

NEGOTIATING THE MEANING OF “LAW”: THE METALINGUISTIC DIMENSION OF THE DISPUTE OVER LEGAL POSITIVISM

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ABSTRACT

One of the central debates in legal philosophy is the debate over legal positivism. Roughly, positivists say that law is ultimately grounded in social facts alone, whereas antipositivists say it is ultimately grounded in both social facts and moral facts. In this paper, I argue that philosophers involved in the dispute over legal positivism sometimes employ distinct concepts when they use the term “law” and pick out different things in the world using these concepts. Because of this, what positivists say might well then be true of one thing (e.g., law₁) but false of another (e.g., law₂). Accepting this thesis does not mean that the philosophers engaged in this dispute are “talking past each other” or engaged in a “merely verbal dispute” that lacks substance. I argue that participants in this dispute are sometimes arguing about what they should mean by the word “law” in the context at hand. This involves putting forward competing proposals about which concept the word “law” should be used

*Thanks to Larry Alexander, Derek Ball, Chris Barker, Charles Beitz, Mitchell Berman, David Braddon-Mitchell, Mark Budolfson, Alexis Burgess, Herman Cappelen, David Chalmers, Matthew Chrisman, Shamik Dasgupta, Ronald Dworkin, Andy Egan, Chris Essert, Max Etchemendy, Stephen Finlay, Johann Frick, Lyndal Grant, Mark Greenberg, Sally Haslanger, Scott Hershovitz, Torfinn Huvenes, Frank Jackson, A.J. Julius, Sam Levey, Dustin Locke, Peter Ludlow, Berislav Marušić, Eliot Michaelson, Tristram McPherson, Hille Paakkunainen, Philip Pettit, Peter Railton, Mark Richard, Lea Schroeder, Scott Shapiro, Seana Shiffrin, Michael Smith, Justin Snedegar, Tim Sundell, Rachel Sterken, Sharon Street, Folke Tersman, Jean Thomas, Amie Thomasson, Kevin Toh, Pekka Väyrynen, Grégoire Webber, Daniel Wodak, and an anonymous referee for *LEGAL THEORY*. Earlier versions of this paper were presented at the Oxford Jurisprudence Discussion Group, Queen’s Law School, the 2015 Analytical Legal Philosophy Conference at the University of Southern California, and the University of Southern California Philosophy Department. Closely connected material was presented at the Arché philosophical research centre at the University of St. Andrews, the Center for Study of Mind in Nature (CSMN) at the University of Oslo, a workshop on Normativity and Reasoning at NYU Abu Dhabi, a workshop on Conceptual Engineering at the MIT Philosophy Department, a workshop in honor of Frank Jackson in Bundanoon, Australia, and the Value Theory Discussion Group at the Rutgers Philosophy Department. Thanks to everyone who participated in those discussions.

to express. This is an issue in what I call “conceptual ethics.” This argument in conceptual ethics can be well worth having, given the connotations that the term “law” plays in many contexts, ranging from legal argument to political philosophy to social-scientific inquiry. Sometimes, I claim, philosophers (and ordinary speakers) engage in such argument tacitly by competing “metalinguistic” usages of the term “law”—usages of the term that express a view (in this case, a normative view) about the meaning of the word itself. In such cases, speakers on different sides of the positivism debate might in fact both speak truly, in terms of the literal (semantic) content of what they both say. Nonetheless, they may disagree in virtue of views in conceptual ethics about “law” that they express through the nonliteral content of what they say. These views in conceptual ethics often reflect further disagreements about issues that are not ultimately about words or concepts. These include foundational ones in ethics and politics about how we should live and what kind of institutions should govern our lives. My metalinguistic account of the dispute over legal positivism better equips us to identify what such issues are and to engage them more fruitfully.

INTRODUCTION

One of the central debates in legal philosophy is the debate between legal positivists and antipositivists. The basic positivist thought might be glossed as follows: law is created *solely* through the activities of human beings (or other similar agents). Such activity fully determines the content of the law (of a given jurisdiction), regardless of what morality requires or recommends. Of course, it would be good to create law in a way that is consistent with what morality requires of us, but moral facts themselves do not play an ultimate role in determining facts about the existence and content of law. Instead, the only facts that ultimately matter here are descriptive social facts about human beings, their activity, and the products that they produce (roughly, the kinds of facts studied by the social sciences). In contrast to this line of thought, antipositivists have been drawn to the idea that when we look at how legal argumentation actually unfolds—or when we look to what kind of authority we grant to law in our lives (as opposed to, say, how we view the authority of criminal organizations with social power)—we see that facts about the existence and content of law are in fact at least partly a moral matter, and necessarily so.

What exactly is at issue in the debate between positivists and antipositivists? The above gloss suggests the following: at its core, it is a debate about what kinds of facts ultimately determine the existence and content of legal systems. In short: Is it social facts alone? Or is it a combination of social facts and moral facts?

Expanding on this idea, we might put things as follows: legal positivism and legal antipositivism are competing theses about what constitutively explains (or “grounds”) the *legal facts* (where the term “legal facts” can be used to designate facts about what the law is in a given jurisdiction at a given

time, as well as facts about the existence of legal institutions).¹ According to legal positivism, social facts (roughly, descriptive facts about people, their activities, and the products that they create) are the sole ultimate grounds of these legal facts. On this view, moral facts might matter for settling the content of law in certain jurisdictions (which is what inclusive legal positivism claims). But (if they do at all) it is only because of the obtaining of certain contingent social facts: according to legal positivism, moral facts themselves are not part of the *ultimate* grounds of legal facts. According to legal antipositivism, on the other hand, the ultimate grounds of legal facts include both social facts and moral facts (such as, for example, normative facts about what morality requires, or about what distributive justice requires).

To sharpen this discussion, we might zoom in on a feature that moral facts have according to many (perhaps most) conceptions of them. This is that such facts (purportedly) have an important tie to *robust normativity*. By "robust normativity," I mean our most loaded notion of normativity, whatever that turns out to be. The idea of robust normativity involves appeal to a distinctive kind of normative authority. It is the kind of authority that (at least many) people think is involved in all-things-considered ethical facts or all-things-considered epistemological facts. Robust normativity is intimately bound up with the idea of *genuine* normative reasons for action (or belief, etc.) or, similarly, of things *really* "counting in favor of" certain actions (or beliefs, etc.). It is also intimately bound up with the idea of things being *really* of value.

Contrast the idea of robust normativity with the idea of merely *formal* normativity. A merely formal norm sets a standard by which one can judge whether something (e.g., an action, a belief, etc.) conforms to it. The rules of a board game or a list of arbitrarily chosen social norms involve (at least) this kind of normativity. But such norms need not generate strong normative reasons for agents to behave one or another (or think one way or another, etc.).² Many take morality to have a tie to robust normativity that rules of board games lack. For example, it might be that when morality requires an agent A to ϕ , this necessarily yields a strong normative reason for A to ϕ .

1. Throughout this work, I use italics to introduce terminology or for rhetorical stress, quotation marks to mention linguistic expressions, and small capitals to name concepts. I also use double quotes for quoting other authors, "scare quoting," simultaneous use and mention, and other informal uses. In cases where there is a potential ambiguity in the way I am using double quotes, I attempt to make clear which way I am using it (to avoid confusing use and mention).

2. This sort of distinction between two kinds of normativity is widely discussed in the metaethical literature. For versions of this distinction, see Philippa Foot, *Morality as a System of Hypothetical Imperatives*, 81 PHIL. REV. 305–316 (1972); RICHARD JOYCE, THE MYTH OF MORALITY (2001); David Copp, *Moral Naturalism and Three Grades of Normativity*, in *NORMATIVITY AND NATURALISM* (P. Schaber ed., 2005); Stephen Finlay, *Responding to Normativity*, in *OXFORD STUDIES IN METAETHICS* (R. Shafer-Landau ed., 2006); Tristram McPherson, *Against Quietist Normative Realism*, 154 PHIL. STUD. 223–240 (2011); and DEREK PARFIT, ON WHAT MATTERS (2011). Cf. Scott Shapiro's thin definition of "norm" in SCOTT SHAPIRO, LEGALITY (2011). My terminology of "robust" versus "formal" normativity parallels the terminology used in McPherson, *id.*, to discuss this kind of distinction.

The thesis that there is *some* kind of important connection between morality and robust normativity is a presupposition of much of the debate over legal positivism.

For the purposes of this paper, I take it that this thesis is on the right track. Thus, when I talk about “morality” in this paper, I am talking about something that (at least purportedly) has an important connection to robust normativity that many things do not (e.g., rules of board games). The question of exactly *which* connection this has is an important one but one that will not matter much for my arguments in what follows. The upshot for our discussion here is just this: for our purposes in this paper, we can take the core dividing line between positivism and antipositivism to concern whether facts that bear an important connection to robust normativity (or, indeed, perhaps robustly normative facts themselves) are part of the ultimate grounds of legal facts.³

To help make this a bit more concrete, consider two different theories of law. One theory holds that legal facts are ultimately grounded solely in facts about the *social conventions* of a group of agents. Here is an attractive thesis about social conventions: facts about what social conventions a group of agents has, as well as facts about what the content of those conventions are, are contingent descriptive facts that do not depend on any moral facts (or any robust facts). If that is right (which I think it is), then such a theory of law (which includes influential ways of developing H.L.A. Hart’s theory of law from *The Concept of Law*) yields a form of legal positivism, according to the definition above.⁴ In contrast, consider a Dworkinian view (along the lines of what Ronald Dworkin argues for in *Law’s Empire*) according to which, roughly, the law consists in the moral standards that best justify a set of social practices.⁵ This latter view is an antipositivist one, since it holds that legal facts are ultimately grounded in (that is: constitutively explained by) social facts as well as moral facts.

3. This basic way of understanding legal positivism and legal antipositivism draws on Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157–198 (2004); Gideon Rosen, *Metaphysical Dependence: Grounding and Reduction*, in MODALITY: METAPHYSICS, LOGIC, AND EPISTEMOLOGY (B. Hale & A. Hoffmann eds., 2010); and SHAPIRO, *supra* note 2. I discuss (and defend) this basic way of thinking about legal positivism in David Plunkett, *A Positivist Route for Explaining How Facts Make Law*, 18 LEGAL THEORY 139–207 (2012); and David Plunkett, *Legal Positivism and the Moral Aim Thesis*, 33 OXFORD J. LEGAL STUD. 563–605 (2013). See also David Plunkett & Scott Shapiro, *Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry*, ETHICS (forthcoming). In David Plunkett, *Robust Normativity, Morality, and Legal Positivism*, in DIMENSIONS OF NORMATIVITY: NEW ESSAYS ON METAETHICS AND JURISPRUDENCE (David Plunkett, Scott Shapiro & Kevin Toh eds., forthcoming), I defend the idea that at least in many contexts, we should understand *legal positivism* as a thesis about robust normativity rather than morality.

4. For examples of positivist views that take this form, see Gerald Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165–203 (1982); ANDREI MARMOR, *SOCIAL CONVENTIONS: FROM LANGUAGE TO LAW* (2009); and ANDREI MARMOR, *PHILOSOPHY OF LAW* (2011). Cf. H.L.A. HART *THE CONCEPT OF LAW* 3rd ed. (2012). For a view of the nature and grounds of conventions that pulls convention-based views in jurisprudence in an antipositivist direction, see George Letsas, *The DNA of Conventions*, 33 LAW & PHIL. 535–571 (2014).

5. RONALD DWORCKIN, *LAW’S EMPIRE* (1986).

I think that this basic way of regimenting discussion of legal positivism and antipositivism—namely, as competing theses about what kinds of facts are among the ultimate grounds of legal facts—is a good one, at least for many of our philosophical purposes. In particular, it does a good job of identifying a core thought that has animated the broad positivist tradition in legal philosophy as well as a conflicting one that has animated the broad antipositivist tradition. Moreover, this way of regimenting the discussion marks out a philosophically interesting and important dividing line in theories of law.⁶

Here is an important result of my above definition of legal positivism: according to my definition, legal positivism (and, accordingly, legal antipositivism) is an *object-level* thesis rather than a *representational-level* one. The thesis is about *law* and its explanation and not about our *thought and talk* about law or other kinds of representations about it. Facts about our thought and talk (e.g., facts about which concepts we employ or facts about what we mean by our words) might, of course, be epistemically relevant to figuring out whether an object-level thesis such as legal positivism is true. Moreover, it might, of course, turn out to be that our thought and talk themselves play a role in the constitutive explanation of the relevant part of reality that an object-level thesis is about, as is the case of a range of judgment-dependent and response-dependent phenomena. But the crucial point is just that the thesis of legal positivism itself is about *law* and not about our thought and talk *about* it.

Importantly, this result is not idiosyncratic to my particular definition of legal positivism—or, indeed, to closely related definitions I am drawing on from others, including those offered by Mark Greenberg, Scott Shapiro, and Gideon Rosen.⁷ Rather, it is shared by most of the other leading ways of defining legal positivism within recent philosophy of law, including, for example, the influential definition that John Gardner puts forward in "Legal Positivism: 5 ½ Myths," as well as related definitions given by H.L.A. Hart and Joseph Raz.⁸

6. I defend this claim at greater length in Plunkett, *Legal Positivism*, *supra* note 3, where I also discuss how this kind of proposed way of thinking about legal positivism relates to other ways of thinking about it; e.g., the view put forward in John Gardner, *Legal Positivism: 5 1/2 Myths*, 46 AM. J. JURISPRUDENCE 199–228 (2001). This is not to say that I think my proposed definition of legal positivism is adequate for all of our philosophical purposes as it stands. It is not. The definition I am giving is a schematic one that I think will need to be filled in more precisely in many contexts, given the philosophical work we want to do in those contexts. For example, in many contexts, more will need to be said about (1) what is meant by "ultimate" grounds (an issue about locating the relevant *explanatorily deep* level of ground that matters for discussion in legal philosophy, as opposed to in fundamental metaphysics or fundamental physics); (2) how to understand what counts as "moral facts"; and (3) how to locate theories of law that ground legal facts in moral facts but on which moral facts are themselves fully grounded in social facts. I discuss these issues in other work. See Plunkett, *Positivist Route*, *supra* note 3; Plunkett, *Legal Positivism*, *supra* note 3; and Plunkett, *Robust Normativity*, *supra* note 3. However, such issues do not matter for the core claims I want to make in this paper. So I leave them to the side here.

7. See Greenberg, *supra* note 3; Rosen, *supra* note 3; and SHAPIRO, *supra* note 2.

8. See, e.g., the views of what legal positivism amounts to in Gardner, *supra* note 6; HART, *supra* note 4; JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979). Cf.

In this respect, the thesis of legal positivism (as I define it above or as Gardner, Hart, Raz, and others define it) is like many of the theses that philosophers argue about. When philosophers make claims about such things as free will, knowledge, beauty, justice, or consciousness, they are often not making claims about our thoughts or our representational schemes—or at least not directly so. Rather, they are often making claims about some other *part of reality*—for example, what consciousness really is, rather than what we mean by the term “consciousness.” Generalizing from this, we can (and I think should) say the following: much of philosophical inquiry ultimately aims at making progress on object-level issues rather than representational-level ones. In short, much of philosophical inquiry ultimately aims at better understanding some part of reality rather than our representations of that part of reality.

The object-level focus of much of philosophical inquiry is important to keep in mind when doing philosophy, for example, when evaluating theses such as legal positivism. Perhaps in part because of this, philosophers often interpret what is going on in actual communication in philosophical exchanges—whether in writing or in direct conversation—in a way that straightforwardly aligns with the kind of object-level focus I sketch above. They often think the following: (1) philosophical communication centers on the exchange of competing propositions about an agreed-upon object-level subject matter (e.g., the nature of free will, the grounds of moral facts, etc.); and (2) those propositions are *literally* expressed in what each philosopher says (or writes, etc.). This kind of view informs much of the self-interpretation among legal philosophers of what is going on in actual linguistic exchanges between positivists and antipositivists. A range of legal philosophers (either explicitly or implicitly) take it that this dispute centers on a disagreement about an object-level issue (e.g., the grounds of legal facts) and that this disagreement is literally expressed in what different philosophers involved in the dispute say.

In this paper, I challenge this kind of self-interpretation. I argue for the following: the dispute over legal positivism is in part a dispute over which of a range of competing concepts we should use in a given context and, in a connected vein, which of those concepts should be paired with the word “law” in that context. These are normative issues about thought and talk: about which concepts we should use and about which words we should use to express those concepts. Drawing on terminology that Alexis Burgess and I introduce in recent coauthored work, I call these kinds of normative issues (as well as similar evaluative issues) ones in *conceptual ethics*, where the word

Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 N.Y.U. L. REV. 1035–1058 (2008); JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2001); and BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* (2007).

"ethics" is used in a very broad sense to cover the full range of questions about how to live and of what to do.⁹

As Burgess and I emphasize, philosophers have a range of different views about what kinds of values or norms matter in conceptual ethics—including, for example, broadly epistemic ones (e.g., norms connected to truth, understanding, or knowledge) to broadly political ones (e.g., norms connected to the promotion of social justice, freedom, or social equality). The term "conceptual ethics" is meant to be neutral on the question of which of these values or norms matter more than others. Thus, for example, it is not part of the definition of conceptual ethics that the most important kinds of values or goods for settling concept choice and word usage are the kinds that are the center of moral and political philosophy.¹⁰

The general picture I advocate for is this: different legal philosophers often employ different concepts in their respective ways of thinking about social/political reality, and part of what is going on in philosophical debate about social/political reality is that different philosophers advocate for using their preferred concept in the context at hand. This is going on, I think, in many different kinds of debates between legal philosophers (as well as in debates between lawyers and other legal actors), ranging from debates among legal positivists over which form of legal positivism is correct to debates about how to interpret the U.S. Constitution. However, in this paper I focus on something more specific: I argue that conceptual ethics is an important part of the philosophical dispute over legal positivism.

There are different ways one might try to identify exactly which dispute I am talking about here when I say that I am interested in the "philosophical dispute over legal positivism." Doing that in a theoretically neutral way is not as straightforward as it might seem, given my own eventual proposed interpretation of that dispute. Put roughly, the dispute I am interested in is the one that legal philosophers would intuitively call—and in many contexts do call (as I myself am doing)—"the philosophical dispute over (or about) legal positivism." More specifically, the dispute I am interested in is one where legal philosophers literally express object-level theses about the nature and grounds of things they call "law" and, in particular, theses that are along the lines of the theses I introduce at the start of this paper when defining "legal positivism" and "legal antipositivism." There is more to say on this issue, but, for my purposes here, that should be enough to help readers identify the basic dispute I am interested in and fix my subject matter going forward.

In short, I argue that positivists and antipositivists involved in this dispute are often employing distinct concepts that they each express by the term "law" and that they are each putting forward their concept as the more apt or, similarly, the better one to use in the context at hand. I argue that this

9. Alexis Burgess & David Plunkett, *Conceptual Ethics I*, 8 PHIL. COMPASS 1091–1101 (2013); and Alexis Burgess & David Plunkett, *Conceptual Ethics II*, 8 PHIL. COMPASS 1102–1110 (2013).

10. For further discussion of these points, see Burgess & Plunkett, *Conceptual Ethics I*, *supra* note 9; and Burgess & Plunkett, *Conceptual Ethics II*, *supra* note 9.

is often going on implicitly via the use of certain pragmatic mechanisms to put forward a view in conceptual ethics. I argue that speakers themselves are often unaware that this is what they are doing, and thus that the role of conceptual ethics in the dispute over legal positivism is often a covert one.¹¹

One striking result of the framework that I put forward is this: a positivist and an antipositivist arguing with each other might both be speaking truly about the respective object-level issues that each of them is directly talking about. That is consistent with thinking that one (or both) of them might still be getting it wrong about the issue in conceptual ethics that they are tacitly negotiating—and, connected to this, that the two speakers are genuinely disagreeing with each other rather than “merely talking past” each other or having a “merely verbal dispute.”¹² And indeed, on the view that I put forward, it might very well be that it is partly by each of them literally saying true things that they are able tacitly to negotiate about this issue in conceptual ethics in the first place.

Another striking result of my framework is this: the view of linguistic exchange between positivists and antipositivists that I am putting forward, on which the immediate disagreement expressed is one about our words and concepts, is fully compatible with an understanding of the aims of philosophical inquiry on which it ultimately aims at making progress on object-level issues. On my proposal, one’s normative views in conceptual ethics are often based on further normative views one has about object-level issues—and indeed, the normative facts in conceptual ethics are often settled (at least partly) by the facts about such issues. So what I want to challenge is *not* the object-level understanding of the aims of philosophical inquiry—whether in legal philosophy or any other subarea of philosophy—but rather the view of communication in philosophy that is often endorsed alongside that understanding.¹³

Here is the plan for the rest of the paper. In [Section I](#), I introduce the kind of dispute that Tim Sundell and I call a *metalinguistic negotiation* (or, equivalently, what we can call a *normative metalinguistic dispute*).¹⁴ A metalinguistic negotiation is a dispute in which two speakers use (rather

11. In David Plunkett, *Which Concepts Should We Use? Metalinguistic Negotiations and the Methodology of Philosophy*, 58 *INQUIRY* 828–874 (2015), I argue that some (perhaps many), philosophical disputes are best understood as metalinguistic negotiations. In this paper, I follow the same basic argumentative strategy I employ in *id.* but zoom in on a particular philosophical dispute (namely, the dispute over legal positivism). This paper can thus be seen as an applied case study based on the schematic form of argument developed in *id.*

12. Cf. David Chalmers, *Verbal Disputes*, 120 *PHIL. REV.* 515–566 (2011); C.S.I. Jenkins, *Merely Verbal Disputes*, 79 *ERKENNTNIS* 11–30 (2014).

