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# The Improbability of Positivism

Andrew Tutt\*

## Abstract

*Ronald Dworkin's contributions to legal philosophy have been subject to severe criticism in recent years.<sup>1</sup> Other legal philosophers call his arguments "deflected or discredited,"<sup>2</sup> laced with "philosophical confusions,"<sup>3</sup> and "deeply embedded" mistakes.<sup>4</sup> As Brian Leiter writes, "[t]he only good news in the story about Dworkin's impact on law and philosophy is that most of the field declined to follow the Dworkinian path . . . ."<sup>5</sup>*

*This Article endeavors to show that, far from an effort beset with primitive errors, Dworkin's challenge to legal positivism in the opening pages of his seminal work was neither misguided nor trivial.<sup>6</sup> Rather, Dworkin's challenge remains as important and thought-provoking today as it was when he first set it*

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1. See, e.g., JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 67, 105 (2001); Brian Leiter, *The End of Empire: Dworkin and Jurisprudence in the 21st Century*, 36 RUTGERS L.J. 165, 166 (2004) [hereinafter Leiter, *The End of Empire*]; Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17, 18 (2003) [hereinafter Leiter, *Beyond the Hart/Dworkin Debate*]; Dan Priel, *The Place of Legitimacy in Legal Theory*, 57 MCGILL L.J. 1, 3 nn.1 & 2 (2011) (collecting criticisms).

2. Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1216 (2009) [hereinafter Leiter, *Explaining Theoretical Disagreement*]; see also Brian Leiter, *The Radicalism of Legal Positivism*, 66 NAT'L LAW. GUILD REV. 165, 165 (2009) [hereinafter Leiter, *The Radicalism of Legal Positivism*] ("Ronald Dworkin . . . has made a career out of scandalous mischaracterizations of the positivist theory of law.").

3. COLEMAN, *supra* note 1, at 155.

4. *Id.* at 181.

5. Leiter, *The End of Empire*, *supra* note 1, at 166.

6. See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*].

down.<sup>7</sup> His challenge, though straightforward, has never been satisfactorily answered. Rather than grapple with Dworkin's argument, legal philosophers have either misunderstood or trivialized his insights in the decades since.<sup>8</sup> But there is a reason H.L.A. Hart, one of Dworkin's examiners at Oxford, saved his jurisprudence examination before ever having reason to believe that Dworkin would become the primary opponent to legal positivism.<sup>9</sup> Hart's challenge—the argument from theoretical disagreement—still burns bright nearly a quarter-century on.

Furthermore, this Article seeks to explain why legal positivism's inability to preserve the face value of theoretical disagreement makes it improbable that legal positivism offers an adequate descriptive account of the nature of law. It also endeavors to outline why this deficiency is so immensely important. To accept the legitimacy of theoretical disagreement is accept that to know what the law is one must know something about the moral and political culture in which that law resides.

## I. Introduction

A set of spelunkers are trapped in a cave, and to stave off starvation, one man is chosen to die so that the others may live.<sup>10</sup> Dice choose the martyr.<sup>11</sup> The man chosen objects, calling it “frightful” and “odious” to mark one for death by the most naked of chance.<sup>12</sup> Nonetheless, upon his accession to the fairness of the throw, he is killed and consumed by his companions.<sup>13</sup> The survivors are charged with the murder.<sup>14</sup>

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7. See Dale Smith, *Theoretical Disagreement and the Semantic Sting*, 30 OXFORD J. LEGAL STUD. 635, 636 (2010).

8. See, e.g., COLEMAN, *supra* note 1, at 105; Leiter, *Explaining Theoretical Disagreement*, *supra* note 2, at 1215-16.

9. See Adam Liptak, *The Transcendent Lawyer*, N.Y.U. L. SCH. MAG., Autumn 2005, at 15.

10. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 616 (1949) (illustrating the improbability of positivism through a fictional hypothetical case and corresponding opinions by five fictional judges, each examining the case from a different legal principle).

11. *Id.* at 617-18.

12. *Id.* at 618.

13. *Id.*

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The statute reads, with no exceptions, “[w]hoever shall willfully take the life of another shall be punished by death.”<sup>15</sup>

And yet, on appeal, the judges divide. They disagree about what the law requires.<sup>16</sup> They do not disagree about what the law *ought* to be—all agree that a murder conviction and death for the survivors would be a tragic result—but some think the law mandates punishment,<sup>17</sup> others forgiveness,<sup>18</sup> others nothing at all.<sup>19</sup> The judges do not disagree about the facts, the words of the statute, or all the cases that have come before; that is, they are not engaged in a factual or empirical dispute about what mutually agreed upon authoritative sources say.<sup>20</sup> They are instead engaged in what Ronald Dworkin famously called “theoretical disagreement.”<sup>21</sup> They disagree about which sources they are meant to look to in determining what the law is.

According to legal positivism this sort of disagreement is impossible.<sup>22</sup> At most one—and possibly none—of the judges in

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14. *Id.*

15. *Id.* at 619.

16. *See id.* at 616-19 (Truepenny, C.J.) (holding the men guilty by arguing that the Chief Executive will surely issue them a pardon, thus allowing the judges to respect and uphold the law without guilty consciences for putting the defendants to death); Fuller, *supra* note 10, at 620-26 (Foster, J.) (holding that there is no law to apply, because the men were not within the jurisdiction of the realm at the time of the killing, and through arguing that they are emphatically not guilty by reason of necessity, their convictions should be set aside); *id.* at 626-31 (Tatting, J.) (holding that he cannot discover a single appropriate course for resolving the case—finding it intellectually unsound to excuse the men for murder, but evil to put them to death, and therefore recusing himself from the case); *id.* at 631-37 (Keen, J.) (holding that regardless of executive clemency, the words of the statute are unambiguous, thus resolving the matter irrespective of the court’s sympathies, and that it was inappropriate for Truepenny even to mention them); *id.* at 637-44 (Handy, J.) (arguing that this is clearly an extraordinary case, calling for an exercise of discretion and judgment by the court that is well outside the bounds of any case the law was ever intended to cover, and that it is quite simple to conclude that common sense and substantial justice favor a judicial declaration of the defendants’ innocence).

