Persistent Legal Disagreement: its Nature and Theoretical Relevance

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Abstract

Disagreement among legal practitioners (mainly, judges and lawyers) about the content of the law is a pervasive feature of any modern legal system. Sometimes, subjects disagree about the content of the law because they disagree over some non-legal issues (e.g., empirical facts, linguistic facts, rules of logic, etc.). For instance, two people in California may disagree over whether the speed limit is 55 miles an hour because they disagree over whether the relevant statute contains a provision to that effect. Some other times, subjects disagree about the content of the law despite their agreement over every other (relevant) non-legal issue. For example, two judges may disagree over whether an inheritor who murdered her testator is entitled to the inheritance despite there being agreement between them (the judges) over the fact that the inheritor did kill the testator, the fact that there was a valid will in which the murderer figured as the heir, etc.

I label the latter type of disagreement ‘persistent legal disagreement’ (PLD). Some legal philosophers have taken PLD to be theoretically significant. They have suggested that looking at PLD may be helpful to explain some features of law, legal practice, and legal discourse. More specifically, some legal philosophers have advanced disagreement-based arguments (i.e. arguments that draw on some observations about PLD) to support their views about the nature of law, legal practice and legal discourse.

This thesis is an analysis of PLD and its role in argumentation within philosophy of law. In this thesis, I pursue five aims. First, I aim to provide a complete description of PLD. The description is complete in the sense that it accounts for the structural and substantive features of this type of disagreement. Second, I aim to show that most (if not all) disagreement-based arguments in legal philosophy are committed to a particular understanding of PLD. I call this standard understanding ‘the content view’. According to the content view, disagreement is a relation that obtains between two propositional attitudes when their contents are incompatible. Third, I aim to show that this way of thinking about PLD is mistaken. I argue that PLD cannot be understood as a relation between the contents of propositional attitudes. Fourth, I aim to propose an alternative account of PLD. I call this alternative account the functionalist view. According to the functionalist view, disagreement is a relation that is sensitive to the functions of attitudes. Finally, I aim to make explicit how, when we drop the content view and adopt the functionalist view, most (if not all)
arguments that have been suggested in legal philosophy that are premised on observations about PLD fail to deliver their conclusions.

This thesis proceeds as follows. In chapter one, I suggest a description of the structure of PLD. According to this description, PLD involves two disagreements (one over the content of the law and one that concerns the concept THE CRITERIA OF LEGAL VALIDITY) and an explanatory relation between them. The description of PLD suggested in this chapter is not committed to any substantive account of what the relation of disagreement is or what type of attitudes constitute PLD.

In chapter two, I present the content view and argue that such a conception of disagreement is mistaken. My argument is that incompatibility between contents is neither sufficient nor necessary for disagreement. Additionally, I introduce an alternative conception of PLD: the functionalist view. As mentioned, according to the functionalist view, disagreement is a relation that is sensitive to the functions of attitudes.

In chapter three, I tackle the question of what type of attitudes are involved by PLD. I argue against the view that PLD involves two non-cognitive attitudes. I contend instead that PLD involves two cognitive attitudes. My argument is premised on two observations. Firstly, I argue that if PLD involved non-cognitive attitudes, then it would be faultless; secondly, I argue that PLD is not faultless.

In chapter four, I examine the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY in PLD. I clarify the claim, common in legal philosophy, that disagreement requires some sort of coordination between subjects. Contrary to the standard view, I argue that two people can coordinate and thus disagree despite not having the same concepts. My arguments rely on recent developments suggested by cognitive scientists.

In chapter five, I pursue a twofold goal. On the one hand, I aim to make explicit that three important disagreement-based arguments in legal philosophy entail the content view. Those arguments are: Dworkin’s argument against legal positivism, Kevin Toh’s argument for legal expressivist, and David Plunkett and Timothy Sundell’s analysis of the disputes they call bedrock legal disputes. On the other hand, I aim to make explicit the way in which once we replace the content view with the functionalist view, those arguments fail to deliver their conclusions.
Lay Summary

This thesis is an analysis of a particular type of legal disagreements (Legal Persistent Disagreement) and its relevance in philosophical argumentation. This thesis is divided into two uneven parts. In the first (longer) part, I introduce an account of the structure and substantive features of legal persistent disagreements. In the second (shorter) part, I assess the correctness of some arguments suggested in legal philosophy that draw on observations about this type of disagreement.

In the first part, I argue for three main claims. Firstly, to describe the structure of legal persistent disagreements, I claim that disagreements of this type involve a disagreement over the content of the law (in a particular legal system at a given time) that arises in virtue of a more fundamental disagreement about the criteria of legal validity (of a particular legal system). To defend this claim I argue against one incompatible, and currently highly influential, theory. Secondly, to account for one of the substantive features of persistent legal disagreements, I argue that disagreement is not a relation between two incompatible contents of two mental attitudes but a relation that is sensitive to those attitudes’ function(s). My argument consists in showing that incompatibility between the contents of attitudes is neither sufficient nor necessary for disagreement. This argument draws on some recent developments made by social psychologist and philosophers of mind. Thirdly, to account for the second substantive feature of persistent legal disagreements, I argue that the mental attitudes that constitute the disagreements that form legal persistent disagreements can be evaluated as true or false. To defend this claim, I introduce an argument that relies on some observations about faultless disagreement and the property being wrong.

In the second part, I argue for two main claims. Firstly, I claim that most (if not all) arguments that draw on observations about persistent legal disagreements in legal philosophy rely on a mistaken analysis of this type of disagreement. Secondly, I claim that, owing to that fact, those arguments must be abandoned, or at least revised.
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Introduction

Disagreement in legal practice is ubiquitous. Legal practitioners (mainly, judges and lawyers) disagree about a broad range of matters. They disagree about which legal materials should be applied to specific cases, how to interpret some words from legal texts, the competence of authorities, how the facts relevant for the case at hand took place, etc. Often, legal practitioners disagree about the content of the law; that is, they disagree over what the law is in a specific jurisdiction at a given time.

Sometimes legal practitioners disagree over the content of the law because they disagree over other non-legal issues (e.g., empirical facts, linguistic facts, rules of logic, etc.). For instance, two people in California may disagree over whether the speed limit is 55 miles an hour because they disagree over whether the relevant statute contains a provision to that effect. Disagreements over the content of the law of this type are not persistent in the sense that, as soon as the disagreement over non-legal issues is solved (for instance, by the facts becoming clear for the parties), they should cease to exist (they shouldn’t persist). For ease of exposition, let’s call this type of disagreement non-persistent legal disagreement.

Sometimes legal practitioners disagree over the content of the law despite their agreement over every other (relevant) non-legal issue. For example, two judges may disagree over whether an inheritor who murdered her testator is entitled to inherit, despite there being agreement between them (the judges) over the fact that the inheritor did kill the testator, the fact that there was a valid will in which the murderer figured as the heir, the fact that the relevant statute contains a provision to the effect that everyone who figures as a heir in a valid will ought to inherit, etc. Disagreements over the content of the law of this type are persistent in the sense that they shouldn’t cease to exist even if the parties were to agree over all other relevant non-legal issues. For ease of exposition, let’s call this type of disagreement persistent legal disagreement (PLD).

Following the standard view in philosophical discussion, I conceive of disagreement as a relation between two mental states. If two individuals disagree, then each has a mental state that stands in a particular relation to the mental state held by the other. I assume that those mental states are intentional; that is, I assume that they have a content. I assume that the content of each of the mental states that constitute a disagreement is a structured piece of information about (that stands
for) a state of affairs. As I understand it, to say that a piece of information is structured is to say that it is made up by parts which are ordered according to rules of grammar and syntax.

PLD can be, and often is, expressed by legal practitioners through linguistic exchanges. Typically, but not necessarily, the actions that individuals perform in a linguistic exchange to express disagreement (of any kind) are the utterances of sentences (disagreement can also be expressed by, for instance, shaking one’s head). The following is an example of a linguistic exchange through which an instance of PLD might be expressed:

(1)

John: Everyone who figures as a beneficiary in a valid will is entitled to inherit.
Robert: Not everyone who figures as a beneficiary in a valid will is entitled to inherit.

Understood as an instance of PLD, (1) is an exchange in which John and Robert express their disagreement over whether, according to the law in their jurisdiction at the time of their conversation, everyone who figures as a beneficiary in a valid will is entitled to inherit. They disagree on that matter despite their agreement over all other relevant non-legal issues.

It is worth highlighting that the same sentences that are used to express PLD (more generally, the actions that are performed in an exchange that expresses PLD) can also be used to express other types of disagreements. For example, by engaging in a linguistic exchange like (1), John and Robert might have expressed a disagreement over what the law in their jurisdiction should be. Being expressed in linguistic exchanges like (1) is not a feature exclusive to PLD.

Legal philosophers have taken PLD to be theoretically significant. They have suggested that by looking at PLD we can reveal some features of the nature of law, the nature of the concept LAW, and the nature of legal discourse.\(^1\) The way in which they have done so is by advancing disagreement-based arguments (i.e., arguments that draw on observations about PLD).

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\(^1\) In this thesis, I follow the convention coined by Eric Margolis and Stephen Laurence of denoting concepts by using small capitals. See (Laurence & Margolis, 1999).
One example of an argument in legal philosophy that draws on considerations about PLD is Ronald Dworkin’s disagreement-based argument against legal positivism. Roughly, Dworkin’s argument aims at providing an effective metatheoretical instrument to choose between two incompatible explanations of the nature of Law (legal positivism and legal interpretivism) which seem otherwise to have equal explanatory merits. Broadly, Dworkin’s idea is that the fact that one theory (interpretivism) can accommodate PLD, while the other (positivism) can’t, gives us sufficient reason to uphold the former and abandon the latter. As the result of accepting Dworkin’s argument is the adoption of a theory of the nature of law, at least indirectly, accepting Dworkin’s argument is also accepting a certain conception of law’s nature.

Dworkin’s argument has given rise to a vast secondary literature. In fact, most of the debate about PLD within legal philosophy revolves around Dworkin’s ideas. Some philosophers, sympathetic to legal positivism, have offered arguments against Dworkin. Some others, sympathetic to legal antipositivism, have offered arguments to defend him. The dispute between positivists and antipositivist regarding Dworkin’s work seems to be far from being settled.

In response to Dworkin, for example, David Plunkett and Timothy Sundell have introduced an alternative analysis of the linguistic exchanges that express PLD. Plunkett and Sundell suggest that, by engaging in a linguistic exchange in which, despite agreement over all other relevant non-legal issues, speakers make seemingly conflicting utterances about what the law is, they (the speakers) express via pragmatics their disagreement over which concept (say, LAW1 or LAW2) should be used in their jurisdiction (which concept should be expressed by the term “law”). Plunkett and Sundell argue for their account in terms of some theoretical advantages it is supposed to have over the view suggested by Dworkin; just to give an example, they claim that their view doesn’t posit the existence of multiple types of concepts while Dworkin’s does. Plunkett and Sundell’s analysis entails that there might be multiple concepts LAW that people deploy within the same legal system when they use the word “law”. In that sense, their argument helps unveil some features of our concept(s) LAW.

Not all arguments in legal philosophy that draw on observations about PLD revolve around Dworkin’s views. Kevin Toh has offered an argument premised on considerations about PLD to support his expressivist account of legal discourse. The conclusion of Toh’s argument is that

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2 See (Dworkin, 1986).
3 See (Plunkett & Sundell, 2013b).
internal legal statements are best understood as expressions of a non-cognitive psychological attitude Toh calls *plural acceptance of a norm*. Roughly, Toh claims that, once we accept that internal legal statements are expressions of attitudes, the only way in which we can characterize them as instances of guidings (as opposed to goadings) is if we adopt his expressivist theory of legal statements. That is something that becomes apparent, Toh argues, when we examine instances of PLD. As can be seen, Toh’s argument is supposed to help us unveil an important feature of legal discourse.

In this thesis I’ll pay attention to these three arguments and no others. The reasons why I decided to do so are as follows. Dworkin’s argument was the first in analytical legal philosophy to draw on observations about PLD. It has also been the most influential. Plunkett and Sundell’s argument has opened new paths of research in legal philosophy. The analysis they suggest to explain linguistic exchanges that express PLD can be, and has been, used to explain some other debates that theorists have considered of philosophical interest (for instance, the debate between legal positivists and legal antipositivists). Finally, Toh’s argument is a good example of a disagreement-based argument in legal philosophy that is neither a reply to Dworkin, nor a reply to Dworkin’s critics. In that sense, Toh has extended the scope of disagreement-based argumentation in the realm of the philosophy of law.

Most (if not all) arguments in legal philosophy that draw on observations about PLD conceive of this type of disagreement along (more or less) the same lines. In terms of the structure of PLD, theorists usually take this type of disagreement to be formed of three elements: a disagreement over the content of the law, another disagreement commonly thought to be more fundamental, and an explanatory relation between them. It is usually accepted that the former disagreement arises in virtue of the latter more fundamental disagreement. Thus, for example, for some theorists, PLD involves a disagreement over the content of the law that arises in virtue of a disagreement that (in some sense) revolves around the concept LAW.

In more substantive terms, legal philosophers conceive (often implicitly) of disagreement in general, and (the disagreements that make up) PLD in particular, as a relation that obtains between two mental states when their contents are incompatible. As understood int his work, two contents are incompatible if they cannot be true at the same time. According to those philosophers, it is because, and only because, my attitude has the content P and I yours the content no-P that you
and I disagree. It is usually accepted that there is no disagreement between a subject that endorses the content \( P \) and a subject that endorses the content no-\( R \) (where no-\( R \) doesn’t entail no-\( P \)).

This thesis is firstly an analysis of PLD and secondly an examination of its role in argumentation within legal philosophy. My first aim is to offer a complete description of this type of disagreement. Such a description is complete in the sense that it accounts for both the structure and substantive features of PLD.

In terms of the structure of PLD, the description I suggest in this thesis is not new but more of a clarification. The description of PLD in this thesis presents in a clear manner the way in which most (if not all) legal philosophers think, often implicitly, of the structure of this type of disagreement. I claim that, when engaged in an instance of PLD, two individuals disagree over the content of the law in a particular jurisdiction at a particular time because they have a disagreement that concerns the concept \textit{THE CRITERIA OF LEGAL VALIDITY}.

In terms of the substantive features of PLD, the description suggested in this thesis is original. It is different from, and even incompatible with, the standard way in which PLD has been conceived of by (most) legal philosophers. I don’t take disagreement to be a relation that obtains between incompatible contents. I argue that the relation of disagreement obtains instead between the functions of two attitudes. Additionally, I claim that the attitudes that constitute (each of the disagreements that form) PLD are cognitive (as opposed to non-cognitive).

In this thesis, I provide strong reasons to support such a description of PLD. If correct, my observations should be enough to accept the new description and abandon incompatible conceptions of PLD. A good deal of my arguments relies on recent developments suggested in cognitive science and philosophy of mind. Resorting to these disciplines when analyzing disagreement is justified because we conceive of disagreement as a relation between mental states.

My second aim in this thesis is to assess how useful current disagreement-based arguments in legal philosophy are. Given that most (if not all) arguments in legal philosophy that rely on observations about PLD do not endorse the new description, an obvious consequence that follows from the observations in this thesis (if correct) is that those arguments cannot be correct. More specifically, my aim is to make explicit the consequences that accepting the new conception of PLD bears with respect to most (if not all) current disagreement-based arguments in the philosophy of law.
For reasons of time and space, I will examine only the arguments sketched above (i.e., the arguments suggested by Dworkin, Plunkett and Sundell and Kevin Toh). The general conclusion I will argue for is that current arguments in legal philosophy that are based on observations about PLD need to be abandoned or at least revised. To clarify, I don’t deny that observations about PLD might be useful to unveil features of legal practice, the concept LAW, or legal discourse. What I deny is that our current disagreement-based arguments are such. Those arguments fail to achieve their purposes because they rely on a mistaken conception of PLD.

This thesis proceeds as follows. In chapter one, I suggest and argue for a description of the structure of PLD. As noted, according to this description, PLD involves two disagreements and an explanatory relation between them. More specifically, I suggest that PLD involves a disagreement over the content of the law that arises in virtue of a disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY. The description of PLD suggested in this chapter is not committed to any substantive account of what the relation of disagreement (the relation between mental states) is. It is not committed either to any view on what kind of propositional attitudes are involved by the disagreements that form PLD. To argue in favor of this description of the structure of PLD, I present an argument against what seems to be an incompatible conception. This incompatible conception follows from the analysis of the linguistic exchanges that express PLD suggested by Plunkett and Sundell.

In chapter two, I examine one of the substantive features of PLD; namely, I examine what it takes for two attitudes to enter the relation of disagreement. Firstly, I present the standard view adopted by legal philosophers. As mentioned, according to this view, disagreement is a relation that obtains when the contents of two attitudes are incompatible. I argue that such a conception of disagreement cannot be correct. My argument consists in showing that incompatibility between contents is neither sufficient nor necessary for disagreement. Secondly, I introduce an alternative conception of disagreement. As noted, in general, according to this alternative conception, disagreement is a relation rather sensitive to the functions of attitudes. My observations in this chapter draw on recent works from social psychology which suggest that our attitudes (more specifically our beliefs) may serve different functions (at least, a representational, a hedonic, and a motivational function).

In chapter three, I examine the other substantive feature of PLD; namely, I investigate what types of attitudes constitute the disagreements that make up PLD. I argue against the view I call
non-cognitivism. According to non-cognitivism such disagreements involve non-cognitive attitudes. Hence, I argue that PLD involves cognitive attitudes. My argument against non-cognitivism has two premises. First, I argue that accepting that the attitudes that constitute the disagreements that form PLD are non-cognitive, entails that those disagreements are faultless. Second, I argue that those disagreements are not faultless. From these premises it follows that such attitudes are cognitive. To conclude the chapter, I suggest, on speculative grounds, that the attitudes involved by the disagreement over the content of the law in PLD are beliefs that serve a motivational function at the expense of a representational function. Also on speculative grounds, I suggest that the attitudes involved by the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY are beliefs that serve a motivational and a representational function complementarily.

In chapter four, I address an important theoretical constrain posed by accepting (as I do) that the beliefs that constitute the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY in PLD serve a representational and a motivational function complementarily. The constrain is that disagreement, when it involves beliefs that serve a representational function (or a representational and a non-representational function complementarily), requires coordination between the parties. The challenge posed by this constrain is to explain what coordination consists of so that individuals can in fact coordinate with each other. The standard view on this matter is that for there to be coordination between two subjects, they must share the same concepts. I suggest an alternative account. According to this account, there is coordination between two subjects if their respective concepts are coreferential, if their concepts are deployed in similar enough contexts, and if their concepts are used to perform similar enough cognitive tasks. I argue that the new account of coordination fits better than the standard view alongside some novel (and acceptedly controversial) hypotheses suggested by philosophers of mind and cognitive scientists regarding the ontology of concepts. An important result of adopting the new account of coordination is that two people can engage in a disagreement (that involves representational beliefs) even if they don’t share the same concepts.

In chapter five, my aim is to illustrate how accepting the new account of PLD and dropping the standard view has consequences with regards to most (if not all) disagreement-based arguments in legal philosophy. First, I aim to show that the arguments suggested by Dworkin, Plunkett and Sundell, and Kevin Toh, entail the standard view. Second, I aim to show that, once we replace the standard view with the new account of PLD, the disagreement-based observations those arguments
rely on no longer give reason to accept their conclusions. This conclusion can be generalized, and thus we can conclude that all arguments in legal philosophy that rely on considerations about PLD fail to support their conclusions and therefore should be discarded (or at least revised). To repeat, I don’t deny that disagreement-based argumentation can be useful to elucidate questions about the nature of law, the concept LAW or legal discourse; what I deny is that our current arguments do.
Chapter 1. The Structure of PLD

This thesis is concerned with a particular kind of legal disagreement: persistent legal disagreement (PLD). My purpose in this chapter is to introduce and defend a description of the structure of PLD. According to this description, this type of disagreement involves two disagreements and a relation between them. One of those disagreements concerns the content of the law in a specific jurisdiction at a given time. The other disagreement concerns the concept THE CRITERIA OF LEGAL VALIDITY. The disagreement over the content of the law arises in virtue of the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY. The description of the structure of PLD suggested in this chapter is not committed to any substantive views on (i) what it takes for two attitudes to enter the relation of disagreement, and (ii) the type of mental states involved by each of the two disagreements that form PLD. To defend this description of the structure of PLD, I argue against an incompatible analysis of the linguistic exchanges that express disagreements of this kind. Namely, I argue against the metalinguistic analysis of so-called bedrock legal disputes suggested by David Plunkett and Timothy Sundell.

1. Disagreement in Law: Non-persistent and Persistent

Consider the following exchanges:

(1)

Josefin: The speed limit in California is 55 miles an hour.
Olivia: The speed limit in California is not 55 miles an hour.

(2)

John: Everyone who figures as a beneficiary in a valid will is entitled to inherit.
Robert: Not everyone who figures as a beneficiary in a valid will is entitled to inherit.
Linguistic exchanges of this sort—i.e., exchanges in which two people make two supposedly incompatible utterances about the content of the law in a specific jurisdiction at a particular time—are pervasive in legal practice. It seems intuitive that, by engaging in (1), Josefin and Olivia evince some disagreement they have over what is the (legal) speed limit in California at the time of their conversation. Similarly, it seems intuitive that, by engaging in (2), John and Robert evince some disagreement they have over whether everyone who figures as a beneficiary in a valid will is (legally) entitled to inherit in their jurisdiction at the time of their exchange. More generally, it seems intuitive that, by engaging in exchanges like (1) or (2), subjects evince a disagreement over the content of the law in a particular legal system at a particular time.

However, it is worth noticing that the same utterances in both (1) and (2) can be used to express other types of disagreements. For example, they can be used to express a disagreement over what the law should be, or even a disagreement about what should be done according to morality. Being expressed by linguistic exchanges like (1) or (2) is not an exclusive feature of disagreements over the content of the law.

In the preceding paragraphs an important distinction was presupposed. In contemporary philosophical discussion, it is usual to distinguish between disputes and disagreements. Disputes are normally understood as linguistic exchanges in which individuals, through their actions (commonly the utterances of some sentences), typically express (evince) a disagreement. On the other hand, disagreement is usually conceived of as a relation between two conflicting mental states respectively held by two individuals (or one individual at different times). As can be seen, it is possible to disagree without engaging in a dispute and to engage in a dispute without disagreeing.

Although this thesis is concerned with disagreements and not with disputes, for ease of exposition, and in order to align myself with the terms in which the discussion around legal disagreement has been commonly framed in legal philosophy, I will focus on cases like (1) and (2). That is, I will focus on cases where the parties disagree and their disagreement manifests through their utterances of conflicting sentences.

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1 Philosophers commonly attribute the introduction of this distinction to Cappelen and Hawthorne. See (Cappelen & Hawthorne, 2009). The distinction has appeared in the works of several philosophers. See (Jackson, 2014; Jenkins, 2014; Marques, 2014; Rott, 2015). In legal philosophy, the distinction has been explicitly mentioned by Plunkett and Sundell. See (Plunkett & Sundell, 2013b).

2 Disputes typically, although not necessarily, involve the individuals’ utterances of conflicting statements. They may involve, for instance, wagging one’s finger.
Not all mental states can enter into the relation of disagreement. It is widely accepted that disagreement may arise between intentional mental states but not between mental states that lack intentional content.\footnote{For an introduction on the intentionality of mental states see (Jacob, 2019).} More specifically, it is widely agreed that the typical class of mental states among which disagreements take place is what philosophers call *propositional attitudes*.

Propositional attitudes are commonly characterized as psychological relations that subjects bear to propositions.\footnote{According to McKinsey, the idea that propositional attitudes are relations between subjects and propositions was first introduced by Frege. See (McKinsey, 1999, p. 519).} Typical examples of propositional attitudes are: beliefs, desires, hopes, fears, doubts etc. Pretheoretically, we can explain the *attitudinal* element of a propositional attitude in terms of the way in which a subject *takes* a given proposition. In this regard, we say of a thinker A and a proposition P that A *believes* P, *desires* P, *hopes* P, *fears* P, etc.

The notion of *proposition* is highly contested in philosophy.\footnote{Arguably, the most general way of thinking about propositions is as whatever a sentence expresses. Matthew McGrath and Devin Frank have distinguished four ways in which philosophers use the term “proposition”: “[…] the primary bearers of truth-value, the objects of belief and other “propositional attitudes” (i.e., what is believed, doubted, etc.), the referents of that-clauses, and the meanings of sentences”. (McGrath & Frank, 2018) They suggest their own definition according to which propositions are “[…] the sharable objects of the attitudes and the primary bearers of truth and falsity”. (McGrath & Frank, 2018)} For present purposes, and to avoid unnecessary complications, in this thesis, I will think of the content of an intentional attitude simply as a structured piece of information.\footnote{Among the complications I aim to avoid is the debate about what propositions are, the debate about how propositional content is determined, complications raised by the distinction between propositions expressed and propositions communicated, etc. Another reason to drop the term “proposition” is that I’d like to remain noncommittal with respect to the possibility of disagreement between non-propositional (although intentional) mental states. On a defense of the idea that some intentional attitudes don’t have as their content a proposition. See (Montague, 2007).} As understood in this thesis, in its most basic form, the content of an attitude encodes information of something (or someone) and of something that is predicated of it (or them). In other words, I take it that, in its most basic form, the content of an attitude comprises a subject and a predicate (that picks up a property attributed to that subject). To refer to such information, I will use the term “content” instead of the term “proposition”. This notion of informative content is, if you will, a naïve notion of proposition.

I assume a minimal understanding of intentionality. That is, I assume that the content of an attitude is a mental representation of something. In other words, I assume that the content of an attitude *stands for or is about* something. For my purposes in this thesis, I need not be more specific about what it means for mental representations to be intentional (the sense in which mental
representations are *about* things). Hence, feel free to use the notion of *intentionality* or *aboutness* that suits you better.

In legal philosophy, it is widely accepted that there are (at least) two types of disagreements about the content of the law that exchanges like (1) and (2) can evince.\(^7\) For expository reasons, it is useful to have a label for each of these types of disagreement. I’ll label one type *non-persistent* and the other *persistent*.\(^8\)

When two people engage in a *non-persistent legal disagreement*, they disagree over the content of the law because they disagree over other (relevant) non-legal issues (mainly empirical facts, but also rules of logic, linguistic facts, etc.). For instance, Josefin and Olivia may disagree over whether the speed limit in California is 55 miles an hour because they disagree over whether the relevant statute contains a provision to that effect. In every instance of a non-persistent legal disagreement, as soon as the disagreement over non-legal issues is solved (for example, by the facts becoming clear for both parties), the disagreement over the content of the law should cease to exist. It shouldn’t *persist*. As soon as Josefin and Olivia find out (and thus come to agree about) whether Californian statutory law contains a provision that sets the speed limit at 55 miles an hour, there should be no disagreement between them on this matter. Their disagreement shouldn’t persist despite their agreement.

By contrast, when two subjects engage in a *persistent legal disagreement*, they disagree over the content of the law despite agreeing over all (relevant) non-legal issues. For instance, Robert and John could disagree over whether, according to the law in New York, an inheritor who murdered her testator is legally entitled to inherit, despite there being agreement between them over the fact that the inheritor killed the testator, the fact that there was a valid will in which the murderer figured as the heir, the fact that there is a legal disposition in New York to the effect that

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\(^7\) This idea is owed to Dworkin’s seminal work *Law’s Empire*. There, Dworkin distinguished between empirical and theoretical disagreements. See (Dworkin, 1986, pp. 4–5). It might be worth noticing that not everyone accepts that there are two ways in which legal practitioners can disagree about the content of the law. Brian Leiter has argued that persistent disagreements don’t exist (or that even if they do, they are not theoretically relevant). Roughly, Leiter’s view is that we can explain away the *at face value* existence of persistent disagreements by attributing to the disagreeing parties error (they do think they have a persistent disagreement but they don’t) or a misleading intention (they do know they don’t have a persistent disagreement but intentionally pretend they do). See (Leiter, 2009, 2019). I won’t argue against Leiter (or anyone else denying the existence of persistent disagreements in law) in this thesis. I’ll simply assume that persistent legal disagreements do exist in legal practice (or at least that they might).

\(^8\) In suggesting these two labels I depart from Dworkin’s famous terminology. Dworkin uses the terms “empirical disagreement” and “theoretical disagreement”. The reason to introduce new terminology is that Dworkin’s vocabulary is theoretically loaded, and the new labels are not. However, I take the difference between Dworkin’s *empirical* and *theoretical* disagreements and my *non-persistent* and *persistent* disagreements to be only terminological.
people who figure as heirs in valid wills are entitled to inherit etc. For all instances of persistent legal disagreement, the disagreement about what the law is persists even if all non-legal issues become clear for the parties (and thus they come to agree about those issues). Even if all (relevant) non-legal issues (like the fact that the inheritor killed the testator) are clear for both Robert and John, their disagreement over whether the inheritor is entitled to the inheritance might persist. If it does, Robert and John engage in a persistent legal disagreement.

This thesis is concerned with disagreements of the second type: persistent legal disagreement (PLD). This type of disagreement can be examined with respect to its structural and substantive features. In the next section, I will introduce a description of the structure of PLD. According to this description, PLD involves two disagreements and an explanatory relation between them.

2. Persistent Legal Disagreement (PLD)

I suggest that PLD is formed by three elements: (i) one disagreement over the content of the law, (ii) one disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY, and (iii) the explanatory relation in virtue of which obtains between them. In the next three subsections, I’ll flesh out these three ideas.

2.1 The Disagreement over The Content of the Law

When people engage in an instance of PLD they disagree (although not only) over the content of the law in a specific jurisdiction at a given time. They disagree over what the law is. I take this idea to be a truism.

To say of a disagreement that it is a disagreement over the content of the law is to say something about the content of the mental states that constitute it. We have said that a disagreement is a relation between two attitudes each of which has as its content a structured piece of information. A disagreement over the content of the law is a relation between two attitudes each of

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9 Dworkin has introduced a number of actual cases that he takes to be instances of this type of disagreement. See (Dworkin, 1986, pp. 15–30).
10 As noted in the introduction to this thesis, I follow the convention coined by Eric Margolis and Stephen Laurence of denoting concepts by using small capitals. See (Laurence & Margolis, 1999).
11 As we will see below, this idea might not be as uncontroversial as I take it to be. It might be that some legal theorists do not accept that persistent disagreements in law involve a disagreement over the content of jurisdiction-specific law.
which has as its content a piece of information about what the law is in a specific jurisdiction at a given time.

PLD and non-persistent legal disagreement alike involve a disagreement over the content of the law. This is what makes (at least partially) both types of disagreements to be legal. In that sense, involving a disagreement over the content of the law is not a feature exclusive to PLD even if it is one of its necessary features.

Depending on the type of information encoded by their contents, there might be different types of attitudes about the content of the law. For example, let’s assume for a moment that legal systems contain (legal) norms. If legal systems contain norms, by virtue of the information encoded by their contents, there seem to be at least three types of attitudes that subjects might hold about the content of the law. First, a subject might hold an attitude about whether a particular norm is part of the relevant legal system. For instance, a subject might hold an attitude towards a (linguistic) content like “N is a valid norm of the legal system S”. Second, a subject might hold an attitude about (the content of) a specific norm she takes to be valid in the legal system in question. For instance, a subject might hold an attitude towards a (linguistic) content like “(in this legal system) whoever earns more than £ 20’000 ought to pay tax X”. Finally, a subject might hold an attitude about the application of a general norm to a particular case. For instance, a subject might hold an attitude towards a (linguistic) content like “(in this legal system) Isabel ought to pay tax X”.\(^\text{12}\)

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\(^\text{12}\) This distinction between different types of attitudes draws on a distinction between different types of legal statements suggested by Luís Duarte d’Almeida; however, there is no exact correspondence between the two. Duarte d’Almeida has distinguished between four types of legal statements:

1. A general statement of a rule of recognition RR accepted as appropriate to assess legal validity (“A rule is legally valid when...”);
2. A particular statement applying RR to a particular case (“R is a legally valid rule”);
3. A general statement of rule R (for example, “Whoever...is under the legal obligation to φ”; “A will is legally valid when...”);
4. A particular statement applying R to a particular case (“Person p is under the legal obligation to φ”; “This will is legally valid”). (Duarte d’Almeida, 2016, p. 179)

The types (2), (3) and (4) identified by Duarte d’Almeida correspond to the distinction between types of attitudes suggested above in the following sense. I take it that a speaker who utters a statement of type (2) would communicate by it (although perhaps not only) the fact that she holds an attitude towards whether or not a particular norm is part of the legal system within which she speaks. A speaker who utters a statement of type (3) would communicate by it (although perhaps not only) her attitude towards (the content of) a specific norm she takes to be valid in the legal system within which she speaks. A speaker who utters a statement of type (4) would communicate by it (although perhaps not only) her attitude towards the content of the law in a particular case in the legal system within which she speaks. The attitude expressed by an utterance of a statement like (1), I take it, is an attitude about the criteria of legal
If there are different types of attitudes that subjects might have about the content of the law, then there are different types of disagreements over the content of the law. Following with our example, if the content of the law are norms and there are three different types of attitudes that subjects can have about norms, then there are three different types of disagreements over the content of the law. For the sake of explicitness, I should make clear that I don’t aim to commit to any specific views on what the content of the law is and what the content of attitudes about the content of the law looks like. Our example in which we take the content of the law to be norms is only for illustration purposes.

Intuitively, in a dispute that reflects PLD, disputants express by their actions (via semantics when those actions are the utterances of sentences) their disagreement over the content of the law. They do not express the other disagreement that constitutes PLD. Take for example exchange (2). It seems intuitive to think that, by their utterances, John and Robert express (via semantics) their disagreement over whether everyone who figures as the beneficiary in a valid will is entitled to inherit. However, that view is not uncontroversial. \(^\text{13}\) I’ll explain what the controversy is below. To repeat, the point now is that, when two individuals who are involved in an instance of PLD engage in a dispute, the disagreement that seems to be commonly expressed by their actions (semantically when those actions are the utterances of sentences) is the disagreement over the content of the law (as opposed to the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY).

For the purposes of his thesis, this description of the disagreement over the content of the law in PLD will suffice. In the following subsection, I will briefly describe the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY. I fully develop and defend a characterization of this type of disagreement in chapter 4. The description that follows is a summary of my views there.

2.2 The Disagreement that Concerns the Concept THE CRITERIA OF LEGAL VALIDITY

I claim that PLD involves a disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY. To explain what kind of disagreement that is, it is useful to clarify first, even if

\(^{13}\) David Plunkett and Timothy Sundell have recently challenged this intuition. See (Plunkett & Sundell, 2013b). I’ll present Plunkett and Sundell’s challenge, and argue against it, in the next section.
only briefly, the way in which I conceive of concepts.\textsuperscript{14} I take concepts to be psychological entities. I take concepts to be mental representations. As understood in this thesis, concepts are the constituents of the contents of our intentional attitudes.

A concept is a mental representation of something. A concept is a representation of either an individual or a class of individuals.\textsuperscript{15} For example, the concept NAPOLEON is a representation of Napoleon, and the concept TIGER is a representation of tigers.

I assume that concepts have structure. That is, I assume that concepts have parts. For present purposes, we can say that A is a part of a concept C, if A is a piece of information that an individual retrieves from long-term memory when she deploys her concept C. For instance, the piece of information “tigers are mammals” is a part of somebody’s concept TIGER, if that person retrieves such information from long-term memory when deploying her concept TIGER.

Subjects deploy concepts when they perform a cognitive task. For example, a subject deploys her concept TIGER when she is in the task of identifying a particular item as a tiger. To be clear, as I understand it, performing a cognitive task is a necessary condition of deploying a concept.

The description of concepts above should suffice for the purposes of this chapter. Now we should ask: what is the concept THE CRITERIA OF LEGAL VALIDITY? The first thing to be noticed is that the label “THE CRITERIA OF LEGAL VALIDITY” is rather general. It is, so to speak, an umbrella term to refer to a group of concepts. To this group belong all concepts that are mental representations of the criteria of legal validity of a legal system. Let me explain.

Imagine a legal system S1. Imagine the criteria of legal validity of S1. The mental representation that a subject has of the criteria of legal validity of S1 is that subject’s concept THE CRITERIA OF LEGAL VALIDITY OF S1. Now, imagine a legal system S2. Imagine the criteria of legal validity of S2. The mental representation that a subject has of the criteria of legal validity of S2 is that’s subject concept THE CRITERIA OF LEGAL VALIDITY OF S2. Certainly, the concept THE CRITERIA OF LEGAL VALIDITY OF S1 and the concept THE CRITERIA OF LEGAL VALIDITY OF S2 are different. However, for ease of exposition and to make my observations general, I will refer to every concept that is a representation of the criteria of legal validity of a legal system (such as the

\textsuperscript{14} This characterization of concepts is also a summary of the view expressed in chapter 4.

\textsuperscript{15} Whether subjects can have conceptual representations of verbs or representations that correspond to other linguistic units is not relevant for our discussion here.
two concepts above) as “the concept THE CRITERIA OF LEGAL VALIDITY”. So, keep in mind that, when looking at a particular instance of PLD, the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY concerns mental representations of the criteria of legal validity of the particular legal system in which such an instance of PLD takes place.

I will explain now what it means to say that a disagreement concerns the concept THE CRITERIA OF LEGAL VALIDITY. As observed, I assume that the concept THE CRITERIA OF LEGAL VALIDITY has parts. C is a part of a subject’s concept THE CRITERIA OF LEGAL VALIDITY, if C is a piece of information retrieved from long-term memory by that subject when she deploys such a concept.

I won’t commit to any specific formulation of how the information retrieved form long term memory when deploying the concept THE CRITERIA OF LEGAL VALIDITY might look like. Perhaps, with respect to legal system S, when deploying their concept THE CRITERIA OF LEGAL VALIDITY, subjects retrieve from long-term memory information of the form “C is a criterion of legal validity in legal system S”. Perhaps they retrieve information of the form “X belongs to legal system S only if it meets criterion C”. Perhaps the information they retrieve can have both forms. For my purposes, this is not relevant.

There is no reason to deny that the information that a subject retrieves when deploying her concept THE CRITERIA OF LEGAL VALIDITY can be the content of an attitude. Now, imagine that a subject holds an attitude towards one of the parts that forms her concept THE CRITERIA OF LEGAL VALIDITY. Imagine that another subject (or the same subject at a different time) holds an attitude towards one of the parts that forms her concept THE CRITERIA OF LEGAL VALIDITY. A disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY arises when there is a conflict between two attitudes of that type. That is, two subjects engage in a disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY, when they hold two conflicting attitudes each of which has as its content information those subjects respectively retrieve from long-term memory when deploying their respective concepts THE CRITERIA OF LEGAL VALIDITY. To repeat, I will explain these ideas in further detail in chapter 4.

Two more features of the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY are explanatorily relevant for the purposes of this chapter. First, involving a disagreement of this type is a feature of PLD but it is not a feature of non-persistent legal disagreements. As understood in this thesis, that is one of the main differences between persistent and non-
persistent disagreements in legal practice. Second, the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY is typically not expressed by the actions of the disagreeing parties when they engage in a dispute (when those actions are the utterances of sentences, this type of disagreement is typically not expressed via semantics). As noted, the disagreement that is typically expressed in a dispute by the actions performed by the disputants is the disagreement over the content of the law.

Admittedly, this characterization of the disagreement that concerns the concept CRITERIA OF LEGAL VALIDITY is hasty and incomplete. As repeatedly mentioned, it is in chapter 4 that I will develop this characterization at full length. The characterization presented in this subsection should be just enough to proceed with our discussion in this and the next two chapters.

The two disagreements that make up PLD are explanatorily related. In the following subsection, I will flesh out the idea that, in PLD, the disagreement over the content of the law arises in virtue of the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY.

2.3 The Relation “in Virtue of”

When two subjects engage in an instance of PLD, they disagree over the content of the law because they have a disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY. That is what I mean when I say that the disagreement over the content of the law arises in virtue of the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY. In other words, the relation in virtue of is an explanatory relation. The disagreement over the concept THE CRITERIA OF LEGAL VALIDITY explains the disagreement over the content of the law.

The explanation is partly causal. For the purpose of this thesis, it suffices to understand causality along the lines suggested by the so-called counterfactual theories. According to these theories, A causes B if, and only if, if A hadn’t occurred, B wouldn’t have occurred. Thus, to say that the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY causes the disagreement over the content of the law is to say that the latter wouldn’t have happened if the former hadn’t happened.

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16 I follow David Chalmers in understanding the relation in virtue of in this way. See (Chalmers, 2011).
17 The introduction of the counterfactual analysis of causation is commonly attributed to David Lewis. See (Lewis, 1973).
I don’t contend that the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY is the only cause of the disagreement over the content of the law. It might be that, for some (or even all) instances of PLD, the disagreement over the content of the law has multiple causes. I don’t contend either that the disagreement over the content of the law has multiple causes. What I contend is that the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY is necessarily one (or the only) cause of the disagreement over the content of the law.

The explanation is asymmetrical. The disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY explains the disagreement over the content of the law, but the disagreement over the content of the law doesn’t explain the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY.

By understanding the relation *in virtue of* as causal and asymmetrical in the sense described above, one explains in which sense the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY is *more fundamental* than the disagreement over the concept of the law. In other words, thus understood, to say that the former is a more fundamental disagreement than the latter is to say that the former explains the latter but not the other way around.

No more features of the relation “in virtue of” are explanatorily relevant for my purposes. To sum things up, I think of the relation *in virtue of* as an explanatory relation that is causal and asymmetrical.

We have now a full description of the structure of PLD. It seems to me that most (if not all) legal theorists that are engaged in the debate around PLD endorse (or would endorse) a description like this. In the rest of this chapter, I will present some reasons that speak in favor of this picture of the structure of PLD.

2.4 The Reasons in Favor of the Description of PLD

To conclude this section, let me point out the immediate reasons that support conceiving of the structure of PLD along the lines suggested above. Clearly, for a description of the structure of PLD to be theoretically useful, it should depict disagreements of this type as instantiating those features that we would consider explanatorily relevant for it to have. It seems to me that the description presented above does just that.
First, the description depicts PLD as involving a disagreement over the content of the law in a given jurisdiction at a particular time. To repeat, I take this claim—PLD involves a disagreement over the content of the law—to be a truism. Accounting for this feature is theoretically relevant because it ensures that we characterize such disagreements as properly legal. The fact that PLD involves a disagreement over the content of the law should suffice to depict that type of disagreement as being legal.