13. For further discussion of these themes in the context of discussion of philosophical communication in general (and not in the context of legal philosophy in particular), see Plunkett, *Which Concepts*, *supra* note 11.

14. See David Plunkett & Timothy Sundell, *Disagreement and the Semantics of Normative and Evaluative Terms*, 13 *PHILOSOPHERS’ IMPRINT* 1–37 (2013); David Plunkett & Timothy Sundell, *Dworkin’s Interpretivism and the Pragmatics of Legal Disputes*, 19 *LEGAL THEORY* 242–281 (2013); and David Plunkett & Timothy Sundell, *Antipositivist Arguments from Legal Thought and Talk: The Metalinguistic Response*, in *PRAGMATISM, LAW, AND LANGUAGE* (G. Hubb & D. Lind eds., 2014).

than mention) a term to advocate for a normative view about how that term should be used. In [Section I](#), I explain this idea of a metalinguistic negotiation in a way that abstracts away from anything having to do directly with legal philosophy. I focus instead on a more prosaic case from everyday life. The goal is to get the idea of a metalinguistic negotiation squarely in view and to appreciate the reasons that support thinking that a given linguistic exchange is a metalinguistic negotiation.

In [Section II](#), I argue that there is good reason to think that some of the important exchanges between legal positivists and antipositivists are metalinguistic negotiations or, put another way, that there is an important metalinguistic component of the ongoing dispute between positivists and antipositivists. If my proposed metalinguistic reading is correct, it means that there is an important (often covert) role of conceptual ethics in arguments about legal positivism. I argue that this conclusion helps to explain some elements of the existing debate over positivism that can otherwise seem confusing or which might (wrongly) be taken to lend support to antipositivism. If my thesis about the role of conceptual ethics in the debate over positivism is correct, it also has some important implications for how one should go about arguing for either positivism or antipositivism.

In [Section III](#), I conclude the paper by discussing some of those implications. In particular, I sketch out some of the ways in which I think philosophers (such as myself) who are involved in the dispute should best proceed.¹⁵

I. METALINGUISTIC NEGOTIATIONS

In his paper "Cheap Contextualism," Peter Ludlow reports hearing a lively debate on sports radio.¹⁶ The debate concerned a recent issue of the magazine *Sports Illustrated* that contained a list of the fifty greatest athletes of the twentieth century. The horse Secretariat was on the list. Some of the people who called into the radio show were really enthusiastic about this choice. Others disagreed strongly with it. Simplifying a bit, we can imagine the following dialogue occurring as part of the sports radio show:

15. At the end of Plunkett & Sundell, *Dworkin's Interpretivism*, *supra* note 14, Sundell and I propose a (positivist-friendly) metalinguistic reading of a range of first-order legal disputes, including, centrally, the kind of disputes that are at the core of Dworkin's disagreement-based arguments in favor of his interpretivism (and, in turn, his brand of antipositivism about law) in DWORKIN, *supra* note 5; and RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (2011). We propose that the relevant disputes are metalinguistic negotiations. At the end of our article, Sundell and I briefly suggest that the dispute over legal positivism might itself be partly a metalinguistic negotiation, based on the same kinds of considerations that support our metalinguistic reading of the legal disputes that we discuss. With that in mind, this paper can be seen as follows: it is an attempt to explore this proposal in more detail, to argue on its behalf, and to explore some of its methodological implications.

16. See Peter Ludlow, *Cheap Contextualism*, 18 *PHIL. ISSUES* 104–129 (2008).

- (1) (a) Secretariat was *not* one of the fifty greatest athletes of the twentieth century. This *Sports Illustrated* ranking is dead wrong about this.
- (b) No way. Secretariat really was one of the fifty greatest athletes of the twentieth century. *Sports Illustrated* was correct about this.

We can of course imagine a version of this dialogue in which the following is true: at least one of the speakers does not know much about the racehorse Secretariat, as I imagine will be the case with some philosophers reading this paper. (If you do not know much about Secretariat, the main fact to have in mind here is that Secretariat is generally regarded to be one of the best racehorses of all time.) But it is also easy to imagine that most of the people calling into a sports radio show to debate this topic will be sports enthusiasts and will know a lot about Secretariat. So it is easy to imagine that both speakers in (1) know about many (or perhaps all) of the empirical facts that would intuitively be relevant here, including facts how fast Secretariat was, how many races Secretariat won, how dominant Secretariat was with respect to other horses that he raced against, and so on. Still, it is easy to imagine them arguing with each other at length despite both being aware of these empirical facts (as well as mutual awareness of the fact that they are both so aware). Moreover, it will also strike many as intuitive that the speakers disagree with each other and that they are expressing that disagreement in their linguistic exchange.

Now suppose that in the course of their argument, the speakers engage in the following dialogue.

- (2) (a) You are missing the point here. Secretariat wasn't even an athlete at all, let alone one of the fifty best ones of the twentieth century.
- (b) No. You are wrong. Secretariat was obviously an athlete. In fact, he was one of the fifty best ones of the twentieth century!

Following this, the speakers then go on arguing. In so doing, the following becomes clear: the speaker of (1a) and (2a) never uses the term "athlete" to refer to a nonhuman animal. In contrast, the speaker of (1b) and (2b) calls many nonhuman animals "athletes." Moreover, this happens even when each becomes aware that the other speaker is using the term in a divergent way.

What is going on in this dialogue about Secretariat? To regiment my discussion of the range of options here, let me pause to introduce some terminology that Sundell and I put forward in other work.¹⁷ Let us use the term *dispute* to refer to a linguistic exchange in which two or more speakers appear to disagree. In turn, we can say that when two people *disagree* with each other, there is a rational incompatibility between their mental states, such that one person accepts content that is incompatible with content

17. The terminology that I introduce below draws from Plunkett & Sundell, *Disagreement*, *supra* note 14. See also Plunkett & Sundell, *Dworkin's Interpretivism*, *supra* note 14; and Plunkett & Sundell, *Antipositivist Arguments*, *supra* note 14.

accepted by the other person. The most straightforward way this might happen is this: one person believes a proposition *p*, the other person believes a proposition *q*, and *q* entails not-*p*. However, for my purposes here, we can be open to there being any number of ways in which people might *accept contents* (in the relevant senses of "accept" and "content" here) to yield disagreement between them and another person (or even with their past or former self); for example, perhaps there are disagreements that involve a certain kind of clash of noncognitive attitudes such as desires or intentions.

On this way of carving up the terrain, a dispute is a kind of *activity* that might or might not actually express a disagreement. A disagreement, in contrast, is not a kind of activity at all. Rather, on our definition of it, when two people disagree with each other, that is a *state* that they are in rather than an activity that they engage in. With that in mind, here are two questions that we can then ask about any given dispute: (1) Does the dispute actually express a disagreement? and (2) If so, how?

We can then draw a distinction between two different classes of dispute. Some disputes are what Sundell and I dub *canonical* ones. These are disputes that center on information that is expressed by the semantics of the statements involved, that is (roughly), the linguistically encoded content of those statements. If we were to try to model the Secretariat case as a canonical one, we should then say this: the speakers each mean the same things by the words that they use, including, crucially, the word "athlete." If we think of the meaning of words (in the sense of "meaning" that is explicitly about semantics) in terms of the concepts they express, this amounts to the following idea: there is a common, shared concept (call it *ATHLETE*) that both of them express by the word "athlete" in this dispute. The reason we should want to say this is as follows. First, consider that, crucially, it seems that speakers in the Secretariat case do not just appear to disagree (as they do on any dispute, given the definition of "dispute" that I am working with). Rather, it is also compelling to think that we as theorists should want to vindicate this appearance, such that we end up saying that the speakers really do disagree. Now consider that if the speakers meant different things by "athlete," then it seems likely that they would be expressing propositions (or contents of some other sort) that were mutually compatible, in terms of the semantics of what they have each said. But if that is true, then we cannot explain the disagreement in terms of the semantics of what each of them has said. So we should hold that speakers mean the same thing by "athlete."

The problem with this approach in the Secretariat case is that it seems false to say that speakers mean the same thing by "athlete." There seems to be compelling evidence that they mean different things by the term. The reason is simple. One important piece of evidence for what a speaker means by a term is how she is disposed to apply that term in nondefective conditions. This is evidence that a wide range of linguists and philosophers of language should grant is important. In the Secretariat case, the speakers diverge significantly in their dispositions to apply the term—moreover, in

conditions that certainly seem to be nondefective (in the relevant sense of “nondefective” that matters here for our purposes of linguistic analysis, even if not for the purposes of doing epistemology). So it seems that we have good evidence that the speakers mean different things by their terms. Such evidence, of course, might be outweighed, defeated, or undercut by other evidence. I talk more about this in [Section II](#). For now, what is important is this: at least *prima facie*, we have strong evidence that the speakers in the Secretariat case mean different things by “athlete.”¹⁸

If we remain committed to the view that the Secretariat case is a canonical dispute, then this conclusion would make it hard (if not impossible) to vindicate the idea that the speakers really do disagree with each other. This is for the reason that I gloss above. But, importantly, not all disputes are canonical. Some disputes, rather than being centered on information communicated via semantics, are instead centered on information communicated via *pragmatics*, that is, information communicated in virtue of features of how we use words or sentences in a given context rather than in virtue of the linguistically encoded content of those words or sentences. Such disputes are what Sundell and I call *noncanonical ones*. There is a variety of different kinds of noncanonical disputes. Some involve information communicated by implicature, others involve information communicated by presupposition, and others still involve information communicated by connotation.

Roughly, the thought is this. First, take whatever pragmatic mechanisms you think we have for communicating information in general (something that different philosophers of language have different views on). Then, suppose that one or more speakers in the dispute is using one (or more) such mechanism to communicate information in a linguistic exchange that at least appears to be the subject of disagreement. You then have a noncanonical dispute.¹⁹

18. I am here (and throughout this paper) taking it that words are not individuated in terms of meaning. This means that, for example, the noun “bank” can be used to mean different things (and thus can refer either to a side of a river or to a certain kind of financial institution). This is one prevalent view of word individuation in philosophy of language and linguistics. However, many philosophers of language and linguists prefer a view of word individuation on which words are individuated partly in terms of meaning. On such a view, we can consider two distinct words in our “bank” case—the words “bank₁” and “bank₂.” These words are homophonous but nevertheless distinct in virtue of differences in meaning. My main points in this paper do not depend on my way of individuating words, as opposed to this alternative way. I use the first way for ease of presentation. If you are committed to the alternative way, that is fine. You will then need to paraphrase what I say in this paper (e.g., in my description of what is involved in metalinguistic negotiation). Doing so will not affect the core philosophical content of my argument.

19. One might ask: What about if you deny the existence of a sharp distinction between semantics and pragmatics as on, for example, certain forms of *dynamic semantics*? The short answer is this: the distinction between canonical and noncanonical disputes gets harder to state, but something (at least largely) functionally equivalent will still be needed in your theory. However, it is beyond the scope of this paper to go into that here. Rather, for ease of presentation, I just stick with a fairly common way of thinking about the semantics/pragmatics distinction and employ it throughout the paper.

To illustrate, consider a case involving implicature.

- (3) (a) I missed the party last night. I am curious how many people were there.
Can one of you two tell me?
(b) Sure. I can. There were twenty-five people at the party last night.
(c) No there were not. You are wrong. There were forty people there.

According to the familiar Gricean story about number terms, the speaker of (3b) literally says that there were *at least* twenty-five people at the party, whereas the speaker of (3c) literally says that there were *at least* forty people at the party. Those are consistent propositions. What is not consistent is what each *implicates* by making those claims. In such a context, given the expectations that the speaker of (3a) brings to the table—expectations, roughly, that the other speakers will provide information that is maximally informative and relevant, relative to her interests in this subject matter—the speakers of (3b) and (3c) communicate inconsistent propositions.²⁰

What Sundell and I propose is that the Secretariat case is a noncanonical dispute. More specifically, we propose that it is a particular kind of non-canonical dispute that we call a *metalinguistic negotiation* (or, equivalently, a *normative metalinguistic dispute*).²¹ In a metalinguistic negotiation, at least one speaker uses (rather than mentions) a given term in order to advocate a *normative* view about what the term should mean, at least for the given context at hand.

One way to get a handle on metalinguistic negotiations (or at least an important subset of them) is as follows. Sometimes, when we use words, we hold fixed facts about what our words mean and then use those words to communicate our views about some part of reality. But we sometimes do the reverse. Sometimes we hold our views about some part of reality fixed, and then use our words to communicate not about that part of reality (or at least not directly) but rather about what those words do or should mean. In such a case, then, speakers use (rather than mention) a word to communicate something about the word itself—for example, what it *does* mean (a descriptive issue) or what it *should* mean (a normative issue). Such usages are what Sundell and I, drawing on work from Chris Barker, call

20. Perhaps this story is wrong because (as some philosophers of language think) the scalar-implicature analysis of number words I am assuming here is wrong. Many linguists and philosophers of language reject it. See Gennaro Chierchia, *Polarity Phenomena and the Syntax/Pragmatics Interface*, in *STRUCTURES AND BEYOND* (A. Belletti ed., 2004), among others. That is fine. The example is meant to be an illustrative one, using broadly Gricean views that will be familiar to many philosophers, including many philosophers of law. See H. PAUL GRICE, *Logic and Conversation*, in *STUDIES IN THE WAY OF WORDS* (1989). There are many other disputes that I could use to illustrate the idea of a noncanonical dispute that do not depend on the scalar-implicature analysis of number words favored by Grice. For other examples, see Plunkett & Sundell, *Disagreement*, *supra* note 14; Plunkett & Sundell, *Dworkin's Interpretivism*, *supra* note 14; and Plunkett & Sundell, *Antipositivist Arguments*, *supra* note 14. See also related discussion in Timothy Sundell, *Disagreements about Taste*, 155 *PHIL. STUD.* 267–288 (2011); and Timothy Sundell, *Disagreement, Error, and an Alternative to Reference Magnetism*, 90 *AUSTRALASIAN J. PHIL.* 743–759 (2011).

21. See Plunkett & Sundell, *Disagreement*, *supra* note 14.

metalinguistic usages of a term.²² Speakers can employ a metalinguistic usage of a term in the context of a dispute, and they can express a disagreement by a metalinguistic usage of a term.²³ A *descriptive metalinguistic dispute* is one in which at least one speaker employs a metalinguistic usage of a term to put forward a view about what a term *does* mean. And a *metalinguistic negotiation* (or, equivalently, a *normative metalinguistic dispute*) is a dispute in which at least one speaker employs a metalinguistic usage of a term to put forward a view about what a term *should* mean.

Here is what this means for the Secretariat case. In that case, Sundell and I claim, the speakers of (1a) and (1b) both speak truly, in terms of the semantics of what each of them says, given what each of them in fact means by the relevant term “athlete.” (The same goes for when one says (2a) and the other says (2b).) But, in addition to communicating information through the semantics of what they say, the speakers each communicate information through the pragmatics of what they say. In particular, each is advocating for their preferred meaning of the term “athlete” and doing so by metalinguistic usage of the term “athlete.” Each of these speakers, we claim, means something distinct by the term “athlete,” such that each expresses a different concept by that term. So, put in terms of concepts, we can say the following: each speaker is advocating for using one of a range of competing concepts in the context at hand, a concept that each aims to have paired with the term “athlete” in this context.

I am putting things in terms of concepts, so it is worth pausing to say something briefly here about what I take concepts to be and what this means for Sundell’s and my proposal about the Secretariat case. The first thing to emphasize is that the idea of a metalinguistic negotiation does not depend on a specific, fully developed view of concepts. Neither do the more general views about thought and talk that I gloss above and which I draw on throughout this paper. Rather, they are compatible with a wide range of leading theories from the philosophy of mind and philosophy of cognitive science of what concepts are.²⁴ That being said, it is worth adding a bit more about the basic view of concepts that I favor, at least for the purposes of this paper.

In rough terms, I take concepts to be the equivalent in mental representation to what words are in linguistic representation. In turn, we can then think of different concepts as being marked by the specific cognitive significance that they have for an agent or the specific cognitive role that

22. See Chris Barker, *The Dynamics of Vagueness*, 25 *LINGUISTICS & PHIL.* 1–36 (2002).

23. In *id.*, Barker does not consider speakers expressing disagreements via competing metalinguistic usages of a given term. Sundell introduces these kinds of disputes in Sundell, *Disagreement, Error*, *supra* note 20. Barker then picks up on the same idea in Chris Barker, *Negotiating Taste*, 56 *INQUIRY* 240–257 (2013). Sundell and I discuss these cases at length in Plunkett & Sundell, *Disagreement*, *supra* note 14; and Plunkett & Sundell, *Dworkin’s Interpretivism*, *supra* note 14.

24. For a helpful overview of different views of the nature of concepts, see ERIC MARGOLIS & STEPHEN LAURENCE, *CONCEPTS: CORE READINGS* (1999).

they play. In many cases (including the concepts that the speakers express by "athlete" in the Secretariat case) the different concepts that each speaker is using play a kind of representational role, such that they are each categorizing things in the world in a different way. These different ways of representing the world partition the world into ways that are in accordance with that representation and those that are not. If one wanted, one might then model that way of representing as something along the following lines: a function from possible worlds to extensions.²⁵ This function is a way of determining the extension of the concept in a given possible world. In turn, as mentioned above, I take the meaning of a given word (in the sense having to do with "semantics") to be given by the concept that it expresses.

Why bother arguing about which concept should be paired with the term "athlete" in the Secretariat case? There are two main things to say here. The first is that not all concepts are equally good for using in a given context, relative to our purposes in that context. For example, when engaged in mathematical inquiry, it will be good to have (and sometimes use) the concepts SET and NUMBER. Compare that to a concept that picks out the union of numbers, elephants, and tennis racquets. Such a concept is less helpful in such a context, given our aims in engaging in mathematical inquiry.²⁶ Second, consider that terms often carry with them significance in a given social-historical setting that goes well beyond what is built into the semantics of a term. For example, quite aside from what is built into the semantics of a term like "athlete," that term has a rich set of associations tied to it. The term is also closely connected to certain kinds of functional roles in a given context. For example, in the context of a list of the fifty greatest athletes of the twentieth century published in *Sports Illustrated* (a very widely read magazine), consider some of the things that are likely to go along with calling a human (or nonhuman animal) an "athlete." These include such things as certain forms of esteem, praise, and social recognition. In light of this, speakers might have very good reason to have normative views about not only which concept should be deployed in a given context but also which word should be used to express that concept in the context at hand.²⁷

25. This function can in turn be made more complicated by introducing centered worlds in addition to possible worlds and by thinking of them within a two-dimensional framework of the kind advocated for by David Chalmers and Frank Jackson, among others. See David J. Chalmers, *Two-Dimensional Semantics*, in *OXFORD HANDBOOK OF THE PHILOSOPHY OF LANGUAGE* (E. Lepore & B. Smith eds., 2006); David J. Chalmers & Frank Jackson, 110 *Conceptual Analysis and Reductive Explanation*, *PHIL. REV.* 315–360 (2001); and FRANK JACKSON, *FROM METAPHYSICS TO ETHICS: A DEFENCE OF CONCEPTUAL ANALYSIS* (1998). I am sympathetic to both of these ideas. But such complications do not matter for my purposes in this paper.

26. One question is whether some concepts are better than others. If the answer is yes, a separate question is *why* certain concepts are better than others. I do not need to take a stand on that here. For discussion of this topic, see Burgess & Plunkett, *Conceptual Ethics I*, *supra* note 9; and Burgess & Plunkett, *Conceptual Ethics II*, *supra* note 9. I return to this issue briefly in *Section II*.

27. For further discussion of these ideas, see Plunkett & Sundell, *Disagreement*, *supra* note 14; and Plunkett & Sundell, *Dworkin's Interpretivism*, *supra* note 14.

