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Legal Agreement

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LEGAL AGREEMENT

*Andrew Tutt**

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I. INTRODUCTION

Every day, children in classrooms across the country are told they must stand and recite the pledge of allegiance in unwitting violation of the First Amendment.¹ Meanwhile, in cafeterias from Kansas to California, children forego their own quiet prayers, believing even private prayer in school to be prohibited.² Police officers stop citizens and ask for their consent to searches and interrogations.³ Many say yes because they do not believe they can say no.⁴ People jaywalk, adversely possess, claim exemptions, and refuse to pay their taxes because they dubiously believe they can legally do so.⁵ Merchants write and people sign contracts without the remotest idea whether the terms are enforceable or whether the oral promises they exchange have changed it.⁶ Even in run-of-the-mill litigation, experienced commercial litigators and criminal lawyers routinely argue over discovery rights, enlargements of time, and the meaning of words like “jurisdiction,” “unfairness,” and the “interests of justice.” They do not always do this because they are villainous law abusers. Often, they do it because they sincerely disagree about what the law requires.

Yet, lawyers, laymen, law professors, and legal scholars often insist that “there is massive and pervasive agreement about the law throughout the system.”⁷ These claims are frequent and seldom carefully examined.

1. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

2. See John M. Swomley, *Myths About Voluntary School Prayer*, 35 WASHBURN L.J. 294, 297 (1996).

3. Schneckloth v. Bustamonte, 412 U.S. 218, 220 (1973).

4. Adrian J. Barrio, Note, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court’s Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215, 233 (1997) (“The most baffling aspect of the Supreme Court’s conception of voluntary consent is that it virtually ignores the well-documented observation that most people mechanically obey legitimate authority.”); see also *People v. Spicer*, 203 Cal. Rptr. 599, 602 (Cal. Ct. App. 1984) (“[T]he greatest legal fiction of the late 20th Century . . .”).

5. Bert I. Huang, *Shallow Signals*, 126 HARV. L. REV. 2227, 2229, 2232 (2013) (explaining the concept of “shallow signals” in which “the law’s design may contribute to . . . misperception, and in which . . . misguided imitation [of conduct that is legal for A] results in illegal conduct [by B].”).

6. Russell Korobkin, *The Borat Problem in Negotiation: Fraud, Assent, and the Behavioral Law and Economics of Standard Form Contracts*, 101 CALIF. L. REV. 51, 57 (2013) (“The . . . Problem exists on the border between contract and tort law, creating confusion for courts and leading to inconsistent rulings.”).

7. Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1227 (2009). (“[T]here is massive and pervasive agreement about the law throughout the system.”); *id.* at 1228 (“To be sure, we must concede the obvious: massive agreement about the law—not

Nevertheless, when it is insisted that there is widespread agreement about the law, it is often unclear what that means. Is it agreement about what is illegal? As in, what laws there are and what they prohibit or allow? Is it agreement about how to find out if something is illegal? As in, what sources you might look to, or how you might reason about those sources? Is it a prediction about what will happen in a case, what conduct will be scrutinized, or what cases will be brought?

If the question was put to you, and I claimed that there was massive and pervasive agreement about the law, what would you think I meant by that? How would you understand whether it was a true statement? If it was a true statement, what would it mean for theories of law and adjudication? This last question is especially interesting, because in the eyes of many Legal Positivists, the existence of massive agreement strikes a decisive blow in favor of that theory.⁸

This Article grapples with the question of what it means to agree about what the law is. First, it shows that the question of what it means to “agree about the law” invites us to consider many different kinds of agreement and disagreement we might have about what the law is. Second, it shows that without selecting one of these kinds of agreement, we cannot speak intelligibly about whether we agree or disagree. Third, it explains that this failure to choose is a source of much confusion and apparent disagreement between competing philosophers and philosophies of law. Fourth, it argues that the presence or absence of at least certain kinds of agreement cannot tell us whether we should prefer Legal Positivism or other theories of law. Finally, it concludes that the pervasive reliance among Positivists on a generalized notion that there exists “massive agreement” about the law should be regarded

disagreement—is the norm in modern legal systems.”); *id.* at 1231 (“At the base of the pyramid, ordinary language and ordinary meaning hold sway, which, together with the convergence of officials on criteria of legal validity, render most cases clear and produce massive agreement in legal judgments.”); *see also* Brian Leiter, *Why Legal Positivism (Again)?*, 11 (U. Chi. Law Sch. Pub. Law & Legal Theory Working Paper No. 442, 2013), *available at* <http://ssrn.com/abstract=2323013> (“[T]here exists massive agreement about what the law is in the vast, vast majority of legal questions that arise in ordinary life. If there were not massive agreement on the law, then every modern legal system would collapse under the weight of the disputes that resulted.”); John Oberdiek, *Specifying Constitutional Rights*, 27 CONST. COMMENT. 231, 246 (2010) (reviewing GRÉGOIRE C.N. WEBBER, *THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS* (2009)) (“As a general matter, no one should deny that there is widespread agreement about the law. . . .”); Garrick B. Pursley, *Defeasible Federalism*, 63 ALA. L. REV. 801, 839 (2012) (“[There is] widespread agreement about law’s constraints”); Eric J. Segall, *Justice Scalia, Critical Legal Studies, and the Rule of Law*, 62 GEO. WASH. L. REV. 991, 1029 (1994) (“[O]ur legal system presently contains enough clear rules to allow us to govern our day-to-day behavior. . . .”).

8. *See, e.g.*, Leiter, *Explaining Theoretical Disagreement*, *supra* note 7, at 1227; Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 413 (1985).

skeptically.

II. WHY TALK ABOUT LEGAL AGREEMENT?

Why should we be concerned with the concept of legal agreement at all? To answer that question, it might be best to take a step back before stepping forward. Legal philosophers have long been concerned with variants of the question, “What is law?”⁹ They have asked, “What is law?” and meant, what makes law uniquely “law” and not something else—a game, a policy, or a plan?¹⁰ They have also asked, “What is law?” and meant, must there be law, and must it be one way and not another?¹¹ They have also asked, “What is law?” and meant, what role does or should law play in society?¹² They have also asked, “What is law?” and meant, what is necessary or sufficient for something to be the law or against it?¹³ They have also asked, “What is law?” and meant, how do we define or identify that category of things we call laws?¹⁴ They have also asked, “What is law?” and meant, what does or should the law entitle people to do, or to have?¹⁵ They have also asked, “What is law?” and meant, what will a court do when confronted with a case?¹⁶ And this is a non-exhaustive list.

The question, “What is law?” is a difficult one because it is difficult to know what exactly is being asked.¹⁷ But there is a different question that will help us answer a number of these other questions. That different question is whether, for something to be “the law,” officials must agree with each other that it is the law, or whether there need not be such agreement. Answering this question can tell us a great deal about these other questions. It can help us understand what distinguishes law from other social practices. It can help us know what purposes law does or should serve in society. It can help us, in the actual practice of law, to identify those arguments that are legal and those arguments that are non-legal. The fact of widespread agreement—and, in particular, widespread agreement of a particular kind—would be enormously significant if we understood it well.

9. See John Gardner, *Legal Positivism: 5 1/2 Myths*, 46 AM. J. JURIS. 199, 223-24 (2001) (simultaneously lamenting and extolling this litany of “What is law?” variants and its confusions).

10. *Id.* at 226-27.

11. *Id.* at 224.

12. *Id.*

13. *Id.* at 223.

14. *Id.* at 222.

15. *Id.* at 224.

16. *Id.*

17. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 14 (1977) (making this point).

According to the leading theory of law, Legal Positivism, for a law to be “law,” there must be agreement among officials about what it is and what it dictates.¹⁸ On this view, a judge would be right on the law to hold a particular individual accountable for murder in a particular case only if that judge acted pursuant to a convention among legal officials dictating that the judge do so.¹⁹ This convention, or “social rule,” called the rule of recognition sets the criteria by which a judge decides what the law is and how to apply it.²⁰ Where the rule of recognition is unclear, the law is unclear, and the judge must exercise discretion in deciding the case.²¹ There is no fixed or determinate law to apply in such cases.²²

Put another way, Legal Positivism argues that the very means of discovering whether something is against the law is to see if, in the mine run of cases, when the question is put before different judges, those judges apply the same criteria for determining legal validity and reach

18. See, e.g., SCOTT J. SHAPIRO, *LEGALITY* 290 (2011) (“The idea that the criteria of legality are determined by consensus is not just one aspect of legal practice among many; on current accounts of legal positivism, it is *the fundamental ground rule of law*. What ultimately makes it the case that some rule is a binding legal rule is that it is validated by some standard accepted by officials of the group.”); STEVEN J. BURTON, *LAW AS PRACTICAL REASON*, 62 S. CALIF. L. REV. 747, 766 (1989) (“The rule of recognition, and all of the laws identified by it, rest on a social convention.”); JULES L. COLEMAN & BRIAN LEITER, *DETERMINACY, OBJECTIVITY, AND AUTHORITY*, 142 U. PA. L. REV. 549, 591 (1993) (“The scope of legal reasons will be set by ‘a rule of recognition’ or binding sources and conventions, whereas the scope of legitimating reasons for acting will be set by the relevant political theory of the state.”).

19. This is perhaps the Maginot line between the theory of law expounded by Ronald Dworkin, who contends that there can be law without convergent social practices, see, e.g., DWORKIN, *supra* note 17, at 36, and those who reject this view, see, e.g., LEITER, *Explaining Theoretical Disagreement*, *supra* note 7, at 1222. One way of framing the difference between believing judges do or don’t seek to apply—but rather “make”—law turns on whether one believes umpires always merely call balls and strikes or sometimes make them. See CHARLES YABLON, *On the Contribution of Baseball to American Legal Theory*, 104 YALE L.J. 227, 234 (1994) (“Consider the legendary discussion among three umpires as to the proper way to judge whether pitches are balls or strikes. Says the first, ‘I call them as I see them.’ The second counters, ‘I call them as they are.’ The third responds, ‘they ain’t nothing until I call them.’”); see also DWORKIN, *supra* note 17, at 32-34, 39 (“Positivists treat law like baseball revised this way [allowing the umpires to occasionally redefine ‘balls’ and ‘strikes’]”).

20. See, e.g., W. BRADLEY WENDEL, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 102 & n.119 (2005) (“The rule of recognition specifies binding criteria for legal officials to use in deciding whether a given norm is a rule that is part of a legal system.”).

21. H.L.A. HART, *Discretion*, 127 HARV. L. REV. 652, 653 (2013) (recently rediscovered, published posthumously) (setting forth “cases where everyone would agree that we have the phenomenon of discretion”).

22. See, e.g., CASS R. SUNSTEIN, *Problems with Rules*, 83 CALIF. L. REV. 953, 984 (1995) (“When the law confronts an unanticipated situation raising questions about its underlying goals, the problem of open texture will arise, and people interpreting the law will have discretion, in a sense, to make law on their own.”).

the same results.²³ There might be problems of talent, capacity, clarity, knowledge, and so forth in the doing, but the application of law—*true* law—is the solving of a formula, not the painting of a portrait.²⁴ There is agreement on what the symbols and operators mean and how they fit together. A good judge who confronts an easy case could fit the symbols and operators together as a matter of expertise in the performance of his duties and nothing else.²⁵

This leads to a critical lemma of Legal Positivism, which is that there is no necessary connection between law and morality.²⁶ While Legal Positivists are willing to say that moral considerations can be operators in the legal formula, none will say that they *must* be. This has become so synonymous with Legal Positivism that some argue the separation of law and morals is Legal Positivism's constitutive feature²⁷ (though it is fairer to say that dependence on a particular kind of conventionality is actually its defining feature).²⁸

23. Leiter, *Explaining Theoretical Disagreement*, *supra* note 7, at 1222 (“[T]he only dispute about the criteria of legal validity that is possible, on Hart’s view, is an empirical or ‘head count’ dispute: namely, a dispute about what judges are doing, and how many of them are doing it, since it is the actual practice of officials and their attitudes towards that practice that fixes the criteria of legal validity according to the Positivist.”).

24. *Cf.* Jerome Frank, *What Courts Do In Fact*, 26 ILL. L. REV. 645, 648-49, 666 (1932) (caricaturing formalism as reducing law to “Rules Times Facts = Decision”).

25. As a Positivist would be the first to tell you, the very notion that we can speak intelligibly about one judge or lawyer being better at the law, and one being worse, confirms this facet of Legal Positivism. *See* Joseph Raz, *Legal Positivism and the Sources of Law*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 37, 48-50 (2d ed. 1979). But this argument is not particularly strong for the same reasons that the argument from agreement is not particularly strong. *See infra* Part III. To give something of a preview: history has managed to rank painters and statesmen, but few would say they are like mathematicians.

26. Some would take issue with this formulation of Legal Positivism’s most famous lemma. John Gardner rejects its existence. *See* Gardner, *supra* note 9, at 201. Jules Coleman embraces it. *See* JULES COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY 152 (2001); *id.* at 104 n.4 (“As I have used the term, the separability thesis is the claim that there is no necessary connection between law and morality. That claim does express a tenet of Positivism. . . .”). Positivists appear to be confused about their position on the question. *See* Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 N.Y.U. L. REV. 1035, 1037-38 (2008).

27. *See, e.g.*, COLEMAN, *supra* note 26, at 151 (“It is common to characterize Legal Positivism in terms of two basic tenets: the social fact thesis and the separability thesis. Of the two, the separability thesis is more familiar, more closely associated with Positivism, and more contested—all of which strikes me as somewhat mystifying”); HOWARD DAVIES & DAVID HOLDCROFT, JURISPRUDENCE: TEXTS AND COMMENTARY 3 (1991) (“the quintessence of Legal Positivism”).

28. *See, e.g.*, COLEMAN, *supra* note 26, at 107-08 (“If what unites exclusive and inclusive Legal Positivism is a commitment to the conventionality of the criteria of legality, what distinguishes them is a difference over what can count as a criterion of legality.”); Gardner, *supra* note 9; Green, *supra* note 26, at 1057 (“Law is a matter of social rules . . . the rule of rules . . .”).