17. *Id.* at 616-19 (Truepenny, C.J.); *id.* at 631-37 (Keen, J.).

18. Fuller, *supra* note 10, at 620-26 (Foster, J.).

19. *Id.* at 625-31 (Tatting, J.); *id.* at 637-44 (Handy, J.).

20. *See* DWORKIN, *LAW’S EMPIRE*, *supra* note 6, at 5.

21. *Id.* at 6.

22. *See* Leiter, *Explaining Theoretical Disagreement*, *supra* note 2, at 1216-20; Leiter, *The Radicalism of Legal Positivism*, *supra* note 2, at 167

the case of the Speluncean Explorers is correct about what the law requires.<sup>23</sup> Any dispute about whether or not killing out of necessity is or is not the law is *unintelligible* in the absence of a convergent practice among officials establishing the criteria for definitively deciding this “proposition[] of law.”<sup>24</sup> There may be no fixed practice, but in that case, there is no law to apply and judges must engage in the unavoidable exercise of discretion. To say otherwise is to make a primitive mistake about the nature of law itself.

The disagreement on display in Lon Fuller’s famous hypothetical case—known commonly as “theoretical disagreement,”<sup>25</sup> but also as disagreement about the “grounds of law,”<sup>26</sup> disagreement about the criteria of legal validity, or disagreement about the “content” of the Rule of Recognition<sup>27</sup>—is both recurrent in our legal discourse<sup>28</sup> and defies Positivism’s most basic assumptions about the nature of that discourse.<sup>29</sup> For nearly three decades, Positivism has escaped without confronting the enormous challenge that the possibility of legitimate theoretical disagreement poses to the foundations of that theory.<sup>30</sup> Professor Scott Shapiro recently called Positivism’s inability to satisfactorily account for the persistence of this kind of disagreement as “the most serious threat facing legal positivism at the beginning of the twenty-

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(“[Positivism] claims only that *when law exists* in some society, we find a social rule that is the Rule of Recognition.”).

23. See Kenneth Einar Himma, *Substance and Method in Conceptual Jurisprudence and Legal Theory*, 88 VA. L. REV. 1119, 1159 (2002).

24. See DWORKIN, *LAW’S EMPIRE*, *supra* note 6, at 4 (internal quotation marks omitted) (“Let us call ‘propositions of law’ all the various statements and claims people make about what the law allows or prohibits or entitles them to have.”); see also Himma, *supra* note 22, at 1215-18.

25. Smith, *supra* note 7, at 636.

26. SCOTT J. SHAPIRO, *LEGALITY* 285 (2011) [hereinafter SHAPIRO, *LEGALITY*].

27. *Id.*

28. *Id.* at 283 (“pervasive”); *id.* at 291 (“a truism about legal practice”).

29. *Id.* at 291-92 (“[L]egal positivism, at least as it is currently conceived, cannot make sense of this truism and hence is incapable of accounting for a central feature of legal practice.”).

30. Scott J. Shapiro, *The “Hart-Dworkin” Debate: A Short Guide for the Perplexed*, in RONALD DWORKIN 22, 50 (Arthur Ripstein ed., 2007) [hereinafter Shapiro, *The “Hart-Dworkin” Debate*].

first century.”<sup>31</sup> Only one robust defense of legal Positivism has been marshaled, and it frankly and freely admits that for Positivism to survive, theoretical disagreements must be fundamentally misguided, incoherent, disingenuous, or unintelligible.<sup>32</sup>

This Article seeks to explain why this notion is highly unconvincing, and why this seemingly minor defect in the foundations of Positivism—its inability to account for theoretical disagreements—makes it improbable that Positivism offers an adequate descriptive account of the nature of law. Not *impossible*, but unlikely. This Article also endeavors to outline why this deficiency is so immensely important. To accept the validity of theoretical disagreement is to accept that the very concept of law must incorporate deeper principles embedded in the moral and political culture in which that law resides, an outcome that threatens to tear down legal Positivism’s conceptual cathedral.

Part II of this Article explains legal Positivism’s core claim about the existence and nature of the “Rule of Recognition,” and describes the puzzling persistence of disagreements that seem to flatly contradict Positivism’s most basic claims about it. Part III briefly explains unreconstructed legal Positivism’s contemporary answer to this critique.<sup>33</sup> Part IV explains why these defenses require us to believe that there is widespread repetition of simple errors and rudimentary mistakes among some of the legal system’s most skillful and important actors—an outcome that, while certainly *possible*, is highly *improbable*.

The Article concludes with an explanation as to why the fall of the Rule of Recognition is so devastating to the Positivist program. Acceptance of the possibility of genuine theoretical disagreement means that *what* the law is at any given moment must be justified by the political morality that makes it

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31. *Id.*

32. See Leiter, *Explaining Theoretical Disagreement*, *supra* note 2, at 1215-18.

33. See generally H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994) [hereinafter HART, CONCEPT OF LAW]. “[U]nreconstructed” means either Hartian Positivism, as set forth in H.L.A. Hart’s masterwork, *The Concept of Law*, or the writings and views of legal philosophers who still ascribe to the core tenets of that theory but offer no alternative explanation or justification for the existence of this kind of disagreement.

legitimate. In other words, no proposition of law can be decided without potential recourse to its merits. Rather than content-free and morally neutral, if theoretical disagreement exists, law is always subject to deliberation and its validity is always subject to its conformance with more basic principles of justice and political morality in the society of which it is a part.

