events" does not succeed as a defense against the semantic sting.

36. *See* Coleman, THE PRACTICE OF PRINCIPLE, Lecture 11. Hereinafter referred to as *POP*.

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paradigm cases.[37] For example, in the United States, officials generally agree that prohibiting distribution of *The Turner Diaries* violates the First Amendment; that torturing a criminal suspect to induce a confession violates the Fifth Amendment; and that giving someone the death penalty for driving under the influence of alcohol violates the Eighth Amendment—to cite just a few paradigms. If officials did not converge in their judgments about such cases, it would not make sense to say that there is a convention with respect to the authority of the First, Fifth, and Eighth Amendments.[38]

Dworkin is correct, then, in thinking that the content of the rule of recognition is rooted in certain paradigms, but Coleman argues that this does not preclude pivotal disagreement. On Coleman's view, individual paradigms, no matter how fundamental they might be, are revisable in principle; for the standards making up any conventional rule are always subject to change. Thus, the Conventionality Thesis does not preclude there someday being a consensus among officials that a state ban on *The Turner Diaries* and other literature associated with extremist violence is permitted by the First Amendment. What the Conventionality Thesis rules out, according to Coleman, is disagreement on all (or a large number of) paradigms at the same time. As long as officials agree on a number of these paradigms, disagreement on even the most fundamental of paradigms (i.e., pivotal cases) is consistent with the existence of a conventional rule of recognition.

Suppose, for example, that there developed widespread disagreement about whether the Second Amendment is a criterion of validity and that officials were evenly divided about the status of the Second Amendment. As an empirical matter, of course, this is not likely to happen; competent officials may disagree on paradigm issues of whether the Second Amendment establishes an individual (as opposed to collective) right to bear arms, but all agree that the Second Amendment is a criterion of validity. But if such disagreement were to occur, it would make sense to claim, as Coleman would, that the validity criteria pertaining to restrictions on gun ownership were being revised. It would not, however, make sense to claim that there was no longer a conventional rule of recognition in the United States. For this reason, the presence of pivotal disagreement regarding the Second Amendment would not be enough to defeat the claim that the grounds of law are exhausted by a conventional rule of recognition.

Dworkin would likely respond that if officials are divided on whether the Second Amendment belongs to the set of validity criteria, then it follows that there is no convention with respect to whether official acts restricting gun ownership result in legally valid norms. But if this is so, the argument

37. I cannot go into the details of Coleman's powerful argument, which is grounded in deep views about language. But Coleman's point as applied to law is extremely plausible on its own.

38. Again, I am assuming here that the Constitution states norms that express criteria of validity. Nothing turns on this assumption, as the point could be made without such an assumption.

continues, then it cannot be true that the grounds of law are *exhausted* by shared criteria of validity. For it is indeterminate as to whether performance of an act *c* that restricts gun ownership results in a legally valid norm. Accordingly, there are no shared validity criteria that determine the truth-value of the proposition that performance of *c* by officials results in a legally valid norm—and this, Dworkin would conclude, is inconsistent with the claim that the grounds of law are exhausted by shared criteria of validity.

The problem with this line of argument, however, is that it turns on a misunderstanding of what is meant by the claim that the grounds of law are *exhausted* by conventional (or shared) criteria of validity, which is just Dworkin's description of the Conventionality Thesis. For this argument assumes that the conventional criteria of validity must be (a) *complete*, in the sense that they uniquely determine a correct answer to every question about the validity of a norm; and (b) *transparent*, in the sense that this correct answer will always be clear to competent officials. Of course, if the claim that the grounds of law are exhausted by shared criteria of validity means that such criteria are complete and transparent, then a sufficiently pervasive disagreement about some member of this set would arguably be inconsistent with the Conventionality Thesis. This would imply that *every* disagreement about the validity of a norm implicated some preexisting authoritative standard of validity. And if the relevant standard transparently determines a uniquely correct answer to questions about validity, then two competent factions that disagree on the validity of some norm must be disagreeing about the status of the relevant criterion. But if two factions disagree about whether a standard is valid under some criterion of validity, it is not clear that they can be said to *share* a commitment to the same set of criteria.