There are other theories of law, some of which disagree fundamentally with Legal Positivism's major premise that legal validity is determined by a particular kind of conventionality among legal officials. For instance, Natural Law theories have often held that law is something outside of us—an omnipresence, like numbers perhaps, that seems simply to exist.²⁹ Other theorists have argued that law has no conventionality unique to it,³⁰ or it need not, does not, or cannot depend on conventionality.³¹ Those who reject conventionality entirely take the view that law is whatever the judge says it is: the interpreter of the law is its author.³² This view is often associated with Legal Realism,³³ and later critical legal studies,³⁴ and is sometimes called the argument from indeterminacy³⁵ or rule skepticism.³⁶ Every legal ruling is simply the

29. See, e.g., JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 23 (2d ed. 1980); MICHAEL BERTRAM CROWE, *THE CHANGING PROFILE OF THE NATURAL LAW* 6 (1977).

30. This was seemingly the position of Lon Fuller and, at various times, Ronald Dworkin. See LON L. FULLER, *THE MORALITY OF LAW* 140-41 (rev. ed. 1964); RONALD DWORIN, *JUSTICE IN ROBES* 188-89 (2006); Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 627 (1987).

31. See, e.g., COLEMAN, *supra* note 26, at 166 (“Dworkin rejects conventionalism of all kinds and at every turn.”); RONALD DWORIN, *LAW’S EMPIRE* 138 (1986) (“[N]othing *need* be settled as a matter of convention in order for a legal system not only to exist but flourish.”).

32. See, e.g., LEARNED HAND, *THE BILL OF RIGHTS* 8 (1958) (quoting Bishop Hoadley’s sermon before George the First in 1717: “Whoever hath an absolute authority to interpret written or spoken laws; it is he who is truly the lawgiver to all intents and purposes and not the person who wrote or spoke them.”).

33. See, e.g., Michael Steven Green, *Legal Realism As Theory of Law*, 46 WM. & MARY L. REV. 1915, 1917-18 (2005) (“According to this theory, statutes and the like may be law, but they are too indeterminate to be significant influences on, or predictors of judges’ decisions. Because the law is indeterminate, judges actually decide cases on the basis of non-legal considerations.”); see also H.L.A. HART, *THE CONCEPT OF LAW* 136 (2d ed. 1994) (characterizing Legal Realism as the view “that talk of rules is a myth, cloaking the truth that law consists simply of the decisions of courts and the prediction of them . . .”); DWORIN, *supra* note 17, at 3 (characterizing Legal Realism as the view that “judges actually decide cases according to their own political or moral tastes, and then choose an appropriate legal rule as a rationalization.”); Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CALIF. L. REV. 200, 203 (1984) (painting Legal Realism as the view that “the judge simply selects the result that best comports with personal values and then enlists, sometimes brutally, whatever doctrines arguably support the result.”).

34. See, e.g., Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 227-35 (1986); Girardeau A. Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473 (1984); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 12 (1984); Mark V. Tushnet, *Perspectives on Critical Legal Studies: Introduction*, 52 GEO. WASH. L. REV. 239, 241-42 (1984); Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 351-54 (1973).

35. See, e.g., Ken Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283-84 (1989); Brian Leiter, *Legal Indeterminacy*, 1 LEGAL THEORY 481, 487 (1995).

36. See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 479-80 (1987) (critiquing it); Mark V. Tushnet, *A Note on the Revival of*

judge's preferred decision, and every explanation of the ruling merely a post-hoc rationalization.³⁷

Because neither Natural Law theory nor nonconventionality theories like Legal Realism or Dworkinism depend for their validity on agreement about what the law is, Legal Positivists have been using the argument from "massive agreement" as an argument in favor of Legal Positivism for decades. The argument is straightforward once you know the premises underlying these varying theories. Legal Positivism stems from the belief that a kind of massive agreement about law already exists and builds a theory around it.³⁸ Legal Positivism thus both predicts massive agreement and depends for its vitality upon it. And we see, so say the Positivists, massive agreement. On the other hand, other theories of law, such as Natural Law, Legal Realism, and Dworkinism, have no necessary connection with massive agreement. Not depending for their truth on massive agreement, they nonetheless observe massive agreement. This is thought to be a profound failure of consilience—the principle that all things being equal, we prefer theories that explain more things.³⁹ Natural Law theories and nonconventionality theories give no explanation of a feature—massive agreement—that Legal Positivists

Textualism in Constitutional Theory, 58 S. CALIF. L. REV. 683, 688 (1985) (describing the content of the theory).

37. See, e.g., Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 206 (1984) ("Like traditional jurists, the Critical scholars are obsessed with the judicial function and its alleged central importance for an understanding of law in society. Yet, while they share this infatuation, they adopt a radically different view of the judicial process: All the Critical scholars unite in denying the rational determinacy of legal reasoning. Their basic credo is that no distinctive mode of legal reasoning exists to be contrasted with political dialogue. Law is simply politics dressed in different garb; it neither operates in a historical vacuum nor does it exist independently of ideological struggles in society. Legal doctrine not only does not, but also cannot, generate determinant results in concrete cases. Law is not so much a rational enterprise as a vast exercise in rationalization. Legal doctrine can be manipulated to justify an almost infinite spectrum of possible outcomes. Moreover, a plausible argument can be made that any such outcome has been derived from the dominant legal conceptions. Legal doctrine is nothing more than a sophisticated vocabulary and repertoire of manipulative techniques for categorizing, describing, organizing, and comparing; it is not a methodology for reaching substantive outcomes. As psychiatrists create 'a monologue of reason about madness,' so, the CLSers claim, do lawyers establish a fake rationalistic discourse out of the chaos of political and social life.").

38. See sources cited *supra*, notes 18-20.

39. See Paul R. Thagard, *The Best Explanation: Criteria for Theory Choice*, 75 J. PHIL. 76, 79 (1978) ("Consilience is intended to serve as a measure of *how much* a theory explains, so that we can use it to tell when one theory explains *more* of the evidence than another theory. Roughly, a theory is said to be consilient if it explains at least two classes of facts. Then one theory is *more* consilient than another if it explains more classes of facts than the other does. Intuitively, we show one theory to be more consilient than another by pointing to a class or classes of facts which it explains but which the other theory does not.").

consider endemic to every functioning legal system.

Hence, Legal Positivists argue that massive agreement about what the law *is* powerfully favors Legal Positivism. As the remainder of this Article endeavors to show, however, when we get down to brass-tacks, it is unclear what kind of agreement Legal Positivists are referring to when they refer to massive agreement, and many of the kinds of agreement they could be referring to—were we to use them—would mean there is massive *disagreement* about the law, cutting strongly against Legal Positivism. Moreover, other theories of law are capable of explaining massive agreement without undermining their core claims. As such, the claim of massive agreement seems at best irrelevant and at worst actively harmful to the Positivist program. Thus, it is quite puzzling that massive agreement is so frequently deployed as an argument for Positivism.

III. WHAT IS LEGAL AGREEMENT?

Legal agreement could mean many things. It could mean (A) agreement about the existence of laws; (B) agreement about the meaning of legal sources; (C) agreement about how to reason about legal sources; (D) agreement about the outcomes of cases; or (E) agreement about legal propositions. It is neither naïve nor uncharitable to be confused about which of the aforementioned senses is meant when the existence of massive legal agreement is asserted.

Perfect precision is not necessary to every discussion, and it is a great virtue that not everything that is said requires further clarification.⁴⁰ But the imprecision in the meaning of “agreement,” as it is frequently employed in this context *is* an important imprecision. This is especially so because the argument from massive agreement plays a pivotal role in bolstering important arguments about the legitimacy of the legal system and the descriptive accuracy of Legal Positivism. In keeping the notion of legal agreement vague, individuals offering the argument from massive agreement invite us each to pick out what we think it means, without realizing we could all think it means something different.

40. 1 ARISTOTLE, NICOMACHEAN ETHICS 13-14 (W. Ross trans. 1940) (“Our discussion will be adequate if it has as much clearness as the subject-matter admits of, for precision is not to be sought for alike in all discussions . . .”).

A. *Setting The Stage: A Hypothetical Statute*

The best way of presenting the different possible ways of understanding legal agreement is by way of example. Consider a hypothetical statute: “No person shall be compelled in any criminal case to be a witness against himself.” On the one hand, this may seem like a bad statute to consider because it carries what some might consider extralegal constitutional dimensions. It appears, for example, awfully similar to the Fifth Amendment (on account of its identity with it).⁴¹

On the other hand, this statute could not be more banal—every jurisdiction, down to the smallest small town, is free to enact it.⁴² It could have been snatched out of a police manual or a court’s local rules. As far as I know, every state has something similar.⁴³ One might object that this rule of police procedure seems to appear only in constitutions, and therefore, is more aspirational than real.⁴⁴ But one glance at the words shows it is not vague or indefinite. It does not invoke abstract notions like due process, equal protection, or cruelty and unusualness. Rather, it says, simply, that no person shall be compelled in any criminal case to be a witness against himself. Its presence in constitutions seems more to measure its importance than its intended operation—one would expect that if it were not woven in constitutional fiber, it would be written precisely the same way in local codes and ordinances of various

41. U.S. CONST. amend. V (“No person shall . . . be compelled in any criminal case to be a witness against himself”).

42. See BILL OF RIGHTS DEFENSE COMMITTEE, RESOLUTIONS AND ORDINANCES CRITICAL OF THE USA PATRIOT ACT AND OTHER LAWS AND POLICIES THAT DIMINISH CIVIL LIBERTIES (2008) (listing over 400 county and local governments enacting resolutions affirming the Bill of Rights).

43. This was the case at least as of 1965. Arthur E. Sutherland, Jr., *Crime and Confession*, 79 HARV. L. REV. 21, 30 (1965) (“In 1791 the privilege against self-incrimination found a place in the fifth amendment to the United States Constitution; by 1965 the constitution of every state except Iowa and New Jersey has explicitly guaranteed to the accused immunity from self-incrimination in criminal proceedings. Iowa and New Jersey have long guaranteed the same immunity by legislation.”); see also, e.g., ALA. CONST. art. I, § 6; ALASKA CONST. art. I § 9; ARIZ. CONST. art. II, § 10; ARK. CONST. art. II, § 8; CAL. CONST. art. I, § 15; COLO. CONST. art. II, § 18; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 7; FLA. CONST. art. I, § 9; GA. CONST. art. I, § 1, para. XVI; HAW. CONST. art. I, § 10; IDAHO CONST. art. I, § 13; ILL. CONST. art. I, § 10; IND. CONST. art. I, § 14; KY. CONST. § 11; LA. CONST. art. I, § 16; ME. CONST. art. I, § 6; MICH. CONST. art. I, § 17; MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 26; MONT. CONST. art. II, § 25; NEB. CONST. art. I, § 12; NEV. CONST. art. I, § 8.

44. Laurence Tribe, *Comment, in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 65, 87-93 nn.57-58 (Amy Gutman ed., 1997) (contending that many provisions of the Bill of Rights—“equal protection” “privileges and immunities” “rights . . . retained by the people”—are aspirational in nature, setting forth broad principles to be interpreted in succeeding generations, while others serve as an “unambiguous blueprint for running a government”).

jurisdictions. And so it is.⁴⁵ Like all of the most beautiful and basic laws, it is simple and declarative. It states what is prohibited. In that way, it is similar in kind and quality to the laws against murder and mayhem, and it can therefore serve as an excellent vehicle for explaining the ways we might agree or disagree about what it means.

Before diving into the various modes of agreement we might have, it would be useful to have in mind the following hypotheticals—easy, medium, and hard—so we might have a common grammar with which to describe the different senses of agreement:

1) *The Case of a Clear Violation but a Procedural Defect in Its Assertion.* Three black men in Mississippi are tried for the murder of a white planter.⁴⁶ The county sheriff takes their statements.⁴⁷ He testifies that the “confessions took place in jail and were free and voluntary,” but concedes that while one man was confessing, “another one came in who had been so badly whipped and beaten that he was unable to sit down.”⁴⁸ Other evidence showed “without any material conflict,” that “all the confessions made to the sheriff and other witnesses were forced by brutal whippings and beatings.”⁴⁹ But the Defendants fail to raise their objections to the admission of their statements in accordance with state procedural rules, thus, forfeiting them.⁵⁰

2) *The Case of a Long Interrogation, Contestably Voluntary Confession.* Officers remove a man from his home in the early evening hours on a Saturday.⁵¹ They take him to an office on the fifth floor of the county jail, “equipped with all sorts of crime and detective devices, such as a fingerprint outfit, cameras, high-powered lights, and such other devices as might be found in a homicide investigating office.”⁵² They begin to quiz him continuously, questioning him in relays—they themselves becoming so tired they cannot continue.⁵³ At hour twenty-eight, about 11 p.m. Sunday night, he confesses.⁵⁴ Or, perhaps, he

45. Louisiana’s Criminal Code looks similar, for instance, to the Supreme Court’s interpretation of the free-and-voluntary confession rule. See LA. REV. STAT. ANN. § 15:451 (West, Westlaw through the 2014 Reg. Sess.) (“Before what purports to be a confession can be introduced in evidence, it must be affirmatively shown that it was free and voluntary, and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises.”).

46. *Brown v. State*, 158 So. 339, 339 (Miss. 1935), *rev’d*, *Brown v. Mississippi*, 297 U.S. 278 (1936).

47. *Id.* at 339.

48. *Id.* at 343 (Anderson, J., dissenting).

49. *Id.*

50. *Id.* at 341-42.

51. *Ashcraft v. Tennessee*, 322 U.S. 143, 149 (1944).

