

DWORKIN V. THE PHILOSOPHERS: A REVIEW ESSAY ON *JUSTICE IN ROBES*

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*In this review essay, Professor Michael Steven Green argues that Dworkin's reputation among his fellow philosophers has needlessly suffered because of his refusal to back down from his "semantic sting" argument against H. L. A. Hart. Philosophers of law have uniformly rejected the semantic sting argument as a fallacy. Nevertheless Dworkin reaffirms the argument in *Justice in Robes*, his most recent collection of essays, and devotes much of the book to stubbornly, and unsuccessfully, defending it. This is a pity, because the failure of the semantic sting argument in no way undermines Dworkin's other arguments against Hart.*

Justice in Robes, by Ronald Dworkin. Belknap Press of Harvard University Press, 2006.

Ronald Dworkin's theory of law has not been adequately appreciated by other philosophers of law. At first glance, this statement might seem absurd. After all, Dworkin is, by a wide margin, the most famous living philosopher of law.¹ But his influence is primarily upon *non*-philosophers. The philosophers of law themselves would choose Joseph Raz as their most influential member.² While countless philosophers of

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1. In a list Brian Leiter compiled of the most cited law professors by specialty for the academic year 2002–2003, the number of citations to Dworkin (4750) was larger than the number of citations to the next ten law professors writing in the philosophy of law *combined*. Brian R. Leiter, Top 10 Most Cited Faculty by Areas, 2002–03, http://www.leiterrankings.com/faculty/2002faculty_impact_areas.shtml (last visited Mar. 13, 2007).

2. See Leslie Green, *Three Themes from Raz*, 25 OXFORD J. LEGAL STUD. 503, 503 (2005) ("To find another legal theorist [besides Raz] who has not only produced an indispensable body of work, but who taught and encouraged so many jurists of the next generation, one has to go back to his forebear, H.L.A. Hart."); Brian Leiter, *The Law School Observer*, 5 GREEN BAG 101, 103 (2001) ("Among philosophers, [Dworkin] has long been overshadowed by Raz, who is generally thought by specialists in the field to be the most important living legal philosopher.").

law have declared their debt to Raz, the number of self-described Dworkinians is small.³

Why has Dworkin's fame not translated into comparable influence in the philosophical community? It is not enough to point to Dworkin's view that moral considerations must be part of the criteria for determining valid law⁴ (a position that we can call, perhaps misleadingly, *natural law theory*).⁵ It is true that most philosophers of law reject natural law theory.⁶ But John Finnis,⁷ Stephen Perry,⁸ and Michael Moore⁹ have each embraced natural law positions, and their writings have not met with the same level of resistance as Dworkin's.¹⁰

The problem, I believe, is that Dworkin has made it far too easy for other philosophers to dismiss him, because he stubbornly refuses to back down from some bad arguments. The best example is Dworkin's "semantic sting" argument against H. L. A. Hart, first presented in *Law's Empire*.¹¹ As we shall see, philosophers of law have consistently rejected the semantic sting argument as a fallacy.¹² There is, literally, no disagreement in the profession on the matter. And yet Dworkin continues to present the argument, even though he would have plenty of good reasons for criticizing Hart without it.

3. See Brian Leiter, *The End of the Empire: Dworkin and Jurisprudence in the 21st Century*, 36 RUTGERS L.J. 165, 166 (2004) ("The only good news in the story about Dworkin's impact on law and philosophy is that most of the field declined to follow the Dworkinian path—something, interestingly, that those not working in legal philosophy generally do not know."); Thom Brooks, Book Review, 69 MOD. L. REV. 140, 140 (2006) ("[Dworkin's] wide readership has not translated into more than a small number of disciples. It is quite rare to find anyone in the field identifying herself as a 'Dworkinian.'").

4. RONALD DWORKIN, *JUSTICE IN ROBES* 35 (2006).

5. See Ronald A. Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165, 165 (1982) (noting that critics have characterized his theory as a natural law theory).

6. Most philosophers of law are positivists. *Inclusive* legal positivists claim that the law *may* contain moral criteria of validity, but need not do so. Whether the law includes morality is ultimately answered by social facts—namely the conventions that form the foundation of a legal system. See, e.g., JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 67–148 (2001) [hereinafter COLEMAN, *PRACTICE OF PRINCIPLE*]; H. L. A. HART, *THE CONCEPT OF LAW* 250–54 (2d ed. 1994); W. J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* (1994); Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982). *Exclusive* legal positivists agree that the criteria of legal validity are ultimately determined by social facts, but argue that morality cannot be incorporated into the law at all. See Joseph Raz, *Authority, Law, and Morality*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 195 (rev. ed. 1994); Joseph Raz, *Legal Positivism and the Sources of Law*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 37 (1979); Scott J. Shapiro, *On Hart's Way Out*, in *HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW* 149 (Jules Coleman ed., 2001).

7. See, e.g., JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

8. See, e.g., Stephen R. Perry, *Interpretation and Methodology in Legal Theory*, in *LAW AND INTERPRETATION* (Andrei Marmor ed., 1995).

9. See Michael Moore, *Law as a Functional Kind*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 188 (Robert P. George ed., 1992).

10. Only Dworkin's arguments have been described as "riddled with philosophical confusions," COLEMAN, *PRACTICE OF PRINCIPLE*, *supra* note 6, at 155, and "largely without philosophical merit," Brian Leiter, *supra* note 3, at 166.

11. See RONALD DWORKIN, *LAW'S EMPIRE* 45–46 (1986).

12. Indeed, according to Brian Leiter, it "has by now been subjected to so many withering criticisms, that . . . if any argument is no longer worth discussing, it is this one." Brian Leiter, *Beyond the Hart/Dworkin Debate*, 48 AM. J. JURIS. 17, 31 n.49 (2003).

Dworkin's stubbornness is sadly in evidence in *Justice in Robes*,¹³ his most recent collection of essays. As with all of Dworkin's writings, there is much in the book to admire. But I doubt that its virtues will be noticed by philosophers of law. What they are likely to remember is the futile defense of the semantic sting argument to which a large part of the book is devoted.¹⁴

I. THE SEMANTIC STING ARGUMENT

In his semantic sting argument, Dworkin claims that H. L. A. Hart's theory of law is a consequence of Hart's semantic views about how words (in particular the word "law") get their meaning. According to Dworkin, Hart's semantic theory was conventionalist—the meaning of the word "law" is determined by agreement. As a result, Dworkin argues, Hart was committed to a conventionalist theory of law, in which the law of a jurisdiction is determined by agreement. Dworkin takes the semantic foundations of Hart's theory of law as a reason for rejecting it. Because semantic conventionalism is inadequate, so is Hart's theory of law.

Although Dworkin's semantic sting argument is unquestionably a fallacy, *why* it is a fallacy takes some explaining. In particular, care is needed in describing the conventionalist theories of law and conventionalist semantics that Dworkin wrongly sees as related.

A. *Conventionalist and Nonconventionalist Theories of Law*

A *theory of law* is a *general* account—that is, an account that applies to any jurisdiction (the United States, Uzbekistan, the Roman Empire)—of the conditions that must be satisfied for something to be the valid law of the jurisdiction.¹⁵ Because they are general, theories of law have a hurdle to overcome: the conditions for valid law *change* as one moves from jurisdiction to jurisdiction. To use a very simple example, in 1788 the valid laws of Great Britain were arguably what the King-in-Parliament commanded. At the same time, the valid laws of France were arguably what the King of France commanded. "What the King-in-Parliament commands is valid law" cannot be a general theory of law, for it does not work for France in 1788, just as "what the King of France commands is law" would not work for Britain at that time. For this reason, it appears that a general theory of law cannot directly identify the laws of a jurisdiction. Instead, it must offer a more general criterion that allows us to identify the criteria, *specific to each jurisdiction*, that in turn identify the laws of that jurisdiction.

13. DWORKIN, *supra* note 4.

14. *Id.* at 30–33, 165–66, 225–26.

15. See Michael S. Moore, *Interpreting Interpretation*, in *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* 1, 26–27 (Andrei Marmor ed., 1995).