## II. The Rule of Recognition and the Existence of “Theoretical Disagreement”

Legal positivism aims to be descriptive and morally neutral.<sup>34</sup> As an empirical and analytical theory, if it is to be judged, it is to be judged by the fit of its account with the institutions and social practices that create and enforce the law.<sup>35</sup> For the most part it fits tremendously well. Positivism straightforwardly locates the foundations of legal authority,<sup>36</sup> explains how individuals predict legal consequences,<sup>37</sup> draws clear and definite lines between what is and isn’t law, and illuminates why unjust and immoral laws can still be “law.”<sup>38</sup> Since these are all important aspects of the law as we observe it, Positivism gracefully explains the majority of our experience.<sup>39</sup>

34. Andrei Marmor, *Legal Positivism: Still Descriptive and Morally Neutral*, in *LAW IN THE AGE OF PLURALISM* 125, 125 (2007); see 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, 1 (Jules Coleman ed., 2001); Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 *CORNELL L. REV.* 1080, 1088 (1997); see also HART, *CONCEPT OF LAW*, *supra* note 33, at 239.

35. See Schauer & Wise, *supra* note 34, at 1082 (“[T]he truth or falsity of legal positivism has as its most substantial component a claim that is more empirical than conceptual.”).

36. See, e.g., Scott J. Shapiro, *On Hart’s Way Out*, in *HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO ‘THE CONCEPT OF LAW’* 149, 153-56 (Jules Coleman ed., 2001).

37. See, e.g., *id.* at 187. See generally Scott J. Shapiro, *The Bad Man and the Internal Point of View*, in *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 197, 200-04 (Steven J. Burton ed., 2000).

38. HART, *CONCEPT OF LAW*, *supra* note 33, at 207-12.

39. See *id.* at 98-99; see also Scott J. Shapiro, *What is the Rule of Recognition (and Does it Exist)?*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 235, 242-45 (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

Legal positivism rests upon the “Rule of Recognition”<sup>40</sup>—a master norm, derivable from the practice of officials, dictating the criteria of legal validity.<sup>41</sup> According to Positivism, the Rule of Recognition is the norm shared by the officials in a legal system that sets out the criteria for the validity of legal rules.<sup>42</sup> This norm is not *itself* a legal rule, but instead is a social convention, what H.L.A. Hart termed a “social rule.”<sup>43</sup> The Rule of Recognition is the bedrock of a legal system, because it makes all other legal rules possible without needing to rely on other legal rules to ground its own authority (a problem that would lead to a significant chicken-egg paradox).<sup>44</sup>

According to Positivists, the Rule of Recognition is constituted entirely and merely by the practice of officials in a legal system.<sup>45</sup> As such, the Rule of Recognition is content free—it has no “necessary” nexus with morality, justice, or fairness.<sup>46</sup> It is simply the label we use to describe the rule legal officials use to decide what they are obligated to do when deciding legal questions. It can therefore be determined empirically. In fact, it *must* be determined empirically.<sup>47</sup> One resolves legal questions by looking to the Rule of Recognition to determine what the officials who apply the relevant law will do, because the Rule of Recognition is merely the description of what legal officials in a legal system feel themselves obliged to do as a matter of convergent social practice.<sup>48</sup>

The account so far is quite straightforward, almost tautologically so. Looking to what judges and other officials in the legal system think they are obligated to do when faced with a particular set of facts giving rise to a legal question is pretty much exactly how most people—consciously and unconsciously—determine what the law is. There is only one

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40. See *id.*; HART, CONCEPT OF LAW, *supra* note 33, at 100; see also JOSEPH RAZ, PRACTICAL REASON AND NORMS 146 (1999).

41. HART, CONCEPT OF LAW, *supra* note 33, at 94-95.

42. *Id.* at 106.

43. *Id.* at 109.

44. SHAPIRO, LEGALITY, *supra* note 26, at 84.

45. See HART, CONCEPT OF LAW, *supra* note 33, at 91.

46. See, e.g., Scott J. Shapiro, *Was Inclusive Legal Positivism Founded on a Mistake?*, 22 *RATIO JURIS* 326, 327 (2009).

47. See SHAPIRO, LEGALITY, *supra* note 26, at 290-91.

48. See HART, CONCEPT OF LAW, *supra* note 33, at 97.



problem with this account, which is that judges frequently disagree about what they are obligated to do.<sup>49</sup> That is, judges persistently engage in what Ronald Dworkin called “theoretical disagreement about the grounds of law.”<sup>50</sup> They disagree about the criteria of legal validity.<sup>51</sup>

This is an important insight because according to Positivists, the Rule of Recognition provides the criteria for determining when something is against the law. To answer a question about what the law is, one looks to the Rule of Recognition and deduces the answer from it. There is no room, in legal Positivism, for anything more than superficial disagreement about what the law is. It might be unclear what the Rule of Recognition demands, but its content is not something that is open to debate because the very idea of debating the content of a norm derived from the practice of officials is incoherent—akin to debating whether gravity exists. Whether one believes or refuses to believe in it, gravity will continue to persist. Likewise, according to Positivists, whether one chooses to agree with or disagree with the content of the Rule of Recognition, it provides the criteria of legal validity.

But this account falls short if we accept that it is possible to disagree about the very notion of what makes something the law. If one accepts the modest proposition that we might not all share the same ideas about what makes something “against the law”—that is, that we might legitimately disagree about the grounds of law itself without thereby giving up the claim that there can still be binding legal authority—it then becomes difficult to accept the notion that something is “law” only if it meets the test set forth in a Rule of Recognition.

Theoretical disagreement poses an overwhelming challenge to legal Positivism because in hard cases giving rise to such disagreements, the traditional content- and value-free

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49. Many of these disagreements are interpretive and abstract, reflecting conflicts over what the Constitution commands judges to do, or what statutes require, when properly interpreted. See DWORKIN, *LAW'S EMPIRE*, *supra* note 6, at 16; see also SHAPIRO, *LEGALITY*, *supra* note 26, at 283 (calling theoretical disagreement a kind of disagreement “legal reasoners frequently have . . .”).

50. DWORKIN, *LAW'S EMPIRE*, *supra* note 6, at 6.

51. See Leiter, *Explaining Theoretical Disagreement*, *supra* note 2, at 1217.

nature of the Rule of Recognition no longer sets the criteria of legal validity. Judges and lawyers continue to argue what the law *is* even though according to legal Positivism without the Rule of Recognition to guide them, this argument is incoherent.