52. *Id.*

53. *Id.*

54. *Id.* at 151.

doesn't.⁵⁵ According to officers, "he is 'cool', 'calm', 'collected,' 'normal'" at the time of his confession.⁵⁶

3) *The Case of an Ambiguously Coercive Non-Interrogation.* A twelve-year-old boy is indicted for arson.⁵⁷ Committed to jail in Philadelphia, "several respectable citizens" come visit him in his cell, "represent[ing] to him the enormity of the crime."⁵⁸ They tell him a confession would mean "compassion," probably, "a pardon," but no confession would leave him "without hope."⁵⁹ The inspectors show him the dungeon, and explain its "gloom and horror."⁶⁰ Though the boy "continue[s] to deny his guilt for some time," at length he confesses.⁶¹

4) *The Case of Harsh Interrogations of a Non-Citizen Detainee in an Arguably Non-Criminal Setting.* An Algerian native is captured in Faisalabad, Pakistan in February 2002 and brought to the Naval Base at Guantanamo Bay, Cuba.⁶² He is subjected to intense interrogations, interrupted sleep patterns, and repetitive rounds of "harsh" questioning for two months.⁶³ He later makes inculpatory statements.⁶⁴

5) *The Case of an Interrogation Outside of Custody, Outside of a Criminal Setting, Without a Miranda Warning.* A man is stopped at the U.S.-Mexico border and asked a question by a police officer before being read his *Miranda* rights.⁶⁵ He makes an incriminating statement.⁶⁶

These cases give a sense of the law's open texture and the way that a simple rule confronts an enormous range of not-so-simple facts.⁶⁷ The

55. *Id.* at 150 ("As to what happened in the fifth-floor jail room during this thirty-six hour secret examination the testimony follows the usual pattern and is in hopeless conflict.")

56. *Id.* at 151 ("[H]is vision was unimpaired . . . his eyes not bloodshot . . . he showed no outward signs of being tired or sleepy.")

57. *Commonwealth v. Dillon*, 4 U.S. 116 (1792).

58. *Id.* at 116.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Shafiq v. Obama*, 951 F. Supp. 2d 13, 17 (D.D.C. 2013).

63. *Id.* at 19.

64. *Id.*

65. *United States v. Butler*, 249 F.3d 1094, 1097 (9th Cir. 2001).

66. *See, e.g., id.* at 1098 ("The case books are full of scenarios in which a person is detained by law enforcement officers, is not free to go, but is not 'in custody' for *Miranda* purposes. A traffic stop is not custody. A *Terry* stop-and-frisk is not custody. A brief detention at the border by immigration and customs officials of persons presenting themselves for admission to the United States is not custody, even though such persons are not free to leave or to refuse to be searched."); *id.* at 1101.

67. *See Schauer, supra* note 8, at 421 ("Open texture is not vagueness, which is always

mantra in law, and even in philosophy of law, often seems to be: simplify, simplify. But it is occasionally useful to see that sometimes we simplify too much—that the range of possible factual scenarios is nearly infinite, and that just when we think we have identified the core or archetypical case, we discover no such thing exists. With this groundwork in mind, let us now consider the many ways in which we might agree about what the law means.

B. *Existential Agreement*

First, and most elementally, we might simply agree that a law exists, and that it exists in a certain form with certain words. This is not agreement on its semantic content, let alone its legal content. Rather, this is agreement that the words that are in it are in it. For the purpose of our example, this is agreement that our sample law exists, that it is located in a particular authoritative source, and that it says “no person shall be compelled in any criminal case to be a witness against himself.”

In general, there may not even exist this minimal agreement as to the vast majority of laws. The Constitution is both short and arguably readable. The individual-rights provisions—those substantive provisions that might directly affect the day-to-day interactions of people with, for instance, the police—are even shorter and more readable. They are located in the commendably succinct Bill of Rights. Yet survey after survey and poll after poll show that average Americans have no idea what is in the Bill of Rights except in the vaguest terms.⁶⁸ Remarkably, the most basic ground for agreement about the law—agreement about its words—is literally absent from society.

This absence of agreement, moreover, is an absence of agreement that rises all the way to the very top: to the words of society’s supreme law. People have a sense that they are free to speak, free to publish, free to worship. But they do not know the words nor the content of those

eliminable, but is rather the *possibility* of future vagueness, which is not eliminable. For example, although there is no doubt now about what does and what does not count as a ‘goldfinch,’ an encounter with a bird that was like a goldfinch in every respect save that it exploded before our eyes would *then* cause us to be uncertain about whether the exploding creature was or was not a goldfinch.”); see also NELSON GOODMAN, *FACT, FICTION AND FORECAST* 74 (1955) (describing “grue” a heretofore unnecessary word for all those things which were green before time *t* and are now blue).

68. See Ilya Somin, *Originalism and Political Ignorance*, 97 *MINN. L. REV.* 625, 640-42 (2012) (“Ignorance about basic aspects of the Constitution is also extensive. . . . Only twenty-eight percent can name two or more of the five rights guaranteed by the First Amendment. . . . According to a 2002 survey, only thirty-one percent realize that Karl Marx’s famous dictum ‘from each according to his ability, to each according to his needs’ is not in the Constitution.”)

laws. They rarely wonder, for instance, why fraud is unlawful, question the absence of tobacco ads on television, or, ask why the quarterback cannot lead a prayer before the big game. Nobody seems to know if you really get one phone call in jail.⁶⁹ Frequently, even the legislators who make the laws do not know what it is they are enacting.⁷⁰ As one textbook puts it, “Almost the only knowledge of the law possessed by many people is that ignorance of it is no excuse.”⁷¹

Yet ignorance of the law is both broad and deep. Stepping back just one level, from the most basic law to the corpus of federal law, it seems almost inevitable that individuals are massively unaware of the “more than 4,000 federal criminal statutes” in the United States “spread out across the fifty-one titles and 27,000 pages of federal law.”⁷² When “federal regulations that can be enforced in criminal prosecutions” are added to the mix, “the number of potentially relevant federal laws may exceed 300,000.”⁷³ There are so many federal laws “that no one, not even the Justice Department, knows the actual number of federal criminal offenses.”⁷⁴

69. It is a matter of state law, and it is a right of arrestees in some states. *See, e.g.*, ALASKA STAT. ANN. § 12.25.150 (2011); CAL. PENAL CODE § 851.5 (West, Westlaw through the 2014 Reg. Sess.); IOWA CODE § 804.20 (2014); MASS. GEN. LAWS ANN. ch. 276, § 33A (West, Westlaw through the 2014 2d Annual Sess.); N.Y. CRIM. PROC. LAW § 140.20 (McKinney, Westlaw through L.2014); R.I. GEN. LAWS ANN. § 12-7-20 (West, Westlaw through Chap. 555 of the Jan. 2014 session); TENN. CODE ANN. § 40-7-106 (West, Westlaw through 2014 2d Reg. Sess.). One would not be remiss in asking if it should not follow *a fortiori* from the constitutional right not to be compelled to be a witness against oneself.

70. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 34 (1945) (“Now it is a fact often, if not always, a considerable number of those who vote for a bill have at most a very superficial knowledge of its contents.”).

71. GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 451 (2d ed. 1983); *see also* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 645-46 (1984) (“If one were to take a poll and ask about the legal significance of ignorance of law, most non-lawyers would answer, I believe, by citing the maxim that ‘ignorance of the law is no excuse.’”).

72. Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 739 (2012).

73. *Id.* at 739-40.

74. *Id.* at 739-41 (“The federal criminal law also is not limited to crimes that mirror any readily recognizable moral code. No criminal code that outlaws the unauthorized use of Smokey the Bear’s image or the slogan ‘Give a Hoot, Don’t Pollute’ can credibly claim to exclude trivial conduct wholly unrelated to moral delinquency. Other equally nefarious crimes are the failure to keep a pet on a leash that does not exceed six feet in length; digging or leveling the ground at a campsite picnicking in a non-designated area; operating a ‘motorized toy, or an audio device, such as a radio, television set, tape deck or musical instrument, in a manner . . . [[t]hat exceeds a noise level of 60 decibels measured on the A-weighted scale at 50 feet’ (whatever that means); ‘[b]athing, or washing food, clothing, dishes, or other property at public water outlets, fixtures or pools’ not designated for that purpose; ‘[a]llowing horses or pack animals to proceed in excess of a slow walk when passing in the immediate vicinity of persons on foot or bicycle’; operating a snowmobile that

Moreover, even the saltiest litigators are often unaware of the scope and breadth of the procedural doctrines that might be brought to bear in run-of-the-mine lawsuits. Few lawyers realize the potentially enormous consequences, for example, of a misunderstanding in an oral argument.⁷⁵ Fewer still can name the doctrines that might be used to punish one: judicial estoppel, equitable estoppel, quasi-estoppel, collateral estoppel, “mend the hold,” “fraud on the court,” judicial and evidentiary admission, forfeiture, and, waiver, to name a few. Sometimes “the courts do not even clearly identify why an inconsistent [litigating] position should be precluded; it seems rather to be a matter of it ‘just isn’t right.’”⁷⁶

Frequently, situations arise where existential agreement is unobtainable because uncertainty over what law “there is” is too great. Since the 1960s, the Supreme Court has been developing an array of doctrines that deal precisely with this—prominently in the areas of criminal law⁷⁷ and official immunity from civil liability⁷⁸—permitting courts to deny redress for past constitutional violations when the claim to relief rests on “new” law.⁷⁹ But “new” law isn’t “new” law—it is, rather, an “unpredict[ed]” application of the constitution’s existing requirements.⁸⁰

The legal system makes a number of concessions to the problem of existential uncertainty. Judges’ evidentiary rulings are reviewed under a very deferential standard by appellate courts.⁸¹ Decisions about whether to issue preliminary injunctions or declaratory judgments are also

makes ‘excessive noise’; using roller skates, skateboards, roller skis, coasting vehicles, or similar devices in non-designated areas; failing to turn in found property to the park superintendent ‘as soon as practicable’; and using a surfboard on a beach designated for swimming.”)

75. See, e.g., *Ergo Sci., Inc. v. Martin*, 73 F.3d 595, 598-99 (5th Cir. 1996); *Veillon v. Exploration Servs., Inc.*, 876 F.2d 1197, 1199 (5th Cir. 1989).

76. Eugene R. Anderson & Nadia V. Holober, *Preventing Inconsistencies in Litigation with a Spotlight on Insurance Coverage Litigation: The Doctrines of Judicial Estoppel, Equitable Estoppel, Quasi-Estoppel, Collateral Estoppel, “Mend the Hold,” “Fraud on the Court” and Judicial and Evidentiary Admissions*, 4 CONN. INS. L.J. 589, 591-92 (1998).

77. See, e.g., *Teague v. Lane*, 489 U.S. 288, 315-17 (1989) (holding that subject only to narrow exceptions, a federal habeas court should dismiss claims based on “new” rules of constitutional law without reaching the merits).

78. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982) (holding that officials sued in constitutional tort actions generally are immune from damages liability unless their conduct violated “clearly established” law).

79. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1733-38 (1991).

80. See *id.* at 1758-77.

81. See Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 780-83 (1982).

reviewed under this deferential standard.⁸² The decision to issue a warrant is reviewed with “great deference.”⁸³ Additionally, the reasonable suspicions of police officers are given this same deference.⁸⁴ Administrative agencies classically receive substantial deference in their judgments about what the law means.⁸⁵ Judges also show deference to other judges through the practice of following precedent, a practice that stems in no small measure from humility in the face of uncertainty about what the law is. If recent academic writing on the relationship between caseloads and appellate scrutiny is given its due, deference is often directly traceable to how much time judges and their clerks have available to devote to finding out what the law is.⁸⁶

But building in an escape hatch for uncertainty about what law exists is not agreement. Deference is not agreement. Deference is agreement that what law “there is” is uncertain.⁸⁷

All this is to say that the argument from massive agreement cannot be referring to massive agreement about what the laws are. At the zeroth step of inquiry into what the law is—“what laws are there?”—there almost certainly exists very little agreement at all.

C. Content Agreement

Existential agreement is merely one way of looking at agreement, and almost certainly not the way that is meant when it is asserted that “there is massive and pervasive agreement about the law throughout the system.”⁸⁸ After all, it cannot be, at least not without undermining the claim to massive agreement right out of the gate. Another way we might agree about what the law is, then, is that we might agree about what the law means when a law (or the law) is put before us. There are two ways of understanding this form of agreement, and this section will take up

82. *See id.* at 773-79.

83. *Illinois v. Gates*, 462 U.S. 213, 236 (1983) (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969)).

84. *Ornelas v. United States*, 517 U.S. 690, 699-700 (1996) (holding that review of police officer’s reasonableness must give due weight to “police experience and expertise”).

85. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 511 (1989) (“[T]he courts will accept an agency’s reasonable interpretation of the ambiguous terms of a statute that the agency administers.”).

86. Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1111-12 (2011) (presenting empirical evidence suggesting a causal link between judicial burdens and the outcomes of appeals).

87. The law may be determinate and knowable at any moment, but it may be the case that there is not enough time to determine it. But there is an important difference between uncertainty and indeterminacy: it is the difference between what is unknown and what is unknowable.

88. Leiter, *Explaining Theoretical Disagreement*, *supra* note 7, at 1227.

both of them. They are agreement about semantic (or communicative) content and agreement about legal content.

1. Semantic Content Agreement

The first form of content agreement we might be referring to when we refer to massive agreement as a kind of content agreement is what might be called semantic, communicative or linguistic agreement. That means agreement about language as language—it includes more than words, but also sentences, paragraphs, texts, and so on, but, it understands their meaning as part of language conventions as opposed to legal conventions.⁸⁹

Quite often, in conversation, we exchange phrases between one another and ask each other “what we really mean.” But sometimes we are left to hopelessly attempt to puzzle out what someone meant without the opportunity to ask him or her. That case is determined by semantic agreement. Putting aside any opportunity to elaborate through applications, criteria, tests, archetypes, examples, or hypotheticals, semantic agreement turns on each of us having a shared understanding of what is meant in English without the opportunity to ask anyone else what they think is meant.⁹⁰

A skeptic might say that when our concern is legal agreement, this form of agreement would seem almost beside the point. Semantic agreement is just the agreement that allows an English speaker to distinguish between the meaning of the words “wife” and “hat.” It is the type of agreement that makes this text intelligible to a native English speaker at all. But even hardened Positivists agree there is no necessary connection between semantic meaning and legal meaning, and most would agree that semantic meaning cannot be all that there is to deciding propositions of law.⁹¹

89. See, e.g., Ronald Dworkin, *Comment*, in SCALIA, *supra* note 44, at 117 (“[T]extualism insists on deference to one kind of intention—semantic intention”).