Of course, speakers might not be—and, indeed, I think often are not—aware that they are engaged in a metalinguistic negotiation, even though they in fact are.²⁸ So my point here is not that speakers engaged in this metalinguistic negotiation are consciously aware of the fact that they are engaged in it or that they would quickly affirm that description of their linguistic exchange. Rather, my point is that the basic topic I am claiming is at issue in the Secretariat dispute—a topic about which concept should be paired with a relevant term—can be a substantive one well worth arguing about. And if this topic can be worth arguing about explicitly (via a canonical dispute in conceptual ethics), then so, too, can it be worth arguing about via metalinguistic negotiation. The mode of communication about the subject matter does not change the substantiveness and import of the subject matter itself. In short, there are lots of issues in conceptual ethics that matter, and they matter independently of anything having to do with the way in which we communicate about them.²⁹

In making our metalinguistic proposal about the Secretariat case, Sundell and I are following the basic suggestion made by Ludlow himself in his original discussion of the case. Ludlow puts things in different terminology—terminology that is tied to a broader view of language that he advocates for in “Cheap Contextualism,” and which is extended in his recent book *Living Words*.³⁰ Ludlow’s core thought is that in the Secretariat case, there is no antecedently settled meaning of the term “athlete” as used by all of the speakers on the sports radio. Rather, the speakers advocate for different ways of fleshing out that meaning. Moreover, Ludlow thinks that many of our words have meanings that are massively underdetermined and that we flesh out their meanings via negotiation in particular contexts relative to the particular purposes at hand. Importantly, one need not accept a radical picture of language in general (e.g., that meaning is massively undetermined

28. For one thing, we should not expect ordinary speakers to have developed explicit theories about how they communicate information (and especially not ones that make fine-grained distinctions between different nearby proposals that involve subtle distinctions about semantics versus pragmatics). Second, speakers might be wrong in their self-interpretation when they in fact do have such explicit theories (after all, why should we expect ordinary speakers always to have the right linguistic theory of how they communicate?). Third, there might be good reasons to expect speakers to deny that they are engaged in a metalinguistic negotiation, given their own strategic aims in such a negotiation, and given background worries many people have about arguing “just over words.” Sundell and I discuss all of these points in our joint work. See Plunkett & Sundell, *Disagreement*, *supra* note 14; Plunkett & Sundell, *Dworkin’s Interpretivism*, *supra* note 14; and especially Plunkett & Sundell, *Antipositivist Arguments*, *supra* note 14. You might object that we cannot use pragmatic mechanisms unless we are aware of doing so. That objection is mistaken: we use pragmatic mechanisms all the time to communicate information without being aware that we are doing so, let alone understanding *how* we are doing so. For further discussion, see Plunkett & Sundell, *Dworkin’s Interpretivism*, *supra* note 14; and Plunkett & Sundell, *Antipositivist Arguments*, *supra* note 14.

29. For more on this point, see Plunkett & Sundell, *Disagreement*, *supra* note 14; and Plunkett & Sundell, *Dworkin’s Interpretivism*, *supra* note 14. See also Sundell, *Disagreement, Error*, *supra* note 20.

30. See Ludlow, *supra* note 16; and PETER LUDLOW, *LIVING WORDS: MEANING UNDETERMINATION AND THE DYNAMIC LEXICON* (2014).

in general) to grant Ludlow's basic reading of the Secretariat case: a reading on which the speakers are advocating for different meanings of the term "athlete" for the context at hand. Sundell and I think Ludlow's view here is on the right track, but we develop it in a different way—a way that is more schematic and which, we think, is harder to resist.

A. The Variety of Metalinguistic Negotiations and of Metalinguistic Disputes More Generally

Metalinguistic negotiations vary along a number of different dimensions. For example, in some cases of metalinguistic negotiation, it is natural to think that there are (at least) two culturally prevalent meanings of the term in question, such that prior to the metalinguistic negotiation, we would not say that there is a settled fact about what the term means "in that community" as a whole. Perhaps the Secretariat case is best thought of in that way. (And perhaps other cases from everyday life involving terms like "planet" and "marriage" are like that for speakers in certain communities). But, importantly, that need not be the case. Perhaps there is an existing meaning of "athlete" that is settled for many people across a wide range of circumstances. However, if so, we can then still say this: at least one of the speakers is not taking that meaning (insofar as there is one) as settled but is rather trying to change the meaning to something new.

To make this possibility vivid, suppose that a linguist or a philosopher calls into the sports radio show and aims to settle the dispute over Secretariat by citing facts about the (purportedly) settled meaning of the term "athlete" as it is standardly used. Suppose that meaning is one that excludes nonhuman animals from being called "athletes." Would the Secretariat fan really then give up her argument? It is very easy to imagine a version of this case where she would not. For it is easy to imagine that she herself thinks that the meaning of the term, as used by most people in most contexts, is exactly as the linguist says. But she might actively want to change that meaning of the term—perhaps, for example, for ethical/political reasons having to do with improving the way in which racehorses are treated (and perhaps the way in which nonhuman animals in general are treated by humans). In short, a speaker in a metalinguistic negotiation might very well be advocating for a highly revisionary or revolutionary usage of a term—indeed, she might even be doing so consciously. (Think here, for example, of the process of trying to appropriate terms like "queer" and "slut.")

There is a range of other dimensions along which metalinguistic negotiations differ from each other. For example, consider terms like "soft," "tall," "sharp," and "hot." These terms are gradable—things can be more or less soft, more or less tall, and so on. They also denote a property only once some context-sensitive standard has been set. For example, suppose we want to know whether the statement "Eliot is tall" is true. If we are in a context

of comparing Eliot to a group of professional basketball players, that is different from if we are comparing him to a group of philosophy professors. Different contexts supply different standards. One thing that speakers can do is to put forward views, via the metalinguistic usage of a term, about how such a contextually specific standard should be set. That would be different from what Sundell and I claim is going on in the Secretariat case.

In the Secretariat case, we claim, speakers mean different things by “athlete” at the most basic level. On our view, it is not that there is a context-invariant meaning of the term “athlete” (which we can put in Kaplanian terminology as its “character”) that is true of both of their uses of “athletes” and that the speakers are just negotiating about how to set a context-specific standard.³¹ Rather, they are negotiating about what the character of the term should be. In contrast to this, metalinguistic negotiations involving terms like “hard,” “tall,” “sharp,” and “hot” (terms that Chris Kennedy calls *relative gradable adjectives*)³² might very well be ones in which speakers agree on the character of the term in question but disagree about how a contextually supplied standard should be set. For example, suppose the character of “tall” is something along the following lines: having a maximal degree of height greater than the contextually supplied standard.³³ Speakers involved in a metalinguistic negotiation might agree on the character of the term “tall” (and thus agree on what the term means, in one key sense of “means”) but disagree about what the relevant standard or threshold should be in this context. To put the basic thought here in more abstract terms, we can say the following. There is a range of things that go into determining the content of a statement in a given context, and metalinguistic negotiations can target any number of the things that go into determining that content, including both the most basic aspects of a term’s meaning as well as issues involving context-specific standards of a context-sensitive term.

It is also important to keep in mind that not all disputes involving the metalinguistic usage of a term are metalinguistic negotiations (or, equivalently, *normative metalinguistic disputes*). We can put the point like this. Sundell and I use the term “metalinguistic dispute” to refer to any dispute in which (at least) one speaker employs a metalinguistic usage of a term. As I explain below, one can use (rather than mention) a term in a metalinguistic way to communicate views about the descriptive issue of what a term does mean rather than normative views about what it should mean. So some metalinguistic disputes are just about a descriptive issue (rather than the kinds of normative issues in conceptual ethics that metalinguistic negotiations are about). Those are the ones that we can call *descriptive metalinguistic disputes*.

31. I here draw on David Kaplan, *Demonstratives: An Essay on the Semantics, Logic, Metaphysics, and Epistemology of Demonstratives*, in THEMES FROM KAPLAN (J. Almog & J. Perry eds., 1989).

32. Chris Kennedy, *Vagueness and Grammar: The Semantics of Relative and Absolute Gradable Predicates*, 30 LINGUISTICS & PHIL. 1–45 (2007).

33. Barker, *Dynamics*, *supra* note 22.

To illustrate this, consider the following case.³⁴ Suppose that Oscar and Jill have just arrived at a scientific research station in Antarctica, where they will be spending the next few months. It is Oscar's first time in Antarctica. Oscar, bundled up in his warmest clothing, is standing shivering next to an outdoor thermometer. Pointing at the thermometer, he asks Jill (who has been at this research station many times before) the following question: "Is this cold?" Jill shakes her head and replies "Nope. This is not cold. This is actually pretty warm." In many cases, statements of this kind involving "cold" are part of a discussion in which the speakers are trying to get clear on what the temperature is. But this is not such a case. In this case, both of the speakers are looking at the same thermometer. So that does not seem like a reasonable account of this case. Instead, what Sundell and I propose is this: Jill is helping Oscar understand something about how the term "cold" is used at this research station in Antarctica. In particular, she is informing him that the local threshold for "coldness" is lower on the temperature scale than the current temperature being displayed on the thermometer.

That information—information about the meaning of "cold" in this context—can be useful to Oscar for any number of reasons. For example, it can help him smoothly communicate with his new colleagues at the research station in the days to come. And, perhaps more importantly, by learning this new information about the threshold for "cold" in this context, Oscar learns important information about the range of temperatures he is likely to experience during his time at this research station.

Or at least, so he learns, if Jill is right. But perhaps she is wrong. One of her colleagues might think she is and challenge what she says with a competing metalinguistic usage of the term "cold." Suppose Anand is a scientist who has been based at this research station for much of the last year. He is standing next to Jill when she says "Nope. This is not cold. This is actually pretty warm." In response, Anand says "Actually, no. You are wrong. This is cold. Perhaps things have changed since last time you were here." In such a case, Anand is having a metalinguistic dispute with Jill. He uses the term "cold" in a metalinguistic way, and it appears (at least to Anand and perhaps to others as well) that Anand and Jill disagree. And, in this case, assuming that Jill and Anand really do disagree, what they disagree about is a descriptive issue about what "cold" means, rather than a normative one about what it should mean. So this is an example of a metalinguistic dispute that is not a metalinguistic negotiation.

There is much more to say about the different dimensions along which metalinguistic negotiations differ from each other, as well as about the variety of metalinguistic disputes more generally. But we now have enough on the table to move on. For in this paper, the key kind of metalinguistic

34. This case is a modified version of a case in Plunkett & Sundell, *Dworkin's Interpretivism*, *supra* note 14. Sundell and I discuss other cases of the same kind in Plunkett & Sundell, *Disagreement*, *supra* note 14; and Plunkett & Sundell, *Antipositivist Arguments*, *supra* note 14.

dispute that I am interested in is the basic kind of metalinguistic negotiation that we get in the Secretariat case. This is because what I argue in the next section is tied to that particular kind of metalinguistic negotiation. I claim that part of what is happening in the ongoing philosophical dispute over legal positivism is that philosophers use the term “law” in a metalinguistic way, whereby they put forward competing normative views about which concept should be expressed by that term. In other words, they engage in a kind of metalinguistic negotiation along the basic lines of what Sundell and I claim is going on in the Secretariat case.

Put more carefully, in the next section, I argue for the following claim: the same kind of evidence that supports thinking that the Secretariat case is a metalinguistic negotiation also supports thinking that the ongoing dispute over legal positivism is partly a metalinguistic negotiation. (I explain more in the next section about why I say “partly” here.) I take it that the evidence in favor of the metalinguistic reading of the Secretariat case is quite strong; indeed, strong enough that we should think that the Secretariat case is actually a metalinguistic negotiation. But I am also sensitive to the philosophical difficulties involved in establishing that claim—difficulties that I explain in the next section, including, centrally, ones about the foundations of semantics and the nature of theory-choice in the philosophy of language and in linguistics. Because of this, I stick with the more modest claim above, at least for the purposes of this paper. I can get a lot of mileage out of the modest claim for the work that I want to do here in legal philosophy. Or at least, so I argue below.

II. THE DISPUTE OVER LEGAL POSITIVISM

Here is a basic thought about the relationship between communication in everyday life and communication in philosophy: if there are pragmatic mechanisms that we use to communicate information in everyday life, the chances are that we also sometimes use those very same pragmatic mechanisms to communicate information in a philosophical context. I think this thought is on the right track. Consider the following. Suppose that we start with a tool for communicating information and that this tool can potentially be used to communicate about a wide range of topics in a wide range of different contexts. Then we start communicating about some specialized topic in some particular context. Suppose that in theory we could use this tool to help us communicate about this topic in this context. If so, would we not then expect that we would at least sometimes use this tool in this context, at least if we were being rational? After all, the tool is already there, at our disposal, and ready to be used for communicating about this topic in this context, just as it can be used for communicating about any number of other topics in a wide range of other contexts.

Based on this, I think we should start with the following idea about the pragmatics of philosophical communication—that is, communication among philosophers about philosophical topics. We should expect that the pragmatic tools that we use in everyday conversation (e.g., implicature, connotation, presupposition, metalinguistic usage, etc.) will also be ones that we should expect that we also sometimes use when talking about philosophy. (The same points holds true for first-order legal discourse as well as any subarea of discourse in general, absent special reason to think otherwise).

If this thought is on the right track, it gives us reason to think that philosophers, when talking about issues in philosophy, might well sometimes use terms in a metalinguistic way, for example, in a way that parallels Jill's use of the term "cold" at the Antarctic research station or the use of the term "athlete" in the Secretariat case. Of course, there might be reasons that the philosophical context turns out to be special, such that this available pragmatic tool just is not used in the philosophical context at all. But we have at least *prima facie* reason to think otherwise. If so, this should then make us at least open-minded about the possibility that there is an important metalinguistic element to the dispute over legal positivism. Indeed, it gives us reason to take such a proposal seriously and to investigate whether it is true. With that in mind, let us then turn to the dispute over legal positivism; that is, the dispute that pretheoretically we can gloss as one about legal positivism versus legal antipositivism.

In broad terms, here is the question on the table: Should we think of the dispute over legal positivism as a metalinguistic negotiation? In order to zero in on the core issues that matter here, we should make this question a bit more precise. Consider again the dispute about Secretariat on sports radio, as well as the dispute between Jill and Anand at the Antarctic research station. These were disputes that occurred over a relatively short period of time and involved only two people. In contrast, the dispute over legal positivism is something that has occurred (in one form or another) throughout the history of modern legal philosophy and has involved many different philosophers. It is also something that has not just been discussed in conversation but has also been written about at great length by many different people. Such a dispute would be likely to take different forms at different times. Based on this, I think it would be quite surprising if the dispute were always a purely canonical one—or, even more specifically, if it were always a canonical dispute about the exact same topic. For the same reason, I think it would also be quite surprising if it were a purely noncanonical one—or, even more specifically, if it were a purely metalinguistic one.

This, I think, provides good reason to think that the real question that matters to us here is something more nuanced than the question I introduce above (namely, the question of whether we should think of the dispute over legal positivism as a metalinguistic negotiation). I think the relevant question here is more carefully stated as follows: How much

of the dispute over legal positivism has been (and is) a metalinguistic negotiation?³⁵

The claim that I want to put forward is this: a significant part of the dispute over legal positivism is a metalinguistic negotiation. How much of it? Enough that it can help us illuminate important (and initially confusing) aspects of what is going on in this dispute. Or at least so I suggest in what follows. Put more carefully, what I argue can be stated as follows: the same kind of evidence that supports thinking that the Secretariat case is a metalinguistic negotiation also supports thinking that an important part of the ongoing dispute over legal positivism is a metalinguistic negotiation—a part that might not make up the majority of the dispute (or even anything close to it) but which is nonetheless explanatorily important for our self-understanding of this dispute within legal philosophy.

In order to build this case, what I propose to do is straightforward: to consider the kind of evidence that was relevant in the Secretariat case and then see if the same kind of evidence is present in the dispute over legal positivism. I start by putting the kind of evidence we are looking for in schematic form, and explaining why, in general, this sort of evidence supports thinking that a given linguistic exchange is a metalinguistic negotiation. I then turn to looking at the dispute over legal positivism.

Here is a schematic summary of the kind of evidence that Sundell and I draw on in arguing for reading the Secretariat case as a metalinguistic negotiation.³⁶

- (A) There is good evidence that the linguistic exchange is a dispute; that is, there is good evidence that it is a linguistic exchange that appears to express a disagreement.
- (B) There is good evidence that the dispute really does express a disagreement.
- (C) There is good evidence that speakers in the dispute mean different things by (at least) one of the terms in that dispute. There are different things that might provide such evidence for a given term. (What one takes to provide such evidence will, of course, depend on one's more general commitments in the philosophy of language). I claim that one such important piece of evidence is this: the speakers in the dispute have dispositions to apply systematically the same term in divergent ways in the same (nondefective) conditions. And I

35. If one were inclined to certain ways of individuating disputes, one might want to think of there being a very large number of different disputes over legal positivism that which overlap and connect to each other in a number of different ways. That might ultimately be the correct way to go, at least given what we might want to mean by “dispute” for certain explanatory purposes. But, for my purposes here, I think it is best to think of there being one large, ongoing dispute involving lots of different people communicating in different ways (writing books, talking in person, writing emails, etc.), and that dispute takes different forms at different times (e.g., sometimes it is a canonical dispute, sometimes it involves metalinguistic negotiation, etc.). If you want to think of that description as largely metaphorical—given your commitments about dispute individuation—that is fine. What I go on to say below could then be rephrased without loss of philosophical content.

36. My way of framing things below—in terms of conditions (A) to (D)—draws from Plunkett, *Which Concepts*, *supra* note 11.

claim that many different philosophers with a range of different commitments should take that as good evidence, even if there are many other sources of evidence as well.

- (D) There is good evidence that the disagreement expressed in the dispute, insofar as there is one, is not just about descriptive information about what a word means or how it is used. (This is something that helps provide evidence that it is a normative metalinguistic dispute, i.e., a metalinguistic negotiation, and not a descriptive metalinguistic dispute.) For example, one good piece of evidence here would be that speakers persist in their dispute even when they agree on the facts about a term's current meaning or current use.

It should be emphasized that these conditions are presented in a highly schematic way. What it would take to show that each condition holds would, of course, depend on many other issues. Critically, this includes figuring out what, in general, gives us good evidence for variation between speakers in what they mean by a given term.

This last point is a crucial one to emphasize. For an important piece of the argument for reading a case as a metalinguistic negotiation, at least one along the lines of the Secretariat case, is that there is compelling evidence that speakers in a dispute mean different things by their terms. But of course, different philosophers will have different views here about what counts as good evidence of speakers meaning different things by their terms. This is tied to different foundational views about the grounds of meaning.³⁷ For example, perhaps external facts about a speaker's environment or the patterns of usage by experts matter here as well, independently of anything having to do with facts about the speaker's own psychology (as is true according to certain kinds of well-known externalist theories of meaning).³⁸ Or perhaps, as proponents of Lewis-inspired reference magnetism urge us, facts about genuine objective similarity, or facts about what is genuinely explanatory important, matter for settling the meaning of our terms, and do so independently of anything about the speaker's own psychology.³⁹ Or perhaps, as Dworkin urges, facts about the content of at least certain concepts

37. To get a sense of the range of different views in contemporary philosophy about the grounds of meaning, see ALEXIS BURGESS & BRETT SHERMAN, *METASEMANTICS: NEW ESSAYS ON THE FOUNDATIONS OF MEANING* (2014).

38. I have in mind the broad kind of content externalism advocated for in Hilary Putnam, *The Meaning of "Meaning,"* 7 *MINN. STUD. PHIL. SCI.* 131–193 (1975); and Tyler Burge, *Individualism and the Mental*, 4 *MIDWEST STUD. PHIL.* 73–121 (1979). Cf. Laura Schroeter, *Why Be an Anti-Individualist?* 77 *PHIL. & PHENOMENOLOGICAL RES.* 105–141 (2008); and Laura Schroeter & François Schroeter, *Normative Concepts: A Connectedness Model*, 14 *PHILOSOPHERS' IMPRINT* 1–26 (2014). In the context of discussion of the philosophy of law, it is worth noting here that Raz's view of concepts—and connected views of conceptual analysis—also involve a related kind of anti-individualism. See Joseph Raz, *Authority and Justification*, 14 *PHIL. & PUB. AFF.* 3–29 (1985); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986); and Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, 4 *LEGAL THEORY* 249–282 (1998). For another important example of a related kind of anti-individualism in the philosophy of law, see NICOS STAVROPOULOS, *OBJECTIVITY IN LAW* (1996).

39. See David Lewis, *New Work for a Theory of Universals*, 61 *AUSTRALASIAN J. PHIL.* 343–377 (1983); THEODORE SIDER, *WRITING THE BOOK OF THE WORLD* (2012); and Brian Weatherston, *What Good Are Counterexamples?* 115 *PHIL. STUD.* 1–31 (2003).

(and thus the meaning of terms that express those concepts) are settled by normative facts about what best justifies a set of practices, such that moral facts matter for settling the meaning of terms, and do so independently of anything about the speaker's own psychology.⁴⁰

In light of this, one might be tempted to think the following: if one of those views is right, then that changes what we should be looking for in condition (C). It might be harder to find good evidence that speakers in the dispute mean different things by (at least) one of the terms in that dispute. Perhaps the evidence that Sundell and I cite in the Secretariat case—facts about the dispositions of speakers to apply a term one way or another—is strong evidence only on certain theories of meaning, for example, a kind of internalism. On many other theories of meaning, perhaps the evidence we cite is only a very weak kind of evidence.

