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3 Antipositivist Arguments from Legal Thought and Talk

The Metalinguistic Response*

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INTRODUCTION

One reason that many people are drawn to some form of legal antipositivism stems from a simple observation about legal thought and talk. The observation is this: when legal actors argue in legal contexts—in a courtroom, for example, or in writing a judicial opinion—they sometimes appeal to moral considerations about issues like fairness, equality, freedom, or justice in support of their views. This is especially true in so-called "hard cases"—roughly, cases where it is difficult to figure out what the law is, based solely on the existing social facts. Crucially, when such moral claims are made, legal actors do not always say things like "now I am taking about what law *should* be, instead of what the law currently is." Rather, at least in many cases, the moral claims seem to be advanced smoothly as part of discussion squarely about what the law *is* in a given jurisdiction (at a given time).

This observation would seem to suggest that our best account of how legal actors figure out what the law is involves learning about moral facts. Insofar as our best metaphysical account of law should fit smoothly with our best epistemology of law, this in turn lends support to the following thesis: part of what ultimately determines what the law is in a given jurisdiction (at a given time) are moral facts. And this metaphysical thesis is what many have identified as definitive of *legal antipositivism*.[1] Hence, it seems that a basic awareness of the nature of legal thought and talk lends at least *prima facie* support to legal antipositivism. Or, to put it another way, this line of thought seems to provide a compelling argument against *legal positivism*—roughly, the thesis that facts about the existence and content of the law are ultimately determined *solely* by social facts, and not by moral facts.[2] The basic thought is that since actors in actual legal practice draw freely on moral considerations in arguments about the content of the law, then legal positivism, which has no place for such considerations in the metaphysics of law, cannot be correct. Call this line of argument the *Argument from Legal Thought and Talk*.[3]

One line of response starts as follows. Begin with the idea that some reasoning in legal contexts indeed aims at discovering the content of the

law in a given jurisdiction (at a given time). It thereby aims at uncovering what we can call the *legal facts*.[4] Call such reasoning *legal reasoning*.[5] Now ask: is it really the case that all of the reasoning that goes on in legal contexts is genuinely legal reasoning in this narrow sense? Many have thought that the answer is clearly "no." For instance, it is commonly thought that judges engage not only in legal reasoning but also in decision-making about what the law should be. This sociological observation is closely connected to the positivist picture of law. Many positivists have thought that since the relevant social practices are finite, and the law is fully grounded in facts about these social practices, then it can't be that the law itself is fully determinate across all possible cases. Hence, it must be that judges—who are often legally obligated to make a decision about a case—will be making new law as well as simply discovering existing law. To think otherwise is to buy into a formalist fantasy about there being fully determinate law, a fantasy that, so the thought goes, any right-minded positivist should forcefully reject.[6]

If this line of thought is on the right track, then the fact that legal actors make moral claims in a legal context cannot automatically be taken as support for the thesis that they are advancing those claims as part of *legal reasoning* in the narrow sense. (We use the phrase 'legal reasoning' in this narrow sense throughout.) Of course, participants might *think* that is what they are doing, and it might even look to many theorists like that is what they are doing. But that doesn't mean they aren't mistaken. This leads to the following sort of response to the Argument from Legal Thought and Talk: in many cases where participants think that what they are doing is advancing moral claims in the service of legal reasoning, they are in fact advancing moral claims in the service of something else. This response grants that legal actors make genuinely moral claims in legal contexts, but holds that those claims are advanced not in the service of legal reasoning, but in the service of some other project, perhaps the project of deciding what the law should be.[7] Call this type of response the *Multiple Projects Response*. If it can be shown that this idea is right, then the fact that legal thought and talk involves a good deal of moral thought and talk poses no great threat to legal positivism. So the antipositivist Argument from Legal Thought and Talk fails.

Two important issues confront any proponent of the Multiple Projects Response. The first issue is this: if legal thought and talk involve more than just straightforward legal reasoning, then it would be good to have an account of the other project (or projects) that legal actors are engaged in. What is this other project, and how exactly are they engaging in it? Call this first issue the *Other Projects Issue*. The second issue stems from the fact that many legal practitioners hold that they appeal to moral facts precisely in the service of legal reasoning. If that isn't what is going on, it would be good to have an explanation of why legal practitioners are blind to this fact. Call this the *Error Issue*. One's response to the Other Projects Issue matters for what explanatory resources one has in responding to the Error Issue. The

facts about what else legal practitioners are doing in legal thought and talk, beyond reasoning and communicating about what the law is, change what explanatory resources one has in responding to the Error Issue.

In recent work, we have developed a distinctive view about the nature of legal thought and talk, a view on which important parts of legal communication involve a type of linguistic exchange that we call a *metalinguistic negotiation*.[8] In this paper, we show that our view of legal thought and talk puts us is in a particularly good position to pursue the Multiple Projects Response on behalf of legal positivism, and, especially, to tackle the Error Issue.

Two main features characterize metalinguistic negotiations. First, they express disagreements over information that is conveyed pragmatically through a *metalinguistic* usage of a term, rather than via literal semantic content. Second, they express disagreements not about descriptive, non-linguistic facts, or even purely descriptive matters of meaning. Rather, metalinguistic negotiations reflect disagreements about what words *should* mean—about, among other issues, which among a set of candidate concepts should in fact serve as the meaning of the word in the relevant context. In this paper, we show that, in those cases where speakers engage in a metalinguistic negotiation—whether in a legal context or anywhere else—there is good reason to suspect that they will not recognize this fact. Rather, they will, in many cases, take themselves to be engaged in an entirely ordinary dispute about the correctness of the contents they literally express—what we call a "canonical dispute." In disputes involving moral terms, this means that speakers will be prone to mistake a metalinguistic negotiation (for example, about what concept should be expressed by the term 'equality') for a canonical moral dispute (about which things fall under a shared concept EQUALITY).[9] Moreover, speakers can be prone to make this mistake even when presented with the alternative (and, we claim, correct) account of what they are doing. If that is right, then our view of legal discourse provides an important tool for responding to the Error Issue—a tool that can be combined with other positivist resources in pursuing the Multiple Projects Response to the Argument from Legal Thought and Talk.