Yet, we observe theoretical disagreement constantly. Judges argue with each other *as if* there is law to apply,<sup>52</sup> *as if* the Constitution commands that a non-marital father receive no parental rights, not as if it *ought* to command that<sup>53</sup>—even though there is no established convention upon which to draw.<sup>54</sup> According to Positivism these judges are not *applying* law, they are making it up, because the panoptic Rule of Recognition is silent as to how these cases should come out.<sup>55</sup>

Legal Positivists have responded to the rhetorical problem hard cases pose—wherein judges appear to strongly disagree about the validity and authoritativeness of competing sources, often in morally freighted terms—in two unsatisfying ways.<sup>56</sup> One school has taken the route of “exclusive” legal Positivism, and argues that the Rule of Recognition simply demands the application of extralegal norms in hard cases.<sup>57</sup> In other words, these Positivists argue that judges can decide hard cases by looking to moral criteria, but when they do, they do not apply the law—they exercise discretion.<sup>58</sup> A second school, “inclusive”

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52. See DWORKIN, *LAW'S EMPIRE*, *supra* note 6, at 37-43.

53. See *Michael H. v. Gerald D.*, 491 U.S. 110, 127-28 n.6 (1989). In *Michael H.*, the Supreme Court famously sparred over the “generality,” with which legal principles should be incorporated into claims of constitutional liberty. *Id.* at 142. One side asserted that relevant historical traditions were those specifically relating to the rights of an adulterous natural father, and the other, into whether parenthood was an interest that had been historically protected, *id.* at 127-28 n.6.

54. See DWORKIN, *LAW'S EMPIRE*, *supra* note 6, at 37.

55. See *id.*; see also Leiter, *Explaining Theoretical Disagreement*, *supra* note 2, at 1223 (“They write as if there is a fact of the matter about what the law is, even though they disagree about the criteria that fix what the law is.”).

56. See SHAPIRO, *LEGALITY*, *supra* note 26, at 289. For a compelling account of why one might call these rehabilitations “unsatisfying,” see generally RONALD DWORKIN, *JUSTICE IN ROBES* 189-216 (2006) [hereinafter DWORKIN, *JUSTICE IN ROBES*] For the proposition that this is, indeed, how positivists respond, see SHAPIRO, *LEGALITY* *supra* note 26, at 289.

57. SHAPIRO, *LEGALITY*, *supra* note 26, at 289.

58. John Gardner, *Legal Positivism: 5 1/2 Myths*, 46 AM. J. JURIS. 199, 201 (2001).

legal Positivists, argues that the Rule of Recognition can make recourse to morality part of the law, and as such judges are occasionally free to treat moral truths as legally relevant facts (for instance, in hard cases).<sup>59</sup> These Positivists make the Rule of Recognition so abstract that the legal obligations judges adhere to fit into a set of expansive conventions (about as opaque and indeterminate, one imagines, as the *kōans* of equity).<sup>60</sup>

On the one hand, to an exclusive legal Positivist, the judges in the case of the Speluncean explorers are engaged in a coherent argument over how to decide the case but not because the law dictates one answer or another. If the law dictated one answer or another, the judges would *agree* on it, and decide the case according to it. Rather than arguing over how to apply law, the judges in the case of the Speluncean explorers are arguing over how to appropriately exercise their discretion where the law furnishes no answer. On the other hand, to an inclusive legal Positivist, the judges in the case of the Speluncean explorers might actually be arguing over the proper application of law, but if they are, they are engaged in an argument about empirical fact, not about law. The law is not really in dispute. The facts are. The judges in the case of the Speluncean explorers are engaged in a disagreement about how to properly *apply* the law to the moral facts before the court.

Neither of these theories seems to match what the judges in the case of the Speluncean explorers actually say. One can easily see that they do not believe themselves to be engaged in disagreements of either of these kinds. Some of the judges seem to think the law squarely dictates the outcome of the case while others seem to think it does not dictate an answer of any kind. Some respond to the belief that there is no law to apply by contending that the very non-existence of law deprives them of the authority to act. Others believe it is a license to make a decision consistent with the dictates of justice. But the judges in the case do not see themselves as engaged in an argument about the exercise of discretion (some think the law clearly

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59. SHAPIRO, *LEGALITY*, *supra* note 26, at 289

60. *Id.*

dictates the outcome and there is no discretion), and they also do not see themselves as engaged purely in an argument about the proper application of the law to the facts (some think there is no law to apply and that the exercise of discretion is warranted).

This is the problem theoretical disagreement poses to legal Positivism. Positivism can explain away why judges often seem to speak in the language of morality when arguing about law without giving up the claim that law and morals are separate. But Positivism lacks any similarly expedient means of dismissing systematic interpretive disagreements, such as the longstanding conflicts between Textualists and Purposivists.<sup>61</sup> Positivism cannot preserve the face value of disagreements about how to determine when a particular command or norm has the force of law—disagreements, that is, about what is authoritative and who has authority. Since these are not linguistic or semantic conflicts,<sup>62</sup> and since both exclusive and inclusive legal positivists still ascribe to the “core” of legal Positivism—that the Rule of Recognition, established by the practice of officials, decides the criteria of legal validity—the very existence of longstanding, irreconcilable, and legally decisive interpretive disagreements is *impossible* unless one of the two sides of the debate in any case giving rise to theoretical disagreement is fundamentally wrong (the “Error” thesis) or one side is being disingenuous (the “Disingenuity” thesis).<sup>63</sup> The next section explains how contemporary Positivism has responded to this charge. It has been rather surprising.