This, however, is an implausible interpretation of the Conventionality Thesis. Just as Dworkin was mistaken in thinking the classical Pedigree Thesis implies the existence of a test that determines a uniquely correct answer to every question of what the law requires,[39] he is mistaken in thinking the Conventionality Thesis implies that the criteria of validity are complete or transparent.[40] Indeed, Hart's own views about the open texture of language suggest that there will inevitably be gaps in the criteria of validity. Similarly, as one with any familiarity with hard constitutional cases would expect, there will often be instances in which what is required by the criteria of validity is far from transparent even when there is no reason to think there is a gap in those criteria. In such instances, disagreement about even pivotal cases might occur among competent officials without implying

39. *See* Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982); and Kenneth Einar Himma, *The Epistemic Sense of the Pedigree Thesis*, 80 PAC. PHIL. Q. 1 (1999).

40. Joseph Raz argues for a defense against the semantic sting that relies on the possibility that a society's criteria of validity might be incomplete. Raz argues that that there are shared criteria for the use of a concept does not imply that there cannot be disagreement about those criteria (*TV* 261-65). He points out that people may share criteria that are not fully specified, so that disagreements may arise where *specified* criteria run out.

that they do not share criteria—though disagreement about cases involving gaps might better be characterized as disagreement about what the criteria of validity *should* be.

But there is a more basic sense in which all the formulations of premise (2) misfire against the Conventionality Thesis. According to this most basic of positivist commitments, it is a conceptual truth that the grounds of law are exhausted by conventional criteria of validity in the sense that all legal norms are valid in virtue of satisfying purely conventional criteria of validity; as Coleman describes this thesis:

> [L]aw is made possible by an interdependent convergence of behavior and attitude: a kind of *convention* or social practice that we might characterize as an agreement among officials on the criteria for membership in the category "law." . . . For Hart, this practice of officials creates and sustains criteria for membership in the category "law." (*POP* 75–76)

Legal validity is thus conventional in the sense that the criteria of validity are decided upon by a particular group of people; as Shapiro puts the point, "the law cannot exist independently of coordinated human agency; at some fundamental level, all law is positive law."[41]

Accordingly, the Conventionality Thesis makes two claims about the nature of law: (C1) the institutions and norms associated with law are manufactured entirely by human beings; and (C2) the activities by which these institutions and norms are manufactured are grounded in social convention. For this reason, the Conventionality Thesis implies that it is entirely up to each society to decide what its criteria of validity are and hence that there are no necessary substantive moral constraints on the content of such criteria. But the conjunction of (C1) and (C2) is equivalent to the claim that there does not exist a possible legal system in which the existence of legal norms and institutions is not grounded in social convention. What the Conventionality Thesis ultimately asserts, then, is nothing more ambitious than this: It is a conceptual truth that *there are no nonconventional criteria of validity*.

There is no reason to think that the Conventionality Thesis, properly understood, is inconsistent with the existence of pivotal disagreement. For what is needed to falsify the claim that there are no nonconventional validity criteria is, obviously enough, the existence of a criterion of validity that owes its legal authority to something other than a convention among officials. Of course, widely pervasive disagreement about the status of some putative criterion of validity *C* might, as we have just seen, be inconsistent with claiming that *C* is the object of a convention (i.e., that a commitment to *C* is shared) or even with claiming that *C* belongs to the set of validity criteria. If, for example, there is fifty-fifty split among all the officials of a

41. Shapiro, *The Difference Rules Make*, 56.

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legal system as to whether a norm passed by some body of persons is legally valid, it makes no sense to say there is a convention with respect to the "enactments" of that body. But even wildly pervasive disagreement about the status of some putative criterion *C* does not imply the existence of a nonconventional criterion of validity.

To see this, it might be helpful to contrast the Conventionality Thesis with the semantic theory Dworkin attributes to positivism. According to semantic theories, two people cannot meaningfully disagree about the application of the concept-word "law" unless they share roughly the same criteria for its application. On this view, then, the application conditions for "law" are exhausted by shared criteria. This implies that, while two people who share the same criteria can disagree about borderline cases, they cannot disagree about pivotal cases. Insofar as positivism incorporates this semantic view, it straightforwardly follows that there cannot be pivotal disagreement about the concept of law. For the semantic view that Dworkin attributes to positivism is *itself* built on a view about when meaningful disagreement is possible.