Second, the description depicts PLD as involving a persistent disagreement. The description shows that disagreements of this type involve a disagreement that persists despite agreement over any other non-legal relevant issues. The relevance of accounting for this feature comes from allowing us to distinguish PLD from (most) other types of disagreements in law. Particularly, it allows us to distinguish PLD from (all kinds of) non-persistent legal disagreements.

Third, the description captures the relation between the disagreement over the content of the law and a (in some sense) more fundamental disagreement (which is not about non-legal issues). As noted, as understood in this thesis, the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY is more fundamental than the disagreement over the content of the law in the sense that the former explains the latter, but the latter doesn’t explain the former. The fact that when two subjects engage in an instance of PLD they disagree over the content of the law because they disagree about some more fundamental (legal) issue seems to be, to a large extent, the reason why legal philosophers have found this type of disagreement philosophically interesting. This explains why portraying PLD as instantiating such a relation is theoretically important.

In summary, to be of explanatory use, any description of the structure of PLD should portray this type of disagreement as being legal, persistent, and involving a causal relation between a disagreement over the content of the law and a more fundamental disagreement that is not about non-legal issues. I don’t claim that the description above is the only one that does (or can do) that. I claim only that it does. If we accept that the three features that I have highlighted are in fact the relevant features that we would want PLD to instantiate, and we accept that the description above depicts PLD as instantiating those features, then we have good reason to accept the description of the structure of PLD suggested in this thesis.

By suggesting a well-defined description of the structure of PLD, we have set up clearly the type of cases with which this thesis is concerned. As I pointed out, it seems to me that most
philosophers who are engaged in the debate around PLD agree (or would agree) with the description suggested here. However, it would be incorrect to say that the description is beyond contention. In the following section, I anticipate and deal with one of its possible limitations: the description seems to be incompatible with an account of a certain type of disputes that has recently gained popularity in philosophical discussion. That account is David Plunkett and Timothy Sundell’s metalinguistic analysis of bedrock legal disputes. If there is in fact such incompatibility, one cannot accept the description of the structure of PLD unless one has rejected Plunkett and Sundell’s analysis. That’s what I’ll do in the next section.

3. The Metalinguistic Analysis of Bedrock Legal Disputes

In a recent paper, David Plunkett and Timothy Sundell have suggested an analysis of a type of dispute that seems to entail an incompatibility with the description of the structure of PLD suggested in this chapter. In what follows, my aim is to argue in favor of the description of PLD by arguing against Plunkett and Sundell’s metalinguistic analysis of bedrock legal disputes. I’ll begin by reconstructing the proposal of Plunkett and Sundell.

3.1 Presenting the Metalinguistic Analysis of Bedrock Legal Disputes

Plunkett and Sundell take as the focus of their analysis a class of disputes they call bedrock legal disputes. Bedrock legal disputes are “disputes where speakers persist in the dispute about what counts as “the law” despite full agreement on the relevant empirical facts and awareness of that background agreement.” According to Plunkett and Sundell, the best way to analyze bedrock legal disputes is as instances of a type of disputes they call metalinguistic negotiations. Let’s elaborate.

Plunkett and Sundell start their analysis by observing that bedrock legal disputes belong to a more general class of disputes which they call seeming conceptual variation cases (seeming variation cases for short). Two features characterize seeming variation cases. First, disputants in a seeming variation case persist in their dispute even after becoming aware about all non-linguistic

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18 See (Plunkett & Sundell, 2013b).
19 (Plunkett & Sundell, 2013b, p. 244)
facts and the fact that they use a term (the relevant term around which their dispute revolves) systematically differently. Second, despite the different ways in which disputants use the relevant term, theorists and disputants themselves take their dispute to reflect a disagreement. According to Plunkett and Sundell, the fact that, in seeming variation cases, speakers show divergence in the way they systematically use the relevant term suggests that they mean different things by it.

Plunkett and Sundell’s analysis of bedrock legal disputes rests on the claim that disagreement can be expressed throughout different linguistic mechanisms. They observe that disagreement can be expressed in a dispute via semantics or pragmatics. Plunkett and Sundell draw a distinction between canonical and non-canonical disputes in terms of the linguistic mechanism that disputants use to express their disagreement. According to this distinction, if disagreement is expressed via semantics, a dispute is canonical and if disagreement is expressed via pragmatics, a dispute is non-canonical.

More cautiously, canonical disputes “…reflect disagreements over the truth or correctness of literally expressed semantic content.” If two speakers disagree and express their disagreement by engaging in a canonical dispute, their disagreement revolves around the information expressed by the literally expressed semantic content of their utterances. For this reason, according to Plunkett and Sundell, in canonical disputes, the literally expressed semantic content of the speakers’ utterances must be logically inconsistent. That is why, according to Plunkett and Sundell, when engaged in a canonical dispute, accepting that speakers mean the same things by the words they use is crucial to conceive of the relation between the mental states they respectively express (by their utterances) as a disagreement. Typically, when speakers don’t mean the same things by their words, the literally expressed semantic content of their utterances is consistent and, when the content of the speakers’ utterances is consistent, they cannot have a disagreement around it, or so Plunkett and Sundell seem to suggest.

For Plunkett and Sundell, disagreement can also be expressed via pragmatics. A non-canonical dispute expresses a “…disagreement [that] concerns information that happens to be communicated pragmatically rather than semantically.” The disagreement expressed in a non-

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20 (Plunkett & Sundell, 2013b, p. 247)
21 In later writing David Plunkett is fully explicit about the notion of logical inconsistence he has in mind. According to him, logical inconsistence obtains between a content p and a content q when q entails not-p. See (Plunkett, 2016, p. 215).
22 (Plunkett & Sundell, 2013b, p. 247)
canonical dispute does not revolve around the information expressed by the literally expressed semantic content of the disputants’ utterances. Rather, it is centered on information communicated by the way in which speakers use some linguistic expressions in a given context. Since the disagreement expressed by a non-canonical dispute doesn’t revolve around the information expressed by the literally expressed semantic content of the speakers’ utterances, consistency between those contents is not an indication that the disputants are not having a disagreement. According to Plunkett and Sundell, speakers in a non-canonical dispute (can) express a disagreement despite their meaning different things by the words they use.

Among non-canonical disputes, Plunkett and Sundell distinguish different types. The distinction is drawn in terms of the different pragmatic mechanisms that speakers might employ to express the information concerned by their disagreement. For instance, there are non-canonical disputes in which disagreement is expressed throughout the pragmatic mechanism of implicature.23

Plunkett and Sundell pay special attention to one subtype of non-canonical disputes. That is the type they call metalinguistic disputes. In metalinguistic disputes the pragmatic mechanism that speakers use to express their disagreement is what Plunkett and Sundell (following Barker) call the metalinguistic usage of a term.24

A speaker uses a term metalinguistically when she uses it to convey information about how that very term is/should be used in the context of her conversation. For instance, think of a gradable adjective like “tall”. Instead of using “tall” to predicate a property of someone (or something), a speaker can use it to convey information about the parameter of tallness that is operational in her conversational context. Here is an example. Imagine that you take me to my very first game of professional basketball. When I see the first player get into the court I say “she’s really tall” and you reply “she is not tall”. If you use “tall” metalinguistically, you don’t use it to share with me information about the height of the player; instead, you use “tall” to inform me about the parameter of tallness that is operational in our current conversational context. You use “tall” to inform me that the parameter of tallness that is operational is higher on the height scale than what I take it to be.

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23 Very roughly, a content is an implicature if that’s what a speaker means by saying something else. The notion of implicature was introduced by Grice. See (Grice, 1991).
Plunkett and Sundell distinguish two types of metalinguistic disputes. It is characteristic of disputes of the first type that the facts concerning the linguistically relevant features of the conversational context with respect to the relevant term are already established when a dispute takes place. In these cases, the expressed disagreements are factual and, in some sense, objective. They concern different views over what characterization of the shared conversational context is more precise. The following situation is an example of this type of dispute:

(3)

Oscar: It’s cold
Jill: No, it is not cold.  

Imagine that Oscar is a researcher that is spending his first week at a research station in Antarctica. Imagine that Jill is a researcher that has been working at that research station for several years. It seems plausible to say that their dispute doesn’t reflect a disagreement over the temperature, since that fact is known to both. It is reasonable to think that the dispute reflects instead a disagreement over the correct use of the (relevant) term “cold”. Oscar uses “cold” to express his view on how “cold” is used in the context of his conversation with Jill. Jill uses “cold” to express hers.

As noted, in metalinguistic disputes of this first type, the relevant features of the conversational context are already established. That is, at the time of the conversation between Oscar and Jill, it is already settled in the conversational context what is the parameter of coldness that is operational. The disagreement between Oscar and Jill concerns their conflicting views about how to depict that conversational context accurately. This disagreement is expressed pragmatically by their respective metalinguistic usages of “cold”. For the sake of argument, let’s say that Oscar got things wrong and Jill got them right.

Metalinguistic disputes of the second type are what Plunkett and Sundell call *metalinguistic negotiations*. In metalinguistic negotiations the features of the conversational context are not settled in advance. In these situations, speakers do not reflect a disagreement over which

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25 Although Plunkett and Sundell do not present their example strictly in this way, it seems to me that this is a faithful reconstruction of their views.
characterization of the conversational context is more accurate. Rather, each disputant advocates for her own way of using the relevant term. They negotiate how the relevant term should be used (which concept should be expressed by it). Here is Plunkett and Sundell’s example of a metalinguistic negotiation.\textsuperscript{26} Consider again the exchange between Oscar and Jill (repeated here as (4)):

(4)

Oscar: It is cold.
Jill: No, it is not cold.

Imagine now that Oscar and Jill are office mates in Chicago. Imagine that Oscar is much more sensitive to cold than Jill. Imagine that they have their exchange while looking at the thermostat in their office (which both know to be accurate) so that they both know the temperature. The important point is that it is not settled yet, at the time of the dispute, which parameter of coldness is operational in the context of Oscar and Jill’s conversation. Oscar and Jill each use the term “cold” not to inform the other about what their conversational context looks like (since that question is not settled), but to negotiate the appropriate use of “cold”. Oscar and Jill each use “cold” to express their respective views on which parameter of coldness should be operational in their conversational context (on how the term “cold” should be used).

For Plunkett and Sundell, bedrock legal disputes are better analyzed as metalinguistic negotiations around the term “the law”. According to them, when two subjects engage in a bedrock legal dispute, the disagreement they express does not concern the literally expressed semantic content of the disputants’ utterances, but information conveyed by the metalinguistic usage of the term “the law” that each of them makes. Such information pertains to the way in which such a term should be used (which concept it should express).

Plunkett and Sundell depict bedrock legal disputes as having the following form:

(5)

\textsuperscript{26} See (Plunkett & Sundell, 2013b, p. 261).
A: The law requires that φ.
B: No, the law requires that ψ. 27

As understood by Plunkett and Sundell, “φ” and “ψ” stand for incompatible understandings of what the law is in a given jurisdiction at a given time.

To repeat, in Plunkett and Sundell’s proposal, when two speakers engage in a bedrock legal dispute they each advocate for their own meaning of the term “the law” and they do so by using that very term metalinguistically. In other words, bedrock legal disputes, understood as metalinguistic negotiations, reflect a disagreement that concerns the speakers’ conflicting views on how “the law” should be used and this disagreement is expressed pragmatically by the speakers’ metalinguistic use of the term “the law”. It is important to highlight that, if bedrock legal disputes are understood as metalinguistic negotiations, then the disagreement expressed by speakers in bedrock legal disputes doesn’t revolve around the content encoded via semantics by their utterances.

I will conclude this reconstruction of Plunkett and Sundell’s theory by making a couple of clarifications. Firstly, I interpret Plunkett and Sundell’s analysis as suggesting that the best way (or at least a better way than Dworkin’s) to analyze all bedrock legal disputes is as metalinguistic negotiations. This interpretation, however, might be controversial.

Perhaps it is not Plunkett and Sundell’s view that the best way to analyze bedrock legal disputes is as metalinguistic negotiations; perhaps it is their view that it is a good way. Perhaps it is not their view that all bedrock legal disputes are best analyzed as metalinguistic negotiations; but only that some are. It seems to me that there are some important reasons to support my interpretation.

Plunkett and Sundell take their analysis of bedrock legal disputes to be an alternative to Dworkin’s. Thus, it cannot be Plunkett and Sundell’s view that their account is only one (good) option among others. Perhaps their view is not that the metalinguistic analysis is the best way to understand bedrock legal disputes, but it must be, at least, that it is better than Dworkin’s. The following long passage seems to give some textual evidence that, for Plunkett and Sundell, what they suggest is the best way to analyze bedrock legal disputes:

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27 See (Plunkett & Sundell, 2013b, p. 267).
This, we submit, puts our metalinguistic account in a strong position. In other words, it lends support to the following claim: bedrock legal disputes are best analyzed as metalinguistic negotiations.

One point about this thesis is worth emphasizing. In accepting the claim that bedrock legal disputes are best analyzed as metalinguistic negotiations, one is not accepting the claim that every instance of something that seems to be a bedrock legal dispute is in fact a metalinguistic negotiation. One might argue that many seeming bedrock legal disputes reflect empirical disagreements expressed with concepts whose application conditions are surprisingly complex. Or one might argue that most seemingly bedrock legal disputes in fact reflect opportunistic usages that disqualify them from being genuine bedrock legal disputes, in our sense. Or, to take another example, one might argue that in the context of overall theory choice among accounts of legal thought and talk, bedrock legal disputes are simply not that important a class of disputes to worry about.

Our view is entirely consistent with all of these ideas, and in fact we are sympathetic to a more general view in legal philosophy that combines them. It is important to keep in mind that the view on the table is this: if a dispute is in fact a bedrock legal dispute, then there is very good reason to analyze it as a metalinguistic negotiation. How many disputes in fact qualify is an open question, as is how important these disputes ultimately are for developing an account of legal thought and talk. Those questions are both beyond the scope of this paper.

A few pages later, they seem to reinforce the idea that what they suggest is the best way to understand bedrock legal disputes when they write:

Dworkin suggests that in order to vindicate our intuitions about the presence of genuine disagreement across disputes, theorists need to posit a special kind of concept, namely “interpretive concepts.” We disagree. We think that traditional understandings of concepts and word meanings can give the kind of analysis of those

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28 (Plunkett & Sundell, 2013b, p. 268)
disputes that Dworkin demands without the resources he thinks are necessary. This in turn leads us to different accounts of how best to explain seeming variation cases (including, crucially, bedrock legal disputes).²⁹

I admit that a sentence at the end of a paragraph on a different idea is far from being conclusive evidence of anything; I even admit that the long quote above might be open to interpretation; however, to say this is different from saying that those passages give us no evidence at all. Unless one is willing to attribute to Plunkett and Sundell some seriously sloppy writing, we have reason to think that they take their debate with Dworkin to be about the best way to explain bedrock legal disputes.

On the other hand, it seems to me that the best reading of Plunkett and Sundell’s theory is as suggesting an analysis of any dispute that counts as a bedrock legal dispute. If the correct interpretation of the metalinguistic analysis is that it focuses only on some bedrock legal disputes but not on all of them, it becomes extremely difficult to appreciate in which sense it is supposed to be an alternative to Dworkin’s view. If Dworkin, by introducing his disagreement-based argument against legal positivism, was focusing on bedrock legal disputes, an analysis that focuses only on a subset of those cannot be an alternative to it (at most it can be a partial alternative). Dworkin would still be able to claim that there are some (bedrock legal) disputes that the legal positivist can’t explain, and since they are an important part of legal practice, legal positivism must be a defective theory. If we interpret Plunkett and Sundell’s view as an analysis of only a subset of bedrock legal disputes, we seem to have weakened the strength of their account to the point where it is difficult to think of it as a response to Dworkin. Even more so, it seems that accepting that Plunkett and Sundell focus on a subset of the relevant disputes would bring consequences in terms of the balance of reasons we might have to prefer one view or the other. It seems that one should prefer the view that has the larger explanatory reach, which, under such an interpretation of Plunkett and Sundell’s account, would be Dworkin’s.

However, I must admit that there is some textual evidence that, literally taken, seems to prove my interpretation mistaken. Plunkett and Sundell write:

²⁹ (Plunkett & Sundell, 2013b, p. 277 [emphasis added])
So, do we engage in metalinguistic negotiation in the particular part of legal thought and talk that Dworkin draws our attention to: bedrock legal disputes and legal seeming variation cases more generally? We argue that the answer is yes. In the next section, we argue for the following view: at least some bedrock legal disputes are best analyzed as metalinguistic negotiations, as are other important seeming variation cases that come up in law, including at least some cases that Dworkin and other legal philosophers refer to as “hard cases.”

Since my intention in this thesis is not to do exegesis of Plunkett and Sundell’s proposal, I will not carry on with this discussion any further. As I have already mentioned, I admit that my interpretation of Plunkett and Sundell’s theory as suggesting that all bedrock legal disputes are best analyzed as metalinguistic negotiations is controversial.

The second clarification I’d like to make has to do with the question of what term counts as the relevant term in bedrock legal disputes. Based on their explicit formulations, for Plunkett and Sundell, the relevant term in bedrock legal disputes can be “the law” or “law.” It seems to me that Plunkett and Sundell cannot be right about this.

If bedrock legal disputes, as portrayed by Plunkett and Sundell, are metalinguistic negotiations, the relevant term cannot be “law”. It can only be “the law”. Briefly, the reason is that, as used in a bedrock legal dispute, “law” fails to express the concept that speakers in such exchanges would mean to express in making their utterances. To explain this idea, let’s have a look first at a non-legal example.

Consider the following sentence:

(s) The cat is on the mat.
Notice that, at least syntactically, there are no relevant differences between this sentence and the sentences that, according to Plunkett and Sundell, speakers utter when engaged in bedrock legal disputes. They are declarative sentences that attribute a predicate to an object denoted by a noun phrase formed by a common noun and the determiner “the”.

Now, look at the expressions “the cat” and “cat” in (s). Does “cat”, as it occurs in (s), express the concept that a person who utters (s) would mean to express by her utterance? It seems to me that it doesn’t. It seems natural to say that, when a speaker utters (s), she aims to say something about a particular cat. The speaker’s concept about that particular cat is not expressed by the expression “cat” alone as it occurs in (s); instead, it is expressed by the expression “the cat”. The term “cat” seems to express a person concept CAT which is a concept of the category cats, but not the concept THIS PARTICULAR CAT.

To be clear, I don’t claim that the term “cat” cannot express somebody’s concept of a particular cat. Perhaps that’s what happens, for example, in situations in which a speaker utters a sentence like “cat is on the mat” and “cat” is being used as a proper name. However, the sentence “cat is on the mat” is, at least syntactically, different from (s). The difference being that the noun phrase “cat” is not antecedced by the determiner “the”.

The takeaway from the observations above is that when a common noun (like “cat”) occurs as the grammatical subject of a declarative sentence antecedced by the determiner “the” (at least in regular occurrences) the linguistic unit that express the concept that the speaker means to express (her concept of a particular cat) is not the common noun alone (“cat”) but the common noun plus the determiner (“the cat”). Making clear that we mean to talk about some particular item(s) seems to be precisely what we use determiners for (at least one of the reasons).

There is no reason to think that things are different when it comes to the expressions “the law” and “law” in an utterance of a sentence like “the law requires that φ”. A person that utters the sentence “the law requires that φ” is seemingly trying to say something about a particular legal system S (at least in normal occurrences). Just as with “cat” and “the cat” with respect to the sentence “the cat is on the mat”, it seems that the expression used by a speaker to talk about S in

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33 This is compatible with saying that, in identifying the particular object (the particular cat) the concept of which the speaker means to express by uttering (s), she has used her concept CAT. My claim is not about how speakers determine which object(s) they mean to talk about, but about what concepts they express by the words their use.
uttering a sentence like “the law requires that φ” is “the law” not “law”. The term “law” seems to express the concept LAW, which is different from the concept of a particular legal system. Therefore, it seems reasonable to think that the concept of a particular legal system that a speaker intends to express in uttering the “the law requires that φ” is expressed by the term “the law” rather than “law”.

A speaker who utters “the law requires that φ” in a bedrock legal dispute, according to Plunkett and Sundell, is advocating in favor of her concept, say, LAW1. That concept is a concept of (the law of) a particular legal system. If the observations in the preceding paragraph are correct, the term that expresses that concept in that sentence is “the law” not “law”. If these observations are correct, we can conclude that the relevant term in bedrock legal disputes is “the law” and cannot be “law”.

It seems that, if correct, the metalinguistic analysis of bedrock legal disputes would prove the description of the structure of PLD incorrect. That is, it seems that these views are incompatible. The incompatibility between these two accounts is not obvious. Some work must be done to show it. That is what I will do in the next subsection.

3.2 The Metalinguistic Analysis of Bedrock Legal Disputes vs the Description of PLD

Strictly speaking, the metalinguistic analysis suggested by Plunkett and Sundell is an analysis of a type of dispute not a type of disagreement. By contrast, the description of the structure of PLD depicts a type of disagreement not a type of dispute. This gives reason to think that the two views are compatible. Things, however, are not that simple.

Here is Plunkett and Sundell’s characterization of bedrock legal disputes again: “disputes where speakers persist in the dispute about what to count as “the law” despite full agreement on the relevant empirical facts and awareness of that background agreement”.

A dispute that reflects PLD is necessarily a dispute about what the law is (what to count as “the law”) in which speakers persist despite agreement over all relevant empirical facts (and the speakers’ knowledge of that agreement). In short, disputes that reflect PLD necessarily satisfy the characterization of bedrock legal disputes suggested by Plunkett and Sundell.

34 (Plunkett & Sundell, 2013b, p. 244)
As noted, I take it to be Plunkett and Sundell’s view that all disputes that fall under the characterization of bedrock legal dispute (all bedrock legal disputes) are better analyzed as metalinguistic negotiations. Thus understood, bedrock legal disputes reflect a disagreement that concerns the proper use of the term “the law”. They do not reflect a disagreement over the information encoded by the literally expressed semantic content of the speakers’ utterances.

But two subjects who engage in an instance of PLD and express that disagreement in a dispute might disagree over the literally expressed semantic content of their utterances. In fact, as noted, they typically do. It is possible and, as noted, even typical, that the speaker’s utterances in disputes that reflect PLD encode via semantics the information involved by the disagreement speakers have over the content of the law.

Now, if the disputes that (would) express PLD are necessarily bedrock legal disputes, then it cannot be true that all bedrock legal disputes do not reflect a disagreement over the information encoded by the literally expressed semantic content of the speakers’ utterances. Conversely, if it is true that all bedrock legal disputes do not reflect a disagreement over the information encoded by the literally expressed semantic contents of the speakers’ utterances, then it cannot be true that (at least some) bedrock legal disputes reflect an instance of PLD. Put briefly, if the metalinguistic analysis is correct, then the description of the structure of PLD must be mistaken and vice versa. It cannot be simultaneously true that all bedrock legal disputes are metalinguistic negotiations and that in some bedrock legal disputes speakers disagree over the literally expressed semantic content of their utterances.

If the metalinguistic analysis of bedrock legal disputes and the description of the structure of PLD are in fact incompatible, we cannot accept the latter until we have rejected the former. In the rest of this section, I’ll present some reasons against the metalinguistic analysis of bedrock legal disputes. By arguing against the metalinguistic analysis, I aim to argue in favor of the description of the structure of PLD.

3.3 Arguing against Plunkett and Sundell’s Analysis of bedrock legal disputes

One weak reason against Plunkett and Sundell’s analysis
The first reason against the metalinguistic analysis I’d like to point out pertains to the fact that analyzing bedrock legal disputes as metalinguistic negotiations around the term “the law” requires that such term occurs in both sentences uttered by the speakers, but that doesn’t seem to be the case for all (not even most) disputes that fall under the characterization of bedrock legal dispute. The term “the law” must occur in both utterances because otherwise it is not being used metalinguistically. In other words, two speakers cannot express their conflicting views over the correct use of the term “the law” by using that very term metalinguistically if they don’t use that term. For example, a speaker that utters “everyone who figures as a beneficiary in a valid will is entitled to inherit” and a speaker that replies “not everyone who figures as a beneficiary in a valid will is entitled to inherit” do not use the term “the law” metalinguistically because they do not use that term at all.

However, it seems that a dispute might count as a bedrock legal dispute even if the term “the law” doesn’t occur. There can be disputes about what the law is that persist in the face of empirical agreement in which the term “the law” is not used. Think for instance of a dispute that express an instance of PLD in which one person utters “everyone who figures as a beneficiary in a valid will is entitled to inherit” and another person replies by simply wagging her finger. In this interaction, none of the disputants is using the term “the law” metalinguistically. Nonetheless, it seems that their dispute counts (might count) as a bedrock legal dispute.

Against the considerations above, one can make various arguments. One might argue that those observations don’t provide a reason against interpreting bedrock legal disputes as metalinguistic negotiations, but a reason to reject that certain disputes are indeed bedrock legal disputes. Perhaps not all disputes about what the law is which persist despite agreement about all relevant empirical facts count as bedrock legal disputes. Perhaps a dispute cannot be a bedrock legal dispute unless the speakers use the term “the law”.

The problem with such a reply is that it seems to defeat the main purpose of Plunkett and Sundell’s analysis. As noted, they explicitly take it to be their goal to introduce an alternative account of the same type of disputes that were the focus of Ronald Dworkin’s disagreement-based argument against legal positivism. If disputes that express PLD but in which “the law” doesn’t occur do not count as bedrock legal disputes, it is hard to accept that Plunkett and Sundell’s theory and Dworkin’s disagreement-based argument focus on the same kind of disputes. If we accept that
only disputes in which speakers use the term “the law” can count as bedrock legal disputes, then it is hard to accept that the disputes that Dworkin had in mind were in fact bedrock legal disputes.

Plunkett and Sundell themselves seem to acknowledge that the disputes on which Dworkin’s argument focuses were not only those in which the term “the law” occurs. They write that, for Dworkin, the relevant disputes are those in which “legal actors such as lawyers or judges express different views about “what the law is” despite full agreement about all of the relevant empirical facts”.\(^{35}\) To think that disputes about what the law is can only be disputes in which speakers use the term “the law” doesn’t seem to be a correct interpretation of Dworkin’s thought. There is no reason to think that, according to Dworkin, disputes that express a persistent disagreement over what the law is in which the term “the law” doesn’t occur cannot be examples of the type of dispute his argument focuses on. If the disputes that Dworkin had in mind included more than only those in which speakers use the term “the law”, then Plunkett and Sundell’s view cannot be an alternative to Dworkin’s. If Plunkett and Sundell’s view is indeed an alternative to Dworkin’s, then disputes that express a persistent disagreement over what the law is must count as bedrock legal disputes even if speakers don’t use the term “the law”.

Another possible reply against the observation that, since there are bedrock legal disputes in which “the law” doesn’t occur, bedrock legal disputes cannot be metalinguistic negotiations, is to deny that using metalinguistically the term “the law” is necessary for having a metalinguistic negotiation of the type alleged by Plunkett and Sundell. Perhaps Plunkett and Sundell’s suggestion is that parties to a bedrock legal dispute can advocate for the respective concepts they would use the term “the law” to express (say, LAW1 and LAW2) without actually using that very term.

This reply strikes me as mistaken. First, we should notice that for a dispute to be a metalinguistic dispute (be that a metalinguistic negotiation or not), disagreement must be communicated through a particular pragmatic mechanism: the metalinguistic use of a term. A dispute in which speakers communicate disagreement through a different linguistic mechanism (pragmatic or semantic) is simply not a metalinguistic dispute. Put briefly, having a term being used metalinguistically is a necessary condition of having a metalinguistic dispute (and thus, of having a metalinguistic negotiation) around that term.

\(^{35}\) (Plunkett & Sundell, 2013b, p. 243)
Now we should ask: in the case of bedrock legal disputes, must the term that is being used metalinguistically be “the law”? If the answer is no, as the reply holds, what follows is not that two subjects can have a metalinguistic negotiation without a term being used metalinguistically but that there are other terms apart from “the law” that speakers might use metalinguistically to express their disagreement in a bedrock legal dispute.

The thought that there are multiple terms that speakers might use metalinguistically to express disagreement in bedrock legal disputes is highly problematic. To begin, it would make the interpretation of Plunkett and Sundell’s theory less clear as that idea seems to be compatible with at least two possible interpretations of the metalinguistic analysis. Second, and most importantly, no matter what interpretation we chose, it would commit us to an interpretation of Plunkett and Sundell’s views that seems highly implausible. From here we can conclude that having both speakers use metalinguistically the term “the law” is a necessary condition of bedrock legal disputes being metalinguistic negotiations in the terms suggested by Plunkett and Sundell. Since, as argued, there are disputes that fall under the description of bedrock legal disputes in which “the law” doesn’t occur, we have reason to abandon Plunkett and Sundell’s account. Let me expand on these ideas.

First, accepting that there are multiple terms that speakers might use metalinguistically to express disagreement in bedrock legal disputes is problematic because there are at least two ways equally justified in which that idea can be fleshed out. On the one hand, we might understand Plunkett and Sundell as suggesting that bedrock legal disputes are metalinguistic negotiations around multiple relevant terms that are used to express (two versions of) the same one concept. For example, we could say that in bedrock legal disputes speakers can use metalinguistically the term “the law” or the terms “x”, “y”, “z”, etc., to express their disagreement about what concept, say, LAW1 or LAW2, they should use.

On the other hand, we might understand Plunkett and Sundell’s theory as suggesting that bedrock legal disputes are metalinguistic negotiations around multiple relevant terms that are used to express (two versions of) multiple concepts. We could say, for instance, that bedrock legal disputes are disputes in which the relevant term is “the law” and reflect a disagreement over what concept LAW1 or LAW2 should be used, or disputes in which the relevant term is “x” and reflect a disagreement over what concept X1 or X2 should be used, or disputes in which the relevant term is “y” that reflect a disagreement over what concept Y1 or Y2 should be used, etc.
Since there seems to be no principled reasons to prefer one interpretation over the other, accepting that in bedrock legal disputes multiple terms can be used to express disagreement would make the interpretation of Plunkett and Sundell’s theory less clear. This itself is problematic.

But perhaps it is not true that both interpretations are on the same standing. Perhaps one of them is to be preferred. We would still lack reason to accept that bedrock legal disputes are metalinguistic negotiations in which multiple terms might be used to express disagreement. Regardless of which interpretation we preferred, by choosing one, we would be committing to a highly implausible view.

The first interpretation is implausible because it suggests that multiple terms are synonyms with the term “the law”. Since Plunkett and Sundell suggest that the meaning of a word is given by the concept it expresses, by accepting the first possible interpretation of their theory we would be saying that the meaning of “x”, “y”, “z”, etc., is given by the same concept that gives the meaning of the term “the law”; namely, the concept LAW. This is implausible. It is hard to accept that “the law”, “x”, “y”, “z”, etc., are synonyms (or at least that they are used to express the same concept). The point is more evident if we consider that the list of terms that we might take as possible substitutes for “the law” will (most likely) be rather extensive.

The second interpretation is implausible because of how difficult it would be to determine an exhaustive list of candidate terms. Let’s say that we postulate as possible candidates the terms “the law”, “x”, “y”, and “z”. Yet, it seems possible for there to be a dispute that is a bedrock legal dispute (that express a persistent disagreement about what the law is) in which none of those terms is being used. That would be confirmation that our list was not exhaustive. To make an exhaustive list of terms seems to be a task almost impossible to accomplish. At least, it seems a task so difficult that rejecting such an interpretation seems like the best thing to do.

If it is true that interpreting Plunkett and Sundell’s proposal in either of those two ways is problematic, then we have reason to reject that there might be multiple terms that speakers might use metalinguistically to express their disagreement in bedrock legal disputes. We have reason to think then that, according to Plunkett and Sundell, understanding bedrock legal disputes as metalinguistic negotiations requires that the relevant term be only “the law”.

To repeat, since there might be disputes that satisfy the characterization of bedrock legal dispute in which the term “the law” doesn’t occur, we have reason to reject the metalinguistic analysis suggested by Plunkett and Sundell. At best, their analysis can be an analysis of a (most
likely small) subset of the disputes that we (Dworkin included) would consider relevant; namely, disputes in which speakers express a disagreement over what the law is despite agreement over all relevant non-legal issues.

Another weak reason against Plunkett and Sundell’s analysis

Another reason against Plunkett and Sundell’s account has to do with what apparently is a powerful intuition. There seems to be wide agreement in philosophical discussion around the idea that persistent disputes about what the law is reflect a disagreement (even if not only) over the content of the law in a specific jurisdiction at a given time. This view is commonly accepted on intuitive grounds. Take for instance the dispute in (2) (repeated her as (6):

(6)

John: Everyone who figures as a beneficiary in a valid will is entitled to inherit.
Robert: Not everyone who figures as a beneficiary in a valid will is entitled to inherit.

It seems intuitive that by engaging in a dispute like that, John and Robert reflect (even if not only) a disagreement over whether it is the law (in their jurisdiction at the time of their conversation) that everyone who figures as a beneficiary in a valid will is entitled to inherit.

But it seems that if one accepts the metalinguistic analysis of bedrock legal disputes, one must give up on that intuition. As seen, as a matter of definition, when two speakers engage in a metalinguistic negotiation (more generally, in a non-canonical dispute), they don’t disagree over the literally expressed semantic content of their utterances. As noted earlier, and as it is illustrated by (2), it seems natural to think that the literally expressed semantic content of the speakers’ utterances in a persistent dispute over what the law is, typically, or at least possibly, concerns the content of the law in a specific jurisdiction at a given time. If persistent disputes over what the law is do not reflect a disagreement around the literally expressed semantic contents of the speakers’ utterances and that content, at least possibly, pertains to the content of the law in a specific jurisdiction at a given time, then those disputes, at least possibly, do not reflect a disagreement over the content of the law.
Using the vocabulary suggested by Plunkett and Sundell, their analysis suggests that, when engaged in bedrock legal disputes, speakers do not disagree over whether the law requires that \( \phi \) or that \( \psi \). That must be so because otherwise bedrock legal disputes would be canonical disputes and not metalinguistic negotiations. If you accept that whatever the law requires amounts to the content of the law, then you must accept that, according to Plunkett and Sundell, when engaged in bedrock legal disputes, speakers don’t disagree about the content of the law. To say that speakers in persistent disputes about what the law is don’t disagree about the content of the law seems counterintuitive.

Perhaps it is not an implication of Plunkett and Sundell’s analysis that in bedrock legal disputes speakers don’t disagree about the content of the law. Perhaps what follows from their view is that this disagreement is not expressed by the semantic content of the speakers’ utterances. Perhaps it is Plunkett and Sundell’s view that, even if speakers in bedrock legal disputes do disagree over the content of the law, this disagreement either remains unexpressed or it is expressed throughout a linguistic mechanism different from the literally expressed semantic content encoded by their utterances. This conclusion is problematic. It is so, particularly, if it is true that the information concerned by the disagreement over the content of the law overlaps the information semantically encoded by the speakers’ utterances. Plunkett and Sundell would be claiming that the information concerned by such a disagreement is not communicated by some linguistic (semantic) mechanism that encodes that same information. This is difficult to accept.

To repeat, the conclusion to be drawn from the considerations above is that, if we accept Plunkett and Sundell’s metalinguistic analysis of bedrock legal disputes, then we must abandon our intuition that disputes of that kind reflect (or at least might reflect) a disagreement over the content of the law in a given jurisdiction at a particular time. Because we might want to keep our intuitions, this seems to be a reason to drop the metalinguistic analysis of bedrock legal disputes.

Admittedly, abandoning intuitions may be a theoretical cost worth paying. Perhaps, the overall theoretical gains of accepting Plunkett and Sundell’s analysis outweighs the theoretical loss of dropping that particular intuition. Although I think that being able to keep our intuitions is an indication of healthy theorizing, I concede that the question of whether we should do it in this case is still open.

I must admit that none of the two objections suggested in this subsection against the metalinguistic analysis of bedrock legal disputes is definite. The observations above give reasons
against the metalinguistic analysis and in favor of the description of the structure of PLD only to the extent that the problems they point out do arise for the former but not for the latter. One can accept the description of the structure of PLD without committing to the implausible view that the term “the law” (or any other) must occur in all disputes that reflect disagreements of that kind. Similarly, one can accept the description of the structure of PLD without abandoning the intuition that, when people engage in a persistent dispute about what the law is (a dispute that reflects an instance of PLD), they disagree (even if not only) over the content of the law.

One strong reason against Plunkett and Sundell’s analysis of bedrock legal disputes

In what follows, I aim to suggest an argument that, if correct, should provide definite reason to reject Plunkett and Sundell’s analysis of bedrock legal disputes. This argument has two premises. First, I argue that in a bedrock legal dispute the term “the law”, which occurs as the grammatical subject of a declarative sentence, is a rigid designator. Second, I argue that speakers cannot have metalinguistic negotiations over rigid designators that occur as the grammatical subjects of declarative sentences. The conclusion that follows from these premises is that speakers cannot have metalinguistic negotiations over the term “the law” as that term occurs in bedrock legal disputes. Let’s elaborate.

To begin, let’s have a look again at the form bedrock legal disputes have according to Plunkett and Sundell. Here is exchange (5) (repeated here as (6)):

(6)

A: The law requires that φ.
B: No, the law requires that ψ.

First, notice that, in both utterances, the term “the law” occurs as the grammatical subject of the uttered sentences. As it occurs in both sentences, the expression “the law” is a noun phrase formed by the determiner “the” and the common noun “law”, similar to the expression “the smoke” in the sentence “the smoke is the biggest city in the UK”. More specifically, the expression “the
law”, as it occurs in the sentences uttered by the speakers of (6a) and (6b), is an instance of what philosophers of language and linguists typically call a *definite noun phrase*.

Among definite noun phrases, philosophers and linguists have distinguished different sub-types: pronouns, demonstrative phrases, proper names, definite descriptions, etc.\(^{36}\) It seems to me that the term “the law” as it occurs in a bedrock legal dispute is a proper name similar to the proper name “the village”; it seems to me that the name “the law” used in a bedrock legal dispute designates a particular legal system.\(^{37}\) However, I won’t argue for these ideas here. The idea that I will argue for is that “the law”, as used in exchanges like (6), is a rigid designator (be that a name or some other type of expression).

The notion of rigid designator was introduced by Saul Kripke.\(^{38}\) Following Kripke, we can define a rigid designator as an expression that designates one and the same object in all possible worlds in which that object exists.\(^{39}\) It follows from this definition that if an expression is not a rigid designator, then that expression does not refer to one and the same object in all possible worlds in which that object exists. It also follows that if an expression does not refer to one and the same object in all possible worlds in which that object exists, then that expression is not a rigid designator.

To make the case for the claim that “the law”, as it occurs in a bedrock legal dispute as depicted by Plunkett and Sundell, is a rigid designator, it is useful to begin by establishing what is the object that “the law” refers to. It seems plausible to say that, as used in a particular bedrock legal dispute, the term “the law” refers to the legal system with respect to which that dispute takes place. When used in a particular bedrock legal dispute like (6), the term “the law” is a shorthand for “the legal system S”. For example, if (6) takes place with respect to the Scottish legal system,

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\(^{37}\) The village is a city in the state of Oklahoma in the US.

\(^{38}\) See (Kripke, 1980). The philosophical literature around rigid designators, rigidity and reference, is vast and growing. It goes beyond the limits of this thesis to engage thoroughly with it. I acknowledge that sticking to an analysis of rigid designators along the lines originally suggested by Kripke might be a limitation of my observations. For an introduction to the literature on rigid designators see (LaPorte, 2022).

\(^{39}\) See (Kripke, 1980, p. 48). In *Identity and Necessity* Kripke slightly modified this definition of “rigid designator”. There he claims that a rigid designator is an expression that designates one and the same object in all possible worlds in which that object exists and designates nothing in those possible worlds in which that object doesn’t exist. See (Kripke, 1971, p. 146). Kripke’s latest notion of rigid designator has been criticized by David Kaplan. See (Kaplan, 1989). According to Kaplan, a rigid designator designate one and the same object in all possible worlds, including those worlds in which that object doesn’t exist.
then “the law” refers to the Scottish legal system. As used by the speakers of such a dispute, “the law” is a shorthand for “the Scottish legal system”.

One quick note before proceeding: it seems to me that, in order to maintain that in bedrock legal disputes the term “the law” refers rigidly to a legal system, one needs not take a stance on what type of objects legal systems are. I take it that whatever legal systems are, when used in a particular bedrock legal dispute, the term “the law” refers rigidly to one of them. However, I must admit that this claim is far from being uncontroversial. In philosophical discussion, for example, there is debate around whether abstract objects can be referred to by rigid designators.\(^{40}\) If there is good reason to think they cannot, and there is good reason to think that legal systems are abstract objects, then there would be good reason to think that “the law” (as used in a bedrock legal dispute) cannot be a rigid designator. The question of whether rigid designators can refer to abstract objects is far from being settled; and so seems to be the question about the kind of objects that legal systems are. Clearly, it goes beyond the scope of this work to argue for or against any position on these matters. In that sense, for the rest of this chapter, the view that legal systems are the kinds of objects that can be referred to by rigid designators is admittedly an assumption.

If the term “the law”, as used in a bedrock legal dispute with respect to, say, legal system S, is not a rigid designator, then it must be false that “the law” as used in that bedrock legal dispute designates S in all possible worlds in which S exists and designates nothing in those worlds in which S doesn’t exist. Take for instance the expression “the brightest non-lunar object in the evening sky”\(^{41}\). This expression is not a rigid designator. The reason is that there is a possible world in which the object that the expression designates is different from the object it designates in the actual world. In the actual world the expression designates Venus. But it might have been that (there is a possible world in which) Venus were dimmer, perhaps as a result of being obscured by cosmic dust, making (say) Mars the brightest object in the evening sky apart from the moon. Since the expression “the brightest non-lunar object in the evening sky” fails to designate the same object (Venus) in all possible worlds in which that object exists, it is not a rigid designator.

To prove that “the law” as used in a particular bedrock legal dispute is not a rigid designator, one must show that it is like the expression “the brightest non-lunar object in the evening sky”. That is, one must show that “the law” fails to refer to one and the same object in all possible worlds

\(^{40}\) See (Donellan, 1983; LaPorte, 2000, 2006; Schwartz, 1980, 2002).