In Hart's theory of law, the general criterion is *acceptance by officials in the jurisdiction*: something is the law of a jurisdiction if it satisfies the criteria that the jurisdiction's officials (judges, legislators, sheriffs, and the like) have accepted for enforcing norms.¹⁶ For example, the Securities Exchange Act is valid law in the United States because it satisfies the criteria, such as promulgation in accordance with the U.S. Constitution, that American officials have accepted for norms that may be backed up by governmental power.¹⁷ Hart calls this official practice of enforcing norms on the basis of these accepted criteria a *rule of recognition*.¹⁸

An alternative, but not incompatible, description of a theory of law (one favored by Dworkin) is to speak of it as an account of the truth conditions for propositions of law.¹⁹ Consider the proposition "The Securities Exchange Act is valid American law." Hart's theory of law can be understood as describing the conditions under which that proposition is true—namely if the Securities Exchange Act satisfies the enforcement criteria accepted by American officials.

It follows from Hart's theory that when there is disagreement among judges about how to resolve a hard case, and the disagreement stems from differing views about enforcement criteria, there is *no law* answering the case, for the rule of recognition is silent on the matter.²⁰ This is not to say that the court must dismiss the action for failure to state a claim, for the court's resolution of the case may be a legally permissible act of law *making* (as opposed to law *application*). It would be an act of law making if so identified by the rule of recognition, that is, if there is agreement among officials that judicial resolutions of legally undetermined cases are enforceable (something true of the American rule of recognition, for example).

16. HART, *supra* note 6, at 94. The existence of a legal system also requires that the primary rules that are valid according to the criteria are generally—although not necessarily *always*—obeyed by the population. *Id.* at 116–17.

17. On the complexity of these criteria in the American legal system, see Michael Steven Green, *Legal Revolutions: Six Mistakes About Discontinuity in the Legal Order*, 83 N.C. L. REV. 331, 343–51, 358–60, 374–82 (2005), and Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 630–60 (1987).

18. In fact, sometimes Hart speaks of the rule of recognition not as a social practice but as a *proposition* specifying the criteria of legal validity within the legal system. See Benjamin C. Zipursky, *The Model of Social Facts*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW, *supra* note 6, at 219, 227–28. But he also uses the term to refer to the social fact that a certain rule of recognition (in the propositional sense) is practiced by officials. The proposition is practiced in the sense that officials agree to enforce only that which satisfies the criteria in the proposition. On the distinction between a rule of recognition in the propositional sense and the practice of that rule, see COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 6, at 77–78.

19. DWORKIN, *supra* note 4, at 9.

20. Judges might disagree about how a case should turn out even though they agreed on enforcement criteria, for they might disagree about whether those criteria are in fact satisfied. They might agree, for example, that the case could be resolved only by a statute validly enacted by the legislature, but disagree about whether the legislative quorum required for valid enactment was satisfied because the presence of a legislator at the time of voting was in dispute.

Let us call a theory of law *conventionalist* if it looks to the currently accepted views of a group in a jurisdiction to find the criteria identifying the laws of that jurisdiction. In contrast, under a *nonconventionalist* theory of law these criteria can diverge from the currently accepted views of any group in the relevant jurisdiction. Hart's theory of law is conventionalist because the criteria identifying the laws of a jurisdiction must be accepted by officials in the jurisdiction.²¹

An extreme example of a *nonconventionalist* theory of law would simply use the *same* set of criteria for identifying the laws of all jurisdictions. Such a theory might say, for example, that God's word, as expressed in the Bible, is the law of every jurisdiction in the world. But a theory of law can be *nonconventionalist* even if it is sensitive to the current views of people in a jurisdiction, provided that it does not simply equate the criteria identifying the laws of a jurisdiction with these current views the way a conventionalist theory of law does.

Dworkin's theory of law is an example of such a *nonconventionalist* theory of law. In *Justice in Robes*, Dworkin asks us to consider an imaginary case in which the plaintiff, Mrs. Sorenson, has suffered harm from a generic drug.²² She cannot prove which company manufactured the pills that caused her harm. Does the law of her jurisdiction entitle her to damages from each of the manufacturers on the basis of its market share, given that in past cases "judges stated that no one is liable for injuries he did not cause" and there are "no past decisions in which the judge awarded anyone damages based on market share rather than direct causation"?²³

Dworkin offers the following account of how the matter would be decided according to his theory of law and according to Hart's:

In my view, legal argument is characteristically and pervasively moral argument. Lawyers must decide which of competing sets of principles provide the best—morally most compelling—justification of legal practice as a whole. According to Hart's [theory], on the other hand, substantive legal argument is normative only when social sources make moral standards part of the law. No legislature or past judicial decision has made morality pertinent in Mrs. Sorenson's case so, on Hart's view, no moral judgment or delibera-

21. In speaking of Hart's theory as conventionalist, I mean only and vaguely that the rule of recognition rests upon agreement. I do not take a stand on whether it should be understood as a convention in the sense articulated by David Lewis, that is, as a solution to a coordination problem. DAVID LEWIS, *CONVENTION: A PHILOSOPHICAL STUDY* (1969). For such an account of the rule of recognition, see Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW, *supra* note 6, at 99, 114–22; Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165 (1982). Nor do I take a stand on whether it should be understood as a shared cooperative activity in Michael Bratman's sense. Michael E. Bratman, *Shared Cooperative Activity: Three Features*, 101 PHIL. REV. 327 (1992). For such an account of the rule of recognition, see COLEMAN, *PRACTICE OF PRINCIPLE*, *supra* note 6, at 96–99.

22. DWORKIN, *supra* note 4, at 7.

23. *Id.* at 8.

tion enters into the question whether she is legally entitled to what she asked. So far as the law is concerned, he would have said, she must lose.²⁴

The truth is, for Hart's theory to say that Sorenson loses, Dworkin must also assume that the statutes and past decisions did not leave her case legally indeterminate. After all, it is common for the rule of recognition of a jurisdiction to allow courts to create new law, on the basis of moral considerations, when the law is silent on a matter.

Nevertheless, the fact remains that Sorenson's case is treated differently under Hart's theory compared to Dworkin's. According to Hart's theory, morality is relevant to Sorenson's case only if officials agree that it is. For Dworkin, in contrast, the law concerning Sorenson's case is always answered "by asking whether the best justification of negligence law as a whole contains a moral principle that would require that result in her circumstances."²⁵ Moral considerations are always relevant, even if officials in the jurisdiction disagree on this matter, and so it always is possible that the law is on Sorenson's side.

Dworkin's theory of law is nonconventionalist because the criteria identifying the law of a jurisdiction are not necessarily those currently accepted by people in the jurisdiction. Currently, no one in the jurisdiction agrees about how Sorenson's case should be answered or they agree that she should lose. But there nevertheless can be law on the matter on the basis of which she should win—namely if such law follows from the best moral justification of negligence law. But Dworkin's theory of law is not completely insensitive to the attitudes of people in the jurisdiction, for the materials upon which the moral interpretation works are identified by these attitudes. The question is the best moral justification of the negligence law of Sorenson's jurisdiction, not whatever is morally best *simpliciter*. For this reason, the criteria identifying the valid law of a jurisdiction, although always taking morality into account, will do so in different ways as one moves from one jurisdiction to the next.

B. *Philosophy as Conceptual Analysis*

Hart titles his book *The Concept of Law* because he takes his conventionalist theory of law to be the articulation of the content of that concept.²⁶ In so doing, Hart assumes a popular theory of philosophical activity, according to which philosophers analyze the contents of problematic and significant concepts, such as freedom, knowledge, and law, in order to arrive at peculiarly philosophical knowledge concerning the es-

24. *Id.* at 144.

25. *Id.* at 14.

26. See H. L. A. Hart, *Jhering's Heaven of Concepts and Modern Analytical Jurisprudence*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 265, 274 (1983); Nicos Stavropoulos, *Hart's Semantics*, in *HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW*, *supra* note 6, at 59, 63–88.

sential existence conditions for these things—that is, knowledge of what must be the case for something to be freedom, knowledge, or law.²⁷

An allied position, also endorsed by Hart,²⁸ is that philosophers arrive at existence conditions by analyzing the meanings of words. But this view suffers from the awkward problem that linguistic meanings rarely correspond to the contents of concepts with which philosophers are concerned. It is implausible with respect to the philosophy of law, for example, because the word “law” can be used to refer not merely to statutes, judicial decisions, and the like, but also to scientific or mathematical laws. Philosophers of law are generally interested in the word “law” only as applied to items of the former type.²⁹ For this reason, it is best to assume that Hart is concerned, not with the meaning of the word “law,” but with the content of *one* of the concepts associated with the word “law.”