In contrast, the Conventionality Thesis, broadly construed, makes no claims or assumptions about language, concepts, or disagreements. As we have seen, the Conventionality Thesis claims that it is a conceptual truth that every legal norm is valid in virtue of satisfying certain conventional criteria of validity. Schematically, then, the Conventionality Thesis asserts that:

> (CT): It is a conceptual truth that, for every legal system *S* and proposition *P*, *P* is legally valid in *S* if and only if *P* satisfies the criteria articulated in the conventional rule of recognition for *S*.

By its own terms, then, (CT) purports to do little more than explain the authority of the criteria that makes law possible. And in the absence of any semantic claims or presuppositions about language, concepts, or disagreements, there is nothing in (CT) that implies anything that would conceptually preclude even pervasive confusion about pivotal cases.

Compare, for example, (CT) with another conceptual claim that is nearly identical in formal structure:

> (LP): It is a conceptual truth that, for every legal system *S* and behavior *B*, *B* is legally permissible in *S* if and only if *B* satisfies the requirements of all legally valid norms in *S*.[42]

Notice that (LP) does not imply that the law is complete or transparent. It is, for example, perfectly consistent with (LP) that there are gaps in the law and that the law's requirements may be quite difficult to discern. Similarly, it is perfectly consistent with (CT) that there are gaps in the criteria of

42. For purposes of construing (LP), the locution "a behavior *B* satisfies a set *S* of norms" simply means "*B* does not violate any of the norms in *S*."

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validity and that the requirements of such criteria may be quite difficult to determine.

What is inconsistent with (LP), however, is the claim that there exists some possible legal system *S* and some behavior *B* such that *B* is legally impermissible in *S* even though it satisfies all legally valid norms in *S*. This, of course, is logically equivalent to the claim that the grounds of legal permissibility are not "exhausted" (in the relevant sense) by the content of legally valid norms. Likewise, (CT) is inconsistent with the claim that there exists some possible legal system *S* and some proposition *P* such that *P* is not legally valid in *S* even though it conforms to all conventional criteria of validity. This latter claim is logically equivalent to the claim that the grounds of law in *S* are not exhausted by conventional criteria of validity, which is logically equivalent to the claim that there are some nonconventional criteria of validity in *S*.

Since (LP) is consistent with the existence of gaps and legal norms that are sometimes difficult to understand, it is also consistent with considerable disagreement about what behaviors are legally permissible in a legal system *S*. For even disagreement with respect to pivotal cases of what is permissible under some legal norm in *S* does not imply the falsifying case of some behavior *B* such that *B* is legally impermissible in *S* even though it satisfies all legally valid norms in *S*. Likewise, the existence of even wildly pervasive pivotal disagreement in a legal system *S* does not imply the falsifying case of some proposition *P* such that *P* is not legally valid in *S* even though it conforms to all conventional criteria of validity. Thus pervasive pivotal disagreement about some putative criterion of validity does not imply the existence of nonconventional criteria of validity in *S*. Broadly construed, then, there is nothing in the Conventionality Thesis that conceptually precludes pervasive pivotal disagreement about the grounds of law.[43]

Still, one might think the existence of pivotal disagreement among competent officials is inconsistent with Hart's practice theory of social rules—even if such disagreement is compatible with the more general Conventionality Thesis. As we have seen, a social rule has a behavioral and cognitive element; the former consists of convergent behavior among participants, and the latter consists of the adoption of the internal point of view towards the rule. Since, on Hart's view, the rule of recognition is a social rule, it consists of convergent behavior among the participants (i.e., the officials) along with the adoption by the officials of a critically reflective acceptance of the rule.

43. Nevertheless, it is true that the existence of pervasive disagreement encompassing a large number of the standards intended to make up the criteria of validity is inconsistent with the existence of a legal system. In such a system, for example, the citizens will not know which standards to obey because the officials will not know which standards to enforce and adjudicate; thus general obedience in such a system would seem to be nearly impossible. But the difficulty here has to do with the *efficacy* of such a system and not with the Conventionality Thesis. *See* n.35, *supra*.