It is worth emphasizing that there are *lots* of responses that positivists can make to the Argument from Legal Thought and Talk. Our goal is not to canvass all of those responses in this essay, let alone to evaluative the merits of each. Rather, our goal is to show how the sort of general view that we favor about communication in law and beyond—a view on which metalinguistic negotiations are a common and important part of how we communicate with each other—puts us in a particularly good position to deal with the Error Issue, and hence to pursue the Multiple Projects Response. When coupled with an independent set of arguments for legal positivism, we thus think that our view of communication can play an important role in the overall development of a positivist account of the metaphysics of law.[10]

I. THE ERROR ISSUE

The Error Issue is a worry that confronts any proponent of the Multiple Projects Response. The issue stems from the following observation: many legal practitioners hold that they often appeal to moral facts in the service of legal reasoning. Now, one might dispute that this is an accurate sociological report of how legal practitioners conceive of their own activity. However, we think that the widespread appeal of the Argument from Legal Thought and Talk—within both philosophical and non-philosophical contexts—suggests that it is quite plausible. Thus, we grant for the sake of argument that the sociological claim is roughly correct.[11] That is, we grant that at least some legal actors advancing moral claims in the legal context do take themselves to be doing so in the service of genuine legal reasoning.

Now consider the Multiple Projects Response to the Argument from Legal Thought and Talk. The Multiple Projects Response suggests that legal actors often engage in additional projects, beyond pure legal reasoning, when they engage in legal discourse and debate. They may indeed make genuinely moral claims, but those claims are not meant to elucidate what the law is, but rather to advance one of these other projects. But would legal practitioners themselves endorse these other projects, whatever they are, as a description of their own activity? We've granted for the sake of argument that in many cases they may not. Thus, if the Multiple Projects Response is going to work, then to some extent legal practitioners must be described as mistaken about what they're doing. The more error the positivist attributes to legal practitioners, the more moral claims can be explained away as contributing to something other than legal reasoning, and thus the more effective the Multiple Projects Response becomes.

The Multiple Projects Response is thus committed to the claim that legal actors are sometimes mistaken in their understanding of their own activities. Perhaps this sort of attribution of error to legal practitioners is not really a problem. Consider, for instance, the oft-repeated claim in the history and philosophy of science that scientists are often bad at understanding what they are doing when they are engaged in scientific activity. Perhaps there is no reason to think that the situation is any different in the case of law. After all, why should we expect practitioners to be adept sociologists and anthropologists of their own activity? If that skepticism is on the right track, then why worry about the attribution of error involved in the Multiple Projects Response?

We are sympathetic to this line of thought. Practitioners in *any* domain of human practice are often bad theorists about what activity in that domain involves. However, this is not the end of the story. For even if this thought is correct, it would still be good to offer an explanation of *why* that error occurs—an explanation that would go beyond just saying "practitioners are bad theorists." There are two ideas that motivate this thought.

First, it would be good to have an explanation of why the practitioners are prone to making the *particular* types of error they do. There are many ways for someone to be mistaken about what she is doing. Insofar as a theory ascribes a specific type of mistake to the relevant speakers or agents, it owes some accounting of why that mistake is the one that is made rather than others. This theoretical requirement holds, no matter how predictable it may be, in general, that the speakers or agents will be mistaken in some way or other.

Second, consider the idea that, other things being equal, a linguistic theory should avoid positing widespread error to ordinary speakers. This is a widely accepted methodological notion in linguistics and large parts of philosophy of language, where attribution of systematic error is considered a significant theoretical cost, if not an insurmountable problem. In fields where speakers' intuitions and usage constitute the primary data for theorizing, error theories create a worrisome distance between the theory and the facts to which the theory is meant to be accountable. One way to mitigate the costs of attributing such error is to explain why the particular errors are occurring. If it is the case that, other things being equal, we should hold that people aren't systematically mistaken about what they are communicating, then it would be good to explain *why other things aren't equal* in this case.

Thus, whether one is sympathetic to widespread error in general, or on the contrary, considers the positing of systematic error to be a theoretical cost, a theorist should, either way, have some explanation to offer of the specific types of error she posits.[12] So whatever one's general take on the plausibility of this form of mistake, error theory is a genuine issue for the proponent of the Multiple Projects Response. How, then, might one respond? In responding to the Error Issue, different theorists will have different resources at their disposal. One factor that will vary from theorist to theorist is their particular accounts of the other projects legal actors are engaged in. Given an overall account of what legal actors are doing, what are those other projects? What other activities are legal actors engaged in such that it would make sense for them, given who they are and what they are doing, to be mistaking those projects for legal reasoning?

Our claim is that the other project that legal actors are engaged in is the project of deciding which concepts should be employed in the context, and how they should be employed. This project—the project of choosing which concepts are best suited to our purposes—is a normative project concerning our thought and talk, a project in what we call *conceptual ethics*.[13] Our claim is that legal actors engage in disputes over conceptual ethics by engaging in what we call a *metalinguistic negotiation*, a dispute in which speakers employ metalinguistic usages of a term to express a view in conceptual ethics. We explain in more detail what metalinguistic negotiations are in the next section. What is important here is this: speakers engaged in a metalinguistic negotiation work to settle antecedently indeterminate facts about meaning. Thus, it is extremely natural for the positivist to analyze them as thereby settling antecedently indeterminate facts about the content of the law. Nevertheless, when

speakers are engaged in a metalinguistic negotiation there is good reason to expect that they will not recognize this to be the case. Where legal actors are engaged in metalinguistic negotiations involving moral terms, in particular, they will be prone to systematically mistake this for a canonical moral dispute. When that happens, given the structure of the discourse and practice, they are likely to believe that their moral claims are made *in the service of legal reasoning*. What this means is that our preferred account of legal thought and talk—an account on which legal actors are often involved in metalinguistic negotiation—is in an especially good position to address the Error Issue, and thus to advance the Multiple Projects Strategy more generally.