This charge is onto something important. But the dialectic here is more subtle than it might appear at first blush. There are two things that are crucial to keep in mind. First, as Sundell and I argue elsewhere, everyone needs to hold that there are *some* metalinguistic disputes.⁴¹ The question is how far the phenomenon extends and what sort of explanatory work it can do. But it is a tool that everyone needs in their toolkit anyway, to explain at least some cases. Second, as Sundell and I emphasize, all plausible theories of meaning—including the kinds of views I sketch above—grant that facts about patterns of usage or dispositions matter to some degree for settling facts of meaning. We then need to ask how much they matter and what other facts matter as well. The answers to those questions obviously interact with the question of which foundational theory of meaning is correct. However, the answer to that question also needs to be informed by the question of how plausible it is to suppose that speakers differ in what they mean, including, for example, whether someone who posits significant variation of the meaning of terms between speakers has a good story to tell about disagreement (and, relatedly, about agreement). The question of how prevalent metalinguistic disputes are (as well as, more broadly, how prevalent noncanonical disputes in general are) matters for thinking about that issue—and thus for thinking about which kind of foundational semantic theory is correct.

With that in mind, we might put the point like this: thinking about the viability of reading a given dispute as a metalinguistic one is part of the process of figuring out our best general theory of meaning. To appreciate this, consider that one prevalent kind of argument in favor of rival semantic views is a disagreement-based one, on which a given view (e.g., Dworkinian interpretivism, expressivism, speaker-relativism, etc.) is supported by its (purported) ability smoothly to capture (purported) data about disagreement—or at least do so more smoothly than its rivals. Such a

40. See DWORKIN, LAW'S EMPIRE, *supra* note 5; and DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 15.

41. This includes both content-externalists and context-externalists. See Plunkett & Sundell, *Disagreement*, *supra* note 14.

disagreement-based argument is also sometimes given not for a particular view of concepts or semantics but for what might best be thought of as a broad schema of a view; for example, that speakers share a given concept but have different "conceptions." Without further detail, on such a view the idea of the concept/conception distinction is really more of a schema of a kind of view than a developed view of the foundation of meaning: it is a schema that says speakers share a concept but differ in something else (i.e., whatever it turns out a "conception" ultimately is).

The broad thesis at the core of this "concept/conception" schema is one that a lot of disagreement-based arguments aim at establishing: the thesis that speakers mean the same things by their words in the disputes that express the disagreements in question, such that at bottom they really do share the same concepts (that they express with the relevant words in these disputes). One crucial component of assessing such disagreement-based arguments for sameness of meaning is to figure out whether the disputes are ultimately best understood in metalinguistic terms. In short, one's views about the grounds of meaning both inform and are informed by one's views about the prevalence of metalinguistic disputes.

Disagreement-based arguments often assume, often without argument, that the best way to capture how disagreements are expressed in the relevant class of cases is to see such disputes as canonical ones (where there is then pressure to maintain sameness of meaning between speakers in order to uphold the idea that there really is a disagreement that is expressed). The boldest versions of such disagreement-based arguments for sameness of meaning are ones that appeal to something like the following principle: the only possible way to avoid concluding that the speakers are "merely talking past each other" (and thus not disagreeing) is to posit that speakers mean the same things by their words in a given dispute (and thus that they express the same concepts by those words). The metalinguistic disputes that Sundell and I discuss, in which speakers mean different things by their words but still genuinely disagree, are counterexamples to this principle. Indeed, to provide a counterexample to the above principle, Sundell and I do not even need to be right in our diagnoses about the particular cases; we just need to be right that such disputes are metaphysically possible.

More careful disagreement-based-argument disputes work by appeal to a kind of inference to best explanation. Such arguments claim that positing that the relevant disputes are canonical ones, where speakers mean the same things by their words, is the best explanation of how disagreement is expressed in these disputes. To run this second kind of disagreement-based argument for a given class of disputes, one needs to show that such a view is better than our metalinguistic reading of those disputes. We argue that for many disputes where disagreement-based arguments are run, our kind of metalinguistic reading is in fact the better one. In short, Sundell and I claim that seeing disputes such as the Secretariat one as metalinguistic (rather than canonical) both better illuminates what is going on with them and

fits more smoothly with a good general theory of meaning. And, crucially, our theory can do this without positing that speakers involved in these disputes mean the same things by their words (which, for example, is what the concept/conception model claims is so).⁴²

Moreover, we can note the following. Inference-to-best-explanation versions of disagreement-based arguments are more philosophically promising than versions that appeal to the (demonstrably false) principle that in order for two speakers to express a disagreement in a given dispute, sameness of meaning is required. But even these arguments turn out to be in bad shape once metalinguistic disputes are squarely in view. We can put this point as follows. If a philosopher wants to show that speakers mean the same things by their words in a given dispute, then she must provide an argument that this is so. We have just seen that merely citing the presence of genuine disagreement does not show this. So she must provide an independent argument for this conclusion, which, typically, will involve arguing that the dispute is really a canonical one. However, by showing this, she will have done the core work she needs to do in order to show that speakers mean the same things by their words. For in order to argue that a dispute is a canonical one that really does express a disagreement (which, remember, is what the theorist running the disagreement-based argument wants to show), the theorist needs to maintain (at least typically) that speakers mean the same things by their words.

The upshot is this. Some disagreement-based arguments are unsound (these are the ones that rely on the overly strong principle about sameness of meaning underwriting the possibility of genuine disagreement being expressed in a dispute). And the ones that revolve around an inference-to-best-explanation claim end up being either unsupported or unnecessary.⁴³ Thus facts about the presence of disagreement here just will not do much dialectical work in this context. The relevant question we then need to ask is simply this: Should we regard the relevant disputes as canonical ones or as noncanonical ones (e.g., as metalinguistic negotiations)? Sundell and I argue that (1) holding that condition (C) holds in a wide range of cases (e.g., wider than certain externalist rivals hold), based on the kind of evidence about speakers' dispositions that we emphasize in the Secretariat case, and then (2) viewing disputes where (A) to (D) hold as metalinguistic negotiations is the best overall package deal here. To rebut that claim, one needs to propose an alternative package deal and show that it does better. Simply citing the (purported) presence of genuine disagreement in these disputes is going to get you nowhere.

It is beyond the scope of this paper to go into great detail to defend Sundell's and my approach in relation to all of the salient alternatives here.

42. For further discussion of the above points, see *id.*; and Plunkett & Sundell, *Dworkin's Interpretivism*, *supra* note 14.

43. See Plunkett & Sundell, *Disagreement*, *supra* note 14, at 18.

But it is worth saying a few things here to frame the discussion and the assessment of the view that I am putting forward about the dispute over legal positivism.

One important advantage of our view is that it allows us to vindicate intuitions of disagreement in a straightforwardly descriptivist framework—on which the semantics of the relevant class of statements is explained at the most explanatorily basic level in terms of beliefs that speakers express about how things are. Our approach thus fits smoothly with the default view in much of philosophy of language and linguistics (thus avoiding the range of difficulties faced by noncognitivist approaches, e.g., the Frege-Geach problem about nonassertoric uses of the relevant terminology).⁴⁴ At the same time, our approach does not end up positing “talking past” each other in cases where we reflectively think there really is a disagreement being expressed. It is hard to get both of those things at once for many cases (including those such as the Secretariat case). And so the fact that our proposal does so is a mark in its favor.

Another important advantage of our view is that it allows us to explain how speakers express disagreement in these cases without invoking a (purportedly) special type of concept, as on the Dworkinian interpretivist approach. In rough terms, Dworkin argues that we need to introduce what he calls “interpretative” concepts in order to explain an important class of disputes: disputes where (1) speakers agree on all of the relevant nonlinguistic facts, (2) they apply the same term in divergent ways, (3) they are aware of this divergence in use, and (4) we as theorists (and often the participants themselves) take those speakers to disagree with each other. Dworkin introduces the idea of interpretative concepts in order to explain how genuine disagreements are possible in such cases—which, he claims, cannot be done if one posits that speakers simply employ the other kinds of concepts Dworkin posits in his overall theory (namely, what he calls “criterial” concepts and also what he calls “natural-kind” concepts).⁴⁵ Dworkin argues that an interpretative concept is one whose correct application does not depend on fixed criteria or an instance-identifying decision procedure but rather on the moral facts that best justify the total set of practices in which that concept is used.⁴⁶

Sundell’s and my metalinguistic approach to the disputes that Dworkin is concerned with—and which, it should be noted, he claims include the dispute over positivism that I am discussing here—does not require positing any such concepts. Instead, we can stick with our best general, independently motivated view of the nature and content of concepts. Our view thus has the advantage of theoretical parsimony here. We make use of tools that everyone (including Dworkin) needs in their toolkit anyway, including,

44. For a good overview of the Frege-Geach problem, see Jack Woods, *The Frege-Geach Problem*, in *THE ROUTLEDGE HANDBOOK OF METAETHICS* (T. McPherson & D. Plunkett eds., 2017).

45. DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 15.

46. *Id.*

centrally, noninterpretative concepts (which Dworkin thinks we also need to posit) and the device of metalinguistic usage of a term (which everyone, including Dworkin, needs to posit in order to explain some cases). In contrast, Dworkin introduces a new special type of concept—and one that moreover remains underdescribed and mysterious in many key respects, especially relative to the concerns about concepts that motivate work on them in the philosophy of mind.⁴⁷

A third advantage of our view—relative to, say, assessor-relative approaches to the grounds of meaning, such as Andy Egan's and John MacFarlane's—is that we can stick with a more straightforward approach to content and a more straightforward approach to truth.⁴⁸

Finally, a fourth important advantage of our view is that it allows one to hew closely to patterns of usage and dispositions when assigning meaning to speakers—an approach that fits well with many of the leading methodological approaches in linguistics (certainly much more so than Dworkinian views do). In general, fit with an explanatorily powerful empirical research program is an important piece of evidence in favor of a view.

With all of this in mind, let us now return to the kinds of evidence outlined in (A) to (D) which I sketch above. If what I say above is on the right track, then, in cases where (A) to (D) hold, there is good reason to think that dispute might well be a metalinguistic negotiation. Perhaps such a reading will ultimately turn out to be wrong. Perhaps, all things considered, a rival reading of the case (e.g., an expressivist reading or a Dworkinian interpretivist one) will turn out to be the best one. But it is at least a proposal worth taking seriously for such cases, and indeed, there is much to be said in its favor.

Before moving on, it is worth emphasizing here that a dispute might be a metalinguistic negotiation *even if* (A) to (D) do not all hold. Consider the

47. For extended discussion of the general theoretical advantages of the kind of metalinguistic approach I am advocating, as opposed to Dworkinian interpretivism, see Plunkett & Sundell, *Dworkin's Interpretivism*, *supra* note 14. It should be noted that some of what Dworkin writes suggests that the way I put things in the text here—even though it aligns with much of how Dworkin himself puts things throughout his work—will ultimately need to be modified slightly. In DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 15, Dworkin suggests that any concept (including criterial and natural-kind concepts) can undergo an “interpretative” phase, such that, in rough terms, it becomes an interpretative concept of this kind for a given period of time in a given context. This suggests that at the end of the day what Dworkin might best be seen as ultimately advocating is a special way that concepts can be for a given period of time in a given context, rather than advocating for introducing a special kind of concept per se. For discussion of this, see Plunkett & Sundell, *Dworkin's Interpretivism*, *supra* note 14. If this reading of Dworkin's views is accurate, this would mean that my way of putting things in the text would need to be changed slightly. Even if so, however, the same basic dialectic remains. Dworkin explicitly claims that one needs to posit the existence of interpretative concepts (or a special interpretative phase of concepts) in order to explain what is going on in the kind of disputes at issue. In contrast, the metalinguistic proposal that Sundell and I offer does not require positing any such thing. Instead, we can just stick with whatever theory of concepts we started with in the first place as part of our overall theory of thought and talk.

48. See Andy Egan, *Relativist Dispositional Theories of Value*, 50 S. J. PHIL. 557–582; and JOHN MACFARLANE, ASSESSMENT SENSITIVITY: RELATIVE TRUTH AND ITS APPLICATIONS (2014).

following. In a series of recent papers, Amie Thomasson draws on Sundell's and my work on metalinguistic negotiation in the context of defending her broadly deflationary views in meta-metaphysics.⁴⁹ In the course of doing so, Thomasson defends the idea that there can be metalinguistic negotiations in which speakers engaged in a dispute mean the *same* thing by their words. She focuses on cases where one of the speakers says something false in order to push the usage of the relevant term toward a meaning on which the speaker's statement *would* be true.

Thomasson's views here will be particularly attractive to those drawn to more externalist ways of thinking about semantics. Nothing Sundell and I say rules out the possibility of such cases. Sundell and I focus on cases where we claim that speakers mean different things by their words in what we take to be a crucial sense of "meaning" relevant to judgments about the truth and falsity of what speakers say (at least in many theoretical contexts where we are interested in assessing such judgments). Our claim about meaning variation in such cases is tied to our more general views in the philosophy of language, which not everyone interested in the idea of metalinguistic negotiation will share. In this paper, I develop my proposal about the dispute over legal positivism based on the idea that this dispute bears important similarities to Ludlow's Secretariat case. Because Sundell and I hold that speakers mean different things by the word "athlete" in that case, and because my work here draws extensively on the overall framework about thought and talk that Sundell and I have been developing, I treat the presence of variation of meaning (satisfying condition (C)) as an important piece of evidence that a linguistic exchange is a metalinguistic negotiation.

But, for the reasons Thomasson's work brings out, it would be a mistake to think of (C) as a condition that *must* be satisfied in order for something to be a metalinguistic negotiation.⁵⁰ More generally, it would be a mistake to think

49. Amie L. Thomasson, *Metaphysical Disputes and Metalinguistic Negotiation*, 57 *ANALYTIC PHIL.* 1–28 (2016). See also Amie L. Thomasson, *What Can We Do, When We Do Metaphysics?*, in *THE CAMBRIDGE COMPANION TO PHILOSOPHICAL METHODOLOGY* (G. d'Oro & S. Overgaard eds., 2017).

50. In addition to the possibility of cases along the lines that Thomasson gives us, there are also cases that suggest that there can be metalinguistic negotiations where speakers use terms to advocate for views about how they should be used but mean the same things by their words. Consider disputes in which speakers use the grammatical device of metalinguistic negation—in the broad sense discussed in LAURENCE HORN, *A NATURAL HISTORY OF NEGATION* (1989)—to engage in metalinguistic negotiation. For example, perhaps that is so in the following case: one speaker says "Abe needs some help getting to the party tonight since he is disabled," and the other speaker responds by saying "No, Abe is not disabled. He is differently abled." (Thanks to Lyndal Grant for helpful discussion on this point and for this kind of example.) In this case, it seems that the following might well be true: both speakers mean the same things by the relevant words ("disabled" and "differently abled") but advocate (by use of their words rather than by mentioning them) a normative view about which of these words should be used in the context at hand. The issue with these kinds of cases is delicate: whether the speakers mean the same things by their terms depends partly on (among other things) how we should think about the meaning of thick terms, pejoratives, and slurs, as well as how we should think of metalinguistic negation. More importantly, since I am here focusing on the kind of metalinguistic negotiation involved in the Secretariat case, I leave this kind of case—and the important issues it raises—to

that (A) to (D) give us anything like necessary and sufficient conditions for an exchange being a metalinguistic negotiation. Rather, my idea is that when conditions (A) to (D) are satisfied, this gives us important evidence that an exchange is a metalinguistic negotiation.

With these qualifications about conditions (A) to (D) in mind, let us now turn to the dispute over legal positivism. Let us start with (A). In this case, there seems to be ample evidence that the linguistic exchange is a dispute. (And thus that (A) is met.) After all, many participants in the relevant linguistic exchanges here—as well as many observers of them—take it that positivists and antipositivists express a disagreement when they argue with each other. And that is all that is needed for something to be a dispute, on the stipulative definition of “dispute” I am working with here. Does the dispute really express a disagreement? Perhaps it does not. Some disputes are ones where speakers think they are expressing a disagreement, but it turns out that they are not doing so at all. For example, that is so in some cases where one speaker uses the term “bank” to refer to the side of a river, and another does so to refer to a financial institution, but each speaker thinks the other is using it in the same way she is. In that case, discovering the difference in usage might dissolve the initial appearance of disagreement.

I think that parts of the dispute over positivism are like that kind of case of “merely talking past each other.” But it is also hard to accept the conclusion that this is all that is going on in the dispute over positivism and that there is no disagreement that is actually being expressed here. It is hard to imagine that there is nothing that positivists and antipositivists disagree about—and that they manage to communicate about—in their dispute. I could say more on this front to motivate that thought. However, for now, let us leave it at that. For the core of what makes the metalinguistic proposal an interesting one is that it shows us a way to avoid the conclusion of “merely talking past each other,” while still granting a variance in what speakers mean by the words they use in the dispute.

What about condition (C)? Is there is good evidence that speakers in the dispute mean different things by (at least) one of the terms in that dispute? For our purposes at hand, the relevant term to focus on here is “law” (or, relatedly, “the law”). Here is a reason for thinking that speakers mean different things by this term, at least some of the time. Suppose one is a convinced positivist. Then one is going to make claims about what kinds of facts are among the grounds of law and also what kinds of facts are not. Those are claims that an antipositivist denies. We know there will be some claims using the term “law” that the positivist is disposed to make which the antipositivist is not. So that is some evidence that they mean different things

the side for now. Sundell and I discuss metalinguistic negation at length in the context of discussing other important connections it has to our views on metalinguistic negotiation in Plunkett & Sundell, *Disagreement*, *supra* note 14.

by their terms. But it also might be pretty weak evidence, for, other things being equal, it seems implausible to hold that every time one philosopher says something of the form "X is grounded in Y" and the other says "X is not grounded in Y" then they mean different things by the term X. After all, it is surely possible for two speakers to mean the same thing by "X" but have different theories about X (including different theories about the grounds of the X facts).

But we can also appeal to more than this evidence in the case at hand. First, in the case of the dispute over legal positivism—in parallel to the Secretariat case—speakers persist in using the term "law" in different ways after being presented with all sorts of arguments for and against positivism. There is a lot of evidence and arguments being offered by both sides for what should count as "law"—just as in the Secretariat case with "athlete." And just as in the Secretariat case, where both sides of the dispute know the relevant empirical facts about how many races Secretariat won, how fast he was, and so on, many of the speakers in the positivist dispute are well aware of a range of the relevant empirical facts. Moreover, many of them—despite being on opposite sides of this debate in philosophy of law—will agree on a range of moral and political issues as well. Despite all of this, some philosophers seem totally convinced that legal positivism is true and others seem totally convinced that legal antipositivism is true. (Just as one speaker is totally convinced that Secretariat is an athlete and the other is totally convinced that he is not).

Second, it is not just that speakers on one side of the dispute make claims about the grounds of law that the other side does not. Positivists also present purported platitudes about law that (at least some) antipositivists deny, as well as vice versa. Moreover, they often do this knowing full well that others will deny those purported platitudes. This is important data to have on the table when theorizing about what speakers mean by their words.⁵¹ Consider, for example, Scott Shapiro's claim (which he rightly notes not all antipositivists will agree with) that "it seems to me an obvious truth about the nature of legality that regimes that are morally illegitimate may still have law. I say this because it is easy for me to imagine legal systems that are evil."⁵² The same thing happens in reverse. For example, antipositivists present ways in which law figures into normative topics such as political legitimacy or moral worth in a way that many positivists would deny is so.

Consider, for example, the following statement from Lon Fuller: "Law, as something deserving loyalty, must represent a human achievement; it cannot be a simple fiat of power or a repetitive pattern discernible in the

51. This is especially so on certain views of the foundations of meaning. See, e.g., JACKSON, FROM METAPHYSICS, *supra* note 25. See also David Braddon-Mitchell, *Masters of Our Meanings*, 118 PHIL. STUD. 133–152 (2004).

52. SHAPIRO, *supra* note 2, at 16.

behavior of state officials.”⁵³ When there is significant disagreement on platitudes about those things that a given term (e.g., “law”) refers to—or, in a connected vein, when speakers (in nondefective conditions) insist on basic truths about a subject matter that they take to be nonnegotiable in terms of fixing the topic of the subject matter at hand—that is some evidence that speakers actually mean different things by the term in question. So there is some evidence here that speakers do mean different things by the term “law” in the dispute over legal positivism. In particular, for my purposes here, what I want to focus on is this idea: some positivists mean one thing by “law” that is different from what some antipositivists mean by “law.”

Given my aims in this paper, the relevant question about my proposal is not actually whether it is correct, all things considered. For recall that my ambition is to argue for the following claim: the same kind of evidence that supports thinking that the Secretariat case is a metalinguistic negotiation also supports thinking that the ongoing dispute over legal positivism is partly a metalinguistic negotiation. Now ask about condition (C) in light of this. What evidence supports thinking that speakers meant different things by “athlete” in the Secretariat case? Does the same kind of evidence hold here? I argue above that the answer is yes. If one wants to deny this, then we need a reason for thinking that the cases are different in a respect relevant to the semantic facts about what each speaker means by the relevant terms in each dispute.