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Accordingly, one might blend elements from Dworkin's earlier criticism of Hart and the reconfigured version of the semantic sting (i.e., freed from its problematic attribution of the Criterial Thesis to positivism) in the following way. On Dworkin's early criticism of Hart's account of social rules, disagreement about a legal norm poses a problem for Hart because: "[i]f judges are in fact divided about what they must do if a subsequent Parliament tries to repeal an entrenched rule, then it is not uncertain whether any social rule governs that decision; on the contrary, it is certain that none does" (*TRS* 61–62). While Coleman's response shows that Hart's account of social rules is consistent with borderline disputes, this does not help against the semantic sting; for the semantic sting is concerned with pivotal disputes—and Dworkin characterizes the dispute in *Riggs* as pivotal. Thus one might argue that Dworkin's semantic sting refutes Hart's account of social rules because the occurrence of pivotal disagreement about the grounds of law is inconsistent with the idea that the grounds of law are exhausted by a *social rule* of recognition.

But all the same things can be said in defense of Hart's practice theory of social rules that were said in defense of the Conventionality Thesis. First, of course, there is nothing in Hart's account of social rules that requires that *every* member of the group converge in his or her behavior with respect to a social rule; it is enough to establish a social rule that most people in the group converge in their behavior. Second, as Coleman points out, Hart's practice theory implies that official behavior converges on a substantial number of paradigm cases; it does not imply that it must converge on all such paradigm cases. Finally, Hart's theory of legal validity asserts only this:

> (HART): It is a conceptual truth that, for every legal system *S* and proposition *P*, *P* is legally valid in *S* if and only if *P* satisfies the criteria articulated in the *social* rule of recognition for *S*.

(HART) is nearly identical in formal structure with (LP) and (CT). Accordingly, what is needed to falsify (HART) is the existence of a proposition *P* and a legal system *S* in which *P* satisfies *S*'s social rule of recognition, but is not legally valid. And the existence of even wildly pervasive pivotal disagreement is not enough to give rise to such a falsifying case. If this is correct, then there is nothing in either the Conventionality Thesis or Hart's particular account of social rules that conceptually precludes pivotal disagreement.

C. Pivotal Disagreement and Riggs v. Palmer

Each of the various interpretations of the semantic sting argument contains the premise that there occurred pivotal disagreement about the grounds of law in Riggs v. Palmer. As we have seen, Dworkin interprets *Riggs* as presenting an instance of pivotal disagreement about the grounds of law. On Dworkin's view, the judges in *Riggs* disagreed about the power of courts to

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construe an unambiguous legislative enactment to conform to common-law principles. Insofar as the judges disagreed about their powers as defined by the criteria of validity, they were having a dispute about whether a particular kind of judicial act results in valid law. Construed, then, as an issue about the criteria of validity, the judges in *Riggs* disagreed about whether the following proposition is true:

> (R1) A judicial holding that construes common-law principles as constraining the application of an unambiguous legislative enactment results in valid law.[44]

Otherwise expressed, the judges disagreed about whether (R1) is a member of the set of validity criteria. And if this is correct, then, on Dworkin's view, the grounds of law cannot be *exhausted* by shared criteria of legal validity because the majority and the dissent subscribe to different criteria of validity.

Nevertheless, there were two disputes dividing the *Riggs* court—and neither of them is plausibly characterized as pivotal. The first dispute concerned the doctrine of equitable construction, which authorizes a court in limited circumstances to depart from the clear language of statutes. The majority cited the relevant legal standard: "It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers."[45] The court then explained the application conditions for this standard in the following passage:

> The reason for [equitable] construction is that the law-makers could not set down every case in express terms. In order to form a right judgment whether a case be within the equity of a statute, it is a good way to suppose the law-maker present, and that you have asked him this question: Did you intend to comprehend this case? Then you must give yourself such answer as you imagine he, being an upright and reasonable man, would have given. If this be that he did mean to comprehend it, you may safely hold the case to be within the equity of the statute; for while you do no more than he would have done, you do not act contrary to the statute, but in conformity thereto.[46]

According to this passage, a court may depart from the clear language of a statute if and only if (a) the relevant fact-pattern falls outside the scope of what was contemplated by the legislature in framing the statute; and (b) a reasonable legislator would not have intended the result entailed by the clear language of the statute.

44. Brian Bix pointed out to me that there may be other ways to interpret the disagreement in *Riggs*. If so, the same argument can be made about these interpretations as the one that I will make about (R1). What ultimately matters, as we will see, is that a holding in either direction results in valid law—no matter how one characterizes the disagreement.

45. *Riggs*, 22 N.E. 188, 189.

46. *Riggs*, 22 N.E. 188, 189.