II. METALINGUISTIC NEGOTIATION

The "metalinguistic analysis" of a dispute—an analysis on which the dispute evinces a disagreement about what an expression does or should mean, expressed via metalinguistic usages of that very expression—is driven by a simple observation about the interplay between the meanings of words and the facts that we use words to describe. The observation is this: to the extent that we can hold fixed the meaning of a word, we can, with our use of that word, communicate facts about the world around us. *But that process is reversible.* To the extent that we can hold fixed facts about the world around us, we can, with our use of a word, communicate information about its meaning.[14]

To see this, contrast the following four cases.

BOOK 1. Don and Peggy are colleagues in a philosophy department. Don is new to the department and curious about the academic accomplishments of his colleagues. Don and Peggy mean, and know that they mean, the same thing by the word 'book'.[15] For ease of exposition, let us suppose that 'book' refers to a monograph of 100 pages or more. Don and Peggy engage in the following dialogue:

(1)
- (a) Who around here has written a book?
- (b) Well, Adam has written a book, but neither Betty nor Charlie has written a book.

Because Don and Peggy know how 'book' is used in this environment, Peggy's utterance has the potential to convey useful information to Don, information of which, until this point, he has been ignorant. Namely, Adam has written a monograph of at least 100 pages, while Betty and Charlie, whatever they have written, haven't done that.

BOOK 2. Don and Peggy are colleagues in a philosophy department. Don is new to the department and concerned about his tenure case. Don has been told that "if you've written a book, then your tenure case is a sure thing," but he knows that different departments mean different things by

'book'. Departments differ, in particular, by how long a work must be to count, and whether collections of articles qualify. For ease of exposition, let us suppose that these are the only dimensions along which departments vary in their application of the term. Don doesn't know where his new department comes down on these questions, but he does know that his colleague Adam has published a monograph of 124 pages, while Betty has published a bound extended essay of 78 pages and Charlie has published a collection of articles. Don and Peggy engage in the following dialogue.

(2)
(a) Who around here has written a book?
(b) Well, Adam has written a book, but neither Betty nor Charlie has written a book.

In this case, the relationship between facts about meaning and non-linguistic facts is reversed. Because Don and Peggy are in a position to hold fixed the facts about their colleagues' research, Peggy's use of the word 'book' communicates to Don information, not about that research, but about the local use of the word 'book'. In particular, Don can now, with the help of some plausible background assumptions, exclude from the set of possible meanings of (the relevant use of) 'book', (a) all those meanings according to which it applies to collections of essays and (b) book-like works of less than 79 pages, along with (c) those meanings according to which it does not apply to monographs of 124 pages or more. This is substantially more information than he had before. For something to count as a book around here, it cannot be a collection of essays and it must have a page count of more than some cut-off point falling between 79 and 124 pages. Call a usage such as Peggy's in (2b)—in which the expression is used in such a way as to communicate information about the meaning of that very expression—a *metalinguistic usage* of a term.

BOOK 3. Don and Peggy's circumstances are just as in BOOK 2. So is their dialogue. But this time, their colleague Rob overhears their conversation and interjects a comment voicing his disagreement with Peggy's characterization of their colleague's work.

(3)
(a) Who around here has written a book?
(b) Well, Adam has written a book, but neither Betty nor Charlie has written a book.
(c) You're wrong! It's true that Adam has written a book and Betty hasn't, but Charlie certainly has—he's got that great collection of essays.

Later on, Don checks with the chair and discovers that in fact Peggy was right. Charlie's collection does not count as a book. Peggy and Rob both employ metalinguistic usages, as defined above in BOOK 2. However, in this case they employ those usages to voice a disagreement regarding the relevant matter of meaning. Call a dispute like this—a dispute in which speakers employ metalinguistic usages to express a disagreement about meaning—a *metalinguistic dispute.*[16]

BOOK 4. In an effort to clarify the department's previously vague and variable standards for tenure, Don and Peggy, now both full professors, are rewriting the department regulations. They agree that advice of the form given to Don all those years ago should be vindicated: "if a person writes a book, then they're a sure thing for tenure." But they have yet to settle the matter of how to write up the relevant regulations. They engage in the following dialogue:

(3)
(a) Well, Charlie wrote a book.
(b) No he didn't! He got tenure because those articles were good. But he never wrote a book.

In this case, Don and Peggy are both aware of all the relevant non-linguistic facts. They know exactly how much Charlie has written and in what form those writings have been published. So they're not arguing about the non-linguistic facts. But in this case there is no antecedently settled meaning of 'book' for them to argue about. So they're not having a descriptive disagreement about the meaning of 'book' either. Nevertheless, they persist in their disagreement. In this case, we say that Don and Peggy are negotiating *what that meaning should be*. Call a dispute like this one—a metalinguistic dispute in which two speakers employ metalinguistic usages of an expression to *advocate* for competing candidate meanings of that expression—a *metalinguistic negotiation.*

What are the lessons of BOOK 1–BOOK 4? The move from BOOK 1 to BOOK 2 demonstrates the difference between ordinary and metalinguistic uses of linguistic expressions. The move from BOOK 2 to BOOK 3 demonstrates that metalinguistic usages can be employed in metalinguistic disputes—disputes that express disagreements about the meaning of the term being used metalinguistically. Finally, the move from BOOK 3 to BOOK 4 demonstrates that some metalinguistic disputes are metalinguistic negotiations. In other words, a subset of disputes involving metalinguistic usage do not express descriptive disagreements about what a word in fact means. Rather, they serve as the vehicle for negotiations that aim to settle the antecedently undetermined meaning, at least for purposes of the conversation.