Much of *Justice in Robes* is devoted to criticizing aspects of Hart’s philosophical method, as Dworkin understands it. For example, Dworkin argues that philosophers of law should be understood as investigating the *doctrinal* concept of law, that is, the concept that one employs when one talks about what is valid or invalid law in a certain jurisdiction.³⁰ He claims that some confusion in Hart’s philosophy of law has resulted from the failure to distinguish the doctrinal from other concepts of law.³¹ Dworkin also rejects Hart’s “archimedianism”—that is, Hart’s belief that the analysis of the concept of law is an activity divorced from

27. E.g., Stavropoulos, *supra* note 26, at 59, 64.

28. HART, *supra* note 6, at vi.

29. See, e.g., Jules L. Coleman & Ori Simchen, “Law,” 9 LEGAL THEORY 1, 1 n.1 (2003); Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, in HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW, *supra* note 6, at 1, 7–8.

30. See DWORKIN, *supra* note 4, at 2.

31. E.g., *id.* at 2–5. The *sociological* concept of law is used to identify “a particular type of institutional social structure.” *Id.* at 3. It is employed, for example, when we ask whether a primitive tribal society has law. Dworkin believes, perhaps rightly, that this concept of law is insufficiently determinate for such questions to have an interesting answer.

Dworkin also identifies the *taxonomic* concept of law as that used to identify which standards “are legal standards as opposed to moral or customary or some other kind of standards.” *Id.* at 4. For example, even when a judge must use arithmetic to decide the appropriate damages that must be paid by a defendant, it does not mean that arithmetic is part of the law in the taxonomic sense. *Id.* at 4–5. Likewise, a Polish court might use Greek law to decide a case, but that does not necessarily mean that, taxonomically, Greek law has become part of Polish law. *Id.* at 235. Once again, Dworkin does not think that the question of what is law in the taxonomic sense is an interesting one.

One can understand Hart’s theory as concerning the concept of law in both the sociological and taxonomic sense. Hart’s idea of a rule of recognition was intended to identify those societies in which law, rather than a more informal system of norms, exists. Furthermore, Hart’s theory might be understood as concerning the taxonomic concept, in the sense that only those norms identified by the rule of recognition should be considered laws. But Dworkin accepts that Hart’s conception of a rule of recognition provides an account of the doctrinal concept of law and so is a theory of law in the proper sense. *Id.* at 26. Hart’s theory provides truth conditions for propositions of law. It simply gives the wrong truth conditions.

the more concrete efforts of lawyers and judges to determine what is legal or illegal.³²

But even though Dworkin sees the investigation of the doctrinal concept of law as situated within concrete judgments of legality and illegality, he nevertheless agrees with Hart that a general theory of law can be arrived at by revealing the content of this concept of law.³³ Dworkin thinks that his theory of law is the proper account of the content of this concept.³⁴

C. Conventionalist (Meta)semantics

Both Hart and Dworkin understand their theories of law as revealing the content of the concept of law. For this reason, both theories of law can be understood as semantic. To make a semantic claim is to identify the meaning of a word—or the content of a concept associated with the word. For example, to say that the content of the concept of bachelor is *unmarried male* (or that “bachelor” means *unmarried male*) is to make a semantic claim. Both Hart’s and Dworkin’s theories of law can be understood as semantic, for both are accounts of the content of the concept of law.

But there is a different sense of the word “semantic,” which refers not to claims about *what* the content of a concept (or the meaning of a word) is, but rather to claims about how this content or meaning is generated. Sometimes the term “metasemantic” is used to identify semantic claims in this second sense.³⁵ The view that “bachelor” means *unmarried male* says nothing about *why* “bachelor” has this meaning and so is not a metasemantic claim. Likewise, Hart’s and Dworkin’s theories of law are not metasemantic, for in saying what the content of the concept of law is, they do not say anything about how it came to have this content.

Dworkin primarily uses the term “semantic” in this second, metasemantic, sense. For example, in *Justice in Robes*, he describes as “se-

32. *Id.* at 140–86. As we shall see later, it might be the case that Hart, like Dworkin, did not insist upon a neat separation between the analysis of the concept of law and concrete applications of the concept.

33. For example, in *Justice in Robes*, Dworkin notes that “[i]n one respect . . . [Hart and I] are in the same boat. We both believe that we will understand legal practice and phenomena better if we undertake to study, not law in some particular manifestation, like the law of product liability in Scotland, but the very concept of law.” *Id.* at 145; *see also id.* at 8–9 (stating that an account of the doctrinal concept of law is the development of a “general theory of law”).

34. He does not join Quine, who questions the very existence of philosophical truths that follow from the content of a concept. He is not a skeptic about conceptual analysis. W. V. Quine, *Two Dogmas of Empiricism*, 60 *PHIL. REV.* 20, 20–34 (1951). For a Quinean position in the philosophy of law, see Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, in *HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW*, *supra* note 6, at 355, 357.

35. David Kaplan, *Afterthoughts*, in *THEMES FROM KAPLAN* 565, 573–76 (Joseph Almog et al. eds., 1989); *see also* Coleman & Simchen, *supra* note 29, at 12, 18; Michael Steven Green, *Dworkin’s Fallacy, Or What the Philosophy of Language Can’t Teach Us About the Law*, 89 *VA. L. REV.* 1897, 1905 n.21 (2003).

semantic” the view that a concept is “criterial.” To say that a concept is criterial is to say *how* the concept gets its content. If a concept is criterial, its content is fixed by agreement “on a definition—rough or precise—that sets out the criteria for the correct application of the associated term or phrase.”³⁶ The concept of a bachelor is an example of a criterial concept: “People share the concept of bachelorhood only when they know that a bachelor is an unmarried male.”³⁷

To repeat, to say that the concept of a bachelor is criterial is to make a *metasemantic* claim about the concept. It tells us how the concept gets its content, namely from the commonly accepted criteria for employing the concept. To say the concept of a bachelor is criterial is *not* a semantic claim (in the first sense of the word) because it does not assign a content to the concept the way “‘bachelor’ means unmarried male” does. However, armed with the metasemantic knowledge that the concept is criterial, we can figure out its content by examining the criteria that people agree upon for using it.

Notice that by virtue of accepting a semantic account of a concept, one is not yet committed to any metasemantic theory. Someone who believes that “bachelor” means unmarried male might have any number of theories of why the word has this meaning. She might believe, for example, that God determines the meanings of our words. According to this (implausible) metasemantic theory, “bachelor” would still mean *unmarried male* even if we all used the word to refer to married females.

The metasemantic view that concepts are criterial can be understood as *conventionalist* because concepts are shared only to the extent that there is current *agreement* concerning the criteria for the concepts’ use. Other people share my concept of bachelor only if they also accept the criteria *unmarried* and *male*.³⁸ If they do not, their concept has a different content. When they think about bachelors, they are thinking about something different from what I am.

Dworkin’s fundamental criticism of conventionalist metasemantics is that it makes meaningful disagreement about a concept’s content impossible, for such disagreement would simply mean that different concepts were being used and people were talking past one another.³⁹ Of course, sometimes this is just what we want to say. Someone who insists that married women can be bachelors must be working with a different concept of bachelorhood and so cannot really be disagreeing with me at

36. DWORKIN, *supra* note 4, at 9. In *Law’s Empire*, Dworkin also describes this metasemantic position as the view that “[w]e follow shared rules . . . in using any word: these rules set out criteria that supply the word’s meaning.” DWORKIN, *supra* note 11, at 31.

37. DWORKIN, *supra* note 4, at 9.

38. For a fuller description of the metasemantic conventionalist approach, see Green, *supra* note 35, at 1899–1903.

39. DWORKIN, *supra* note 4, at 9–12.

all. Dworkin argues, however, that conventionalist metasemantics is implausible concerning some concepts.⁴⁰

For example, according to the criteria accepted by most white Southerners in 1850, slavery should be judged *just*. If conventionalist metasemantics applies to the concept of justice, then slavery was indeed just according to their concept of justice, even though it is not according to ours. But this, Dworkin argues, misdescribes our disagreement. We think that they were *wrong* about justice in a shared sense, not right about justice in some different sense.⁴¹ The inability of conventionalist metasemantics to explain disagreement about the content of a concept is the “semantic sting.”⁴² As we shall later see, Dworkin believes that because there is significant conflict concerning the content of the concept of law, it too cannot be understood as criterial.

What are the nonconventionalist metasemantic alternatives? According to one approach, commonly applied to *natural-kind* concepts, meaningful disagreement about the content of a concept is possible because the content is determined, not by common criteria for use, but by the natural structure of paradigm samples falling under the concept.⁴³ For example, we can say that we share the same concept of water with people in the sixteenth century, even though their criteria for using the concept (odorless, colorless, potable liquid) are different from ours (having the molecular structure H₂O). The concept had the same content for them as it does for us (namely having the molecular structure H₂O) because paradigm samples of water have the molecular structure H₂O. It is true that people in the sixteenth century might have occasionally described as “water” some odorless, colorless, potable liquid that was not H₂O. But they misapplied our common concept of water. They did not correctly apply a different concept.