### III. How Positivists Explain Theoretical Disagreement

Unreconstructed Positivists who have confronted the problem of theoretical disagreement (most have overlooked it<sup>64</sup>) concede that there are only two explanations for the persistence of such disagreements in legal argument.<sup>65</sup> Either legal reasoners who engage in theoretical disagreements are

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61. *Id.*

62. DWORKIN, *LAW'S EMPIRE*, *supra* note 6, at 37-43.

63. SHAPIRO, *LEGALITY*, *supra* note 26, at 290-92.

64. Shapiro, *The “Hart-Dworkin” Debate*, *supra* note 30, at 50.

65. Leiter, *Explaining Theoretical Disagreement*, *supra* note 2, at 1223.

mistaken about the criteria of legal validity—that is, they are wrong, or in error<sup>66</sup>—or are aware of the proper criteria (or are aware that there exist no proper criteria) but nonetheless persist in making arguments *as if* there were binding law to apply—that is, they are being dishonest or disingenuous.<sup>67</sup>

Nonetheless, Positivists hold, even though judges who argue about the proper approach to statutory interpretation or the proper way to interpret the Constitution are either in Error or being Disingenuous about what the law requires, this should not deeply concern us.<sup>68</sup> Notwithstanding Ronald Dworkin's vociferation that law "is not a grotesque joke"<sup>69</sup> and Professor Scott Shapiro's acclamation that if Positivists "wish to deny the existence of theoretical legal disagreements, they are forced to say that legal scholars are so confused about the practice they study that they routinely engage in incoherent argumentation"<sup>70</sup>—such disagreement is indeed impossible according to Positivists.<sup>71</sup> Fortunately, they counter, both the Error and Disingenuity theses, though precisely what we see when we see so-called theoretical disagreements occur, are no big deal.<sup>72</sup>

In support of the proposition that these disagreements are no big deal, they take two argumentative tacks. First, they contend that Error and Disingenuity are far likelier than one would initially suspect.<sup>73</sup> Errors are a common occurrence in any sufficiently complex field.<sup>74</sup> "Religious discourse is our paradigm case of an ongoing discourse that nonetheless invites Error Theoretic treatment, since its persistence (notwithstanding its systematic falsity) seems explicable by the powerful psychological satisfactions it affords sincere participants."<sup>75</sup> Likewise, Disingenuity is common to the

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66. *Id.* at 1224.

67. *Id.*

68. *Id.* at 1247-49.

69. DWORKIN, *LAW'S EMPIRE*, *supra* note 6, at 44.

70. Shapiro, *The "Hart-Dworkin" Debate*, *supra* note 30, at 43.

71. Leiter, *Explaining Theoretical Disagreement*, *supra* note 2, at 1223.

72. *See* Smith, *supra* note 7, at 659.

73. *Id.*

74. Himma, *supra* note 23, at 1159; Leiter, *Explaining Theoretical Disagreement*, *supra* note 2, at 1225.

75. Leiter, *Explaining Theoretical Disagreement*, *supra* note 2, at 1225-

practice of professionals. Lawyers often use specialized language, terms, and rituals even though they are divorced from the meanings that might be ascribed to them by laymen.<sup>76</sup> Legal fictions are the paradigm case here. In law, terms of art, forms of action, and modes of proceeding are often treated idiosyncratically in order to effect outcomes that the legal system cannot fashion honestly.<sup>77</sup>

Second, “[b]orrowing a bit loosely from the philosophical literature that examines the rationality of belief and theory choice in the sciences,”<sup>78</sup> Positivists contend that because legal Positivism simply and elegantly explains an enormous range of our experience, it is likelier to be true than alternative accounts of the concept of law.<sup>79</sup> Offering “three familiar theoretical desiderata often thought relevant” to deciding between competing theories in the sciences, they offer Positivism’s superior simplicity, consilience, and conservatism over competing accounts as another point in its favor.<sup>80</sup>

The final section of this Article takes up each of these strands of argument and shows why they are deeply implausible.

#### IV. The Improbability of Positivism

This final section briefly outlines why the two accounts of theoretical disagreement offered by legal positivists—the “disingenuity and error are common” response and the “positivism better fits and justifies our concept of law” response—are both highly unlikely to save Positivism.

At the outset, the “positivism better fits and justifies our concept of law” response to the problem of theoretical disagreement is a non-starter if accounting for theoretical disagreement is a *necessary condition* of any adequate account of the nature of law. There are, after all, an infinite number of possible explanatory accounts that we might proffer to explain

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76. *Id.* at 1238-39.

77. *See* LON FULLER, *LEGAL FICTIONS* 9 (1967).

78. Leiter, *Explaining Theoretical Disagreement*, *supra* note 2, at 1239.

79. *Id.* at 1239.

80. *Id.* at 1239-40.

the world and our experience in it.<sup>81</sup> In choosing between them we first eliminate all those theories that simply categorically fail to account for necessary conditions—that is, that are false. Milton Friedman once offered the example of the rational, energy-density maximizing manner in which leaves seem to arrange themselves on trees.<sup>82</sup> One hypothesis would be that the arrangement is volitional, another that it is the product of chance.<sup>83</sup> The most reliable test for determining that these hypotheses do not hold, is to falsify them—to find systematic shortcomings that render these hypotheses highly improbable, if not impossible. If theoretical disagreement is possible, that fact alone would falsify Positivism, regardless of Positivism's truthiness with respect to the remainder of our experience.

This makes the argument that theoretical disagreement is erroneous because it is inconsistent with Positivism backward. Such an argument seems to hold that where reality and theory diverge it is reality that should give way. This cannot be right. Legal positivism has no *a priori* claim to being more correct than any other account of the nature of law, save that it fits our understanding of law better than other accounts have. But the argument that Positivism is a better theory than other theories because it better explains more of our experience of legal practice has no impact on the likely validity of theoretical disagreement. The supposed archetypical case—religious disagreement—exemplifies the point. When one's baseline is atheism, religious discourse can come across as infected with primitive errors. But they are not *logical* errors. Indeed, the ordinary dictates of logic hold up just fine in theological disputes. The problem for the atheist who judges theological disputes resides in his belief in religion's faulty premises. But since the premises of atheism are neither more nor less provable than those of (most) religious faith, it is impossible for atheists to make claims about the likelihood that debates are any more erroneous than debates about other phenomena, for

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81. Milton Friedman, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 1, 9 (1953).

82. *See id.* at 12.

83. *Id.* at 12-13.

84. *See* Richard Posner, *The Problematics of Moral and Legal Theory*, 111 *HARV. L. REV.* 1637, 1653-54 (1998).