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From this doctrinal foundation, the *Riggs* majority went on to argue that both of the relevant conditions were satisfied:

> It was the intention of the law-makers that the donees in a will should have the property given to them. But it never could have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it. If such a case had been present to their minds, and it had been supposed necessary to make some provision of law to meet it, it cannot be doubted that they would have provided for it.[47]

Accordingly, the majority did what they believed the legislature would have done with *Riggs* had they anticipated such a situation, and withheld Elmer's share.

Notably, the dissent did not challenge the authority of the principle defining the doctrine of equitable construction: "when the legislature has by its enactments prescribed exactly when and how wills may be made, altered, and revoked, and apparently, as it seems to me, when they have been fully complied with, [the legislature] *has left no room for the exercise of an equitable jurisdiction by courts* over such matters."[48] As the italicized portion makes clear, the dissent accepted the doctrine of equitable jurisdiction but denied its applicability to Elmer's case. For, on the dissent's view, the statute of wills had, by its terms, provided the exclusive grounds by which a court may decline to enforce a will: "No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked or altered otherwise."[49] The dissent took this language as showing that the legislature intended that all wills valid under the express provisions of the statute of wills be administered by the court—no matter how unjust doing so might be in a particular case.

The important point for our purposes is this: insofar as the dissent and majority agreed on the relevant legal principle but disagreed on whether it applied to *Riggs*, the judges were having a borderline dispute about the application of the principle—and not a pivotal disagreement about its authority. As Coleman points out and Dworkin concedes, borderline disagreement about the application of shared standards is consistent with positivism's Conventionality Thesis. To quote Dworkin one more time on this important point:

> People do sometimes speak at cross-purposes in the way the borderline defense describes. They agree about the correct tests for applying some word in what they consider normal cases but use the word somewhat differently in what they all recognize to be marginal cases. (*LE* 41)

47. *Riggs*, 22 N.E. 188, 189.
48. *Riggs*, 22 N.E. 188, 191; emphasis added.
49. *Riggs*, 22 N.E. 188, 191.

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Though Dworkin is conceding the defense as it applies to criterial explanations of concepts, the defense is no less plausible with respect to shared criteria of legal validity, as Coleman's analysis shows. The first disagreement dividing the *Riggs* court presents no problem for the Conventionality Thesis.

The second disagreement dividing the *Riggs* court is somewhat deeper. The majority's argument begins with a surprising proclamation: "Besides, all laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law."[50] The *Riggs* majority then identifies the relevant maxim in the following passage:

> No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.[51]

The majority concludes that to allow a murderer to take under the will of his victim would be to allow him to "take advantage of his own wrong, . . . found [a] claim upon his own iniquity, or . . . acquire property by his own crime."

The dissent, of course, rejects the view that the content of a legislative enactment is constrained by the substantive requirements of the common law:

> [The majority says] that to permit the respondent to take the property willed to him would be to permit him to take advantage of his own wrong. To sustain their position the appellants' counsel has submitted an able and elaborate brief, and, if I believed that the decision of the question could be effected by considerations of an equitable nature, I should not hesitate to assent to views which commend themselves to the conscience. But the matter does not lie within the domain of conscience. We are bound by the rigid rules of law, which have been established by the legislature, and within the limits of which the determination of this question is confined.[52]

The dissent takes the view that legislative enactment represents a superior source of law and that the court is bound to respect the language of the applicable statute—regardless of whether it coheres with relevant common-law provisions.

Thus the disagreement dividing the court concerns the proper role of the court vis-à-vis the legislature. The majority claims the common law functions as a constraint on the operation of statutory law; or, to put it otherwise, the majority views judge-made law as a superior source of law to legislative

50. *Riggs*, 22 N.E. 188, 190.
51. *Riggs*, 22 N.E. 188, 190.
52. *Riggs*, 22 N.E. 188, 191.

enactment. The dissent claims that legislative enactment is a superior source of law to judge-made law and that legislatures have considerably more latitude in enacting statutory law than courts have in applying and construing it.

The dissent did not offer much in the way of an explanation for this view, but it is not difficult to surmise its justification. Judge Gray's view here was likely based on a familiar conception of democracy: Since judges are less accountable to the electorate than legislators, judges should respect the institutional decisions of the legislatures. On this line of argument, elected legislatures are responsible for creating statutory law, while unelected judges are responsible for interpreting and applying that law.[53] Thus courts lack lawmaking authority to limit the reach and application of any given statute—and this is so even if statutes have the effect of modifying the common law.

