Metadata of the chapter that will be visualized online

Chapter Title	“Semantic Sting” Controversy	
Copyright Year	2022	
Copyright Holder	Springer Nature B.V.	
Corresponding Author	Family Name	**Kyritsis**
	Particle	
	Given Name	**Dimitrios**
	Suffix	
	Organization/University	University of Essex
	City	Colchester
	Country	UK

AU1

"Semantic Sting" Controversy

Dimitrios Kyritsis
University of Essex, Colchester, UK

Introduction

In the opening chapter of *Law's Empire*, Ronald Dworkin argues against the semantic sting, a "philosophical prejudice" (Stavropoulos 2001, 61) which he attributes to what he calls "semantic theories of law." Among those theories, he counts his primary foil in the book, the legal positivism of HLA Hart, John Austin, and others. Dworkin's critique of the semantic sting sets the stage for his positive account of law, elaborated in the rest of *Law's Empire*. That critique has engendered a long-standing jurisprudential controversy. Theorists disagree what is its thrust and whether it succeeds. In what follows, the critique will be analyzed and some of the key responses to it as well as Dworkin's rejoinders will be examined.

Semantic Theories and Grounds of Law

In *Law's Empire*, Dworkin famously defends a moralized approach to the theory of law, which he calls interpretive. According to the interpretive theory of law, the nature of law is determined by the moral principles that best explain and justify legal practice. Dworkin juxtaposes his approach to analytical legal positivism, which contends that jurisprudential method is descriptive in the sense that it does not rest on substantive commitments about what is morally right and wrong. Dworkin's critique of the semantic sting is meant to expose a fundamental flaw in the descriptive approach. With the descriptive approach thus set aside, Dworkin then goes on in the rest of the book to shift his focus to interpretivism.

On the face of it, though, the target of the semantic sting argument is not legal positivism or a method for exploring the nature law at all, but a group of theories about the proper use of the word "law," so-called "semantic theories of law." Some legal philosophers have protested that as a result, the argument misses its mark because legal positivism does not seek to explicate the meaning of the word "law" (Coleman and Simchen 2003, 8; Raz 1998, 2). This issue will not detain us. Dworkin is interested in semantic theories of law insofar as they can contribute to our understanding of the concept of law, and there is little reason to suppose that they do not. Indeed, for Dworkin they contribute to it in a special way, and it is important for understanding the semantic sting argument to explain how they are meant to do so.

Dworkin maintains that there is a close relationship between theories about the nature of law, on the one hand, and propositions of law, "the various statements and claims people make about what the law allows or prohibits or entitles them to have" (Dworkin 1986, 4), on the other.

M. Sellers, S. Kirste (eds.), *Encyclopedia of the Philosophy of Law and Social Philosophy*,
https://doi.org/10.1007/978-94-007-6730-0_212-1

More specifically, he contends that theories of law elucidate the concept of law by specifying the grounds of true propositions of law. By grounds, Dworkin means determinants of true propositions of law. For example, it may be that a proposition of law is true by virtue of the fact that a statute is enacted by Parliament, which (statute) has the effect of adding that proposition to the law. Enactment of a statute by Parliament is on this view a ground of law.[1]

Semantic theories of law, for Dworkin, also provide an answer to the question: What makes propositions of law true or false? They hold that "lawyers all follow certain linguistic criteria for judging propositions of law, perhaps unawares" (Dworkin 1986, 32), and that these shared criteria supply the grounds of propositions of law. Semantic theories locate the standard of correctness for the application of the concept of law in "criteria in framing, accepting, and rejecting statements about what the law is" (Dworkin 1986, 33) that are embedded in actual usage of the concept. Importantly, that standard does not transcend actual usage (Stavropoulos 2001, 71ff). In other words, whilst each of us individually may be mistaken about the concept, the linguistic community as a whole cannot be wrong, because there is nothing to the meaning of concepts other than its conventional meaning as this is determined by actual usage.

Some philosophers dispute that there is such a connection between theories of law and the grounds of propositions of law. (e.g., Coleman 2001, 180ff; Himma 2002, 160ff; Toh 2013) They contend that sharing the same criteria for the concept of law does not entail sharing the same criteria for determining the truth of propositions of law. For example, persons from different jurisdictions share the former but not the latter. This seems to open up the space for the existence of a class of (privileged) conceptual truths, which are shared even by those who disagree about the truth of propositions of law.

It is not clear how we are supposed to draw this distinction. In any event, however we draw it, it is doubtful that it can be kept watertight. It could be argued that, for almost any criterion, these philosophers offer at the level of the concept of law, it is possible to imagine a dispute over that criterion leading to a disagreement about the grounds of propositions of law. Consider a positivist who maintains that one of the criteria for the existence of law is that there is a social practice among officials containing the ultimate criteria of legal validity and an anti-positivist who denies this because she thinks that a standard may be part of the law even though it is not treated as such by the community of officials. There are likely cases where the positivist and the anti-positivist disagree about the truth of a proposition of law by virtue of that upstream disagreement about the concept of law.