90. David Millon, *Objectivity and Democracy*, 67 N.Y.U. L. REV. 1, 29 & n.76 (1992) (“Effective communication constantly requires us to use words (like ‘table’ or ‘red’ or ‘addition’) in novel situations in the same way other people would. We are confident in our abilities to do so, even though we typically lack the benefit of their views about correct usage until after we have spoken.”); *id.* at 20 (“When we say that someone has applied a concept correctly (like the operation called ‘addition’ or the adjective ‘red’), we mean that he or she acted the way we would. Fluency in a language means that a subject is able to make such judgments correctly, intuitively and without reflection, and without first consulting other community members.”); see Schauer, *supra* note 8, at 414-20.

91. For an excellent discussion of the distinction between these two forms of meaning, see Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479,

A debate about semantic meaning's special importance to law formed the core of one of the most famous jurisprudential debates in history: the Hart-Fuller debate.⁹² It then became the fulcrum over which debates about legal determinacy and indeterminacy flourished for another half-century.⁹³ As such, the idea that agreement on what the law is might be reducible to—or at the very least intimately bound up with—semantic agreement remains a plausible candidate for what is meant when legal agreement is discussed.

The Hart-Fuller debate began with Hart's insistence—in the face of criticisms by Legal Realists that all legal rules are hopelessly indeterminate⁹⁴—that there exist a multitude of easy cases because there is widespread agreement about ordinary semantic or language meaning.⁹⁵ Fuller responded by insisting that it takes little imagination to generate an almost limitless number of cases that seem like they should be easy from a language-view, but are in fact quite hard from a legal-content view.⁹⁶ Both were right, since neither was disputing the other's core claim. There are many easy cases arising from shared semantic-content meanings, and there are many semantically easy-looking cases that are in fact hard because of other non-semantic considerations.⁹⁷

Given significant revisions in the claims of Legal Positivism and its alternatives in the years since 1958, it is not clear that the points that Hart and Fuller were attempting to win against one another have precise contemporary relevance. But the very fact of the debate—and subsequent debates—shows that many legal scholars plant their flag largely on semantic agreement as the form of massive agreement about

517-19 (2013) (“Even an exclusive legal positivist might deny that all legal content is the product of the full set of legally operative texts.”). For a lighthearted discussion of the long-standing debates over the possibility that law cannot live on text alone, see Andrew Tutt, *Fifty Shades of Textualism*, 29 J.L. & POL. 309, 314-22 (2014).

92. Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109 (2008) (abstract) (“The 1958 debate between Lon Fuller and H.L.A. Hart in the pages of the Harvard Law Review is one of the landmarks of modern jurisprudence.”).

93. See, e.g., Schauer, *supra* note 8, at 417.

94. See H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606-07 (1958).

95. *Id.*; Schauer, *supra* note 92, at 1119 (“Hart’s claim, at least in 1958, was that the statutory language, as language, would generate some number of clear or core applications. . . .”).

96. See Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 662-65 (1958).

97. This is emphatically not the argument from “weird cases.” See Schauer, *supra* note 8, at 420-23. The question is instead whether Fuller was not right that the world is such that hard cases proliferate to such a degree as to render even an admittedly large number of easy cases comparatively small. *Cf. id.* at 427-28.

the law that people share.⁹⁸ On this view, it is semantic agreement that makes easy cases easy, and since language is widely considered to be a conventional practice—we can only understand one another because of shared meanings we have developed together⁹⁹—this at least makes much of law, if not all of law, conventional as well.

There are two problems with these claims, one of which can only be flagged for later, the other of which will be addressed in the section immediately following this one. First, what must be flagged for later is whether our choice of theory should be affected at all if, in fact, semantic agreement is the form of massive agreement we all share. Because of language's conventionality, it can be used as a tool. In particular, a clever polity might coopt language for use in operationalizing, or instantiating, or creating a "conception" of legal rules, legal principles, or legal propositions. But it should be noticed that semantic agreement does not make law uniquely law at all—instead it is used to instantiate law derived from *some other source*. Put another way, because language is a tool—much like a fence or a wall—it need not itself be the law. A wall is not the law, though it may instantiate the law by preventing trespass. Perhaps in the same way, a statute threatening sanctions for trespass is not the law either, even though it also prevents trespass. In this way, the question of which comes first—the language or the law—bedevils legal theory and our understandings of legal agreement. This argument, that legal propositions are frequently, if not always, merely gloss on the law; that language primarily operationalizes *other* norms; and, that as such legal propositions are frequently, if not

98. See Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1296 (2014) (calling this "the Standard Picture": "According to this vague picture—I hesitate to call it a theory—the content of the law is primarily constituted by linguistic (or mental) contents associated with the authoritative legal texts. The Standard Picture is extremely widely taken for granted, and assumed to be common ground (though it is rarely explicitly espoused)."); Leiter, *Explaining Theoretical Disagreement*, *supra* note 7, at 1230 ("Someone familiar with mundane legal practice—the ordinary problems and issues that arise, most of which do not lead to litigation—might reasonably conclude that if there is a governing rule of interpretation at work in law, it is something like 'ordinary meaning controls, except when its import is absurd or repugnant, at which point interpretive opportunism takes hold."); Schauer, *supra* note 8, at 414-20.

99. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 242 (G.E.M. Anscombe trans., 3d ed. 1968) ("If language is to be a means of communication there must be agreement not only in definitions but also (queer as this may sound) in judgments."); *id.* §§ 225-27 (discussing agreement about correct solutions to mathematical problems); see also SAUL A. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE: AN ELEMENTARY EXPOSITION* 96 (1982) ("On Wittgenstein's conception, such agreement is essential for our game of ascribing rules and concepts to each other"); *id.* at 86-113 (explaining that Wittgenstein stresses importance of agreement about correct use of rules and concepts, and of "shared form of life" for deciphering meaning).

always vulnerable to point-of-application attacks via challenges to their merits, may pose a powerful alternative to Legal Positivism.¹⁰⁰

Second, all sides concede that semantic meaning does not cover the entire scope of legal agreement and disagreement in any event. Some legal decisions fly in the face of absolutely clear language, and yet all sides agree that they should do so.¹⁰¹ In some cases, judges and litigants seem to argue over issues as if the language is only a starting point for general historical, moral or political debate.¹⁰² The next section takes up this sort of content agreement: legal content agreement.

2. Legal Content Agreement

Still preoccupied with recovering the meaning of our hypothetical statute, but having acknowledged the limits of language, we might posit the existence of a kind of content agreement that involves specialized understandings, unique to law, legal practice, and American legal culture. This essay adopts Lawrence Solum's notion of "legal content" agreement because the label itself communicates the idea well.¹⁰³ There are a thousand ways that this form of agreement is described—sometimes it is called recourse to practical reason,¹⁰⁴ or explained through the ideas of legal and cultural narrative¹⁰⁵ or ideology,¹⁰⁶ or

100. See COLEMAN, *supra* note 26, at 161-73 (noting Positivism offers no theory for determining or identifying "legal content" and explaining that "[t]o his credit, Dworkin has done more than anyone else to develop a general theory of legal content.").

101. See, e.g., Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 515-20 (1988).

102. This kind of interpretation is perhaps best summed up and explained by the line, "we must never forget that it is a *constitution* we are expounding." *McCulloch v. State*, 17 U.S. (4 Wheat) 316, 407 (1819) (Marshall, C.J.); *accord* *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 443 (1934) (Hughes, C.J.) (elaborating on the admonition). This idea creates a set of boundaries and expectations: an entire normative universe; quite different than if one is expounding the rules of Chess.

103. Solum, *supra* note 91, at 509-10; Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1937-40 (2013).

104. See, e.g., Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 538-39 (1992) ("Practical reason, unfortunately, is easier to invoke than to define."); Frank I. Michelman, *Traces of Self-Government*, 100 HARV. L. REV. 4, 28-29 (1986).

105. See, e.g., Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4-10 (1983) ("We inhabit a *nomos*—a normative universe. . . . In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose."); Lawrence B. Solum, *Narrative, Normativity, and Causation*, 2010 MICH. ST. L. REV. 597, 610, 621 (2010) ("Narratives structure our understanding of the world . . .").

106. See, e.g., J. M. Balkin, *Ideology As Constraint*, 43 STAN. L. REV. 1133, 1138 (1991); J. M. Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197, 199-200 (1990); Jack M. Balkin, *Taking Ideology Seriously: Ronald Dworkin and the CLS Critique*, 55 UMKC L. REV. 392, 422

professional conventions,¹⁰⁷ or membership in a shared interpretive community,¹⁰⁸ or the experience of a “shared form of life.”¹⁰⁹ Other times it is called “construction”¹¹⁰ or interpretation in “context.”¹¹¹

All of these are efforts to get at the idea that language itself does not exhaust the kinds of content agreement we might have merely by virtue of its conventions alone. You need to be from the place, perhaps socialized in the practice, to understand what is actually being referenced, commanded, allowed, prohibited, or created by its law.¹¹² Legal content agreement is not quite the same as technical meaning—it is neither truer nor more accurate than some other meaning—but rather, is understood differently because its meaning is made in a particular time and place, among a particular set of actors, acting in particular roles.

There are many famous illustrations depicting the distinction between semantic content and legal content agreement.¹¹³ Often, legal content agreement is tacitly reduced to the idea that words, phrases, and

(1987); Denis J. Brion, *Rhetoric and the Law of Enterprise*, 42 SYRACUSE L. REV. 117, 157-59 (1991); Segall, *supra* note 7, at 1031 (“CLS argues that there are easy cases and that law is relatively stable only because judges interpreting the law share common values and ideals.”).

107. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 125 (1984); Millon, *supra* note 90, at 30.

108. *See, e.g.*, Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 746 (1982); Millon, *supra* note 90, at 21.

109. *See, e.g.*, KRIPKE, *supra* note 99, at 96.

110. *See, e.g.*, Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 103 (2010).

111. David Kairys, *Legal Reasoning*, in THE POLITICS OF LAW 14-15 (David Kairys ed., 1982); Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1366 (1997); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 396-97 (1995); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1174-82 (1993).

112. Put another way, “Deathstar,” “Hydrospanner,” “Force,” and “Lightsaber” mean very different things to Han Solo and Harrison Ford. So too do words like “droid,” “pilot,” “smuggler,” “republic,” and “parsec.” This parlor game can be played across a number of different domains all in service of the same point—“Hunger Games” means something very different to Katniss Everdeen than Jennifer Lawrence. “The Matrix” means something very different to Neo than Keanu Reeves, etc.

113. *See, e.g.*, Tutt, *supra* note 91, at 320 (describing the legal-versus-semantic content debate in *United States v. Marshall*, 908 F.2d 1312, 1317 (7th Cir. 1990) over whether PCP and blotter paper are a “mixture” of PCP and blotter paper “resulting in an enormous sentencing enhancement for those unfortunate enough to transport their PCP via blotter paper and not some lighter means”); *id.* at 320-21 (describing the legal-versus-semantic content debate in *Smith v. United States*, 508 U.S. 223 (1993) over whether it counts as “using” a gun “during and in relation to . . . [a] drug trafficking crime” to offer to trade a gun for cocaine); Greenberg, *supra*, note 98, at 1291-92 (discussing the same case); Tutt, *supra* note 91, at 338-39 (describing *FDA v. Brown & Williamson Tobacco*, 529 U.S. 120 (2000) where the Supreme Court divided 5-4 over whether the FDA had authority to regulate cigarettes “even though nicotine is a ‘drug’ and the FDA has the authority to regulate ‘drug delivery devices’”).

documents acquire specialized content through their history and development as uniquely legal materials. In this way, the First Amendment¹¹⁴ and Eighth Amendment mean both more and less than the full semantic import of their words.¹¹⁵ No statute can be read without careful attention to what past courts have said about its meaning even if that results in a slow, steady drift further and further from the semantic meaning of its words.¹¹⁶

Legal content agreement sweeps far beyond the idea that text on a particular document might mean something other than what it would mean to a reasonably able reader of English unfamiliar with America's legal customs and traditions.¹¹⁷ For instance, the very ability to identify legal materials as legal materials frequently stems from agreement about what counts as a valid legal source without looking to any particular text.

Phillip Bobbitt's identification of six "modalities" of constitutional argument is probably among the finest explanations of what we mean when we refer to legal content agreement apart from semantic agreement. The six modalities are textual, historical, structural, prudential, doctrinal, and ethical arguments, and each can be objectively regarded as a legitimate method of determining constitutional meaning.¹¹⁸ While Bobbitt self-consciously presented his modalities as the key to legitimizing judicial review (because the objective nature of these modalities means that the Supreme Court's decisions striking down unconstitutional laws can be shown to be impartial, rather than

114. Solum, *supra* note 91, at 480.

115. Dworkin, *supra* note 89, at 119-27.

116. See, e.g. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 729 (1988) ("Given existing interpretations of our civil liberties guarantees, precisely what does it mean to assert that there is a textual Bill of Rights, apart from fixing some outer perimeter limiting judicial decisionmaking?"). Apologies must be made for the continual focus on Constitutional texts. Such a focus is not required. The Administrative Procedure Act and the Sherman Act are two federal laws whose interpretations have also become almost fully untethered from their words. See Daniel A. Farber & Brett H. McDonnell, "Is There A Text in This Class?": *The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 620 (2005) ("Antitrust cases generally discuss precedent and economic policy. They rarely include more than a passing citation to the statutory text."); Peter L. Strauss, *Changing Times: The APA at Fifty*, 63 U. CHI. L. REV. 1389, 1421 (1996) ("For Justice Jackson, the fact that the Act may have 'contain[ed] many compromises and generalities and, no doubt, some ambiguities' was an invitation to an activist, constructive judicial role.").

117. See Schauer, *supra* note 8, at 418 (arguing that semantic content agreement is responsible for most legal agreement because "[h]owever sketchy and distorted the understanding it might be," reading a legally authoritative source still imparts an immense amount of legal information because it is written in English).

118. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7, 93 (1982).

political), more interesting for purposes of understanding legal content agreement is that the six modalities of constitutional argument do in fact canvass nearly the whole terrain of legal argument.¹¹⁹ Bobbitt recognized that this conventionality was arbitrary, calling it “a legal grammar that we all share and that we have all mastered,” but noting that “arguments are conventions . . . they could be different, but . . . then we would be different.”¹²⁰ Nonetheless, textual, historical, structural, prudential, doctrinal, and ethical arguments were “the kinds of arguments one finds in judicial opinions, in hearings, and in briefs.”¹²¹ No one asks why these arguments—and not some other set—appear to be the legitimate modes of not just constitutional argument, but much legal argument in American law.¹²² In this way, an imperceptible set of conventions channel and structure our thinking about how legal propositions should be decided.

Embedded in this modal structure is the interesting insight that only one of the six modes of legal argument is actually grounded in *semantic* content agreement. The other five (historical, structural, prudential, doctrinal, and ethical arguments)—so pervasive in law and essential elements of legal agreement—are not rooted in what the law’s words say. They do not depend on language conventions. As such, it is possible to talk about different *senses* of legality, because it is possible to talk about argumentation within one convention to the exclusion of the others. One can talk about what the Constitution’s text means, or what its history dictates, for instance, without actually talking about what legal rights individuals have under it, because, for example, the decisions of the Warren Court mean that regardless of the Constitution’s text and history, the constitution demands that a *Miranda* warning be read,¹²³ evidence obtained by an illegal search be excluded,¹²⁴ and violations of the Fourth Amendment be remediable via a *Bivens* action

119. See PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 22 (1991); *id.* at 24 (“If we want to understand the ideological and political commitments in law, we have to study the grammar of law, that system of logical constraints that the practices of legal activities have developed in our particular culture. A study of the modalities gives us such a description.”); *id.* at 27 (“Once we looked carefully at constitutional argument, it became apparent that the legitimacy of judicial review was maintained by adherence to these forms of argument. An opinion stated in these terms was accepted as legitimate and so also for briefs and oral arguments, whereas other forms of argument, some acceptable in other legal cultures, rendered a decision quite illegitimate . . .”).

120. BOBBITT, *supra* note 118, at 6.

121. *Id.*

122. See also J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771, 1776-80 (1994) (objecting).

123. *Miranda v. Arizona*, 384 U.S. 436 (1966).

124. *Mapp v. Ohio*, 367 U.S. 643 (1961).

in federal court.¹²⁵

Even these legal grammars change over time. H. Jefferson Powell's research into the legal culture of the founding generation and the early Supreme Court have shown that that generation possessed ideas about how to understand legal commands, legal authority, and legal texts far different from our own.¹²⁶ Semantic content was an essential and decisive element of constitutional argument, but invocation of extratextual principles—rights and duties embedded in a higher Natural Law—were frequent.¹²⁷ Legislatures, state and federal, and certainly the President, were thought by many to be coequal legal interpreters and expositors.¹²⁸ The Americans constructed a shared legal-political grammar in a remarkably short period out of materials they had readily at hand, namely the tools of religious and scholarly interpretation that informed other areas of political and social life.¹²⁹ Yet only some of those practices arose from text. Agreement on the rest was tacit. It was, as Legal Positivists would say, conventional.

125. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

126. For the sources undergirding the discussion in this paragraph, see H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 642-62 (1993); H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 949 (1993); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987); and H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

127. See Powell, *The Political Grammar of Early Constitutional Law*, *supra* note 126, at 964-68 (“American constitutional discourse in this period was not conducted solely in terms of arguments from, or about the meaning of, the texts of the federal and state constitutions. Indeed, a striking feature of early constitutional debate was the invocation of a veritable host of extratextual authorities: ‘the spirit of the Constitution’; the ‘fundamental principles’ of the constitution, of free government, or of republicanism; ‘natural justice’; and so on.”).

128. *Id.* at 974-85 (“[A] major theme in early constitutional debate concerned rival claims of interpretive authority. Various people during the period claimed major roles in constitutional interpretation for Congress, the President, the federal courts, the state legislatures, the state courts, and state conventions; the two primary disputes were over the finality of judicial interpretation, and the identity of ultimate interpretive authority in the federal Union.”).

129. *Id.* at 1008 (“Viewed from the perspective of specific political issues, the founding era appears to have been a time of remarkably widespread constitutional dissension. . . . The founding era’s very real battles over substantive constitutional questions, however, were articulated—indeed, were made possible—by the emergence of a common set of ideas, problems, and structures of argument.”); see also Powell, *The Original Understanding of Original Intent*, *supra* note 126, at 887-88 (explaining that “cultural influences of Enlightenment rationalism and British Protestantism combined in an unlikely alliance” opposite the interpretive practices drawn from “[t]he rich interpretive tradition of the English common law”—though the interpretive practices of the common law ultimately won out).

3. Limits of Content Agreement

It would be both tidy and compelling to conclude that content agreements and disagreements exhaust the kinds of agreement and disagreement we might have. There can be no doubt that agreements of these two kinds cover an immeasurably enormous territory. Where semantic content agreement fails, legal content agreement points us toward authoritative sources and can fill in many of the gaps or holes in what the statute, precedent, or past practice means.

Moreover, we do experience fulsome and meaningful disagreements over language and law rooted only in pure disagreements about its content. Language is conventional, but its adoption by native speakers, and their sense of proper usage, is unconscious. A native speaker can articulate that a particular usage is proper or improper according to both conscious and unconscious understandings. She can articulate theories of these usages and adopt prescriptive accounts of how language should be spoken and used even though she is a mere participant in the shared practice.¹³⁰ Native English speakers learn English in schools precisely so they can understand and articulate the usages of their own language in a useful manner.¹³¹

By the same token, however, disagreements about language frequently are not purely rooted in disagreements about content. Not infrequently, disagreements about language are about how English should be spoken, rather than how it is spoken. Admittedly, few would say that having a strong opinion about the proper usage of the word “whom” is necessarily a moral opinion. But no one would deny that having a strong opinion about the proper usage of language is *normative*—whether that normativity is rooted in a descriptivist or prescriptivist view of language—and to the degree it affects how we understand one another, this has important implications for language, for law, and potentially for all human endeavors.¹³²

Thus, even content agreements do not exhaust the forms of agreement. In our weaker moments, we might be tempted to say that

130. See Balkin & Levinson, *supra* note 122, at 1779.

131. See Balkin, *The Rhetoric of Responsibility*, *supra* note 106, at 200-01.

132. See Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551, 558 (2010) (“In *Law’s Empire*, interpretivism [a normative theory] governs all of law. And in *Hedgehogs*, interpretivism provides the normative theory for all human endeavors except science. If this pattern continues, we might expect that Dworkin’s next book will take up the philosophy of science, extending interpretivism to this final domain.”); see also Balkin & Levinson, *supra* note 122, at 1774 (“[A]s a normative matter, the grammarian has the right, just as any other speaker does, to attempt to influence the course and development of the language she studies.”).

legal agreement and disagreement are captured entirely by semantic and legal content agreements and disagreements, and that disagreements of all other kinds are somehow non-legal disagreements. They are arguments about the proper application of admitted discretion, for example. But while content agreement could be the source of a great deal of agreement about law, even Legal Positivists must concede it is not the only such source of legal agreement. In fact, there is strong reason to believe that content agreement is not—or cannot be—the kind of agreement Legal Positivists are referring to when they speak of massive agreement about what the law is.

D. Extensional and Intensional Agreement

Even in the shared usages of language and law, there is a vast area of potential disagreement in the space between the description and the described. Here, we cannot say there is agreement about content because the content of the description is inadequate. Instead, we must say there is agreement about how to reason about, or extend, a vague or ambiguous concept—one admittedly lacking in deducible content. This kind of meaning-making, which this Essay calls “extensional and intensional” is a fact of life, though it is uncomfortable because it involves the imputation of content where no content existed before.¹³³ It is unavoidably normative in character.

Examples of extensional and intensional agreement abound. Language is an imperfect medium, so both speakers and listeners often confront situations in which they say more or less than they intend, or understand more or less than they should.¹³⁴ When I describe a chair, for instance, and mean to refer to a special kind of professional accolade rather than article of furniture,¹³⁵ that usages create a kind of confusion. If I did not realize that what I sought to communicate would have a double-effect, and did not clarify it, my statement would either be misunderstood or ambiguous. If context did not give away my meaning, it would be impossible to tell what was intended. In such a situation, the listener must reason about what was meant. The content of the statement

133. This terminology has been used elsewhere in discussion of this topic, if only rarely. See, e.g., M.B.W. Sinclair, *Statutory Reasoning*, 46 *DRAKE L. REV.* 299, 324-25 (1997).

134. LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION* 62-63 (2010) (“[T]ry to define ‘book’ or ‘pen’ or anything else in your immediate reach so that your definition includes all instances of the concept and not much else; you will find the task both daunting and time-consuming.”).

135. For example, the “Chair” of the History Department or the Honorable George J. Mitchell, L’61 “Chair” in Law and Public Policy.

is not deducible, and the process of deriving it is not necessarily rooted in a shared form of life. The meanings of phrases that are vague by nature, such as “a little” or “a lot” are also difficult to deduce.¹³⁶

Affixing meaning to many seemingly simple statements is therefore unavoidable normative because it involves the exercise of judgment on the basis of an extraordinary amount of often unknown and ineffable criteria (it is normative because deciding that you will derive my meaning based on your thoughts about what I should have meant is normative unless you and I share a more general agreement that we will look to certain rules in resolving doubts¹³⁷). For example, saying that “reasonable delays will be excused” is not necessarily an invitation to legislate what counts as “reasonable.” It could mean that one (e.g., a judge) should look to a library of prior decisions as a basis for determining what is reasonable. However, it could be an invitation to exercise personal judgment and discretion on a case-by-case basis. In other words, at the zeroth step, a judge must decide in what manner to understand how much discretion has been delegated—if any at all—when confronted with a statute requiring the application of reasonableness.

Extensional and intensional interpretations arise precisely when semantic and legal content agreement run out. No longer can the listener and the speaker say that they share a mutual understanding about how to deduce the content of a statement. The listener has to impute, one way or another, what the listener thinks the speaker meant. The same is true of imputation of the legal effect of a particular legal claim or material. Of course, it must be admitted that there might even be massive agreement about how to impute the content of vague or ambiguous legal materials. After all, extensional agreement would just be agreement about how to reason from a particular quantum of evidence. Extensional agreement would therefore exist where a speaker, upon seeing his statement interpreted, would fill the same gaps in meaning in the same manner and, therefore, arrive at the same result. We do this all the time. In that way, content agreement plus extensional agreement (where gaps exist) could be the kind of massive agreement that Legal Positivists describe

136. I distinguish between ambiguity, which deals in matters of kind, and vagueness, which deals in matters of degree. Dworkin distinguished them as the difference between “testing or pivotal cases” and “borderline cases.” DWORKIN, *supra* note 31, at 41.

137. In law, that would be legal content agreement, and then your statement would not be vague or ambiguous anyway. “A lot” would not really mean “a lot”—it would mean, look to some rule we share for deducing how much “a lot” is, and use that amount. It would become a tacit unit of measure.

when they describe massive agreement.

There are innumerable forms of extensional agreement because it involves settling on shared meanings on the basis of incomplete content. Four broad categories have formed important aspects of debates in jurisprudence, usually in the context of showing that much of law is animated by disagreement. They are: (1) paradigmatic agreement (2) criterial agreement, (3) theoretical agreement, and (4) incompletely theorized agreement. This section describes them briefly.

1. Paradigmatic Agreement

Paradigmatic agreement arises when we do not agree on the overarching concept, but we agree about certain paradigm instances of the concept.¹³⁸ With ambiguous concepts like “art”, we might select individual paintings, movies, or novels and say that we agree that they are in the class. For vehicles, it might be planes, trains, and automobiles, as well as a hodgepodge of more exotic motorized devices. For vague concepts, like many and few, or a lot and a little, or jumbo and micro, or purple, we might attempt to settle on our individual understandings of the supremum (the least upper bound) and infimum (the greatest lower bound). If we are fortunate, we need never totally agree on how much, exactly, is too much or too little.

Notice however, that paradigmatic agreement is not agreement on the content of the concept.¹³⁹ It is something less. It is recourse to another form of judgment. We must negotiate with one another to settle on the contours of the concept through appeals to paradigms precisely because we do not completely understand one another. Recourse to paradigmatic agreement, therefore, introduces the possibility of normativity in a way that semantic content agreement and legal content agreement simply do not. It is fundamentally different.

To give an example, in a debate about whether or not Pluto is a planet, two individuals might attempt to articulate paradigm cases of “planet-ness” and then reason back from an individual celestial object’s inclusion in the category as reason to also include Pluto (or not include it). But when these arguments are marshaled, they are normative in character even if two individuals agree on the ultimate outcome: “Because Mercury is a planet, Pluto should be as well.” Or, “because certain very large asteroids in the asteroid belt are not planets, Pluto also

138. Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CALIF. L. REV. 277, 295 (1985).

139. See Millon, *supra* note 90, at 18-19 & n.54.

should not be a planet.” These arguments from paradigm cases do not help participants in the shared conversation to actually identify all those objects which are and are not planets, nor even identify what criteria make planets “planets” and not something else, but nonetheless can be grounds for agreement and disagreement about how to resolve concrete cases, such as whether Jupiter, Earth or Pluto are properly termed planets or not. In a similar way, two individuals could agree about how cases should be decided without ever agreeing on what the law actually is.

2. Criterial Agreement

As the name suggests, criterial agreement arises when we do not agree on the overarching concept, but we agree on criteria about it.¹⁴⁰ More frequently, quite the opposite circumstance arises—we agree on the concept but not all of its criteria. Because criterial disagreement is another form of estimating what was meant—rather than deducing what was meant—one can make recourse to criteria rather than paradigms in resolving disputes over meaning.