Metalinguistic negotiations are thus distinguished from ordinary disputes in two ways. First, they make use of a distinctive pragmatic mode of communication. Rather than communicating the information at issue via assertion of literal content, speakers in metalinguistic negotiations communicate that information via metalinguistic usage. Second, metalinguistic negotiations concern a distinctive normative topic. When speakers employ metalinguistic uses of a term to advocate for a particular way of using that term, they are advocating for competing normative positions about how that term should

be used under the circumstances. This type of negotiation is no simple matter of definition or stipulation. Because of facts about departmental practice and decision-making, the term 'book' plays a certain functional role, irrespective of which among a range of plausible contender concepts it expresses. In this case, 'book' is the word used (among other things) to describe an extended published work that goes a long way towards getting somebody tenure.

There is nothing analytic about this connection between the word 'book' and departmental decision-making about promotion. But because—as a contingent matter of social practice—the expression plays the role it does, different choices of denotation for that expression will have different consequences for that decision-making. Thus, even though the disagreement expressed in BOOK 4 concerns neither descriptive facts about the world, nor descriptive facts about meaning, it nevertheless is a disagreement very much worth having. Arguing about how best to use the word 'book' matters because choices about word usage play a crucial role in collective decision-making and action. More generally, arguing about conceptual ethics matters because what thoughts we have—including facts about how those thoughts are structured—matters for a whole range of reasons, from what beliefs we have to what actions we undertake to what kinds of people we are.

Now consider the following sorts of well-known cases from the law, drawn from Shapiro's discussion of hard cases in *Legality*.[17] When a drug trafficker trades a firearm for illegal drugs, is he *using* the gun? Are representatives who are elected through the use of electronic voting machines *chosen by written votes*? Does the use of a riding lawn mower violate the rule that there be no *vehicles* in the park? An individual takes an action that causes an event that unexpectedly causes an injury. Is the individual's action a *proximate* cause of the injury? Disputes about such issues have exactly the sorts of features that make them ripe for analysis as metalinguistic negotiations. The speakers involved are by and large mutually aware of all the relevant non-linguistic facts. And it is at least plausible that there is no antecedently settled matter of fact about the meaning. Consider the "vehicle" case. Everybody knows what a riding lawn mower is like. So descriptive, non-linguistic facts are not at issue. But 'vehicle' is a vague term, and riding lawn mowers are a classic borderline case. So antecedently settled facts about meaning are not at issue either. What matters is a decision about how, for present purposes, to precisify the vague term.[18]

Whether in fact any given legal dispute is a metalinguistic negotiation will of course depend on further details of the individual case, details that it is beyond the scope of this paper to investigate. Thus, we do *not* claim that all "hard cases" in law must be analyzed as metalinguistic negotiations. But well-known cases of the kind listed above are so similar in structure to core cases of metalinguistic negotiation that we submit that at least *some* of the relevant legal disputes are in fact metalinguistic negotiations. This provides a resource in responding to the Argument from Legal Thought and Talk. For it gives one an account of another project that speakers are engaged in *other* than straightforward legal reasoning, a project that naturally is sensitive to

moral considerations among many others. Of course, if the view is to be put to that use, then the Error Issue will have to be addressed.

III. SPEAKER BLINDNESS

In the metalinguistic negotiations we have described above, speakers are not disagreeing about the truth of a literally expressed proposition. They are thus not disagreeing about what falls under a shared concept expressed by a word they both use in that dispute. That kind of single, stable concept, shared among speakers with systematically differing dispositions to apply the corresponding term, plays no role on our analysis. Rather, the parties to these disputes advocate and negotiate on behalf of distinct concepts, each candidate concept competing to play the functional role associated with the term in question. Thus the speakers do not, in the relevant sense, mean the same things by the words they use in the dispute, and, whatever they may think, their dispute reflects in the first instance a disagreement about language and thought, i.e., about which concept/word pairing should be used in the context at hand.

Nevertheless, if one were to ask the speakers engaged in this type of dispute what they are arguing about, the above analysis is not what one is likely to hear. Consider a debate, observed by Peter Ludlow, about whether the horse Secretariat is an "athlete."[19] This is a classic case of metalinguistic negotiation. Everybody agrees how many races Secretariat has won and how fast he can run; the question is whether that makes him an "athlete." Yet parties to the dispute about Secretariat are likely to report that they are arguing about a horse, not a word, or perhaps about the *true nature of athletes*. In typical cases, ordinary speakers might reject quite strongly the notion that they mean different things by their words and are, thus, both speaking truly. To posit such an analysis is thus, seemingly, to attribute a kind of error to ordinary speakers. The more widespread one takes metalinguistic negotiation to be, the more widespread the error one posits. How big a problem is this for a view on which many legal disputes consist in metalinguistic negotiations? Not a big one. There are two central reasons for this: (a) subtleties of the semantics/pragmatics distinction, and (b) parallels between issues in conceptual ethics and corresponding first-order issues.

III.1 Semantics and Pragmatics

As we've noted, metalinguistic negotiations differ from ordinary disputes in two ways: their distinctive pragmatic mechanism, and their distinctive normative topic. So if speakers believe that a metalinguistic negotiation is in fact a canonical dispute over some first-order matter, there are two ways in which they're mistaken. They're mistaken in thinking that the relevant information is the literal content of the expressions they utter. And they're

mistaken in thinking that their disagreement is not, in the first instance, about language and thought. We address these in turn.

To what extent should ordinary speakers be expected to have fine-grained and accurate intuitions with respect to semantics and pragmatics? In the case of some pragmatic types of communication, the distinction is quite clear, even to ordinary speakers. For example, consider the dialogue in (5):

(5)
(a) Care to see a movie tonight?
(b) I've got work to do.