Dworkin attributes a criterial semantics to Hart's positivist theory of law. The attribution has been defended by Stavropoulos (2001), who offers close textual evidence from *The Concept of Law* and other work to support it. Although legal positivism is not the only theory of law that Dworkin associates with criterial semantics, there seems to be a special affinity between the two. Famously, Hart took himself to be pursuing a descriptive rather than normative inquiry (Hart 1994, 239–241). Criterial semantics, as Dworkin understands it, lends support to this pursuit. If the concept of law is individuated by the criteria employed collectively by members of the relevant linguistic community when they use the concept, the aim of the legal philosopher becomes one of reporting or unearthing those. Importantly, this exercise must involve very limited revision of members' use, because there is no standard independent of use by which we can correct it (Stavropoulos 2001, 76–77). Of course, we can evaluate and amend our linguistic practices, say, because the concept of law we currently employ has morally negative consequences, but that is an analytically separate task.

[1] To be more precise, Dworkin maintains that the grounds of propositions of law are themselves propositions such as the proposition that "a majority of MPs voted in favour of this bill." The difference is not relevant for present purposes.

Theoretical Disagreement and the Sting

Dworkin faults semantic theories for their explanation of disagreement in law. He distinguishes two kinds of disagreement that people may have about the content of the law governing a particular issue: empirical and theoretical. Empirical disagreement is disagreement over whether a crucial law-creating or law-changing fact has occurred or not. Clearly, if you believe that the ayes had it when a bill was put to a vote in Parliament, and I believe that they did not, then we are likely to disagree about what the law is on a particular issue. But in this example, we agree that a bill securing a majority of affirmative votes in Parliament is a fact whose occurrence affects the content of the law by changing our legal rights and duties. In Dworkin's terminology, we agree what are the grounds of law. By contrast, two people have a theoretical disagreement when they disagree about whether a fact affects the content of the law in that way. For example, you and I disagree about whether the fact that it is morally wrong to benefit from your own wrongdoing affects the law of inheritance. That is, we disagree whether this fact is a ground of law.

Dworkin contends that theoretical disagreement is a common feature of legal practice, but that semantic theories cannot adequately explicate it, because they are afflicted by the semantic sting. The semantic sting is the belief that, in order for two people to be using the same concept, they must share the same criteria for its application. As explained above, for semantic theories these criteria are the grounds of propositions of law. But ex hypothesi cases of theoretical disagreement involve a dispute about such grounds. So, according to semantic theories, we must treat theoretical disagreements as "illusory" or "a pretense" (31): Disputants may frame their views in terms of what the law is, but what they are really doing is disagree about how the law should be developed in cases where, since agreement has broken down, the law has run out. In fact, for some semanticists, this will be a common occurrence, the result of the open texture of language throwing up "borderline cases." These are cases that our shared criteria for applying a concept do not fully anticipate, as when we contemplate whether to count a palace as a house. Palaces satisfy some of the criteria for a house but not others, so a fresh decision needs to be made whether to include them in the concept.

Dworkin finds this explanation unsatisfactory. Genuine cases of theoretical disagreement are not about drawing a linguistic boundary. In Dworkin's terminology, they arise in pivotal cases: Each side has its own understanding of the correct test guiding the application of the concept in such cases, and reporting to them that thus and so is how the term is used by the other side or even the rest of the community would not sway them.

If one takes this view of theoretical disagreement in law, one has reason to be attracted to the interpretive theory of law that Dworkin advances. In this theory, the grounds of law are (or are supplied by) the principles that best fit and justify legal practice, not what the community takes them to be. Accordingly, the interpretive theory ascribes to participants in legal practice a "Protestant attitude" (Dworkin 1986, 252, 413). Each of them must work out for herself the best interpretation of legal practice. Theoretical disagreement is very likely to occur among people adopting this attitude.

Thus understood, the semantic-sting critique of legal positivism is ancillary to the broader argument from theoretical disagreement but independent of it (Smith 2010, 644ff). It offers a diagnosis for why some theorists downplay the importance of theoretical disagreement in law. However, the argument from disagreement does not stand or fall on the soundness of that diagnosis. If theoretical disagreement in law exists and a theory of law fails to account for it, then it is for this reason explanatorily deficient.

Disagreement Without Shared Criteria

One common strategy for deflecting the semantic sting is to deny the putative link between legal positivism and criterial semantics altogether. This is the line Hart himself took (Hart 1994, 246).