Here is one proposal. Speakers in the dispute over legal positivism use more specialized philosophical terminology, such as “ground,” “supervenience,” or “essence,” terminology not present in the dispute on sports radio. Perhaps that is a relevant disanalogy? It is not. To see that, we can consider a modified version of the Secretariat case where speakers assert claims using that terminology on sports radio, for example, claims such as “it is part of the essence of being an athlete to be a human agent,” or “facts about being an athlete are partly grounded in facts about performance relative to physical ability.” The addition of such claims does not change our main reasons for thinking that speakers mean different things by “athlete” in the Secretariat case. If anything, it might give us more reason to think they mean different things—for we are now adding new ways in which the speakers diverge in their application of the term “athlete” in nondefective conditions.⁵⁴

Perhaps there are features of the case that support a disanalogy here having to do with the context of a philosophical conversation rather than a sports radio debate. That might be so. But it is also hard to see what those would be. One such feature might be this—speakers in a philosophical

53. Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630–672 (1958), at 632.

54. For more on this line of argument, see Plunkett, *Which Concepts*, *supra* note 11.

context often want to converge on an agreed-upon meaning for relevant terms (e.g., "knowledge," "free will," or "law"), in a way that perhaps is not the case in debates on sports radio. But even if so, that does not mean that speakers meant the same thing throughout the dispute. It very well might be that speakers meant different things at the start of the dispute and then, perhaps in part by engaging in metalinguistic negotiation, come to agree upon a meaning of the term for the purposes of conversation. Indeed, I think that is a crucial part of many disputes involving metalinguistic negotiation. So this (purported) difference of the philosophical context from the context of a sports radio debate does not seem to support a disanalogy here in terms of thinking about how much speakers vary in what they mean by the relevant terms (e.g., "law" or "athlete").⁵⁵

In light of all this, I conclude the following: if there is good reason to think that the speakers in the Secretariat case mean different things by "athlete," then so, too, is there good reason to think that speakers in the positivist dispute mean different things by "law." The same kind of evidence is present in both cases.

Now consider the final condition, condition (D). The question here is this: Is there good evidence that the disagreement expressed in the dispute, insofar as there is one, is not just about descriptive information about what a word means or how it is used? In thinking about this issue, is important to proceed with care. Sometimes, of course, positivists and antipositivists put forward their views as part of canonical disputes about what a group of people in fact mean by the term "law." Such canonical disputes—disputes that we can think of as a kind of interpretative, metalegal dispute—make up an important part of legal philosophy and, moreover, illuminate an important part of what is going in the dispute over legal positivism.⁵⁶ Philosophers (and linguists and others) often engage in canonical disputes about what people in fact mean by their terms—as exemplified, for example, by what I myself am doing in much of this paper.

In many cases, proposals about what speakers mean by their words—especially when they take a descriptivist form rather than an expressivist one—involve facts about the metaphysics of what that word refers to (such as facts about what kind of things these things are, or about their grounds), insofar as that word ends up successfully referring to anything at all. This is certainly not always the case. But it is a common feature of many semantic proposals that follow a descriptivist pattern of explanation (which, for our purposes here, we can also call a "cognitivist" pattern of explanation). Thus,

55. This is not to say that there is nothing further that can be said on this line of argument. For example, the intention to co-refer might very much matter here, depending on (1) which kind of view is correct about the foundations of meaning (different views will take different kinds of intentions to matter) and (2) the details of the intention. There is much more to say on this, but I leave these issues to the side for now, given the scope of this paper. For further discussion, *see id.*

56. For further discussion of this, *see* Plunkett & Shapiro, *supra* note 3. *Cf.* Kevin Toh, *Jurisprudential Theories and First-Order Legal Judgments*, 8 PHIL. COMPASS 457–471 (2013).

in the metalegal case, we should expect that for some proposals about legal discourse, those proposals will carry with them a proposal about whether positivism or antipositivism is true.

We can in fact push this point further. Suppose one is drawn to a descriptivist understanding of the discourse in question. And suppose one accepts a view of concepts of the kind I am sympathetic to in this paper—one on which concepts are individuated in terms of their precise cognitive significance, for example, in terms of one particular way of representing reality as opposed to another, and where we want to make fairly fine-grained distinctions between different concepts that individuals have (such that, e.g., the speakers in the Secretariat case employ distinct concepts). When we seek to specify a particular way of representing reality that someone employs when she uses a particular concept C1 (as opposed to nearby concepts C2, C3, etc.), that might very well tell us the following: the only things that fall under this concept are things that have a certain kind of nature or certain kinds of grounds. Because of that, it might very well be that *conceptual analysis* of a given concept—for example, the concept LAW employed by a group of people—yields a verdict as to whether positivism or antipositivism is true of the things picked out by that concept.⁵⁷

This means that metalegal theorists who are interpreting legal thought and talk might well express, within a canonical dispute in metalegal theory, literal claims that yield a claim about the truth or falsity of legal positivism.⁵⁸ Conceptual analysis—which, for purposes here, we can understand as a purely descriptive project aimed at understanding the content of concepts (e.g., those that we ourselves use)—can thus play a potentially important role in making progress in the dispute over legal positivism.

However, the model just sketched does not capture everything going on in the dispute over positivism. In some parts of the dispute, there is reason to think that speakers are not only making rival substantive semantic proposals about what a group of speakers (perhaps including themselves) mean by the term “law” (and in turn, metaphysical proposals about what follows from that proposal) as part of a canonical dispute in metalegal theory. Rather, for the reasons I give above, there is pressure to think that speakers sometimes (1) themselves mean different things by the term “law” (and hence express different concepts by that term), and (2) then use (rather than mention) the term to put forward a view about the term. What kind of view are they putting forward when they do so? As I discuss in [Section I](#), some metalinguistic disputes are about the descriptive issue of what a word

57. For more on this line of thought, see Plunkett, *Positivist Route*, *supra* note 3. In that paper, I employ this broad kind of appeal to conceptual analysis in my argument on behalf of legal positivism, drawing extensively on the views of concepts and conceptual analysis advocated for by David Chalmers and Frank Jackson in work such as DAVID J. CHALMERS, *THE CONSCIOUS MIND: IN SEARCH OF A FUNDAMENTAL THEORY* (1996); JACKSON, *FROM METAPHYSICS*, *supra* note 25; and Chalmers & Jackson, *supra* note 25.

58. For further discussion of this idea—as well as my understanding of the nature of metalegal theory—see Plunkett & Shapiro, *supra* note 3. Cf. Toh, *supra* note 56.

does mean. But this seems like a bad model for much of what is going on in the dispute over positivism, at least for much of what is going on when speakers are using the word in a metalinguistic way. Instead, I think, they are putting forward views about what the word should mean. If so, that means they are engaged in a metalinguistic negotiation.

Why think it is a metalinguistic negotiation as opposed to the contrasting kind of metalinguistic dispute that concerns just the descriptive facts about what a word does mean? Consider a committed Dworkinian who makes claims about what the law is and what follows from that. And suppose, for now, that as part of this, she uses the term in a metalinguistic way. Will information from a linguist about what the term currently means in the broader community convince the Dworkinian that she is mistaken (or that she is correct)? Perhaps it will in some cases, if she actually accepts the linguist's proposal. But it is also easy to imagine that she will not. For it might very well be that she thinks she has normative reason—for example, perhaps deriving from moral or political considerations—to use the term one way or another. That would hardly be surprising in the case of a Dworkinian, given that such moral and political considerations are standardly taken by Dworkinians to pervade how we should think about theory-choice in legal philosophy across a wide range of parts of the subfield. If that is right, and if it is correct that the Dworkinian and a positivist both use the term "law" in a metalinguistic dispute, then it looks like their dispute must be a metalinguistic negotiation in particular (i.e., a normative metalinguistic dispute).

To add to this, consider that a number of important proposals in the philosophy of law explicitly involve putting forward reforming definitions of the term "law." For example, this is so in the case of Jeremy Bentham, who proposes that we use the term "law" in such a way that positivism is true of the thing picked out by it.⁵⁹ Bentham proposes this reforming definition based partly on the perceived moral and political benefits of adopting his preferred usage. But not all reforming definitions need appeal to such values at all. For example, one might instead propose a reforming definition of a given term based on the idea that the new way of using the term will help us deliver better social-scientific explanations. One might couple that proposal with the idea that doing so will lead to some kind of moral or political progress (as in the case of Bentham). But one also need not do so—one might propose the reforming definition based on the purported theoretical virtues (rather than practical virtues) of the new way of using the term.

A reforming proposal about a given term x will often be put forward by mentioning rather than using that term x . But once the reforming proposal

59. JEREMY BENTHAM, *OF LAWS IN GENERAL* (Athlone Press, 1970). Cf. Natalie Stoljar, *What Do We Want Law to Be? Philosophical Analysis and the Concept of Law*, in *PHILOSOPHICAL FOUNDATIONS OF THE NATURE OF LAW* (W.J. Waluchow & S. Sciaraffa eds., 2013).

has been made, a speaker will then often go on to use the term in a way that aligns with the reforming definition. Such is the case with Bentham and “law.” Such usage will sometimes be metalinguistic—especially when the term is being used in line with a reforming definition in a context where others do not use the term in that way. In such a case, information about the descriptive issue about what a term does mean will not settle the issue of what it should mean. And that is what a proponent of a reforming definition ultimately cares about. This means that when (1) there is a proponent of a reforming definition of a given term, (2) she uses that term in a metalinguistic way that aligns with her proposed reforming definition, and (3) she enters into disputes with others who do not use the term in the same way, then such disputes will be metalinguistic negotiations. This supports thinking that part of what is going on in the philosophical dispute over legal positivism is a metalinguistic negotiation, given the way in which proponents of reforming definitions enter into the dispute.

Let us now take stock of where we are. I argue above that the same kind of evidence that supports thinking that the Secretariat case is a metalinguistic negotiation also supports thinking that a subset of the dispute over legal positivism is as well.

Three things should be underscored about this proposal.

First, I am not saying that all of the dispute over positivism is a metalinguistic negotiation. Indeed, as I indicate above, I do not think that is so. Rather, my proposal is that part of this dispute is a metalinguistic negotiation—and, moreover, an important enough part to be explanatorily important for the self-understanding of this dispute within legal philosophy.

Second, I am not aiming to identify which specific parts of the dispute over legal positivism are metalinguistic negotiations. Rather, I am giving a general, schematic argument for why we should think that at least some parts of it are, based on the same kind of evidence that supports thinking that the Secretariat case is a metalinguistic negotiation. The argument for this general claim lays important groundwork for further, more focused investigation into which particular parts of the dispute over legal positivism are metalinguistic negotiations. It does so by providing reasons to think that at least some parts of it involve metalinguistic negotiation, as well as providing some of the key tools to use when investigating whether specific parts do or not. That does not mean that it will be easy to deploy those tools. Indeed, it would take significant further work to make a convincing case that a given particular linguistic exchange within the dispute over legal positivism really is a metalinguistic negotiation. (Recall, for example, the philosophical complexities involved in condition (C) above, at the start of this section).

But that does not mean that the general claim is not itself already a significant one. After all, the default views of communication that dominate much of the contemporary discussion in legal philosophy—and, indeed, dominate contemporary philosophy more generally—are ones that I am rejecting in

arguing for the partly metalinguistic reading of the dispute over legal positivism. If my argument is successful, it will lay the philosophical foundations for future work that would otherwise seem implausible if one were to rely on those default views within the field. At the same time, this general claim, if correct, is an important contribution to our self-understanding in legal philosophy and already has some important methodological upshots for work in the philosophy of law. Or at least so I argue below.

Third, my claim that part of the dispute over legal positivism is a metalinguistic negotiation ultimately rests on a claim about how one case compares to another: the Secretariat case and the case of the dispute over legal positivism. By itself, this comparative claim is compatible with it ultimately being a mistake to think of the Secretariat case as a metalinguistic negotiation. I think that the Secretariat case really is a metalinguistic negotiation. But, for the reasons I give above, I think it is beyond the scope of this paper to provide anything like a conclusive argument on behalf of that proposal—for doing so, as explained, is bound up with theory-choice at the foundations of semantics, of a kind that I do not have room to go into here. But even the conclusion of the more modest argument is still dialectically powerful. For, if the conclusion is correct, it shows the following: if you want to resist the idea that the dispute over legal positivism is partially a metalinguistic negotiation, then you need to either (1) deny that the Secretariat case is a metalinguistic negotiation, or (2) locate a relevant disanalogy between the Secretariat case and the case of the dispute over legal positivism. Neither is easy to do, and especially not when one is aiming to integrate one's views into a plausible overall account in the philosophy of mind and language.

What exactly does my metalinguistic proposal amount to in the case of the dispute over legal positivism, if it is correct? The core picture here is this. In part of the dispute over legal positivism, some philosophers use the term "law" to mean something different from what other philosophers mean by the term. For one meaning of the term (meaning 1), positivism is true of the thing picked out by the term "law." For another meaning of the term (meaning 2), antipositivism is true of the thing picked out by the term "law." (We could continue the list for any number of further meanings, e.g., meanings 3, 4, 5, etc.) A philosopher who uses the term with meaning 1 who then says "legal positivism is true" says something that is literally true. Another philosopher who uses the term with meaning 2 and who then says "legal antipositivism is true" also says something that is literally true. But that does not mean that there is nothing at issue between these two philosophers when they enter into a dispute and say such things. For, in addition to making rationally compatible (and true) claims in terms of the literal content of what they say, they also sometimes metalinguistically use terms like "law" (or relatedly, "the law," "legal facts," etc.) in a way that involves them advocating for a normative view about how those terms should be used. Put in terms of concepts, each of them is advocating for using the term "law" to express rival concepts. So there is a disagreement between

them that is being expressed here, namely, one about which concept should be employed in the context at hand. And one (or both) of them could be getting it wrong about this normative topic.

Like “athlete,” the term “law” has rich associations in many contexts, largely independent of what is built into the semantics of the term. Some of those associations have to do with moral and political ideals, and some have to do with explanatorily important cuts within our best sociological or anthropological theories. In such a case, it can matter a great deal in a given context which concept is expressed by the term “law.” Different philosophers—often drawn to capturing different associations of the term “law”—metalinguistically advocate for attaching their preferred concept to the term and, in so doing, put forward (what are often) competing visions of which thing should play a functional role in a given part of our thought and talk and in a given part of our social practices.

At this point, many philosophers reading this paper will no doubt have started to get worried (or may have been worried for quite some time now) about the following question: Does the form of argument not extend to many other disputes in philosophy? Given the form of argument I give here, should I not also think that many philosophical disputes are at least partially metalinguistic negotiations? I think this is entirely correct. But I do not think that is a problem for my view. In other work, I argue that the same kind of argument that I give here supports thinking that a wide range of philosophical disputes across a range of subareas of philosophy are best thought of as involving metalinguistic negotiation.⁶⁰ Or, more carefully, what I argue for is the conditional claim: if the Secretariat case is best thought of as a metalinguistic negotiation, then so, too, are many disputes in philosophy. This includes disputes that we would describe intuitively as “about” object-level issues, such as disputes involving issues of supervenience, ground, and real definition. The basic idea is this: when philosophers make claims of the form “the essence of X is Y” or “the X facts are grounded in the Y facts,” they are sometimes engaged in a metalinguistic negotiation. The dispute over positivism is, on my view, much the same as many other philosophical disputes, including ones, for example, about central philosophical topics such as free will, knowledge, epistemic justification, morality, meaning, objectivity, and justice.⁶¹

B. Some Clarifications about the Proposal

I now want to make some important clarifications about my proposed reading of the dispute over legal positivism as well as situate it with respect to some other well-known proposals in the literature.

60. See Plunkett, *Which Concepts*, *supra* note 11.

61. For further discussion, see *id.* For a closely connected discussion of key philosophical disputes (in particular, key metaphysical disputes) as metalinguistic negotiations, see Thomasson, *Metaphysical Disputes*, *supra* note 49.

The first thing I want to note about my proposal is how it relates to the idea that is sometimes called "normative legal positivism."⁶² There are different ways of making sense of this view. One way is this: it is the view that at least in given social-historical contexts, we should have a legal system where legal positivism is true of law in that system. One might initially be tempted to think that my proposal is that philosophers involved in the dispute over legal positivism are often tacitly arguing for normative legal positivism or normative legal antipositivism and that they are doing so via metalinguistic usage. But that is not the case, at least when normative legal positivism is understood along the lines just glossed. It is important to understand why this is so.

Normative legal positivism, as stated, is a strange doctrine. Suppose it is true of the A facts that they are ultimately grounded in the B facts and not the C facts. Given the most straightforward ways of thinking about that kind of thesis—a thesis about the ultimate grounds of the A facts—it seems as though it must be the kind of thing that is necessarily true of the A facts. Indeed, there is good reason to think it is something that follows from what it is to be A, where this involves invoking the notion of *essence* or of *real definition*.⁶³ It therefore seems that for a given group of A facts, positivism or antipositivism is either true of those facts or not, based on what the A facts most fundamentally are. It is not the kind of thing we ourselves can make true or not based on our activity. Rather, it is the kind that we will discover is either true of the A facts or not. So it is hard to see what is involved in saying we *should* make it true (especially if "ought" implies "can" here in any straightforward sense).⁶⁴

My metalinguistic proposal holds that philosophers involved in the dispute over legal positivism are sometimes covertly putting normative views forward in the dispute. But it does not involve thinking that they put forward versions of normative legal positivism or normative legal antipositivism (at least as I gloss such theses above). To see this, focus on the fact that according to my proposal, speakers engaged in the dispute over legal positivism sometimes have different normative views about which concepts we should use in a given context. Suppose that a legal philosopher settles on the view that we should use the term "law" to express concept C1 and that she does so based partly on moral considerations. Now take the following thesis (call it "Thesis P"): positivism is true of the set of the X facts (that involve the X norms) picked out by the concept C1. Thesis P might be true in virtue

62. See, e.g., TOM CAMPBELL, *PRESCRIPTIVE LEGAL POSITIVISM: LAW, RIGHTS AND DEMOCRACY* (2004).

63. For discussion of the idea that there is this kind of connection between essential truths about X and the grounds of X facts, see Rosen, *supra* note 3; Kit Fine, *Guide to Ground, in METAPHYSICAL GROUNDING: UNDERSTANDING THE STRUCTURE OF REALITY* (F. Correia & B. Schnieder eds., 2012); and Shamik Dasgupta, *The Possibility of Physicalism*, 111 J. PHIL. 557–592 (2014).

64. Cf. Jeremy Waldron, *Normative (or Ethical) Positivism*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW (J.L. Coleman ed., 2001).

of descriptive facts alone and not in virtue of any moral facts (or any facts that bear an important connection to robust normativity). So, advocating a normative view about which concept we should express by the term “law,” even if that view involves appeal to normative facts, need not involve endorsing normative legal positivism or normative legal antipositivism (given how such theses are understood above).

The second point of clarification I want to make concerns the question of what, on my proposal, legal philosophers are ultimately arguing about when they engage in a metalinguistic negotiation as part of the dispute over legal positivism. Suppose I am right that a part of the dispute over legal positivism is a metalinguistic negotiation. That means that the immediate issue that they are disagreeing about—insofar as they actually are disagreeing—is an issue in conceptual ethics. Crucially, however, issues in conceptual ethics—including, centrally, the issues of which concepts we should employ in a given context—are often not the only issues two speakers disagree about when they are having a metalinguistic negotiation. They often disagree about other things, too, things that they might in fact explicitly cite in the course of their dispute. Consider again the Secretariat case. The speaker who claims that “Secretariat is one of the fifty greatest athletes of the twentieth century” likely has views about how racehorses deserve to be treated in our society, what kind of praise and fame they should have, and so on. These might very well be views that the other speaker rejects. And perhaps they disagree about further matters that underwrite these differences, for example, issues about animal rights and the ethical/political status of non-human animals. Based on this, one might think the following: Are not the real disagreements in metalinguistic negotiations ones that concern these issues and not ones about conceptual ethics?

This thought is onto something important but it can also lead us astray, depending on what is meant by the “real disagreement” at issue in a metalinguistic negotiation. Here is what *is* true. When speakers engage in metalinguistic negotiation, this is often a way of having an argument that (at some level) is in fact about object-level issues. To see this, consider the following case. Two biologists are engaged in a metalinguistic negotiation about what the term “species” should mean. Part of what might be at issue between them is which concept does a better job of carving reality at its joints. In this case, it is the biological joints that matter. Moreover, on many views about the foundations of conceptual ethics (at least for such contexts), such facts are precisely the kinds of facts that settle which of them has the better view in conceptual ethics.⁶⁵

Here is another case. Two political philosophers are engaged in a metalinguistic negotiation about what the term “justice” should mean. Part of what might be at issue between them is substantive normative issues about how people should be treated and what kind of social/political institutions we

65. See Sider, *supra* note 39. Cf. Sundell, *Disagreement, Error*, *supra* note 20.

should have. Here, too, on many views about the foundations of conceptual ethics (at least for such contexts), such facts are precisely the kinds of facts that settle which of them has the better view in conceptual ethics.⁶⁶ But that does not mean that those are the disagreements they immediately express in the dispute at hand. The immediate disagreements expressed in the metalinguistic negotiations are ones in conceptual ethics. These disagreements exist partly because of further disagreements the speakers have, and their expression of the disagreements in conceptual ethics can thus be a way of getting at the issues at the heart of those further disagreements.