Though Judge Gray's view of the court's role in statutory construction is now the more prevalent one, the view of the *Riggs* majority was quite common in the eighteenth and nineteenth centuries. Indeed, many jurisdictions had explicitly adopted the principle that statutes in derogation of the common law would be strictly construed.[54] As a historical matter, the institutions associated with courts and the common law evolved earlier than those associated with legislative bodies and statutory law; thus, at least early on, the courts were viewed as a source of law superior to the legislature.[55]

But this view about the proper role of the court and legislature began to change during the nineteenth century. Towards the end of the nineteenth century, many state legislatures abolished the requirement that statutes in derogation of the common law were to be strictly construed. For example, the Idaho legislature abolished this doctrine by statute in 1887.[56] Similarly, a Kentucky court held, with *Riggs* in mind, that: "[a] statutory right cannot be defeated by a common-law principle, such as that forbidding a person to take advantage of his own wrong."[57] The majority view among the states is now that the common law can be modified or even abolished by statute.[58]

53. As a greater number of judges are elected to the bench, this line of reasoning loses its force.

54. *See, e.g.*, Brown v. Barry, 3 U.S. 365, 1 L.Ed. 638 (1797); Cook v. Meyer, 73 Ala. 580 (1883); Hotaling v. Cronise, 2 Cal. 60 (1852); Young v. McKenzie, 3 Ga. 31 (1847); Kramer v. Rebman, 9 Iowa 114 (1859); Dwelly v. Dwelly, 46 Me. 377 (1859); Sibley v. Smith, 2 Mich. 486 (1853); Sullivan v. La Crosse & M. Steam-Packet Co., 10 Minn. 386 (1865); Burnside v. Whitney, 21 N.Y. 148 (1865); Bailey v. Bryan, 48 N.C. 357 (1856); Appeal of Esterley, 54 Pa. St. 192 (1867); and Hearn v. Ewin, 43 Tenn. 399 (1866).

55. *See, e.g.*, Theodore F.T. Plucknett, A CONCISE HISTORY OF THE COMMON LAW (5th ed., 1956).

56. *See* Idaho Code Civ. Proc., §3.

57. Eversole v. Eversole, 185 S.W. 487, 169 Ky. 793 (1916).

58. *See, e.g.*, Lowman v. Stafford, 37 Cal. Rptr. 681 (1964); Drafts v. Drafts, 114 So.2d 837 (1963); Wallach v. Wallach, 95 S.E.2d 750 (1956); Bissell Carpet Sweeper Co. v. Shane Co., 143 N.E.2d 415; Williams v. City of Wichita, 374 P.2d 578 (1962); Dieball v. Continental Cas. Co., 176 So.2d 774 (1965); State Highway Commission v. Southern Union Gas Co., 332 P.2d 1007 (1958).

Assuming that the dispute in *Riggs* was a dispute about the grounds of law, it was not one that challenged the status of any putative criterion of validity. Neither the majority nor the dissent, for example, challenged the authority of the court and legislature to create binding law. What was at issue was merely the proper role of the common law relative to that of statutory law. It was once commonly thought that certain political principles implied that the common law should operate as a constraint on the content of statutory law. According to this view, the common law has its foundation in considerations of justice and natural law and thus represents a higher source of law than the statutory law, which is often based on utilitarian considerations of expediency and compromise among diverse constituencies. Now those same political principles are commonly thought to imply that the body less accountable to the electorate should respect the institutional decisions of the body more accountable to the electorate. But it is important to realize that both positions are rooted in principles relating to the notion of representative democracy. Thus, while the *Riggs* dispute cannot plausibly be characterized as borderline, the fact that the majority and the dissent both accepted the same set of basic principles means that the dispute cannot be characterized as pivotal. Construed as a dispute about the criteria of validity, it was a dispute about the core implications of those principles, but, as we saw with the *Brown* case,[59] this does not entail a disagreement that is incompatible with positivism.

Nevertheless, even this characterization of the *Riggs* dispute concedes too much to Dworkin; for the disagreement dividing the court cannot plausibly be described as being about what the criteria of validity require. Insofar as the *Riggs* judges were divided over how best to understand principles of political legitimacy, the dispute was about political morality and not about the criteria of legal validity; for the judges disagreed over what the courts *should* do—and not over what the courts *could* do. For a pivotal disagreement about the grounds of law must be construed as a disagreement about whether the criteria of validity contains some particular standard that has the form:

> (CoV): The performance of some act *a* by some class *C* of officials results in a legally valid norm.