Although natural-kind metasemantics might appear to allow for meaningful disagreement concerning the contents of controversial concepts—like equality, liberty, or law—Dworkin rejects such an approach in *Justice in Robes*:

Do these concepts describe, if not natural kinds, at least political kinds, which, like natural kinds, can be thought to have a basic ingrained physical structure or essence? Or, at least, some structure that is open to discovery by some wholly scientific, descriptive, non-normative process? Can philosophers hope to discover what equality or legality really is by something like a DNA or chemical analysis? No. That is nonsense.⁴⁴

40. *Id.*

41. DWORKIN, *supra* note 11, at 73.

42. DWORKIN, *supra* note 4, at 223–26; DWORKIN, *supra* note 11, at 43–46.

43. DWORKIN, *supra* note 4, at 10.

44. *Id.* at 152.

What these concepts are about has no natural structure that could be scientifically investigated: “[P]hilosophical analysis of political concepts cannot be shown to be descriptive on the model of scientific investigation into natural kinds. Liberty has no DNA.”⁴⁵ And neither does the law.⁴⁶

Another reason not to apply natural-kind metasemantics to the concept of law is that this metasemantics is still conventionalist in the sense that content depends upon agreement concerning paradigm samples. And certain concepts can lack even *that* level of agreement: “People can share . . . a concept even when they disagree dramatically about its instances.”⁴⁷ A metasemantic theory about such a concept “cannot simply . . . excavate the deep structure of what people mainly agree are instances.”⁴⁸

Dworkin’s metasemantic theory is more radically nonconventionalist than the natural-kind approach. The content of a concept can outstrip the current beliefs and attitudes of those using the concept even concerning paradigm samples. The fact that there is disagreement, even pervasive disagreement, about what falls under a concept does not mean that the concept is not shared or that there is no fact of the matter about what falls under the concept.⁴⁹

D. Dworkin on the Relationship Between (Meta)semantic Conventionalism and Conventionalist Theories of Law

But Dworkin’s semantic sting argument is more than a criticism of conventionalist metasemantics. In *Law’s Empire* he argues that acceptance of conventionalist metasemantics leads to conventionalist theories of law.⁵⁰ Dworkin says the same thing in *Justice in Robes*,⁵¹ except he includes natural-kind approaches among the metasemantic culprits:

[In *Law’s Empire*] I hypothesized that [legal positivists] assume that all concepts, including the doctrinal concept of law, are criterial concepts and that proper analysis of the doctrinal concept must therefore consist in elucidating the tests that lawyers share, except in borderline cases, for judging whether propositions of law are

45. *Id.* at 153.

46. *Id.* at 166.

47. *Id.* at 11–12.

48. *Id.* at 12.

49. I shall not say anything more here about the specifics of Dworkin’s nonconventionalist metasemantics. I explore that issue in Green, *supra* note 35, at 1908–29. In particular, I argue that, much as Dworkin confuses metasemantic conventionalism with a conventionalist theory of law, he confuses metasemantic nonconventionalism with a nonconventionalist theory of law. Dworkin has criticized my interpretation in *Justice in Robes*, Dworkin, *supra* note 4, at 226–27, 289 n.5, and I have responded in Michael Steven Green, *Does Dworkin Commit Dworkin’s Fallacy?*, 28 OXFORD J. LEGAL STUD. (forthcoming 2008). I will not discuss this disagreement between the two of us here.

50. See DWORKIN, *supra* note 11, at 45–46.

51. DWORKIN, *supra* note 4, at 31 (“Hart assumed, in effect, that the doctrinal concept of law is a criterial concept and that analyzing that concept means bringing to the surface the criteria that lawyers actually use, even if unselfconsciously, in applying it.”).

true. I called that assumption—that all concepts are criterial—the “semantic sting.” I then offered an analysis of law as an interpretive rather than a criterial concept to show how lawyers’ disagreements can be genuine even if they do not agree on criteria for identifying true propositions of law.

I tailored that account of the semantic sting, in 1986, to fit the arguments for legal positivism then current. But a fresh generation of legal philosophers has become more sophisticated in the philosophy of language, which has itself moved on since I wrote, and my description has proved too narrow. I should now characterize the sting more broadly: it lies in the assumption that all concepts depend on a convergent linguistic practice. . . : a practice that marks out the concept’s extension either through shared criteria of application or by attaching the concept to a distinct natural kind. The infection of the semantic sting, I shall now say, is the assumption that all concepts of law, including the doctrinal, depend on a convergent practice in one of those two ways. The pathology of the semantic sting remains the same. Lawyers who are stung will suppose that an analysis of the concept of law must fit—and only fit—what lawyers mainly agree is law.⁵²

In particular Dworkin argues that *Hart’s* conventionalist theory of law was the result of his conventionalist metasemantic views⁵³; “Hart assumed, in effect, that the doctrinal concept of law is a criterial concept and that analyzing the concept means bringing to the surface criteria that lawyers actually use, even if unselfconsciously, in applying it.”⁵⁴ Although Dworkin recognizes that his interpretation of Hart has been criticized since the publication of *Law’s Empire*, he insists that his is “the best available”⁵⁵ and that his “original diagnosis was correct.”⁵⁶ Hart’s conventionalist theory of law was a consequence of his conventionalist metasemantics.

II. DWORKIN’S ARGUMENT FAILS

But Dworkin’s argument is a fallacy, for, as many philosophers of law have argued, conventionalist theories of law do not follow from conventionalist metasemantic views.

52. *Id.* at 225–26.

53. In *Law’s Empire*, Dworkin describes theories of law like Hart’s as “semantic theories of law” because they allegedly follow from conventionalist (meta)semantic views. DWORKIN, *supra* note 11, at 31–35.

54. DWORKIN, *supra* note 4, at 31.

55. *Id.* at 166.

56. *Id.* at 31.

A. *Conventionalist Metasemantics Does Not Generate Conventionalist Theories of Law*

Keep in mind that metasemantic conventionalism is a view about how concepts—including the concept of law—get the contents they have. According to this view, the content of the concept of law is determined by the criteria for using the concept agreed upon by those employing it. In saying this, one has not yet said *what* the content of the concept is. In contrast, a conventionalist *theory of law* says what the content of the concept of law is, without yet saying how the concept gets that content.

If this distinction is kept in mind, it should be clear that conventionalist metasemantics does not entail conventionalist theories of law. After all, the metasemantic fact that the content of the concept of law consists of the criteria agreed upon by those using the concept has yet to tell us *what* these criteria are and therefore cannot yield any particular theory of law. The criteria people have agreed upon for using the concept of law might be that the law of every jurisdiction in the world is God's word, as expressed in the Bible. One can accept conventionalist metasemantics and a nonconventionalist theory of law.

Indeed, people could agree that the criteria for using the concept of law are those specified in a nonconventionalist theory of law like Dworkin's. Dworkin's theory of law would be the content of a criterial concept.⁵⁷

57. Indeed, it is arguable that there is *nothing* that conventionalist metasemantics excludes as the content of a criterial concept. Assume that it is claimed to exclude a candidate content. To be a plausible candidate, what the content *is* must be described by describing what it is about. (For example, the content *bachelor* can be described by saying that it is about unmarried males.) One has not adequately described a candidate content simply by saying that it is about an *indescribable something*, for the metasemantic conventionalist could simply deny that thinking about this indescribable something is thinking about anything at all. But once a description of the content is offered, the description itself could be the criteria agreed upon for using a concept.

The fact that any description can be made the criteria of a concept has been taken advantage of by defenders of conventionalist metasemantics. Consider the metasemantic theory for natural-kind terms, discussed earlier, according to which the meaning and reference of these terms is fixed by the underlying structure of a paradigm sample. See *supra* text accompanying notes 43–49. Although such accounts appear incompatible with conventionalist metasemantics—since the underlying structures of these paradigm samples can be unknown to those using the term—metasemantic conventionalists can reply that the description by means of which this alternative metasemantic theory is articulated is *itself* part of the criteria for using the term. The word “gold,” for example, *means* “whatever has the same structure as the stuff picked out by the appropriate causal-historical relationship with the first uses of the term ‘gold.’” See, e.g., Green, *supra* note 35, at 1950–51; Frederick W. Kroon, *Causal Descriptivism*, 65 AUSTRALASIAN J. PHIL. 1 (1987); David Lewis, *Putnam's Paradox*, 62 AUSTRALASIAN J. PHIL. 221 (1984).