\(^{41}\) This example was suggested by Joseph Laporte. See (LaPorte, 2012, p. 2).
in which that object exists. It seems to me that this cannot be done. When the term “the law” occurs as the grammatical subject of a declarative sentence in a bedrock legal dispute, it refers to the legal system with respect to which that dispute takes place, and there is no possible world in which that legal system exists in which “the law”, as used by the speakers of that dispute, doesn’t refer to it. For instance, there is no possible world in which “the law” understood as a shorthand for “the Scottish legal system” does not refer to the Scottish legal system.

Philosophers of language often rely on the necessary truth of an identity statement that relates two terms which designate the same object, as evidence that each of those terms is a rigid designator. For example, both names “Hesperus” and “Phosphorus” designate the same object (Venus) rigidly. Evidence of that is that the identity statement “Hesperus = Phosphorus” is necessarily true (there is no possible world in which it is false). The identity statement “Hesperus = Phosphorus” is necessarily true because in all worlds in which Venus exists “Hesperus” refers to it and so does “Phosphorus”. By contrast, the identity statement “Hesperus = the brightest non-lunar object in the evening sky”, even if true in the actual world, is not necessarily true. The reason is that, as noted, it is possible that (there is a possible world in which) Venus be not the brightest non-lunar object in the evening sky. With respect to the worlds in which Venus is not the brightest non-lunar object in the evening sky the statement “Hesperus= the brightest non-lunar object in the evening sky” is false. Since “Hesperus” is a rigid designator, the fact that the identity statement “Hesperus= the brightest non-lunar object in the evening sky” is not necessarily true is enough evidence that “the brightest non-lunar object in the evening sky” does not designate the object it does in the actual world (Venus) rigidly. The important point here is that if an identity statement that relates a term to a rigid designator is necessarily true, then we have evidence that that term is itself a rigid designator and evidence that the term is not a rigid designator otherwise.

It seems to me that we can obtain the right kind of evidence with respect to the term “the law” as used in a particular bedrock legal dispute. That is, it seems to me that an identity statement flanked by “the law” (as it occurs in a particular legal dispute) and another rigid designator that designates the same legal system is necessarily true. Here is an example. Imagine again that (6) takes place with respect to the legal system in Scotland. For the sake of argument, let’s stipulate that “the Scottish legal system” is a name that rigidly designates the Scottish legal system. The following statement is necessarily true: “the Scottish legal system = the law (as it occurs in (6))”. There is no possible world in which the Scottish legal system is identical to itself, but the identity
statement is false. The takeaway from these observations is that “the law”, when it occurs as the grammatical subject of a declarative sentence in the context of a bedrock legal dispute, is a rigid designator.

Notice, I don’t claim that there is only one object (one legal system) that “the law” might refer to when used as the grammatical subject of the sentences uttered in some bedrock legal dispute. The term “the law” can refer to as many legal systems as those with respect to which a bedrock legal dispute can take place. For instance, if instead of the Scottish legal system, a bedrock legal dispute takes place with respect to the English legal system, “the law” refers to the English legal system. In that case, “the law” is not a shorthand for “the Scottish legal system” but for “the English legal system”. In this respect, “the law” is no different from other rigid designators. Think for example of the name “John Smith” and the likely thousands of people it refers to.

I do not claim that the object referred to by “the law” (as used in a particular legal dispute) must have the same properties in all possible worlds in which it exists if it is to be referred to rigidly. For example, it is possible that the Scottish legal system doesn’t include customary rules. When “the law” occurs in a bedrock legal dispute with respect to the Scottish legal system, it refers to that legal system even in those possible worlds in which the Scottish legal system does not include customary rules (provided including customary rules is not an essential feature of the Scottish legal system). As before, in this respect, the term “the law” is not different from other rigid designators. Take for example the name “Socrates” that refers to Socrates even in those worlds in which Socrates is an inch taller. Just to be clear, I aim to remain noncommittal regarding any views on identity.

I don’t deny that the term “the law” can occur as a different type of expression. I don’t deny either that “the law” can occur as a rigid designator that refers to some object(s) different from a particular legal system (for example, perhaps it can occur as a rigid designator that refers to a certain regularity observable in the physical world). However, I don’t endorse any of those views either. For my purposes I need not to. Put briefly, I aim to remain noncommittal as to whether “the law” must occur as a rigid designator and as to whether, when it occurs as a rigid designator, it must refer to a legal system. The only claim I reject is that “the law” cannot occur as a rigid designator. I argue that it can. More precisely, I argue that “the law” is a rigid designator when it occurs as the grammatical subject of a declarative sentence in a bedrock legal dispute.
If the considerations above are correct, we have reason to accept the first premise of the argument against the metalinguistic analysis: “the law”, as it occurs in the sentences that form bedrock legal disputes, is a rigid designator. We can move on now to make the case for the second premise: there cannot be metalinguistic negotiations over a rigid designator that occurs as the grammatical subject of a declarative sentence in a bedrock legal dispute.

I claim that a rigid designator that occurs as the grammatical subject of a declarative sentence in a bedrock legal dispute is not used metalinguistically. That is, it is not used to express (pragmatically) the speaker’s view on how that expression should be used.

By claiming that a rigid designator that occurs as the grammatical subject of a declarative sentence can be used metalinguistically we seem to depict our linguistic practice rather inaccurately. In representing our everyday life linguistic practice, it seems accurate to say that a speaker would not use a rigid designator as the grammatical subject of a declarative sentence unless she takes it to be undisputed what is the item that that term refers to in the context of her conversation.

To explain the idea above more easily let’s look at an example. Imagine you utter the sentence “Erika is Colombian”. For the sake of argument, let’s grant that, just as “the law” in (6), the term “Erika” in such an utterance is a rigid designator that occurs as the grammatical subject of a declarative sentence. It seems to be our practice that, regardless of the context, you wouldn’t have uttered “Erika is Colombian” if you didn’t take it to be an undisputed matter that “Erika” refers to someone or something (say, person1). Differently put, speakers don’t use rigid designators as subjects of declarative sentences unless they assume that their audience take that designator to refer to the same object the speaker takes it to refer to. A speaker who uses a rigid designator (for instance, a name) as the subject of a declarative sentence without thinking her audience shares with her the same views as to what’s the object referred to by that rigid designator seems to have misunderstood the linguistic game. It would be puzzling if you utter “Erika is Colombian” and when I ask you “who is Erika?” you hesitate about who you were talking about.42

If it is true that speakers use a rigid designator as the subject of a declarative sentence only if they take it to be fixed in their conversational context which object it refers to, then it is hard to

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42 There are atypical contexts in which that can be the case. For instance, imagine that you find a diary that doesn’t belong to you in which the sentence “Erika is Colombian” is written and that you read that sentence aloud. It seems safe to say that utterances in bedrock legal disputes are not like this one. In bedrock legal disputes, speakers do not utter sentences that belong to someone else. Notice that, even in cases like this, it is difficult to think that a subject is using “Erika” to convey information about how that term is/should be used.
see how expressions of that type can be used metalinguistically. To explain this idea, we must ask first, what would it be to use a rigid designator metalinguistically? A speaker would use a rigid designator metalinguistically if she uses it to communicate something about its proper use. More specifically, a speaker uses a rigid designator metalinguistically, if she uses it to communicate her view on what is the object it does/should refer to. In the case of metalinguistic disputes (when the relevant features of the conversational context are not previously established), a speaker uses a rigid designator metalinguistically to express her view on what is the object the rigid designator should refer to.

But why would a speaker use a rigid designator to communicate her view on what object it should refer to, if she takes that issue (which object the rigid designator refers to) to be already settled? In pain of irrationality, you cannot advocate for how a rigid designator should be used, if you already take it to be an undisputed (in the context of your conversation) matter how it is used.

Notice, a speaker might be mistaken at thinking that it is fixed in her conversational context which object a rigid designator that occurs as the subject of a declarative sentence refers to. He might mistakenly think that her audience will not dispute her use of the term. But she cannot think that the question (what object the rigid designator refers to) is up for grabs. Otherwise, she wouldn’t have used the term as she did (as the grammatical subject of a declarative sentence) in the first place.

To repeat, if a speaker uses a term metalinguistically in a metalinguistic negotiation, she must think that the question of how that term should be used in her conversational context is not settled. But a speaker who thinks of a rigid designator in that way, would not have used it as the grammatical subject of a declarative sentence. In a bedrock legal dispute, as depicted by Plunkett and Sundell, speakers use the rigid designator “the law” as the grammatical subject of the sentences they utter. Hence, as it occurs in a bedrock legal dispute (as depicted by Plunkett and Sundell), the term “the law” is not being used metalinguistically.

It is important to clarify that my claim is not that it is (logically) impossible that a rigid designator that occurs as the grammatical subject of a declarative sentence be used metalinguistically. Perhaps speakers could use terms of that kind in that way. My claim is that, in our everyday practice of using rigid designators, we don’t do that. A world in which speakers make metalinguistic usages of rigid designators that occur as the grammatical subjects of declarative sentences is not the actual world. What is at stake here in our debate against the metalinguistic analysis is which
is a better depiction of our normal everyday life linguistic practice. I claim that Plunkett and Sundell’s analysis requires us to depict our practice in rather inaccurate terms. Even if it is true that speakers sometimes use some terms metalinguistically to advocate for their own meaning for those terms (for instance gradable adjectives like “cold” when used in declarative sentences as predicates), it doesn’t seem true that speakers do so when they use a rigid designator as the grammatical subject of a declarative sentence.

If I utter “Mexico is a country in North America” and you reply, “no, Mexico is a municipality in the Philippines”, it doesn’t seem to be a good depiction of what is going on to say that we are negotiating what is the meaning of “Mexico”. It seems a better depiction to say that we take that term to refer to distinct objects and thus that we are having a misunderstanding. This seems to be the case even if I ignore that there is a Mexico in the Philippines, and you ignore that there is a Mexico in North America. I have mistakenly taken you to think “Mexico” refers to a country and you have mistakenly taken me to think “Mexico” refers to a municipality. To negotiate the meaning of rigid designators (if we ever do) we normally don’t use such terms as subjects of declarative sentences.43

So far, I have argued that the relevant term “the law” in a bedrock legal dispute (as depicted by Plunkett and Sundell) is a rigid designator that occurs as the grammatical subject of a declarative sentence. I have argued that expressions of that type (rigid designators that occur as the grammatical subject of a declarative sentence) are not used metalinguistically in a metalinguistic negotiation. If these observations are correct, it follows that “the law” in a bedrock legal dispute is not being used metalinguistically by the speakers to advocate for their respective views on how that term should be used. In short, it follows that disputes like (6) cannot be analyzed as metalinguistic negotiations. This argument, if correct, provides definite reason to reject the metalinguistic analysis of bedrock legal disputes suggested by Plunkett and Sundell.

By proving the metalinguistic analysis of bedrock legal disputes mistaken, we support the description of the structure of PLD suggested in this chapter. If those two accounts are indeed incompatible, one being incorrect would make the other correct. The metalinguistic analysis of bedrock legal disputes being incorrect makes the formal description of PLD correct.

43 It seems to me that the most natural way (perhaps the only way) in which speakers convey information about the (proper) use of rigid designators requires that speakers mention (not that they use) those terms.
4. Conclusion

In this chapter, I have introduced a description of the structure of persistent legal disagreement (PLD). According to this description, PLD involves a disagreement over the content of the law that arises in virtue of a disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY.

I have argued in favor of the description of the structure of PLD by arguing against an incompatible view, namely, the metalinguistic analysis of bedrock legal disputes suggested by David Plunkett and Timothy Sundell. To that end, I have presented three arguments. First, I argued that the description of the structure of PLD does not commit us, while the metalinguistic analysis does, to the implausible conclusion that the term “the law” necessarily occurs in all persistent disputes about what the law is. Second, I have argued that accepting the description of the structure of PLD doesn’t require us, while the metalinguistic analysis do, to abandon the intuition that a persistent dispute around what the law is reflects a disagreement over the content of the law. Third, I have argued that bedrock legal disputes, as depicted by Plunkett and Sundell, cannot be analyzed as metalinguistic negotiations. The reason being that rigid designators that occur as the grammatical subject of a declarative sentence (as it is the case for the term “the law” in bedrock legal disputes as depicted by Plunkett and Sundell) cannot be used metalinguistically.

To conclude I’d like to highlight that the description of the structure of PLD suggested in this chapter doesn’t take a stance on two substantive issues. First, it doesn’t take a stance on what it takes for two attitudes to enter the relation of disagreement. Second, it doesn’t take a stance on what kind of attitudes constitute the disagreements involved by PLD. In the following chapter, I’ll address the first of those issues. That is, I will address the question of what it takes for two attitudes to enter the relation of disagreement.
Chapter 2. The Functionalist View of PLD

My goal in this chapter is to debunk the standard characterization of the relation of disagreement (in particular, for the two disagreements that constitute PLD) and to present and argue in favor of a novel account. By doing so, I will fill one of the two substantive gaps left by the description of the structure of PLD suggested in chapter 1. To refer to the standard approach I use the term “the content view”. According to the content view, disagreement obtains when there is incompatibility (logical inconsistency) between the contents of two beliefs. By contrast, I suggest that the relation of disagreement is sensitive to the functions of the attitudes that constitute it. My arguments against the content view and in favor of the new account draw on some recent developments in the philosophy of mind and social psychology.

1. Introduction

In the previous chapter, I introduced a description of the structure of PLD. According to this description, PLD involves a disagreement over the content of the law in a specific jurisdiction at a given time and a disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY. The disagreement over the content of the law arises despite agreement over any other relevant non-legal issues. The disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY explains the disagreement over the content of the law. Legal philosophers have adopted a particular view to characterize the relation of disagreement. According to this view, disagreement is a relation of incompatibility between the contents of two beliefs. I will call this “the content view”.

In this chapter, I pursue two aims. First, I aim to advance an objection against the content view. My argument will be twofold. On the one hand, I argue that individuals can hold two beliefs whose contents are incompatible without disagreeing. On the other, I argue that two people can disagree without there being any incompatibility between the contents of the beliefs they hold. In other words, incompatibility between the contents of beliefs is neither sufficient nor necessary for disagreement.

My second aim is to suggest a new account of the relation of disagreement. Disagreement, I will suggest, is best understood as a relation that is sensitive to the function of attitudes. The
conditions that must obtain for any two attitudes to give rise to a disagreement depend on the functions those attitudes serve. Attitudes might serve at least three functions: representational, motivational and hedonic. By suggesting an account of the relation of disagreement, I address one of the substantive issues left open in chapter 1.

This chapter proceeds as follows. In section 2, I introduce some preliminary remarks that set up the scope of my claims. In section 3, I present the content view and elaborate on the idea that most legal theorists adopt it. As most of the debate about persistent disagreement in legal philosophy revolves around Ronald Dworkin’s disagreement-based argument against legal positivism, I will pay particular attention to Dworkin’s work. In section 4, I advance an objection against the content view. This objection draws on some recent developments in the philosophy of mind and social psychology. In section 5, I develop a new account of the relation involved by disagreement. This account arises as the natural candidate once we understand what is wrong about the content view. In section 6, I conclude by highlighting the core remarks made throughout the chapter.

2. Preliminary Remarks

Let’s begin by restating the type of situations (disagreements/disputes) we are concerned with in this thesis. Consider the following exchange:

(1)

John: Everyone who figures as a beneficiary in a valid will is (legally) entitled to inherit.
Robert: Not everyone who figures as a beneficiary in a valid will is (legally) entitled to inherit.

As interpreted in this thesis, this exchange illustrates an instance of PLD.¹ John and Robert disagree over whether it is the law in their legal system, at the time of their conversation, that every person who figures as a beneficiary in a valid will be entitled to inherit. John and Robert do not disagree over any other (relevant) non-legal issues (For example, they both agree that there is a

¹ Keep in mind that, as noted in chapter 1, linguistic exchanges of this type might express other types of disagreement.
statute in their community aimed at the regulation of wills, that the statute clearly specifies the conditions a will must fulfill to be considered valid, and even that, according to that statute, being named as a beneficiary in a valid will is sufficient to be entitled to inherit). This disagreement between John and Robert arises in virtue of a further disagreement between them which concerns the concept THE CRITERIA OF LEGAL VALIDITY.

The characterization of disagreement that I will suggest in this chapter is a characterization of disagreement in general. Although my claims, or most of them at least, might be seen to apply to other types of disagreements as well, I will be focusing exclusively on PLD, which is the object of this thesis.

More specifically, my focus will be on the disagreement over the content of the law in PLD. But what is true about disagreement in general must be true about any particular type of disagreement. For that reason, I take it that everything I say about the relation between the attitudes that constitute the disagreement over the content of the law in PLD can be said of the relation between the attitudes that constitute the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY in PLD. In other words, I take it that my conclusions here can be generalized to the other type of disagreement that makes up PLD.

As for the second substantive issue about which the description of the structure of PLD is silent—which types of attitudes (cognitive or non-cognitive) constitute each of the disagreements that make up PLD—I will leave it for chapter 3. Those who embrace the content view do so, it seems to me, regardless of their stance on this issue. Merely for the sake of exposition, though, I will assume in this chapter that the attitudes that constitute the disagreement over the content of the law in PLD are cognitive attitudes, and, more specifically, beliefs.

What then is the content view, and what reasons do we have to think that most legal theorists working on disagreements so far have adopted it? In the next section, I’ll answer this question.

3. The Content View

According to the content view, the relation of disagreement obtains if, and only if, the contents of two beliefs (or two acceptances) are incompatible. The contents of two beliefs (or two acceptances) are incompatible if they cannot be true at the same time. For example, according to
the content view, if you believe (accept) that “Isabel ought to pay a fine of £ 200” and I believe (accept) that “it is not the case that Isabel ought to pay a fine of £ 200”, we disagree.

It seems to me that most (if not all) legal philosophers involved in the discussion around PLD embrace the content view. Their stance in the debate is typically to argue either for or against Ronald Dworkin’s disagreement-based argument against legal positivism. In so doing, as I will argue, they share the conception of disagreement that Dworkin himself espoused. I claim that Dworkin embraces the content view. In the following two subsections, I make the case for this claim.

3.1 Dworkin’s Disagreement-based Argument against Legal Positivism

Here is an overview of Dworkin’s disagreement-based argument, the initial version of which— “the semantic sting” argument, as he calls it—is introduced *Law’s Empire*.

First, Dworkin distinguishes between two types of legal propositions. *Propositions of law* are statements that “…people make about what the law allows or prohibits or entitles them to have”. One of Dworkin’s examples of a proposition of law is “no one may drive over 55 miles an hour in California”. Propositions of law are generally taken to be true or false (or at least sound or unsound), and they will be true or false “…in virtue of other, more familiar kinds of propositions on which these propositions of law are (as we might put it) parasitic”. This second type of propositions identified by Dworkin are said to be *propositions that furnish the “grounds” of law*. Dworkin does not give a fully spelled-out example of this type of proposition, but examples have been suggested in the literature. Based on Dworkin’s writing, Luís Duarte d’Almeida formulates one: “The official California statute book contains a provision to the effect that no one may drive over 55 miles an hour.”

Dworkin then distinguishes between two ways in which judges and lawyers might disagree about the truth of a proposition of law. First, they might agree about the grounds of law but disagree about whether those grounds are satisfied in a particular case. Two people agree about the grounds

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2 According to Barbara Levenbook, there are seeds of the semantic-sting argument in Dworkin’s earlier work *Model of Rules II*. See (Baum Levenbook, 2015, pp. 1–9; Dworkin, 1977).
3 (Dworkin, 1986, p. 4)
4 (Dworkin, 1986, p. 4)
5 (Dworkin, 1986, p. 4)
6 (Duarte d’Almeida, 2016, p. 166)
of law if they agree that the truth of a proposition that furnishes the grounds of law makes a particular proposition of law true. Here is Dworkin’s example of this first type of disagreement:

Lawyers and Judges might agree [...] that the speed limit is 55 in California if the official California statute book contains a law to that effect, but disagree about whether that is the speed limit because they disagree about whether, in fact, the book does contain such a law.7

Dworkin labels this first type of disagreement in law empirical disagreement. Empirical disagreement, he claims, is hardly puzzling. Having an empirical disagreement is (in no relevant sense) different from having a disagreement about any other empirical matter.

But there is, Dworkin says, another way in which judges and lawyers might disagree about the truth of a proposition of law. For Dworkin, this second type of legal disagreement deserves serious philosophical reflection. Theoretical disagreement, as Dworkin calls it, arises when judges and lawyers disagree about the grounds of law themselves.8 That is, when they disagree “…about which other kinds of propositions, when true, make a particular proposition of law true.”9 Here is how Dworkin illustrates this idea:

They [judges and lawyers] might agree, in the empirical way, about what the statute books and past judicial decisions have to say about compensation for fellow-servant injuries, but disagree about what the law of compensation actually is because they disagree about whether statute books and judicial decisions exhaust the pertinent grounds of law.10

7 (Dworkin, 1986, p. 5)
8 From here onwards, I will proceed on the assumption that the only difference between theoretical disagreement and PLD is terminological. I have chosen to depart from using the term “theoretical disagreements” because, as David Plunkett and Timothy Sundell point out, it is inconveniently theoretically loaded. See (Plunkett & Sundell, 2013b, p. 245).
9 (Dworkin, 1986, p. 5)
10 (Dworkin, 1986, p. 5)
For Dworkin, theories that embrace what he calls *the plain fact view of the grounds of law* are unable to explicate theoretical disagreements.¹¹ According to the plain fact view, “[t]he law is only a matter of what legal institutions, like legislatures and city councils and courts, have decided in the past”.¹² If the plain fact view is correct, the only way judges and lawyers can disagree is in the empirical way. That is so because if what the law is depends solely on past facts about what legal institutions have done, then every disagreement about what the law is must arise because of a disagreement over those facts. According to Dworkin, if the plain fact view is correct, judges and lawyers cannot have a disagreement about what the law is that arises in virtue of a disagree about the grounds of law.

In actual practice, Dworkin says, judges and lawyers do engage in theoretical disagreement. To support his claim, he introduces a series of four real-life cases that, according to him, are instances of that type of disagreement.¹³ The existence of theoretical disagreements is, for Dworkin, a (important) feature of legal practice. Dworkin argues that, since theories that embrace the plain fact view fail to account for this (important) feature of legal practice, they must be abandoned.

Dworkin refers to (some) theories that embrace the plain fact view of the grounds of law as *semantic theories*.¹⁴¹⁵ Roughly, a semantic theory of law holds that the question of what jurisdiction-specific law is (at a specific time), is tied to the way in which the word “law” is used by judges and lawyers. For Dworkin, according to proponents of semantic theories, when we use any word, we follow certain rules.¹⁶ The meaning of every word is given by the criteria set out by those rules. The fact that the rules we follow when using the word “law” specify a set of factual criteria make it the case that the content of jurisdiction-specific law depends on plain historical facts. In that sense, according to Dworkin, semantic theories hold that, in deciding whether a proposition of law is true or false, all (or at least most) judges and lawyers (must) use the same (empirical) criteria.¹⁷

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¹¹ See (Dworkin, 1986, p. 7).
¹² (Dworkin, 1986, p. 7)
¹³ See (Dworkin, 1986, pp. 15–30).
¹⁴ See (Dworkin, 1986, p. 33).
¹⁵ Austin’s and Hart’s versions of legal positivism are two examples of a semantic theory according to Dworkin.
¹⁶ It might be worth noticing that, as Dworkin makes it clear, it doesn’t follow from saying this that people are aware of the rules they follow in using their words. See (Dworkin, 1986, p. 31).
¹⁷ Two semantic theories of law are different if they provide different accounts of the shared criteria we follow in using the word “law”.

For Dworkin, cases of theoretical disagreement make apparent that sometimes lawyers and judges do not follow the same rules in using the word “law”. Equivalently, for Dworkin, theoretical disagreements show that judges and lawyers don’t use the same factual criteria for deciding whether a proposition of law is true or false.

Dworkin observes that, according to semantic theories, if two lawyers follow different rules in using the word “law” (if they use different criteria in deciding whether a proposition of law is true), they must mean different things by that word. If so, they must mean something different when one asserts what the law is and the other denies it; “they are only talking past one another”.18 The case is the same for agreement. If two people follow different rules in using the word “law”, their agreement about what the law is in a particular lawsuit turns out to be fake. Semantic theorists, Dworkin holds, are committed to these conclusions.

For Dworkin, concluding that legal practitioners talk past one another when (apparently) engaged in theoretical disagreement cannot be right. As mentioned, for Dworkin, actual practice shows that sometimes judges and lawyers do disagree (instead of merely talking past) about the grounds of law (or at least, that they behave as if they do). Contrarily to what the proponents of semantic theories think, in using the word “law”, lawyers and judges do not (necessarily) follow the same rules and yet they disagree.19 Therefore, semantic theories are defective and because of that they must be abandoned.

Up to here my reconstruction of Dworkin’s argument. Although inexhaustive, it should suffice for my purposes. Let’s move on now to show how, in advancing this disagreement-based argument, Dworkin necessarily embraces the content view.

3.2 Dworkin and the Content View

At first sight, it is far from clear whether Dworkin conceives of disagreement as a relation between mental states, let alone being committed to the content view. At least explicitly, Dworkin never talks about incompatibility between the content of beliefs (or any other kind of mental states). For him, at least based on his explicit formulations, disagreement is a relation between two

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18 (Dworkin, 1986, p. 44)
19 Scott Shapiro understands Dworkin’s claim as a modal claim about the possibility of theoretical disagreements. So, according to him, the semantic sting argument poses a challenge for the positivists even if theoretical disagreements do not take place in real practice because they could take place. See (Shapiro, 2007).
(perhaps contradictory) propositions of law. As seen, according to Dworkin, propositions of law are statements that people make of what the law is in a particular case. This seems to suggest that, for Dworkin, disagreements are linguistic exchanges (or, in more familiar terms, disputes).\(^{20}\)

It seems to me that to interpret Dworkin’s work as focusing on disputes instead of disagreements would be incorrect. Despite the way in which Dworkin explicitly formulates his ideas, under closer examination, he doesn’t seem to understand theoretical disagreements as a relation between two statements. Here is why. As seen, for him, disagreements in law (empirical or theoretical) are disagreements about the truth of a proposition of law that arise in virtue of a further disagreement. By accepting that the second disagreement (which may concern either empirical facts or the grounds of law) might remain unstated (there is no reason to think Dworkin would not accept that), one accepts that disagreement obtains (or might obtain) between something different from the statements of two speakers. It doesn’t seem wrong to say that the unstated disagreement involves a relation between (the contents of) two beliefs that the disagreeing subjects hold (about either some facts or the grounds of law). From here, it follows that, unless we are ready to attribute to Dworkin an ambiguity in his use of “disagreement”, then the most charitable interpretation of his work is as conceiving of disagreement as a relation between mental states (some of which subjects express when they state what the law orders, prohibits and/or permits).

Once we accept that Dworkin thinks of disagreement as a relation between attitudes, showing that he embraces the content view is not difficult. Briefly, the reason is that, if one doesn’t accept the content view, then one has no reason to accept, as Dworkin claims the positivist does, that compatibility between contents entails lack of disagreement. Let’s elaborate.

As seen, according to the view attributed by Dworkin to defenders of semantic theories, two subjects who seem to disagree but mean different things by their words don’t disagree (they rather talk past one another). More specifically, for Dworkin, the defender of a semantic theory is committed to say that, if an individual states that “the law is P” and another individual states that “the law is not P”, but they mean different things by “the law”, then those individuals don’t disagree. For Dworkin, two contents like “the law1 is P” and “the law2 is not P” are like the two contents “(river) banks are dangerous” and “(financial) banks are not dangerous”. What makes

\(^{20}\) Just a reminder: as noted in chapter 1, the distinction between disagreements and disputes is a distinction between a relation between attitudes and a relation between the actions that might express them. It is worth noticing that, at the time Dworkin wrote *Law’s Empire*, the distinction between disagreements and disputes was not yet in place within philosophical discussion.
those two pairs of contents be alike according to Dworkin seems to be that they are compatible. Just as the contents “(river) banks are dangerous” and “(financial) banks are not dangerous” can be true at the same time, it seems to be Dworkin’s idea that the contents “the law1 is P” and “the law2 is not P” can be so. It seems then that, for Dworkin, defenders of semantic theories must claim that two subjects who endorse compatible contents about what the law is, don’t disagree. In other words, for Dworkin, the defender of a semantic theory is committed to the view that endorsing compatible contents is sufficient for lack of disagreement (or, in Dworkinian terms, for talking past).

There is another view to which the defender of a semantic theory seems to be committed according to Dworkin: incompatibility between contents is sufficient for disagreement. If you state that “(financial) banks are dangerous” and I state that “(financial) banks are not dangerous”, according to the defender of a semantic theory, in Dworkin’s view, we disagree. This view extended to legal contexts is that, if you state that “the law is P” and I state that “the law is not P”, we disagree. Since those contents are incompatible, it must be that incompatibility between contents is sufficient for disagreement. Contrapositively, if there is no disagreement, then there is compatibility between contents. Thus, for Dworkin, the defender of a semantic theory is committed to the view that if there is lack of disagreement, then the contents endorsed by the disagreeing parties must be compatible.

The conclusion to be drawn from the observations above is that the defender of a semantic theory, according to Dworkin, is committed to the following two claims (with respect to disagreements over the content of the law): (i) if there is compatibility between two contents, then there is lack of disagreement; and (ii) if there is lack of disagreement, then there is compatibility between contents. It follows from here that, according to Dworkin, the defender of a semantic theory endorses that there is lack of disagreement if, and only if, there is compatibility between contents. This is equivalent to the content view: there is disagreement if, and only if, there is incompatibility between contents.

If the observations above are correct, it follows that the semantic sting argument can only work if one attributes to defenders of semantic theories (as Dworkin does) the content view. If it were false that the defender of a semantic theory is committed to the content view, then it would be false that she is committed to the view that, in (apparent) cases of theoretical disagreement, there is no disagreement between disputants that mean different things by their words (particularly,
by “the law”). In other words, if the defender of a semantic theory were not committed to the content view, then she could vindicate her claim that, in apparent cases of theoretical disagreement, two disputants mean different things when one state what the law is and the other denies it, without having to accept that those disputants necessarily don’t disagree. This would render Dworkin’s argument ineffective. To keep Dworkin’s argument against semantic theories effective, we need to keep his attribution of the content view to those theories.

As noted, most legal philosophers who engage in the debate around PLD do so by arguing against or in favor of Dworkin’s semantic sting argument.21 It seems to me that most (if not all) of those philosophers embrace the characterization of disagreement that Dworkin attributed to the defenders of semantic theories.22 I will elaborate on this idea in the next subsection.

3.3 The Content View in Legal Philosophy

It seems to me that neither the critics of Dworkin nor its defenders have challenged Dworkin’s attribution of the content view to semantic theories. Among the critics of Dworkin, for instance, Joseph Raz argues that Dworkin premised his argument on a defective characterization of the concept LAW.23 Roughly, Raz contends that rules setting out the criteria of correct application of most concepts, including the concept LAW, are not defined individually but by deference to a linguistic community. According to Raz, Dworkin’s argument fails because it neglects this fact. Raz never challenges the idea that, in terms of Dworkin’s criticism of semantic theories, disagreement entails incompatibility.

Another legal theorist that has argued against the semantic sting argument is Brian Leiter.24 Leiter agrees that sometimes judges and lawyers talk as if they were engaged in disagreements of the kind Dworkin calls “theoretical”. However, he claims that there is no need to take interactions of that kind at face value (as actual disagreements). The reason is that there are two ways in which such interactions can be explained away. On the one hand, we can think that when two judges

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21 Or the disagreement-based argument introduced by Dworkin in Justice for Hedgehogs (Dworkin, 2011).
22 One exception might be Ralf Poscher. Poscher suggests that theoretical disagreements should not be understood as being “about right or wrong, but about winning or losing.” (Poscher, 2016, p. 205) His suggestion seems to reject the content view. However, it might be that Poscher is rejecting all together that disagreement is a relation between attitudes. See (Poscher, 2016).
23 See (Raz, 1998).
24 See (Leiter, 2009, 2019).
engage in what seems to be a theoretical disagreement, they are not sincere in saying they believe there is a fact of the matter about what the grounds of law are. On the other, we can think that judges sincerely believe there is such a fact of the matter, but they are simply mistaken about it. Moreover, Leiter claims, the explanation of Dworkinian theoretical disagreements does not count for much when it comes to choosing between competing theories of legal practice. That is so because it is agreement and not (theoretical) disagreement that is the central feature of legal practice. So, it is agreement and not disagreement what a good theory of law should be expected to explain. It seems clear to me that none of Leiter’s reasons against Dworkin’s argument pertain to the conception of disagreement Dworkin attributes to the defender of a semantic theory.

Luís Duarte d’Almeida has recently raised further criticism against Dworkin’s semantic sting argument. Roughly, for him, Dworkin’s argument misses its target. Duarte d’Almeida accepts that Dworkin’s argument is a sound argument against theories that embrace the plain fact view. However, he observes, legal positivism, particularly H. L. A. Hart’s theory (Dworkin’s main target), is not (or need not, and should not, be construed as) one of those theories. Duarte d’Almeida claims that, by overlooking Hart’s distinction between internal and external legal statements, Dworkin attributes to Hart a view—the plain fact view—he doesn’t hold. Dworkin’s argument is defective as its reconstruction of the theory it targets is a straw man. Once again, this objection against Dworkin’s argument doesn’t seem to rest on a challenge to Dworkin’s understanding of the relation of disagreement in his criticism against semantic theories.

It goes beyond the purpose of this chapter to provide (exhaustive) reconstructions of all the objections against the semantic sting argument available in the literature. The important point for my purposes is to motivate the idea that, despite the plurality of argumentative lines against Dworkin’s views, none of the criticisms seems to dispute Dworkin’s attribution to semantic theories of a conception of disagreement as a relation between the contents of two attitudes.

Not all philosophers who engage with Dworkin’s argument do so in a critical way. Some have been persuaded by Dworkin. For reasons of time and space, I will not offer reconstructions of their views: For my purposes, it is enough to point out that those who embrace Dworkin’s views

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25 See (Duarte d’Almeida, 2016).
26 Among the critics of Dworkin I didn’t mention we can find, for example, Jules Coleman and Kenneth Himma. See (Coleman, 2001; Himma, 2002).
on disagreement in law presumably accept the idea that semantic theories embrace the content view.\(^{27}\)

Let me summarize the relevant points so far. The content view is the view that disagreement is a relation that obtains when, and only when, the contents of two beliefs are incompatible. Thus, according to the content view, disagreement over the content of the law in PLD obtains when, and only when, there is incompatibility between the contents of two beliefs about the content of the law. Dworkin attributes the content view to defenders of semantic theories and so do most (if not all) legal philosophers who have debated the topic so far.

My aim in the next section is to develop an objection against the content view.

### 4. An Argument against The Content View

The content view is, I think, mistaken: incompatibility between the contents of two endorsed attitudes is neither necessary nor sufficient for disagreement. To show why this is so, we must first pay attention to some recent developments in philosophy of mind and social psychology regarding some characteristics of mental states and, more specifically, beliefs. It is worth noticing that it is plausible to inform our discussion from insights in those fields because we conceive of disagreement as a relation between mental states.

#### 4.1 Attitudes and Functions

According to a view now widely spread among philosophers of mind, mental states are individuated by their functions (as opposed to their internal constitution). Roughly, *functionalism*, as this view is usually called, holds that what makes a particular mental state a belief, desire, pain, fear, etc., depends solely on the function(s) it serves and could have served in the system of which it is a part.\(^{28}\) In words of Janet Levin, the central thesis of functionalism is that “types of mental states can be defined in terms of their causal and counterfactual relations to the sensory stimulations, other mental states and behavior of the entities that have them.”\(^{29}\) For example, according to

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29 (Levin, 1985, p. 85)
some type of functionalist theory, the belief that “it is raining” can be caused by a sensory (visual or other) perception of rain, lead to a desire that be not raining, produce a state of anxiety, and cause someone to stay inside.

Let me be explicit about the type of functionalist view I aim to endorse. As understood in this thesis, to say that a type of mental state $T$ is individuated in terms of functions $F_1$, $F_2$ and $F_3$ is to say that, for all instances of $T$, the functions $F_1$, $F_2$ and $F_3$ must be each either actual or counterfactual. To say of a particular mental state $S$ that its function $F$ is actual is to say that $S$ actually serves $F$ (that $F$ obtains with respect to $S$). To say of a particular mental state $S$ that its function $F$ is counterfactual is to say that $S$ doesn’t actually serve $F$ but could have served it (that $F$ could have obtained with respect to $S$).

Most of the theory and research done in philosophy of mind, psychology and cognitive science focuses on beliefs. For that reason, in this brief reconstruction of some of the postulates of such theory and research, I will focus exclusively on this type of mental states. I will set aside (for now) questions regarding other types of attitudes or their relations to beliefs.

It is worth noticing that the question about which (actual and counterfactual) functions individuate beliefs is far from being settled. We need not give a full answer to that question here. We need not be specific as to what relations individuate beliefs. However, this is not to say that we need not be concerned with that question at all. I will clarify the sense in which the individuation of beliefs is relevant for our purposes below. For now, the important point is simply that, according to functionalism, beliefs are individuated in terms of their functions (actual and

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30 It is hard to find in the literature an explicit and clear exposition of the functional relations that beliefs involve. According to Schwitzgebel, philosophers often identify at least four causal relations (functions) as characteristic (although not necessarily definitional) of beliefs:

1. Reflection on propositions (e.g., $[Q]$ and $[\text{if } Q \text{ then } P]$) from which $P$ straightforwardly follows, if one believes those propositions and is not antecedently committed to the falsity of $P$, typically causes the belief that $P$.
2. Directing perceptual attention to the perceptible properties of things, events, or states of affairs, in conditions favorable to accurate perception, typically causes the belief that those things, events, or states of affairs have those properties (e.g., visually attending to a red shirt in good viewing conditions will typically cause the belief that the shirt is red).
3. Believing that performing action $A$ would lead to event or state of affairs $E$, conjoined with a desire for $E$ and no overriding contrary desire, will typically cause an intention to do $A$.
4. Believing that $P$, in conditions favoring sincere expression of that belief, will typically lead to an assertion of $P$. (Schwitzgebel, 2019)

To be clear, this list is not meant to be either exhaustive or even accurate, but simply an illustration.
counterfactual). As Eric Schwitzgebel points out: “[f]or the functionalist, to believe just is to be in a state that plays (something like) this sort of causal role.”

In the literature, it has long been considered that beliefs are characterized by its representational nature. Among some theorists who endorse functionalism, that view translates into the idea that beliefs are individuated (exclusively) in terms of their representational function. This is the idea that a particular mental state is a belief if, and only if, it serves (either exclusively or among others) a representational function (if, and only if, its representational function is actual).

Roughly, the representational function can be explained in terms of an aim for accuracy. To say that beliefs serve a representational function is to say that they aim at being accurate. It is to say that, in having a belief, an individual is in the business of attaining reliable information about a particular state of affairs within certain constraints like the time and effort available to her. A good number of theorists agree that beliefs are estimates of how likely it is that what we think about something is actually the case or will be the case. Researchers in social psychology have found some contexts in which the representational function of beliefs is salient; for instance, some contexts of persuasion.

To be clear, to say of a belief B that it serves its representational function (to say that its representational function is actual) is to say that, in having B, an individual is in the business of representing the world accurately. To say of a belief B that its representational function is counterfactual is to say that, in having B, a subject could have been in the business of representing the world accurately (although actually she is not). Some mental states are not beliefs precisely because, in having them, subjects neither are nor could have been in the business of representing the world (because, with respect to those mental states, the representational function is neither actual nor counterfactual).

Notice that in saying that a subject might have a belief without being in the business of representing the world accurately one doesn’t deny that beliefs are mental representations. Everything one does is to make a claim about the goals that explain the formation of some belief(s) (I’ll explain this idea in full detail below).

31 (Schwitzgebel, 2019)
33 See (Kruglanski, 1980).
34 See (Eagly & Chaiken, 1998; Wyer & Albarracín, 2005).
35 See (Chaiken et al., 1996; Petty & Cacioppo, 1986).
Now I’ll clarify the sense in which, for my purposes on this chapter, the question of how beliefs are individuated is relevant. I will argue that an instantiated mental state can be a belief even though it serves exclusively some non-representational function(s). That is, a particular mental state can be a belief even if its representational function is only \textit{counterfactual}. This view is incompatible with the view that, for something to be a belief, it must actually serve a representational function (the view that the representational function of beliefs must be actual). The question of how beliefs are individuated is relevant for present purposes only to the extent that I deny this later claim.

It is worth highlighting that functionalism doesn’t entail that beliefs are individuated by the representational (or any other) function. A theory could be functionalist even if it would deny that the representational function is among the functions that individuate beliefs. As noted, all it takes for a theory of beliefs to be functionalist is to hold that what individuates this type of mental state (what makes beliefs be beliefs) is their (actual and counterfactual) functions (independently of which we take those functions to be).

I take it that the questions of (i) what functions individuate beliefs and (ii) what functions a particular belief serves, are ultimately empirical. What are the functions that make beliefs be the type of mental state that they are is a fact about the world. In that respect beliefs are not different from other natural kinds. Similarly, it is ultimately a fact about how our minds work what goals motivate people into forming their instantiated beliefs. Clearly, to say as much is not to say that those questions are the same; to be explicit, one is a question about the set of properties that individuate a type while the other is a question about the properties that a particular token of that type does instantiate.

Over the last years, it has become common among psychologists and cognitive scientists to claim that beliefs may serve different functions.\textsuperscript{36} There is a growing body of literature that argues that achieving a representational goal is not always, perhaps not even often, what people attempt to do when they form or change their beliefs. Let’s move on now to explore some of that literature.

\textsuperscript{36} In this reconstruction of some of the literature, I follow the work of Boden, Barenbaum and Gross. See (Boden et al., 2016).
The non-representational functions of beliefs: the evidence

One of the theorists that have suggested that beliefs might serve other functions beyond the representational function is Seymour Epstein. Epstein maintains that there are two cognitive systems through which people form beliefs. There is, on the one hand, an intuitive-experiential system and, on the other, an analytical-logical system. The former operates without using abundant cognitive resources and it is guided by intuition, emotion and past experience. The latter is highly expensive in terms of the cognitive resources it uses and relies on and aims at the accuracy of the conclusions it gives rise to. To describe the experiential system Epstein writes:

The experiential system is assumed to operate in the following manner. When an individual is confronted with a situation that requires some kind of response, depending on past emotionally similar experiences, the person experiences certain feelings. The feelings, or vibes, which can be very subtle, motivate action tendencies to seek to further the state if the vibes are pleasant and to reduce the state if they are unpleasant. The whole process occurs extremely rapidly, so that to all appearances the behavior is an immediate reaction to the eliciting stimulus. In the case of humans, the vibes produce not only tendencies to act in certain ways, but also tendencies to think in certain ways.