The speaker of (5b) has not literally said that she is not able to see a movie tonight. But that is clearly what she communicates, perhaps via Gricean implicature.[20] Should we expect the speaker of (5b) to be aware, or easily able to become aware, that she has not literally expressed the proposition that she cannot see the movie tonight? Of course. If we were to ask the speaker, "What exactly did you say in response to the question?" we might expect an answer like, "Well, all I actually said was that I have work, but obviously that means I can't go to the movie." We might even imagine a speaker putting this to use in an awkward situation, literally expressing only that she has work to do, and thus (arguably) not lying, even while she pragmatically communicates the false proposition that she does not have the time to see a movie.

But not all cases of pragmatic communication are so easily spotted. Consider a case of what Grice calls *relevance implicature*.

(6)
(a) Who all was at the party?
(b) Sarah and Danny were both able to make it.

On Grice's account, the speaker of (6b) literally expresses only that Sarah and Danny had, in some sense, the ability to attend the party. But, on the assumption that she is being even minimally cooperative as an interlocutor, her listener can infer that Sarah and Danny not only had the ability, but in fact attended the party. As Grice emphasizes, what is important to the analysis is that such a line of reasoning *could* be undertaken by the listener: the speaker said that Sarah and Danny had the ability to attend; if they were able to attend but didn't actually come, then the utterance would be unhelpful; but the speaker was probably trying at least a little to be helpful; so Sarah and Danny must have actually attended the party.

This line of reasoning must be *available*, but it's no part of the analysis that the listener must actually run through it. Rather, the listener arrives at the actual, intended meaning essentially automatically, without the need to reason on the basis of any particular assumptions about what is semantically, rather than pragmatically, communicated. And in this case, that's a

good thing. It's actually quite strange to think of the speaker of (6b) as *not* having said that Sarah and Danny attended the party. It would be slippery indeed for the speaker of (6b) to argue that she wasn't lying even though Sarah and Danny never showed up, and it's easy to imagine it being quite difficult to persuade her listeners that she never said that Sarah and Danny were there. The distinction between literal content and relevance implicature is interesting and important to the theorist. But it's a subtle distinction, one that ordinary speakers don't have much reason to care about and would not necessarily have accurate intuitions about if they did.

Finally consider a case of what Grice called *quantity implicature*.

(7)
(a) How many cats does Randall have?
(b) He has three cats.

According to Grice and later theories in that tradition, the speaker of (7b) has literally expressed only that Randall has at least three cats. But that of course is consistent with Randall having an additional seven cats, for a total of ten. Reasoning of the familiar sort allows the listener to infer the logically stronger proposition that Randall has exactly three cats. But this analysis is hardly uncontroversial. Some linguists have argued that expressions like (7b) *do* literally express the *exactly* meaning.[21] If these alternative theories are correct, then it *is* part of the literal content that Randall has exactly, and not at least, three cats, and it was wrong to think that the *exactly* part was pragmatic and not semantic. But here's the important point: if the distinction between semantic and pragmatic aspects of (7b)'s communicative upshot is controversial among *theorists*, then we could hardly expect it be clear to *ordinary speakers*. The distinctions between literal and pragmatic ways of communicating information are subtle, esoteric, and often controversial among theorists themselves. In some cases, there are tests that can be used to distinguish pragmatic from semantic content—cancelability, projection, and the like. But ordinary speakers are unlikely to be aware of such tests, and more importantly, they'd have no need for them. As long as we succeed in communicating what we intended, the mode of communication is not important except to the theorist with an independent interest in it.

The case can be stated even more strongly: drawing the distinctions between semantic and pragmatic modes of communication involves technical, theoretical notions that ordinary speakers may not even have at their disposal. Given the role played by theoretical notions from empirical syntax, semantics, and pragmatics in even making the relevant distinctions, it is not at all clear that we should think of ordinary speakers as *having* intuitions in this domain. As the dialogue in (5) shows, speakers do have intuitions about what was "said" rather than "implied" in some sense, but extreme caution is called for in projecting from ordinary judgments like these to judgments involving the corresponding theoretical notions deployed

by linguists and philosophers of language. Thus, it is not even clear that when we claim that such-and-such dispute is a metalinguistic negotiation we are thereby forced to describe speakers as "mistaken" when it comes to their intuitions about modes of communication. If error is a problem for the metalinguistic analysis, it will have to do with the second distinguishing feature of metalinguistic negotiations—their distinctive normative topic, conceptual ethics.

III.2 Conceptual Ethics

When speakers engage in a metalinguistic negotiation they disagree about how words should be used in the relevant context. This will, in many cases, consist in a disagreement about which among a set of candidate concepts should serve as the meaning of the expression, at least for the context at hand. In our actual practices, linguistic expressions can play certain functional roles, irrespective of the precise meaning we assign to them. It thus matters what a term means, even if, in the first instance, the disagreement is about language. Thus, for example, speakers disagreeing about what 'book' should mean, in the context of rewriting departmental regulations, have good reason to care about the outcome of their negotiation because it will have downstream effects on group decision-making about promotions.

But, as with the first distinctive feature of this analysis, this may not correspond very closely to what you'll hear if you ask the speakers what they're up to. People on sports radio making claims like "Secretariat is one of the greatest athletes in the twentieth century!" may be brought around to the idea that in some sense they're arguing about the meaning of 'athlete', but it could take some effort. Colleagues arguing about Charlie's publication record may be persuaded that their disagreement is, in some minimal sense, about the meaning of 'book', but it could take quite a lot of effort. In either case, it would not be surprising for participants to insist till the end that the argument is about important, first-order issues, and in no sense about semantics.[22] So here, too, the metalinguistic analysis of such cases appears to attribute error to the speakers.