Compare this with the following case. Mark and Lucas are having a canonical dispute that expresses a genuine disagreement about whether one restaurant has better burritos than another, nearby one. Mark says "Pica's has the better burritos," and Lucas says "No. Dos Amigos has the better burritos." They are having this argument because Mark wants to go to Pica's for dinner tonight with Lucas but Lucas wants them to go instead to Dos Amigos. The disagreement that is immediately expressed in the dispute is one about which restaurant has better burritos. But they argue about this as a way of having an argument about a further issue, namely, where they should go for dinner tonight.⁶⁷

These observations underscore an important point about the connection between an object-level-oriented view of philosophical inquiry and the view of communication involved in that inquiry. Just as the speakers in the Secretariat case can engage in a metalinguistic negotiation as a way of ultimately arguing about object-level issues about how racehorses should be treated, and so on, so, too, can philosophers engage in metalinguistic negotiation as a way of ultimately arguing about—and potentially making progress on—object-level issues of exactly the kind that many philosophers insist they ultimately care about and are interested in. This is because a metalinguistic account of what is going on in an area of philosophical discourse is totally compatible with an object-level-oriented understanding of the subject matter of philosophical inquiry. This fact about compatibility is often underappreciated in philosophical discussion in subareas ranging from metaethics to metaontology to philosophy of law. Not appreciating this fact of compatibility, I think, partly explains why so many philosophers initially resist a metalinguistic reading of their communication.

In light of this observation, we might also say the following: it might very well be that the pretheoretical glosses that philosophers tend to give on their disputes—for example, that they are "about" a given set of object-level issues—is neutral with respect to a range of views about how those disputes are about those object-level issues. It thus might be neutral (or at least fairly

66. See Sally Haslanger, *Gender and Race: (What) Are They? (What) Do We Want Them to Be?*, 34 *Nous* 31–55 (2000). See also Burgess & Plunkett, *Conceptual Ethics I*, *supra* note 9; and Burgess & Plunkett, *Conceptual Ethics II*, *supra* note 9, for discussion of this kind of view.

67. For connected discussion, see Plunkett & Sundell, *Disagreement*, *supra* note 14; Plunkett & Sundell, *Dworkin's Interpretivism*, *supra* note 14; and Plunkett, *Which Concepts*, *supra* note 11.

neutral) with respect to an interpretation of those disputes as metalinguistic negotiations versus as canonical disputes. So it might very well be that the metalinguistic reading I am giving here is less in conflict with the default pretheoretical self-understanding of philosophers than might at first appear to be the case.⁶⁸

Before closing this section, I want to make one final point. This point concerns the relationship between my proposal about the dispute over legal positivism and a view of the dispute recently put forward by Liam Murphy in his paper, “Better to See Law This Way.”⁶⁹ Murphy argues for the idea that there is important conceptual variation between positivists and antipositivists and that part of what is at issue in actual disputes between them are questions about how we should use the term “law” going forward, given our various aims (including moral and political ones). I think much of what Murphy says is on the right track, and I take my approach to be closely related to his. But there are also differences between us that are worth briefly underscoring. One difference is that Murphy puts his main point as follows: there is one common concept shared by both positivists and antipositivists, and which they express by the term “law,” that is “indeterminate or partly ambiguous.”⁷⁰ In contrast to this, I argue that there is often not a common concept between them that they express by the term “law” in the relevant class of disputes here.

That being said, this difference might not run that deep. For Murphy grants that depending on one’s views about the nature of concepts and what explanatory role they are meant to play in one’s theory, his main point might ultimately be best put in a different way. He writes, “perhaps it is better to say that ‘law’ is ambiguous among several different meanings corresponding to distinct concepts.”⁷¹ On my view, there might be no ambiguity involved here at the individual level of what speakers mean by their words. But that might still involve thinking there is ambiguity when we reach the level of thinking of something like “public language” that is an abstraction of some kind from the different individual levels. So Murphy’s second way of going here—the one that he himself does not favor—is closer to my own.

There are also, however, deeper differences, differences that help bring out what is important about my argument in this paper.

First, in contrast to Murphy, I advocate for my view of what is going on in the dispute over legal positivism based on a general view of what is going on in communication, such that dispute over legal positivism is continuous with our ordinary disputes in everyday life. This proposal is rooted in the discussion of *metalinguistic usage* and *metalinguistic negotiation* that Sundell

68. For further discussion of this point, see Plunkett, *Which Concepts*, *supra* note 11; and Plunkett & Sundell, *Antipositivist Arguments*, *supra* note 14.

69. Liam Murphy, *Better to See Law This Way*, 83 N.Y.U. L. REV. 1088–1108 (2008). See also LIAM MURPHY, *WHAT MAKES LAW: AN INTRODUCTION TO THE PHILOSOPHY OF LAW* (2014).

70. L. Murphy, *Better*, *supra* note 69, at 1093.

71. *Id.* at 1093.

and I develop elsewhere. Put one way, part of what I want to do in this paper is to motivate a view (along the lines of what Murphy argues for) on the basis of very general considerations about thought and talk and to underscore the explanatory importance of some of the tools we already have in our toolkit for smoothly communicating about this kind of issue in legal philosophy (and elsewhere). This is a different kind of ambition from the one Murphy has (though, of course, it is something that I think he should take as ultimately good for his own project as well).

Second, I put forward a view on which positivists and antipositivists can genuinely disagree with each other even when the concepts they employ and express by the term "law" are radically distinct. In contrast, Murphy suggests that disputes expressing genuine disagreement are ones that involve overlap in the content of concepts expressed by different speakers by the term "law." In turn, he takes speakers to be "talking past" each other (which, for him, entails that they are not really disagreeing) in the cases where there is no such overlap.⁷² That, I think, is a mistake. Such a view is going to be attractive only if we stick with the idea that speakers are involved in canonical disputes. But when we see them as being involved in a metalinguistic negotiation, there is no reason to think that there need be any such overlap in order for the speakers genuinely to disagree. In this way, then, I think that Murphy (like many legal philosophers, including Dworkin and Raz) remains insufficiently attentive to the variety of *noncanonical* disputes we engage in in philosophical exchange and how genuine disagreements (and ones well worth arguing about) can be expressed in such disputes.

Third, Murphy in effect takes a stand on which kinds of arguments are good ones for which of a range of competing concepts we should express by the term "law." As part of this, he takes a stand on a range of issues in conceptual ethics that matter in this context. This includes, for example, endorsing the idea that arguments for one way of using the term "law" as opposed to another (such that positivism is true of the thing that term picks out, or antipositivism is true of it) should ultimately be made by appeal to substantive moral and political values. In contrast, I do not defend that claim here. As I explain further below, I am not sure which values or norms matter in this case of conceptual ethics. My interpretative proposal helps explain why one might very well think that such values matter and thus helps explain certain linguistic data for why it is that appeal to such values shows up in the dispute over legal positivism. But, in contrast to what Murphy does in his paper, I do not want to stake out a view here about the underlying issues in conceptual ethics. My view is neutral with respect to those issues.

72. *Id.* at 1094, 1108.

C. Explicit Arguments in Conceptual Ethics in the Dispute Over Legal Positivism

In “Conceptual Ethics I” and “Conceptual Ethics II,” Burgess and I discuss a wide range of work in conceptual ethics in subfields ranging from applied ethics to fundamental metaphysics to the philosophy of math.⁷³ Our guiding thought is that philosophers from a wide range of subfields are already actively working on issues in conceptual ethics, even though they are often not in dialogue with each other or thinking about the shape of the field as a whole. Many of the arguments that Burgess and I discuss are ones that are *explicitly* about conceptual ethics.

For example, in his recent book *Replacing Truth*, Kevin Scharp argues that we should replace the concept that we standardly express with the term “truth” with two different ones: in particular, ones that do not lead to paradoxes like the liar and the sorites.⁷⁴ Or at least, this is what we should do when we are engaged in explanatory projects such as philosophy and linguistics, even if not throughout everyday life. Introducing these new concepts, Scharp claims, can help us better accomplish our epistemic aims in these areas of inquiry.

Or to take another example, Sally Haslanger argues that we should use the terms “race” and “gender” to express concepts that pick out those properties most important for us to identify in our pursuit of social justice, even if those are not the properties picked out by the current concepts that we express with those terms.⁷⁵ Figuring out which concepts we should use for describing social kinds, Haslanger claims, involves an interesting mix of theoretical and practical values. First, in order to promote social justice (a broadly ethical or practical value), it is important that we accurately understand our (currently unjust) social reality (which would involve a certain kind of epistemic achievement). Second, the concepts we use for describing social kinds help to constitute those social kinds themselves.⁷⁶ So we need concepts that both help us track the relevant properties and which, when used, help make up social kinds in a way that is more just. Haslanger engineers new concepts that she argues best help us to accomplish these tasks in our current social-historical context.

Scharp and Haslanger both explicitly put forward arguments about normative issues about concept use and concept/word pairing. These are what Burgess and I take to be core topics in conceptual ethics. Both Scharp and

73. Burgess & Plunkett *Conceptual Ethics I*, *supra* note 9; and Burgess & Plunkett *Conceptual Ethics II*, *supra* note 9.

74. KEVIN SCHARP, REPLACING TRUTH (2013).

75. Haslanger, *supra* note 66.

76. See SALLY HASLANGER, RESISTING REALITY: SOCIAL CONSTRUCTION AND SOCIAL CRITIQUE (2012). Cf. IAN HACKING, HISTORICAL ONTOLOGY (2002); and ARNOLD I. DAVIDSON, THE EMERGENCE OF SEXUALITY: HISTORICAL EPISTEMOLOGY AND THE FORMATION OF CONCEPTS (2001), for related views about this kind of relationship between the concepts we use to describe social reality (e.g., social kinds or social identities) and social reality itself.

Haslanger engineer new concepts that they claim are better than our existing ones, relative to the purposes we have for using those concepts (or, perhaps more accurately, that we *should* have for using them). But one could also have a more conservative view in conceptual ethics. One could, for example, put forward the normative view that some set of concepts we have is totally fine for the purposes at hand and, indeed, perhaps better than proposed alternatives. Perhaps, moreover, there are reasons to prefer not reforming our conceptual schemes if we do not have to do so. For example, perhaps there are strong reasons to be worried about the unintended side effects of reforming conceptual schemes or to think that there is something important to say in favor of conceptual schemes that have stood the test of time. The important point is this: nothing in the subject matter of conceptual ethics itself mandates that one take a reforming or revolutionary attitude toward our current stock of concepts.

It is worth keeping in mind the prevalence of explicit arguments in conceptual ethics—ranging from revolutionary to conservative ones—when thinking about the kind of metalinguistic proposal that I am putting forward in this paper. For it shows that many philosophers already think that conceptual ethics matters and already think that it is a topic worth debating about. If a number of philosophers already think this, it lends support to the idea that philosophers sometimes argue about conceptual ethics by more implicit means as well, for example, through metalinguistic negotiation, given that they already have linguistic mechanisms available from everyday life that would allow them to do so smoothly.

This raises a natural thought: Are there examples of explicit arguments in conceptual ethics in the dispute over legal positivism? If there are, it would lend some support to the metalinguistic proposal I am putting forward here. I think there are indeed such examples. One kind of example is the kind of explicit reforming definition offered by some legal philosophers that I discuss above—for example, by Bentham.⁷⁷ Another kind of example is related arguments given by Hans Kelsen of the (purported) ethical and political benefits of employing the term "law" in a way that makes it refer to something of which positivism is true.⁷⁸ And there are significant parts of Dworkin's work in jurisprudence that involve arguments in conceptual ethics.⁷⁹ In a longer paper, it would be good to canvass a wide range of

77. See BENTHAM, *supra* note 59.

78. See, e.g., Hans Kelsen, *Law, State and Justice in the Pure Theory of Law*, 57 YALE L.J. 377–390 (1948). For a historically important contrasting view on this issue, see Gustav Radbruch, *Statutory Lawlessness and Supra-Statutory Law* (1946), 26 OXFORD J. LEGAL STUD. 1–11 (2006).

79. See DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 15. It should be noted, however, that as Sundell and I discuss elsewhere, on a Dworkinian view of concepts, the relationship between normative questions about which concepts we should be using and descriptive ones about the ones we are using is a complicated one. See Plunkett & Sundell, *Dworkin's Interpretivism*, *supra* note 14. This kind of issue is also raised by other normatively inclined externalist views, such as the views advocated for in Schroeter, *supra* note 38; and Schroeter & Schroeter, *supra* note 38. For further discussion of this point, see Burgess & Plunkett, *Dworkin's Interpretivism*, *supra* note 14, sec. 4.

explicit arguments in conceptual ethics that legal philosophers deploy in the dispute over legal positivism and discuss them in detail. However, I do not have space in this paper to do so with the kind of care needed for such discussion. Instead, I am taking a different tack. In this section, I focus on a prominent example of such an argument in detail in order to help unpack some of the issues at play. The example I focus on is an argument from Hart in chapter 9 of *The Concept of Law*, which is widely regarded as one of the most important works in legal philosophy of the twentieth century (if not *the* most important).

In the part of *The Concept of Law* that I want to discuss, Hart is, roughly, considering the merits of what look to be two different ways in which we could understand the grounds of legal validity. On one way of understanding it—a way that Hart associates with the natural-law tradition in legal philosophy—we reserve the words “the law” or “legally valid” for norms that pass a certain threshold of moral merit, thus ruling out norms that are sufficiently morally bad from being part of the content of the law. On the other way of understanding it—the way that Hart associates with the positivist tradition in legal philosophy—there is no such test. What is involved in choosing between these two different views? Hart makes it explicit that part of what is involved is an issue about which of two rival concepts is better suited to our purposes at hand. Here is what he writes:

Neither side to the dispute would be content if they were told, “Yes: you are right, the correct way in English (or in German) of putting that sort of point is to say what you have said.” So, though the positivist might point to a weight of English usage, showing that there is no contradiction in asserting that a rule of law is too iniquitous to be obeyed, and that it does not follow from the proposition that a rule is too iniquitous to obey that it is not a valid rule of law, their opponents would hardly regard this as disposing of the case. Plainly we cannot grapple adequately with this issue if we see it as one concerning the proprieties of linguistic usage. What really is at stake is the comparative merit of a wider and a narrower concept or way of classifying rules, which belong to a system of rules generally effective in social life. If we are to make a reasoned choice between these concepts, it must be because one is superior to the other in the way in which it will assist our theoretical inquiries, or advance and clarify our moral deliberations, or both.⁸⁰

Hart is claiming that the dispute over legal positivism centrally involves a debate in conceptual ethics. He claims that “Plainly we cannot grapple adequately with this issue if we see it as one concerning the proprieties of linguistic usage.”⁸¹ According to Hart, the issue is not one that is solely about elucidating a concept that all of us already share—and which everyone expresses by the term “law.” Neither is it about the nature or grounds of the thing picked out by our (purportedly) common concept. Rather, the issue

80. HART, *supra* note 4, at 209.

81. *Id.*

is a normative one about which of a range of competing concepts we should use—and express by the term “law”—in a given context. In this paper, I am suggesting that an important part of what settles the normative issue about which concept we should use is the evaluative issue of which concept is better to use, relative to our purposes in a given context. And this is exactly what Hart says. He writes, “What really is at stake is the comparative merit of a wider and a narrower concept or way of classifying rules, which belong to a system of rules generally effective in social life.”⁸²

Notice that—as I emphasize above in discussing the Secretariat case—it need not be that there are already different rival concepts actively in play in the wider community for this question to be worth asking. Perhaps most people (or everyone) already express the same concept by a given term “X” in a given context. We can still ask whether that is the right concept to be using in that context. The sociological fact that people converge on which concept they are using (and expressing by the same term) does not mean that they are correct in using that concept in the context at hand. This is as true in the case of the dispute over legal positivism as in any other dispute.⁸³

There are many different views that one might have about the foundations of conceptual ethics, views that correspond to the kinds of goods or values that philosophers actually discuss in arguing about conceptual ethics. For example, in *Writing the Book of the World*, Theodore Sider argues that (at least when engaged in theoretical inquiry) we should use those concepts that cut at the objective joints of reality.⁸⁴ In rough terms, these will be concepts that pick out those properties that David Lewis describes as “natural” ones.⁸⁵ Such natural properties (as opposed to gerrymandered ones, such as the property of being a quark-or-elephant) are ones that mark out objective similarities between things and that have real explanatory import. As Sider puts it, “For a representation to be fully successful, truth is not enough; the representation must also use the right concepts, so that its conceptual structure matches reality’s structure. There is an objectively correct way to ‘write the book of the world.’”⁸⁶

Sider’s view suggests a noninstrumentalist take on the foundations of conceptual ethics—where what determines which concepts we should use

82. *Id.* For a connected discussion (which also involves these kinds of issues in conceptual ethics), see the famous exchange between Hart and Lon Fuller in H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); and Fuller, *supra* note 53. See L. Murphy, *Better*, *supra* note 69, for a discussion of this Hart-Fuller exchange that addresses many of the same themes that I emphasize here from Hart (and which also ties those themes to a view of legal philosophy that has important resonance with my emphasis on the importance of conceptual ethics for the field).

83. For more on this point, in the context of discussion about the concept we should express by the term “law,” see Frederick Schauer, *The Social Construction of the Concept of Law: A Reply to Julie Dickson*, 25 OXFORD J. LEGAL STUD. 493–501 (2005); and Stoljar, *supra* note 59.

84. SIDER, *supra* note 39.

85. See Lewis, *supra* note 39.

86. SIDER, *supra* note 39, at vii.

is not fundamentally about what we can accomplish with them (either in terms of helping us achieve independently specified epistemic goals, such as forming true beliefs, or in terms of independently specified political goals, such as promoting a more free and equal society). Rather, for Sider, the question of how well those concepts match up with the objective structure of reality matters unto itself when we evaluate our thought, regardless of how those concepts do or do not promote our ability to get other goods we should be aiming at. In contrast, Scharp's and Haslanger's views, discussed above, suggest a more instrumentalist approach. They are chiefly concerned with how the concepts we use promote certain things that we might accomplish by using those concepts—for example, the promotion of social justice (an example of a fundamentally ethical or political goal) or the promotion of smoother theoretical inquiry in fields such as philosophy or linguistics (an example of a good or value that is, in the first instance, not about ethics and politics but rather about the success of theoretical inquiry on its own terms).

Questions about the foundations of conceptual ethics are difficult ones, and there is no consensus on such questions among philosophers working on issues in (or about) conceptual ethics. Moreover, many philosophers thinking on issues in (or about) conceptual ethics do not have fully developed views on the foundations of the field and instead tend to cite various kinds of plausible goods or values in arguing for their views. Because of this, we should not expect that philosophers will all agree on which values or goods are relevant for a given issue in conceptual ethics, let alone on how those values or goods should be weighed against each other or about the foundations of conceptual ethics as a whole. This is part of what makes disputes in conceptual ethics tricky. But in this respect, conceptual ethics is on all fours with disputes about a wide range of other well-known normative topics in philosophy, for example, object-level issues in epistemology, aesthetics, ethics, and political philosophy. For example, when two philosophers argue about the ethics of abortion or affirmative action, it can hardly be taken for granted that they will share the same foundational ethical view (e.g., that they embrace the same kind of act-utilitarianism or the same kind of contractualism, etc.). Indeed, such philosophers often have sharply contrasting explicit views on the foundations of ethics.

With that in mind, now return to what Hart says. Hart puts forward a view about what should determine which of the range of competing concepts we should use when thinking about law and legal validity. He says the following: "If we are to make a reasoned choice between these concepts, it must be because one is superior to the other in the way in which it will assist our theoretical inquiries, or advance and clarify our moral deliberations, or both."⁸⁷ Hart does not really give an argument for this position here, and it certainly is not clear that this is what *must* determine which concepts

87. HART, CONCEPT, *supra* note 4.

we should use. (Think here of the alternative views in conceptual ethics canvassed above from both Sider and Haslanger). But it is also not difficult to see why Hart might think something along these lines. And indeed, I think there is much to be said on its behalf. When we make claims using the word "law," we are sometimes concerned with making distinctions that are relevant to theoretical inquiry in the social sciences, for example, in history, sociology, or political science. At other times, we make claims as active participants in legal practice, for example, when judges or lawyers argue about what the law is. At other times still, we make claims as part of inquiry in moral and political philosophy, for example, when we ask questions about whether we are morally obligated to obey the law and, if so, what that obligation consists in. If the concept we are using fits into one or more of these endeavors, and these are endeavors that we should be pursuing, then it is a natural thought that we should find a concept that helps us in those endeavors. And that seems to be precisely the kind of thing Hart has in mind.