Beliefs formed through the experiential system are formed (or modified) in response to an emotional state rather than through an assessment of representational information. The fact that, when subjects rely on the experiential system, they form beliefs in response to their emotions is taken to be an indication that, in forming those beliefs, subjects do not aim at accuracy.

Some empirical research indicates that, in most of their everyday life reasoning, people rely on the intuitive-experiential system rather than on the analytical-logical one. This makes it likely that most of the beliefs people have do not aim at accuracy but at the regulation of emotions. One example pertains to the type of beliefs Epstein calls basic beliefs. Roughly, basic beliefs are intuitive assessments of the degree to which the world is benign, the degree to which the world is

37 See (Epstein, 1990).
38 (Epstein, 1990, pp. 167–168)
39 See (Catlin & Epstein, 1992).
meaningful (e.g., predictable, controllable and just), the degree to which people are considered to be worth relating to, and the degree to which the self is viewed as worthy. Studies have shown, for instance, strong correlations between major life events (e.g., the death of a loved one, a major success, a significant rejection) and subjective rates of immediate and long-term effects on self-esteem and attitude towards others. The overall results of these studies indicate that major life events have general and specific effects over (some) basic beliefs. For instance, the belief that “I like people and believe in giving them the benefit of the doubt” is typically affected when individuals undergo a violent crime as victims. Subjects who go through that situation change or show radically lower degrees of confidence towards such a belief than subjects who have not undergone a similar highly distressing experience in life. To repeat, the finding that sometimes beliefs are formed (or modified) in response to emotion(s) rather than to an assessment of representational information has been interpreted as an indication that, in forming such beliefs, subjects are not in the pursuit of representational goals.

Another example is Ziva Kunda. According to Kunda’s theory of motivated reasoning, people are motivated to derive accurate conclusions as well as directional conclusions. “[W]hen people are motivated to be accurate, they expend more cognitive effort on issue-related reasoning, attend to relevant information more carefully, and process it more deeply, often using more complex rules.” This idea has been supported by a good number of studies. The strategy some of these studies follow in order to show that accurate goals lead to more careful cognitive processing is to show that manipulations designed to increase accuracy lead to an elimination or reduction of cognitive biases. Such studies induce accuracy goals by increasing the stakes involved in making mistakes in judgment (for example, by making subjects aware that their judgments will be made public). For instance, some studies have shown that there is more careful cognitive processing in reassessing one’s initial impressions of an individual after being presented further information about that individual, if one is expected to justify their final judgments than if one is not.

On the other hand, when people have directional goals, their reasoning becomes biased. In order to reach a desired conclusion, directional goals influence people’s memory, their selection

40 (Catlin & Epstein, 1992)
41 See (Kunda, 1990).
42 (Kunda, 1990, p. 481)
of rules of reasoning, their selection and application of existing beliefs, etc. The existence of biases is taken to be an indication that reasoning has been affected by directional goals. It is alleged that when people pursue directional goals, they are not in the business of being accurate. In short, the idea is that reasoning becomes biased because people don’t aim at accuracy. Since, as noted, when people aim at accuracy they rather try hard to get rid of those biases, the fact that subjects don’t try to avoid biases is taken to be an indication that they are not concerned about the accuracy of their representations. The conclusions at which people arrive when they are motivated by directional goals may already be or become beliefs. Directional conclusions are taken to be beliefs formed when pursuing directional (non-representational) goals. In more familiar language, they are taken to be beliefs that serve non-representational functions.

The idea that directional goals motivate people to derive directional conclusions is supported by empirical data. Studies have shown that directional goals bias the access and formation of beliefs, the use of inferential rules, and even the evaluation of scientific evidence (the last one by biasing the selection of both beliefs and rules). For example, in a study subjects were induced to believe that a given trait (extroversion or introversion) was conducive to academic success.\textsuperscript{45} The study showed that subjects so induced came to think of themselves as being more characterized by that trait than other people. It was hypothesized that the reason for this finding is that subjects were motivated to see themselves as possessing such success-leading attributes (rather than to assess accurately their own traits). Studies have also shown that individuals who were extroverts before being induced to believe that introversion would lead to success viewed themselves as less extroverted after the induction.\textsuperscript{46} To repeat, studies like this are taken as evidence for the idea that, sometimes, directional goals bias reasoning. This, in turn, is taken to be an indication that sometimes individuals are not in the business of representing the world accurately when they form their beliefs.

One more example of theorists who have suggested that beliefs might not serve (at least not exclusively) a representational function is Matthew Boden and his colleagues.\textsuperscript{47} These scholars have developed a theoretical framework that integrates two functions of beliefs, namely, the hedonic function and the representational function. They base their model on some of the findings.

\textsuperscript{45} See (Kunda & Santioso, 1989).
\textsuperscript{46} See (Kunda & Santioso, 1989).
\textsuperscript{47} See (Boden et al., 2016).
advanced by Kunda. Boden and his associates suggest that one highly important directional goal is hedonic. Beliefs held or arrived at by virtue of hedonic goals serve a hedonic function. For Boden et al, a belief has a hedonic function if it helps us “…regulate affective states in valued directions and achieve our overarching hedonic goals, which include the up-regulation, down-regulation, and maintenance of pleasant and unpleasant emotions that vary by person and situation.”

One example of a hedonic belief is the belief that “there is an afterlife”, for instance, when it helps release some of the anxiety caused by believing that “death is inevitable”. Boden and his colleagues suggest that, according to an ongoing body of theory and research, some of people’s most important beliefs play a hedonic role. They also suggest that pursuing hedonic goals in forming and changing beliefs may be more common than attempting to represent the world accurately.

It is normally accepted that another important non-representational function that beliefs may serve is motivational. Generally described, a belief serves a motivational function if it causes a person to carry out a particular action (or at least the intention to carry out an action). The relation between beliefs (or attitudes more broadly) and action is to this day a point of contention among philosophers and psychologists. One of the core debates in philosophy regarding that relation, confronts the so called Humeans and Anti-Humeans. Roughly, Humeans claim that there cannot be motivation without desire, while Anti-Humeans contend that sometime beliefs can suffice to motivate action. It goes beyond the scope of this thesis to take part in this longstanding debate. As will become clear later, for my purposes, I need not commit to any of those views. All that is

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48 According to Boden and his colleagues, there are at least four psychological theories supported by evidence that explicitly suggest that (some) beliefs serve hedonic functions: Just-world theory suggested by Melvin Lerner, system justification theory suggested by John Jost and Orsolya Hunyady, compensatory control theory suggested by Aaron Kay et al and terror management theory suggested by Tom Pyszczynski. According to just-world theory and the research that supports it, people are motivated to form the belief that the world is inherently just in order to alleviate the anxiety and depression caused by the realization that the world is chaotic and inexplicable. System justification theory suggests that, to establish and maintain an idea of order, certainty and the perception of a safe environment in the face of threat, and to reduce unpleasant affect, people form and strengthen beliefs that support the status quo. Compensatory control theory holds that threats to personal control produce perceptions of randomness and chaos which cause feelings of anxiety. To avoid and reduce those feelings, people form particular types of beliefs, for example, religious or political beliefs. Lastly, terror management theory suggests that people protect themselves from the anxiety induced by some moral and death-related beliefs by forming beliefs that give meaning and sense to their lives. See (Jost & Hunyady, 2002; Kay et al., 2009, 2010; Lerner, 1980; Pyszczynski et al., 1999).

49 (Boden et al., 2016, p. 401)

50 See (Boden et al., 2016, p. 401).


52 For Anti-Humean arguments see (Friedrich, 2014; Pettit, 1987). For Humean arguments see (Lewis, 1988; M. Smith, 1987). For a different account of the motivational function of beliefs see (P. Smith & Jones, 1986).
important for my claims is that we can identify the motivational function as an independent, non-representational function of beliefs (no matter what we take the motivational function to be).

*The non-representational functions of beliefs: clarifications and two arguments*

I aim to endorse the view that beliefs (can) serve multiple functions. More specifically, I claim that beliefs are individuated in terms of (at least) their representational, hedonic and motivational functions. However, I don’t take this list to be exhaustive or indisputable. As mentioned, the question of what functions individuate beliefs (as a type of mental state) is empirical. It might be that those three functions are not the only ones that individuate beliefs, or it might be that the functions that individuate beliefs are not those but others. Future research could bring new light on this issue.

To be explicit, I don’t contend that, if something is a belief, then it must serve all those representational, hedonic and motivational functions (and/or any other functions I have failed to point out) simultaneously (I don’t contended that all three functions are necessarily actual). Rather, I contend that, if something is a belief, then it must serve at least one of them (I contend that at least one function of beliefs must be actual). This is of course compatible with saying that if something is a belief, then it serves one function, two functions, or all three (or more in case there are more). The functions that a particular belief doesn’t serve are its counterfactual functions.

One reason to accept an account of beliefs according to which mental states of this type (can) serve multiple functions is that it fits better alongside a good deal of theories in social psychology. As indicated, a growing body of literature in psychology advocates for the multiplicity of functions of beliefs. An account of beliefs that conceives of this type of attitudes as serving exclusively or necessarily a representational function would be in tension with such theories. Moreover, an analysis that denies that beliefs can serve multiple functions should offer an alternative interpretation of the empirical data that allegedly support those theories. If we want our account of beliefs to combine well with theories in other fields of knowledge and the data that support them, we might as well just accept that beliefs are individuated in terms of multiple functions, each of which can be either actual or counterfactual.

Another reason to support the idea of the multiplicity of functions of beliefs is conceptual. It seems to be a fact that there are some belief-formation systems which typically bring about
inaccurate beliefs. Take for example the belief-formation system of (quick) generalization. Generalizations are, more often than not, inaccurate representations of the world. Even more, it seems that when generalizations happen to be true, it is not because the generalization belief-formation system leads to accuracy, but because we got lucky. If one argues that, if something is a belief, then it must serve exclusively or necessarily a representational function, then one must think that subjects aim at accuracy when they generalize. From this, one must conclude that the belief-formation system of generalization is highly inefficient since subjects who aim at accuracy rarely get it and therefore, one must conclude that throughout evolution humans have kept highly inefficient belief-formation systems. The conclusion that humans have kept over the years highly inefficient belief-formation systems can be avoided, if one accepts that the function that generalizations serve is non-representational. If, in forming generalizations subjects aim at something else, the fact that generalizations are typically inaccurate doesn’t indicate that the belief-formation system of generalization is highly inefficient.

It seems to me that the reasons above are sufficient to support the claim that beliefs can serve multiple functions. We can now introduce the objection against the content view. However, before doing that, for the sake of exposition, it is worth making explicit the exact way in which I conceive of the functions of beliefs.

Some definitions

This is how I suggest understanding what it is for a belief to serve a function (more generally, what it is for an attitude to serve a function):

A belief B held by a subject S serves a function F if, and only if, what explains the formation of B is that S is motivated to attain goal G.

53 Someone who thinks that, if something is a belief, then it must serve exclusively a representational function could also deny that generalizations are beliefs. The claim that generalizations are not beliefs seems implausible to me.
54 A similar argument was presented by Marcus Giaquinto in his unpublished paper On the dictum “the aim of belief is true”. I took the example of generalizations from there.
55 In conceiving of the function of beliefs in this way I have been influenced by Robert Cummins, Berent Enc and Fred Adams, and Ziva Kunda. See (Cummins, 1975; Enc & Adams, 1992; Kunda, 1990).
Since there are multiple functions that beliefs might serve, this characterization has multiple specifications. Different functions pertain to different goals. We have then that:

A belief $B$ held by a subject $S$ serves a representational function if, and only if, what explains the formation of $B$ is that $S$ is motivated to gain accurate information of the world.

A belief $B$ held by a subject $S$ serves a motivational function if, and only if, what explains the formation of $B$ is that $S$ is motivated to carry out an action.

A belief $B$ held by a subject $S$ serves a hedonic function if, and only if, what explains the formation of $B$ is that $S$ is motivated to attain the up/down regulation of (some of her) pleasant/unpleasant emotional states.

Five points of clarification about this way of characterizing the functions of beliefs are in order. First, as noted earlier, the representational, motivational and hedonic function might not be the only functions that beliefs serve. There might be other functions that I have failed to mention. This is not a problem. Firstly, it is not a problem because the general model can easily be specified to characterize any function I didn’t mention. Secondly, it is not a problem because, as will become clear later, for my claims, only the representational, motivational, and hedonic functions, are relevant.

Second, it is not entailed by this way of defining the functions of attitudes that, for a belief to serve a function, the goal that motivates its formation must be achieved. Sometimes, for instance, people get things wrong even if they are motivated to get them right. More generally, the idea is that a belief might serve a function, even if it is not successful at achieving the goal the attainment of which explains its formation. It is sufficient for a belief $B$ to serve, for example, a representational function that, in forming $B$, a subject is motivated to gain accurate information about things, regardless of whether $B$ is accurate or not.

Third, a belief that serves a representational function is formed by a belief-formation system that typically but not necessarily forms beliefs that provide accurate information about the world. More generally, the property of forming beliefs that serve a function $F$, predicated of a
belief-formation system that forms beliefs that serve F, is typical but not necessary. It is worth highlight that this is not a point about beliefs and its functions but about the systems that form them.

Fourth, the fact that I am committed to a set of multiple definitions like the ones above entail that, as I understand them, beliefs might serve more than one function. As mentioned earlier, by saying that a belief serves exclusively a non-representational function (by denying that a belief serves necessarily or exclusively a representational function), one doesn’t deny that beliefs are mental representations. The claim that beliefs are psychological relations that subjects bear to a mental representation is compatible with the claim that, in forming beliefs, subjects might not be motivated to gain accurate information about the world. In other words, from accepting the set of definitions above it doesn’t follow that beliefs are not intentional (propositional) mental states; all that follows is that, in forming a belief, a subject need not be motivated (much less exclusively motivated) to attain accurate information about the world.

Lastly, subjects need not be aware (as a matter of fact, they rarely are) of their motivations. People might think they aim at accuracy in forming a belief and be wrong about that. As repeatedly indicated, what goal motivates someone to form a belief is an empirical matter. In fact, research has shown that most of the time individuals are not aware about their motivations and, more generally, of what is involved by their psychological processes of belief formation.56

I will move on now to introduce the objection against the content view I aim to suggest. Again, I argue that the content view is mistaken because incompatibility between the contents of two beliefs (about the content of the law) is neither sufficient nor necessary for (the) disagreement (over the content of the law in PLD). In the next two subsections, I elaborate on these ideas.

4.2 Incompatibility Is not Sufficient for Disagreement

Let me argue first for the claim that incompatibility between contents is not sufficient for persistent disagreement. Consider the following dialogue:

(2)

56 See (Mauss et al., 2007).
Sally: Your father is legally dead.
Molly: My father is not legally dead.

These are the facts. Molly’s father has been missing from his home for an extended period of time. Exchange (2) takes place after a conversation between Sally and Molly in which Sally brought up irrefutable evidence that, according to law, Molly’s father is to be considered dead. After being presented the evidence, Molly doesn’t refute it.

Suppose now that the mental states Sally and Molly express by their utterances are beliefs. While Sally believes that “Molly’s father is legally dead”, Molly believes that “my father is not legally dead”. Suppose that Sally’s belief serves a representational function, and Molly’s serves a hedonic function. To avoid unnecessary complications, assume that the information that is the content of Molly’s belief is incompatible with the information that is the content of Sally’s. It seems intuitive to think that, in this setting, Sally and Molly don’t disagree.

Here are some reasons that count in favor of that intuition. For one thing, it would be hard to imagine both speakers in (2) thinking of themselves as engaging in a disagreement. Presumably, (at least) Sally would be reluctant to think she is having a disagreement with Molly. When we are in the business of representing the world, it is difficult to accept we are having a disagreement with someone who doesn’t refute disconfirming evidence but refuses to modify their views. It seems to me that the lack of the feeling of disagreement by one of the parties is a sufficient indication of the lack of disagreement; however, I must admit that this is not conclusive grounds to accept that, in (2), speakers don’t disagree.

There is another slightly modified scenario that speaks in favor of the intuition of lack of disagreement between Sally and Molly. Let the facts be the same. Imagine now that, instead of (2), Sally and Molly engage in the following dispute:

(2*)

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57 As Boden et al point out, “…people do not generally search for information that would challenge their beliefs and instead, people search for evidence that confirms their beliefs, and discard disconfirmatory evidence or reinterpret such evidence to support their beliefs” and “because many beliefs are intended to also or primarily serve hedonic functions (…), encountering corrective information will often not lead to belief change” (Boden et al., 2016, p. 406). Some lines below, Boden et al. suggest that the way in which people discard disconfirmatory evidence is by ignoring it.

58 That might be because she either accepts it or (more likely) because she ignores it.
Sally: Your father is legally dead.
Molly: You are wrong, my father is not legally dead.

It seems difficult to deny that, as things stand, there is some oddity in what Molly just said. As noted, she has just been presented the evidence and did nothing to refute it. It would be puzzling if someone who has been presented irrefutable evidence to the contrary uses a disagreement marker as “you are wrong” without rejecting any of that evidence. To use a disagreement marker as “you are wrong” (or any other) in the given situation seems an inappropriate move in the conversation for Molly.\(^59\) It is not hard to imagine the conversation proceeding with Sally asking Molly “What do you mean I’m wrong?” If Sally and Molly were indeed having a disagreement, it should be appropriate for Molly to use any linguistic disagreement marker, since it seems inappropriate for her to use the disagreement marker “you are wrong”, then we have reason to think that between her and Sally there is no disagreement.

The conclusion to be drawn from the considerations above is that, since (2) and (2\(^*\)) are possible, incompatibility between the contents of mental states cannot be sufficient for (persistent) disagreement (over the content of the law).\(^60\)

**Possible objections**

Against the claim that incompatibility is not sufficient for disagreement, one can make various arguments. For instance, one may reject that it is possible that, in forming their beliefs, subjects not be motivated to gain accurate information about the world.\(^61\) In other words, one may claim that beliefs necessarily serve a representational function.

\(^59\) Other linguistic makers of disagreement identified by philosophers are the expressions “that is not true”, “that is false”, “I disagree”, “no”, “nuh-uh”, “nope”, etc. See (Huvenes, 2012; Sundell, 2011; Zouhar, 2018).

\(^60\) If you are still not convinced that (2) and (2\(^*\)) show that Sally and Molly don’t disagree, just imagine that Molly is completely delusional or even crazy. I take it to be intuitive that we don’t engage in disagreement with delusional or crazy people.

\(^61\) One may as well reject functionalism. Notice, however, that in so doing one doesn’t necessarily reject that there are some functions that beliefs serve. By rejecting functionalism, one rejects that types of mental states are individuated by their (actual and counterfactual) functions. It seems to me that, ultimately, all it takes for my argument to run is that one accepts that beliefs can serve different functions, independently of whether such functions are definitional of mental states. It is worth repeating that the claim that beliefs serve multiple functions is an empirical claim for which at present we have good evidence.
It is hard to imagine a non-circular argument in favor of that claim. Unless one assumes that for something to be a belief it needs to serve a representational function, there seems to be no reason to deny that there can be beliefs that fail to do so. Unless one assumes that if a mental state is a belief, then its formation must be explained by the pursuit of a representational goal, there is no reason to deny that the formation of a belief can be explained by the pursuit of some other non-representational goal(s). Moreover, as noted above, some theories in social psychology suggest, based on empirical data, that that is not the case; that is, research in psychology suggests that it is not true that subjects are necessarily motivated to attain accurate representations of the world when they form their beliefs. Rejecting the view that it is possible that beliefs not serve representational functions comes at an extremely high theoretical cost. On the one hand, we would be compelled to drop a good number of currently accepted theories in social psychology; on the other, we would have a hard time trying to accommodate the empirical data that allegedly support them. This cost can be avoided if we accept that sometimes, in forming their beliefs, individuals pursue non-representational goals.

One may argue that the hedonic function (and any other non-representational function) of beliefs implies the representational function.\footnote{I’d like to thank Claudio Michelon who pushed me on this point.} This consideration is a little more sophisticated version of the consideration in the preceding paragraph. It is another way of denying that beliefs might serve exclusively non-representational functions. I grant that if both Sally and Molly’s beliefs were to serve a representational function, it would be our intuition that they disagree in (2) and (2\*). It is true that, according to theory and research in social psychology, in most cases, multiple goals influence belief formation and change.\footnote{For instance, see (Kunda, 1990) and (Kruglanski, 1980).} In forming one belief, people can pursue, for instance, both representational and hedonic goals. However, theory and research in psychology doesn’t rule out the possibility of having only one goal influence the formation (or change) of our beliefs (they don’t rule out either the possibility of having multiple but exclusively non-representational goals influence belief formation).

One example of a theory that doesn’t rule out the possibility that beliefs serve only non-representational goals is the theory suggested by Boden and his associates. For them, it is possible that beliefs serve “primarily” one function; that function can be representational, hedonic or
other. Even if the term “primarily” may introduce some confusion, I take it to be clear that what they mean is that in such cases a belief serves \textit{exclusively} one function. In those cases, they say, only one function is salient. Boden et al make it clear that the only salient function a belief serves needs not be representational (it can be hedonic). If it is possible for beliefs to be formed or changed exclusively by virtue of hedonic goals, then it is false that the hedonic function implies the representational function.

Let’s say that my interpretation of the theory suggested by Boden and his colleagues is incorrect. Let’s say that by “primarily” they don’t mean “exclusively”. Even more, let’s say that none of the theories in social psychology that I reviewed earlier (or any others) support the claim that beliefs can serve exclusively some non-representational function(s). I claim that this still doesn’t show that the hedonic function implies the representational function (more generally, it doesn’t follow that serving a representational function is necessary for something being a belief). One reason to reject that implication is, once again, that there doesn’t seem to be a non-question-begging argument in favor of it. Unless one already accepts that, in forming a belief, if a person is motivated to achieve a hedonic goal, then she is motivated to represent the world accurately, there is no reason to accept so. As constantly noted, ultimately, the question of what goals motivate people in forming their beliefs (what functions a belief serves) is an empirical question. At least at first sight, it doesn’t seem empirically (nomologically) impossible that an individual might form a belief motivated exclusively by a hedonic goal (or, more generally, exclusively by a non-representational goal). For example, it seems empirically (nomologically) possible that, in forming her belief “God exists”, a person might have been exclusively in the business of regulating her emotions.

Suppose again that I’m wrong in thinking that, according to our empirical theories, it is possible that the formation of a particular belief is explained exclusively by virtue of non-representational goals. This doesn’t mean that our empirical theories support the contradictory claim. It doesn’t seem clear that, according to our empirical theories, beliefs must serve necessarily a representational function. If our empirical theories fail to either confirm or disconfirm that it is possible to explain belief formation by virtue of exclusively non-representational goals, then accepting such a possibility is an empirical bet but so would it be accepting that that it is impossible. Between

\footnote{See (Boden et al., 2016, pp. 401–402).}
these two bets the former seems more plausible to me. The reason is that possibilities always seem
easier to accept that impossibilities. To prove that beliefs serve necessarily a representational func-
tion (i.e., beliefs are formed necessarily by virtue of representational goals), one must show that,
in forming beliefs, it is empirically (nomologically) impossible that a subject be motivated exclu-
sively by some non-representational goal(s). To show that strikes me as a difficult task.

But even more so, even if it is true that the representational function is a necessary condi-
tion for something being a belief, it doesn’t necessary follow that Sally and Molly disagree in (2)
and (2*). It is possible to accept that beliefs necessarily serve a representational function and still
keep the intuition of no-disagreement in those cases. To show how this can be done, we need to
look once more at the explanation on how multiple functions can be integrated suggested by Boden
et al.

According to the model that Boden and his colleagues suggest for the integration of the
hedonic and representational functions, when beliefs fulfill both functions, they can do so in a
complementarily or a competitive way. For Boden et al, a belief that fulfills both functions com-
plementarily is successful at both accuracy and regulation of emotions. One example is the belief
“I didn’t get the scholarship because I didn’t put enough effort in my application”. This belief
could be an accurate representation of things and could lead a person to feel less anxious than she
would, were she to believe she didn’t get the scholarship due to other factors less easily changeable
and so more unpleasant. As understood in this thesis, the belief “I didn’t get the scholarship be-
cause I didn’t put enough effort in my application” serves complementarily a hedonic and a repre-
sentational function if, in forming it, a person is equally motivated to regulate her emotions and to
represent the world accurately.

I grant that if Molly’s belief in (2) and (2*) serve a representational and a non-representa-
tional function complimentarily, then (2) and (2*) do not take place as described. It seems hard
to accept that Molly might be motivated to represent the world accurately but keep her belief with-
out rejecting (some of) the evidence raised by Sally. If Molly is trying to get an accurate repre-
sentation of the world just as much as she is trying not to feel bad and still wants to keep her belief
after being presented contradictory evidence, she must reject some of it (that evidence). I grant
that if Molly does reject the evidence, the intuition of disagreement is not triggered.

65 Strictly speaking, if one accepts that beliefs serve necessarily a representational function, then one accepts that (2)
and (2*) as described are impossible.
On the other hand, according to Boden and his colleagues, beliefs can fulfill a representational and a hedonic function in a competitive fashion. They write that, in such cases, beliefs “…may be (a) more accurate than successful at regulating emotions, or (b) more successful at regulating emotions than accurate. In both cases, beliefs represent a trade-off between representational and hedonic functions.”

One example of a belief that may be more accurate than successful at regulating emotions is “my partner doesn’t love me anymore”. One example of a belief that may be more successful at regulating emotions at the expense of accuracy is “I will win the lottery”. As understood in this thesis, a belief serves a function A and a function B competitively when, in forming that belief, a subject was either more motivated to attain goal a than to attain goal b, or more motivated to attain goal b than to attain goal a. To say that a belief serves a function a at the expense of a function b is to say that, in forming such a belief, a subject is more motivated to achieve goal a than to achieve goal b. I grant that if Molly’s belief serves competitively a representational function at the expense of its hedonic function (if she was more motivated to be accurate than to regulate her emotions), (2) and (2*) do not occur as described. Like before, the reason is that if Molly is more motivated to gain accurate information about the world than to regulate her emotional state, she cannot keep her belief without rejecting (some of) the evidence; thus, those would be cases in which Molly either rejects some of the evidence or modifies her belief. As noted earlier, I take it that cases where Molly rejects the evidence fail to trigger the intuition of no-disagreement.

Nonetheless, if Molly’s belief serves competitively a hedonic function at the expense of accuracy, (2) and (2*) take place as described and the intuition that she and Sally don’t disagree is triggered. In other words, if Molly is more motivated to regulate her emotional state than to get an accurate representation of the world, then it is intuitive that she disagrees with Sally. That’s because insofar as Molly is willing to give up on accuracy in exchange for mood regulation (if she is more motivated to release anxiety than to be accurate), it seems plausible to think that she could keep her belief without contesting any of the irrefutable evidence that she has been presented with. As noticed, it seems intuitive that two subjects don’t engage in disagreement when one of them is not responsive (by either rejecting the evidence or modifying her belief) to disconfirmatory evidence.

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66 (Boden et al., 2016, p. 402)
The conclusion to be drawn from these observations is that, even if it were true that beliefs serve necessarily a representational function, it is still possible that in scenarios like (2) and (2*), Sally and Molly don’t disagree. Put differently, even if it is true that, in (2) and (2*), Molly’s belief serves both a representational and a non-representational function, it doesn’t follow that necessarily she and Sally disagree. To repeat, they don’t disagree if Molly’s belief serves a hedonic function at the expense of its representational function.

One more thing one might argue against the analysis of (2) and (2*) is that Molly’s belief “my father is not legally dead” wouldn’t accomplish its hedonic function—i.e., decrease an unpleasant emotional state—, unless she takes it to be true. How could that belief help her feel any better if she thought it false? Notice that the claim is not about the truth of Molly’s belief. There is no reason to think a hedonic belief cannot serve their function unless it is true. The claim is also not about what Molly takes the function of her belief to be. As pointed out by Mauss et al, the goals that influence belief formation and change need not be conscious and are often pursued through unconscious processes. The claim is about Molly’s taking it that her belief is true. One might claim that if Molly takes her belief to be true, she and Sally disagree.

To argue against the claim that Molly and Sally disagree because Molly (necessarily) takes her belief to be true, we should clarify first what taking a belief to be true is. It seems to me that a natural way to understand the expression “taking a belief to be true” has to do with a further belief a subject might have towards the belief that is thus taken. In this sense, if you take your belief to be true, you believe (you have a second order belief) that your belief is true. Thus understood, the claim that a belief cannot serve a hedonic function unless it is taken to be true is unwarranted. It seems right to say that a belief cannot serve a hedonic function if it is taken to be false. If I think that my belief “there is an afterlife” is false, then seemingly that belief cannot help me feel less anxious with respect to the thought of my future death. But from here it doesn’t follow that a belief cannot serve a hedonic function unless it is taken as true. People might simply fail to entertain any attitudes towards their beliefs. A person could have no dispositions towards a particular belief and still have that belief serve (successfully) a hedonic function. Molly

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67 Strictly speaking, it is the truth value of the content of beliefs what is at stake here. A belief is true, I take it, when its content is true, and false when its content is false.
68 See (Mauss et al., 2007).
69 To think otherwise would lead to the implausible conclusion that belief systems are infinite. If every time I have a belief, I also have a belief that that belief is true, then I must also have a belief that the latter belief is true, and so on.
could simply lack any dispositions towards her belief “my father is not legally dead” at the moment of expressing it, and still that belief could help her decrease a negative emotional state. At least, there is no reason to think this cannot be the case.

But perhaps “taking a belief to be true” should not be understood as having a second order belief about it. Perhaps in saying that a person takes her belief to be true all that one means is that, in having that belief, that person takes its content to be true.\textsuperscript{70} It is hard to see how accepting this would lead to the conclusion that Sally and Molly necessarily disagree in (2) and (2*). In believing that “the sky is not blue”, a totally delusional person might be taking that content to be true; however, it doesn’t seem right to say that she would have a disagreement with us if we, aiming at representing the world accurately, would believe that “the sky is blue”. Intuitively, we don’t engage in disagreement with delusional people. In a similar vein, it seems intuitive that one doesn’t have a disagreement with someone who has been presented evidence to the contrary but, without rejecting any of the evidence, doesn’t modify her belief. That is so even if in having that belief that person takes its content to be true.

The claim that a belief cannot serve a hedonic function unless necessarily that belief is taken to be true (by the subject that holds it) would show that in (2) and (2*) Sally and Molly do disagree, only if by “taking a belief to be true” we mean something that is contradictory (or entail a contradiction) with the claim that it is possible that beliefs not serve a representational function (or the claim that it is possible that beliefs serve a non-representational function at the expense of their representational function). Only if by “taking a belief to be true” you mean that in forming a belief a subject is necessarily (be that exclusively or not) motivated to attain accurate information about the world, then it would follow from accepting that a belief cannot serve its hedonic function unless it is taken to be true, that Sally and Molly disagree in (2) and (2*). Whether the claim that beliefs do not necessarily serve a representational function—which is necessary for the claim that Sally and Molly don’t disagree in (2) and (2*)—and the claim that a belief cannot serve a hedonic function unless it is taken to be true—which is supposedly necessary for the claim that Sally and Molly disagree in (2) and (2*)—are inconsistent, depends on how you understand "S takes P to be true". If you think that “taking a belief to be true” is (or entails) to be necessarily motivated by

\textsuperscript{70} I’d like to thank Anthony Duff who pushed me on this point.
representational goals (or impossible to be more motivated to attain some non-representational goal than a representational goal), then those claims are inconsistent; otherwise, they are not.

Suppose that there is inconsistency between those claims. If so, the reasons to accept that beliefs might not serve a representational function are the ones mentioned above. First, the idea that beliefs need not serve a representational function fits better alongside a good deal of theories in social psychology that are said to be supported by empirical data. Unless you are willing to cast doubt on those theories and able to accommodate the empirical data that support them, you have reason to reject that beliefs serve necessarily (and/or exclusively) a representational function. Second, even if our empirical theories are inconclusive about the matter, accepting that it is possible that beliefs serve exclusively non-representational functions is easier than accepting that it is impossible. Lastly, there doesn’t seem to be reason that is not question begging to think that beliefs serve necessarily (and exclusively) a representational function. If these observations are in the right track, we must conclude that we still have reason to think that in (2) and (2*) Sally and Molly don’t disagree.

Finally, to reject that Sally and Molly don’t disagree, one can argue that scenarios like (2) and (2*) as described are impossible. I don’t see why this must be the case. A scenario in which Molly doesn’t contest any of the evidence and still hold on to her belief that her father is not dead seems certainly possible to me. In not modifying her belief in accordance with the evidence without rejecting it, Molly might be irrational, psychotic, delusional, or simply crazy. Being irrational, psychotic or delusional are certainly (possible) features of human beings. If Molly is irrational, psychotic or delusional, the idea of lack of disagreement between her and Sally seems to be even reinforced, although this is not the point. The point is that there is no reason to think that (2) and (2*) cannot occurred as described. That is, there is no reason to think they cannot exist as cases in which Molly believes “my father is not legally dead” despite being presented incontrovertible evidence to the contrary that she doesn’t contest. To repeat, I hold that (2) and (2*) as described trigger the intuition of no disagreement.

The observations in this subsection, if correct, support the view that, in (2) and (2*), Sally and Molly don’t disagree. More generally, they show that incompatibility between the contents of two beliefs is not sufficient for having a (persistent) disagreement (over the content of the law). I will argue now for the claim that incompatibility between the content of beliefs is not necessary for (the) disagreement (over the content of the law in PLD).
4.3 Incompatibility Is not Necessary for Disagreement

Consider the following dialogue:

(3)

John: Legally, Jackson is entitled to inherit.
Robert: Legally, Jackson is not entitled to inherit.

Suppose John and Robert are judges deciding a case. Suppose John and Robert agree about all relevant non-legal issues. Suppose that, by their utterances, the mental states they both express are beliefs. While John believes that “legally, Jackson is entitled to inherit”, Robert believes that “legally, Jackson is not entitled to inherit”. Suppose that both beliefs serve exclusively a motivational function such that while the formation of John’s belief is explained by him being motivated to award the inheritance to Jackson, the formation of Robert’s is explained by him being motivated not to. Finally, to avoid unnecessary complications, suppose that by “legally” John and Robert mean different things, and thus, that the contents of their beliefs are compatible.71

I take it that, intuitively, in (3) John and Robert disagree. Intuitively, John and Robert disagree about whether Jackson is entitled to inherit. This is easier to see if we suppose further that, when the time comes to make a decision, they cast votes in opposite directions. Let’s say that while John votes to award the inheritance, Robert votes to deny it. It is hard to think that in a situation like that there is no disagreement or that the disagreement between John and Robert is not about the legal status of Jackson (more generally, that it is not about the content of the law in this particular case).

Here is some reason in favor of the intuition of disagreement in scenarios like (3). Let the facts be the same but now imagine that, before having their exchange, John and Robert find out that by “legally” they mean different things. Again, imagine that both judges are part of the same

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71 It would be more precise to describe the contents of the beliefs of John and Robert respectively as “legally1, Jackson is entitled to the inheritance” and “legally2, Jackson is not entitled to the inheritance”.
court and that, when the time comes to reach a verdict, moved by their respective beliefs, they vote in opposite directions. Now, consider the following exchange:

(3*)

John: Legally—and by “legally” I mean something different than Robert—Jackson is entitled to inherit.
Robert: I disagree, legally—and by “legally” I mean something different than John—Jackson is not entitled to inherit.

Nothing in this linguistic interaction strikes me as odd. That is so, even if both John and Robert are aware that they mean different things by “legally”. I fail to see any reason why the use of a linguistic marker of disagreement like “I disagree” (or any other) wouldn’t be an appropriate move in the conversation for Robert. Even if they are aware of the different ways in which they use “legally”, there is an intuitive sense, I believe, in which they would be able to express disagreement by engaging in such an interaction; it is worth highlighting here that they even ended up carrying out actions that go in opposite directions. It seems intuitive that their carrying out those actions evinces a disagreement. That disagreement seems to be about whether Jackson is legally entitled to inherit (as opposed to, for instance, a disagreement about what “legally” means). It is because they have conflicting views over what is the content of the law in this particular case that they take diametrically different courses of action when solving it.

If these considerations are correct, then (3) and (3*) are cases where disagreement is constituted by two beliefs whose contents are not incompatible. If this is correct, then incompatibility between contents cannot be necessary for disagreement.

Possible objections

There are several arguments one may advance against the view that in (3) and (3*) John and Robert disagree. For instance, one may argue that it is precisely because the contents of the beliefs that they express are compatible, that they don’t disagree. But to say this begs the question. Unless you have accepted the idea that disagreement is a relation between beliefs with
incompatible contents, the fact that the contents of the beliefs (about the legal status of Jackson) of John and Robert are compatible is not a reason to reject that in (3) and (3*) they disagree (over whether it is the law that Jackson be entitled to inherit).\footnote{Carl Baker has made a similar argument. See (Baker, 2014).}

This idea is not entirely new in philosophical discussion. That disagreement can exist notwithstanding compatibility between endorsed contents has recently been suggested by a rapidly growing literature.\footnote{See (Huvenes, 2012; MacFarlane, 2014; Zouhar, 2018).} To make the case for this idea philosophers look at interactions like the following:

\begin{enumerate}
\item X: I like this chili.
\item Y: Nop, I don’t like it, it is too spicy for me.
\end{enumerate}

A number of philosophers have suggested that, even if we accept that the contents of the attitudes expressed by both utterances is compatible, as it is indexicalized, there is a (intuitive) sense in which speakers in (4) disagree.\footnote{See (Huvenes, 2012, 2014; Zouhar, 2018).} This example is relevant for our purposes because (4) is similar to (3) and (3*) in that it involves beliefs with compatible contents; it is an example in which there is disagreement without incompatibility.

One note before moving further: One might wonder why (the contents of) likings (and other non-cognitive) attitudes are said to be indexicalized but beliefs are not. There are (at least) two (non-definite) reasons to support this idea. The first reason comes from an admittedly controversial interpretation of some linguistic data. It is a fact that speakers can express their beliefs by making utterances of declarative sentences. Typically, the semantic contents of those utterances (is taken to) match the contents of the beliefs that subjects use those utterances to express. Typically, in uttering “the sky is blue”, I express a belief that has the content “the sky is blue”. The content of my belief matches the semantic content of my utterance.\footnote{Clearly, this is not necessarily the case. Sometimes the contents of the beliefs we aim to express with our utterances matches the pragmatic, not the semantic, contents of those utterances. This is part of the reason why I don’t take this argument to give conclusive reason for the idea that the content of likings is indexicalized.} Other attitudes can also be expressed by uttering declarative sentences. Attitudes like likings are expressed by sentences of the form “I
If you hold that the content of a liking attitude is not indexicalized, then you are committed to deny that the content of likings matches the semantic content of the utterances we typically use to express them. You would be saying that the semantic content of my utterance “I like this chili” necessarily doesn’t match the content of my attitude *liking this chili*. If that’s your view, now you owe us a non-ad hoc explanation of why beliefs can be expressed by utterances whose semantic contents match their contents (of those beliefs) but likings cannot. No explanation of that type is needed if you accept that the content of the liking expressed by an utterance of “I like this chili” is “I like this chili”.

The second reason pertains to the type of content that we might want likings to have. Let’s assume that the content of a liking attitude is a piece of structured information just like the content of beliefs. As described in chapter 1, in its most basic form, the structure of that informative content comprises a predicate and a term that designates something (or someone) to which the property picked up by that predicate is attributed. Now, what would be the (intentional) content of my attitude *liking this chili*? There seems to be two ways to answer this question. One way is to say that the content of likings includes the indexical expression that refers to the subject of the liking “I”, the verb “like” and the thing that is liked (e.g., this chili). Another way is to say that the content of such attitudes doesn’t not include the indexical “I” (regardless of whether it includes a verb) but something else. If we want to keep our assumption that the contents of likings are just like the contents of beliefs, then we might as well just accept that the contents of likings include the indexical term and the attitude verb. In other words, you wouldn’t be able to claim that likings and beliefs have the same type of contents (in terms of their minimum structure) unless you accept that the contents of likings is indexicalized. It might be worth noticing that the content of beliefs doesn’t need to include the indexical term “I” and the verb “believe” to have a content that comprises a subject and a predicate. The content of a belief “the sky is blue” already comprises a predicate and a term designating the thing of which that predicate is predicated.

But perhaps the intentional content of my liking attitude *liking this chili* is not “I like this chili” but simply “this chili”. Notice that by accepting that, one doesn’t argue in favor of the

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76 Strictly speaking, this is not true. You could still argue that the content of likings doesn’t include the indexical that refers to the speaker but includes other term that designates something (or someone) of whom the predicate is predicated. The challenge for someone who argues that is to come up with a plausible characterization of which that term might be.
content view but against it. If the content of a liking attitude doesn’t encode information that can be assessed as true or false (correct or incorrect), and it is intuitively possible, as it seems to be, to have disagreements that involve likings, then disagreement cannot be a relation that obtains when there is incompatibility between contents. If the content of my liking this chili is simply “chili” and the content of your not liking this chili is just “chili”, and if in holding those attitudes we disagree (as intuitively it seems we do), then our disagreement must be something different from a relation that obtains between incompatible contents. Moreover, if you think that likings are the same type of attitudes as beliefs in terms of the type of contents they have, but still deny that the contents of likings are indexicalized, you owe us an explanation of what the contents of likings might look like.

Let’s get back to disagreement. It might be argued that it is irrational for John and Robert to disagree about whether Jackson is entitled to inherit in the face of their agreement that there is a linguistic difference between them. Unless we are willing to accept the irrationality of disagreement, the argument would go, we have reason to reject that people disagree in situations like (3) and (3*). I aim to remain noncommittal as to whether disagreement must be rational. However, it seems to me that saying that two individuals disagree despite being aware of a linguistic difference between them doesn’t entail that disagreement is irrational. It is certainly irrational for two people who pursue representational goals to keep up their disagreement upon realization that both their beliefs may be accurate representations of the world. If, as a representation of things, I believe that “banks are dangerous places” and you believe that “banks are not dangerous places”, and by “bank” I mean “a financial institution” while you mean “the land alongside a river”, intuitively, it would be irrational for us to keep pretending we are having a disagreement after realization that, since we are thinking of different kinds of banks, both our representations could be accurate.