But, here too, it is easy to overstate both the extent to which the metalinguistic analysis in fact attributes error, and the extent to which the error it does attribute is theoretically worrisome. In this case the reason is that in typical situations, issues in conceptual ethics closely parallel corresponding normative issues that are not in conceptual ethics. While it is in principle possible for issues in conceptual ethics to come apart from their first-order correspondents, in typical cases the two march in parallel. Thus, in typical cases, one way of discussing or debating the first-order issue is to discuss or debate the corresponding issue in conceptual ethics. The distinction between the two thus becomes quite subtle, and in most cases, irrelevant to the goals of the speakers involved. To the extent that speakers are even aware of the difference, they may not have accurate intuitions about which type of debate

they're having. More likely, their intuitions will not be fine-grained enough to even describe them as mistaken.

To see this, consider again the scenario in BOOK 4. According to the metalinguistic analysis, Don and Peggy are, in the first instance, negotiating a question about language and thought: how, for present purposes, should the word 'book' be used? What concept is best suited to the role played by that expression in the departmental context? In one sense then, Don and Peggy are arguing about semantics. However, as we have emphasized, the argument is not *merely* about semantics. Because of the functional role played by the expression 'book' in the practices of the department, a lot hangs on Don and Peggy's determination of which concept is best suited to play that role. The decision between concepts differing by their inclusion or exclusion of, for example, collections of essays, will have concrete consequences in future promotion decisions. Thus, even though Don and Peggy are in one sense arguing about semantics—which is the *immediate* topic of disagreement—they are also having an argument about important and quite concrete issues of departmental policy. Because of the functional role played by the word, arguing about 'book' is *one way* of arguing about the criteria by which to make promotion decisions.

What's important to note about this analysis is that Don and Peggy's reasons for engaging in this argument about how to use the word 'book' boil down to this: how should the department evaluate the research success of its members? Should the author of a collection of essays be, in virtue of that, a sure thing for tenure? But these are *precisely* the reasons Don and Peggy would have for arguing on an analysis according to which there *was* an antecedently specified meaning for 'book'. On *any* successful analysis of Don and Peggy's discourse, their reasons for arguing will boil down to these questions of coordinated action and decision-making. Thus, the issue in conceptual ethics—whether 'book' should apply to collections of essays (in a context where aptly being described as "having written a book" is associated with being a sure thing for tenure)—closely corresponds to the first-order issue of whether tenure candidates who have written a collection of essays should for that reason be a sure thing for tenure.

The distinction between the argument in conceptual ethics and the corresponding argument that is not in conceptual ethics is, in a case like Don and Peggy's, subtle and of little practical importance. Insofar as the participants have intuitions one way or the other about the precise manner in which they're arguing departmental policy, there's no reason to expect those intuitions to be terribly fine-grained or accurate. Much more plausibly, Don and Peggy's intuitions are in fact coarse-grained: they think that they're arguing about whether candidates who have published a collection of essays should thereby be a sure thing for tenure. And, on the metalinguistic analysis, that intuition is entirely correct.

It is too strong to claim that, in every case, the matters that settle a question in conceptual ethics will settle some closely corresponding question

outside of conceptual ethics. Nevertheless, in typical cases, when the metalinguistic analysis claims that the real topic of disagreement is one in conceptual ethics, that topic will parallel the "first-order" issues in such a way as to render the difference academic to anyone but the theorist herself. In the context of Don and Peggy's dispute, arguing about how to use 'book' is *one way* to argue about promotion decisions. In the context of a debate on sports radio, arguing about how to use 'athlete' is *one way* of arguing about whether Secretariat is owed certain kinds of esteem or reward. The connection between these expressions and the roles they play in coordinated decisions and action is not analytic. But because the expressions play the functional roles they do, arguments about how to use them can matter a great deal, and matter in precisely the ways that the relevant arguments intuitively do. The only difference between a traditional and a metalinguistic analysis of the relevant disputes is thus a subtle one between different methods for debating the same issues. That is a difference that speakers are unlikely to have clear or reliable intuitions about. Most plausibly, the intuitions that speakers do have are sufficiently coarse-grained that the metalinguistic analysis would not even count as ascribing error.

III.3 Special Features of the Legal Context

The problem of error arises for anyone who advances a theory of communication in conflict with ordinary intuitions. But it might be that in the legal context—populated largely by educated speakers paying very close attention to language—the problem is particularly pressing. So we close this section by observing that there are additional features of the legal context that can mitigate this worry.

We begin by observing that a central component of *folk-linguistic* theories, at least within the cultural and economic elite of Western cultures, is a strong commitment to the notion of public language and public meanings. This component of folk-linguistic theories leads naturally to a suspicion of disagreements about language. After all, "words mean what they mean," however anybody happens to be using them.[23] Correspondingly, arguments that are "just semantics" are unlikely to be substantive in any sense; one of the parties must simply be misusing the term. Speakers with a strong commitment to their arguments' being understood as "substantive" will thus be resistant to any analysis that seemingly reduces the debate to a dispute about language.

This observation is significant *rhetorically* irrespective of whether the speaker herself buys into the relevant folk-linguistic assumptions. And these negative connotations of an argument's being about semantics are compounded by features of the legal context in particular. Legal actors often speak in contexts where their claims and arguments must be persuasive to a wide and highly varied audience. They must have in mind not just the present audience, but also other legal actors, the general public, and even future

decision-makers who will be influenced via precedent. Even if such an actor *agreed* that her claims were, in the first instance, about language, she would have very good practical reasons not to parade around that feature of the discourse.

In addition, it is a widespread (though hardly universal) assumption among legal actors, political actors, and the general public, that the primary business of judges is *not* to make new law in any sense, but simply to apply the law. Whatever the legal or philosophical merits of such an assumption, it creates a rhetorical backdrop against which it can be highly disadvantageous to frame one's arguments as advancing claims about what the law should be.[24] This point applies both to judges writing judicial opinions and to lawyers making arguments in a courtroom. Metalinguistic negotiation thus provides a tool that allows the legal actor (whether that actor is conscious of this or not) to frame her arguments in a way that makes them appear a lot like first-order questions about the application of shared concepts within the project of legal reasoning, even though they are in fact arguments in conceptual ethics that are part of an argument about what the law should be.