Indeed, if Dworkin argued that his theory of law could *not* be the content of a criterial concept, he would be saying, in effect, that conventionalist metasemantics is unable to explain how one could *think* his theory of law, *even to reject it*. I doubt—and Dworkin never suggests—that he thinks metasemantic conventionalism is *that bad* of a theory.

To say that conventionalist metasemantics renders no content unthinkable is not to say that a content cannot be unthinkable *in particular circumstances*. What conventionalist metasemantics makes impossible is thinking a content that outstrips currently accepted criteria for the concept's use. Any content can be thought if it is formed in the right way, and any content can be unthinkable if it is formed in the wrong way.

The error in Dworkin's argument is his assumption that because the content of a concept is *determined by* convention, it is *about* convention. That this is a mistake is easiest to see in connection with concepts whose content, being obviously unrelated to human practices, could not possibly be about conventions. No one is tempted to commit Dworkin's fallacy in connection with the concept of a bachelor, for example. Even if the content of this concept is determined by convention, it is, quite obviously, about unmarried males, not conventions.

But even if a concept is about human practices, the metasemantic fact that its content is determined by convention does not mean it is about the conventional aspects of those human practices. Consider, for example, the concept of the *nonconventional*, that is, a concept that refers to those characteristics of practices that do not depend upon agreement among the practices' participants. The nonconventional would include, for example, the injustice of slavery in the South in 1850. The metasemantic conventionalist would say that the concept of the nonconventional gets its content from language-users' conventions. But it would be a mistake to conclude from this that the concept's content is *about* the conventional aspects of human practices. It is, after all, the concept of the *nonconventional*. To think that a conventionalist theory of law follows from conventionalist metasemantics is a similar mistake, for conventionalist metasemantics on its own gives one no reason to think that the concept of law is about conventional rather than nonconventional aspects of legal practices.

By the same token, the fact that the content of a concept is determined nonconventionally does not mean that it is about the nonconventional. Indeed, the content of the concept of a *convention* might be determined nonconventionally, that is, by something other than the criteria agreed upon for the concept's use.⁵⁸ This would allow for meaningful disagreements about the content of the concept. The fact that we have different theories of conventions would not mean that we are simply talking past one another. But it would be absurd to conclude from this that the concept of a convention is *about* the nonconventional.

Just as nonconventionalist metasemantics is compatible with our concept of the conventional, it is compatible with conventionalist theories of law. If a philosopher of law accepts nonconventionalist metase-

For this reason, conventionalist metasemantics can make *conventionalist* theories of law unthinkable. Consider Dworkin, who currently accepts a nonconventionalist theory of law. According to metasemantic conventionalism, when Dworkin is thinking about the law, he cannot be thinking about the law as identified by a conventionalist theory like Hart's, because that attributes a content to Dworkin's concept of law that outstrips the criteria for using the concept that Dworkin currently accepts. For the metasemantic conventionalist, Dworkin thinks about Hart's theory of law (in order to reject it) only when he generates a concept whose criteria are, by stipulation, those spelled out in Hart's theory. In contrast, nonconventionalist metasemantics would open up the possibility that Dworkin is actually thinking about the law as identified in *Hart's* theory when he tries to think about the law as identified by *his own* theory.

58. Green, *supra* note 35, at 1917-18.

mantics, he thinks that people can share a concept of law even though they do not currently agree about the criteria for its use. This would allow for meaningful debate about the proper theory of law. But all this is compatible with insisting that, according to the *nonconventional* criteria that actually make up the content of the concept of law, something is the law of a jurisdiction only if it satisfies the criteria for enforcement *agreed upon* by people within that jurisdiction.

Indeed, not only is such a person possible, H. L. A. Hart was (or at least claimed to be) just such a person. True, Hart thought that an examination of the content of the concept of law showed that the proper theory of law was conventionalist. But he did *not* think that the reason *why* the concept of law had this content was because language users *agreed* that it did. As he put it, “the criteria of the application of a concept with a constant meaning may both vary and be controversial.”⁵⁹ He was no less aware than Dworkin that there was fundamental disagreement between theorists of law. But he did not think that they were simply talking past one another.

If Hart was indeed a metasemantic nonconventionalist, then Dworkin is wrong to accuse him of archimedianism, that is, of a commitment to philosophy as occurring on a “second-order platform of ‘meta’ discourse, in which first-order concepts are defined and explored.”⁶⁰ Philosophy of law would be archimedian if it simply reported the criteria people accept for using the concept of law, in a way that did not depend upon concrete employment of the concept. Hart, however, repudiated such a method.

Nevertheless, even if Dworkin is right that Hart was a metasemantic conventionalist—and there are some reasons to believe that Hart was—Dworkin’s argument *remains* a fallacy. Dworkin is still wrong that Hart arrived at his conventionalist theory of law *because* he was a metasemantic conventionalist, for metasemantic conventionalism is compatible with *nonconventionalist* theories of law like Dworkin’s.

B. Why Does Dworkin Commit His Fallacy?

Given that Dworkin’s argument is a fallacy, why does he repeatedly succumb to it? One reason is that he confuses two practices—the *linguistic* practice of applying the concept of law and the *legal* practice of enforcing norms in a jurisdiction (which Hart calls a rule of recognition).⁶¹

Although they may appear similar, the two practices are in fact very different. First, the linguistic practice of talking about the law is a practice in which any language user can participate, including those in different jurisdictions or indeed those in conditions of anarchy. In contrast,

59. HART, *supra* note 6, at 246.

60. DWORKIN, *supra* note 4, at 141.

61. Green, *supra* note 35, at 1919–29.

the legal practice is one in which only officials in a *particular* jurisdiction can participate. Second, one engages in the linguistic practice just as much when one says law does not exist as when one says it does. In contrast, the legal practice consists not in opining that certain laws are valid or not valid, but in enforcing, through coercive sanctions, norms that satisfy certain conditions. Third, the criteria at issue in the linguistic practice are *general* (they allow one to identify, for *each* jurisdiction, what the laws of that jurisdiction are). In contrast, the criteria in the legal practice identify only the conditions for enforcing norms in the jurisdiction. They are not the criteria for identifying law in some general sense at all.

For clear examples of Dworkin's conflation of the two practices, consider the following descriptions, in *Justice in Robes*, of the rule of recognition:

Hart thought that in every community in which claims of law are made the great bulk of officials of the community all accept, as a kind of convention, some master rule of recognition that identifies which historical or other facts or events make claims of law true.⁶²

But this is not a description of the rule of recognition. A community in which *claims of law are made* is a community engaged in the *linguistic* practice of using the concept of law. Or again: "Hart argued that every legal system necessarily depends upon a master rule, or 'rule of recognition,' for identifying any and all valid propositions of law."⁶³ Once again, this is not a description of the rule of recognition. Criteria for identifying valid propositions of law are criteria for employing the concept of law. Dworkin has misdescribed the rule of recognition as the *linguistic* practice of employing that concept.

If the rule of recognition is treated as a linguistic practice, it does indeed look like there is a connection between conventionalist metasemantics and conventionalist theories of law. The metasemantic demand for agreement in the practice of employing the concept of law (on pain of talking past one another) starts to look equivalent to Hart's demand that there be agreement among officials concerning criteria for enforcement (on pain of there being no law to enforce in that jurisdiction).

But a rule of recognition is not something that exists "in every community in which claims of laws are made," nor is it a rule "for identifying any and all valid propositions of law."⁶⁴ Consider a community living in anarchy in Somalia. In saying "We have no valid law here, but the Securities Exchange Act is valid law in the United States," the members of this community would be making claims of law or stating valid propositions of law. For this reason, metasemantic conventionalism would

62. DWORKIN, *supra* note 4, at 163.

63. *Id.* at 190; *see also id.* at 32, 165–66, 214. He makes the same claim in *Law's Empire*: "Semantic theories [of law] suppose that lawyers and judges use mainly the same criteria (though they are hidden and unrecognized) in deciding when propositions of law are true or false . . ." DWORKIN, *supra* note 11, at 33.

64. *See supra* text accompanying notes 62–63.

have a good deal to say about the rules that they use. Unless they shared the same criteria for employing the concept of law, they would be talking past each other. This metasemantic requirement would be satisfied, for example, if Hart's *The Concept of Law* was accepted by people in Somalia as a proper theory of law.