However, disagreement in the face of agreement about the compatibility of (the contents of) our beliefs doesn’t seem to be irrational when, in having the beliefs we do, we are motivated by non-representational goals. It is easy to appreciate this point if we look at other attitudes with non-representational functions. Why would it be irrational for a couple to hold two preferences with compatible contents when trying to find a name for their newborn baby upon realization of such compatibility? Two parents are not irrational if one endorses the attitude “I prefer the baby’s name be Alexander” and the other endorses the attitude “I prefer the baby’s name be Peter” even after realization that the content of their preferences is compatible (as it is indexicalized). Insofar
as the function that our beliefs serve is not representational, the realization that our attitudes have compatible contents bears no import on the rationality of an instance of disagreement. Thus, accepting that John and Robert disagree despite being aware of a linguistic difference between them doesn’t entail that their disagreement is irrational.

One may argue that disagreement can only arise between representational beliefs. Then, John and Robert don’t disagree in (3) and (3*). Once again, I fail to see any reason in favor of such a claim that doesn’t presuppose a particular characterization of disagreement. Even more, to claim that people can engage in disagreement only when they pursue representational goals seems to be counterintuitive. As mentioned, although contested, there is a growing philosophical literature according to which there is disagreement in situations in which people hold non-representational attitudes.\footnote{For instance, some philosophers accept that there may be disagreement that involves non-cognitive attitudes. See (Huvenes, 2012; Zouhar, 2018).} To further explain this idea, let’s have another look at (4). Speakers in that interaction seem to disagree, and their disagreement seem to involve some attitudes that don’t aim at depicting the world accurately; instead, it is natural to understand speakers as expressing some likings they have. Notice that even if we accept that the attitudes expressed by the parties in (4) are beliefs that serve a representational function, it is not the case that the contents of those beliefs are incompatible. Accepting that disagreement can only emerge among representational beliefs, plus the content view, would lead to the implausible conclusion that, in (4), speakers don’t disagree. There is reason then to reject that disagreement must involve representational beliefs.

One more thing one may argue for the conclusion that in (3) and (3*) speakers don’t disagree is that the dispute between John and Robert is (merely) verbal.\footnote{It’s argued that there is a distinction between verbal disputes and merely verbal disputes. See (Jackson, 2014; Jenkins, 2014). I take this distinction to be innocuous to my claims.} For present purposes, it will suffice to understand verbal disputes along the lines suggested by David Chalmers. According to Chalmers, “…a dispute between two parties is verbal when the two parties agree on the relevant facts about a domain of concern and just disagree about the language used to describe that domain.”\footnote{(Chalmers, 2011, p. 515) Chalmers characterization has been criticized by Carrie Jenkins. See (Jenkins, 2014).} The fact that parties agree on the relevant facts about a domain of concern amounts to

\footnote{It is worth noticing that Chalmers does not account, at least not explicitly, for the distinction between disputes and disagreements. I suspect that the failure to consider such a distinction generates a good deal of imprecision in his exposition of ideas, specially once the distinction is introduced. I’m afraid my presentation of Chalmers’ view is permeated with the same imprecisions.}
their lack of disagreement over that particular domain of concern.\textsuperscript{81} The argument then would claim that, in (3) and (3*), even though John and Robert seem to disagree about the legal status of Jackson, they don’t, they actually agree on that. It would be claimed that, in both disputes (3) and (3*), the judges rather disagree exclusively over the meaning of “legally”.

The conclusion that in situations like (3) and (3*) individuals agree over the content of the law strikes me as implausible. For one thing, if judges John and Robert agree about Jackson’s legal status, why would they take contrary courses of action when reaching for a verdict? To repeat, as the example stands, John is motivated to concede the inheritance and Robert to deny it. It seems to me that the fact that they carried out such actions is evidence that they don’t agree over the content of the law (over the legal status of Jackson).

Lastly, another thing that one can argue to deny that in (3) and (3*) John and Robert disagree and the contents of the attitudes involved by their disagreement are compatible is that, as presented, both cases are under-described. That is, one can accept that scenarios (3) and (3*) are indeed instances of disagreement and that those scenarios might involve attitudes with compatible contents, but deny that those two compatible attitudes constitute the disagreement, and claim instead that the disagreement is constituted by other two attitudes with incompatible contents which the description I have suggested ignores. For instance, one might argue that while John’s action of conceding the inheritance entails that (besides having the belief “legally, Jackson is entitled to inherit”) he has an attitude with the content “I ought to award the inheritance”, Robert’s action of denying the inheritance entails that (besides having the belief “legally, Jackson is not entitled to inherit”) he has an attitude with the content “I ought not to award the inheritance”. One would claim then that there is disagreement between John and Robert because the contents of those entailed attitudes are incompatible, without denying that John and Robert might have two beliefs with compatible contents. Someone who argues in this way would claim that, by ignoring the entailed attitudes, the appearance of compatibility in the description I suggested was artificially manufactured.

\textsuperscript{81} It is typically claimed that in verbal disputes parties do not really or substantively disagree. Such a claim suggests the following two ideas: parties to a verbal dispute seem to disagree; and they don’t disagree. According to Jenkins, there are two ways to cash out the idea of the absence of disagreement. First, there is no disagreement when the disputants’ beliefs (their contents) are compatible. Second, there is no disagreement when parties agree on the facts. As noted, we have no non-begging reason to think that there cannot be disagreement when beliefs are compatible; so, for expository reasons, I’ll focus on the suggestion of factual agreement. See (Jenkins, 2014, p. 14).
Notice, any objection that claims that (3) and (3*) as presented are under-descriptive cannot be successful unless it is impossible that (3) and (3*) take place in the exact way I described them. In other words, for any objection along those lines to be successful, it must be impossible that the description I have suggested is a complete description. Thus, to probe the objection wrong one needs to show that it is indeed possible for my description of (3) and (3*) to be complete. I fail to see any non-question begging reason to deny that possibility. For example, there doesn’t seem to be any non-question begging reason to accept that intentional action entails the instantiation of ought attitudes. Why would that be necessarily the case? I can’t imagine a non-circular answer to this question. What is more, the implication from action to ought attitudes seems to be blatantly false. It is easy to see that intentional action doesn’t entail ought attitudes; think for instance of the action of taking a step while walking. It just sounds implausible to think that one necessarily has the attitude “I ought to move my right feet forward” every time one takes a step. The conclusion to be drawn from these observations is that (3) and (3*), as described, are possible and thus that they illustrate that there can be disagreement without incompatibility of contents.

The observations in this subsection, if correct, give reason to accept that, in (3) and (3*), John and Robert have a (persistent) disagreement (over the content of the law) even if the contents of their beliefs can be both true at the same time. More generally, (3) and (3*) show that incompatibility between contents is not necessary for disagreement.

To sum things up, in this section, I have argued that scenarios (2) and (2*) show that incompatibility between the content of two beliefs is not sufficient for PLD and that scenarios (3) and (3*) show that it is not necessary. These observations draw on the idea, suggested by psychologists, that beliefs may serve different functions. If my observations are correct, the content view is mistaken. Because the content view is mistaken, we need a new way to understand (the) disagreement (over the content of the law in PLD). To provide such a new account of (the) disagreement (over the content of the law in PLD) is what I aim to do in the following section.

5. A New Approach

In this section, I will develop an alternative account of (the persistent) disagreement (over the content of the law in PLD). This account earns its keep largely by the fact that it emerges as the obvious approach once we understand why the content view is mistaken. As seen, a body of
empirical research in social psychology suggests that beliefs may serve different functions. Since there is no reason to reject that disagreement may arise among all functions, our conception of disagreement must be broad enough to include at least two cases: disagreements where the attitudes involved serve representational functions, and disagreements where they serve non-representational functions. The content view fails to do that. The conception of disagreement that I’ll suggest in this section accommodates, as the content view does, disagreements that involve representational functions, but, unlike the content view, it also accommodates disagreements that involve non-representational functions.

5.1 The Functionalist View of Disagreement in General

As seen, according to the content view, the relation involved by disagreement obtains when the contents of two attitudes cannot be true at the same time. A relation between the truth value of the content of attitudes might be relevant for disagreement when, in having the attitudes they do, subjects are motivated to achieve representational goals. But, as argued in the previous section, when attitudes serve non-representational functions, the relation between the truth values of their contents doesn’t seem to be relevant for disagreement.

Those observations point towards the idea that disagreement (more specifically, the disagreement over the content of the law in PLD) is sensitive to the functions of attitudes. It is precisely because, when pursuing representational goals, two subjects are motivated to attain accurate information, that they disagree only if the contents of their beliefs cannot be simultaneously accurate. By contrast, when, for instance, two subjects’ beliefs serve motivational functions, the relation between the accuracy of the contents of their beliefs has no bearing on whether those subjects may engage in a disagreement. Instead, given that a belief serves a motivational function when, in forming it, a subject pursues the goal of performing an action (which will bring about a state of affairs), two individuals who hold motivational beliefs seem to disagree only if the two states of affairs to which their actions would give rise cannot coexist. As can be seen, there is one thing that the representational and the motivational case have in common: disagreement is sensitive to function. Let’s flesh out these ideas.

I claim that the functions that attitudes serve modify the conditions that must obtain for disagreement to arise. Different functions entail different conditions. Here is a precise statement
of what I call the functionalist view of disagreement. According to the functionalist view of disagreement:

Two individuals A and B disagree if, and only if,

(i) A holds attitude X and B holds attitude Y.
(ii) X and Y serve the same function(s).
(iii) If X and Y serve (exclusively or complementarily) a representational function, then (a) X and Y cannot be both accurate representations of the world; and (b) there is coordination between A and B.
(iv) If X and Y serve (exclusively or complementarily) a motivational function such that X would motivate A to perform conduct P and Y would motivate B to perform conduct Q, then the state of affairs that A gives rise to in doing P and the state of affairs that B gives rise to in doing Q cannot exist simultaneously.
(v) If X and Y serve (exclusively or complementarily) a hedonic function such that X makes A feel more/less anxious/cheerful/etc. and Y makes B feel more/less anxious/cheerful/etc., then (a) if A held Y, Y would cause in A the opposite emotional reaction from that caused by X, and if B held X, X would cause in B the opposite emotional reaction from that caused by Y; and (b) there is coordination between A and B.

Some clarifications about this definition are in order. First, there is a sense in which the definition is incomplete. It doesn’t include the conditions for all functions that attitudes might serve. The definition is limited to the representational, motivational and hedonic functions because, as noted, those functions are the only ones that are relevant for our purposes in this chapter. If attitudes serve more functions, the definition needs to be complemented.

To be explicit, an individual A holds a belief X if she instantiates that belief. In other words, A holds X if she accesses X from long term or working memory. In the sense relevant for an analysis of disagreement, holding a belief is not only for that belief to be part of somebody’s belief system, but for that person to access that belief at the time at which the disagreement takes place. In short, disagreement is a relation between tokened attitudes.
As can be appreciated, conditions (iii) and (v) appeal to a notion I haven’t discussed yet; that is the notion of *coordination*. I’ll develop the notion of coordination at full length in chapter 4. For now, it suffices to say that two individuals coordinate only if their respective attitudes are about the same things, and they (those individuals) are able to realize they (their attitudes) are.

The last clarification about the functionalist definition of disagreement is that there is a sense in which condition (iv) lacks specificity. What is the state of affairs that an action brings about? Imagine I change gears from second to third. What exactly is the change that I have introduced into the world? Is it the change of position of my hands and feet? Is it the change of position of the stick? Is it the change I caused in the engine? Is it all of that? Describing the results of our actions in terms of the changes they introduce into the world is as problematic as describing actions themselves. It goes beyond the limits of this thesis to solve this problem. I admit that this answer is unsatisfactory but, since I share this theoretical burden with all theories that are concerned with actions and their results, I take it that this answer being unsatisfactory doesn’t give a reason (at least not enough reason) against the functionalist view.

Before proceeding let me make an important reminder: as noted earlier, as understood in this thesis, to say that an attitude *serves* its function is to say that a particular causal relation *does* obtain. For example, a belief *serves* a representational function if what explains why that belief was formed is that the subject who has it is motivated to attain an accurate representation of the world. As mentioned, being motivated to achieve a certain goal is not the same (it doesn’t entail either) as achieving it. Thus, for example, false beliefs can still serve representational functions. Certainly, a subject can be motivated to attain an accurate representation of the world and fail at getting it.

*The functionalist view at work*

It seems to me that, contrary to the content view, the functionalist definition of disagreement doesn’t yield counterintuitive results. To illustrate this point, let’s look at some cases of disagreements that involve motivational beliefs. Imagine that an individual A believes “I’m hungry”. Imagine that such belief was formed exclusively because A is motivated to eat. Imagine that an individual B believes “The sky is blue”. Imagine that such belief was formed exclusively because B is motivated not to eat. Thus, A is motivated to eat, and B is motivated not to eat. It doesn’t
follow from our definition of disagreement that those subjects disagree. The reason is that the state of affairs that A would bring about with her action (A eating) and the state of affairs that B would bring about with her action (B eating) can both exist simultaneously. This result seems intuitive.

Now consider the following two scenarios. Individual A believes “there is a gosht in this room”. The formation of that belief is explained exclusively by A being motivated to turn on the light. Individual B believes “having the light on is bad for the environment”. That formation of that belief is explained exclusively by B being motivated to turn off the light.

Scenario (a)

A is in her room in Edinburgh.
B is in her room in Glasgow.

According to the functionalist definition of disagreement, A and B do not disagree. A having the light on in Edinburgh and B having the light off in Glasgow are two states of affairs that can perfectly coexist. This result seems intuitive.

Scenario (b)

A and B are in the same room at the same time.

According to the functionalist view, A and B disagree. A having the light on cannot coexist with B having the light off. This disagreement could manifest, for instance, in the following way: Imagine that A turns the light on; after that, B turns the light off; after that, A turns the light back on and after that, B turns the light back off. Imagine that A and B don’t say a single word during this whole interaction. That A and B disagree, once again, seems intuitive.

Lastly, imagine that an individual A believes “it is raining outside”. Imagine that another individual B believes “it is not raining outside”. Imagine that what explains the formation of A’s belief is exclusively that she is motivated to stay inside and what explains the formation of B’s belief is exclusively that she is motivated to go outside. According to the functionalist view, since the states A goes out and B stays inside can both exist at the same time, this situation is not an
instance of disagreement. Is this a counterintuitive result of the functionalist approach? I think not. If you accept that both beliefs in the example serve *exclusively* a motivational function, it shouldn’t seem counterintuitive to say that those individuals don’t disagree. The intuition of disagreement in a case like this only arises if one still thinks that disagreement is a relation between incompatible contents or if one thinks that those beliefs serve a representational function. We can imagine a dialogue in which the first person utters “it is raining” while making herself comfortable at a couch, while another utters “it is not raining” while closing the door on her way out, but none of them experience the feeling of disagreement nor do anything to correct the other person’s position; they just accept what the other is doing. Our intuition, I take it, would be that in this case those individuals don’t disagree.

It would take so much time and space to illustrate how the definition avoids counterintuitive results across all different types of cases regarding all types of functions. Hopefully the examples above are enough to show that it does. To defend the functionalist view, the burden of proof, it seems to me, is no longer on its advocates.

5.2 The Functionalist View of PLD

To conclude this chapter, I will make explicit how the functionalist view makes sense of (the disagreement over the content of the law in) PLD. To account for the disagreement over the content of the law in PLD from a functionalist perspective, all we have to do is to add an extra condition to our definition of disagreement. That condition could be formulated as follows:

(vi) X and Y are attitudes about the content of the law in a specific jurisdiction at a given time.

It should be easy to appreciate that, contrary to the content view, the functionalist approach is compatible with our intuitions regarding scenarios (2), (2*), (3) and (3*). To illustrate how that is so, consider again exchange (2) (restated here as (5)):

(5)
Sally: Your father is legally dead.
Molly: My father is not legally dead.

and exchange (2*) (restated here as (5*)): 

(5*)

Sally: Your father is legally dead.
Molly: That is false, my father is not legally dead.

Let those cases be the same as before. As argued, intuitively, Sally and Molly don’t disagree in either of those situations. The reason is that, while the belief expressed by Sally serves a representational function, Molly’s belief serves a hedonic function. In such situations, condition (ii) in our definition of disagreement doesn’t obtain. Hence, according to the functionalist view, there is no disagreement between Sally and Molly. The functionalist conception of disagreement is compatible with our intuition of lack of disagreement with respect to both scenarios (5) and (5*).

The functionalist approach is also compatible with our intuitions regarding situations like (3) (restated here as (6)):

(6)

John: Legally, Jackson is entitled to inherit.
Robert: Legally, Jackson is not entitled to inherit.

and (3*) (restated as (6*)): 

(6*)

John: Legally, Jackson is entitled to inherit.
Robert: I disagree, legally, Jackson is not entitled to inherit.
As argued, intuitively, in these cases, John and Robert disagree over whether Jackson is entitled to inherit; even though John and Robert have different understandings of what “legally” means. As the examples were formulated, judge John and judge Robert’s beliefs serve a motivational function. That is, the formation of judge John’s belief “Jackson is legally entitled to inherit” is explained by him being motivated to concede the inheritance, and the formation of judge Robert’s belief “Jackson is not legally entitled to inherit” is explained by judge Robert being motivated not to concede it. The action of judge John conceding the inheritance would make the world such that Jackson receives the inheritance (or that it is the law that he does). The action of judge Robert of not conceding the inheritance would make the world such that Jackson does not receive the inheritance (or that it is the law that he doesn’t). Those two states of the world cannot coexist. Therefore, according to the functionalist approach judge John and judge Robert disagree. Once again, the functionalist analysis of persistent disagreement proves compatible with our intuitions.

6. Conclusion

In this chapter, I have argued that conceiving of disagreement as a relation that obtains when the contents of two attitudes are incompatible is a mistake. I have suggested, and argued for, an alternative account of disagreement. According to this account, disagreement is sensitive to the function of attitudes. By suggesting an approach of what it takes for two attitudes to enter the relation of disagreement (particularly, the relation involved by the disagreement over the content of the law in PLD), we address one of the substantive issues about which the description of the structure of PLD presented in chapter 1 was silent. That was my main purpose in this chapter. In the next chapter, I’ll address the second issue that the description of the structure of PLD left unresolved. That is the issue of what types of attitudes are involved by the disagreements that constitute PLD.
Chapter 3. Persistent Legal Disagreement and Attitudes

In this chapter, I argue for the claim that the attitudes that constitute both disagreements involved by persistent legal disagreement (PLD) are cognitive. By doing so, I aim to fill the second substantive gap left by the description of the structure of PLD suggested in chapter 1. To support my claim, I argue against its contradiction: such attitudes are non-cognitive. My argument is premised on the observation that the disagreements that make up PLD are not faultless. For all instances of both disagreements that make up PLD, if a disagreement is not faultless, then it involves cognitive attitudes, or so I argue.

1. Introduction

In chapter 1, I suggested a description of the structure of persistent legal disagreement (PLD). According to such description, PLD is formed by two disagreements: a disagreement over the content of the law and a disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY. The description is silent about two substantive issues. The first issue pertains to the relation of disagreement itself: the description isn’t committed to any views on the conditions that must obtain for a disagreement to take place. I addressed this issue in the previous chapter; there, I argued that the relation of disagreement is sensitive to the function of attitudes. The second issue pertains to the type of attitudes that constitute the disagreements that form PLD: the description of the structure of PLD is silent as to whether they are cognitive or non-cognitive. My purpose in this chapter is to tackle this question.

In philosophical discussion, it is common to distinguish between two types of attitudes: cognitive (doxastic) and non-cognitive (non-doxastic). The question of what type of attitudes is involved by the disagreements that constitute PLD has not been explicitly addressed in legal philosophy;¹ yet, the question of whether those attitudes are cognitive or non-cognitive is relevant.

¹ A possible exception is Kevin Toh. Toh has famously suggested that (committed) legal statements are expressions of a non-cognitive attitude he calls plural acceptance of a norm. His argument in favor of such view draws on observations about persistent disagreements. However, strictly speaking, Toh’s analysis is not an analysis of legal persistent disagreements. It is rather an analysis of (the meaning of) legal statements supported by a disagreement-based argument. I’ll say more on this below. See (Toh, 2005, 2008, 2011).
The question is relevant to the extent that a characterization of PLD cannot be complete without an answer to it. Another reason (less important for our purposes here) for the relevance of the question is that the answer might bear consequences regarding other debates in legal philosophy; for instance, the debate around the meaning of legal statements (if the attitudes involved by PLD are cognitive, then legal there is reason to reject that the meaning of legal statements is a non-cognitive attitude expressed by the speaker). My aim in this chapter is to show that the attitudes that constitute each of the disagreements that make up PLD are cognitive.

Before proceeding, there is one clarification worth making. As in the previous chapter, for ease of exposition, I will focus exclusively on one of the two disagreements that constitute PLD: the disagreement over the content of the law. Yet, as before, I take it that all claims I make about this type of disagreement can be made about the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY, and thus, that all my arguments can be restated accordingly. Since, for my purposes, there is no explanatorily relevant difference between those disagreements, I take it that the conclusion(s) of my argument(s) here which concerns the attitudes involved by the disagreement over the content of the law can be restated as an argument about the attitudes involved by the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY.

This chapter is divided as follows. In section 2, I will expand on some observations made in the previous chapter about the type of mental states that can enter the relation of disagreement. More specifically, I will expand on the view that disagreements involve the intentional mental states that philosophers usually call (propositional) attitudes. In addition, I will expand on the distinction between cognitive and non-cognitive attitudes. In section 3, I’ll present the thesis I label “non cognitivism” or “(NC)”. According to this thesis, the disagreement over the content of the law in PLD involves non-cognitive attitudes. I’ll argue that, although not explicitly embraced by any legal theorist, some views on the meaning of legal statements might entail (NC). In section 4, I will introduce an argument for the conclusion that PLD does not involve non-cognitive attitudes. Finally, in section 5, I will conclude by highlighting some of the main remarks suggested throughout the chapter.

2. Propositional Attitudes: Cognitive and Non-Cognitive
I take it to be uncontroversial that the mental states that constitute the disagreement over the content of the law in PLD are intentional. More precisely, I take it to be uncontroversial that they are propositional attitudes. Now I will make explicit how intentional mental states and propositional attitudes are to be understood in this thesis.

2.1 Mental States

Put very roughly, a mental state is a psychological event. It is something that takes place at a certain time in somebody’s mind. Mental states, philosophers regularly claim, are divided into two fundamental types. To the first non-intentional type belong those with a qualitative nature. Mental states of this kind are generally described as conscious sensations and raw emotions. Some examples are: particular pains, itches, tickles, joy, sadness, some types of nervousness and anxiety, etc. Arguably, qualitative mental states lack intentional content. Mental states of the second type are said to be intentional or contentful. Intentional mental states are directed at, or about, or represent, or stand for, things, properties and states of affairs. Examples of intentional mental states are: perceptions, hopes, desires, admirations, beliefs, etc.

According to the Representational Theory of Mind (RTM), a deep-rooted and popular tradition in philosophy, intentional mental states can be identified with a mind’s possession of appropriate mental representations. Put differently, for RTM, intentional mental states are better conceived as relations individuals bear to mental representations. According to this theory, mental

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3 In philosophical discussion there is much debate about how to characterize the notion of intentional content. I will follow Peter Carruthers in understanding the notion of “representative content” as a conceptual primitive just as, according to him, most work in cognitive science. However, it is worth making explicit that it goes beyond the purpose of this thesis to argue for or against any view on this matter. See (Carruthers, 2015, p. 20).
4 As put by Jerry Fodor, “[t]he representational theory of mind (RTM) is really a loose federation of claims. It lacks, to put it mildly, a canonical formulation.” (Fodor, 1997, p. 829). Philosophers (including Fodor himself) have attempted to present RTM as a unified set of theses. On this see (Fodor, 1997; Sterelny, 1990b). For an introduction to RTM, see (Pitt, 2017).
5 As indicated by David Pitt, the term “Representational Theory of Mind” is sometimes used by philosophers interchangeably with the term “Computational Theory of Mind”. According to the Computational Theory of Mind, the occurrence, transformation and storage in the brain/mind of representations — information-bearing structures — is what constitutes mental states and processes. See (Pitt, 2017). Another term used by philosophers to refer to a theory that explains (intentional) mental states and processes in terms of (relations to) mental objects with semantic properties is “Representational Theory of Mind”. See (Morgan & Piccinini, 2018).
6 We must be careful not to mix up the representational nature of some mental states with the representational function of beliefs. To say that an intentional mental state has a representative content is not to say that it serves a representational function. One is a claim about the nature of a mental state, the other a claim about the goals that motivated the formation of it.
representations are mental objects with semantic properties (reference, content, truth-conditions, truth-value, etc.).

Theorists from RTM usually hold that the intentional property of intentional mental states— their property of being about— can be explained in terms of the semantic properties of their representative contents. For instance, the belief of a subject A that “snow is white” can be understood as A being appropriately related to a mental representation with the representative/intentional content that snow is white.

Since the mental states that constitute the disagreement over the content of the law in PLD are mental states towards (about, that stand for, etc.) something (i.e., the content of the law), they must be intentional. In other words, the mental states that constitute the disagreement over the content of the law in PLD are intentional relations that obtain between a person and a mental representation of something (i.e., the content of the law at a particular time in a specific jurisdiction). To repeat, I take this claim to be uncontroversial.

To characterize intentional mental states, it is important to distinguish between the representative content and the psychological mode (the intentional relation) in which one subject holds that content. John Searle, for example, symbolizes such a distinction as “S(r)”, where “S” stands for the psychological mode and “r” for the representative content. Different intentional mental states involve different modes (relations). We may say, for instance, that John sees Donald Trump, that he loves Trump, that he hates Trump, or that he admires Trump, etc. All these are different ways in which John may be related to (different psychological modes in which he might be directed at) the same mental representation; namely, Trump. On the other hand, we may say that John believes that Trump will never be elected president of the US again, also that he hopes that Trump will never be elected, that he fears that Trump will never be elected, and so on. Once again, we may say that John is related in different ways to the same mental representation, namely, Trump will never be elected president of the US again.

Notice that the mental representation Trump is different from the mental representation Trump will never be elected president of the US again. Although there is no clear consensus in the literature, among intentional mental states, philosophers tend to distinguish two types: those whose representative content need not be a proposition, and those whose content is necessarily a whole.

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7 See (Searle, 1983, p. 6).
Perceptions, certain types of love and hatred illustrate the former; think for example of the intentional state reported by an utterance of the sentence “Laura loves Anna”. The intentional relation of love holds between Laura and something that is not a proposition but a person, namely, Anna (strictly speaking, a mental representation of Anna). By contrast, propositional attitudes, as philosophers call the second type of intentional states, have a whole proposition as their intentional contents. Preliminarily, as noted in chapter 2, we can describe propositional attitudes as psychological relations that subjects bear to propositions.

2.2 Propositional Attitudes

Propositional attitudes are typically reported by uttering sentences like “Gunnar believes that snow is white”. Propositional attitude reports, as philosophers commonly call such sentences, typically contain the subject of the attitude, a propositional attitude verb (“likes”, “believes”, “fears”, “hopes”, etc.) and a that-clause introducing a full sentence that expresses a proposition. Graham Oppy suggests symbolizing the form of propositional attitude reports as “X Fs that P”, where “X” stands for the subject of the attitude, “F” is a propositional attitude verb, and “P” stands for the (propositional) content of that attitude. The fact that a mental state can be reported by an utterance of this form is commonly taken to be sufficient evidence that that mental state is a propositional attitude.

I take it to be uncontroversial that the mental states that constitute the persistent disagreement over the content of the law in PLD are propositional attitudes. It might be worth mentioning two reasons that support this idea. First, as noted, the mental states involved by the disagreement over the content of the law in PLD are states that people hold towards the content of the law. The content of the law is propositionally encoded. Thus, an attitude towards the content of the law is an attitude towards a representation of a content propositionally encoded. This seems to suggest that the content of that attitude itself is propositionally encoded. Second, we can make propositional attitude reports to talk about such mental states. For instance, by uttering a sentence like “Ruby thinks that the law requires Isabel to pay a fine of £ 500”, we can report Ruby’s attitude.

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8 Whether the content of intentional mental states is always encoded propositionally is a point of contention in contemporary philosophical discussion. For views that embrace propositionalism see (Perry, 1994; Stoljar, 1996). For views against propositionalism see (Grzankowski & Montague, 2018; Montague, 2007).

9 See (Oppy, 1998).
towards what the law requires in a specific case. If these considerations are correct, we have good reason to think that the attitudes involved by the disagreement over the content of the law in PLD are propositional attitudes.

Before proceeding, it is useful to make a couple reminders. First, as noted in chapter 2, for the purpose of this thesis, I aim to endorse a functionalist view of mental states.\(^{10}\) Remember, according to functionalism, what defines a type of mental state (types of psychological modes) is their causal (actual and counterfactual) relations to sensory stimulations, other mental states and behavior. Secondly, to avoid unnecessary complications (for instance, addressing the question: what are propositions?), form here onwards, I’ll avoid the term “propositional attitudes” and use instead simply the term “attitudes”. Accordingly, I will think of the contents of those attitudes simply as structured pieces of information as opposed to think of it as *propositions*. I will refer to the content of these attitudes simply as “content” and will avoid the term “propositional content”.

In philosophical discussion, it is common to distinguish between two types of attitudes: cognitive (doxastic) and non-cognitive (non-doxastic).\(^{11}\) Cognitive attitudes are propositional attitudes that “…make categorical or graded judgments concerning the truth or falsity of their (…) contents.”\(^{12}\) By contrast, although there are different views on how to characterize non-cognitive attitudes, it is usually agreed that they bear an element of preference.\(^{13}\) That is, it is commonly accepted that when a subject holds a non-cognitive attitude, she *prefers* (rather than *endorses*) a certain propositional content. Beliefs are said to be clear examples of cognitive attitudes and desires of non-cognitive ones.\(^{14}\)

Philosophers usually hold that cognitive attitudes can be evaluated in terms of their truth or falsehood and non-cognitive attitudes cannot.\(^{15}\) For the sake of simplicity, I aim to draw the distinction between cognitive and non-cognitive attitudes along those lines. As understood in this

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\(^{10}\) On functionalism see (Sterelny, 1990a).

\(^{11}\) In the last decades, the distinction between doxastic and non-doxastic attitudes has been largely developed mainly by epistemologists. Searle, for instance, introduces the distinction (or a very similar one) by using the terms “BEL” to group all belief-like attitudes, and “DES” to group all desire-like attitudes. See (Searle, 1983, pp. 29–36). Similarly, Stephen Williams introduced a distinction between what he calls “doxastic attitudes” and “orectic attitudes”. See (Williams, 1990, p. 124).

\(^{12}\) (Goldman & Blanchard, 2016)

\(^{13}\) See for instance (M. Smith, 1994, p. 10; Stevenson, 1963, pp. 79–84).

\(^{14}\) Other cases of attitudes commonly considered doxastic are hopes, fears and doubts. Other attitudes usually considered non-doxastic are likings and wantings. See for instance (Gauderis, 2014, p. 426), and (Oppy, 1998).

\(^{15}\) See, for instance, (Williams, 1990, p. 124).
thesis, cognitive attitudes are those that can be assessed as true or false and non-cognitive attitudes are those that cannot.

A consequence of understanding the difference between cognitive and non-cognitive attitudes in that way is that, necessarily, all attitudes are either cognitive or non-cognitive. An attitude can or cannot be assessed in terms of its truth or falsehood, and thus, it must be cognitive or non-cognitive. There are no more possibilities than those two.

Disagreement involves two attitudes, for that reason, the logical space might seem to be exhausted by three possibilities: disagreements that involve two cognitive attitudes, disagreements that involve two non-cognitive attitudes, and disagreements that involve one cognitive and one non-cognitive attitude. It seems to me that the third of these possibilities must be ruled out; that is, no instance of disagreement can be constituted by one cognitive and one non-cognitive attitude.

To show that the third possibility (i.e. disagreement involves a cognitive and a non-cognitive attitude) must be ruled out, we can argue as follows. It seems correct to think that cognitive attitudes and non-cognitive attitudes serve different functions. According to the characterization of disagreement suggested in chapter 2, disagreement is a relation sensitive to the functions of attitudes. It seems plausible to think that, if a subject holds a non-cognitive attitude and another subject holds a cognitive attitude, no conflict can arise between them with respect to their attitudes. Here is an example. For the sake of argument, let’s say that the function of representational beliefs is to provide accurate information about the world, while the function of desires is to motivate conduct.\textsuperscript{16} If I have a representational belief that “the wall is only blue” and you have a desire that “the wall be only red”, my belief could be accurate, and your desire could effectively motivate your conduct (to perhaps paint the wall red). Since there is no conflict sensitive to the functions respectively served by our attitudes, you and I don’t disagree. That seems to be necessarily the case for all cognitive/non-cognitive pair of attitudes; for instance, it cannot be that the accuracy of a representational belief entails the failure of a desire motivating conduct (or whatever function desires serve), or the other way around. Therefore, disagreement cannot involve one cognitive and one non-cognitive attitude.

\textsuperscript{16} This is an imprecise but, for expository reasons, useful characterization of the functions of attitudes. As noted in chapter 2, as understood in this thesis, the functions of attitudes are defined in terms of the goals that explain their formation. I have decided not to talk about functions in those terms here to avoid unnecessary complexity.
Nothing in our characterization of the relation of disagreement rules out any of the other two possibilities. Thus, there are disagreements that involve two cognitive attitudes and there are disagreements that involve two non-cognitive attitudes. To which kind does the disagreement over the content of the law in PLD belong? In the following sections, I’ll advance an argument against the view that the attitudes involved by the disagreement over the content of the law in PLD are non-cognitive. I’ll begin by presenting the view I reject, namely, the view I call legal non-cognitivism.

3. Legal Non-Cognitivism (NC)

Let’s begin by stating our working example. Consider the following exchange:

(1)

John: Everyone who figures as a beneficiary in a valid will is entitled to inherit.
Robert: Not everyone who figures as a beneficiary in a valid will is entitled to inherit.

Suppose that, despite agreeing over all relevant non-legal issues, John and Robert have a disagreement over the content of the law (in their legal system at the time of their exchange) that arises by virtue of a further disagreement which concerns their respective concepts THE CRITERIA OF LEGAL VALIDITY. That is, suppose that John and Robert engage in an instance of PLD and express their disagreement (at least their disagreement about the content of the law) by engaging in such a linguistic exchange. Now, consider the following two thesis:

*Cognitivism* (C) The attitudes that constitute the disagreement over the content of the law in PLD are cognitive.

*Non-Cognitivism* (NC) The attitudes that constitute the disagreement over the content of the law in PLD are non-cognitive.
My aim is to argue in favor of (C) by arguing against (NC). However, before presenting my arguments, there are some clarifications worth making. First, I must admit that it is not at all clear that, within the analytical tradition in legal philosophy, anyone has ever argued in favor of (NC). Most legal philosophers don’t address the question of what type of attitudes people have when they engage in a persistent disagreement over the content of the law. Theorists seem to simply assume (without even noticing they do) some position on this matter.

Yet, that is not to say that (NC) is a thesis unheard of in legal philosophy. There seems to be at least one recent theory of legal discourse that entails (NC). That theory is Kevin Toh’s own version of legal expressivism. Toh holds that (committed) legal statements are (best analyzed as) expressions of a non-cognitive attitude he calls plural acceptance of a norm. He explicitly takes his analysis of legal statements to apply to utterances that speakers make in contexts of disagreement, particularly, in contexts of PLD.

I take it to be Toh’s view that, by making a legal statement, a speaker expresses one, and only one, non-cognitive propositional attitude (i.e., one plural acceptance of a norm). This idea applied to situations like (1), plus the assumption that the attitudes involved by the speaker’s disagreement over the content of the law in PLD are those they respectively express by their utterances (when they engage in a linguistic exchange), makes it the case that, according to Toh, the attitudes involved by the disagreement over the content of the law in an instance of PLD are non-cognitive. If this is correct, then it doesn’t seem wrong to say that Toh subscribes (NC).

One point is worth clarifying: I take legal expressivism to be a thesis about the meaning of (committed) legal statements. According to this thesis, the meaning of a legal statement is (better analyzed as being) exhausted by the mental attitude the speaker expresses by it (that statement). Notice that, thus understood, neither legal expressivism entails legal non-cognitivism, nor legal non-cognitivism entails legal expressivism. One can argue that the semantic content of a legal statement is exhausted by the attitude expressed by the speaker and hold that such an attitude is cognitive. Or one can argue that the attitude expressed by a speaker in making a legal statement is non-cognitive and deny that such an attitude exhausts the semantic content of a speaker’s legal

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17 Toh has not only suggested his own expressivist view of legal statements. He has also suggested an expressivist reading of Hart’s theory of legal statements. If Toh’s interpretation of Hart is right, Hart could also have endorsed the thesis I call non-cognitivism. See (Toh, 2005).
18 See (Toh, 2011).
19 In fact, the argument that Toh offers in favor of his expressivist analysis of legal statements is a disagreement-based argument that focusses on disputes that reflect PLD which he calls fundamental legal disputes. See (Toh, 2011).
statement. I don’t intend any of the observations below to pose a challenge against legal expressivism, only against non-cognitivism.

I believe that Toh subscribes (NC); however, admittedly, I might be wrong about that. If I’m wrong in attributing (NC) to Toh (and even more so, if nobody has ever endorsed such a thesis) what follows is that he (or even more, everyone in legal theory) endorses (C), for (C) and (NC) are contradictory thesis.\(^{20}\)

If Toh (or even more, everybody) endorses (C), the argument that follows can be simply seen as presenting a reason in favor of a view that is already shared. It seems to me that no harm is done in making explicit (some of) the reasons that support our views (even if those views are not controversial). If my observations in this chapter are correct, we can rest assured that our (shared) idea that the attitudes that constitute the disagreement over the content of the law in PLD are cognitive is justified.

Before presenting the argument against (NC), I’d like to make explicit one important assumption I make in this chapter. I take it that, for every instance of PLD, in having the propositional attitudes about all relevant non empirical issues that the parties have, full agreement over those issues entails that neither of the subjects has a deficit of information or has made a mistake of reflection. Put differently, the reason for an agreement over all non-legal issues in every instance of PLD is not ignorance or failure in reasoning but shared full knowledge and flawless reflection. With that said, let’s turn now to develop the objection against (NC).

### 4. An Objection against (NC)

Here is the argument:

(1) If (NC) is true, then the disagreement over the content of the law in PLD is faultless.

(2) The disagreement over the content of the law in PLD is not faultless. Therefore,

(3) (NC) is not true.

\(^{20}\) Strictly speaking, this is not true. It might be that Toh (and everyone else) remains noncommittal with respect to (C) and (NC). If that were the case, offering an argument for (C) would be justified to the extent that it gives reason to take a position.
The argument that supports premise (1) as well as the argument that supports premise (2) are long. I will develop such arguments in the next two subsections.

4.1 Arguing for Premise (1)

In this subsection, I’ll argue for the claim that if (NC) is true, then the disagreement over the content of the law in PLD is faultless. However, before presenting the argument, some clarifications are in order.

It is worth making clear what it means for the disagreement over the content of the law in PLD to be faultless.\(^{21}\)To be explicit, I assume that faultless disagreement is possible.\(^{22}\) I take it that a disagreement is faultless if, and only if, in having their respective attitudes, neither disagreeing party is wrong.\(^{23}\) What counts as being wrong in having an attitude varies according to the type of attitude. That is, the predicate “being wrong” picks out different properties depending on the type of attitude about which it is predicated. For instance, one natural way to account for being wrong in having a representational belief is to say that a subject X is wrong, if X believes something false (i.e., if the propositional content of her belief is false). A person who believes something false as

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\(^{21}\) The philosophical literature around faultless disagreement is vast. Most of it focuses on disagreements that concern the so-called subjective matters of taste/opinion. See for example (Barker, 2013; Clapp, 2015; Dreier, 2009; Egan, 2010; Eriksson & Tiozzo, 2016; Hou & Wang, 2013; Huvenes, 2012; Köbel, 2004; MacFarlane, 2007, 2014; Marques, 2014; Rosenkranz, 2008; Stojanovic, 2007; Sundell, 2011; Zouhar, 2018). In legal philosophy, though, the idea of faultless disagreement does not seem to be quite popular. To the best of my knowledge, the only theorists who have analyzed PLD (or a very similar type of disagreement) as an instance of faultless disagreement are Andrej Kristan and Giulia Pravato in their unpublished paper Faultless Disagreement in Matters of Adjudication.

\(^{22}\) For some philosophers, disagreement is never faultless. See (Stojanovic, 2007).

\(^{23}\) There is a different way to cash out the idea of faultless disagreement. According to this, say, normative view, disagreement is faultless if each of the disagreeing subjects is justified in having the propositional attitude she has. At least at first sight, there seems to be no reason to think that the normative sense of faultless disagreement is incompatible with the non-normative sense I have suggested (perhaps, they are even complementary). However, if those views turned out to be incompatible, I believe there is reason to prefer the non-normative sense. One reason is that a non-normative notion of faultless disagreement fits better with a functionalist view of mental states. Because the function of a representational belief is to provide accurate information about the world, there seems to be a sense in which someone who has a false belief is wrong in having that belief even if she is justified in having it. The non-normative sense of faultless disagreement seems to fit better alongside this idea. Another reason to prefer the non-normative view pertains to the fact that being justified in having a particular propositional attitude might not be a property that can be predicated with respect to all different types of attitudes. It is not clear to me, for instance, that one can be justified/unjustified in having a preference. If one cannot be justified in having a preference, and the normative characterization of faultless disagreement is correct, then there cannot be faultless disagreements that involve preferences. This conclusion strikes me as wrong. If I’m right about this, there is reason to reject the normative account of faultless disagreement. I won’t develop further any of these ideas here. Suppose I’m wrong about all this, it is still hard to see how taking a stand between the two senses of faultless disagreement could debunk my argument against (NC). I take it that, if the normative sense of faultless disagreement is to be preferred, the consequence is not that my observations are incorrect, but that they need to be reformulated.
a representation of the world would certainly improve her epistemic position by giving up that belief.\(^{24}\) By contrast, for example, when it comes to desires, the truth of a desire’s propositional content seems to be no indication of whether a subject is wrong in having it. Perhaps being wrong in having a desire has to do with the realization conditions of it; perhaps it has to do with its rationality; perhaps it is impossible to be wrong in having desires. It is in this relational sense that what counts as faultless disagreement depends on the types of attitudes that disagreement involves.