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which no empirical evidence has yet been disclosed such as disputes about virtue, ethics, justice, and morals.<sup>84</sup>

As to empirical evidence, the weight of observation is decidedly against Positivism. Indeed, the “error is common account” of theoretical disagreement suffers from the most elementary of problems, which is that it seems to call into question the very notion that one can argue meaningfully over what the law is, even though that seems to be all that judges do. Positivism declares that the only kinds of disputes about what the law is are either empirical or imaginary. That is, only two kinds of questions ever come before the Supreme Court: empirical disputes (i.e. “Given the evidence we have, was *X in fact* the law on this day”) and invitations to legislate dressed up as disputes over what the law is (i.e. “What should the law be when facts like these arise?”). By declaring these the only two kinds of disputes that *can* arise—even though none of the Questions Presented to the Supreme Court are ever fashioned in a manner that reflects either of these—Positivism must hold out that our judicial institutions, from the highest to the lowest, are fundamentally mistaken about what it is our society has instituted to them to do.<sup>85</sup>

The argument that these observations are illusory because “disingenuity explains theoretical disagreement” is subject to the same critique.<sup>86</sup> To argue that disingenuous, specialized or unartful language explains why we witness what *looks* like theoretical disagreement is just to reformulate the error argument in another guise.<sup>87</sup> The Disingenuity account of theoretical disagreement differs only from the Error account in postulating that those who engage in theoretical disagreement *realize* it is a farce.<sup>88</sup> That is, they are aware that the arguments they are making and responding to are not arguments about what the law is, but rather about what the law should be. But Dworkin, quite appropriately, maintained

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85. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

86. See generally Leiter, *Explaining Theoretical Disagreement*, *supra* note 2.

87. See generally *id.*

88. See generally *id.*



that if legal officials were being disingenuous their opponents would say so, if only, at the very least, to undercut such arguments.<sup>89</sup> Since they do not, it must be the case that they do not believe other judges are behaving disingenuously. The Positivist's response to this is to bring up legal fictions, and argue that judges systematically conflate the is-ought distinction, but that they *know* deep down they are really making arguments about what the law ought to be, and that their statements should not be taken at face value.<sup>90</sup> A better counterargument to the Disingenuity account, first voiced by Professor Scott Shapiro, is that if it were true, law professors, judges, lawyers, and pretty much every member of the legal system trained in the practice of law would *know* that these fictive theoretical disagreements were fictions.<sup>91</sup> Legal fictions work *because no one believes them*.<sup>92</sup> Legal fictions are not meant to deceive.<sup>93</sup> They are the specialized language of a practice—much like mathematical symbols and biochemical charts are part of the specialized language of science.<sup>94</sup> But ordinary lawyers, judges, and law professors are not systematically aware that judges are engaging in disingenuous theoretical disagreement.<sup>95</sup> As such, the only explanation for their naïve credulity must be that they are fundamentally in error about the possibility of theoretical disagreement.

The foregoing points taken together establish why

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89. See DWORKIN, *LAW'S EMPIRE*, *supra* note 6, at 37-38. Dworkin made a further argument, though one that is not quite as compelling: that judges often argue that a proposition of law *must* be decided in a certain way even though the judge personally deeply opposes that outcome. *Id.* at 38. The weakness in this argument lies in the fact that we already suspect the judge to be acting disingenuously in asserting this is what the law *is* even though he knows this is a lie. Nothing would better conceal this deception than a false expression that he disagrees with the result the law "requires" him to reach.

90. Leiter, *Explaining Theoretical Disagreement*, *supra* note 2, at 1237.

91. *See generally id.*

92. FULLER, *supra* note 77 at 6.

93. *Id.*

94. For disingenuity accounts to truly hold, disingenuous theoretical arguments would have to possess the added dimension of a knowing intention to deceive, a relevant fact with which Positivists who have responded to the possibility of theoretical disagreement have not contended. *See* Leiter, *Explaining Theoretical Disagreement*, *supra* note 2, at 1238.

95. *See* Shapiro, *The "Hart-Dworkin" Debate*, *supra* note 30, at 42-43.

Positivism, as it is currently comprised, is so improbable. Recall that Positivists contend that theoretical disagreement is fundamentally in error or disingenuous because arguing about the criteria of legal validity is equivalent to arguing about some fixture of reality that is unaffected by deliberation—be it the nature of God, the velocity of light, or the existence of gravity. None of these phenomena can be changed by disagreements about them. Their existence, validity, and content are fixed by facts unaffected by belief. So too, according to Positivists, the criteria of legal validity are unaffected by disagreement about them. The law is fixed by the Rule of Recognition, whether judges think they can engage in disagreement about it or not. The Positivist's claim is a simple one: disagreement about the content of the Rule of Recognition does not, because it cannot, change the content of the Rule of Recognition.

But consider the analytical quandary legal Positivists have argued themselves into. They argue that the Rule of Recognition is fixed by the practice of officials in the legal system, but deny that a practice widely shared by those officials (theoretical disagreements) counts toward determining its content.

Three possibilities flow from this apparent paradox. On the one, hand legal Positivism could be wrong about theoretical disagreement because theoretical disagreement *can* exist, and the account of the nature of law that Positivism offers is itself wrong or incomplete. What is and isn't law is simply not decided by looking to a Rule of Recognition. This argument flips the Positivist's contention on its head and argues that Positivists—who would require that the criteria of legal validity be fixed by a Rule of Recognition—are the ones who are fundamentally in error. If this is true, then theoretical disagreement is possible because Positivism simply fails to properly describe the universe (much like the theory of Phlogiston misdescribes the nature of reality). If this is so, then we must construct an entirely new account of the nature of law, one that validates theoretical disagreement.