Otherwise put, a pivotal disagreement involves a disagreement among competent officials over whether a statement of this form is true. Construed as a pivotal disagreement about the criteria of legal validity, the *Riggs* dispute was about whether a judicial construction of the common law as constraining an unambiguous legislative enactment would result in valid law.

But this is an implausible interpretation of the disagreement. The court's holding, of course, created a precedent that lower courts were obligated to

59. *See* Section II, *supra*.

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follow. But notice that if the court had decided to enforce the terms of the will, as the dissent urged, *that* holding would also have created binding precedent. For better or worse, lower courts would have been bound to allow murderers to take under the wills of their victims—at least until the legislature or some higher court changed the law. Accordingly, no matter how the *Riggs* court decided the case, no matter what principle its decision was based on, the holding would constitute binding legal precedent and hence valid law.

And here it is worth noting that some courts went the other way on the issue. In Bird v. Plunkett,[60] for example, Plunkett was charged with second-degree murder but was convicted of only the lesser charge of manslaughter in his wife's death. Although the statute of wills had been amended to prohibit a convicted murderer from taking under the will of his victim, it did not prohibit a person convicted of manslaughter from so taking. Nevertheless, a relative sued to prevent distribution of the victim's estate to Plunkett, citing *Riggs* in support of the argument that common-law principles precluded allowing Plunkett to take under the will. The court rejected such reasoning:

> The maxim that one should not be permitted to profit by his own wrong of itself is insufficient upon the facts to entitle the plaintiffs to equitable relief. . . . [J]udicial tribunals have no concern with the policy of legislation and . . . cannot engraft upon the provisions of the statutes of descent and distribution an exception to bar one who feloniously kills his benefactor from succeeding to the latter's property.[61]

The *Bird* court went on to construe the relevant statutory provisions as allowing Plunkett to take under the will.

Of course, one could argue, as Dworkin presumably would, that *Bird* was a mistake, and that the *Riggs* court would have been making the same mistake if it had decided the case differently. For this reason, a contrary decision could have been reasonably and perhaps in some sense "correctly" criticized by other practitioners and laypersons. But it cannot plausibly be denied that a contrary decision in *Riggs* would have created legally valid precedent. As a matter of legal validity, the *Riggs* court had the authority to decide the case either way and create valid law; as Raz puts this important point: "some courts' decisions set precedents. They create law that may be difficult to overturn. As always where courts' decisions set precedents they do so even when they are mistaken or misguided" (TVI 278). For better or worse, the "mistakes" of a court on a matter over which its authority is final

60. 95 A.2d 71 (1953).

61. *Bird*, 95 A.2d at 75. Indeed, as the *Bird* court points out, the *Riggs* holding has been criticized in a number of other cases. *See, e.g.*, Shellenberger v. Ransom, 59 N.W. 935 (1894); Wall v. Pfanschmidt, 106 N.E. 785 (1914); and Box v. Lanier, 79 S.W. 1042 (1904).

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results in valid law.[62] And it is uncharitable in the extreme to think that the judges in *Riggs* were confused about this obvious point.[63]

The same is true of most disputes concerning the proper role of the Supreme Court in interpreting the Constitution. Sometimes the Court has taken an expansive view of its role in constitutional interpretation, as was true of the Warren Court; at other times, the Court has taken a more conservative view of its role, which fairly characterizes the current Court. But regardless of the Court's approach to constitutional interpretation, its holdings result in binding legal precedent.[64]

Consider, for example, the line of cases beginning with Griswold v. Connecticut,[65] which established a right to privacy with respect to sexual matters. Robert Bork rejects the entire line of holdings as mistaken:

> The unmarried individual has, as a matter of fact, the freedom to decide whether to bear or beget a child, of course, because he or she has the right to choose whether or not to copulate. But that did not seem enough to the Court, perhaps because copulation should not be burdened either by marital status or by abstinence from its pleasure. There may or may not be something to be said for this as a matter of morality, but there is nothing to be said for it as constitutional law. The Constitution simply does not address the subject.[66]

But while Bork rejects the *Griswold* holding and its progeny as mistaken and even politically illegitimate because inconsistent with democratic principles, he would not—and *could not* plausibly—argue that those holdings are illegal or not legally valid.[67]

62. Dworkin acknowledges that judicial mistakes constitute binding law: "If the Constitution did not as a matter of law prohibit official racial segregation, then the decision in *Brown* was an illicit constitutional amendment" (*LE* 30). The same can be said, of course, for every judicial mistake by the highest court empowered to consider the issue. Every such mistake results in the creation of binding law. Accordingly, judicial decisions by the highest court result in valid law both when they are "correct" and when they are not.