However, he did not elaborate which semantic view *does* underpin his theory. In later work, Dworkin argues that there is no viable alternative that does not collapse Hart's theory to a fully normative project (Dworkin 2006, 140ff).

This strategy is also pursued by Endicott (1998, 285). Endicott maintains that Hart's semantic commitments are modest, consisting solely in a set of indisputable paradigms shared by all competent language users. When we apply a concept to a particular case, we do so on the basis of similarities between the case at hand and those paradigms. Such judgments of analogy serve a range of purposes in everyday communication. They are sometimes tenuous, but this does not mean that they are unwarranted, or that two people who draw different analogies are talking at cross-purposes; they can still make sense of each other if they bear in mind the context within which they are expressed. The same applies to law. The task of the legal philosopher is not to spell out the criteria for the application of the word "law." Such criteria are not available because we use the word "law" for different purposes.

Given that, as already mentioned, the semantic sting critique is a component of the argument from theoretical disagreement, it is not clear that Endicott's proposal undercuts it. Dworkin's semantic sting critique was not meant to question the very possibility of any kind of communication in the absence of shared criteria. Endicott may well be right that two people can engage in some genuine forms of communication although they employ different criteria when they use the word "law," but it does not follow without further argument that cases allegedly involving theoretical disagreement are best explicated in this way.

In a similar vein, Plunkett and Sundell (2014) challenge the argument from theoretical disagreement on the grounds that disagreement is not necessarily pointless in cases where people mean something different by a term like "law." They propose that in some of these cases, participants are best understood as conducting a *metalinguistic negotiation* (Plunkett and Sundell, 2014, 248). Metalinguistic negotiations do not revolve around the semantic content of the speakers' utterances but around propositions they convey by pragmatic means. Moreover, they cannot be settled by the correct meaning of any concept, since ex hypothesi the two parties refer to a different concept with the same term. Rather, they are about how that term should best be employed, which of the two (or more) concepts it should refer to. This is a normative question of "conceptual ethics." Plunkett and Sundell do not give an account of the considerations that settle that question, in law or in any other domain, but they allow that these may be moral. However, Marques (2017) argues that, if it turns out that such metalinguistic negotiations in law systematically draw on moral considerations, they could be said to support the antipositivist view, whereby such considerations are constitutive of law. Thus, they offer a merely "notational variant of Dworkin's *conceptual interpretation*" (Marques, 2017, 225).

Disagreement About Shared Criteria

Some theorists dispute that semantic theories are committed to the view that all competent language users must possess the criteria for the correct use of concepts (Raz 1998, 15–16). They accept that the meaning of concepts like law is determined by the criteria a linguistic community employs when it uses those concepts in the sense that competent language users take their use to be governed by those criteria. However, they insist that the criteria need not be fully accessible to everyone. This anti-individualistic understanding of criterial concepts allows for the possibility that two language users sometimes disagree about shared criteria of which they only have partial knowledge. Furthermore, Raz cites two additional characteristics of criterial concepts that give rise to theoretical disagreements: the non-exhaustive character of criterial explanations and the interdependence of criterial concepts. By virtue of the first characteristic two persons might have different criteria in mind but only because these criteria refer to different aspects of the concept. By virtue of the second characteristic, two persons might share the same criteria for one concept but still disagree about their application because these criteria make

reference to further concepts about which they do not have shared criteria.

Raz's strategy rests on a sophisticated understanding of criterial concepts, but it does not offer a complete rebuttal of the semantic sting critique. For, it is not tailored to account for the types of disagreement that Dworkin discusses (Smith 2009, 305ff). In particular, it is far from clear that it allows criterialists to explain cases where legal practitioners do not take their disagreements to be settled by appeal to shared criteria at all (Smith 2009, 312ff).

Disagreement About the Application of Criteria

A final strategy questions that a criterial explanation of the grounds of law allows only for empirical disagreement about propositions of law (Coleman 2001; Dare 2010). As Coleman puts it, "judges accept the same truth conditions for propositions of law. . .. They disagree about which propositions satisfy those conditions" (Coleman 1982, 156). Put differently, they disagree about how to apply those conditions. Himma (2002, 153) uses the example of the Equal Protection Clause of the US Constitution. Two legal practitioners can agree that equal protection of the laws is a standard of legal validity while disagreeing whether racial segregation fails or satisfies the standard.

Dworkin had anticipated this strategy in his early critique of Hart's account of social rules (Dworkin 1978) and reiterated his objections to it in subsequent work (Dworkin 2006, 187ff). He argues that it rests on an abstraction strategy, which "[converts] any disagreement that any group might have over the standards that should govern its conduct into a supposed disagreement over the application of some more abstract moral convention they share" (Dworkin 2006, 192). However, this strategy trivializes the positivist thesis that the law is ultimately based on a social practice among officials. In addition, it has difficulty accounting for deep-rooted theoretical disagreements such as the disagreement between originalists and non-originalists whether the Equal Protection Clause makes the law depend on morality at all.