We can also now start to see some of the reasons things can get complicated pretty quickly. First, different philosophers are not all going to agree on which of these endeavors should count more than others. For example, suppose we are going to employ a given concept (which we express with the term "law") in a variety of different endeavors (e.g., moral philosophy, sociology, legal argumentation, etc.), and each of these endeavors has different internal success-conditions. We might have strong reason to prefer using one concept in virtue of how it helpfully contributes to one kind of inquiry (e.g., political philosophy) even though another, rival one is more helpful when doing another kind (e.g., anthropology). Different philosophers are likely to weight these things differently. And, indeed, I think that is exactly what we see in legal philosophy. The term "law" shows up in a wide range of contexts—and, as with "athlete," has an important set of cultural associations, independent of the semantics of the term—and different philosophers care more about some of those contexts than others do and also care more about preserving certain connotations than others do. In light of this, we should not expect that there will be agreement among all legal philosophers about what exactly the functional role is of the concept that people express by the term "law" in a given context or what it should be.⁸⁸

Second, it is also not at all clear that legal philosophers agree on the relevant endeavors here. Hart claims that, "[i]f we are to make a reasoned choice between these concepts, it must be because one is superior to the other in the way in which it will assist our theoretical inquiries, or advance and clarify our moral deliberations, or both."⁸⁹ But perhaps the choice has to do with what will help us in actual legal practice, for example, when

88. Cf. L. Murphy, *Better*, *supra* note 69.

89. HART, CONCEPT, *supra* note 4, at 209.

lawyers and judges argue about what the law is (in a given jurisdiction, at a given time). Or perhaps one of the things we are trying to do is not fundamentally about inquiry as such but rather involves trying to promote actual social and political progress. In such a case, we should arguably be attuned to the actual social and political effects of the deployment of given concepts outside of inquiry and then choose our concept based partly on which will have better expected value on that front.⁹⁰

Finally, consider that we might well want to use different concepts (which we express by the term “law”) in the different contexts just glossed above (not to mention other ones). Given the kind of view of meaning-variation I am working with in this paper, there is good reason to think that we already do so. And perhaps this is exactly what we should be doing. Dworkin promotes a version of this kind of view in *Justice in Robes* (though couched in a different theoretical framework).⁹¹ This kind of proposal is well worth considering. The trouble with such an approach, however, is that we are inclined to make claims about “law” that bring together considerations from different contexts, perhaps partly in virtue of what we mean by “law” in one or more of these contexts. For example, think here about when we ask about our moral obligations to obey the law or when we make claims about the role of legal institutions in creating and enforcing the law.

Such questions and claims seem to involve a concept (or a closely connected group of concepts) that picks out things that we investigate both when doing sociology and when doing moral philosophy. And, moreover, such questions and claims also seem to involve a concept (or a closely connected group of concepts) that picks out things that we engage with from an internal perspective when engaged in legal practice. So suggesting a range of only loosely connected concepts here—one of which we express with “law” in one context, others in other contexts—might make it very difficult for us to make progress on the issues in legal philosophy that we do and should care about. Whether or not that is so, of course, requires much further thought. But this line of argument at least helps explain, I think, some of the appeal of what seems to be guiding Hart in this part of *The Concept of Law*. The idea, roughly, is that we are likely to want *one* concept here, and, furthermore, there is likely to be a variety of different kinds of values and goods that matter for our decision of which one.

I now want to turn to another important aspect of Hart’s argument in the passage that I am focusing on. This will allow me to underscore a

90. For more on this basic line of thought in the context of general jurisprudence, see Stoljar, *supra* note 59. Stoljar draws heavily on Haslanger’s work. For some of the relevant work of Haslanger on this basic line of thought, see Haslanger, *Gender*, *supra* note 66; and HASLANGER, *RESISTING*, *supra* note 76.

91. RONALD DWORIN, *JUSTICE IN ROBES* (2006). See also Scott Hershovitz, *The End of Jurisprudence*, 124 *YALE L.J.* 1160–1204 (2015).

particular virtue of my reading of the dispute over legal positivism as a partly metalinguistic one. In this chapter of *The Concept of Law*, Hart is giving a normative argument for using a concept that picks out something of which positivism is true, as opposed to a concept that picks out something of which antipositivism is true. Some legal philosophers might be tempted to think that if Hart gives such an argument—and especially if he does so based partly on moral and political considerations—that is bad news for legal positivism. But this does not follow. Moral facts might make it the case that we should use concept A as opposed to concept B. But that does not mean that the things picked out by concept A are themselves partly grounded in moral facts. The A facts might be ultimately fully grounded in social facts alone. Indeed, the fact that the A facts are ultimately fully grounded in social facts alone, and not moral facts, might be part of the moral reason we have for choosing concept A in the first place.⁹²

This brings out the following important fact about the view of the dispute over legal positivism that I am putting forward in this paper: it is neutral as to whether positivism or antipositivism is correct. The fact that we engage in conceptual ethics in the dispute over legal positivism—both via metalinguistic negotiation and by explicit argument—does not tell us about the grounds of the things picked out by a given concept (whether that concept is one that at least some of us are currently using or one that we should be using). At the same time, the view I am putting forward helps explain why normative facts of the kind we appeal to in moral and political philosophy might well be relevant to the dispute. Perhaps more important, it helps explain why such facts are at least perceived to be relevant to it by participants in this dispute—which is a salient feature of the dispute that calls out for explanation. The explanation that my interpretative proposal suggests has to do with the plausibility of views in conceptual ethics about which concepts we should use and also about concept-word pairing—or at least the appeal such views will have to many people in the relevant kinds of disputes.

Just as speakers in the Secretariat case are likely to think (arguably correctly) that moral facts matter for determining which of a relevant range of concepts they should express by "athlete" in that context, so, too, does it make sense that moral considerations help settle the normative facts about what concept we should express by the term "law" in a range of

92. Compare: Haslanger argues for expressing certain concepts with existing terms (e.g., "man" and "woman") based on normative views she has about what social justice requires. The concepts she proposes pick out facts that according to Haslanger's proposed usage are ones about racial and gender identity. These facts, according to the view Haslanger develops, are *not* grounded in facts about what social justice requires. Rather, these facts are grounded in social facts about how people are systematically subordinated or privileged along certain dimensions (economic, political, legal, etc.) as a result of being imagined by others to possess particular features that purportedly reveal biological, ancestral, or other socially salient facts. See Haslanger, *Gender*, *supra* note 66; and HASLANGER, RESISTING, *supra* note 76.

contexts. In short, it makes good sense to think that broadly moral considerations are crucial for deciding what concept to express with terms of central importance to our social lives—for example, terms such as “race,” “gender,” “torture,” and “democracy.” My metalinguistic proposal about the dispute over legal positivism thus helps illuminate why many philosophers would think (perhaps correctly) that moral facts can and do matter to this dispute. The thesis they might well endorse is this: moral facts—or at least robustly normative facts in ethics—matter here because of facts about the kind of norms governing all-things-considered questions in conceptual ethics and because part of the positivist/antipositivist debate encompasses such a question (according to the interpretation of the dispute that I am advocating).

It is important to underscore that if this thesis turns out to be correct—and thus that moral facts do in fact matter in this particular way within the dispute over legal positivism—this is perfectly compatible with thinking that moral facts (or our judgments about them) do not matter in many other ways. For example, it is compatible not only with denying the metaphysical thesis that moral facts are among the grounds of law (as I argue above), but also with denying the thesis that the real definition of law, or, similarly, the essence of law, is something that makes ineliminable reference to moral facts (or moral properties, relations, etc.). Furthermore, it is also compatible with denying a range of methodological proposals about how questions about the nature of law are best pursued. For example, it is compatible with denying the following two theses: (1) once we settle which concept to express by the term “law” we also need to keep appealing to moral facts to justify our theory of the nature of law (perhaps, e.g., to show that law as such is a morally valuable phenomena),⁹³ and (2) once we settle which concept to express by the term “law,” we need to engage in the moral evaluation of existing laws (and hence appeal to moral facts) in order to develop an adequate theory of the nature of law.⁹⁴

Before closing, I want to note something important about the passage from Hart that I am focusing on (something that many readers likely are also already thinking about). This passage from Hart does not line up neatly with everything that Hart says in other parts of *The Concept of Law*, including, crucially, about his main aims and methodology. For example, consider the following statement from the postscript to *The Concept of Law*:

My aim in this book was to provide a theory of what law is which is both general and descriptive. It is general in the sense that it is not tied to any particular legal system or legal culture, but seeks to give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and in that sense “normative”) aspect.⁹⁵

93. This thesis is a version of what Julie Dickson terms the *moral justification thesis*; JULIE DICKSON, *EVALUATION AND LEGAL THEORY* (2001).

94. This thesis is a version of what Dickson, *id.*, terms the *moral evaluation thesis*.

95. HART, *CONCEPT*, *supra* note 4, at 239.

This description of Hart's project arguably lines up well with much of what Hart in fact does in *The Concept of Law*. But notice there is nothing here about the ethical or political merits of describing the relevant institutions one way or another, using one set of concepts as opposed to another, or the benefits to moral inquiry of doing so. So how does this new passage quoted above (from the postscript) fit together with the earlier passage from chapter 9 that I am focusing on? Given my purposes in this paper, the interesting (and difficult) interpretative questions about how all of Hart's methodological remarks do (or do not) fit together are not crucial. What matters to me is just the following: the passage from chapter 9 that I am focusing on in this section suggests that Hart himself sometimes employs an explicit argument in conceptual ethics as part of the dispute over legal positivism. That is all I need to help support my case that the dispute over legal positivism sometimes involves explicit argument in conceptual ethics about which concept should be expressed by the term "law" in a given context. The presence of such explicit argument about this topic, I am suggesting, lends support to the idea that legal philosophers also sometimes engage in argument about this topic implicitly, given the tools they already have in their toolkit for doing so (including, most important, via engaging in a metalinguistic negotiation).

One might worry, however, that my quick response about this passage from Hart's postscript misses the point. For this passage from the postscript also brings up a substantive issue about conceptual ethics and legal philosophy in addition to an issue about the interpretation of Hart. Suppose one thought that Hart's more mature view—the one expressed in the postscript—is close to what Hart *should* say about the methodological foundations of his project in *The Concept of Law*, and that his remarks from chapter 9 that I discuss above (as well as in his remarks in the earlier exchange with Fuller) involve a mistake. Crucially, these remarks in the postscript suggest a view in conceptual ethics that (at least *prima facie*) looks different from the kind of view Hart suggests earlier, in chapter 9. In particular, it is plausible to think that the new view would be one that does not say we should choose which concepts to employ based on moral or political values or the epistemic contribution of those concepts to inquiry into ethics or politics—or at least, not in the relevant philosophical context at hand. Rather, it is more natural to think that the view here would be this: the concepts we should employ in this context are the ones that are most helpful for accurately explaining existing social-political reality, relative to the standards of successful inquiry in descriptive social science.

Suppose that is the right view to have here about conceptual ethics, in the context of doing this kind of work in legal philosophy. Some legal philosophers might then be tempted to think the following: all of us doing legal philosophy now agree on this point in conceptual ethics, namely, that the relevant goods or values in this context have to do not with moral or political values but rather with broadly epistemic values having to do with

promoting successful inquiry in the descriptive social sciences. Hart, Fuller, Bentham, and Kelsen might, of course, all have thought otherwise at one point. But that is a mistake we have moved on from. Or at least so this thought goes. If this is right, maybe that is reason to think that there is little metalinguistic negotiation going on in the *contemporary* dispute over legal positivism?

There are two main problems with this kind of argument. First of all, it is sociologically inaccurate to hold that everyone currently engaged in the dispute over legal positivism agrees on what values in conceptual ethics matter for this dispute (let alone how different potentially relevant values should be weighed against each other). The line of argument I suggest above puts forward the idea that all of us arguing about legal positivism in legal philosophy agree that the relevant goods or values in conceptual ethics (for this context) have to do not with moral or political values but rather with broadly epistemic values that help promote successful work in the descriptive social sciences. But that is false. Dworkin is a case in point. In putting forward his brand of legal antipositivism, he explicitly links the concept he expresses by the term “law” to its broader role in our moral and political thinking rather than just values having do with nonnormative explanations in the social sciences.⁹⁶ And he claims that part of what justifies his using this concept is the way it helps us clarify the normative and evaluative realm that we are concerned with when doing moral and political philosophy.

Moreover, Dworkin is not alone in thinking that the relevant norms or values that support employing his preferred concept (and expressing it with the term “law”) are bound up with moral and political values. Many other legal philosophers, either explicitly or implicitly, also appeal to those broad kinds of values in putting forward a concept to be expressed by the term “law” (which then picks out something of which positivism or antipositivism is true of it). Consider, for example, the way in which “law” gets used in work by John Finnis, Jürgen Habermas, A.J. Julius, Liam Murphy, Mark Murphy, Seana Shiffrin, and Natalie Stoljar, work that importantly should count as part of the dispute over legal positivism as I define it at the start of this paper.⁹⁷ Think here also of the case of Joseph Raz, who appeals to substantive moral and political arguments to support his view of authority and then appeals to that view of authority to underwrite his argument

96. DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 15.

97. See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (Clarendon Law Series, 2011), A.J. Julius, *Public Transit*, in REASONS AND INTENTIONS IN LAW AND PRACTICAL REASON (G. Pavlakos & V. Rodriguez-Blanco eds., 2015); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1998); L. Murphy, *Better*, *supra* note 69; MARK MURPHY, NATURAL LAW IN JURISPRUDENCE AND POLITICS (2006); Seana Shiffrin, *Promising, Conventionalism, and Intimate Relationships*, 117 PHIL. REV. 481–524 (2008); and Stoljar, *supra* note 59.

for exclusive legal positivism.⁹⁸ That kind of argument might indeed be quite different from the more practical-oriented ways one might appeal to moral and political values in making an argument in conceptual ethics in the context of the dispute over legal positivism (e.g., in terms of thinking about the expected political consequences of using one concept as opposed to another). But it does suggest the following: whatever norms or values underwrite these philosophers' eventual choice of concepts in the dispute over legal positivism, it is not at all obvious that they see substantive moral and political values as irrelevant to that choice.

Suppose we put to the side moral/political norms (or values). Do legal philosophers involved in the dispute over legal positivism all agree on which broadly epistemic values matter for conceptual ethics in this context, even if they are focused on broadly social-scientific issues of better understanding social/political reality rather than on normative issues in moral and political philosophy? Or do they agree on how these values should be weighed? And what about values having to do carving reality at its joints? Is that an epistemic value, or some other kind of value? And does everyone agree that it is a value? Or that reality even has the relevant kind of joints to begin with? Or consider the following. Some legal philosophers involved in the dispute over legal positivism start their arguments by appeal to a largely pretheoretic folk concept that gets expressed by the term "law" and then aim to put forward a theory of law that fits well (at least to some degree) with the thing picked out by that folk concept.⁹⁹ Others explicitly deny the relevance of starting with the folk concept and focus instead on using ways of categorizing things that help pull their weight in our best social-scientific explanations, even if that involves significant reform away from the original folk concept.¹⁰⁰ Moreover, think of the background disputes in the methodology and nature of social science itself that matter here, which many legal philosophers are well aware of and have different views about.

Put simply, this situation suggests that there is no background agreement on what the relevant values or norms of conceptual ethics are in the contemporary dispute over legal positivism, let alone how the relevant ones (whatever they are) should be weighed against each other. And, as I say above, in this respect the dispute over legal positivism is much the same as many disputes in contemporary philosophy, ranging from disputes in social ontology to fundamental metaphysics to political philosophy. This kind of

98. See Raz, *Authority and Justification*, *supra* note 38; JOSEPH RAZ, *Authority, Law, and Morality*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* (1994); and RAZ, *AUTHORITY OF LAW*, *supra* note 8. Cf. Scott Hershovitz, *The Role of Authority*, 11 *PHILOSOPHERS' IMPRINT* 1–19 (2011).

99. See, e.g., SHAPIRO, *supra* note 2.

100. See, e.g., BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* (2007); and Brian Leiter, *Explaining Theoretical Disagreement*, 76 *U. CHI. L. REV.* 1215–1250 (2009).

diversity of views in conceptual ethics shows up throughout a wide range of philosophical disputes.¹⁰¹

There is also a second issue here. Suppose we restrict ourselves to thinking about the subset of the dispute over legal positivism where there *is* agreement on what kinds of norms or values matter in conceptual ethics for concept choice, at least for the philosophical context at hand. That in no way guarantees that there will not be metalinguistic negotiation going on in this part of the dispute. For different philosophers might still employ different concepts and they might still advocate for their preferred concept via metalinguistic usage of the term “law” (or other related terms). They might all do so with the understanding that they are all ultimately trying to get at the same thing; for example, what the relevant joints are in social reality for the purposes of social-scientific understanding. However, as I emphasize throughout this paper, one can have an object-level understanding of the aims of an inquiry and also think that metalinguistic negotiation is part of how we go about trying to succeed in that inquiry.

Again, the situation here is on all fours with many other areas of philosophy. Take fundamental metaphysics. In contemporary metametaphysics, philosophers put forward a wide range of views about what fundamental metaphysics is about and how it should best proceed. As part of this, they put forward a wide variety of different views in conceptual ethics.¹⁰² But suppose we restrict ourselves to a portion of metaphysical debate where everyone agrees on these issues; imagine, for example, that everyone agreed with Sider’s (controversial) view that we should be trying to form correct representations of objective reality, ones that are both true and couched in a conceptual framework that matches the structure of that reality.¹⁰³ This group of philosophers might still very well engage in metalinguistic negotiation as a way of trying to communicate about what reality is like and which concepts we should employ for thinking about it.

To emphasize that this is so, just look back at the conditions (A) to (D) that I introduce above in this section; the conditions that when present, I claim, support the conclusion that a dispute is a metalinguistic negotiation along the lines of the Secretariat case. None of these conditions involves anything about what kind of values or norms speakers appeal to in their views about conceptual ethics or what kind of explicit arguments in conceptual ethics they might appeal to in order to support their preferred way of using a word. In short, background agreement on issues in conceptual ethics in a given context does not rule out the possibility of widespread metalinguistic negotiation in that context. And neither does background

101. For discussion, see Burgess & Plunkett, *Conceptual Ethics I*, *supra* note 9; and Burgess & Plunkett, *Conceptual Ethics II*, *supra* note 9.

102. For a helpful overview of the contemporary field, see David Manley, *Introduction: A Guided Tour of Metametaphysics*, in *METAMETAPHYSICS: NEW ESSAYS ON THE FOUNDATIONS OF ONTOLOGY* (D.J. Chalmers, D. Manley & R. Wasserman eds., 2009).

103. See SIDER, *supra* note 39.

agreement on an object-level understanding of the aims of inquiry in that context.

III. CONCLUSION: SOME REFLECTIONS ON THE METHODOLOGY OF THE DISPUTE OVER LEGAL POSITIVISM

In this paper, I am arguing for an interpretation of the dispute over legal positivism on which the dispute is partly a metalinguistic negotiation. A common reading of this dispute is this: positivists and antipositivists share a common concept, LAW (which they then express with the same term "law" in actual disputes), and what they are doing is engaging in a canonical dispute about the things picked out by the concept, for example, about the grounds of law or of legal facts. I think that is indeed part of what is going in the dispute over legal positivism. But I think that something else is going on as well. Sometimes, philosophers engaged in this dispute are actually talking about the grounds of (or, similarly, the natures of, etc.) different things picked out by rival concepts. Positivism might well be true of the things picked out by one of those concepts—for example, concept A might pick out things where it is true to say that the A facts are ultimately fully grounded in social facts alone and not moral facts. But that might not be true of the things picked out by a rival concept—for example, concept B might pick out things where it is true to say that the B facts are ultimately fully grounded in social facts alone and not moral facts. But of course it is totally rationally compatible to think that the A facts are ultimately grounded in social facts alone and that the B facts are ultimately grounded in both social facts and moral facts.

That might lead one to think that when one speaker makes a claim on behalf of positivism, whose literal content is about the A facts, and the other makes a claim on behalf of antipositivism, but whose literal content is about the B facts, these speakers are then "merely talking past" each other. Indeed, it might lead one to think, as Dworkin suggests about such cases of semantic variation, that "Their arguments are 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."¹⁰⁴ But that, however, does not follow from the fact that speakers are literally talking about different things and both saying true things about those things, despite using the same word. For, in addition to literally asserting content in disputes, speakers also use such pragmatic mechanisms as implicature, connotation, and presupposition to communicate information—including, crucially, communicating beliefs (or other attitudes) that are rationally incom-

104. DWORKIN, LAW'S EMPIRE, *supra* note 5, at 43–44.

patible with the beliefs (or attitudes) of the person they are communicating with.