In accordance with the observations above, to say that the disagreement over the content of the law in PLD is faultless is to say that, for all instances of such a disagreement, in having the attitudes they have, neither disagreeing party is wrong. One of the key moves in arguing for premise one consists in provide an account of the property being wrong (with respect to the attitudes that constitute the disagreement over the content of the law in PLD), which I will do in full detail below. For now, it suffices to say that a subject that is not wrong in having a particular attitude would not improve her epistemic/practical status by giving up that attitude.

Before moving on, it is important to make two precisions. As noted earlier, I hold that disagreement can involve two non-cognitive attitudes, certainly, there is nothing in our notion of disagreement that rules out that possibility. According to the functionalist view of disagreement, disagreement can involve non-cognitive attitudes such as the two wantings “I want the wall be painted (only) red” and “I want the wall be painted (only) blue”, if, for example, the function of wantings is motivational, and the state of affairs brought about by the action caused by the former cannot coexist with the state of affairs brought about by the action caused by the latter.

Just to be clear, it is not my claim that disagreement arises between wantings or that wantings serve a motivational function. We need not commit to any views on those matters here. My claim is that nothing in our definition of disagreement excludes the possibility of disagreement between wantings or any other type of non-cognitive attitudes. Whether it is possible for disagreement to arise between attitudes of a particular type depends on the function those attitudes serve. As noted in chapter 2, what function attitudes serve is an empirical matter.

Secondly, I assume that disagreements that involve non-cognitive attitudes can be faultless. Surely, nothing in our characterization of faultless disagreement suggests otherwise. At least at

\(^{24}\) Again, this conception of what it is for someone to be wrong in having a representational belief is not uncontrover-sial. One may argue that being wrong in having a representational belief is having that belief without justification. See the previous foot note.
first sight, there is no reason to deny that there can be disagreements that involve two non-cognitive attitudes in which none of the parties *is wrong* in having the attitude she has.

We are ready now to present our argument for premise (1). The following argument is complex in the sense that it comprises several moves. For the sake of clarity, I have decided to present each move in a separate sub-subsection. Crucially, the argument builds on the idea that the property *being wrong*, as predicated of a non-cognitive attitude towards the content of the law (in an instance of PLD), is a response-dependent property. In the following four sub-subsections, I will develop this idea.

*The property being wrong: preliminary remarks*

To begin, let me introduce some clarifications that will make the exposition of ideas easier. Firstly, for the rest of this subsection, I will refer to the attitudes that constitute the disagreement over the content of the law in PLD by the term “acceptance(s)”. To be clear, I don’t intend to endorse any particular understanding of the attitude of *acceptance* already in the market (e.g., the understanding as plural norm acceptances suggested by Toh, or the understanding of acceptance suggested by H. L. A. Hart).\(^{25}\) The notion of acceptance I have in mind is much more modest than any of those. As I understand acceptances, they are simply (non-cognitive) attitudes towards the content of the law (particularly, in contexts of PLD).

Secondly, from here onwards, by “*being wrong*” I’ll refer to the property *being wrong* as instantiated by an attitude of acceptance (unless indicated otherwise). By “*being wrong*” I don’t refer, for example, to the property *being wrong* as instantiated by a representational belief.\(^{26}\)

Thirdly, in the context that interests us, the predicate “*being wrong*” is ambiguous. On the one hand, the predicate “*being wrong*” can be used to denote a property that is instantiated by a person who has an attitude of acceptance (with respect to that acceptance); on the other, the predicate “*being wrong*” can be used to denote a property that is instantiated by an attitude of acceptance itself. Since it seems that the property *being wrong* as predicated of subjects can be reduced to the property *being wrong* as instantiated by acceptances (i.e., we say that a subject is

\(^{25}\) See (Hart, 1961; Toh, 2011).

\(^{26}\) Perhaps it would be more precise to distinguish between the property *being wrong*1 (which is instantiated by acceptances) and *being wrong*2 (which is instantiated by representational beliefs). Thus understood, the clarification is that by “*being wrong*” I aim to refer to *being wrong*1.
wrong in having the attitude of acceptance she has if that attitude is wrong), I will talk of the property being wrong as if it was instantiated by acceptances and not by subjects (unless indicated otherwise).

Lastly, it might be worth noticing that the property being wrong and the property being morally wrong are different. Evidence of that is that a person might not be wrong in having a certain attitude of acceptance that is morally wrong, and an attitude of acceptance may not be morally wrong but a person may be wrong in having it. Perhaps officials in Nazi Germany were not wrong in having certain wicked acceptances; on the other hand, perhaps people in Saudi Arabia today are wrong in accepting that same-sex marriage is permitted, even though morally they are (might) not (be). The property being wrong that I aim to refer to is, so to speak, the property being legally wrong.

Again, I understand faultless disagreement as a disagreement in which subjects fail to be wrong in having the attitudes they have. Thus, to show that premise (1) is correct, one must show that, if the attitudes (of acceptance) that constitute the disagreement over the content of the law in PLD are non-cognitive, then, in having those attitudes (those acceptances), neither disagreeing subject is wrong. To show that, we should examine first the property being wrong as instantiated by an (non-cognitive) attitude of acceptance.

The property being wrong: what is not

Assume that (NC) is correct. That is, assume that the acceptances involved by the disagreement over the content of the law in PLD are non-cognitive. Now, one may ask: would it be possible for acceptances, understood as non-cognitive attitudes, to be wrong? If the answer is no, that is, if it is impossible that acceptances be wrong, then necessarily every disagreement that involves two acceptances is faultless. This would show that by taking acceptances to be non-cognitive attitudes, you are committed to accept that the acceptances that make up the disagreement over the content of the law in PLD necessarily fail to be wrong. In other words, it would show that from (NC) it follows that the disagreement over the content of the law in PLD is faultless. That is just what premise (1) states.

27 Perhaps being morally wrong is a property that can be only instantiated by actions, not by attitudes. I welcome this view.
But perhaps the answer to our question is yes. Perhaps, it is possible for acceptances to be both non-cognitive and wrong. If that’s the case, then it is important to ask: What is the property *being wrong* in having an acceptance? Or, more specifically, what conditions must obtain for an attitude of acceptance to instantiate the property *being wrong*?

Clearly, what would make an acceptance be wrong cannot be that the acceptance is false. Acceptances, qua non-cognitive attitudes, cannot be evaluated as true or false. One might suggest then something slightly different. One may suggest that to be wrong in having an acceptance is to have an acceptance whose propositional content is false (regardless of that acceptance itself not being evaluable as true or false).

I believe there are reasons to reject such a suggestion. Firstly, the idea seems to be ad hoc. It seems to make little sense to think that what makes an acceptance be wrong is that its propositional content is false but contend that such an attitude itself could not be assessed as such. There seems to be no principled reason in favor of that idea.

Another reason to reject the suggestion is that, by accepting it, we would vanish the distinction, plausible to make, between the property *being wrong* as instantiated by an acceptance and *being wrong* as instantiated by a representational belief. As stated above, it is plausible to think that a subject is wrong in having a representational belief if her belief is false. A belief is false if, and only if, its content is false. If the property *being wrong* as instantiated by an acceptance obtains if, and only if, its content is false, then the properties *being wrong* as instantiated by acceptances and *being wrong* as instantiated by representational beliefs are indistinguishable.

The reason to reject that conclusion is as follows. Representational beliefs and acceptances (specially understood as non-cognitive attitudes) are different types of attitudes. As noticed, it is plausible to think that what the property *being wrong* is depends on the type of propositional attitude that instantiates it. If those types of attitudes are indeed different, then the conditions that representational beliefs must meet to instantiate the property *being wrong* (for representational beliefs) cannot be the same as the conditions that acceptances must meet to instantiate the property *being wrong* (for acceptances). Identity of the conditions that must be satisfied to insatiate the property being wrong is sufficient for identity of attitude type.

The observations above give reason to think that, when it comes to attitudes of acceptance, *being wrong* cannot depend on their propositional contents being false. So, what kind of property *being wrong* is? Let’s have a closer look into this question.
The property being wrong as an analyzable property

First, I contend that the property being wrong is analyzable. For present purposes, it suffices to say that a property is analyzable if it can be given an explanation in non-recursive terms. The claim that the property being wrong is analyzable seems obvious to me; however, it might be useful to make explicit the reasons that support it. If you agree with me that the claim is obvious, you might want to skip to the next sub-subsection.

Assume that being wrong is an unanalyzable (not analyzable) property. Thus, to say that an acceptance is wrong is nothing more, nothing less, than to say that it instantiates the property being wrong. The main problem with this assumption is that it makes it hard to explain in which way a causal relation between us and such a property could obtain.

In philosophical discussion, it is common to suggest that if a property is unanalyzable, there must be a certain mechanism that allows us to enter directly into causal relations with that property.28 There must be a mechanism that allows us to gain information about that property being instantiated by the objects that do so. We must be able to either perceive it or intuit it, or something like that. If the only way in which we can be causally affected by unanalyzable properties is by means of some mechanism, being (able to be) causally affected by a particular unanalyzable property is a sufficient condition of the existence of such a mechanism. Equivalently, the absence of such a mechanism is a sufficient condition of the impossibility to be causally related to an unanalyzable property.

Take for example the property having a shape. For the sake of argument, assume that having a shape cannot be given an analysis in non-recursive terms. Having a shape is nothing more, nothing less, than instantiating the property having a shape. Then, there must be a mechanism in virtue of which we can be causally affected by that property. Perhaps, our brains together with other organs evolved to become such a mechanism. Perhaps we can be causally affected by the property having a shape throughout perceptions of it; or perhaps we can be causally affected by it throughout intuition. The important point here is that the fact that we can be causally affected by the unanalyzable property having a shape is a sufficient condition for the existence of such a mechanism.

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28 See, for instance, (Logue, 2018; Lyons, 2018; Moore, 1903, p. 7).
To accept that a mechanism like that does exist imposes a theoretical constrain: we need to find a plausible empirical explanation of it. If there is a mechanism that allows us to enter into casual relations with the property *having a shape*, there must be an empirically plausible story we can tell to explain the workings of it (that mechanism). Following with our example, it should be empirically plausible to say that, through evolution, humans developed the specific system that allow them to have perceptions of the property *having a shape* or a system that allows them to intuit it, etc.

To say that there is a mechanism that allows us to be affected by the property *being wrong* sounds, at least, mysterious. Do we perceive or intuit the property *being wrong*? I think we don’t. Such a mechanism just doesn’t seem to exist. If that mechanism does not exist, then we can’t explain how a causal relation between us and the property *being wrong* can obtain. This is problematic.

But suppose we hold that such a mechanism does exist. Now we must give an empirically plausible story as to how such a mechanism might work. For instance, we will have to point out some organs that humans might have developed to allow them to have sensory experiences of *being wrong* whenever this property is instantiated by an acceptance. This sounds odd. Coming up with an empirically plausible story as to how that mechanism might work and what organs might constitute it seems to be a task bound to failure.

The takeaway from the observations in this sub-subsection, if they are correct, is that *being wrong* is not an unanalyzable property; rather, it is analyzable. In what follows, my aim is to suggest an analysis of the property *being wrong*.

*The property being wrong as a response-dependent property*

In which terms should the property *being wrong* be analyzed? I contend that the property *being wrong* (as instantiated by a non-cognitive acceptance) is a response-dependent property that is to be analyzed in terms of a certain disposition.\(^2\)\(^9\) Let’s focus first on the claim that being wrong is response-dependent.

\(^{2}\) The introduction of the term “response dependence” is commonly attributed to Mark Johnston. See (Johnston, 1989). However, in this work, Johnston introduced the idea of response dependence to talk about concepts, not properties. It was in later work that Johnston talked about response dependence properties. See (Johnston, 1998).
A property is response-dependent if there is a constitutive relation between it and the (psychological) response people have towards the things that instantiate it. Think for instance of the property *being red*. The property *being red* is constituted by the response (perhaps a disposition to have a particular perceptual experience) red objects (objects that instantiate the property *being red*) cause people into having.30 My aim in this sub-subsection is to show that the property *being wrong* is response-dependent in this sense.

The following argument to support the contention that *being wrong* is a response-dependent property is a modified version of an argument suggested in favor of moral sentimentalism.31 Put roughly, the argument builds on the idea that, sometimes, not conceiving of a property in terms of response-dependence entails a theoretical cost we’d like to avoid. That cost is the postulation of disjunctive properties. Let me elaborate.

Acceptances that instantiate the property *being wrong* are group together in virtue of sharing something. As noted, that something cannot simply be the property *being wrong*, as that would imply that *being wrong* is an unanalyzable property. In giving an analysis in non-recursive terms of the property *being wrong*, we aim to explain this property in terms of that something that wrong acceptances have in common.

For the sake of explicitness, let’s say that a property is mind-independent if its identity conditions can be specified without reference to some mental state(s) of either a single individual or a group of individuals. By contrast, let’s say that a property is mind-dependent if, in specifying its identity conditions, we must refer to some mental state(s) of either a single individual or a group of individuals.32 In that sense, if you think that *being wrong* is mind-independent, then you think that the *something* that groups together wrong acceptances can be specified without reference to the mental states of a single individual or a group of individuals.

But it seems that other than the fact that people would respond towards wrong acceptances in a particular way, there is nothing that those acceptances have in common. For example, as argued above, we cannot claim that those attitudes have in common the falsehood of their propositional contents. To repeat, the reason is that by claiming so you would either deny that acceptances

30 For my purposes here, the difference between saying that it is things that cause people into having a psychological reaction and saying that it is people who have a psychological reaction towards things is not relevant.
32 In understanding mind-dependence and mind-independence in this way, I have been influenced by Mathew Kramer. See (Kramer, 2009, p. Chapter 2).
are non-cognitive attitudes (which we are assuming) or erase the distinction between being wrong as instantiated by an acceptance and being wrong as instantiated by a representational belief (which is implausible).

Suppose you hold that being wrong is a mind-independent property anyway. If, after realizing that there is nothing that wrong acceptances share that can be specified without reference to some mental states, you still want to hold that being wrong is a mind-independent property, then you must argue that what makes a particular acceptance A be wrong is something specific to A, what makes an acceptance B be wrong is something specific to B, and so on for acceptances C, D, E, etc. After noticing this, you must claim that being wrong is to have either what A has, or B, or C, or D, or E, etc. It might be worth highlighting that you must also argue that each of those properties instantiated by A, B, C, D or E, are mind-independent. The reason to reject such a view is that to argue for mind-independent disjunctive properties is unnecessary. That is the case precisely because there is a much simpler alternative response-dependent explanation. Instead of postulating an analysis that appeals to a significantly large number of properties, we might simply accept that being wrong is a response-dependent property.

One may still try to resist the conclusion that being wrong is a response-dependent property. One may argue that it is false that there is nothing else beside the responses people have towards wrong acceptances in virtue of which attitudes of that type can be grouped. The challenge for someone who claims that is to come up with a suitable candidate for the single mind-independent something that makes the grouping. At this point, our argument does some burden-shifting. If you think that the property being wrong is not analyzed in terms of the response subjects have towards wrong acceptances, then it is up to you to suggest an alternative plausible response-independent analysis of that property. Unless you can do that, we have reason to think that the best way to understand the property being wrong is as a response-dependent property. It seems to me that coming up with such an alternative analysis cannot be done.

*The property being wrong as a disposition*

The considerations above support the idea that the property being wrong is response-dependent. They support the idea that being wrong is the property that an attitude of acceptance instantiates when that acceptance causes people into having some specific psychological reaction.
I’d like to propose that such a reaction is the \textit{disposition} to assess an attitude of acceptance as \textit{being wrong}. For the sake of precision, here is the definition of \textit{being wrong} I’d like to suggest:

\begin{quote}
\textbf{(Being Wrong)}

An attitude of acceptance A is wrong if, and only if, a subject S would be disposed, under conditions C, to assess A as being wrong.
\end{quote}

Admittedly, this definition is incomplete. It lacks further specifications of who might count as a subject S and what are the relevant conditions C. Let me fill those gaps by stating first who might count as S.

I take it that, in assessing a particular acceptance as being wrong, the relevant dispositions are those of individuals that have a psychology like ours. By “ours” I mean members of the humanity. We don’t need to be more specific as to what exactly \textit{a psychology like ours} might look like. Whatever features human psychology has, my aim is to refer to creatures with alike psychologies.

To be clear, I aim to suggest a characterization of the relevant subjects that looks at them as actual, as opposed to ideal, human beings (or human-like creatures). The rationale behind this aim is simple: there is no theoretically useful way to modestly idealize. That is, idealizations of the relevant subjects are either too much to be explanatorily valuable or too little to make an explanatory difference with respect to a non-idealized model.

Let’s move on now to the question about the appropriate conditions of assessment C. From a general level of specification, assessment conditions can be either actual or ideal. I contend that the relevant conditions of assessment C are ideal. The reason for this is that, by granting ideal conditions of assessment, one ensures that the distinction between success and failure in assessing is possible. In other words, one ensures that it is possible for people to make mistakes in assessing acceptances as \textit{being wrong}. One person’s assessment of an attitude of acceptance fails if it diverts from what the assessment would have been, had it been made from the specified (ideal) conditions. By contrast, if one conceives of the conditions of assessment as actual, one cannot account for the possibility of failing to assess an attitude as \textit{being wrong}. If what makes you be wrong in having
an acceptance is that I am disposed, here and now, to assess your attitude as such, then there is no way, insofar as I’m sincere, in which my assessment of your acceptance can fail.

Making room for the possibility that sincere subjects make mistakes in assessing acceptances is important because otherwise we risk having all (or most) acceptances instantiate and fail to instantiate at all times the property being wrong. That is so because there is no reason to deny that, as a matter of fact, people can be differently disposed. If what makes your acceptance be wrong is that someone is disposed here and now to assess it as such, and it is true that people might have different dispositions, then your acceptance might be wrong because someone might be disposed to assess it as such and, at the same time, not be wrong because someone else might not be disposed to assess it as such. It is to avoid this implausible conclusion that we conceive of the conditions of assessment as ideal.

I’d like to suggest that the proper ideal conditions under which having an attitude of acceptance is to be assessed are conditions of full reflection and complete factual information by assessors. In that sense, we say that an acceptance is wrong if, and only if, someone who has all relevant information (about that acceptance) and makes no mistakes in reasoning, would be disposed to assess it as being wrong.

It is commonly argued that a consequence of having a response-dependence analysis of certain types of properties is relativism. Take for example the response-dependence analysis of aesthetic properties. In terms of such an analysis, a property like being beautiful is the property that an object instantiates when it causes people to have a certain response to it. As a matter of fact, one single object can elicit different responses about its beauty on different sensibilities. The same object might instantiate some property being beautiful1 for some group of people and not instantiate some other property being beautiful2 for another group. That can be the case even if the people in both groups satisfy certain ideal conditions (for example, conditions of imaginative acquaintance). It is in that sense that the property being beautiful, insofar as it is response-dependent, is (commonly) said to be relative.

The observations in the previous paragraph seem to point towards the idea that having a response-dependence analysis of the property being wrong leads to the relativization of that property. It seems that, according to our definition of “being wrong”, an acceptance is wrong for a

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33 See (Lewis, 1989; Marques, 2016).
34 In presenting aesthetic properties in this way, I follow Teresa Marques. See (Marques, 2016).
population that consist of the assessor and those who, under conditions of full information and lack of reasoning mistakes, are disposed like her to assess that acceptance as being wrong.\footnote{There is another sense in which what counts as wrong acceptance may be said to be relative. Acceptances are wrong or not wrong relative to legal systems. The attitude accepting that the speed limit is 55mph may not be wrong in California but might be wrong in Edinburgh. However, this is not the sense of relative I have in mind.} If it is true that people may be disposed, under ideal conditions, in more than one way towards the same object, it seems at least possible that, in assessing a particular attitude of acceptance, two subjects who have all relevant information and make no reasoning mistakes might have different dispositions about whether that attitude is wrong. To sum things up, relativism seems to be a consequence of the response-dependent character of a property and the (apparently plausible) claim that the same object can cause different responses in different people.\footnote{Most theorists who argue in favor of the response-dependent character of evaluative properties welcome relativism. See for instance (Lewis, 1989, pp. 126–129; Prinz, 2006, p. 35) For a relativist theory of the semantics of evaluative terms see (Dreier, 1990).}

However, I deny that, in the context of PLD, the same acceptance can cause different responses among different assessors under ideal conditions. In other words, I claim that, within the context of PLD, in assessing the attitudes involved by the disagreement over the content of the law, assessors under ideal conditions cannot be differently disposed. This claim will be crucial in the argument for premise (1). I will make the case for this claim in the next sub-subsection.

Now that we have a clear understanding of what kind of property being wrong is, we can show how if (NC) is true, then the disagreement over the content of the law in PLD must be faultless. This is what I aim to do in the next sub-subsection.

**Acceptances and dispositions**

I contend that, for all instances of PLD, no subject under ideal conditions would assess as being wrong any of the attitudes that constitute the disagreement over the content of the law. If that is correct, then there is no instance of PLD in which at least one of the attitudes involved by the disagreement over the content of the law is wrong. If neither acceptance involved by a disagreement instantiates the property being wrong, then the disagreement is faultless. Thus, the disagreement over the content of the law in PLD is faultless. Let’s elaborate.

To explicate these ideas more easily, consider again exchange (1) (repeated here as (2)):
John: Everyone who figures as a beneficiary in a valid will is entitled to inherit.
Robert: Not everyone who figures as a beneficiary in a valid will is entitled to inherit.

As before, suppose that (2) is an instance of PLD. Suppose that by making their respective utterances John and Robert express their respective attitudes of acceptance about the content of the law. I contend that neither John’s nor Robert’s acceptances instantiate the property being wrong. The reason for this is that, under ideal conditions, no subject would be disposed to assess either as being wrong. Here are the reasons why.

First, suppose that the assessor satisfies the ideal conditions of assessment. That is, suppose that, in assessing John and Robert’s attitudes of acceptance, the assessor has full information and make no mistakes of reasoning. As noted above, we are assuming that, in having their respective attitudes, parties to a disagreement over the content of the law in an instance of PLD have all the information relevant and do not make mistakes in reasoning; John and Robert both endorse their respective attitudes with no deficit of information nor reasoning mistakes. Now, how could an assessor who has all relevant information and makes no reflection mistakes be disposed to assess an attitude as being wrong, if that attitude itself is held without deficits of information and reflection mistakes? It seems to me that she couldn’t. If our assessor satisfies the ideal conditions of assessment, and John and Robert hold their respective attitudes after having all relevant information and without making reasoning mistakes, the assessor would necessarily not be disposed to assess neither John’s nor Robert’s attitude as being wrong. If that is correct, neither John nor Robert’s acceptance satisfies the right side of our biconditional in the definition of being wrong and, thus, neither of their acceptances instantiates the property being wrong. We can generalize this conclusion for every instance of (the disagreement over the content of the law in) PLD.

Perhaps we are moving too quickly. As indicated, it is widely agreed that, since different people can have different responses to the same object, a response-dependence analysis of a property might lead to relativism. Why couldn’t different assessors under ideal conditions have different dispositions towards the same attitude of acceptance (particularly, in contexts of PLD)? Briefly, the reason is that acceptances in contexts of PLD are not the kind of objects that can elicit different responses from fully informed and diligent people. In that sense, acceptances in contexts of PLD
seem to be different from beautiful/non-beautiful paintings, sculptures, deserts, etc., and more like colored objects.

In the case of colored objects, to say that a property like being red is response-dependent does not lead (at least not necessarily) to say that it is a relative property. It seems plausible that, when it comes to colors, all subjects with similar enough perceptive systems, under ideal conditions, would have the same responses to the same object. It seems plausible to think that, under appropriate conditions of illumination, proximity, etc., all individuals with a perceptive system like ours, would have an (disposition to have an) experience of redness, when faced with the same red object. For some objects (with respect to some properties), response-dependence doesn’t entail relativism. People can be differently disposed as to whether a painting is beautiful or not, but it seems odd to say that they might be differently disposed as to whether snow is white. An assessor who is disposed to assess as being wrong an attitude that is held without information deficits and without mistakes in reasoning must lack herself some relevant information or (for instance) be biased.

The takeaway from the considerations above is that, if the property being wrong is response-dependent, then we must accept that neither acceptance in a disagreement over the content of the law in PLD is wrong. That is another way to say that, if the property being wrong is response-dependent, then the disagreement over the content of the law in PLD is faultless. Since if acceptances are non-cognitive, then the property being wrong must be response-dependent, and since in the case of acceptances response dependence entails faultlessness, then if acceptances are non-cognitive, the disagreement over the content of the law in PLD must be faultless.

To sum up, I have argued that if the acceptances involved by the disagreement over the content of the law in PLD are non-cognitive, then the property being wrong (as predicated of those acceptances) must be response-dependent. One way to conceive of the property being wrong as response-dependent is to conceive of it as a disposition (to assess as being wrong a particular attitude of acceptance) that an assessor would have under ideal conditions. There is reason to think that an assessor who satisfies the ideal conditions of assessment would not be disposed to assess as being wrong an attitude of acceptance that is held with full information and lack of reasoning mistakes. Since the attitudes involved by the disagreement over the content of the law in PLD are held with full information and lack of reasoning mistakes, an assessor that satisfies the ideal conditions cannot be disposed to assess them as being wrong. Therefore, those attitudes do not
instantiate the property *being wrong*. Since, the attitudes that constitute the disagreement over the content of the law in PLD do not instantiate the property *being wrong*, that disagreement is faultless.

In short, the observations in this subsection show that if the attitudes involved by the disagreement over the content of the law in PLD are non-cognitive, then such disagreement is faultless. This is what premise (1) states. Let’s move on now to argue for premise (2).

4.2 Arguing for Premise (2)

Premise (2) states that the disagreement over the content of the law in PLD is not faultless. One reason to support this idea comes from intuition. It seems intuitive that when two people engage in a persistent disagreement over the content of the law, it is necessary that (at least) one of them is wrong in holding the attitude she holds. In that respect, legal practice is different from the so-called *non-objective matters of opinion*.\(^{37}\) While it seems intuitive to think that two subjects can engage in a disagreement about whether a painting is beautiful without any of them being in error, it seems intuitively impossible to have a disagreement (particularly, in a context of PLD) about whether S ought to pay tax X in which no one is wrong. If, you think that “S ought to pay tax X” and I think that “S ought not to pay tax X”, it seems intuitive that at least one of us got things wrong.

Any scenario of legal disagreement should help trigger that intuition. For example, imagine that two judges, Sally and Rodger, engage in the following disagreement in the US in June 2021: judge Sally *accepts that the COVID-19 Hate Crimes Act is valid law in the US*, while judge Rodger *accepts that the COVID-19 Hate Crimes Act is not valid law in the US*. The COVID 19 Hate Crimes Act is either valid law in the US or not. Thus, it seems intuitive to think that either judge Sally or judge Rodger must have a wrong acceptance. It seems counterintuitive to think that both judges in this disagreement are (might be) error-free.

It seems to me that there is no reason to prevent us from generalizing that conclusion to cases of PLD. Since, in a sense, just like our example, all disagreements over the content of the law in PLD are disagreements about whether a certain content belongs to the legal system, and a

\(^{37}\) In the philosophical literature it is taken to be a widely shared intuition that disagreements over matters of opinion are faultless (e.g., aesthetics, taste, morality, etc.). See for instance (Kölbel, 2004, p. 54; Sundell, 2011, p. 268).
content must either belong or not to the system, it seems intuitive that, for all instances of PLD, at
least one subject is wrong. Put shortly, it seems intuitive that, for all instances of PLD, the disa-
egreement over the content of the law is non-faultless.

The fact that, intuitively, the disagreement over the content of the law in PLD is not fault-
less is not a definitive reason for accepting premise (2). If the only reason in favor of that premise
were intuitive, then all that our argument would do is to point out a theoretical cost one must pay
for conceiving of the attitudes involved by such a disagreement as non-cognitive. That cost would
be the withdrawal of one (allegedly important) intuition. Yet, this may be a bullet worth biting.
Perhaps other explanatory virtues of the non-cognitivist approach outweigh the alleged flaw of
requiring us to drop one of our intuitions. For our argument against non-cognitivism to run we
need that premise (2) is true (or at least that we have enough reason to believe it is) but showing
that premise (2) is intuitive might not be enough evidence of that.

The claim that the disagreement over the content of the law in PLD is not faultless can be
defended on non-intuitive grounds. The argument I’ll suggest below builds on the idea that some
problematic conclusions regarding the guiding function of law would follow if we conceive of
disagreements over the content of the law in PLD as faultless.

Let’s have another look at scenario (1) (repeated here as (3)):

(3)

John: Everyone who figures as a beneficiary in a valid will is entitled to inherit.
Robert: Not everyone who figures as a beneficiary in a valid will is entitled to inherit.

Again, let’s suppose that John and Robert engage in an instance of PLD. This time, for
simplicity of exposition, suppose that their disagreement over the content of the law involves two
(representational) beliefs. John believes that “everyone who figures as a beneficiary in a valid
will is [legally] entitled to inherit”, and Robert “believes that not everyone who figures as a ben-
eficiary in a valid will is [legally] entitled to inherit”. Suppose that John and Robert are judges (from

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38 It might be worth highlighting that, if premise (2) is true, it is so regardless of whether the attitudes of acceptance
involved by such disagreements are cognitive or non-cognitive. In that sense, assuming that those attitudes are one or
the other should make no substantial difference with respect to the observations that follow.
the same legal system) adjudicating a case. Lastly, suppose that their disagreement is faultless; that is, suppose that neither judge is wrong in having the belief he has (i.e., neither believes something false).

It seems to me that the fact that two judges may engage in a persistent disagreement over the content of the law without any of them being in error makes it impossible for some of the conditions that legal means of social control must meet to fulfill their function of guiding human conduct to obtain. If we want to keep the idea that legal means satisfy those conditions, we must abandon the idea that disagreements over the content of the law in PLD are (can be) faultless. I will explain this idea now.

It is a widely accepted view in legal philosophy that the legal instruments by which governments intend to rule should be such that they can actually guide people’s behavior. Guiding conduct seems to be the (at least one important) reason why we have laws. It is commonly accepted that legal instruments cannot perform this guiding function unless they meet certain conditions. There even seems to be ample agreement among legal philosophers over which those conditions are.

Generally, legal theorists follow the view suggested by Lon Fuller. Fuller suggested a list of eight conditions: generality, promulgation, no retroactivity, clarity, no contradiction, no impossibility, stability, and consistent application. Most theorists accept that, as Fuller suggested, the failure to fulfill one condition is sufficient to render a legal provision unable to guide people’s conduct.

I will concentrate exclusively on the conditions of no contradiction and consistent application. My aim is to show that accepting that the disagreement over the content of the law in PLD is faultless eliminates the capacity of legal provisions to meet those two conditions and, thus, their

39 See (Finnis, 1980; Fuller, 1969; MacCormick, 1992; Marmor, 2004; Raz, 1979).
40 (Fuller, 1969, p. Chap. 2).
41 Two precisions are in order. On the one hand, strictly speaking, according to Fuller, it is legal systems (as opposed to individual legal provisions) that must satisfy these eight conditions. I believe that, unless one aims to do exegesis of Fuller’s work (which I don’t), this specification is irrelevant. See (Fuller, 1969, p. Chap. 2). On the other hand, it is important to make explicit to which extent legal provisions must fail to meet a condition to be rendered unable to guide conduct. It seems safe to say that the failing should be systematic rather than sporadic. For instance, it doesn’t seem that a legal provision loses its capacity to guide conduct if, by mistake, a judge misapplies a provision (if the condition of consistent application doesn’t apply) in one particular occasion. A legal provision seems to be ineffective in guiding people’s conduct when systematically judges apply the provision in a way that deviates from its content.
capacity to guide people’s conduct. This provides a strong reason to reject the claim that the dis-
agreement over the content of the law in PLD is faultless.

Before proceeding, there is one clarification important to make. In the considerations that
follow, I will concentrate on what is commonly called the prescriptive content of legal provisions.
One might argue that the attitudes involved by a disagreement over the content of the law in an
instance of PLD are not attitudes about the prescriptive content of legal provisions; for one might
believe that the prescriptive content of legal provisions does not exhaust the content of the law. As
noticed in chapter 2, I aim to remain noncommittal as to what the content of the law is. In that
sense, it is important making explicit that it is only for ease of exposition and to align myself with
the terms in which the discussion is usually framed that, for the rest of this section, I’ll accept that
the content of the law corresponds to (is exhausted by) the prescriptive content of legal provisions
and use those expressions (i.e., “the content of the law” and “the prescriptive content of a legal
provision”) as equivalent. It seems to me that the following argument does not depend on accepting
an implausible understanding of what the content of the law is.

The condition of no contradiction

Let’s focus first on the no contradiction condition. There is no doubt that contradictory
prescriptive contents cannot guide people’s conduct. A legal provision that prescribes something
and, at the same time, its contradiction cannot be followed. Likewise, people are incapable of
following two provisions if one prescribes \( \alpha \) and the other prescribes no-\( \alpha \).\(^{42} \) I believe that our
example involving judges John and Robert helps illustrate just that. It illustrates that if a disagree-
ment over the content of the law in PLD is faultless, then it is possible that all legal provisions
prescribe contradictory contents.

Suppose there is a provision within the jurisdiction of judges John and Robert that reads
“those who figure in a valid will as beneficiaries are entitled to inherit”. What does such a provision
prescribe?

As noted, judge John and judge Robert hold conflicting attitudes about who is entitled to
inherit; to repeat, whereas judge John believes that “everyone who figures as a beneficiary in a

\(^{42}\) In characterizing the condition of no contradiction along these lines, I follow Andrei Marmor. See (Marmor, 2004,
p. 6).
valid will is [legally] entitled to inherit", judge Robert believes that “not everyone who figures as a beneficiary in a valid will is [legally] entitled to inherit". We are assuming that those beliefs are about the prescriptive content of a legal provision; for the sake of argument, suppose that they are beliefs about the prescriptive content of the provision “those who figure in a valid will as beneficiaries are entitled to inherit”. It is important to repeat that, in having such beliefs, we are supposing, neither judge is in error (i.e., neither believes something false).

Now, surely, if a belief about the prescriptive content of a legal provision is true, then its content (of that belief) must correspond to (it must be an accurate representation of) the actual prescriptive content of the provision about which it is a belief (and it must be false otherwise). This is just what it means for a belief about the prescriptive content of a legal provision to be true (or false).

Since the correspondence between what a provision prescribes and the intentional content of a subject’s true belief about it is necessary, and both judge John’s and judge Robert’s beliefs are true, it follows that our example is a case in which a provision prescribes something and its contradiction. Particularly, in a situation like the one described, if the disagreement between judge John and judge Robert is faultless, the provision “those who figure in a valid will as beneficiaries are entitled to inherit” prescribes that everyone who figures as a beneficiary in a valid will is entitled to inherit, and that not everyone who figures as a beneficiary in a valid will as beneficiary is entitled to inherit. The provision prescribes contradictory contents and, as a result, the provision must be unable to guide people’s behavior.

Since there is no provision relative to (the content of) which judges cannot engage in PLD, if the disagreement over the content of the law in PLD is faultless, it is at least possible that every provision in a legal system carries contradictory prescriptive contents. If this is correct, then it is possible that no legal provision is capable of guiding people’s conduct. If we want to reject this conclusion, we should reject that the disagreement over the content of the law in PLD is faultless.

Before moving further, there is one clarification worth making. The argument above does not depend on the assumption that the attitudes involved by the disagreement over the content of the law in PLD are beliefs. The argument works even if we think that such attitudes are non-cognitive. Let me illustrate that point.

Suppose that the provision “those who figure in a valid will as beneficiaries are entitled to inherit” carries exclusively the prescriptive content everyone who figures as a beneficiary in a
valid will is entitled to inherit. As before, suppose that judges John and Robert, engage in a persistent disagreement about the prescriptive content of that provision. This time, imagine that their attitudes are non-cognitive: judge John accepts that “everyone who figures as a beneficiary in a valid will is [legally] entitled to inherit”, and judge Robert accepts that “not everyone who figures as a beneficiary in a valid will is [legally] entitled to inherit”. Lastly, suppose that their disagreement is faultless (i.e., suppose that both attitudes of acceptance are error-free).

The correctness of non-cognitive attitudes must entail correspondence between their contents and the prescriptive content of the legal provisions those attitudes are about. A non-cognitive attitude cannot be correct if its content does not correspond to the content of the legal provision about which it is an attitude. To appreciate this point, let’s focus on judge Robert’s acceptance. As things are described, there is no correspondence between the content of the provision and the content of judge Robert’s attitude; in fact, both contents seem to be rather contradictory. Notice, since we are assuming that the disagreement between judges John and Robert is faultless, we are assuming that judge Robert’s attitude is correct.

It seems to me that a notion of legal non-cognitive correctness that counts as correct an attitude like the one held by judge Robert must be trivial. If you think that a non-cognitive attitude about the prescriptive content of a legal provision can be correct even if its intentional content (of that attitude) is incompatible (even contradictory) with the actual content of the provision in question, then there is no reason to deny that any acceptance can have any intentional content and be correct. If judge Robert’s attitude is correct despite its content being contradictory with the actual content of the provision “those who figure in a valid will as beneficiaries are entitled to inherit”, why couldn’t the attitude of accepting that “no one is allowed to drive over 50mph” be a correct attitude (towards the content of that provision) as well? There doesn’t seem to be any principled reason to deny it could. Therefore, our notion of non-cognitive correctness must be trivial. I take it to be uncontroversial that a trivial conception of non-cognitive correctness needs to be rejected.

Notice, it is enough for a notion of non-cognitive correctness to be trivial that it allows no correspondence (be that due to contradiction or not). If the content of a provision is P and according to our notion of non-cognitive correctness an attitude of acceptance with the content S is correct, there cannot be principled reason to deny that an attitude with the content R can also be a correct attitude towards that provision. Contradiction is not necessary for triviality, contradiction is only one case of non-correspondence.
It follows from the considerations above that a non-trivial notion of legal non-cognitive correctness entails that there is correspondence between the actual prescriptive content of a legal provision and the intentional content of an attitude (of non-cognitive acceptance) towards that prescriptive content. In other words, correspondence is a necessary (although not a sufficient) condition of a non-trivial conception of non-cognitive correctness.

It is worth noticing that to say as much is not to say (it doesn’t entail either) that what makes a non-cognitive attitude (towards the content of a legal provision) correct or incorrect is whether correspondence (between the content of the attitude and the content of the provision) obtains. In fact, as hinted in the previous subsection, legal non-cognitive attitudes must be made correct/incorrect by something else, not by the truth of their contents. To be clear, my claim is not about what makes non-cognitive attitudes about the content of a legal provision correct, on this matter (i.e., how to describe non-cognitive correctness) I aim to remain open. My claim is simply that, if legal non-cognitive correctness is not trivial, then the content of a correct non-cognitive attitude about the content of a provision must correspond to the prescriptive content of that provision.

As before, the conclusion to be drawn from the observations above is that correspondence between the content of a legal provision and the intentional content of a correct non-cognitive attitude about that provision is necessary. If, in a case like the one described above, in having a persistent disagreement over the content of a legal provision, each judge has a correct non-cognitive acceptance, then the provision in question carries incompatible contents. Since that provision carries incompatible contents, it must be unable to guide people’s conduct. Since there is no provision with respect to which two judges cannot engage in PLD, then it is at least possible that all provisions in a legal system carry incompatible contents.

In summary, I have argued that if PLD is faultless (regardless of whether it involves cognitive or non-cognitive attitudes), it is possible that all the provisions that make up a legal system carry contradictory prescriptive contents; from here, it follows that it is possible that no legal provision is able to guide people’s behavior. To reject this conclusion, we must abandon the assumption that the disagreement over the content of the law in PLD is faultless.

If correct, the considerations above should give enough reason to reject that the disagreement over the content of the law in PLD is faultless. In other words, the argument in this sub-subsection should be sufficient to accept premise (2). However, it is worth pointing out that there
is at least one more condition that wouldn’t be met if the disagreement over the content of the law in PLD were faultless. That is the condition of consistent application. In the next sub-subsection, I contend that if the disagreement over the content of the law in PLD is faultless, then it is possible that there is inconsistency in the application of all legal provisions. If application is inconsistent, legal provisions cannot guide people’s conduct.

The condition of consistent application

The condition of consistent application requires that there is congruence between official action (in applying provisions to specific cases) and the (content of) the provisions that make up a legal system. As noted by Fuller, this is the most complex of all conditions in the sense that there is a great variety of ways in which congruence can fail to obtain (which entails that many things have to be in place for congruence to be secured). According to Fuller, among the ways in which congruence can be neglected are: mistaken interpretation, inaccessibility of the law, bribery, prejudice, stupidity, etc.43

Before moving any further, let me make one quick clarification. As can be seen, congruence is a relation that obtains between one particular act of application of a legal provision and the content of that provision. I won’t take any stand on what constitutes an act of application, what it takes for the relation of congruence to obtain, or what is the content of a legal provision. For my aims, I need not to. Pre-theoretical understandings of those concepts should suffice.

In words of Andrei Marmor, the condition of consistent application establishes that “for the law to be able to guide human conduct, it must maintain considerable congruence between the rules promulgated and their actual application to specific cases. In other words, the law cannot guide human conduct if actual deviations from it are not treated as such, namely, as deviations from the rule”.44 I take it to be Marmor’s suggestion that the condition of consistent application requires two things: (i) for (the content of) legal provisions and their application to be congruent, and (ii) for us to be able to identify, as such, cases in which there is no congruence between a particular act of application and the (content of the) provision being applied (equivalently, that we

43 See (Fuller, 1969, p. 81).
44 (Marmor, 2004, pp. 6–7).
are able to identify, as such, cases in which there is congruence between a particular act of application and the provision being applied).