References

Coleman J (1982) Negative and positive positivism. J Leg Stud 11:139–164

Coleman J (2001) The practice of principle. Oxford University Press, New York

Coleman J, Simchen O (2003) Law. Legal Theory 9:1–41

Dare T (2010) Disagreeing about disagreement in law: the argument from theoretical disagreement. Philos Top 38(2):1–15

Dworkin R (1978) Taking rights seriously. Harvard University Press, Cambridge, MA

Dworkin R (1986) Law's empire. Harvard University Press, Cambridge, MA

Dworkin R (2006) Justice in robes. Belknap Press, Cambridge, MA

Endicott T (1998) Herbert Hart and the semantic sting. Legal Theory 4:283–300

Hart H (1994) The concept of law. Clarendon Press, Oxford

Himma K (2002) Ambiguously stung: Dworkin's semantic sting reconfigured. Legal Theory 8:145–183

Kramer M (1999) In defense of legal positivism: law without trimmings. Oxford University Press, Oxford

Kramer M (2018) H.L.A. Hart: the nature of law. Polity Press, Cambridge

Leiter B (2009) Explaining theoretical disagreement. Univ Chic Law Rev 76:1215–1250

Leiter B (2019) Theoretical disagreements in law: another look. In: Plunkett D, Shapiro S, Toh K (eds) Dimensions of normativity: new essays on metaethics and jurisprudence. Oxford University Press, Oxford, pp 249–262

Levenbook BB (2015) Dworkin's theoretical disagreement argument. Philos Compass 10(1):1–9

Ludeña LR (2016) Legal disagreements: a pluralist reply to Dworkin's challenge. Revus: J Constitutional Theory Philos Law 28:11–32

Marques T (2017) Can metalinguistic negotiations and 'conceptual ethics' rescue legal positivism? In: Capone A, Poggi F (eds) Pragmatics and law: practical and theoretical perspectives. Springer, Cham

Moore M (1981) The semantics of judging. South Calif Law Rev 54:151–294

Patterson D (2018) Theoretical disagreement, legal positivism, and interpretation. Ratio Juris 31(3):260–275

Plunkett D, Sundell T (2014) Dworkin's interpretivism and the pragmatics of legal disputes. Legal Theory 19(3): 242–281

Raz J (1998) Two views of the nature of the theory of law: a partial comparison. Legal Theory 4:249–282

Shapiro S (2007) The Hart-Dworkin debate: a guide for the perplexed. In: Ripstein A (ed) Ronald Dworkin. Cambridge University Press, Cambridge, pp 22–55

Shapiro S (2011) Legality. Belknap Press, Cambridge, MA
Shecaira F (2015) Sources of law are not legal norms. Ratio Juris 28(1):15–30
Smith D (2009) Has Raz drawn the semantic sting? Law Philos 28:291–325
Smith D (2010) Theoretical disagreement and the semantic sting. Oxf J Leg Stud 30(4):635–661
Smith D (2015) Agreement and disagreement in law. Can J Law Jurisprud 28(1):183–208
Stavropoulos N (2001) Hart's semantics. In: Coleman J (ed) Hart's postscript: essays on the postscript to 'the concept of law'. Oxford University Press, Oxford, pp 59–98
Toh K (2013) Jurisprudential theories and first-order legal judgments. Philos Compass 8(5):457–471

Author Queries

Chapter No.: 212-1 312695_0_En

Query Refs.	Details Required	Author's response
AU1	Please be aware that your name, affiliation and email address and if applicable those of your co-author(s) will be published as presented in this proof. If you want to make any changes, please correct the details now. Note that corrections after publication will no longer be possible. Please note that we standardly publish professional e-mail addresses, but not private ones even if it is provided in the manuscript. If you have a different preference regarding publication of your email address, please indicate this clearly on the proof. If no changes are required, please respond with "Ok".	
AU2	The citation “Dworkin 1998” has been changed to “Dworkin 1986” to match the author name/date in the reference list. Please check if the change is fine in this occurrence and modify the subsequent occurrences, if necessary.	
AU3	Please check sentence “Dworkin faults semantic theories. . .” for correctness.	
AU4	Please provide missing section “Conclusion” as per the chapter structure, if applicable.	
AU5	Page number missing in reference citation “Dworkin 1978”. Please check and provide.	
AU6	Please provide missing section “Cross-References” which are references to other entries within this book that are related to this contribution.	
AU7	“Acknowledgments” section has been removed. Please check if okay.	

Note:
If you are using material from other works please make sure that you have obtained the necessary permission from the copyright holders and that references to the original publications are included.