When we do not simultaneously agree on all the criteria for understanding, interpreting, or applying a concept, we enter something that looks very much like prescriptivist grammarian mode. For example, two individuals might be attempting to determine what it is that makes something a “chair.” I think a chair is a piece of furniture with four legs and a back. You think it is anything on which one can comfortably sit. We each believe that there are different criteria for establishing what is and is not a chair. In resolving our conflict, we might make appeals to other forms of agreement to test whether our criterion hold in paradigm cases, or are consistent with other evidence of the content of the concept—I say, look it up in the dictionary; you say, look to what is commonly described as a chair. I say are stools chairs? You say, are Panton chairs not chairs? I say, look to the psycholinguistic studies: when someone says, “chair,” the first thing that comes to mind is a four-legged straight-backed piece of furniture. You say you can find too many exceptions, from sculptures to tree stumps. We say to each other: why is your evidence relevant? On and on we argue, even over concededly constrained terrain, even using a shared legal grammar.¹⁴¹

By all outward signs, our disagreement appears normative, and it

140. Moore, *supra* note 138, at 296.

141. See Millon, *supra* note 90, at 18 n.54.

appears basic.¹⁴² One could have the disagreement even in the easiest of easy cases. For example, a dispute over what it means for a vehicle to be “in” the park, or the freedom of speech to be “abridged.” On the other hand, there are many instances in which criteria of or for a concept have been definitely settled and are now widely shared. Magic words and rituals often work in this fashion—the ritual comes to be equated with the concept itself, though they are not identical.

In contract law, for example, everyone knows that a signature indicates that one is legally bound by a contract’s terms, even though conceptually the basis of contract is that one has made a promise, not that one has signed a piece of paper. But a signature has become so tied to the notion of consent that it has become synonymous with it. One might just as readily ask, “was there a signature?” in response to an inquiry into whether a contract has been made as “was there a promise?” Yet, to further demonstrate how easily agreement might mask disagreement, two individuals might in fact disagree about whether a signature *is* synonymous with consent (most would not think so, given that fraud in the factum vitiates contractual consent, even with a signature), or is only evidence of consent, or is a legally sufficient act to make a binding contract even *if it is not* consent at all and it is known that it is not. Though in the vast majority of cases, individuals with these three highly divergent views about the criteria for contract formation might agree on the outcome of a case or what the law requires given a certain set of facts; nonetheless, they actually disagree fundamentally about what the law is—i.e., what makes a contract enforceable and why.

3. Theoretical Agreement

Theoretical agreement is the conceptual obverse of criterial agreement—rather than attempting to determine the meaning of a concept by recourse to criteria that might give shape to its contours, we reason from the category of which the concept is thought to be a member.¹⁴³ Most often, theoretical agreement is witnessed in the form of

142. See Balkin & Levinson, *supra* note 122, at 1778.

143. See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1760 (1995) (“There is often good reason for judges to raise the level of abstraction and ultimately to resort to large-scale theory. As a practical matter, discrete judgments about particular cases will often prove inadequate. Sometimes, people do not have clear intuitions about how cases should come out. Sometimes, seemingly similar cases provoke different reactions, and it is necessary to raise the level of theoretical ambition to explain whether those different reactions are justified or to show that the seemingly similar cases are different after all. Sometimes, different people simply disagree. By looking at broader principles, we may be able to mediate the disagreement. In any case, there is a problem of explaining our considered judgments about particular cases – to make

reason giving, and it is a powerful means of agreeing (or disagreeing) because it elevates the generality of agreement and disagreement.¹⁴⁴ Theoretical agreement is then a kind of agreement about a more general concept from which the meaning of the concept under consideration can be deduced by virtue of its relationship to or with it. Principles, shared fundamental norms and values: these are types of theoretical agreements we might have. Theoretical agreement is still not agreement about the specific concept at issue, but if there is generalized agreement about how to reason from more general concepts to more specific ones, then theoretical agreements can fill gaps without requiring particular agreement.

For example, in a dispute over whether an individual should have a right to counsel in a civil contempt proceeding, two individuals might argue about what it is that makes a right to counsel necessary in any given adversary proceeding. One might argue that it is the Sixth Amendment's guarantee that an individual be provided counsel, and that without that specific commitment, there would not even be a right to counsel in criminal cases. Another might argue that it is the Fifth Amendment's right to due process of law that undergirds the right to counsel and that, even if the Sixth Amendment did not exist, there would be a fundamental right to be represented by counsel in any adversary proceeding in which a person's liberty was at stake. In determining the scope of the right to counsel, these two individuals would not be arguing with one another about the concept of the right to counsel, but rather about the theory that gives rise to it, and the category of which it is thought to be a part.

Theoretical agreement is by no means necessary to come to agreement about the meaning of a concept. Two individuals might disagree on the theory that gives rise to the right to counsel—one might think that the right is rooted in the specific textual dictates of the Sixth Amendment and another in the dictates of fundamental fairness—but both might still agree that counsel is or is not warranted in a broad

sure that they are not just an accident – and at some point, the law may well want to offer that explanation. Ambitious thinkers might therefore urge that low-level principles may conflict with one another or be demonstrably wrong. In these circumstances, judges might well resort to higher theory.”)

144. See, e.g., Frederick Schauer, *The Generality of Law*, 107 W. VA. L. REV. 217, 231 (2004) (“Reason-giving is a pervasive and frequently praised feature of legal decision-making, and a legal decision-maker who provides reasons for her decisions is considered a better legal decision-maker than one who does not.”); Sunstein, *supra* note 143, at 1738 (explaining that “[i]t is customary to lament an outcome that has not been completely theorized, on the ground that any such outcome has been inadequately justified.”).

number of adversarial cases where the stakes are low enough that neither theory dictates there be counsel, or the stakes are high enough that both theories give rise to such a right (one might imagine a kind of juvenile delinquency hearing so nearly criminal in its nature, for example, that it still gives rise to a Sixth Amendment right to counsel). Even though they lack theoretical agreement, these two individuals nonetheless can come to a consensus about what the law is in innumerable cases.

4. Incompletely Theorized Agreement

The final kind of agreement that will be presented in this brief sketch of the landscape of normative interpretive agreements (perhaps the most important kind) is incompletely theorized agreement.¹⁴⁵ On its face, incompletely theorized agreement is not really agreement at all. It is really agreement about how to disagree. When faced with a truly intractable disagreement about a particular contested proposition, those in search of incompletely theorized agreement will move to levels of greater and greater particularity in search of agreement.¹⁴⁶ They are “agreements without theory” dependent on recourse to “rules and analogies.”¹⁴⁷ As such, incompletely theorized agreements are actually brokered agreements.¹⁴⁸ Nonetheless, they produce what appears to be consensus, namely consensus on outcomes, and therefore play an extremely important role in interpretive disputes of all kinds.

These types of agreements are brokered in the sense that they are a product of true compromise, and do not necessarily reflect anything we would ordinarily regard as agreement about a contested concept or proposition. Settlements in private law, where an individual or entity agrees to pay a sum certain rather than bear the risk of litigation, is an example of this phenomenon in action. Here, the law specifically provides a mechanism for negotiating over a legal proposition without resolving anything about its merits. Multimember courts also frequently craft decisions and opinions in which it is the case that there may not have been consensus regarding many of the statements concerning what the law is or what it requires in the majority opinion. Once imprinted in a judicial opinion (a conventional source of law), a proposition can become law though literally no individual lawyer or judge ever came to

145. Sunstein, *supra* note 143, at 1735-36; see Cass R. Sunstein, Tanner Lectures on Human Values at Harvard Univ.: Political Conflict and Legal Agreement 138, 141 (Nov. 29 – Dec. 1, 1994), available at http://tannerlectures.utah.edu/_documents/a-to-z/s/Sunstein96.pdf.

146. Sunstein, *supra* note 143, at 1736.

147. *Id.* at 1739, 1743.

148. See, e.g., Sunstein, *supra* note 22, at 969-72.

agreement about it. In this way, law can bubble up from the aether, without agreement of any kind whatsoever.

There can be no doubt that agreement to disagree is an important kind of agreement, and it is a key task of the legal system to be able to handle situations in which agreement cannot be reached. Yet, it is hard not to see the decision to compromise—to decide there is no sense in continuing to seek consensus on the meaning of a contested concept—as a fundamentally normative decision. Indeed, of the kinds of agreement, it is perhaps the kind that most openly acknowledges its explicitly merit-based character, accounting for the idea that two individuals operating in good faith can fundamentally disagree about what the law requires so substantially that they will never come to consensus in any reasonable amount of time.

5. The Limits of Extensional and Intensional Agreement

To take account: beginning first with existential agreement about law, it is probably not the case that there exists massive agreement about what laws there are. Moving next to semantic content and legal content agreement, it seemed more plausible that claims to massive agreement were really meant to cover that territory. But it was also clear that mere semantic content agreement was not enough to create widespread pervasive agreement about law, and even with the addition of legal content agreement to fill gaps, it was easy to imagine innumerable cases where social practices themselves would be insufficient to make most cases easy. Moving to extensional and intensional agreement, it was apparent that there exist innumerable kinds of such agreement—since they are really forms of normative argument, rather than true agreement—but it was posited that it could be the case nonetheless that massive agreement about the law is meant to encompass widespread agreement even about the proper resolution of these normative arguments. If that last proposition were true—and we not only experienced widespread semantic and legal content agreement but also massive agreement about how to extend concepts when there is no content agreement—would that be what is meant by the claim that there is widespread agreement about what the law is?

Probably not. As Justice Holmes once put it, “general propositions do not decide concrete cases.”¹⁴⁹ There is an entire social practice that has been hanging over this discussion—which is that in the American

149. Hart, *supra* note 94, at 614.

system of law at least, the primary legal interpreters are judges and the primary method of expounding the law is through cases. In our entire discussion of legal agreement, we have barely touched on judges and the cases they decide. Yet, the reality that law is bound up with adjudication is integral to the claim that there is widespread agreement about what the law is.¹⁵⁰

E. Agreement About Decisions

One cannot talk about massive agreement about the law without mentioning the most important situs of legal disagreement—the legal case. Whether the kinds of agreement we care about are ultimately lensed through discussion of semantic and legal content, or other forms of agreement, a prediction about how a case will be decided was the centerpiece of arguments about law for centuries. The possibility that we might be talking about what a judge will do in fact when we talk about what “the law” is has a history in American law dating back to the writings of Justice Holmes,¹⁵¹ to those of the Legal Realists and Hartian Positivists,¹⁵² and onto contemporary debates over the concept and nature of law.¹⁵³ This debate has become more sophisticated as the century has progressed, and most lawyers and scholars speaking technically no longer believe that the legal case should be the primary locus of debate about what determines what the law is—especially if the question is legal agreement.¹⁵⁴ Nonetheless, this section will cover it

150. After all, those who make the claim that there is widespread agreement immediately tie the claim to agreement about *cases*. See, e.g., Leiter, *Explaining Theoretical Disagreement*, *supra* note 7, at 1227 (“[I]f there were not massive convergence about what the law is, we should expect the universe of legal cases to look less like a pyramid and more like a lopsided square, whose base was perhaps somewhat bigger than its top.”); Schauer, *supra* note 8, at 413 (“Following the law is a legal event, and the vast majority of *these* legal events are easy cases.”).

151. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460 (1897).

152. HART, *supra* note 33, at 137.

153. See, e.g., Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, in HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 1, 37 (Jules Coleman ed., 2001) (“[Ronald Dworkin’s *Law’s Empire*] is not so much an explanation of the law as a sustained argument about how courts, especially American and British courts, should decide cases. It contains a theory of adjudication rather than a theory of (the nature of) law. Dworkin’s failure to allow that the two are not the same is one reason for the failure of his conception of the tasks and method of jurisprudence.”).

154. See Frederick Schauer, *(Re)taking Hart*, 119 HARV. L. REV. 852, 874-76 & nn.74-81 (2006) (reviewing NICOLA LACEY, *A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM* (2004)) (presenting the arguments explaining why the method by which a legal system performs adjudication is irrelevant to Legal Positivism’s core claims; many theorists hold that Legal Positivism is agnostic as to how legal cases are decided as long as the Rule of Recognition “is a product of contingent human decision, a social fact, rather than . . . a necessary feature of any legal

briefly.

Justice Holmes enunciated the hypothetical of a bad man whose only concern was with legal sanction, and took him as the ultimate test of what we mean by law. According to Holmes, “if we take the view of our friend the bad man we shall find that he does not care two straws” for legal reason, justification, principles, or rules.¹⁵⁵ He wants only to “know what the Massachusetts or English courts are likely to do in fact.”¹⁵⁶ Confessed Holmes, “I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”¹⁵⁷ Justice Holmes’ aphorism became the rallying cry of Legal Realism—since the imposition of legal sanction by a court is frequently the most profound result of writing down the laws.

But law would mean very little if it only commanded then threatened sanction for non-compliance. It would mean even less if all it entailed was our predictions about what we could be punished for doing. We would need considerably more judges and police if all that kept the populace from breaking the law was the fear that we could be punished for doing so. There is something frayed about predicting what courts will do in fact and calling it the law. Hart called it a “threadbare” conception.¹⁵⁸ The idea that law is the combination of command and sanction “if you take these notions at all precisely, is like that of a gunman saying to his victim, ‘Give me your money or your life.’” If law were defined by its capacity to inflict punishment, it would have no greater claim to legitimacy than an ordinary threat, and the decision to comply with the law would be no different from a decision to comply with a threat. According to Hart, “Law surely is not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion.”¹⁵⁹

One reason that it is not useful to talk about how cases will be decided is that so few “legal events”—events in the world where law bears on what might happen—will ever get within a country mile of a courthouse.¹⁶⁰ Individuals comply with the law regularly, even when no one is around to enforce it. We frequently follow the law because it is

system.”).

155. Holmes, *supra* note 151, at 457.

156. *Id.*

157. *Id.* at 460-61.