On the other hand, legal Positivism could be correct without emendation, in which case our concept of law can give no account of disagreements that appear to be systematic,

decisive, and widespread.<sup>96</sup>

On the other hand, one might argue that legal Positivism is mostly correct but that a kind of “reconstructed” Positivism can account for theoretical disagreements. A not insignificant number of Positivists appear to take this view. They argue that theoretical disagreement can be brought within the Rule of Recognition unproblematically, and that therefore the argument from theoretical disagreement is trifling. Some appear to believe that Hart himself accounted for the possibility of theoretical disagreement by explaining that the content of the Rule of Recognition would be fixed more or less by accident—by each legal official creating it accidentally through her own attempts to identify its content and follow it.

Superficially, a reconstructed Positivism that simply brings theoretical disagreement within the Rule of Recognition sounds enticing. The logic of a legal Positivism that gives way to theoretical disagreements is easy enough to grasp. After all, the core tenet of Positivism rests on the belief that an extra-legal norm (the Rule of Recognition) establishes the legal obligations legal officials perceive themselves to have. If legal officials also believe that theoretical disagreements are a part of establishing their obligations, then theoretical disagreement must be possible. The very existence of theoretical disagreements that legal officials believe to be genuine would make it logically impossible for those disagreements to be erroneous, because these purportedly erroneous disagreements decide propositions of law.<sup>97</sup> As such, part of the practice of looking to the Rule of Recognition would be recognizing that no one can perfectly identify its content, and to the degree that fuzziness in determining its content is accepted as part of the Rule of Recognition, the possibility of theoretical disagreement

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96. Moreover, there is no way to use legal rules to overcome interpretive conflicts because there is always a stage of interpretation at which the interpreter must decide for him or herself how to engage in proper interpretation of the initial legal command. See, e.g., Andrew Tutt, Comment, *Interpretation Step Zero: A Limit on Methodology as “Law,”* 122 YALE L.J. 2055, 2057-58 (2013).

97. One imagines this is why religious adherents persistently engage in their fundamentally “erroneous” discourse as well—if it results in converts to the faith, or creates a sense of religious obligation in a community, it seems odd to call it erroneous or impossible.

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would form part of the criteria for determining legal validity. In other words, whether theoretical disputes would *otherwise* fundamentally be in error is ultimately irrelevant if belief about the validity of such disputes were permitted to itself constitute an element of the Rule of Recognition. Then, whether the officials in a particular jurisdiction *believe* theoretical disagreements are possible is the only relevant means of deciding the validity of theoretical disagreements.

But there is a serious circularity problem that arises if the Rule of Recognition itself allows for disagreement about its content. The Rule, as a Rule, becomes irrelevant. It becomes akin to a Rule that says “one may look to other Rules, none of which can be identified a priori, to decide propositions of law.” This is problematic because this kind of “Pickwickian positivism”<sup>98</sup>—that survives only by acceding to the belief among legal officials that theoretical disagreement is possible—is no different from a theory that rejects Positivism.<sup>99</sup>

To see why, consider an argument between two judges over whether the law is X or Y. Suppose Official A is a Positivist, and insists that the criteria of legal validity are set by the practices of officials, and looking to the practices of officials, concludes that the law is X. In a version of Positivism that accepts the possibility of theoretical disagreement, this official’s views would only be one among many. Other officials, also Positivists one imagines, though it would not matter if they were not, could just insist that the Official A—along with a majority of other officials—had misidentified the content of the Rule of Recognition and that the law is actually Y. Official A’s only recourse to the argument that he has misidentified the content of the Rule of Recognition is to point out that the majority of officials agree with his view. At best, recourse to the practices of officials becomes one justification among many for saying the law is X instead of Y, but it is no better or worse than other justifications that one might proffer. The Rule ceases to be a Rule at all, because no one in any meaningful

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98. DWORKIN, *JUSTICE IN ROBES*, *supra* note 56, at 188-198 (noting that such Pickwickian Positivism robs Positivism of any of the special content that made Positivism’s unique descriptive account of the concept of law useful or theoretically interesting).

99. *Id.*

sense “follows” it. It becomes a description of what officials do in fact, rather than a way of picking out which norms are legally valid.

In Pickwickian Positivism, in other words, the Rule of Recognition, as a rule for recognizing which rules are legal rules, is no longer a way of recognizing anything. “Positivism” as a concept, loses all but the most pyrrhic meaning. Yes it could still describe the *concept* of law at its most threadbare and sterile, but its impact on our understanding of law would be negligible. The Positivist world would be indistinguishable from a world in which we took natural law or some other theory as the underlying method of determining the criteria of legal validity. One would never be able to tell whether officials actually followed a social rule in deciding propositions of law, because Positivism’s Rule of Recognition would never be identifiable, even if an overwhelming majority of officials took a particular view about its content.

It is likely because they recognize this problem that unreconstructed Positivists adopt the view that Positivism cannot be squared with theoretical disagreement. Where theoretical disagreements arise, there is either no decisive law on the issue or at least one of the parties to the disagreement is simply wrong about the content of the Rule of Recognition. In this way, in unreconstructed legal Positivism theoretical disagreements do not contribute to the content of the Rule of Recognition. Rather, where theoretical disagreements arise, the Rule of Recognition is unaffected. There is either no law to apply because if there were, legal officials would use the Rule of Recognition to identify it, or, alternatively, one of the officials is wrong about the Rule because the practice of officials has already settled the question and the official engaging in theoretical disagreement is in error about it.

But the extreme difficulty for the view espoused by unreconstructed legal Positivists is that the existence among even a subset of officials of a belief in the validity of theoretical disagreement on some issue effectively forces other officials to engage in theoretical disagreement about it, thereby unsettling the Rule of Recognition even if that subset of officials are in error. After all, insistence by even some officials that the criteria of legal validity should be (1), (2), (3) rather than (x),

(y), (z) forces many or even *all* of the officials in the system to either engage in theoretical disagreement on the issue or give up the capacity for disagreement. This is because officials who strongly believe the criteria are (1), (2), (3) rather than (x), (y), (z) will render decisions on the basis of that belief, purporting to apply law even though there is no law to apply or they are in “error” about the criteria of legal validity.