To put it in the terminology that I am using in this paper, speakers engage in noncanonical disputes as well as canonical ones, and, crucially, such disputes can express genuine disagreements between speakers. What I am suggesting is that participants in the dispute over legal positivism sometimes engage in a particular kind of noncanonical dispute; namely, they employ a metalinguistic usage of a term in order to put forward a normative view about how that term should be used in the context at hand. In particular, I focus on cases of this kind of metalinguistic negotiation in which the issue on the table is this: Which of a range of competing concepts should be employed in a given context and paired with the word “law” in that context? This means that one speaker might very well be advocating that we should be talking about the A facts (of which positivism is true) with the term “law” in this context, while the other might very well be advocating that we should be talking about the B facts (of which antipositivism is true) with the term “law” in this context. Those two speakers thus disagree with each other and manage to express that disagreement in their dispute.

In conclusion, I want to reflect briefly on what my proposal, if correct, means for the methodology of the dispute over legal positivism.¹⁰⁵

A. Two Components of Arguments for Legal Positivism or Legal Antipositivism

If my proposal is correct, it means that legal positivists and antipositivists are sometimes tacitly arguing about an issue in conceptual ethics. In particular, they are sometimes tacitly arguing about which of a range of competing concepts should be expressed by the term “law” in the relevant range of contexts. This is in addition to them making claims about the grounds of the things in the extension of their concepts. This means that legal positivists or antipositivists should advocate for two different views: first, a view in conceptual ethics (about which concept we should express by the term “law”), and second, a view about the grounds of the facts that are picked out by that concept. In this paper, I am suggesting that one’s views on the first topic might very well depend on—and perhaps should depend on—substantive normative facts of a kind familiar from moral and political philosophy. This second topic—about what grounds what—is something that neither positivists nor antipositivists need claim is about a topic where

105. My discussion below stems from my more general discussion of philosophical methodology in Plunkett, *Which Concepts*, *supra* note 11. Indeed, the points I make below are all essentially the application of the general methodological points I make at the end of *id.*, applied to the dispute over legal positivism in particular. My methodological views here draw heavily on Chalmers, *Verbal*, *supra* note 12.

such normative facts play that same kind of role. Instead, one's views on this topic might very well be made correct or incorrect by descriptive facts. Put another way: once one has fixed on a given concept, the facts about the grounds of the things in the extension of that concept might not depend on normative facts at all, let alone the kind that are at the center of discussion in moral and political philosophy.

The core idea above—namely, that legal philosophers involved in the dispute over legal positivism should both (1) argue for which concepts should be used and then (2) aim to think true thoughts using those concepts—is not something that depends on the prevalence of metalinguistic negotiation in the dispute. Such metalinguistic negotiation underscores the importance of doing both things, given that these are already live issues that we are tacitly arguing about in such disputes. But we might also support the same idea starting from a more general view about the aims of inquiry in legal philosophy or, indeed, the aims of inquiry more generally. The view is this: when engaged in inquiry, we should use certain concepts rather than others. And part of what determines which concepts we should use is which ones will best help us accomplish the aims of that inquiry.

B. The Limits of Conceptual Analysis

When philosophers are engaged in a metalinguistic negotiation, they are not arguing about descriptive facts about thought and talk. Rather, they are arguing about a normative issue about thought and talk: about how they should use their words in a given context. Descriptive information about how speakers (including ourselves) currently use words—including, crucially, information about which concepts speakers use our words to express and information about the content of those concepts—can be useful in making progress on normative issues about how we should use our words.

For example, suppose one thinks that a group of speakers should mean something different by the term "athlete" from what they mean now because the current concept expressed by that term is defective in some way. If such a normative judgment about the defectiveness of the current concept is to be assessed in a principled way, then, among other things, we need to understand descriptive facts about that current concept. If we do not, how could we begin to assess whether it is defective or in what particular ways it is defective (if it is at all)? Or, to take another example, suppose one has good reason to hold that some speakers are experts with respect to some subject matter or area of inquiry (e.g., biology). In such a case, one might think that, at least in certain contexts, we should defer (at least to some degree) to their current usage of central terms in choosing how to speak (e.g., with respect to the term "species").

So figuring out what a relevant group of experts in fact means by certain words might be highly relevant to figuring out how we (nonexperts) should use those words.

These examples bring out the fact that conceptual analysis can play an important role in thinking about issues in conceptual ethics. But the descriptive information we get from conceptual analysis will not by itself settle the normative issues in conceptual ethics. The same goes for purely descriptive information we get from any other kind of inquiry, including, for example, descriptive linguistics and experimental philosophy. Metalinguistic negotiations are about normative issues in conceptual ethics. Thus they cannot be fully settled solely by appealing to purely descriptive facts about concepts and language gleaned from engaging in conceptual analysis, descriptive linguistics, experimental philosophy, or anything else.

Another important point about the role of conceptual analysis within metalinguistic negotiations is illustrated by a contrast with the role that conceptual analysis can play within canonical disputes. Consider a canonical dispute in which we are having an argument about what falls under a given concept. Such a dispute is going to be settled by what reality itself is like. (To illustrate: consider concepts that have different extensions in different possible worlds.) But what the concept is also plays an important role here. (To illustrate: consider different concepts that have different extensions in the same world.) Given this, better understanding the shared concept we are employing in the dispute has the potential to help us make progress in the dispute. It can illuminate what must be the case for something to count as falling under that concept in the first place. It can thus help us keep clear about what the subject matter at hand is, as well as, in a connected vein, helping us keep track of when someone is changing the topic of that dispute.¹⁰⁶ Those are potentially important roles for conceptual analysis to play within canonical disputes.

Now consider metalinguistic negotiations. In a metalinguistic negotiation, it might well be that speakers share some background set of concepts. (Indeed, it might be that they need to do so if their thoughts are to be capable of being rationally incompatible.) But that does not mean that those shared concepts are the ones that these speakers express in the actual dispute. In many metalinguistic negotiations, speakers express different concepts with the words used in the dispute. Consider, again, the Secretariat case as an example of this. In such a dispute, analyzing the concepts that speakers express by their words is not going to be as illuminating about the subject matter of the dispute as it would be in a canonical dispute. In

106. These kinds of thoughts form an important part of Frank Jackson's extended discussion of the relevance of conceptual analysis to philosophy in JACKSON, FROM METAPHYSICS, *supra* note 25. At the same time, it should be emphasized that Jackson also defends other theses about the relevance of conceptual analysis to philosophy that I am not discussing here but to which I am very sympathetic. For connected discussion about the import of conceptual analysis to philosophical inquiry, see Chalmers & Jackson, *supra* note 25.

many metalinguistic negotiations—as illustrated by the Secretariat case—speakers employ different concepts, which will often pick out different things in the world. Those things will have different grounds, essences, and (often) different supervenience bases. Given this, a crucial issue here—an issue that speakers in a metalinguistic negotiation argue about by arguing about which concepts they should use—is which of these different things (or some other thing) we should be talking about for the purposes at hand. What fixes the subject matter of the dispute between speakers in such a metalinguistic negotiation is thus not something that we can figure out through descriptive inquiry into the concepts expressed by the words they use in that dispute. Because of this, conceptual analysis has a more limited role to play in metalinguistic negotiations than it does in canonical disputes.

Before moving on, it is worth pausing here to notice how the view just put forward interacts with a prominent proposal about philosophical analysis of concepts prevalent in the philosophy of law. Consider Raz's view that "there is an interdependence between conceptual and normative argument."¹⁰⁷ What does this mean? Raz illustrates with respect to his account of authority:

The philosophical explanation of authority is not an attempt to state the meaning of a word. It is a discussion of a concept which is deeply embedded in the philosophical and political traditions of our culture. The concept serves as an integral part of a whole mesh of ideas and beliefs, leading from one part of the net to another. There is no, nor has there ever been, complete agreement on all aspects of the concept's place and its connection with other concepts. But there is, as part of our common culture, a good measure of agreement between any two people on many, though frequently not the same, points. Accounts of "authority" attempt a double task. They are part of an attempt to make explicit elements of our common traditions, a highly prized activity in a culture which values self-awareness. At the same time such accounts take a position in the traditional debate about the precise connections between that and other concepts. They are partisan accounts furthering the cause of certain strands in the common tradition, by developing and producing new or newly recast arguments in their favor.¹⁰⁸

There is no doubt that Raz (like Dworkin and like Murphy) is drawing our attention to many of the same features of argumentation in legal philosophy that I am emphasizing in this paper. The question then is what the theory of that communication looks like. Different theories will explain that communication in different ways, drawing on different accounts of the linguistic mechanisms involved, different understandings of mental and linguistic content, and different accounts of what disagreements are being expressed in the relevant exchanges. On this front, the thing I want to note about Raz's proposal is as follows. The most straightforward reading of Raz here is this: he is suggesting there is a single common concept that speakers engaged

107. Raz, *Authority and Justification*, *supra* note 38, at 27.

108. *Id.* at 27.

in disputes about authority share. After all, Raz talks about *the* concept of authority here. He then claims that what speakers are doing in proposing accounts of that concept—for example, in analyzing it—is picking up different strands of it and making normative arguments (including ones based on moral and political considerations) about which strands are more important. Thus, on the most straightforward way of taking Raz here, he thinks that normative considerations—including moral and political ones of the kind that he himself appeals to in arguing on behalf of his theory of authority—are epistemically relevant to proposing a philosophical theory of what the content of a given concept is.¹⁰⁹

In contrast to Raz's view, my view in this paper is completely compatible with the idea that analysis of the content of a given single concept—including a normative concept—need not involve normative inquiry (of the kind we find in moral and political philosophy).¹¹⁰ And that is, in fact, the view of conceptual analysis that I ultimately favor. That is, I do not think we should appeal to a view of conceptual analysis on which engaging in the analysis of a single given concept is fundamentally entwined with substantive moral and political considerations. Thus my proposed view stands in marked contrast to Raz's view about the need for normative argument to engage in the analysis of a given concept. If Raz's view were right—then, as with Dworkin's view—it would help underwrite a different account of the dispute over legal positivism, since it would then likely turn out that speakers share (and express) common concepts more often than I am suggesting here.

The question then is: Who has the better view of concepts, as part of an overall package deal of explaining thought and talk? As part of this, we should ask: How much of a role does metalinguistic negotiation play in communication in general? If my view in this paper is on the right track, then we should reject a Razian view of conceptual analysis (and its associated view of concepts) and instead insist on a sharper separation of conceptual analysis and conceptual ethics. In turn, the result is, as I describe in this subsection, a more circumscribed role for conceptual analysis in the dispute over legal positivism than one might have thought prior to appreciating the metalinguistic dimension of that dispute.¹¹¹

109. See also RAZ, MORALITY, *supra* note 38; and Raz, *Two Views*, *supra* note 38.

110. Thus, for example, my kind of view is totally compatible with the view of concepts and conceptual analysis at the heart of JACKSON, FROM METAPHYSICS, *supra* note 25; and Chalmers & Jackson, *supra* note 25, which I draw on in the context of defending legal positivism in Plunkett, *Positivist Route*, *supra* note 3.

111. One might wonder: How deep does the difference with Raz really go here? Perhaps Raz means something sufficiently different by "concept" from what I mean by the term (or what Jackson means by the term) such that our proposed theories of thought and talk are totally compatible. I do not think that is the case, given the basic job description that Raz seems to associate with concepts and given how he understands his view of the things he calls "concepts" to stand in relation to the views of other philosophers about the things they call "concepts" (and their more general theories of thought and talk); (e.g., he sees his view as a rival to other views of thought and talk, such as Jackson-style views, that fit smoothly within my framework

C. Being Explicit About Conceptual Ethics and Moving to Background Issues

In many contexts, once one realizes one is engaged in a metalinguistic negotiation, it can then be helpful to attempt to have a canonical dispute that targets some of the underlying issues at hand—or at least what one suspects are the underlying issues. Indeed, this can also be a good thing to *try* doing, insofar as one suspects one is engaged in a metalinguistic negotiation and one is trying to understand where (if at all) the real disagreements lie between oneself and one's interlocutor.¹¹²

First of all, one can move to having a canonical dispute about conceptual ethics, wherein the literal content of what speakers express in that dispute explicitly concerns the issues in conceptual ethics that were at issue in the metalinguistic negotiation. In some contexts, the move to being explicit about conceptual ethics could be in conflict with a speaker's practical aims in that conversation. For example, consider the Secretariat debate on sports radio again. Suppose part of that conversation unfolds as follows:

- (4) (a) Secretariat is not one of the greatest athletes of the twentieth century. In fact, Secretariat is not even an athlete! That follows from basic facts about what athletes as such just are. Nonhuman animals just cannot be athletes. Maybe aliens could be. But not the kind of nonhuman animals we have here on Earth.
- (b) I agree that what you are saying here is true, given the facts about the current meaning of the term "athlete," or at least given what most people listening to this show mean by that term. So I fully grant that what you are saying is true, given that meaning. But what I think we should do is to introduce a new, more inclusive, less anthropocentric concept, call it ATHLETE*, and express it with our term "athlete" moving forward. What I say above, "Secretariat is one of the greatest athletes of the twentieth century," is true if we are using the term "athlete" to express that new concept I am advocating. The question is whether this concept is better in this context, relative to our legitimate purposes, than the concept you

but not within Raz's). See, e.g., the discussion of concepts in RAZ, MORALITY, *supra* note 38; and Raz, *Two Views*, *supra* note 38. Moreover, if Raz (or anyone else) wants to claim that the package deal I am offering in this paper is ultimately not a rival to his or her view in terms of our actual explanations of thought and talk, despite appearances otherwise, then I am happy to count that as a victory for me, insofar as he or she is accepting the substantive philosophical views I am putting forward in this paper. We can then have an argument in conceptual ethics about how, going forward, we should use central terms in philosophy of mind and language (e.g., "concept," "word," "meaning," etc.). For connected discussion, see Plunkett & Sundell, *Dworkin's Interpretivism*, *supra* note 14, sec. 7. In that section, Sundell and I explain why our dispute with Dworkin involves a substantive disagreement about the explanation of thought and talk rather than solely a dispute over how to use the term "concept." The issues here include what kinds of things one needs to posit in one's theory of thought and talk (e.g., just the kind of units of cognitive significance that granted by someone such as JACKSON, FROM METAPHYSICS, *supra* note 25, or other purportedly novel kinds as well), and what linguistic mechanisms we use to communicate certain disagreements (e.g., metalinguistic usage, etc.).

112. This idea is closely connected to Chalmers's advocacy of what he calls "the subscript gambit" in Chalmers, *Verbal*, *supra* note 12.

(and most people listening to this debate) currently express by the term “athlete.” Let us debate that explicitly. For now, we can just use the term “athlete*” to express my concept and “athlete” to express yours (which is the standard one).

Is it a good idea for the speaker of (4) (b) to try to transform the dispute from a metalinguistic negotiation to a canonical one in conceptual ethics in this way? Maybe not. Given the rich positive cultural associations with the term “athlete” in this context, it could be that the speaker of (4) (b) hinders her ability to bring about certain kinds of social/political change by giving up that term (even temporarily) to her opponent. In short, in many contexts, paraphrase can be costly for speakers, relative to their practical aims.¹¹³ To emphasize this point, consider the costs of paraphrase in debates involving terms like “democracy,” “freedom,” “equality,” or “torture” in the context of running a political campaign in contemporary America.

The aims that speakers have when communicating about philosophy are typically different from the aims speakers have when calling into a sports radio show or when running a political campaign. In short, many philosophers, when engaged in philosophical inquiry or communication, take themselves to be more centrally concerned with gaining a better understanding of reality rather than affecting social/political change. If we assume (as I think is in fact correct) that this view of the aims of philosophical inquiry and communication is on the right track (at least for many parts of philosophy in many contexts), then we should not expect there to be the same practical costs to paraphrase in a philosophical context. In short, then, the benefits of paraphrase (including, crucially, helping speakers get clearer about what, if anything, they are really disagreeing about) will be more important than the costs, within the philosophical context. If so, we should then be more willing to go in for paraphrase for terms such as “democracy,” “freedom,” “equality,” and “torture” in a philosophical context than in the context of political debate, and thereby shift a metalinguistic negotiation to a canonical dispute about the issue in conceptual ethics that the negotiation was about.

But that does not mean that there are not costs to paraphrase here in a philosophical context as well that are worth keeping in mind. Terms such as “knowledge,” “the self,” “meaning,” “free will,” and “morality” have rich associations (both within and outside philosophy) and also ties to long histories of philosophical theorizing. It might be that for certain creatures, the associations of those terms will not have much of an epistemic impact. But for creatures like us, that is not the case. Which words we use when doing philosophy (e.g., “knowledge” versus some new stipulated term) can

113. For more on this point, see Plunkett & Sundell, *Disagreement*, *supra* note 14; Plunkett & Sundell, *Antipositivist Arguments*, *supra* note 14; and Plunkett, *Which Concepts*, *supra* note 11. Cf. HASLANGER, *RESISTING*, *supra* note 76.

matter a great deal to how inquiry in philosophy unfolds. As David Chalmers puts the point:

Ideal agents might be unaffected by which terms are used for which concepts, but for nonideal agents such as ourselves, the accepted meaning for a key term will make a difference to which concepts are highlighted, which questions can easily be raised, and which associations and inferences are naturally made.¹¹⁴

Moreover, speakers might well have legitimate ethical or political aims (as well as epistemic ones) that they bring to the table when doing philosophy, whether in epistemology, metaphysics, or moral philosophy, which would likely make more pressing the costs of paraphrase (for the reasons given above). This point is especially important to keep in mind when thinking about legal philosophy. A good deal of work in legal philosophy—much like a lot of work in political philosophy—is produced by people who self-consciously aim for their philosophical work to make a practical difference in the wider social-political world. That might not follow from what legal philosophy as such is, but it is a sociologically important point about the field. At the same time, many of the central terms involved in legal philosophy have a kind of rich broader cultural resonance that goes well beyond resonance internal to a philosophical context. Because of this fact, within legal philosophy (including in the dispute over legal positivism) it might be more costly to go in for moving from a metalinguistic negotiation to a canonical dispute in conceptual ethics than initially seems to be the case. Still, I think it is likely to prove a useful tool and something well worth exploring for the reasons given here.

D. Moving to Background Issues

In fact, I think we can say something even stronger than is suggested above. In many cases in legal philosophy—and indeed, in philosophy more generally—it will be helpful not only to shift a metalinguistic negotiation to a canonical dispute about conceptual ethics but, moreover, to shift it to a canonical dispute about object-level issues.

When speakers disagree about an issue in conceptual ethics—including, centrally, which concepts should be used in a given context and which word should be used to express that concept in that context—it is usually the case that they disagree about certain object-level issues as well. For example, consider the Secretariat case again. Do the speakers disagree about which kinds of animals deserve praise and recognition? If so, why? Do they, for example, have different views about the moral status of nonhuman animals? Focusing on those issues directly, rather than issues within conceptual ethics, might lead to a more fruitful discussion.

114. Chalmers, *Verbal*, *supra* note 12, at 542.

This is arguably particularly so in a philosophical context, insofar as broadly epistemic aims about gaining a better understanding of reality are more prominent than in many other contexts, including debates on sports radio. The views that philosophers have about issues in conceptual ethics that concern central philosophical terms (such as “knowledge,” “freedom,” “meaning,” “the self”) will often be tied to further views they have about object-level issues: for example, what the nature of reality is ultimately like, what the most important virtues or values are for evaluating one’s doxastic attitudes, or what kinds of social/political institutions we should have. Within the context of two speakers expressing a disagreement about conceptual ethics—whether that is in a canonical dispute or a metalinguistic negotiation—one helpful move will be to try to figure out if it possible to state what the disagreement is in a way that does *not* use the central term(s) at issue (e.g., “athlete” in the Secretariat case).¹¹⁵ Doing so can help locate which object-level disagreements, if any, are tied to the disagreement in conceptual ethics.

As is the case with many questions in conceptual ethics in philosophy, there is a range of underlying issues that matter for the question in conceptual ethics that I am suggesting is an important part of the dispute over legal positivism. It is no easy task to identify what exactly those underlying issues are. And then there is, of course, the further issue of figuring out how the different issues should be weighted for settling the relevant normative facts in conceptual ethics, including, centrally, the normative facts about which concept we should express with “law” (in the relevant range of contexts, whatever those turn out to be). So it is not that turning explicitly to such background issues is a magic bullet that will allow us quickly to resolve the dispute over positivism. That is unlikely to happen. But turning explicitly to such issues might help us to better locate the issues that we ultimately care more about and which drive us to engage in the dispute over legal positivism in the first place.

Some of those issues, I am arguing, have to do with exactly the kind of things suggested by a straightforward object-level interpretation of the dispute over legal positivism as a canonical dispute about the grounds of something picked out by a shared concept. That is, after all, part of what I think is going on in the dispute over legal positivism. But if the dispute over legal positivism is partly a metalinguistic negotiation, then given (1) the variety of values and norms that support philosophers in general use to argue for views in conceptual ethics, (2) the variety of contexts in which “law” figures, and (3) the rich connotations of the term (across a variety of contexts), there are likely to be other issues here that legal philosophers are arguing about as well, even when they are just doing so tacitly. Clearly identifying such issues is likely to be important not only to better

115. *Cf. id.*

understanding what legal philosophers are in fact doing in the dispute over legal positivism but also in helping us to make progress within that dispute.

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