63. Indeed, confusion on this point would be grounds for doubting that a judge is competent.

64. There are, of course, limits to what the Supreme Court can do in creating constitutional law, but those limits are defined by the acceptance of citizens and officials. As long as citizens and officials accept the Court's constitutional holdings, these holdings have the force of law. To my knowledge, the Court has never come closer to reaching the limits of such acceptance than it did with the *Brown* decision. So much resistance did *Brown* engender in the South that the court tolerated school segregation there for ten years after its decision. Judicial efforts to enforce *Brown* achieved real momentum only after the Civil Rights Act of 1964.

65. 381 U.S. 479 (1965).

66. Robert H. Bork, The Tempting of America (1990).

67. Not all constitutional disputes involve disputes about an existing criterion of validity. Consider, for example, Scott Shapiro's description of the dispute dividing the court in Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803):

> In *Marbury*, Chief Justice Marshall was called on to decide whether the Constitution conferred upon the Supreme Court the right of judicial review. No positivist would claim that Marshall and Madison were arguing over the application of an existing rule of recognition. Because this was a case of first impression, there had been no practice

And courts know the difference between disputes concerning political legitimacy and pivotal disputes concerning the criteria of legal validity. In Roe v. Wade, for example, Justice White argues in dissent that: "[a]s an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court."[68] White acknowledges, as any competent practitioner must, that the majority's decision results in valid law, but believes nonetheless that the Court's decision is inconsistent with democratic ideals. For this reason, disputes concerning the proper theory of constitutional interpretation are *not* pivotal disputes about what the criteria of validity require.

Indeed, if the issue that divides a Borkean justice from other justices involved a pivotal dispute, it would involve a disagreement over the truth-value of the following principle of constitutional interpretation:

> (CI): A nonoriginalist interpretation of the Constitution by the Supreme Court results in valid law.[69]

But it should be clear that proposition (CI) is true (at least in the vast majority of cases likely to arise), as Justice White's remarks concede. And it is unlikely that Supreme Court justices have ever been confused about this fundamental point regarding their authority. Disputes about such issues are not pivotal disagreements about the criteria of validity, because such disputes are not about what the criteria of validity require.

Accordingly, Dworkin's semantic sting fails, in part, because he mischaracterizes the disagreement occurring in hard cases like *Riggs*. The cases that Dworkin typically cites as exemplifying pivotal disputes about the grounds of law do not involve such disputes at all; for such cases involve disputes about what the courts *should* do and not disputes about what the courts *can* do. And disputes about what the courts should do are disputes about the morally legitimate role of courts—and not disputes about the criteria of legal validity. Courts understandably wish to exercise their powers in the way that is most likely to endow their decisions with *legitimate* authority, i.e., in a way that gives people a *moral* reason for accepting them. Since each of the various interpretations of the semantic sting argument depends on the

established with respect to the foundational issue in question. As Hart famously argued, in many high-level controversies, we must see judicial behavior as extending the rule of recognition, not applying it.

Shapiro, *On Hart's Way Out*, 486. The justices were presumably guided in reaching the decision by considerations of political morality. If this is correct, they would have decided the case on the basis of considerations bearing on the political legitimacy of the various options available to the court.

68. Roe v. Wade, 410 U.S. 113, 222 (1973).

69. (CI) is a statement of the form (CoV): the relevant act *a* is the articulation of a nonoriginalist interpretation of the Constitution, and the relevant class *C* of officials is the Supreme Court.

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existence of cases involving pivotal disagreement among judges, it cannot succeed as a refutation of positivism until Dworkin produces plausible examples of such disagreement. If there are instances of such disagreement, I think that they are extremely rare; such instances, if any, are neither common to hard cases nor numerous enough to cast doubt on the Conventionality Thesis.

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