158. *Id.*

159. Hart, *supra* note 94, at 603.

160. See Schauer, *supra* note 8, at 413-14 (adopting the “legal event” terminology to describe “the divergence between the behavior that would have occurred but for the law and the behavior that occurred because of the law”).

the law and for no other reason. By the same token, the law is broken constantly, sometimes in view of the police, often without fear of sanction. We frequently double-park, trespass, jaywalk, spit, litter, speed, and loiter without fear. Even in fraught situations in which the police are involved or legally operative materials are in play, the notion that a court will become involved—that lawyers will become involved—is remote. We promise, injure, harass, intrude, convert, and trespass with far greater fear of social sanction than any legal sanction by a judge somewhere in a faraway courtroom. Life is too short. Yet, law still operates. Law has the power to guide conduct even when it can never be enforced by a judge, and by the same token, some laws do not guide conduct even when they could.

Another reason it is not useful to talk about how cases will be decided is that, for all we like to say about it, there is a distinction we each can draw about cases on the law and cases on the votes. Collegiality and civility—not to mention politics—enter into the consideration of actual cases, though many of us think that they should not.¹⁶¹ Many law professors believed that the Affordable Care Act would be held to be constitutional—that the case was an “easy” one on the law governing the Commerce Clause.¹⁶² Instead, the case was lost 5-4.¹⁶³ A social movement emanating from partisan political structures created the ideological conditions necessary to allow the Supreme Court to make this decision.¹⁶⁴ Many law professors would have been quick to tell you

161. Sunstein, *supra* note 143, at 1759 (“Dworkin’s patient and resourceful judge—could not really participate in ordinary judicial deliberations. He would probably be seen as a usurper, even an oddball. On a single-judge court, he would suffer from the vice of hubris. On a multimember panel, he would lack some of the crucial virtues of a participant in legal deliberation. These virtues include collegiality and civility, which incline judges toward the lowest level of abstraction necessary to decide a case.”)

162. See David A. Hyman, *Why Did Law Professors Misunderestimate the Lawsuits Against PPACA?*, 2014 U. ILL. L. REV. 805, 807 (2014) (“Virtually all law professors . . . agreed that all of the constitutional challenges to PPACA were meritless—and the federal courts would make short work of the litigation. Indeed, as Professor Aziz Huq (University of Chicago) observed, ‘[a]mong constitutional scholars, the puzzle is not how the federal government can defend the new law, but why anyone thinks a constitutional challenge is even worth making.’ In 2009, Professor Jack Balkin (Yale University) similarly observed that ‘the idea that the Act’s mandate to purchase health insurance might be unconstitutional was, in the view of most legal professionals and academics, simply crazy.’ Professor Akhil Amar (Yale University) declared that based on his three decades of studying the Constitution, PPACA ‘easily passes constitutional muster.’”)

163. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (U.S. 2012).

164. See Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012, 2:55 PM), <http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040> (“Was there a magic moment when the challenge to the mandate moved from off the wall to on the wall? There are many possible candidates. But the

that it was only because of this shift in the social conditions surrounding the case that the Justices felt the freedom to vote the way that they did, and that the decision was inconsistent with nearly two centuries of American constitutional law.¹⁶⁵ Some cases that were in no way easy—*Brown v. Board of Education* or *United States v. Nixon*—went 9-0 because “a complex array of institutional and political considerations made it important that there be no dissenters in either case.”¹⁶⁶ The early Supreme Court, and indeed the modern Supreme Court at various times, has discouraged the airing of dissents and concurrences in order to strengthen the institution of the Court even at the expense of false certainty over the ease of decisions about the law.¹⁶⁷

Moreover, in a scenario in which panels are multi-member, there is the possibility that the opinion represents no single person’s understanding of the law. There may literally be no individual human being in the world who agrees with the majority opinion in toto, but because of the compromises necessary to secure a majority, the law is established as it is. There “may also be complex bargaining issues as some officials or judges seek to implement a broad theory as part of the outcome, while others seek a narrow theory, and still others are undecided between the two.”¹⁶⁸

A final reason it may not be useful to talk about cases is the outcomes of cases are frequently over-determined. Multiple intersecting legal rules mean that there is no conceivable path from point A to point

most important ingredient was the overwhelming support of the Republican Party and its associated institutions for the challenge.”).

165. See Akhil Reed Amar, *Constitutional Showdown: A Florida Judge Distorted The Law in Striking Down Healthcare Reform*, L.A. TIMES (Feb. 6, 2011), <http://articles.latimes.com/2011/feb/06/opinion/la-oe-amar-health-care-legal-20110206> (“I strive to be apolitical in evaluating students and judges alike. Over the years, many of my favorite students have been proud conservatives, while others have been flaming liberals. The Constitution belongs to neither party.”).

166. See Schauer, *supra* note 8, at 414-20.

167. See William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 432 (1986) (“[U]nanimity underscores the gravity of a constitutional imperative—witness *Brown v. Board of Education* and *Cooper v. Aaron*.”); Ruth Bader Ginsburg, *Speaking in A Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1189-91 (1992) (explaining that Chief Justice Marshall instituted the practice of issuing opinions for the Court as a method of strengthening the Supreme Court as an institution, and praising the practice); G. Edward White, *The Working Life of the Marshall Court, 1815-1835*, 70 VA. L. REV. 1, 36-38 (1984) (explaining various ways in which the Marshall Court’s “opinion of the Court” practice gave a “false impression of unanimity”); see also Letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), in 10 THE WRITINGS OF THOMAS JEFFERSON 169, 171 (Paul L. Ford ed., 1899) (criticizing Chief Justice Marshall for suppressing dissents and lending a false sense of unanimity to the decisions of the Supreme Court).

168. Sunstein, *supra* note 143, at 1737 n.11 (noting the possibility of this phenomenon and the need for further study).

Z, regardless of whether somewhere along that path a clearly defined legal entitlement was plainly violated.¹⁶⁹ Structuring claims around the tort of negligence comes to mind. An individual can be negligent but cause no harm, for instance, and therefore no tort action is ever brought. No claim is ever adjudicated, but one can still say that she acted negligently nonetheless. Claims against government officials who have the power to invoke qualified and sovereign immunity in their defense have a similar quality. There may be no liability, and therefore no possibility of a lawsuit, even if there was a clear violation of a legal duty. Class action certification incorporates the merits of the underlying claim at several stages in the very act of pursuing the vehicle of the class action—there must be standing, jurisdiction, numerosity, typicality, commonality, adequacy, often also predominance and superiority, yet the class action device is the only way in which the claim will ever arise in a court because of exogenous economic, social, political, and institutional considerations.

Nonetheless, all of us, in our less sophisticated moments, use the shorthand of the judge sitting in judgment in a concrete legal dispute as our paradigm instance of a determination of legal meaning. Rightly or wrongly, it is probably the case that even if scholars know better, educated lay people and even smart lawyers often think that when it is asserted there is massive agreement about what the law is, what is meant is that there is massive agreement about what the judges will do. But as this section has sought to show, this is a problematic way to think about legal agreement.

F. Agreement About Propositions of Law and Legal Propositions

There is a final kind of legal agreement that must be discussed: the notion that what is meant by massive agreement could be massive agreement about legal propositions. Agreement about a legal proposition is not the same as agreement about what the law says or even what it means. Dworkin treated propositions of law as the foundation of his

169. See, e.g., Solum, *supra* note 36, at 462, 494-95 (“[I]t is pure nonsense to say that legal doctrine is completely indeterminate even with respect to very hard cases. Even in the hardest hard case, legal doctrine limits the court’s options. One of the parties will receive a judgment, not some unexpected stranger; the relief will be related to the dispute at hand and will not be a declaration that Mickey Mouse is the President of the United States. . . . the reason that easiest cases are not ‘cases’ at all is that the law’s relative determinacy does not permit us to make a ‘case’ out of them. The very determinacy of the law prevents us from even recognizing them as cases in any grand empirical study to determine the percentages of hard and easy cases.”).

theory of law, and they are a useful way of thinking about law.¹⁷⁰ According to Dworkin, propositions of law are “all the various statements and claims people make about what the law allows or prohibits or entitles them to have.”¹⁷¹ Propositions of law are thus composites. They can be quite general, as Dworkin noted, they can be mere recitations of statutory text. But they can also be quite specific—incorporating within them specific references to hypothetical facts and situations that might arise and the outcomes the law would dictate in those situations. According to Dworkin, it is just as much a legal proposition to state that “the law forbids states to deny anyone equal protection within the meaning of the Fourteenth Amendment” as it is to say “the law does not provide compensation for fellow-servant injuries” or “the law requires Acme Corporation to compensate John Smith for the injury he suffered in its employ last February.”¹⁷²

1. Agreement About What the Law Prohibits One From Doing, Making, or Having

Thus, the claim to massive agreement could be a claim about how to decide the truth of legal propositions, rather than about how to decide what the law is. It is a determination of what the law does or does not entitle, prohibit, or allow.

Of all the forms of agreement about the law that we might have, this appears to be the most natural. It is agreement about the answers to discrete propositional statements as opposed to empirical questions about what the law says or is. The distinction is an important one. If someone asks the question, “is murder illegal in the jurisdiction?” or “is it illegal to kill?”, the answer will surely be yes in every jurisdiction worth living in. But framed as a legal proposition, the inquiry becomes both more concrete and more useful. “Does an individual have a right to kill his attacker if there is no opportunity to retreat and he reasonably fears for his life” might be the question, in which case the answer might be “yes,” even though that proposition does not recite a “law” written down anywhere dictating that result. That method of thinking about legal agreement has much more of the texture of actual legal discussion, applying law to fact, than the barren question, “what is the law?”¹⁷³

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

171. *Id.*

172. *Id.*

173. *See also, e.g.*, Moore, *supra* note 138, at 280 n.6 (arguing that legal propositions are an “idiosyncratic way[] of looking at law” because an “idea of law [that] focuses on those singular propositions of law that decide particular cases (‘This contract is valid,’ for example)” fails “[t]o

2. Agreement About What One is In Fact Prohibited From Doing, Making, or Having

A final kind of massive agreement we may share may not just be about propositions of law in the abstract, but about how the law operates in fact. While this form of legal agreement is probably widely shared, it is often difficult for the legal system to confront. Frequently, we massively agree both about the answer to a proposition of law as a formal language game, but also agree as to how the proposition actually operates in fact. This second element is important because the legal system could be considered manifestly and systematically unjust to the extent we thought individuals and judges were systematically unaware of how it operated in fact.¹⁷⁴

This distinction between legal propositions in the abstract and legal propositions in fact is sometimes known as the distinction between concepts and conceptions,¹⁷⁵ as under-enforced norms,¹⁷⁶ or as the distinction between operative rules and decision rules.¹⁷⁷ It is the idea that the law says one thing, but everyone knows it is a fiction. It is something like the notion that “[t]he law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread”¹⁷⁸ and opposite the famous statement that “[i]t is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.”¹⁷⁹ Often there are rights that have no remedies, and formal equality is substantively unequal.

This dividing line is actually far more important than one might initially imagine. The law makes no explicit exception to the speed limit for speeding to get one’s wife to the hospital. No formal rule says that jaywalking is permissible on an empty traffic-less street. Technically, police may stop anyone who violates even the most minimal traffic

distinguish law from interpretation”).

174. See, e.g., Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) (arguing that rights and remedies should be viewed as intimately linked).

175. DWORKIN, *supra* note 17, at 134-35.

176. See Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 152 (1997); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213-20 (1978); Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 961-73 (1985).

177. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9-10 (2004).

178. ANATOLE FRANCE, *LE LYS ROUGE* (1894), reprinted in JOHN BARTLETT, *FAMILIAR QUOTATIONS* 586 (Justin Kaplan ed., 17th ed. 2002).

179. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) (Marshall, C.J.).

law,¹⁸⁰ and ask anyone at all if they will consent to a search no matter what they are up to.¹⁸¹ Officially, students have sweeping rights to speak freely in school,¹⁸² though everyone knows that in reality they do not.¹⁸³

Law and legal propositions weave a complex and interdependent fabric with other conventional and normative activities.¹⁸⁴ They are not cleanly segregable. As such, one way we might agree about what the law is might be that we agree that the law creates and sustains certain social facts, interactions, hierarchies, and structures. We might say that it promises equal protection of the laws, but delivers something less—and that this is something we massively agree about.

IV. LEGAL AGREEMENT AND POSITIVISM'S CLAIMS TO THEORETICAL SUPERIORITY

As Part III sought to show, the claim that “there is massive and pervasive agreement about the law throughout the system” opens for discussion the remarkably rich variety of ways that we might understand the nature of legal agreement and disagreement. But now that the varieties of legal agreement have been laid bare, it is possible to return to the fundamental reason for this Article, which is the remarkably persistent claim that the existence of massive agreement makes Positivism more plausible than competing accounts of the nature of law; that differing theories of the concept of law must make “extravagant” claims to achieve the coincidental outcome—massive agreement—that Positivism comfortably predicts (and that Positivists regard as a constitutive feature of mature legal systems).

In canvassing the possible meanings of agreement, however, we have also seen the possible forms of disagreement. Those forms of agreement and disagreement reveal that claims of Positivism's superior descriptive accuracy of the concept of law are overstated, that Positivism struggles to account for forms of disagreement that most individuals would consider distinctly “legal” even though they cannot be traced to

180. *Whren v. United States*, 517 U.S. 806, 813 (1996).

181. *Schneekloth v. Bustamonte*, 412 U.S. 218, 227-28 (1973).

182. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

183. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 973-76 (1995) (schools teach citizenship and obedience to authority).

184. See Balkin & Levinson, *supra* note 122, at 1784 (“[A]lthough the language game of constitutional argument is different from the language game of politics or that of morality, the three language games (and indeed possibly others) are interpenetrating. They are not identical, but they have linkages and allegiances that cannot be fully and finally distinguished and separated.”).

conventionality or a “rule of recognition.”