But their agreement concerning the criteria for employing the concept of law would do nothing to create a rule of recognition. They *have* no rule of recognition in Somalia, because officials are not actually enforcing norms on the basis of accepted conditions. Indeed, precisely because they all agree concerning the criteria for using the concept of law, they would all conclude that there is *no* valid law in their jurisdiction at all.⁶⁵

Because a rule of recognition is so different from the linguistic practice of using the concept of law, Dworkin finds it difficult to describe just who the *participants* in this muddled linguistic/legal practice are. He often settles on *lawyers*, perhaps because they stand half-way between the officials in a jurisdiction who are relevant for the rule of recognition and the general language users who are relevant for conventionalist metasemantics. For example, in *Justice in Robes*, Dworkin claims that positivists like Hart assume that “analyzing [the concept of law] means bringing to the surface the criteria that lawyers actually use, even if unselfconsciously, in applying it.”⁶⁶

But this misdescribes *both* Hart's conventionalist theory of law *and* conventionalist metasemantics. It distorts Hart's theory of law because Hart did not think that lawyers were participants in a rule of recognition. Assume that American officials (judges, legislators, sheriffs, regulators and the like) took the Securities Exchange Act to be identified by the American rule of recognition and enforced it accordingly. Hart would say that the Securities Exchange Act was law and that lawyers who disagreed were simply wrong—and were going to lose a lot of cases.⁶⁷

Metasemantic conventionalism is also distorted because the content of a common concept of law is determined by the criteria agreed upon by

65. This is true even if one expands the agreement required in a conventionalist theory of law beyond *officials* to include the general population in the jurisdiction. (On the question of whose practices are constitutive of a legal system, see Matthew Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719 (2006).) The point remains that a population can agree concerning the concept of law and nevertheless not have the type of agreement that is necessary for law according to a conventionalist theory of law. That has to be possible, for they must be able to agree that they have no law.

66. DWORKIN, *supra* note 4, at 31; *see also id.* at 225 (noting that positivist theorists of law assume that the analysis of the concept of law must “consist in elucidating the tests that lawyers share, except in borderline cases, for judging whether propositions of law are true”); DWORKIN, *supra* note 11, at 43 (noting that the project of semantic theories of law like Hart's is “digging out shared rules from a careful study of what lawyers say and do”).

67. Of course, because the primary rules that are valid according to the rule of recognition must be generally—although not necessarily always—obeyed by the population, HART, *supra* note 6, at 116–17, it would probably be the case that most lawyers must obey the Act, however grudgingly. It would not, however, be necessary that they think it is actually enforceable.

language users generally—not merely lawyers, much less lawyers within a particular jurisdiction. Nothing about lawyers' views is essential to determining the content of this concept. Although lawyers might know a lot about the rule of recognition in their jurisdiction, they are not in a position superior to other language users in determining the content of the concept of law—determining, for example, whether a rule of recognition is at all relevant to what should be called “law.”⁶⁸ If metasemantic conventionalism is true, lawyers' knowledge of the rule of recognition is relevant to law only because those using the concept of law, which includes all language users, *say* it is.

Dworkin's confusion is evident in the centerpiece of his semantic sting argument against Hart. Dworkin asks us to consider two judges who come to different conclusions in a case because they disagree about the criteria in the rule of recognition of their jurisdiction. Because he confuses legal and linguistic practices, Dworkin assumes that these judges must disagree concerning the criteria for using the concept of law and so must be treated by the metasemantic conventionalist as having different concepts of law. The metasemantic conventionalist must treat the judges' dispute as “pointless in the most trivial and irritating way, like an argument about banks when one person has in mind savings banks and the other riverbanks.”⁶⁹ This, Dworkin argues, would be a nihilistic view about legal practice, since judges in hard cases do not think they are talking past one another.⁷⁰

But this is a fallacy. Assume our judges all accept Dworkin's theory of law. They will show that they *share* the same criteria for applying the concept of law—and so are *not* talking past each other according to conventionalist metasemantics—precisely by concluding that there is an answer to the hard case despite their disagreement.

By the same token, disagreement concerning the concept of law does not have to lead to disagreement in a rule of recognition. Consider two judges: Judge Lockean believes that valid laws must be promulgated in accordance with a constitution to which the population has consented. Judge Hartian holds Hart's theory of law. Judge Lockean considers promulgation in accordance with the U.S. Constitution to be an appropriate criterion for American law because the Constitution received the requisite consent when it was ratified in accordance with Article VII. Judge Hartian also considers promulgation in accordance with the U.S. Constitution to be an appropriate criterion for American law because it is accepted by American officials. There is no reason not to conclude that Lockean and Hartian participate in the same rule of recognition, as

68. Of course, it is possible that language-users' criteria for the concept of law specified that they should defer to experts concerning the content and scope of the concept. *Cf.* Coleman & Simchen, *supra* note 29, at 10–11. But, once again, that would be true not because the experts said so, but because language users did.

69. DWORKIN, *supra* note 11, at 44.

70. *Id.*

they are both enforcing norms if those norms are promulgated in accordance with the Constitution—even though, according to the metasemantic conventionalist, they are talking past one another when they call the norms they are enforcing “law.”⁷¹

Indeed, applying the concept of law is such a different activity from participating in a rule of recognition that officials can have a rule of recognition without a concept of law at all. It is perfectly possible for an official to enforce norms according to accepted criteria in her jurisdiction without being at all aware of the general criteria that would allow her to identify what should be called “the law” of various jurisdictions. She might never have thought about—and be completely disinclined to think about—how her jurisdiction and other jurisdictions have “laws” in some common sense. This is no more impossible than someone who is able to play the game of chess but has never come up with the concept of a game.⁷²

Furthermore, even if an official has the concept of law, there is no reason to think that she regulates her enforcement of norms on the basis of whether they fall under the concept. She might care passionately about abiding by the criteria in her rule of recognition—about enforcing only those norms promulgated in accordance with the U.S. Constitution, for example—but not care a whit about making sure that what she is enforcing is or is not *law* in a general sense. That is no more odd than the idea of someone caring passionately about playing chess properly without caring about whether what he is doing is a game.

C. Was Hart a Metasemantic Conventionalist After All?

As we have seen, Dworkin’s argument that Hart’s theory of law was the *consequence* of his conventionalist metasemantics remains a fallacy even if Dworkin was right that Hart was indeed a metasemantic conventionalist. It is important to keep this point in mind because the question of Hart’s metasemantic views is a matter of some debate.

For example, in *The Concept of Law* Hart argues that legal indeterminacy results from the “irreducibly open-textured” nature of the language in which laws are formulated. A law prohibiting “vehicles” in the park, for example, leaves it open whether bicycles or roller skates are included under the concept of a vehicle.⁷³ The concept is indeterminate on this matter, Hart appears to suggest, because the criteria we currently accept for using the concept do not answer the question.⁷⁴

71. For a similar argument, see COLEMAN, *PRACTICE OF PRINCIPLE*, *supra* note 6, at 181.

72. For a similar argument, see Kenneth Einar Himma, *Ambiguously Stung: Dworkin’s Semantic Sting Reconfigured*, 8 *LEGAL THEORY* 145, 160–65 (2002).

73. HART, *supra* note 6, at 126.

74. Paradigm samples (such as motor cars) clearly fall under the term because we agree that they do. *Id.* at 129.

Nicos Stavropoulos has argued that Hart's metasemantics was conventionalist on these grounds.⁷⁵ He claims that Hart's metasemantic conventionalism can be found not merely in his approach to concepts—like the concept of a vehicle—employed in *legal rules*, but also in his approach to the concept of law itself.⁷⁶ In arriving at his theory of law, Hart sought to capture the criteria that people using the concept currently accept. Joseph Raz has come to the same conclusion about Hart,⁷⁷ although several other philosophers disagree.⁷⁸

Dworkin cannot, therefore, be accused of refusing to acknowledge a clear error in insisting that Hart was a metasemantic conventionalist. But the fact remains that Dworkin is clearly in error in assuming that Hart's conventionalist theory of law was a *consequence* of his metasemantic conventionalism.

D. *The Influence of Metasemantics on the Scope of the Law*

One more qualification is necessary in identifying Dworkin's mistaken argument. Even though conventionalist theories of law do not follow from conventionalist metasemantics, there is reason to believe that conventionalist metasemantics makes a difference to one's understanding of the scope of the law *within* a conventionalist theory of law. Assume one has already adopted Hart's theory of law. According to this theory, the law of a jurisdiction is picked out by the criteria in the rule of recognition. But whether an item satisfies these criteria depends upon the contents of the concepts employed in the criteria. Since metasemantics makes an important difference to our understanding of the contents of these concepts, it should make a difference to what counts as law.