Against a cultural backdrop characterized by suspicion of "just arguing semantics" and commitment, for better or worse, to the idea that legal actors should simply apply the law, a disagreement about the meaning of a word like 'freedom' seems less pressing, and less legitimate, than a disagreement about *the true nature of freedom*. As we've argued, these two types of debate will, in most cases, boil down to the same set of normative and evaluative considerations, and thus, if the second debate is aptly described as "moral," then so too is the first. But arguing about the meaning of a word *sounds* less important, and risks the appearance of violating widely held norms about the goals of legal practice. These kinds of rhetorical considerations are, for very good reason, extremely significant to speakers in the legal context. They are significant irrespective of whether the legal actor herself would endorse the relevant assumptions. And they provide yet further resources—resources specific to the legal context—for the positivist to draw on in addressing the Error Issue.

IV. OUR VERSION OF THE MULTIPLE PROJECTS RESPONSE

We've argued that speakers who are involved in a metalinguistic negotiation are prone to be blind to—or at least reluctant to acknowledge—that fact. We now bring these considerations to bear on the Multiple Projects Response to the Argument from Legal Thought and Talk. Take some legal dispute, D, that the proponent of the Argument from Legal Thought and Talk takes to cause trouble for the positivist. For our purposes, it won't matter what the dispute is, since the points here are schematic.[25] Suppose that the actors involved in D take themselves to be engaged in a canonical moral dispute

in the service of legal reasoning, that is, in the service of figuring out what the law is in the relevant jurisdiction at the relevant time. For the reasons we sketched in the introduction, the proponent of the Argument from Legal Thought and Talk takes this as the basis for an argument against legal positivism. In turn, the proponent of the Multiple Projects Response claims the following: the speakers in D are citing genuine moral considerations, and they are doing so as part of a moral argument. But they are wrong about the project that the moral argument is in the service of.

This is where the Error Issue comes in. While legal actors engaged in disputes resembling D may differ in their intuitions, it is easy to imagine such actors rejecting quite forcefully an analysis on which their disagreement is *not* about what the law is, but rather what law should be. The proponent of the Multiple Projects Response should have an account of what this other activity is (the Other Projects Issue) and an explanation for why the speakers are mistaken about what they are doing (the Error Issue).

On our analysis, one has a clear way to address both of these questions. The speakers take themselves to be arguing about the content of the law. On a positivist metalinguistic analysis of the dispute, they are arguing about what certain, antecedently indeterminate, terms should mean. According to this analysis, they do so as an indirect way of arguing about what the law couched in those terms should be. These aspects of the view do not entail each other; it might be, for the *antipositivist*, that the meaning of the expressions is indeterminate even while the content of the law *is* determinate. Nevertheless, for the positivist—looking to make a defensive maneuver in response to the Argument from Legal Thought and Talk—the complementarity of the metaphysical and linguistic components of the view is striking. The content of the law is partially indeterminate. This is reflected in the fact that the meanings of the relevant texts are partially indeterminate as well. In order to settle on a determinate content for the law—in order to figure out what the content of the law should be—the parties to the dispute negotiate what the meanings of the relevant texts should be. That is the Other Project in which they are engaged.

This account then has a built-in response to the Error Issue. Speakers in *any* context, legal or otherwise, are not well situated to notice, and do not have much reason to care about, the difference between canonical disputes and metalinguistic negotiations. The difference between a disagreement about how a determinate expression is accurately applied and a disagreement about how a partially indeterminate expression *should be* applied may matter a great deal to the theorist. But for all of the reasons canvassed above, it is not likely to matter very much—and in any case is very unlikely to be transparent to—the speakers involved. This is what allows our view of legal communication to go beyond standard versions of the Multiple Projects Response, versions that simply assert that legal actors argue about what the law should be as well as what it is. Our view not only says that participants in the relevant disputes argue about what the law should be. It also explains how exactly they do so, and why those arguments are so easily mistaken for genuine legal reasoning. It is thus especially well positioned to play a role in a more general positivist account of the metaphysics of law.

NOTES

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1. This account of legal antipositivism draws on the formulations in M. Greenberg, "How Facts Make Law," in *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin*, S. Hershovitz ed. (Oxford UP, 2006); S. Shapiro, *Legality* (Harvard UP, 2011); and G. Rosen, "Metaphysical Dependence: Grounding and Reduction," in *Modality: Metaphysics; Logic, and Epistemology*, B. Hale and A. Hoffmann eds. (Oxford UP, 2010).
2. As with the above account of legal *anti*positivism, this account of legal positivism draws on the formulations in Greenberg, "How Facts Make Law"; Shapiro, *Legality*; and Rosen, "Metaphysical Dependence." It should be emphasized that our argument in this paper doesn't depend on this particular way of carving up the antipositivism/positivism debate. If one prefers the way of defining the debate one finds in J. Gardner, "Legal Positivism: 5½ Myths," *American Journal of Jurisprudence* 46 (2001), for example, it won't significantly affect the arguments in this paper. This is because our arguments have to do with the explanatory power of a certain view of legal thought and talk, and not with the details of the nature of legal positivism or antipositivism.
3. Our sketch of this general argument form against legal positivism, as well the basic form of the response we give in this paper on behalf of legal positivism (namely, what we call the *Multiple Projects Response*), draws heavily on the discussion in Shapiro, *Legality*, 234–81. As Shapiro emphasizes, the general argument form that we are here considering against positivism is advanced in many different more specific forms. For one important version of it, see R. Dworkin, "Model of Rules I," in *Taking Rights Seriously* (Harvard UP, 1978).
4. This way of using the term 'legal facts' draws on Greenberg, "How Facts Make Law."
5. Our restricted definition of 'legal reasoning' here draws on the definition from Shapiro, *Legality*, 234–58.
6. For a forceful articulation of this line of thought, see H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford UP, 1983).
7. Other positivists may dispute that the relevant claims are genuinely *moral*. We grant for the sake of argument that they are, and locate the mistake elsewhere—in the question of which project those claims are contributing to.
8. We advance this view of legal communication in D. Plunkett and T. Sundell, "Dworkin's Interpretivism and the Pragmatics of Legal Disputes" (manuscript). This view of legal communication draws heavily on our work in "Disagreement and the Semantics of Normative and Evaluative Terms," *Philosophers' Imprint* (forthcoming). For a related view of communication that also emphasizes the sorts of exchanges that we call "metalinguistic negotiation" see P. Ludlow, *The Dynamic Lexicon* (manuscript). Ludlow's view is

closely related to our own, but is more radical than ours in a number of key respects. We are sympathetic with much of what Ludlow argues, but our view doesn't depend on endorsing the full range of Ludlow's claims.