A. *Massive Agreement and Positivism’s Supposed Descriptive Superiority*

The argument for Legal Positivism’s claims to descriptive superiority over other accounts of the concept of law are that it better explains why there is massive agreement.¹⁸⁵ That is, a legal proposition’s truth or falsity, in Legal Positivism, is defined as whether there is agreement among legal officials about it.¹⁸⁶ In Natural Law, a legal proposition’s truth would be defined by its consistency with transcendental reason, and in Dworkinism by the degree to which one or another outcome of the proposition would best fit and justify the legal system as a whole, casting it in its best light.¹⁸⁷ These latter two theories of law do not require legal agreement by anyone to establish the veracity of legal claims—they appeal to other sources.¹⁸⁸

But it is not readily apparent why Legal Positivism’s prediction that there exists massive agreement among officials about the content of law should have any relationship whatsoever with our expectations regarding agreement about the law among the general public. Indeed, most people admittedly do not know the uniquely legal grammar necessary to even make sense of legal content agreement among officials and practicing attorneys. Yet, individuals manage to stop at stop signs, avoid committing trespass or murder, fill out draft forms, obtain driver’s licenses, sign leases, and pay their taxes capably with minimal knowledge of the specialized legal grammar that forms the unique conventionality that decides concrete cases. Perhaps this is because semantic content agreement is sufficient to fill the entire gap. However, even in Legal Positivism, semantic content agreement is merely a tool of

185. See, e.g., Leiter, *Explaining Theoretical Disagreement*, *supra* note 7, at 1247-49; sources cited *supra* note 7.

186. See, e.g., SHAPIRO, *supra* note 18, at 290 (“The idea that the criteria of legality are determined by consensus is not just one aspect of legal practice among many; on current accounts of legal positivism, it is *the fundamental ground rule of law*. What ultimately makes it the case that some rule is a binding legal rule is that it is validated by some standard accepted by officials of the group.”); sources cited *supra* note 18.

187. See DWORKIN, *supra* note 31, at 228-38; see also Silas Wasserstrom, *The Empire’s New Clothes*, 75 GEO. L.J. 199, 274-75 (1986) (reviewing RONALD DWORKIN, *LAW’S EMPIRE* (1986)) (describing Dworkin’s theory of legal interpretation).

188. See, e.g., COLEMAN, *supra* note 26, at 166 (“Dworkin rejects conventionalism of all kinds and at every turn.”); DWORKIN, *supra* note 31, at 138 (“[N]othing *need* be settled as a matter of convention in order for a legal system not only to exist but flourish.”); Moore, *supra* note 138, at 291-96 & n.25.

agreement, not a source of agreement. Legal Positivism makes use of language conventions to advance and instantiate legal conventions, not vice versa. As such, widespread semantic content agreement does nothing to make Legal Positivism more plausible at all—whether law is conventional or not conventional, we would still expect the tax forms to be written in English rather than French. Reasoning from massive agreement about words to massive agreement about the law is reasoning backward.

The other possibility is that the law is more certain for officials in Legal Positivism because it is conventional. Therefore, law is more certain for everyone because it is more certain for officials. As such, predictions—either about cases or about legal propositions—are somehow likely to be more certain because law is conventional and not some other way.

That implicates the greatest flaw in the reasoning of those who hold out the notion of easy cases or massive agreement as reason to prefer Legal Positivism. There is little reason to expect that Natural Law, Legal Realism, or Dworkinism would give rise to any less certainty about the law than law as a purely conventional social practice.

First, to the extent that Natural Law incorporates principles that are considered by sincere adherents to be time-invariant human universals, it would stand to reason that Natural Law would almost perfectly mirror the actual morals, attitudes, and laws instantiated by society.¹⁸⁹ Most likely, Natural Law has little to say about how the tax forms should be formatted. Yet, to the extent that it would flatly prohibit murder, torture, and rape of its own moment, we find that man-made law reflects those prohibitions. Viewed from the internal vantage point of an adherent to Natural Law who believes that human beings have the capacity to detect and understand the transcendental reasons that give rise to those natural duties, one would fully expect that our laws would be closely aligned with the dictates of that law.¹⁹⁰

Second, to the extent that Legal Realism stands in for the idea that legal materials and legal rules do not constrain legal officials, and that they merely use them to justify their decisions post-hoc, we would nonetheless still expect to see massive agreement. As an initial matter, Legal Realism's post-hoc justifications are designed by the very fact that

189. See, e.g., Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 *YALE L.J.* 907, 960 (1993).

190. See, e.g., Meese & Larkin, *supra* note 72, at 733-34; Neil Duxbury, *Golden Rule Reasoning, Moral Judgment, and Law*, 84 *NOTRE DAME L. REV.* 1529, 1531 (2009) (calling the Golden Rule “[t]he only standard of duty common to all people.”).

they are justifications, to lend the appearance of agreement. Agreement, as Legal Realism itself argues, is a cloak to hide the exercise of discretion.¹⁹¹

There is another reason to believe we would see massive agreement even in a regime where there existed no legal conventionality. What Judge Harold Leventhal once observed about the use of legislative history—it's akin to “looking over a crowd and picking out your friends”¹⁹²—tells us why Legal Realism's theory of judges and judging nonetheless predicts massive agreement. Judges and the politicians who appoint them are friends. They share an ideology, often a culture, a language, and a way of life. Legal Realism says that legal materials do not constrain the decisions of legal officials, but that does not mean that they are not constrained.¹⁹³ We can know quite well how a judge will decide an easy case, and how she will use the legal materials at her disposal to engage in a post-hoc justification of her preordained conclusion, even though those materials were not the reason she came to the conclusion that she did. Even though “law” did not decide the case.

Third, Dworkinism presents the strongest case for massive agreement since it explicitly contemplates the incorporation of existing sources and legal materials into its unique brand of legal reasoning.¹⁹⁴ Dworkinism treats the law like a chain novel in which each individual judge is presented with the task of writing the next chapter, and whose goal it is to write the chapter that best fits and justifies all the chapters that have come before. It is unclear how or why this method—which readily relies on existing legal materials, and incorporates existing semantic and legal content agreement in reaching its conclusions—would not appear almost identical to Legal Positivism in the mine run of cases.¹⁹⁵ In fact, it would only be in hard cases that one would expect the two to be distinguishable.

Indeed, any theory of law that relies on conventional practices to instantiate its norms while only predicting deviations when the existing

191. See, e.g., DWORKIN, *supra* note 17, at 3; HART, *supra* note 33, at 136; Green, *supra* note 33, at 1917-18; Newman, *supra* note 33, at 203.

192. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).

193. See, e.g., DWORKIN, *supra* note 17, at 3; HART, *supra* note 33, at 136; Green, *supra* note 33, at 1917-18; Newman, *supra* note 33, at 203.

194. See, e.g., DWORKIN, *supra* note 31, at 228-38.

195. Dworkin himself frequently and readily discussed the interrelationship between conventions and his theory of law. See, e.g., DWORKIN, *supra* note 31, at 91 (explaining that we encounter the conventions of law ready-made and whole cloth, but that it would be a “mistake . . . to think that we identify these institutions through some shared and intellectually satisfying definition of what a legal system necessarily is and what institutions necessarily make it up.”).

legal superstructure has somehow failed is equally capable of accounting for nearly all the kinds of massive agreement we observe.¹⁹⁶ This is only all the more so when we notice that no account of law that depends on the notion that conventional legal materials matter much can make sense of the profound ignorance of what laws there are.¹⁹⁷ Thus, other theories of law are just as capable of accounting for the existence of massive agreement as Legal Positivism. In crucial ways, some of these accounts do far better jobs of explaining the existence and nature of massive agreement.

To put the point even more finely, Natural Law, Legal Realism, and Dworkinism—just like Legal Positivism—predict massive agreement, even if they do not require it. They are designed to explain and predict the methods of determining, ultimately (or at least most likely, given the possible meanings of the notion of legal agreement canvassed in this Article), the validity of legal propositions. But none of these theories denies—and all explicitly contemplate—that social practices and conventions will be used to operationalize and build upon these foundations in making law work. As such, whether Natural Law, Legal Realism, Legal Positivism, or Dworkinism ultimately create in their own image, we would nonetheless expect the projection of their effects—in the form of agreement about what particular statutes say, or which sources are the most authoritative legal sources—to be nigh indistinguishable. As such, the argument from massive agreement should not affect our decision to adopt any one of these theories over the others.

B. Forms of Disagreement and Problems For Positivism

Even as Positivism does not seem to benefit from careful examination of its claims to superiority from massive agreement, inquiry into the nature of agreement poses vexing problems for Legal Positivism, because extensional and intensional disagreements appear to be normative in character—and possibly, if not frequently, moral and political.

196. See Frederick Schauer, *Is Legality Political?*, 53 WM. & MARY L. REV. 481, 485 (2011) (“[I]t is important to exclude from the category of obedience those actions that are consistent or in conformity with the law but which are not taken because of the law.”). It is difficult to understand the foregoing statement without presupposing a meaning of law, which makes the statement almost unintelligible. See, e.g. COLEMAN, *supra* note 26, at 167 (“[E]ven a decision reached by applying authoritative sources and those to which one is authoritatively directed, and doing so in an appropriate or authorized way, need not state the law. That depends on what one’s theory of law is.”).

197. That is, what is written in the rules, regulations, statute books, case reports, and the Constitution, etc.

The examples one could provide are myriad, but most often are cleanly presented through questions involving persistent interpretive disagreements. When a judge is asked to apply the statute: “No person shall be compelled in any criminal case to be a witness against himself,” much about that statute’s meaning is determinable by its semantic and legal content, but those sources of meaning do not exhaust the ways in which we might be uncertain about how a legal proposition should be decided. As the hypothetical cases presented earlier show, even easy cases can be hard. What is a Court to do if the violation is manifest—torture, beating, and whipping—but there is a procedural defect in raising an objection to the admission of the evidence at trial? Can it really be the case, as the Positivists suggest, that such an instance is either decided readily by convention or decided by discretion, but cannot be decided by argument over what the law requires? That it would not be “legal” argument to engage in prescriptive disagreement about paradigms, criteria, or theory?

This kind of disagreement is not purely the stuff of appellate courts. Indeed, the actors in the legal system who most frequently engage in this sort of reasoning about law are probably police officers and prosecutors. But these sorts of difficult questions—which involve recourse to reason and practical judgment—are still legal questions and the reasoning process certainly appears to be a legal one. To the extent that Legal Positivism seeks to exclude the inevitable disagreements that arise in such situations—fraught and morally freighted as they are—it does so at the cost of offering a descriptively adequate account of a frequent occurrence that dictates the actual determination of a substantial number of propositions of law—whether that disagreement is styled as a language game or understood as effecting substantive outcomes in the world.

Legal Positivists would accept that there might be explicit normative disagreements about what the law requires in any of the myriad easy cases presented earlier in this Article respecting our hypothetical statute. As such, they would not necessarily disagree with anything that has been said about the nature of agreement or disagreement thus far. But to hold to Legal Positivism while accepting the inevitability of *normative* interpretive disagreements is to miss an important endogeneity. Legal Positivism says that social conventions determine legality. Exclusive Legal Positivism argues that legal validity depends solely on sources, not on merits. Inclusive Legal Positivism argues that legal validity can depend on the merits of a law, but only if our shared legal grammar—the rule of recognition, or what this Article

has styled “legal content agreement”—allows for such merits-based considerations.

But when we argue over that shared legal grammar—when we argue over the content of the rule of recognition, (for instance, whether the six modalities of constitutional argument really are the only six legitimate forms of constitutional argument), we create the possibility of normative disagreement about the very conventionality that is supposed to create and sustain law. This form of disagreement, known as theoretical disagreement, remains a serious challenge to Legal Positivism,¹⁹⁸ and one that can only be answered by arguing that it does not really exist. That is, that its face value cannot be preserved.¹⁹⁹ Nevertheless, legal grammar does change, and judges do try to play legal grammarian as a way of deciding concrete legal propositions—which seems to demand that we take the argument from theoretical disagreement at face value and build a theory around it. But if we are to take this form of disagreement seriously, it will require us to reevaluate Legal Positivism.

V. CONCLUSION

This Article sought to show that the concept of legal agreement is itself quite malleable and open to competing interpretations. This ambiguity often means that we have little idea what is meant when someone argues that there is massive agreement about what the law is or that there are many easy cases. Reducing the level of abstraction, we see that all forms of agreement, except pre-interpretive forms of “content agreement” are really forms of intensional and extensional agreement, which involve recourse to normative argument about how a concept should be understood. As such, even in easy cases, it will frequently be the case that we will not ever completely agree on the meaning of concepts and rules involved, even if we reach the same result in their application in deciding a particular proposition (in which case agreement is often incompletely theorized).

Furthermore, we would expect to see massive agreement in any theory of law that relies on conventional practices to instantiate its norms. Since conventional practices are precisely the tools one would expect any rational society to employ in operationalizing its law, we would expect to see this often. Whether speed limits are ultimately a result of transcendental reason or a social rule, we would still expect

198. See Andrew Tutt, *The Improbability of Positivism*, 34 PACE L. REV. 562, 564-66 (2014).

199. See Leiter, *Explaining Theoretical Disagreement*, *supra* note 7, at 1228.

massive agreement about the speed limits on the street signs and in the statute books. Therefore, the existence of massive agreement, such as it is, should play little role in deciding between competing theories of the concept of law.

Finally, because normative *disagreement* is a pervasive feature of interpretation in both language and law, Legal Positivism invites its own challenge in making massive agreement claims. In particular, it must contend with the fact that even in easy cases, substantive normative interpretive challenges can always be marshaled in determining the content of concepts, and the sources of those challenges are not limited by any social rule. For example, in contests over the concept of a chair, a judge is free to make recourse to moral, ethical, and other sources of practical reason in deciding the content of the concept. To the extent that a Positivist would seek to argue that judges are bound by convention to limit the sources to which they might make recourse, that argument is itself a normative one that can be contested on its own merits. This possibility of infinite regress poses a vexing challenge to the notion that law is a purely conventional practice,²⁰⁰ and therefore, to the idea that there is or can be a strict separation between law and morality.²⁰¹

200. See COLEMAN, *supra* note 26, at 157 (“By modus tollens, if officials can disagree about what the criteria are, then the criteria are not a matter of conventional practice.”)

201. *Id.* at 171 (“The problem is that positivists have no theory of revision. Hart certainly does not. He tells us only that to resolve the dispute and in effect therefore to revise the law, the judge must exercise discretion.”).