Consider a crude rule of recognition, under which every norm on a particular tablet, and nothing else, is enforceable. If conventionalist metasemantics applied to the concept *on the tablet*, the scope of that concept would be exhausted by language-users' shared criteria. For this reason, a norm could not be on the tablet if there was fundamental disagreement among language users on this matter. On the other hand, if nonconventionalist metasemantics were correct, there could still be an answer to the question of whether a norm was on the tablet (and so was law) despite fundamental disagreement on the matter.

Assume further that the command "Do not steal" appears on the tablet. If conventionalist metasemantics applies to the concept of *stealing*, then, once again, something cannot be stealing if language users dis-

75. Stavropoulos, *supra* note 26, at 59.

76. *Id.* at 67–69.

77. Raz, *supra* note 29, at 1, 1–27.

78. See, e.g., Timothy A.O. Endicott, *Herbert Hart and the Semantic Sting*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW, *supra* note 6, at 39; Veronica Rodriguez-Blanco, *A Defence of Hart's Semantics as Nonambitious Conceptual Analysis*, 9 LEGAL THEORY 99 (2003).

agree about whether it is stealing. On the other hand, if nonconventionalist metasemantics applies to the concept, it remains possible that the act is stealing despite disagreement on the matter.⁷⁹

Stavropoulos has offered an interpretation of Dworkin's metasemantic critique of Hart that emphasizes these points: According to Dworkin, Hart's metasemantic conventionalism led him to conclude that there was no answer to hard cases that resulted from disagreement about the proper criteria for using a concept. For example, Hart was forced to conclude that it is legally indeterminate whether the rule prohibiting "vehicles" in the park applied to bicycles because language users disagree about whether bicycles are vehicles.⁸⁰ Furthermore, nonconventionalist metasemantics of the sort embraced by Dworkin does a better job accounting for judges' attitudes in such hard cases, because judges engaged in disagreement about whether a concept applies *feel* that there is an answer despite their disagreement.⁸¹

In fact, one can be skeptical about whether metasemantics will have such an effect on the resolution of these hard cases. It is true that nonconventionalist metasemantics makes it *possible* for an act to fall under the concept of stealing even if there is disagreement on the matter. But it does not *mandate* that the concept refer in this way. It is always possible for us to generate a criterial concept of stealing if we want to. A metasemantic theory cannot prohibit me from thinking *only* of what people agree is stealing. So, the possibility will always remain that a concept employed in the law is criterial.

Second, one might argue that the scope of concepts in laws *is itself a question of law*. Even though the tablet's drafters meant stealing in a metasemantically nonconventionalist sense, it may be *the law* that anyone interpreting the command should look only to what is currently agreed to be stealing (or what the drafters agreed to be stealing). One reason for this rule may be that such a limitation on interpretation brings with it predictability. Because the appropriate interpretation of laws is itself a legal question, it is difficult to see how metasemantics can have an influence upon it at all.⁸²

The fact remains, however, that even if metasemantics does have this influence on the scope of the law *within* Hart's theory of law, Dworkin's argument that Hart's theory of law itself followed from conventionalist metasemantics remains a fallacy. The metasemantic conventionalist is free to insist that the best account of the criteria we associate with the concept of law is a nonconventionalist theory of law like

79. See David O. Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 PHIL. & PUB. AFF. 105 (1988).

80. HART, *supra* note 6, at 126.

81. Stavropoulos, *supra* note 26, at 59, 61.

82. See Brian Bix, *Can Theories of Meaning and Reference Solve the Problem of Legal Determinacy?*, 16 RATIO JURIS 281 (2003); Green, *supra* note 35, at 1946-48.

Dworkin's, according to which the criteria for the valid laws in a jurisdiction are not limited to what officials in the jurisdiction consider to be law.⁸³

By the same token, Dworkin's claim that metasemantic conventionalism forces us to conclude that judges who disagree about the criteria of legality in their jurisdiction must be talking past one another remains false. It is true that the metasemantic conventionalist might have to treat judges disagreeing about whether an item falls under a certain concept (such as "stealing" or "vehicle") as talking past one another. These are the examples of hard cases that Stavropoulos emphasizes. But Dworkin emphasizes hard cases that result from judges disagreeing about the criteria in the rule of recognition. And, as we have seen, there is no reason to think that *this* type of disagreement means that judges have different concepts of law and so are talking past one another. For judges might share a concept of law—like Dworkin's—that embraces such disagreement.

E. *Dworkin Is All Alone*

Dworkin's argument that Hart's conventionalist theory of law was the result of conventionalist metasemantics has been widely and consistently rejected by philosophers of law.⁸⁴ Furthermore, these philosophers have all agreed that it is a fallacy for the reasons I have outlined above. Dworkin's mistake is assuming that a legal practice like the rule of recognition is equivalent to the linguistic practice of using the concept of law. As Timothy Endicott has put this point: "Although [Hart] did claim that legal systems are based on rules of recognition, he did not say that those rules are linguistic rules"⁸⁵ Endicott correctly describes this as a "simple and compelling" objection to Dworkin's argument.⁸⁶

Because these linguistic and legal practices are different, a metasemantic demand for agreement in the linguistic practice (in order for there to be a shared concept of law) has nothing to do with the sort of agreement in the legal practice demanded by conventionalist theories of

83. Indeed, at one point in *Justice in Robes*, Dworkin suggests *he* is such a person. He argues that interpretive concepts, like the concept of law as he understands it, "require that people share a practice: they must converge in actually treating the concept as interpretive." DWORKIN, *supra* note 4, at 11. Dworkin appears to argue that the concept of law has the content to which he assigns it because people *agree* that it does.

The same idea pops up in *Law's Empire*. He argues that the concept of law is interpretive because "[j]udges normally recognize a duty to continue rather than discard the practice they have joined. So they develop, in response to their own convictions and instincts, working theories about the best interpretation of their responsibilities under that practice." DWORKIN, *supra* note 11, at 87. Once again, Dworkin suggests that language-users' current attitudes are what determine the contents of their concepts.

84. I rejected Dworkin's argument in Green, *supra* note 35, at 1927–29.

85. Timothy Endicott, *Law and Language*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2007 ed.), <http://plato.stanford.edu/entries/law-language/>.

86. *Id.*

law. As Ken Himma has put this point: “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.”⁸⁷ Or as Dennis Patterson has put it: “Dworkin confuses the view that the content of the rule of recognition is determined by shared criteria, which is a positivist view, with the view that the meaning of the word ‘law’ is determined by shared criteria. The latter is no part of the theory of positivism.”⁸⁸ Not only can officials share the same criteria in a rule of recognition while having different concepts of law, they can share a rule of recognition *without having a concept of law at all*. As Joseph Raz has put it: “The point is that [judges’] duty (under the system in whose courts they sit) is to judge in accordance with the rules of that system, and it matters not at all whether these rules are legal ones [T]here could be legal systems in cultures that do not have the concept of law.”⁸⁹

Conversely, the fact that there is disagreement in a rule of recognition does not mean that officials are employing different concepts of law and so talking past one another. As Hart himself put it, Dworkin was mistaken to think that “if the criteria for the identification of the grounds of law were not uncontroversially fixed, ‘law’ would *mean* different things to different people.”⁹⁰

Is it really true that Dworkin is all alone against these philosophers? Does he have *no* allies? I do not know whether Dworkin has found some private defenders. But I have found no one defending the argument in print. Furthermore, the two allies that Dworkin points to in *Justice in Robes*, abandon him here.

The first is Nicos Stavropoulos. The essay by Stavropoulos that Dworkin cites as defending his interpretation of Hart has been discussed above.⁹¹ In it, Stavropoulos accuses Hart of metasemantic conventionalism and argues that because of this metasemantics, Hart cannot account for why judges disagreeing about the applicability of a concept (such as the concept of a vehicle) in a hard case are not talking past one another.⁹² But Stavropoulos never suggests that Hart held a conventionalist theory of law *because* he had a conventionalist metasemantics, nor does he argue that disagreement over the *criteria in a rule of recognition* means that those disagreeing hold different *concepts of law*.

87. Himma, *supra* note 72, at 165.

88. Dennis M. Patterson, *Dworkin on the Semantics of Legal and Political Concepts*, 26 OXFORD J. LEGAL STUD. 545, 546 n.7 (2006).