Positivism ends up in an even worse position than it was when it tried to become Pickwickian—engagement in theoretical disagreements by even a subset of officials kills the consensus necessary to create a meaningful social rule. Where some officials stubbornly insist on rejecting the settled practice of officials as a means of identifying the Rule of Recognition, the only recourse for the Positivist who wishes to counter these renegade officials is to *justify* recourse to the practice of officials as a means of determining the criteria of legal validity. That is, the only recourse is to justify Positivism.<sup>100</sup> But to justify positivism is to engage in theoretical disagreement, thereby unsettling the Rule of Recognition.<sup>101</sup>

What all of this means, ultimately, is that in unreconstructed Positivism’s account of the concept of law, officials who argue that the law dictates an outcome other than that accepted by the overwhelming majority of other legal officials, hold a veto power over the content of the Rule of Recognition. The minute these officials raise objections to the grounds of law relied upon by the majority of other legal officials, even if they are in the minority, what was once law dictated by a social rule becomes not-law, because into existence comes disagreement that forces theoretical disagreement that unsettles the social rule. For this reason, a Positivism that rejects theoretical disagreement is open to the charges that it either leaves the Rule of Recognition indeterminable or becomes a normative theory about how the criteria of legal validity should be identified rather than a descriptive theory about how they are in fact identified.

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100. We saw this in the example of the case of the Speluncean Explorers at the outset. See Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 753 (1982) (arguing that Positivism is undermined by the very fact that those subject to its dictates require that it justify its claim to authority).

101. See Smith, *supra* note 7, at 660.

There is an escape hatch available that would allow Positivism to survive intact. For Positivism to survive intact, we would need to be able to conclude that the vast majority of legal officials know that theoretical disagreement is fictive and ultimately hollow, even if they engage it. If legal officials secretly know the content of the Rule of Recognition, and then consciously deviate from it anyway, theoretical disagreement is truly disingenuous and there is no issue. Otherwise the Rule of Recognition is destined to be indeterminate because any disagreement about it unsettles it (unreconstructed Positivism) or irrelevant because disagreement about it is part of it in which case Positivism does no theoretical work and cannot tell us anything about what the criteria of legal validity are (Pickwickian Positivism).

This is why Positivism is so improbable, because unless it is broadened to the point that it tells us nothing useful, theoretical disagreement unravels the idea that law is set by a social rule. As such, at its simplest, unless legal officials' *know* theoretical disagreement is impossible, Positivism is either useless as a theory or collapses from within. This is why it is so improbable, and why the contemporary defenses of legal Positivism have thus far proven so unsatisfactory.

## V. Conclusion

The important question for the legal practitioner who cares little for parlor debates is inevitably "so what?"

"So what if theoretical disagreement is possible?" he might ask himself, "What difference could it possibly make one way or the other?" The difference it makes is both trivial and profound. It is trivial because acknowledging the existence and validity of theoretical disagreement simply means that legal philosophers would be willing to accept what lawyers already know—that judges decide propositions of law by looking to principles, consequences, morals, and justice to decide what the law is.<sup>102</sup> Judges do not simply look to a set of agreed-upon

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102. See DWORKIN, *LAW'S EMPIRE*, *supra* note 6, at 10 ("The plain-fact view is not . . . accepted by everyone. It is very popular among laymen and academic writers whose specialty is the philosophy of law. But it is rejected in the accounts thoughtful working lawyers and judges give of their work.").

criteria set by an all-seeing Rule of Recognition and then argue about whether or not those criteria are met in a particular case.

The acceptance of the existence and possibility of theoretical disagreement is profound, however, insofar as it means that law is always subject to contestation on the merits both from within a legal system and from without. Two individuals can be subject to the same legal obligations—the same “law”—and yet properly see this law as valid and fixed for entirely different reasons and rationales. They see the same law, but also different law. Every legal case is an opportunity to call the law into question, and to require that legal officials justify its legitimacy and validity, even if the outcome is all but foreordained. The reason this is profound is because it imports an enormous faith into our legal discourse—a faith that no matter how insurmountably fixed or evil our “positive law” may seem, if it transgresses too far, it is *not law*.<sup>103</sup>

More important than faith in the possibility of law, however, is the way that theoretical disagreement acknowledges that our legal discourse must demand more from judges, lawyers, and scholars than categorization games and debates over word-meanings. Theoretical disagreements mean that the very notion the law is or must only be that which is fixed by one set of criteria or another is subject to question in deciding propositions of law. Thus, the existence and validity of theoretical disagreement means that every theory of interpretation, from Originalism to Textualism, from living Constitutionalism to Purposivism, must justify itself to lay claim to fixing the criteria of legal validity.<sup>104</sup> Unreconstructed

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103. See *Somerset v. Stewart*, [1772] 98 ENG. REP. 499, 510 (K.B.) (Mansfield, C.J.) (alteration in original) (“The state of slavery is of such a nature that it is incapable of being [legally] introduced [established] on [for] any reasons, moral or political, but only by positive [written] law, which preserves its force long after the reasons, occasions, and time itself from whence it was created, is erased from memory. It [slavery] is so odious [evil], that nothing can be suffered [allowed] to support [permit] it, but positive [written] law [allowing detention without due process (none existed)]. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case [for slavery] is allowed or approved by the law of England; and therefore the black [slave James Somersett] must be discharged [free from slavery].”).

104. See Fiss, *supra* note 100, at 753. (“Judges ardently committed to



Positivism holds that this is not only unnecessary and unwise, but impossible as well. The criteria of legal validity are fixed by the practice of officials, after all, and therefore, if a sufficient number of judges are Textualists, textualism is fixed by the Rule of Recognition. It is *positive law*. But if theoretical disagreement is possible, methodology itself must be discussed, debated, and contested—indeed, such contests cannot be avoided. And while this is an immense responsibility, if theoretical disagreement is possible, or even if legal officials merely believe that it is possible, then it is also unavoidable, though perhaps this might be a cause for hope rather than a reason to despair.

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legal positivism will ultimately be asked—as they were in the debates over the constitutionality of slavery before the Civil War and in response to the judicial efforts to protect industrial capitalism in the early part of the twentieth century—to justify the public morality embodied in that text and the processes by which those values are expressed.”).