If that is Marmor’s characterization, I find it persuasive. It seems to me that the fact that there is congruence between legal provisions and their application is not sufficient to ensure the conduct guiding function of law. It is difficult to see how we can use a legal provision to guide our conduct if, when applied to a particular case, we cannot tell whether the provision is being applied in accordance with its actual content (even if indeed it is).

In accordance with the considerations above, I take it that the condition of consistent application is not met if, in a particular case where a provision is being applied, the following two conditions obtain: (i) there is inconsistency between the (content of the) provision and the act of application; and (ii) we are unable to identify that act as such (as a deviant act of application). To repeat, if the condition of consistent application is not met, a provision cannot guide people’s conduct.

I maintain that if two judges engage in faultless persistent disagreement over the content of the law, then in applying the same legal provision to some particular case(s), necessarily (i) (at least) one of them applies the provision in a way that differs from that provision’s content; and (ii) we are unable to identify that deviant act of application as such.

Consider again the provision “those who figure in a valid will as beneficiaries are entitled to inherit”. As before, suppose that there are two judges in the same jurisdiction: John and Robert. Imagine that each judge is adjudicating a separate case in which they have to apply that provision. Suppose that judge John believes that “everyone who figures as a beneficiary in a valid will is [legally] entitled to inherit”; Suppose that judge Robert believes that “not everyone who figures as a beneficiary in a valid will is [legally] entitled to inherit”.

It is plausible to think that the attitudes that judges hold towards legal provisions will cause them to take particular actions when applying those provisions. In that sense, it seems plausible that, in applying the provision in question, the beliefs that those judges respectively hold will cause each to decide particular cases in opposite directions. Namely, provided the relevant subject(s) is mentioned as the beneficiary in a valid will, judge Jon’s belief will cause him to concede the
inheritance every time he applies that disposition, while judge Robert’s belief will cause him not to concede it every time.\textsuperscript{45}

It seems to me that, whatever the content of the provision “those who figure in a valid will as beneficiaries are entitled to inherit” might be, our example shows that there is no congruence between that content and one of the actions carried out by the judges. The reason is that it seems impossible for two actions that go in opposite directions to be both congruent with what the same prescriptive content establishes. Every time that two judges apply the same provision to particular cases in opposite ways, at least one of them seems not to be applying the provision according to its actual content. If judge John gives the inheritance and Judge Robert does not, at least one of them must have failed to follow the provision in accordance with what it prescribes.

One may argue that the lack of congruence between one of the acts of application and the content of the provision being applied is not a consequence of the judges’ disagreement being faultless, but a consequence of the judges’ actions going in opposite directions, which, in turn, is rather a consequence of the judges having a disagreement. I think this is right. It seems to me that, in contexts of legal application, the fact that two judges disagree is (might be) enough for them to carry out diverting actions.\textsuperscript{46} The fact that judges carry out diverting actions is enough for (at least) one of them failing to apply the provision’s actual content. So, the lack of congruence (diversion in application) is a consequence of disagreement not of faultlessness. This much I accept.

To say that disagreement is sufficient for lack of congruence is not to say (it doesn’t entail either) that it is sufficient for failing to meet the condition of consistent application. Clearly, the latter is not my claim. As noted, the lack of congruence is only one of the two conditions needed for failing to meet the condition of consistent application. As observed, for the condition of consistent application not to obtain, it must still be the case that we are unable to identify as deviant an incongruent act of application. I take it that, if the disagreement over the content of the law in

\textsuperscript{45} Evidently, it is possible that judge John’s belief causes him to not concede the inheritance and judge Robert’s belief causes him to concede it. I believe there is an intuitive sense in which these situations are, say, anomalous. I take it that a situation in which a particular action is caused by an attitude is anomalous, when the action performed is different from what most of us would have expected someone to do given the attitude that caused the action. In a situation in which two judges apply a legal provision in a context of PLD, one judge being caused to act anomalously is sufficient to render the whole situation anomalous. So, strictly speaking, I contend that when applying a particular provision, in all possible non-anomalous situations, if two judges engage in PLD, then (at least) one is applying the provision in question diverting from its actual content.

\textsuperscript{46} It is also possible that judges hold conflicting attitudes that fail to cause any actions. However, as we are concerned exclusively with situations of legal application, our domain is restricted to cases in which judges do apply provisions.
PLD is not faultless, we would be able to identify deviant acts of application as such; equivalently, I take it that if the disagreement over the content of the law in PLD is faultless, we wouldn’t be able to do so.

Consider our example again. Imagine that, in applying to a particular case the provision “those who figure in a valid will as beneficiaries are entitled to inherit”, judge John is caused to concede the inheritance by his belief that “everyone who figures as a beneficiary in a valid will is [legally] entitled to inherit”. Now, suppose that we are able to identify judge John’s conceding the inheritance as a deviant act of application. We cannot correctly identify as deviant an act of application that is not deviant. If an act of application is deviant, then there must be a mismatch between the content of the provision and the content the judge thought it had. In other words, it must be the case that the judge acted on a false belief. Put differently, if we are able to identify a particular act of application as deviant, then the belief that caused that act must be false (or the non-cognitive attitude incorrect). If a belief is false, a disagreement in which it is involved cannot be faultless (same for incorrect non-cognitive attitudes). Thus, if we are able to identify a particular act of application as deviant, then a disagreement that involves the attitude that caused that act cannot be faultless. This is equivalent to say that if the disagreement that involves the attitude that caused a deviant act of application is faultless, then we are unable to identify that particular act as such (i.e. as deviant).

If the persistent disagreement over the content of the law between judge John and judge Robert is faultless, then we must be unable to identify any of their actions as a deviant act of application. How could we tell that one of the judges has diverted from the actual content of a provision in applying it, if we accept that both judges got things right with respect to that content and act in consequence? We just couldn’t.

The considerations above show that if the disagreement over the content of the law in PLD is faultless, then (i) there is a failure in congruence between a particular act of application (of one of the disagreeing judges) and the content of the provision being applied; and (ii) we are not able to identify that act of application as deviant. What follows from here is that the condition of consistent application is not met. If the condition is not met, then the legal provision in question cannot guide people’s conduct.

Once again, the scope of that conclusion is not restricted to the application of the provision in our example. Since, in applying the law, there is no legal provision with respect to which it is
impossible for two judges to engage in PLD, then, if the disagreement over the content of the law in PLD is faultless, it must be possible that no legal provision meets the condition of consistent application. If so, it is at least possible that no provision is capable of guiding human conduct. Once more, to avoid this conclusion we must abandon the assumption that the disagreement over the content of the law in PLD is faultless.

To sum up, in this subsection I have argued that, in contexts of PLD, if the disagreement over the content of the law is faultless, the conditions of no contradiction and consistent application are not met. As there is no legal provision around which it is impossible for judges to engage in PLD, it is possible that no legal provision meets those conditions. If it is possible that no legal provision meets the conditions of no contradiction and/or consistent application, then it is possible that no legal provision fulfils its function of guiding people’s conduct. Unless we are ready to embrace that possibility, we have good reason to accept that the disagreement over the content of the law in PLD is not faultless. In other words, we have reason to accept premise (2).

4.3 The Conclusion of the Argument against (NC)

From premise (1) if (NC) is true, then the disagreement over the content of the law in PLD is faultless, and premise (2) the disagreement over the content of the law in PLD is not faultless, it follows the conclusion that (3) it is not the case that (NC) is true. Since, as argued, the attitudes involved by a disagreement over the content of the law in PLD are either cognitive or non-cognitive, that conclusion entails that the attitudes that constitute the disagreement over the content of the law in PLD are cognitive.

As suggested, I see no reason to deny that my observations in this chapter can be formulated as observations about the other type of disagreement involved by PLD; that is, they can be formulated as observations about the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY. So, I take it that the attitudes that constitute the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY in PLD are cognitive.

What is the exact type of cognitive attitudes that are involved by the disagreements that constitute PLD? This is a question I won’t be able to answer here So, please allow me to introduce a bit of speculation. On speculative grounds, I’d like to suggest that the attitudes involved by the disagreement over the content of the law in PLD are beliefs that serve competitively two functions:
representational and motivational. That is, I’d like to suggest that, in having their respective beliefs, the subjects involved in an instance of a disagreement over the content of the law in PLD, aim at representing the content of the law and are motivated to carry out certain actions. Those beliefs serve both functions competitively in the sense that they serve the latter at the expense of the former; this is, each belief is explained by the subject’s motivation to perform a particular action while providing an inaccurate representation of things. The tradeoff between those functions favors the realization of some action over the accuracy of the representation.

On speculative grounds, I’d like to suggest that the cognitive attitudes that constitute the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY in PLD are beliefs that serve a representational and a motivational function complementarily. That is to say that both beliefs are aimed at accuracy as much as they are aimed at the motivation of action.

As adverted, I won’t be able elaborate on the considerations above any further in this thesis. Ultimately, the question of what type of attitudes are involved by each of the disagreements that constitute PLD? is an empirical question that can only be answered by means of psychological research. To carry out that research goes far beyond the limits of this work. For explicitness’ sake, let me highlight one more time that the idea that the disagreement over the content of the law in PLD involves beliefs that serve competitively a representational and a motivational function and the idea that the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY involves beliefs that serve complementarily a representational and a motivational function are no more than empirical bets. To be clear, the only thing that I have argued in this chapter is that the attitudes involved by the disagreement over the content of the law in PLD cannot be non-cognitive.

5. Conclusion

In this chapter, I have argued that the mental states involved by the disagreement over the content of the law in PLD are cognitive. This idea follows from accepting two things: first, that the logical space is exhausted by two possibilities (i.e., such attitudes are either cognitive or non-cognitive); second, that such attitudes cannot be non-cognitive.

I claim that the same can be said of the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY in PLD. By accepting that both arguments that constitute PLD involve
cognitive attitudes, we fill the second substantive gap which the description of the structure of PLD left unsolved.

Accepting the characterization of persistent legal disagreement suggested up to this point bears serious consequences with respect to most (if not all) arguments in legal philosophy that draw on considerations about PLD. Before assessing those consequences, there is a problem that deserves our attention. This problem arises after accepting that the attitudes that constitute the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY are beliefs that serve a representational and a motivational function complementarily. It is widely accepted that a disagreement that involves two beliefs that serve a representational function (or a representational and a non-representational function complementarily) requires some sort of coordination between the disagreeing parties. It is commonly accepted that coordination requires sameness of concepts. Over the years, explaining what coordination is has been a challenge in philosophical discussion. In the next chapter, I take on this question. More specifically, I take issue with the idea that coordination requires sameness of concepts.
Chapter 4. (Dis)agreement and Coordination

According to the description suggested in chapter 1, persistent legal disagreement (PLD) involves two disagreements and a relation between them. One is a disagreement over the content of the law in a specific jurisdiction at a given time. The other is a disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY. In this chapter, I pursue two aims. First, I aim to explain in detail what it is to have a disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY. Second, I aim to address a theoretical constrain imposed by accepting, as I do, that this type of disagreement involves two beliefs that serve a representational and a motivational function complementarily. That constrain pertains to the idea that disagreements that involve representational beliefs (or beliefs that serve representational and non-representational functions complementarily) require some sort of coordination between the parties. To deal with such a constrain, I offer a novel account of coordination.

1. The Unexpressed Disagreement in PLD

Consider the following interaction:

(1)

John: everyone who figures as a beneficiary in a valid will is entitled to inherit.
Robert: not everyone who figures as a beneficiary in a valid will is entitled to inherit.

Suppose that John and Robert engage in PLD. That is, suppose that, despite John and Robert’s agreement over all non-legal matters (e.g., empirical facts, facts about language, rules of logic, etc.), they disagree over the content of the law (in a specific jurisdiction at a given time) and this disagreement arises in virtue of a further disagreement between them. Suppose that, by their utterances, John and Robert express their disagreement over the content of the law. For ease of exposition, let’s call disagreements of this type the expressed disagreement in PLD. As constantly noted in this thesis, PLD involves two disagreements. Suppose that the further disagreement between John and Robert—the disagreement in virtue of which the expressed disagreement arises—remains
unexpressed. For ease of exposition, let’s call disagreements of this type the unexpressed disagreement in PLD.

Some legal philosophers claim that the unexpressed disagreement in PLD concerns the concept LAW. They claim that parties to PLD have a disagreement over the content of the law because they have a disagreement that concerns (in some sense) such a concept. Other philosophers claim that the unexpressed disagreement in PLD is a disagreement about the criteria of legal validity in a particular jurisdiction. I believe that the first claim is incorrect and the second one somehow incomplete. In the following sub-section, I will argue that it is not true that the unexpressed disagreement in PLD is a disagreement that concerns the concept LAW; in the sub-section after that, I will elaborate on the sense in which it is incomplete to describe the unexpressed disagreement in PLD as a disagreement about the criteria of legal validity.

1.1 The Unexpressed Disagreement I

One might argue that, when two subjects engage in an instance of PLD, they disagree over the content of the law because they hold conflicting views that (somehow) concern their concept LAW. This view might seem appealing at first sight but not so much under closer examination, or so I will argue. Briefly, the reason the unexpressed disagreement in PLD cannot be a disagreement that concerns the concept LAW is that it is possible that two subjects engage in PLD but fail to have a disagreement that concerns such a concept. Let me elaborate.

As noted in chapter 1, the relation between the expressed disagreement (the disagreement over the content of the law) and the unexpressed disagreement (whatever that disagreement turns out to be) must be causal and necessary. That is, for all instances of PLD, the expressed disagreement is necessarily caused (at least partially) by the unexpressed disagreement.

For explicitness’s sake, let’s recall that, as understood in this thesis, causation must be understood along the lines suggested by the so-called counterfactual theories. As noted in chapter

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1 See (Dworkin, 1986, 2011; Plunkett & Sundell, 2013b). It is sometimes argued that in Law’s Empire Dworkin conflates two understandings of the unexpressed disagreement in PLD. According to this interpretation of Dworkin’s work, he claims both that the unexpressed disagreement in PLD concerns (in some sense) the concept LAW and that it concerns the criteria of legal validity (a disagreement over the grounds of law in Dworkin’s vocabulary). I won’t take a stand on this exegetical issue. On this point, see (Himma, 2002; D. Smith, 2010).

2 Just a reminder that, in this thesis, I follow the convention of denoting concepts with small capitals. The convention was coined by Eric Margolis and Stephen Laurens. See (Margolis & Laurens, 1999).

3 See (Dare, 2010; Himma, 2002; Shapiro, 2007; D. Smith, 2010).
1, according to these theories, causal claims of the form “A caused b” are best analyzed as conditionals of the form “If A hadn’t occurred, B wouldn’t have occurred”. In that sense, to say that the unexpressed disagreement caused the expressed disagreement in a particular instance of PLD, is to say that if the unexpressed disagreement hadn’t occurred, the expressed disagreement wouldn’t have occurred. It is important to emphasize that this relation is necessary; To repeat, this means that, for all instances of PLD, it is not possible to have an expressed disagreement but to not have an unexpressed disagreement.

Now, notice that the concept LAW is different from other concepts like THE LAW IN THE UK, THE ROMAN LAW and THE LAW IN WAKANDA. In the sense relevant for this thesis, the concept LAW is a concept of a mechanism of social coordination. The concept LAW has in its extension one form of organizing social behavior. On the other hand, a concept like THE LAW IN THE UK is a concept of a specific instantiation of that mechanism. This concept has in its extension a particular system of norms and institutions (or something like that).

It is not necessarily the case that, for all instances of PLD, two subjects disagree over the content of the law because they have a disagreement that concerns the concept LAW. It is possible, for instance, that two subjects agree over what kind of mechanism of social coordination the Law is and still have a persistent disagreement over whether, according to the law in the US, a man named Elmer is entitled to his grandfather’s inheritance. In fact, it seems plausible to think that, in most cases of PLD, the disagreeing subjects (think for instance of judges and lawyers in a legal system) do agree about what type of device for social coordination the Law is. When engaged in an instance of PLD, subjects usually think of themselves as playing the same game. Disagreements over the nature of the mechanism of social coordination we call “(the) Law” might be common in the realm of legal philosophy but they seem to be rather rare in legal practice. Of course, I don’t deny that it is possible that when two subjects engage in PLD, they hold conflicting views about the nature of the Law. Even more, I don’t deny that it is possible that this disagreement be a partial cause of a persistent disagreement over the content of the law in a particular jurisdiction at a given time. My claim is simply that this is not necessarily the case.

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4 For an introduction to contrafactual theories of causation see (Menzies & Beebee, 2020). David Lewis is commonly credited with the introduction of contrafactual theories of causation. See (Lewis, 1973).

5 Perhaps there are multiple concepts LAW. For example, there might be a concept LAW that is a concept of some observable regularities in the physical world. For my purposes, we need not pay attention to any of those alternative concepts.
If it is possible that parties to PLD fail to have a disagreement that concerns the concept LAW, then it is false that, for all instances of PLD, the disagreement over the content of the law is necessarily caused (at least partially) by a disagreement that concerns the concept LAW. It is possible that a disagreement over the content of the law would have occurred even though the disagreement that concerns the concept LAW hadn’t occurred. Since, for all instances of PLD, the expressed disagreement is necessarily (at least partially) caused by the unexpressed disagreement, the unexpressed disagreement cannot be a disagreement that concerns the concept LAW.⁶

It follows from the observations above that the unexpressed disagreement in PLD must concern something else. An alternative view suggested in the literature is that the unexpressed disagreement in PLD is a disagreement about the criteria of legal validity (of a particular jurisdiction at a given time). Let’s move on now to examine this view.

1.2 The Unexpressed Disagreement in PLD II

It has been suggested that the disagreement over the content of the law in PLD is caused by a disagreement about the criteria of legal validity.⁷ The idea is that if, for example, despite agreeing over all non-legal issues, two judges in New York disagree over whether a man named Elmer is entitled to his grandfather’s inheritance, it must be because those judges have conflicting views about what are the criteria of legal validity in their legal system. I find this idea persuasive but the description of it incomplete. The description seems to ignore an important aspect of the unexpressed disagreement in PLD, which is that having a disagreement over the criteria of legal validity in jurisdiction S is having a disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY IN JURISDICTION S. This second description available in the literature of the unexpressed disagreement in PLD is incomplete because it is silent with respect to that fact.

By saying that a disagreement about the criteria of legal validity in jurisdiction S is a disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY IN JURISDICTION S, I don’t mean to say that those criteria and that concept are one and the same thing. I take the latter to be a mental representation of the former. My claim is that talking of a disagreement over the criteria of legal validity and talking of a disagreement that concerns the concept THE CRITERIA OF LEGAL

⁶ Similar arguments have been suggested by Joseph Raz and Jules Coleman. See (Coleman, 2001, pp. 181–182; Raz, 1998, pp. 276–281).
⁷ See footnote 3.
VALIDITY are two different but complementary ways to describe the same situation. I will elaborate now on this more complete characterization of the unexpressed disagreement in PLD.

To begin, it is worth drawing attention to one distinction made in chapter 1: the distinction between having a disagreement over/about something and having a disagreement that concerns a concept. Briefly, I use the expression “having a disagreement over something” to describe a disagreement in terms of the intentional contents of the mental states that constitute it. If two subjects have a disagreement over X, each of them holds an attitude about X. On the other hand, when two subjects have a disagreement that concerns their concept C, the attitudes that constitute that disagreement are not attitudes about C. They are attitudes about the thing that the concept C is a concept of. In disagreements of that type, one attitude is constitutive (it is a part) of one subject’s concept C and the other attitude is constitutive (it is a part) of the other subject’s concept C. To be explicit, that is what I mean by the expression “a disagreement that concerns concept C”. I’ll clarify this point in full detail below. For now, just notice that there is a difference between having a disagreement over something and having a disagreement that concerns a concept.

Notice that an instance of PLD takes place in a particular legal system, for instance, the UK legal system. In that sense, it would be more precise to say that when two subjects engage in an instance of PLD, for example, in the UK, they disagree over the content of the law in the UK because they have a disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY IN THE UK (or a disagreement over the criteria of legal validity in the UK). Relative to a different legal system, say the US, we would say that, when two subjects engage in an instance of PLD, they disagree over the content of the law in the US because they have a disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY IN THE US (or a disagreement over the criteria of legal validity in the US). Evidently, the concept THE CRITERIA OF LEGAL VALIDITY IN THE UK (the criteria of legal validity in the UK) and the concept THE CRITERIA OF LEGAL VALIDITY IN THE US (the criteria of legal validity in the US) are different. For expository reasons, I have decided to ignore this precision. To make my claims general, I have and will use the label “the criteria of legal validity (in S)” to refer to the criteria of legal validity of any legal system (as opposed to using multiple labels such as “the criteria of legal validity in the UK”, “the criteria of legal validity in the US”, “the criteria of legal validity in Spain”, etc.). Similarly, I’ll use the label “the concept THE CRITERIA OF LEGAL VALIDITY (IN S)” to refer to all concepts that have as their referent the criteria of legal validity of a legal system (as opposed to using multiple expressions such as “the
concept THE CRITERIA OF LEGAL VALIDITY IN THE UK”, “the concept THE CRITERIA OF LEGAL VALIDITY IN THE US”, etc.). So, keep in mind that, with respect to particular cases, both terms have a relative character in that sense.

What are the criteria of legal validity? For present purposes, it suffices to understand the criteria of legal validity of a legal system $S$ as whatever it takes for something (perhaps a norm) to belong to $S$. In other words, the criteria of legal validity are the conditions that define membership to a legal system. Such conditions, it is commonly said, are individually necessary and jointly sufficient for membership. Even if controversial, this description of the criteria of legal validity should suffice for our aims. Nothing of substance should follow from replacing this description with any other.

What is to have a disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY? To explain the unexpressed disagreement in PLD I will focus exclusively on this question. I have briefly suggested that the attitudes that constitute the unexpressed disagreement in PLD are constitutive of the concept THE CRITERIA OF LEGAL VALIDITY. To understand what it means to say that an attitude is constitutive of a concept, it is useful to have first a grasp about the sort of thing concepts are. Let me be explicit about the characterization of concepts I aim to endorse.

**Concepts**

As noted in chapter 1, I conceive of concepts as mental representations. This view, although not uncontroversial, is popular in philosophy, psychology, and cognitive science.³ Thus understood, concepts are psychological entities. They are mental particulars. According to the view I aim to subscribe, concepts are the most basic representations that form our thoughts. Concepts are the constituents of the mental representations that are the content of our attitudes (and arguably other types of intentional mental states). As seen, I conceive of the mental representation that is the content of an attitude as (a piece of) information syntactically structured. The most basic representations that form the structure of that information is what I call concepts.

³ Alternatively, concepts have been conceived of as abilities and abstract objects. For the conception of concepts as abilities see (Bennett & Hacker, 2008; Dummett, 1993). For the conception of concepts as abstract objects see (Peacocke, 1992; Zalta, 2001). For an overview of the different approaches to the ontology of concepts see (Laurence & Margolis, 1999).
In philosophical discussion, it is common amongst theorists when explaining concepts to appeal to the distinction between types and tokens. It is common to understand that distinction as the difference between an abstractly constructed (type of) thing and its particular (tokens) instances. For example, the type word “word” and the two tokens of it that occur in this sentence. We can think of a token concept as an ongoing pattern of neurological activity necessary for performing a task. A token concept takes place in a subject’s mind at a particular time. On the other hand, we can think of a type concept as the concept that can be abstractly constructed out of a particular pattern of neurological activity. A type concept is not situated in anyone’s mind at any time. When the same pattern of neurological activity is replicated in two minds, we say that we have two token concepts of the same type concept. Since I conceive of an instance of PLD as a relation between mental states that take place in a certain jurisdiction at a specific time, that is, as a relation between token mental states, in what follows, I will be concerned with token concepts, not with types (unless stated otherwise).

A concept is a mental representation of something. Following a good number of psychologists and philosophers of mind, I’ll use the term “category” to refer to the set of items a concept is a representation of. As understood in this chapter, categories are the references of concepts. For example, the concept DOG is a concept of the category dogs. The category dogs is the set of items (actual and possible) that are dogs.

Performing a cognitive task is necessary for deploying a concept. Cognitive tasks can be described as psychological processes for which subjects allocate a good amount of cognitive resources (attention, memory, etc.) For our purposes, there is no need to be more specific than that. Subjects deploy concepts when they perform any of the psychological processes which cognitive scientists commonly call higher cognitive functions. Among those functions (tasks) we find: categorization, drawing analogies, making inferences, imagining, remembering, etc. Thus, as understood in this thesis, to have a concept is to deploy a conceptual representation when performing a (cognitive) task.

Some concepts are manifestly complex in the sense that they are composed of more basic representational elements (other concepts). One example is the concept NATIONAL TEAMS THAT HAVE WON THE FIFA WORLD CUP. Other concepts are thought to be more basic. Lexical concepts

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9 For a thorough analysis of the distinction between types and tokens see (Wetsel, 2009).
(as it is usual to call them) are concepts that tend to be associated with individual items of the lexicon in a natural language. Examples of lexical concepts are DOG, BIRD, JUSTICE, LAW, etc. I take it to be uncontroversial that the concept THE CRITERIA OF LEGAL VALIDITY is not a lexical concept but a complex one.

I assume that concepts (complex and lexical), just as attitudes, have a structure. That is, I assume that concepts have constituents (or parts). We can think of the parts that form the structure of a concept as pieces of information. I assume that (at least some of) the information that forms a concept comes from long term memory (as opposed to information that comes from perceptual experience). Deploying a concept entails that an individual retrieves from long term memory some information; that information constitutes (at least partially) the concept’s structure.

Although non-exhaustive, the description above is enough to make explicit what type of entity I take concepts to be. To be explicit, relative to the case that concerns us, I take the concept THE CRITERIA OF LEGAL VALIDITY (in S) to be a structured mental representation of the category the criteria of legal validity (in S), that a subject deploys in performing a task (for instance, in finding out the content of the law in S at a particular time). With this in mind, let’s get back to the question of what constitutes a disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY in PLD.

1.3 The Disagreement that Concerns the Concept THE CRITERIA OF LEGAL VALIDITY

To repeat, as understood in this thesis, concepts are structured mental representations. There seems to be no obvious reason to deny that some of the information that an individual retrieves from long term memory when deploying a concept is itself linguistically structured. Similarly, there seems to be no reason to deny that there might be a psychological relation between that information and the subject deploying the concept. In other words, there seems to be no reason to

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10 This claim is far from being uncontroversial. In philosophical discussion, there is an influential view that denies that lexical concepts have structures. That view is commonly called conceptual atomism. One general way to describe (one form of) conceptual atomism is as the claim that a concept is not (not even partially) individuated by its relations to other concepts, but by its causal relation(s) to its referent and syntax. It goes far beyond the limits of this thesis to present an argument against conceptual atomism or in favor of conceiving concepts as having a structure. On conceptual atomism see (Fodor, 1987, 1990; Millikan, 1998, 2000). Skepticism against conceptual atomism has been raised, for instance, by Daniel Weiskopf. See (Weiskopf, 2009a). The idea that complex concepts have structures seems to be less problematic. Since the concept THE CRITERIA OF LEGAL VALIDITY is complex, it shouldn’t be problematic to accept that it has a structure.
deny that at least some of a concept’s parts can be themselves contents of attitudes. This is to say that a subject instantiates some attitude(s) she has about a category when deploying her concept of that category (or at least that there is no reason to deny she does). For ease of exposition, in what follows, I will talk of attitudes of this type as if they were the parts that form the structure of concepts (keep in mind though that, strictly speaking, there is a distinction between the conceptual information retrieved from long term memory and the relations that subjects (might) bear to it). In that sense, I will say that when deploying the concept THE CRITERIA OF LEGAL VALIDITY, subjects retrieve from long term memory some attitudes they hold about the criteria of legal validity. In different words, I will say that an attitude about the criteria of legal validity that is retrieved by a subject from long term memory when using her concept THE CRITERIA OF LEGAL VALIDITY is constitutive of that concept.

I contend that a disagreement between two subjects that concerns the concept THE CRITERIA OF LEGAL VALIDITY (a disagreement over the criteria of legal validity) involves two attitudes of that sort. That is, a disagreement of that type is constituted by one attitude that is part of the structure of one subject’s concept THE CRITERIA OF LEGAL VALIDITY, and one attitude that is part of the structure of another subject’s concept THE CRITERIA OF LEGAL VALIDITY.

Having a look at a simple case might help illustrate these ideas. Consider the concept TIGER. Let’s say that, in instantiating her concept TIGER, a subject A retrieves from long term memory (perhaps among others) the representational belief “tigers are mammals”. Let’s say that a second subject B, in instantiating her concept TIGER, retrieves from long term memory (perhaps among others) the representational belief “tigers are not mammals”. Given that the representational beliefs “tigers are mammals” and “tigers are not mammals” cannot be both accurate representations of the world, this is an example of A and B having a disagreement that concerns the concept TIGER.

The case above is simpler than cases of disagreements concerning the concept THE CRITERIA OF LEGAL VALIDITY because, while it is clear what the content of the attitudes that constitute the concept TIGER might look like (e.g. tigers are mammals), it is not clear what the content of the attitudes that constitute the concept THE CRITERIA OF LEGAL VALIDITY might be. Perhaps that content is to be formulated as “C is a criterion of legal validity in S”; perhaps it is to be formulated as “norm N belongs to legal system S only if it meets condition C”; or perhaps it is to be formulated
as “the criteria of legal validity in S include criterion C”, etc. I aim to remain noncommittal about this matter.

I have claimed that there is no difference between a disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY (relative to S) and a disagreement over the criteria of legal validity (relative to S). It must be clear now what I mean by that. In any instance of PLD, the attitudes involved by the unexpressed disagreement are attitudes about the criteria of legal validity that subjects retrieve from long term memory as they deploy their respective concepts THE CRITERIA OF LEGAL VALIDITY. A description of the unexpressed disagreement in PLD that doesn’t account for this fact leaves unexplained an important aspect of this type of disagreement. It is in that sense that the description suggested in this section is more comprehensive than any description already suggested in the literature.

On speculative grounds, I have suggested in chapter 3 that the attitudes involved by the unexpressed disagreement in PLD are beliefs that serve a representational and a motivational function complementarily. Accepting that idea poses an important theoretical challenge. It is said that disagreements that involve representational beliefs (or beliefs that serve representational and non-representational functions complementarily) require that there is coordination between the disagreeing parties. In the following sections, I’ll introduce a new account of the coordination requirement and sketch some reasons in favor of it.

2. (Dis)agreement and Concepts: Coordination

In philosophical discussion, it is widely accepted that disagreements involving two representational beliefs require some sort of coordination between the parties.\textsuperscript{11} It is said that for two subjects to engage in a disagreement (if their disagreement involves two representational beliefs) it must be the case that those subjects (are be able to) understand each other. If your goal is to attain an accurate description of things and so is mine, our views cannot conflict unless you can share yours with me and I can share mine with you. Since, as seen, when disagreement involves

\textsuperscript{11} This way of putting things is imprecise. The philosophical literature around disagreement does not distinguish between different types of beliefs, particularly, in terms of their functions. The idea that the beliefs that constitute disagreement might serve different functions is part of this thesis’ contribution. However, most (if not all) theorists seem to assume (even if they don’t know they do) the idea that the beliefs involved by disagreement serve (exclusively) a representational function. In that sense, even if imprecise, what I’ve said doesn’t seem incorrect.
two beliefs that serve a representational and a non-representational function complementarily, the disagreeing subjects are in the business of representing the world just as much as in the business of accomplishing some other non-representational goal, I accept that the coordination requirement also applies to disagreements that involve beliefs of this latter type (i.e., beliefs that serve a representational and a non-representational function complementarily).

In philosophical discussion, the requirement of coordination is sometimes referred to as “sameness of topic”\(^{12}\), sometimes as “publicity”\(^{13}\) and some other times as “translatability”\(^{14}\). I won’t use any of these expressions here. I will refer to the coordination requirement simply and as “coordination”.

The requirement for coordination can be (and it has usually been) explained in terms of there being a common topic that the disagreeing subjects are able to track.\(^{15}\) More specifically, it has been explained in terms of two conditions: sameness of topic and mutual awareness. I aim to endorse this view.

Sameness of topic is the idea that both beliefs involved by a disagreement must be about the same thing(s). The belief that “banks (financial institutions) are dangerous” and the belief that “banks (edges of rivers) are not dangerous” are not about the same thing (they are not about the same kind of banks). Consequently, a subject that holds the former and another one that holds the latter don’t coordinate. Since in having such beliefs those two subjects don’t coordinate, they don’t disagree. By contrast, the belief that “banks (financial institutions) are dangerous” and the belief that “banks (financial institutions) are not dangerous” are about the same things (they are about the same kind of banks), thus, a subject who holds the former and a subject who holds the latter do (or at least they might) coordinate with each other. Since those coordinated beliefs cannot be both accurate representations of the world, those subjects disagree.

On the other hand, the condition of mutual awareness requires that the disagreeing subjects (be able to) realize that their beliefs share a common topic. It is hard to see how two subjects that fail (are unable) to realize that their beliefs are about the same thing(s) could understand each other. That is so even if those beliefs would in fact share the same topic. Here is an example.

\(^{12}\) See (F. Schroeter et al., 2020).
\(^{13}\) See (Fodor, 1998, 2004).
\(^{14}\) See (Davidson, 1974).
\(^{15}\) It seems to me that, beyond differences of detail and vocabulary, a number of philosophers embrace this characterization of the coordination requirement. See, for instance, (Chalmers, 2011; Dickie, 2015; Jenkins, 2014; F. Schroeter et al., 2020)
Imagine a subject who, as a representation of things, believes that “Superman flies”. Imagine another subject who, as a representation of things, believes that “Clark Kent doesn’t fly”. For the sake of argument, let’s grant that both beliefs are about the same person (they share a topic). It seems at least possible for those two subjects that they don’t realize their beliefs share a common topic. Imagine, for example, that neither believes that Clark Kent and Superman are the same person. In that case, their beliefs would not be coordinated. Each subject would be unable to tell that her belief is about the same person that the other subject’s belief is about. Again, if those subjects don’t coordinate with respect to two particular beliefs, there cannot be disagreement between them involving those beliefs.

Notice, it doesn’t follow from two subjects failing to disagree because there is no coordination between them, that they agree. Agreement, understood as a relation between beliefs of the representational kind, also requires coordination between subjects. For example, when a subject has the representational belief that “banks (financial institution) are dangerous” and another subject has the representational belief that “banks (financial institution) are dangerous”, their beliefs share a topic. If along with this, they realize it, then those subjects must be able to understand each other. As both beliefs could be accurate representations of the world, a subject who holds one and another subject who holds the other agree. Clearly, there is no coordination, and then no agreement, between someone who representationally believes that “banks (financial institutions) are dangerous” and someone who representationally believes that “banks (the edges of rivers) are dangerous”. By having these two beliefs, two subjects don’t agree on any properties of either financial institutions or the edges of rivers. Likewise, there is no coordination, and thus no agreement, between someone who holds the representational belief that “Superman flies” and someone who holds the representational belief that “Clark Kent flies”, if they don’t realize that those beliefs are about the same person. Two subjects in that situation would be unable to agree that they are attributing the same property to the same person. To be explicit, I take agreement and disagreement to be the only instances of coordination.

It should be noticed that coordination is not required for disagreement when it is constituted by beliefs that serve a motivational (and perhaps some other non-representational) function(s). To explain this idea, it is useful to remember an example presented in chapter 2. Imagine that you have the belief that “there is a ghost in this room” and I have the belief that “having the light on is bad for the environment”. Imagine that both beliefs serve exclusively a motivational function so
that you formed yours because you are motivated to turn on the light and I formed mine because I am motivated to turn it off. Finally, imagine that we are in the same room at the same time. As noted, according to the functionalist view of disagreement, in this case we disagree. That is so even if, in a sense, we *misunderstand* each other; we disagree even if your belief and mine do not share the same topic. To repeat, the point here is that in a disagreement that involves two motivational beliefs there is no need for coordination between the parties.

It may seem familiar (particularly in legal philosophy) to say that when there is no coordination between subjects (cases in which subjects don’t agree nor disagree) there is *talking past*.\(^\text{16}\) However, that expression is inaccurate. Strictly speaking, for two people to talk past one another, they must engage in a linguistic exchange. But neither disagreement nor agreement requires being expressed. As noticed in previous chapters, the relation of disagreement obtains between mental states not between utterances (or other communicative actions). In light of this consideration, I’ll drop the term “talking past” (or any of its related expressions) and use instead the term “non-coordination” to describe the situation that obtains when subjects fail to coordinate.

To sum up, I aim to endorse the view that (dis)agreements involving two representational beliefs or two beliefs that serve a representational and a nonrepresentational function complementarily, require that the disagreeing parties coordinate. I also aim to endorse the view that coordination obtains only if two representational beliefs, or two beliefs that serve a representational and a nonrepresentational function complementarily, share a topic (they are about the same thing) and the subjects are aware of it. For the sake of explicitness, I hold that there is non-coordination between two subjects if their respective representational beliefs or beliefs that serve a representational and a nonrepresentational function complementarily don’t share a topic, or if they do but subjects fail to realize it.\(^\text{17}\) In the following section, I will present the standard way in which the requirement of coordination has been fleshed out in the literature.

### 3. The Coordination Requirement: The Standard View

\(^{16}\) In legal philosophy, the introduction of the expression “talking past one another” is owed to Dworkin who used it in his disagreement-based argument against legal positivism. See (Dworkin, 1986, p. 44).

\(^{17}\) I aim this to be an inclusive disjunction.
For simplicity of exposition, from here onwards, I’ll focus exclusively on disagreements that involve two representational beliefs and set aside disagreements that involve beliefs that serve a representational and a non-representational function complementarily. What does it take for there to be coordination between two subjects? What needs to be the case so that two representational beliefs share a topic and, at the same time, subjects are able to realize it? In the literature, the most common answer to this question is that two subjects coordinate if, and only if, their respective representational beliefs have contents with the same structure; in other words, if, and only if, those beliefs (their intentional contents) are made up by the same concepts. Briefly, according to the standard view, coordination requires sameness of concepts. Let me elaborate a little further on this idea.

The view I call the standard view of coordination can be better explained if we bring up once again the distinction between types and tokens. This time, the distinction is to be applied to the contents of representational beliefs. One may claim that types of contents are individuated in terms of the (type) concepts that form them (plus syntax). For example, the content type “banks (financial institutions) are dangerous”, is individuated by a particular arrangement of the concepts BANK (financial institution), TO BE, DANGEROUS and PLURAL. Any instance of this arrangement is a token of that type.

As seen, agreement and disagreement are relations that obtain between token mental representations. So, according to the standard view, two subjects coordinate if, and only if, the contents of their respective beliefs are instances of the same type.

That there is one concept that two token contents don’t share is sufficient to say that they are instances of different types, and thus that there is no coordination between the subjects that endorse them. Looking at our example, we can say that, according to the standard view, there is no coordination between an instantiated representational belief with the content “banks (financial institutions) are dangerous” and an instantiated representational belief with the content “banks (edges of a river) are not dangerous”, because those contents are not tokens of the same type.

In the same vein, according to the standard view, when subjects fail (are unable) to realize that their attitudes are about the same things (despite that being the case) is because the contents of their beliefs are not tokens of the same type. For the standard view, there is no coordination

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18 In legal philosophy, for example, Dworkin has labeled this idea (or a very similar one) the fulcrum of (dis)agreement. See (Dworkin, 2017, pp. 2109–2110).
between a subject that holds a representational belief that “Superman flies” and another subject that holds a representational belief that “Clark Kent doesn’t fly” (when they don’t believe that superman and Clark Kent are the same person) because the concept SUPERMAN in the former and the concept CLARK KENT in the latter are different which makes those contents be tokens of different types. To be clear, according to the standard view, the fact that the contents of those beliefs are tokens of different types makes subjects unable to realize that their beliefs share a topic.

I will assume without argument that coordination also obtains (it is required) in relation to concepts, particularly, those that form the intentional content of a belief.\(^{19}\) To say that there is coordination between two individuals with respect to two token concepts is to say that they (those concepts) are representations of the same category and that subjects would (be able to) realize it. According to the \textit{conceptual} version of the standard view of coordination, there is coordination between two subjects with respect to their respective two concepts if, and only if, those concepts are instances of the same type. In more intuitive, although more imprecise terms, according to this view, there is conceptual coordination between subjects, only if those subjects \textit{share the same concept}. A subject that instantiates the concept TIGER and another subject that instantiates the concept TIGER coordinate with respect to that concept, but a subject that instantiates the concept TIGER\(_1\) and another subject that instantiates the concept TIGER\(_2\) do not.

Among theorists who understand concepts as mental particulars, it is common to think that types of concepts are individuated in terms of their structure.\(^{20}\) That is, theorists commonly accept that what makes two token concepts be tokens of the same type is that they are formed by the same parts. In other words, it is said that two token concepts are tokens of the same type if, and only if, when deploying those concepts subjects retrieve from long term memory the same package of information (if they instantiate the same pattern of neurological activity). It is worth noticing, however, that neither the standard view of coordination entails this thesis about the individuation of types of concepts, nor such a thesis about the individuation of types of concepts entails the standard view of coordination. Evidently, someone who accepts the standard view of coordination but

\(^{19}\) In philosophical discussion, conceptual coordination is sometimes called conceptual competence, some other times publicity. See, for instance, (Fodor, 1998, pp. 27–29, 2004; L. Schroeter, 2008).

\(^{20}\) See (Machery, 2009; Margolis, 1998; Millikan, 2000; Weiskopf, 2009b).
rejects the idea that concept types are individuated in terms of their structures is charged with the challenge of offering an alternative account of concept individuation.\textsuperscript{21}

For our aims, this brief reconstruction of the standard view of coordination will do. In the next section, I’ll introduce an alternative account of the coordination requirement. Roughly, I’ll suggest that coordination turns on (sufficient similarity of) the determinants of conceptual representation. For simplicity of exposition, in presenting my view, I’ll focus first on concepts and then extend the view to representational beliefs. The conceptual version of the view of coordination I aim to advance holds that two token concepts can share a common topic and subjects be aware of it if, and only if, those concepts are coreferential, they are being used in similar enough contexts, and they are being used to perform similar enough cognitive tasks. The main difference between the standard and the new view of coordination is that, according to the latter, coordination doesn’t require sameness of concepts.

4. The Coordination Requirement: A New Account

There is good (empirical) reason to believe that conceptual representation is sensitive to category, context and cognitive task. What information people retrieve from long term memory when performing a cognitive task depends on what category that information represents, the particular physical, social and individual circumstance in which that information is and has been used, and the cognitive function that information is being used to accomplish.