89. Raz, *supra* note 29, at 1, 35.

90. HART, *supra* note 6, at 246.

91. See Stavropoulos, *supra* note 26, at 59. Dworkin mentions this essay at DWORKIN, *supra* note 4, at 288 n.39.

92. Stavropoulos, *supra* note 26, at 59.

The second ally is Stephen Perry.⁹³ But, once again, in the essay Dworkin cites, Perry does not defend Dworkin's argument that Hart's conventionalist theory of law follows from conventionalist metasemantics. Indeed, the topic does not come up in the essay at all.⁹⁴

F. Dworkin's Response

So how does Dworkin, besieged and friendless, respond to these criticisms? His most pointed response is in chapter seven of *Justice in Robes*, where he reviews Jules Coleman's book *The Practice of Principle*. In this book, Coleman criticized Dworkin's "semantic sting" argument for the same reason the rest of the philosophers have, because Dworkin confuses agreement in a rule of recognition with agreement in the linguistic practice of using the concept of law. As Coleman puts it, people "can use different factual criteria for determining whether something is legally binding without disagreeing about the meaning or concept of law."⁹⁵

93. See Stephen R. Perry, *Hart's Methodological Positivism*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW, *supra* note 6, at 311. Dworkin mentions this essay at DWORKIN, *supra* note 4, at 31 & 265 n.23.

94. Indeed Perry suggests, contrary to Dworkin, that Hart was not a metasemantic conventionalist. Rather, he engaged in a form of conceptual analysis very similar to Dworkin's own approach. Perry, *supra* note 93, at 312-13.

It is worth noting that in a review of Coleman's book, Perry acknowledges that Coleman's critique of Dworkin's semantic sting argument is correct:

Coleman asserts it is possible to disagree about the content of the concept of law while agreeing about the criteria of legality in a particular legal system. He also asserts, more importantly, that it is possible to agree about the content of the concept while disagreeing about the criteria in a particular system. He is clearly right on both counts. He is also right that in Law's Empire Dworkin did not distinguish as clearly as he should have done between the criteria for applying the term "law" and the criteria of legality in particular legal systems.

Stephen R. Perry, *Method and Principle in Legal Theory*, 111 YALE L.J. 1757, 1800-01 (2002). He agrees with Coleman that two Dworkinians can be understood as agreeing concerning the content of the concept of law even though they disagree about the criteria of validity within their legal system.

Perry does offer a different interpretation of Dworkin's argument, however, according to which "this carelessness on Dworkin's part may well be nothing more than harmless error." *Id.* at 1801. As Perry notes, it is clearly possible for there to be *theoretical* disagreement about the criteria of validity in a legal system, that is, disagreement that is motivated by different theories of law. Perry offers as an example the disagreement between inclusive and exclusive legal positivists:

It follows that we cannot determine which theory of law we should adopt simply by looking for agreement about the content of the concept of law, because there is no such agreement. In this sense, we can agree with Dworkin's rejection of "semantic" theories (without, it should be noted, having to accept his claim that substantive positivist theories have heretofore all been semantic in character).

Id. at 1802. Perry's point is that the disagreement between those offering different theories of law suggests that conventionalist metasemantics cannot be true. For these people do not feel as if they are talking past one another. But this is not all that there is to Dworkin's argument. Dworkin does not merely suggest that conventionalist metasemantics cannot explain theoretical disagreement concerning the law. On that matter Coleman agrees. Dworkin also argues that conventionalist theories of law like Hart's follow from conventionalist metasemantics. Perry refuses to sign on to this part of Dworkin's argument. He refuses to accept "[Dworkin's] claim that substantive positivist theories have heretofore been [meta]semantic in character." *Id.*

95. COLEMAN, PRACTICE AND PRINCIPLE, *supra* note 6, at 181.

To show why this is the case, Coleman asks us to consider two people who disagree concerning the criteria for enforcement in their jurisdiction and who nevertheless insist that there is law answering a hard case. It does not follow that they disagree concerning the content of the concept of law. For, as we have seen, they may agree on a nonconventionalist theory of law, like Dworkin's, that allows for right answers even in the face of their disagreement. As Coleman puts it:

Suppose, for example, that we share the view that law is a contestable concept in the sense that wherever there is law, what the law is is always a matter of potential dispute, and requires an interpretive practice. Indeed our disagreement about what the criteria of legality in our community are makes perfectly good sense to us in part because such disagreement is part of what we take law to be—part of our shared understanding of the kind of thing it is. Thus, not only is disagreement about the criteria of legality in our community compatible with our sharing the same criteria for applying the concept of law, in this case our disagreement about the criteria of legality in our community is intelligible to us just because we share the same criteria for applying the concept.⁹⁶

In short, a Dworkinian theory of law can be the content of a criterial concept.

Dworkin begins his reply by noting that both he and Coleman reject conventionalist (or criterial) metasemantics:

Lawyers share the concept of law as what I call an interpretive (or essentially contested) concept. They do not agree on criteria for applying the claim "it is the law that," but rather offer rival interpretations of paradigm propositions of that form that they both accept, and then extract from these paradigm propositions different criteria for applying the judgment "it is the law that" to fresh cases about which they disagree. Coleman . . . also endorses this view about how lawyers employ the concept of law.⁹⁷

Dworkin is correct that Coleman rejects conventionalist metasemantics. Coleman agrees that the true content of the concept of law cannot be simply read off the accepted criteria for using the concept. People can share a concept even though they disagree on criteria for its use.

But Dworkin takes his metasemantic agreement with Coleman to mean that the people *in Coleman's example* disagree about the criteria for using the concept of law. This is false. It is true that Coleman believes that agreement on the criteria for using the concept of law is not *necessary* for sharing the same concept of law. But it hardly follows from this that people can *never* agree on these criteria. And Coleman is offering an example of two people who in fact *do* agree on these criteria.

96. *Id.* at 182.

97. DWORKIN, *supra* note 4, at 221.

The point of his example is to show that it is possible for these people to disagree in hard cases despite this other form of agreement.

Having understood Coleman's example as concerning people who *disagree* concerning the criteria for using the concept of law, Dworkin finds it easy to dismiss:

So what is my "fundamental"—or, as he also says, "deeply embedded"—confusion? His explanation comes to this: if I am right that lawyers share the concept of law as an interpretive concept, then, contrary to what I say, they actually do agree about criteria for applying the concept. They agree that it should be applied in the interpretive manner that I described. But this explanation misunderstands what I meant when I said that lawyers do not share criteria; I clearly meant that they do not agree on a single set of tests for deciding which propositions of law are true. Since Coleman agrees, it remains mysterious why he supposes that I am confused.⁹⁸

But Coleman does *not* accept that the people in his example "do not agree on a single set of tests for deciding which propositions of law are true." As he made clear, they "shar[e] the same criteria for applying the concept of law" and have a "shared understanding of the kind of thing [the law] is."⁹⁹ True, Coleman himself thinks that agreement on criteria is not *necessary* for sharing a concept. But the point of his example is solely to show that disagreement in a hard case does not *entail* disagreement about criteria for using the concept of law.

Of course, by saying that the two people "do not agree on a single set of tests for deciding which propositions of law are true," Dworkin might mean that they do not agree on the enforcement criteria in their jurisdiction. This is indeed something that Coleman accepts about his example. But the fact remains that despite—indeed because of—this disagreement concerning the rule of recognition, the people in his example nevertheless agree concerning the criteria for applying the concept of law because they share a nonconventionalist *theory of law*, like Dworkin's, in which the law is whatever follows from the best moral interpretation of standing law.¹⁰⁰ The fact that they disagree in a hard case would not mean that they assign different contents to the concept of law. This shows that Dworkin's semantic sting argument is wrong. And Dworkin has managed to say nothing in response.

CONCLUSION

Despite his fame, Ronald Dworkin is something of a tragic figure in the history of the philosophy of law. The intransigence of his defense of the semantic sting argument falsely suggests that the argument is some-

98. *Id.* at 221–22.

99. COLEMAN, PRACTICE AND PRINCIPLE, *supra* note 6, at 182.

100. *Id.* at 181.

how crucial to his rejection of Hart. In fact, Dworkin has offered other powerful arguments against Hart's theory of law, arguments that appeal to Hart's inability to arrive at a coherent account of legal obligation. I have indicated my own sympathies to this part of Dworkin's critique of Hart elsewhere.¹⁰¹ But I'm afraid that until Dworkin abandons his semantic sting argument, his critique of Hart—and his philosophy of law as a whole—are not going to get the hearing they deserve.

101. See Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1939–56 (2005).