9. Here we follow one standard convention within contemporary philosophy and use small caps to designate concepts. On this convention, see *Concepts: Core Readings*, E. Margolis and S. Laurence eds. (MIT Press, 1999).
10. It is worth emphasizing here that our positivist response to the Argument from Legal Thought and Talk might fruitfully be combined with other positivist responses. One other important response worth mentioning in this regard involves appeal to the thesis of *inclusive legal positivism*, which is roughly the thesis that moral facts may sometimes play a role in explaining legal facts, but only in virtue of the obtaining of certain contingent social facts. The inclusive legal positivist can accept the idea moral facts *are* among the grounds of the legal facts in some legal systems, but deny that they are among the *ultimate* grounds, which is what the antipositivist claims. (There are different ways of cashing out what 'ultimate grounds' means here. For our purposes in this paper, we can take it to involve at least the following idea: the *ultimate grounds* of legal facts are those facts that ground the legal facts simply because of what law *is*, and not because of the obtaining of such-and-such contingent facts.) For a fuller discussion of how inclusive legal positivism might be used to respond to the Argument from Legal Thought and Talk, see Shapiro, *Legality*, 234–81. We take it that an appeal to inclusive legal positivism is entirely consistent with the analysis we advocate here.
11. If this sociological claim is wrong then our work in defending legal positivism becomes even easier. So we are not stacking the deck in our favor. On the contrary, we are granting an important and perhaps controversial premise in an argument that is targeted *against* the sort of positivist view that we favor.
12. The Error Issue is not a problem only for positivists. Dworkin's antipositivism, for example, explains the role that moral considerations play in legal thought and talk in part with his theory of "interpretive" concepts. Yet as Dworkin himself observes, "few people who use the concept of democracy would agree that what a democracy is depends on which political theory provides the best justification of paradigms of the concept. Most would insist that they rely on a criterial or commonsense account of the matter, or none at all. But we nevertheless need the idea of an interpretive concept to explain their behavior. . . . People are not always or even often aware of the buried theoretical structure needed to justify the rest of what they think" (R. Dworkin, *Justice for Hedgehogs* [Harvard UP, 2011], 163).
13. The terminology of "conceptual ethics" is drawn from A. Burgess and D. Plunkett, "Conceptual Ethics I" and "Conceptual Ethics II," *Philosophy Compass* (forthcoming). These papers also provide a more detailed overview than we do here of what exactly work in conceptual ethics involves and why it is worth pursuing.
14. Our core thought about the possibility of "metalinguistic" usages of terms in this way draws heavily on C. Barker, "The Dynamics of Vagueness," *Linguistics and Philosophy* 25, 1–36. However, Barker is concerned with metalinguistic usages of context sensitive expressions, while that is not our focus here. And Barker does not there consider disagreements involving metalinguistic usages, though he takes that issue up in later work. See his "Negotiating Taste," *Inquiry* 56, 240–57.
15. This stipulation requires different degrees of idealization depending on one's background views, but the details will not matter for our argument. On any set of background assumptions, the relevant details can be made plausible.

16. A terminological point: it is useful to distinguish between conflicts between speakers' attitudes or beliefs on the one hand, and the linguistic exchanges by which they voice those conflicts on the other. We use 'disagreement' to refer to the relevant type of conflict in attitudes, and 'dispute' to refer to a linguistic exchange (more precisely, we use it to refer to a linguistic exchange that *appears* to evince a disagreement). For fuller discussion of our use of this terminology in this way, see Plunkett and Sundell, "Disagreement and the Semantics of Normative and Evaluative Terms."
17. Shapiro, *Legality*, 235–37.
18. For our fuller defense of the claim that many ordinary disputes are in fact metalinguistic negotiations, see Plunkett and Sundell, "Disagreement and the Semantics of Normative and Evaluative Terms." For our discussion of the way in which many disputes in the legal context in particular are metalinguistic negotiations, see "Dworkin's Interpretivism and the Pragmatics of Legal Disputes."
19. P. Ludlow, "Cheap Contextualism," *Philosophical Issues* 18 (2008).
20. See H.P. Grice, "Logic and Conversation," in his *Studies in the Way of Words* (Harvard UP, 1989).
21. See, for example, G. Chierchia, "Polarity Phenomena and the Syntax/Pragmatics Interface," in *Structures and Beyond*, A. Belletti ed. (Oxford UP, 2004).
22. To the extent that these generalizations are false—to the extent, that is, that speakers do *not* resist an analysis on which their argument is in the first instance about meaning—our job becomes significantly easier. We focus on ordinary speakers who resist a metalinguistic analysis of their disputes so as not to stack the deck in our own favor. But clearly, speakers will vary greatly in the analyses they happen to find plausible.
23. Pronouncements like this often convey quite admirable sentiments—they are simply sentiments that we would state in some other way.
24. For more on this basic idea, see A. Marmor, *Philosophy of Law* (Princeton UP, 2011), 90.
25. Again, we do not claim that all "hard cases" are in fact metalinguistic negotiations, but that enough of them are to make this response important to the positivist. Individual analyses must be motivated on a case-by-case basis.