I’d like to suggest that coordination turns on those three determinants of conceptual information. More specifically, I’d like to suggest that they are disjunctively necessary and conjunctively sufficient conditions for coordination. According to the new account of coordination, a subject that deploys a token concept C1 and another subject that deploys a token concept C2 coordinate with respect to C1 and C2 if, and only if, C1 and C2 are coreferential, they are being used in sufficiently similar contexts, and they are being used to carry out sufficiently similar tasks. In what follows, I will elaborate on these ideas.

\textsuperscript{21} In legal philosophy, there are at least two examples of a theory that embraces the standard view of coordination but rejects that concepts are individuated in terms of the information that constitute them. One is Ronald Dworkin’s legal interpretivism; the other has been recently suggested by Françoise Schroeter, Laura Schroeter and Kevin Toh. I’ll say more about this below. See (Dworkin, 2011; F. Schroeter et al., 2020).
First, I take it to be uncontroversial that there cannot be conceptual coordination without coreferentiality; that is, if two concepts are representations of different categories, there cannot be coordination between the subjects that hold them. If by thinking of BANKS, you are thinking of financial institutions and I’m thinking of the edges of rivers, our concepts don’t share a topic; there is coordination between you and me, only if by thinking of BANKS we both think of either financial institutions or riverbanks. Hence, coreference is necessary for (conceptual) coordination.22

But coreference is not sufficient for coordination. As our example involving the concepts SUPERMAN and CLARK KENT illustrates, it seems at least possible that two concepts have the same referent, but subjects fail to notice that they are coreferential. It doesn’t seem wrong to say that (at least part of) the reason why two subjects might deploy their respective concepts SUPERMAN and CLARK KENT without being aware that they are representations of the same person is that the contexts in which those concepts are (have been) deployed are sufficiently dissimilar to one another. Someone who has the concept SUPERMAN but not the concept CLARK KENT and someone who has the concept CLARK KENT but not the concept SUPERMAN must have gone through significantly different experiences in life. Since it seems natural to think that individual experience is determined by context and that individual experience determines what information one draw on to represent a category, it seems natural to think that it is because the contexts in which those two concepts (SUPERMAN and CLARK KENT) are (have been) used are different, that each of those subjects has one concept but lacks the other. The conclusion to be drawn from these observations is that similarity of contexts is also necessary for coordination.

Coreference and similarity of contexts are not sufficient conditions for coordination. The reason is that if, as data suggest, the cognitive task that a subject seeks to accomplish by deploying a concept determines what information she retrieves from long term memory, then a big enough difference between the tasks being performed by two subjects might bring about a big enough difference in what conceptual information each of them retrieves, and thus, it might bring about lack of understanding. A kindergarten teacher and a university professor may have representations of trees so different (at a particular time) that they might fail to understand each other when

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22 I should make explicit that, following a widespread view in philosophy of mind, I assume that a concept’s reference is fixed by a causal relation between a thinker and the category that concept is a concept of. This idea is not uncontroversial in philosophical discussion; however, I won’t argue for it here. Making the case for or against any views about reference determination goes far beyond the limits of this thesis. The introduction of causal theories of reference is often attributed to Saul Kripke and Hilary Putnam. See (Kripke, 1980; Putnam, 1973).
thinking about trees. The conclusion to be drawn here is that it is necessary for coordination that the cognitive tasks that subjects seek to accomplish in deploying their respective concepts are sufficiently similar.

Up to date, theorists have pointed out three determinants of conceptual information. However, category, context and cognitive function, might not be the only factors playing that role. Perhaps there are some other aspects that influence conceptual information of which we are still unaware. What is more, perhaps we are wrong in thinking that conceptual representation is determined by category, context and cognitive task. Future research may change the way in which we think about how conceptual representation is determined. Strictly speaking, my suggestion is not that there is coordination between two subjects if, and only if, their respective concepts are coreferential and the context and cognitive tasks for which those concepts are being deployed are similar enough. My suggestion is a little more general. I contend that for there to be coordination between two individuals, the factors that determine conceptual representation must be sufficiently similar. It is only because our best theories in psychology and cognitive science currently support the view that category, context and cognitive function are the three determinants of conceptual information, that I take them to be the conditions for coordination. If there were further developments that contradict this idea, the view I suggest would need to be modified accordingly.

It is of the outmost importance to make explicit that, according to the new approach, same-ness of concepts is neither sufficient nor necessary for coordination. To explain this point more easily, let’s grant (as most supporters of the standard view of coordination do) that type-concepts are individuated in terms of their constituent parts (and syntax). That is, let’s grant that two token-concepts are tokens of the same type if, and only if, the subjects who respectively hold them, in doing so, retrieve from long term memory the same package of information. It follows from accepting this view on concept individuation that, according to the standard view, if when deploying her token concept C1 a subject retrieves information different from the information retrieved by another subject when deploying her token concept C2, those subjects (necessarily) don’t coordinate. But if we accept the new account of coordination that is not the case. If we accept the new account, we can accept that it is possible for someone who holds C1 and someone who holds C2 to coordinate, even if in deploying C1 that subject retrieves a package of information that is different form the package retrieved from the other subject in deploying C2. According to the new account, all it takes for there to be coordination between those subjects is that C1 and C2 are
coreferential and they are being deployed in similar enough contexts to perform similar enough cognitive tasks. To be explicit, the new account of coordination doesn’t entail *sameness of concepts*.

It is easy to extend this new account of coordination about concepts to representational beliefs. We say that there is coordination between two subjects with respect to two (representational) token beliefs if, and only if, there is coordination between them (those subjects) with respect to each of the concepts that form those beliefs. For example, if, in having a (representational) belief, a subject deploys her token concepts A1, B1, and C1, and another subject, in having a (representational) belief, deploys her token concepts A2, B2, and C2, they coordinate if, and only if, A1 and A2, B1 and B2, and C1 and C2, respectively, share reference, are being used in a similar enough context, and are being used to carry out similar enough cognitive functions.

Notice again that with respect to (representational) beliefs the new account of coordination does not entail sameness of concepts. Two subjects can coordinate despite their beliefs having contents with different structures. In other words, there can be coordination between two token beliefs despite those beliefs being tokens of different types.

A quick note: the reason to accept that conceptual representation is determined by category, context, and task comes from empirical research in psychology and cognitive science. There is a good deal of theories with strong empirical support that have found those three to be the determinants of conceptual representation.\(^{23}\) I will present some of that research below. For now, my aim has merely been to introduce the new account of coordination.

It seems to me that the new account of coordination has some explanatory advantages over the standard view. Mainly, the new account fits better with some currently popular (although admittedly controversial) ideas suggested by cognitive scientists and philosophers of mind. Moreover, by accommodating those ideas, the new account does a better job than the standard view at vindicating the empirical data that support them. In the following section, I’ll elaborate on the theses of *hybrid views of concepts*, *conceptual flexibility*, and *extensive variability of conceptual representation*. I will show that the new account combines better with those ideas than the standard view.

5. The Standard View vs The New Account

For the sake of clarity, I should notice that my aim in this chapter is neither introducing a definite objection against the standard view of coordination nor a definite argument in favor of the new account, but simply to present the new account as a plausible alternative. However, this is not to say that there is no reason to prefer the new account. The reason in favor of the new account of coordination pertains to the fact that it can be more easily inserted in the broader landscape of theories concerning concepts. More specifically, the new account fits better alongside some theses that have recently become popular in cognitive science and philosophy of mind. Those are the theses usually called: a hybrid view of concepts, conceptual flexibility and extensive variability of conceptual representation. In the following subsections, I’ll present these theses and explain why I think they speak in favor of the new account of coordination and against the standard view.

5.1 A Hybrid View of Concepts

According to a hybrid view of concepts, in performing the same type of cognitive function, a person retrieves from long term memory different kinds of information to represent a category.\(^{24}\) In terms of this view, it is possible that subjects in different occasions use different kinds of information, and it is also possible that they use different kinds of information simultaneously in one occasion. Hybrid views of concepts are incompatible with non-hybrid views. According to a non-hybrid view of concepts, there is a single kind of conceptual information that is drawn from long term memory by a subject every time she performs the same type of cognitive function. In other words, in terms of a non-hybrid view, the package of information that a subject retrieves from long term-memory in deploying a concept comprises always information of the same type. It is worth highlighting that the claim that subjects might retrieve information of different kinds in different occasions when deploying the same concept entails that the package of information that a subject retrieves to represent a category might vary.

\(^{24}\) In this presentation of a hybrid view of concepts, I follow Collin Rice. See (Rice, 2016). For other works that suggest a hybrid view of concepts see (Anderson & Betz, 2001; Gelman, 2004).
The difference between hybrid and non-hybrid views can be clarified with an example. Consider the task of categorization (i.e., the task of identifying an item as a member of a category). According to a non-hybrid view of concepts, every time when a subject identifies a particular item as an instance of a category, she relies on one and the same kind of information, say, prototypical. In terms of this view, since categorization involves prototypical information, psychological processes that involve information of other kinds are different from categorization (or, at least, they are different types of categorization processes). By contrast, according to a hybrid view of concepts, when a subject categorizes, she might rely on prototypical, exemplar, theoretical and/or ideal information. According to a hybrid view, that subject can rely on those types of information all at once or on different types on different occasions. Different hybrid views have different conceptions of what kinds of information are involved by different tasks. For instance, for the most comprehensive version of a hybrid view regarding categorization, subjects might rely sometimes on prototypical information, some other times on exemplar information, some others on theoretical information, some other times on ideal information, and often on all those kinds of information simultaneously.

Hybrid views of conceptual representation are supported by a good deal of empirical data. Several studies have shown that, when deploying a conceptual representation, individuals do retrieve from long term memory (often simultaneously) information of different kinds (e.g., prototypical, exemplar, theoretical and ideal). Most of this research focuses on categorization but the same idea has been suggested with regards to other cognitive functions. In what follows, I’ll describe very briefly some of the results found by research focusing on categorization.

Some studies have shown that subjects rely on prototypical information for categorization. The idea is that, in judging the category to which a particular item belongs, subjects often

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26 Research has been carried out with respect to other cognitive functions. Collin Rice presents as an example the case of concept combination. See (Rice, 2016, pp. 605–606). As presented by Rice, according to some studies, concept combination (the process of combining two or more concepts to create a new complex concept) involves prototypical information. See (Hampton, 1987, 1997). According to some other studies cited by Rice, concept combination involves theoretical information. For one example, see (Rips, 1995).
27 See (Hampton, 1987, 1997; Rosch, 1978; Rosch & Mervis, 1975). For instance, in one study researchers found that color categories tend to be defined in terms of their most prototypical examples. Very roughly, the study consisted in presenting different color categories to individuals who lacked linguistic terms to refer to those categories and thus who allegedly lacked the corresponding concepts. Previous research had suggested that for at least some color categories there is a particular color that is focal. Focal points occupy the center of the physical color space. Such colors are focal in the sense that they are naturally the best examples of a color category (for instance, a pure blue that is a better example of blue than others impure blues). The data obtained from the study proved compatible with one central
seek to determine the prototype (stored in long term memory) that the item is most similar to. A particular apple will be judged to be an apple and not a banana because it is judged to share more properties with the prototypical apple than with any other prototypical category, for instance, the prototypical banana.

Research has also found that subjects rely on exemplar information for categorization.28 According to some studies, an item is judged to belong to a category based on judgments about the properties it shares with other exemplars (stored in long term memory) of the same category. For example, robins are taken to be birds (to belong to the category bird) because they share more properties (e.g., flying, singing, laying eggs, nesting in trees etc.) with other exemplars of birds like pigeons and sparrows than with exemplars of other categories like fruits.

Other studies have shown that, when categorizing, subjects make use of theoretical information.29 In cognitive science, it is common to describe (conceptual) theories as complex interrelated bodies of information about a category. For some models, the theoretical information that subjects use for categorization concerns causal relations;30 for others, it concerns ontological beliefs.31 Very roughly, according to, for example, a causal model, an individual item is judged to be a member of a category if, as represented by a theory (about that category), some causal relations between (some of) that item’s properties obtain.32

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28 See (Medin & Schaffer, 1978; Mervis, 1980; E. Smith, 1995). For example, in one study, subjects were presented with cards showing a geometric form. The forms varied along four dimensions with two possible values: form (either a triangle or a circle), size (a diameter or height of either 1.25 cm or 2.5 cm), color (either red or green) and position (centered either on the right side of the card or on the left). During a training period, subjects were instructed to guess which of two sets (A and B) each card belonged to. Feedback was given after every choice. The purpose of the training period was for subjects to learn two new categories A and B. After being asked to perform a distracting task, subjects were requested again to classify cards as belonging to either A or B. Some of the forms showed in the new classification task were unknown to subjects. Data was obtained on how subjects made the classification of the unknown cards. The results proved compatible with the hypothesis that, in classifying an unknown form as a member of A or B, subjects rely on information about the similarity between the properties of the unknown form and the properties of the geometric forms that were members of the category they took it (the unknown form) to belong to. More generally, the study is considered to give empirical support to the idea that subjects rely on exemplar information for categorization. See (Medin & Schaffer, 1978).

29 See (Ahn et al., 2000; Rehder, 2003; Spelke, 1991).

30 See (Rehder, 2003).

31 See (Wellman & Gelman, 1992).

32 For example, in one study, subjects were introduced to a number of constructed categories. Each category was characterized in terms of four binary features and three causal relations between them according to a common cause or a common effect model. For example, a feature F1 would be said to cause features F2, F3 and F4, or a feature F4 would be said to be caused by features F1, F2 and F3. Each feature was said to be probabilistic, that is, some members
Lastly, there are studies that show that subjects sometimes use (information about) ideals when they categorize. Roughly, ideals are characterized as sets of properties that normatively define membership to a category in terms of a function that members of that category are expected to serve. Mainly, but not only, subjects rely on ideals to categorize members of goal-derived categories (e.g., things to wear to the beach). For instance, a particular item may be judged to belong to the category things to wear to the beach because it maximizes the goal of staying cool. Sometimes, a particular item is judged to belong to a category \( C \), if it is judged to possess an enough number of the properties it should as defined by an ideal prototype of \( C \).

As noted, those studies taken together point towards the idea that individuals rely on different types of information when they categorize. As individuals categorize by deploying concepts, then in deploying concepts, individuals rely on information of different types.

Although holding a hybrid view of concepts is not incompatible with holding the standard view of coordination, once we accept that the individuation of type concepts is given in terms of their structures, combining a hybrid view of concepts and the standard view of coordination will lead us to undesirable conclusions. A hybrid view of concepts and the standard view of coordination are not incompatible because one can accept both; one can accept that there is coordination with respect to the token concepts \( C_1 \) and \( C_2 \) only if the package of information that forms both of the category would have it while others wouldn’t. After having learnt one of the constructed categories, subjects were required to rate the category membership of 48 exemplars (all possible combinations presented twice: 16 that can be formed from 4 binary features plus eight formed by each single-feature). The study found that subjects are more likely to classify a particular item as part of a category, if the causal relations (with respect to the item’s properties) that would be expected to obtain if that item was a member of the category do obtain (for instance, in the common cause model, an exemplar that instantiated F1 but also F2, F3 and F4). On the other hand, the study found that subjects are more likely not to categorize an item as a member of the category if such relations don’t obtain (for instance, in the common cause model, for an exemplar that instantiated F1 but didn’t instantiated F2, F3 and F4). These results, it is accepted, give support to the thesis that subjects rely on theoretical (causal) information for categorization. See (Rehder, 2003).

33 See (Barsalou, 1985; Burnett et al., 2005). For example, in one experiment, 18 categories were selected. Of those, 9 were goal-derived and 9 common taxonomic (e.g., birds, vegetables, cutlery, etc.). Subjects were asked to generate exemplars for each category. Then, the generated exemplars were combined and blocked by category. To obtain judgments on how good those exemplars were with respect to a category, subjects were given a document that grouped them (the exemplars) in different pages by category. At the top of each page, the name of the category was written. Subjects were then required to rate each exemplar on a scale 1-9, where 1 corresponded to “poor example” and 9 to “excellent example”. To obtain judgments about ideals, subjects were given exactly the same document except from two things: first, instead of the name of the category, an ideal dimension was written at the top of the page (e.g. instead of the category birthday present, the ideal dimension how happy people are to receive it would appear); second, the scale was 1 for “very low amount” and 9 for “very high amount”. The study found a high correlation between the ideals scores and exemplars scores with respect to both goal-derived and common taxonomic categories. These results have been interpreted as providing support to the idea that, information about ideals is retrieved by subjects when they categorize. See (Barsalou, 1985).
concepts is the same (if C1 and C2 have the same structure), while accepting that such package comprises information of different kinds. However, putting together the two views leads to undesirable conclusions because a hybrid view of concepts brings in more flexibility than the standard view of coordination can allow. As noted, a hybrid view is compatible with saying that the package of information retrieved by a subject when deploying her concept about a category might be different from the package of information retrieved by another subject (or by the same subject in a different occasion). For example, a hybrid view of concepts is compatible with saying that, when representing apples in one occasion, a subject relies on prototypical information while other subject (or the same subject in different occasions) relies on exemplar information. It is even compatible with saying that this is often the case. If we accept, as the hybrid view seems to suggest, that, when deploying their respective concepts, different subjects often retrieve different packages of information (of different kinds), and we accept that difference in information retrieved entails difference in concept type, then accepting the standard view of coordination would commit us to accept that subjects often don’t coordinate.

That is not the case if we accept the new account of coordination. If we accept the new account, we can accept that type concepts are individuated by their structures, accept a hybrid view of concepts, and still conclude that subjects often coordinate. As noted, in terms of the new account of coordination, one needs not conclude that there is no coordination between two subjects who, in deploying their respective token concepts C1 and C2, retrieve different packages of information (of different kinds), even if one accepts that, owing to that fact, C1 and C2 belong to different types. For the new account, there is coordination insofar as C1 and C2 are coreferential and they are used in similar contexts to do similar things. Subjects can coordinate more often than not because their concepts might actually be coreferential and their contexts similar more often than not. Thus, even if by accepting a hybrid view of concepts we might be accepting that subjects often deploy concepts of different types, we need not conclude that subjects often don’t coordinate. It is in this sense that the new account of coordination fits better than the standard view alongside a hybrid view of concepts.

Let’s move on now to examine another thesis recently suggested in cognitive science and philosophy of mind that seemingly bears on an account of coordination: conceptual flexibility. Briefly, according to conceptual flexibility, conceptual representation is determined by context and
cognitive task. In the following subsection, I present this thesis and show how it fits better with the new account of coordination than with the standard view.

5.2 Conceptual Flexibility

Recently, many theorists have suggested that the cognitive process at hand and the context in which a conceptual representation is deployed determine which information is retrieved from long term memory and how it is weighed (which information is more salient). This view is commonly referred to as conceptual flexibility. In cognitive science, it is widely accepted that information stored for a category in long term memory is retrieved in response to a cue (e.g., listening to a word, reading a word, listening to some sound, imagining something, etc.). According to conceptual flexibility, conceptual information is retrieved in response to a cue in context (i.e., listening to a word in a particular situation, reading a word at a particular time, etc.). Two different occurrences of the same cue (say, two occurrences of the word “dog”) or two different cues (say, the word “dog” and a barking sound) may lead subjects to use different information about the same category (say the category dogs). Put shortly, conceptual flexibility is the idea that conceptual representation is determined by context and cognitive task. According to this thesis, for example, a person would use different information to represent a tree depending on whether she is out in the woods taking pictures for a scientific publication or at home reading a story for her kids. Conceptual flexibility is incompatible with the view that tokening a concept is to retrieve always the same predesigned package of information.

I’ll present first the claim that conceptual representation is determined by context as well as some of the research that supports it. Context is thought to determine conceptual representation by affecting an individual’s personal experience. People who have gone through different experiences in life can be expected to represent the world in rather different ways by relying on different information. Studies have found that at least three aspects of context influence conceptual information: the physical context, the social context and the internal context (a subject’s biological and neurocognitive state). It has also been suggested that conceptual representation varies depending

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35 See (Casasanto & Lupyan, 2015).
on the temporality of context: long-term context, recent context, immediate context, ongoing context and personal context (individual abilities).³⁶

For ease of exposition, I’ll expand exclusively on the influence of context along non-temporal dimensions: physical context, social context, and individual context.³⁷ In terms of the physical context, there are, for example, a series of studies showing that subjects’ representation of time is highly sensitive to their environment.³⁸ More specifically, the studies show that conceptual representation is sensitive to subjects’ spatial location. They show that depending on how subjects interact with space (for instance, whether they move through space or not), they represent time in different ways (for example, as coming towards them or as moving forward).³⁹

There are also studies supporting the view that the social context influences conceptual representation.⁴⁰ During their lives, individuals in different social contexts go through different patterns of experience, which causes them to systematically represent the world in rather different ways. One example of this is given by linguistic relativity. Linguistic relativity is the idea that people who speak different languages think (represent things) differently. To be precise, the claim is not that two speakers of two different languages never represent the same things in very similar ways. Indeed, in most cases, speakers from different languages seem to have very similar representations of things. What research has found is that, regarding some languages and some items, subjects represent things very differently depending on the language they speak. The main reason supporting linguistic relativity comes from empirical research.⁴¹ For example, some studies have

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³⁶ See (Yee & Thompson-Schill, 2016).
³⁷ Here I follow the work of Casasanto and Lupyan. See (Casasanto & Lupyan, 2015).
³⁸ See (Boroditsky & Ramscar, 2002).
³⁹ One of those studies consisted in asking subjects waiting in a lunch line an ambiguous temporal question: when a meeting originally scheduled for Wednesday has been moved to if it has been moved forward two days? The study found that subjects close to the end of the line were more likely to respond Monday, whereas those close to the start of the line were more likely to respond Friday. According to the researchers, the natural way to interpret this finding is as suggesting that those subjects close to the end of the line (those who had experienced little movement through space) were more likely to represent time as moving towards them, whereas those close to the start of the line (those who had experienced more forward spatial motion) were more likely to represent time as moving forward. The study has been considered to support the view that the physical context determines how individuals represent time (which conceptual information they use when they deploy their concept TIME). See (Boroditsky & Ramscar, 2002, p. 186, Study 2: The lunch line).
⁴⁰ (Casasanto et al., 2014; Kitayama et al., 2003; Majid et al., 2004).
⁴¹ See (Boroditsky, 2001; Majid et al., 2004; Reiger & Kay, 2009).
shown that people represent spatial location differently depending on the linguistic forms used by their linguistic communities to describe spatial relations.\textsuperscript{42}

Another aspect of context that determines conceptual information has to do with the individual characteristics of each subject. According to the \textit{body-specificity hypothesis}, people who have different bodily characteristics form different mental representations. Data compatible with the body-specificity hypothesis has been collected by recent research.\textsuperscript{43} One study, for example, has shown that being left-handed or right-handed might affect your representations of valence ideas like \textit{good} or \textit{bad}.\textsuperscript{44} The study showed that right-handed people associate positive valence ideas with their right side and negative ideas with their left side, while left-handed people develop

\textsuperscript{42} For instance, multiple studies have found that the way in which subjects represent space varies from language to language. To describe the spatial relation between small-scale objects in non-geographic space (e.g., the top of a table), subjects may use, depending on the language they speak, one (or more) of three frames of reference: relative, absolute and intrinsic. Using a specific frame of reference is to represent spatial relations of that type in a particular way. To illustrate how the frames of reference work, imagine the following image: on a horizontal plane (the top of a table) there is a fork vertically positioned and to its right, about 3 cms. apart, there is a spoon horizontally positioned with its tip pointing towards the middle of the fork’s handle. Now, how do people represent the spatial relation between \textit{the referent} (the fork)—the thing to be located—and the ground object (the spoon)—the thing in reference to which the referent is to be located? A viewer uses the relative frame of reference, if she uses her own perspective to describe the relation. One possible description such a viewer may use to think/talk about that relation is “the fork is to the left of the spoon”. Notice, the viewer’s representation of this spatial relation would change if she moved around to the other side of the table. In this case, she could describe the relation as “the fork is to the right of the spoon”. If a viewer uses the absolute frame of reference, she doesn’t use her own perspective, instead she uses an external framework. One example is given by the speakers of Arrernte in Australia who use a framework composed of the cardinal points. A speaker of Arrernte could describe the relation between the fork and the spoon as “the fork is to the north of the spoon”. Notice, this representation of the spatial relation doesn’t change if the viewer changes her perspective. Lastly, a subject uses the intrinsic frame of reference if she represents the spatial relation between the two items without any reference to either her own perspective or an external framework. A viewer that uses the intrinsic frame of reference could employ a description such as “the fork is at the tip of the spoon”. A viewer who uses the intrinsic frame of reference doesn’t change her representation of the spatial relation even if she changes her perspective. Research has found that the relative frame of reference is dominant among speakers of English (and other languages). As mentioned, the absolute frame of reference has been found to be dominant among speakers of Arrernte (and other languages). Finally, research has shown that the intrinsic frame of reference is dominant among speakers of Totonac in Mexico (and other languages). See (Majid et al., 2004).

\textsuperscript{43} The study was conducted during the final debates of the 2004 and 2008 US presidential elections. The study consisted in analyzing the relation between speech and gestures of two right-handed candidates (Kerry, Bush) and two left-handed (Obama, McCain) candidates. It was hypothesized that subjects associate positive ideas with their dominant hand-side, and negative ones with their non-dominant hand-side. Two opposite patterns were found: right-handed candidates showed a strong association between right-hand gestures and positive clauses, as well as a strong association between left-hand gestures and negative clauses. The opposite pattern of association was found in left-handed candidates. The researchers in this study proposed that the natural interpretation of such findings is that there is a link between how subjects think about (some) valence ideas (“good” and “bad”) and their individual characteristics. More precisely, they suggest that subjects associate their representations of \textit{positive} with their dominant hand-side and their representations of \textit{negative} with their non-dominant hand-side. See (Casasanto & Kyle, 2010).

\textsuperscript{44} (Casasanto & Kyle, 2010)
the opposite association. By having confirmation about the body-specificity hypothesis, we gain reason to think that conceptual representation is determined by individual context.

All the research above taken together provide good support for the idea that context determines what information a subject retrieves from long term memory to represent a category. As seen, according to conceptual flexibility, conceptual representation is determined not only by context but also by cognitive task. To repeat, in this respect, conceptual flexibility holds that different tasks equal different conceptual representations.

The reason to accept the idea that cognitive function determines conceptual representation comes, once again, from empirical research.45 One of the studies in favor of this aspect of conceptual flexibility focuses on the tasks of lexical decision (i.e., is word X a valid word of the lexicon?) and reading aloud in the context of word recognition.46 The following is a brief description of that study.

It is widely accepted that the semantic information encoded by words (their meaning) affects our ability to recognize them. The meaning of a word affects how fast we can identify it. Some of the information encoded by a word is conceptual information in the sense that it is perceptual, it is perceptual information that subjects use to represent the word’s referent. Take for example the word “dog”. Let’s say that this word expresses the concept DOG. Let’s say that that concept is a representation of the category dogs. Some of the information encoded by the word “dog” is perceptual information of dogs. That (perceptual) information of dogs is (partially) constitutive of the concept DOG.

Now, on making a lexical decision and/or reading aloud, subjects direct their attention to a perceptual stimulus: the occurrence of the word in question. Lexical decision and reading aloud direct perceptual attention differently. Both direct attention to a visual stimulus (the display of a written text), but only reading aloud directs attention to an auditory stimulus (only in reading aloud monitoring pronunciation is required). Some words are said to be more visual, whereas others are said to be more auditory. A word is said to be visual because its meaning involves visual perceptual information of its referent more than information from other perceptive modalities (e.g., the word

45 See (Connell & Lynott, 2014a).
46 The study consisted in running a two-step hierarchical regression analyses over hundreds of words on three variables: response times, standardized response times and accuracy rate. In the first step several standard lexical variables were introduced for each word (word frequency, word length, semantic phonological neighborhood, etc.). In the second step, semantic variables for each word were introduced (visual and auditory strength ratings). The data for this analysis were extracted from preestablished databases. See (Connell & Lynott, 2014a).
“lightning”). A word is said to be auditory because its meaning involves, more than other perceptive modalities, auditory information of its referent (e.g., the word “thunder”).

The study showed that by directing perceptual attention differently, different tasks (lexical recognition and reading aloud) facilitate different (conceptual) perceptual information. In this regard, the study proved compatible with the following two hypotheses: (1) since both lexical decision and reading aloud direct perceptual attention to the visual modality, both tasks should facilitate visual perceptual information. For that reason, there shouldn’t be difference in how quickly and accurately visual and non-visual words are recognized in both tasks. It was expected (and later confirmed) that, in performing both tasks, visual words would be recognized faster and more accurately than non-visual words. (2) since only reading aloud directs attention to the auditory modality, only (or at least to a greater extent) reading aloud should facilitate auditory perceptual information. Thus, a difference was expected in how fast and accurately auditory and non-auditory words would be recognized. It was expected (and later confirmed) that in reading aloud, but not in lexical decision, auditory words were recognized faster and more accurately than non-auditory words. These findings give support to the idea that a difference in cognitive task might bring about a difference in conceptual representation.

To sum up, there is good reason coming from empirical research to believe that context and task determine which information a subject uses when deploying a concept. A subject that deploys a concept about a category in context X1 and a subject that deploys a concept about the same category in context X2, might (and most likely do) retrieve from long term memory different packages of information. Similarly, a subject that deploys a concept about a category to perform the cognitive task T1 and a subject that deploys a concept about the same category to perform a different task T2, might (and most likely do) retrieve from long term memory different packages of information.

It shouldn’t be hard to see why, provided we accept the view that types of concepts are individuated in terms of their structures, the thesis of conceptual flexibility fits better alongside the new account of coordination than alongside the standard view. Let me explain. Let’s grant that two token concepts are tokens of different kinds if, and only if, they have different structures. As repeatedly noted, the standard view of conceptual coordination holds that coordination requires sameness of concepts. If cases in which two subjects deploy different token concepts are only those marginal cases in which subjects don’t understand each other, then there is no reason to reject
either concept flexibility or the standard view of coordination. That is, concept flexibility may be true in the sense that context and task determine concepts, while could it also be true that variability of information retrieved is marginal and bounded to cases of misunderstanding. However, if one thinks that flexibility is not marginal but pervasive, then one must accept that it is coordination that is marginal; it would be only on those limited cases in which two subjects do retrieve the same packages of information that they would coordinate.

One can think that coordination is not marginal despite conceptual flexibility being pervasive if one accepts the new account of coordination. Insofar as two token concepts are coreferential, the contexts in which they’re deployed are similar, and so are the tasks for which they’re being deployed, there could be coordination despite extensive conceptual variability. In short, the new account can make room for extensive coordination even if variability is also extensive, while the standard view cannot. This is why I think that the novel account fits better with conceptual flexibility than the standard view.

To conclude, in the following subsection, I will briefly review the most radical version of conceptual variability: extensive variability of conceptual representation. I will present this specification of conceptual flexibility and show how it gives some reason to prefer the new account of coordination over the standard view.

5.3 Extensive Variability of Conceptual Representation

According to the thesis of extensive variability of conceptual representation, the information that an individual draws form long term memory when deploying a concept varies extensively across different subjects and situations. In other words, the thesis holds that in nearly all (if not all) situations the conceptual information about a category used by a subject differs from the information about that category used by other subjects (or used by the same subject in other situations). Theorists who defend this thesis often claim that concepts do not have conceptual cores, or that all concepts are ad hoc concepts.47 Provided we accept that structures individuate concept types, the thesis of extensive variability denies that concepts can be (tokens of) the same (type) across subjects and situations. Put differently, according to this thesis, conceptual representation varies to the point that two subjects in the same situation or the same subject in different situations

47 See (Casasanto & Lupyan, 2015; Yee & Thompson-Schill, 2016).
never (or nearly never) instantiate the same type of concept. In its more radical form, extensive variability holds that every token concept is its own type.\textsuperscript{48}

Over the last years, acceptance of this thesis has grown among cognitive scientists and philosophers.\textsuperscript{49} The thesis is said to be supported by a good deal of empirical data (mostly by research like the one reported above). It is worth emphasizing that the extensive variability of conceptual representation thesis is a further specification of conceptual flexibility. This is the reason why the empirical data that is taken to support extensive variability is the same data that is taken to support conceptual flexibility.

Notice, conceptual flexibility is compatible with a certain idea of (conceptual) stability. Perhaps significant difference in conceptual representation is only prompted by radical difference in context or task. Perhaps similar contexts make individuals retrieve the same package of information even if there is no one package that is always retrieved when deploying a concept about the same category. By contrast, according to the extensive variability thesis, (very) small variation between situations is enough to render conceptual processing different. As noted, in its most radical version, this thesis holds that, given that no two contexts are ever the same, whenever a subject represents a category, she draws from long term memory a new and unrepeatable package of information about that category.

It is easy to appreciate that, provided we accept that concepts are individuated by their structures, there is a sharp tension between the thesis of extensive variability and the standard view of coordination. If we accept that every processing of a concept varies from person to person and situation to situation to the extent alleged by the thesis of extensive variability, it becomes extremely hard to accept that coordination requires sameness of concepts. Here is why.

From accepting that rarely (perhaps never) two subjects draw from long term memory the same (package of) information, and accepting that structures individuate concept types, it follows that rarely two subjects instantiate two concepts of the same type. Since the standard view holds that for two subjects to understand each other (for coordination to obtain), their respective conceptual representations must be tokens of the same type, if the standard view of coordination and extensive variability are both correct, then coordination must be rather (very) rare. If we grant that

\textsuperscript{48} See (Casasanto & Lupyan, 2015; Connell & Lynott, 2014b).

\textsuperscript{49} See (Barsalou, 2016; Casasanto & Lupyan, 2015; Connell & Lynott, 2014b; Kemmerer, 2015; Lebois et al., 2015; Yee & Thompson-Schill, 2016).
concept type individuation depends on conceptual structure, then either coordination is rare, or one of the two theses (extensive variability or the standard view of coordination) must be incorrect. It is in that sense that holding the standard view of coordination and extensive variability at the same time is highly problematic.

By adopting the new account of coordination, we can keep the idea that coordination is pervasive without rejecting the extensive variability thesis. Since the new account holds that subjects understand each other as long as their conceptual representations are representations of the same things, the contexts in which they are being deployed are similar enough, and subjects are performing similar enough cognitive functions, there can be coordination between them even if, in the same or different occasions, they use different information to represent the (same part of the) world. Even if we accept the most radical version of extensive variation according to which the same package of information is never retrieved twice, we don’t need to conclude that subjects don’t (ever) coordinate.

To be clear, I don’t aim to commit to the truth of the extensive variability of conceptual representation thesis; however, I’d like to emphasize once more that nowadays this is a popular view among psychologists, cognitive scientists and philosophers. As mentioned, the view is said to be well supported by empirical data. If it is true that there is a sharp tension between the standard view and the extensive variability thesis, then in abandoning the latter to keep the former we might be turning our back on some of our currently most promising theories regarding concepts. We need not do that if we accept the new account of the coordination requirement. This seems to speak clearly in favor of the new account. More generally, I take it that, although not definite, the fact that the novel account fits better than the standard view alongside a hybrid view of concepts, conceptual flexibility, and extensive variability of conceptual representation, is a reason to prefer the former over the latter.

Before concluding this section, there is a clarification important to make. The new account seems to imply an implausible result. The new account of coordination seems to be compatible with the possibility that two subjects coordinate with respect to two concepts that have radically different structures. There seems to be no reason to deny that the following scenario is possible: imagine that a subject deploys her concept C1 and another subject deploys her concept C2; imagine that C1 and C2 are coreferential, used in similar contexts, and used to perform similar tasks; finally, imagine that the packages of information those subjects respectively retrieve from long term
memory in deploying those concepts are radically different. According to the new account, this situation would count as an instance of coordination. Since, at first sight, it might seem plausible that two subjects who rely on radically different information when representing the same category do not understand each other, then it might seem reasonable to think that the new account of coordination bears an implausible consequence.

I don’t think that the observation above, even if correct, poses a serious objection against the new account of coordination. To explain why that is so, it is pertinent to draw attention first to a distinction commonly made in philosophical discussion between different types of possibility. Among philosophers, it is common to distinguish between logical, metaphysical and nomological possibility. Roughly, a proposition is said to be logically possible if, and only if, it doesn’t entail a logical contradiction. A proposition is said to be metaphysically possible if, and only if, it is true in some possible world. A proposition is said to be nomologically possible if, and only if, it is consistent with the laws of nature (e.g., physical, biological, psychological, etc.) of a particular world.

I concede that, according to the new account of coordination, it is logically possible that two subjects coordinate despite radical difference between the structures of their respective concepts. I also concede that the same is metaphysically possible. However, I contend that the fact that the new account of coordination fails to rule out those two possibilities is not enough reason to discard it. Since, in the sense relevant for this thesis, coordination is a relation that takes place between human beings (or creatures with human-like psychologies) as they exist in this world, the relevant explanatory notion of possibility with respect to coordination is neither logical nor metaphysical but nomological. So, for the purposes of this thesis, even if it is true that the new account fails to discard the logical and metaphysical possibility of coordination despite radical difference of conceptual representation, that failure shouldn’t give definite reason against the new account of coordination.

Now, it doesn’t seem (empirically) plausible to say that two subjects with similar psychologies who respectively deploy two concepts about the same category, in sufficiently similar contexts, to perform sufficiently similar tasks, might draw from long term memory radically different information about that category. What seems (empirically) plausible is to think that when two

50 In this presentation of the different types of possibility I follow Tamar Szabo Gendler and John Hawthorne. See (Szabo Gendler & Hawthorne, 2002, pp. 4–5).
human beings think of the same category in contexts that are not too different from each other to do similar things, they rely on similar (although different) information (at least information that is not radically different). Given how we might think the norms that govern our psychology work, the new account of coordination seems to rule out the relevant implausible possibility, namely, the nomological one. According to the new account of coordination, it is not (nomologically) possible that in deploying two concepts that are coreferential, in similar context, to perform similar tasks, subjects retrieve from long term memory radically different packages of information.

But perhaps the observation in the previous paragraph is mistaken. Perhaps, it is not against the laws that rule the functioning of our minds that two people that satisfy the conditions for coordination in terms of the new account might draw radically different information from long term memory about the same category. Even if that is the case, it still seems to me that this explanatory shortcoming of the new account of coordination is outweighed by its explanatory advantages. Accepting that there might be (even that sometimes there are) coordination despite radical structural difference doesn’t seem to me too much of a theoretical price to be paid when compared to theoretical harmony. We win more by keeping the new approach than by dropping it.

In summary, in this subsection I have presented the reasons that speak in favor of the new account of coordination. In general, the reason is that the new account combines better with a hybrid view of concepts and the theses of conceptual flexibility and extensive variability of conceptual representation, than the standard view. If you think that a reason to prefer a theory over others pertains to how well it goes along with other theories in other disciplines, then you should agree that the new account of coordination is to be preferred over the standard view.

In legal philosophy, there are some accounts of PLD that endorse the coordination requirement but reject the view that structures individuate types. To conclude this chapter, in the next section, I’ll briefly compare the new account to a couple of those views. I’ll claim that the new account represents an alternative even to views of that kind.


I have speculated that the mental states that constitute the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY in PLD are beliefs that serve a representational and a motivational function complementarily. I endorse the view that when disagreement involves
representational beliefs (or beliefs that serve a representational and a non-representational function complementarily), disagreement requires coordination. I endorse too the view that coordination is explained in terms of the conditions of sameness of topic and mutual awareness. I have suggested a new account of the coordination requirement. According to this account, a subject who holds a token belief B1 and a subject that holds a token belief B2 coordinate if, and only if, they coordinate with respect to all the token concepts that respectively form (the intentional contents of) those beliefs. According to the conceptual version of the new account of coordination, a subject that deploys the token concept C1 and a subject that deploys the token concept C2 coordinate if, and only if, C1 and C2 are coreferential, the contexts in which they are being deployed are similar enough, and the tasks for which they are being deployed are similar enough.

Thus far, I have granted that belief types and concept types are individuated in terms of their structure (and syntax). That is, I have granted that a token belief B1 and a token Belief B2 are tokens of the same type if, and only if, their intentional contents are the same (i.e., if those contents are made up by the same parts). Similarly, I have granted that a token concept C1 and a token concept C2 are tokens of the same type if, and only if, the package of information that an individual retrieves from long-term memory when deploying C1 and the package of information that an individual retrieves from long-term memory when deploying C2 are the same.

As indicated, the new account is compatible with the idea that there might be coordination between two subjects despite their respective token beliefs/concepts not belonging to the same types. With respect to the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY in PLD, by accepting the new account of coordination, we make room for the possibility that two subjects disagree even if their respective beliefs have different contents (are tokens of different types). The standard view of coordination cannot accommodate this possibility.

I’d like to highlight that the new account makes room for that possibility regardless of how we think belief types and concept types are individuated. So far, we have granted a particular view about the individuation of (the intentional content of) beliefs and concepts, but we need not do that for the new account of coordination to render the same results. Perhaps neither beliefs nor concepts are individuated in terms of their structures. Perhaps they are individuated in terms of something else. The new account of coordination also represents an alternative to any view that, while accepting that coordination is explained in terms of sameness of concepts, rejects that concept types (and belief types) are individuated in terms of the parts that constitute them.
There are (at least) two views in the literature that, with respect to disagreements in law (particularly PLD), seem to accept that coordination requires sameness of concepts while rejecting that concept types are individuated in terms of the structure of their contents. One is Ronald Dworkin’s interpretivism, the other has recently been suggested by Françoise Schroeter, Laura Schroeter and Kevin Toh.\textsuperscript{51,52} For the sake of explicitness, I must admit that the following presentation of these two views is far from being exhaustive and it is imprecise. Since, as noted, my aim is not to reject any views but to make room for the new account of coordination, that shouldn’t be a problem. All I am trying to make here is to explicitly illustrate how the new account also represents an alternative to views that endorse a different account of belief/concept individuation.

Dworkin identified three types of concepts that he called interpretive concepts, criterial concepts and natural kind concepts.\textsuperscript{53} Contrarily to criterial concepts which are individuated in terms of their structures, and natural kind concepts that are individuated in terms of their references, interpretive concepts are individuated in terms of the evaluative facts that best justify the practice in which those concepts are used. In my interpretation of Dworkin, he suggests that a token interpretive concept C1 and a token interpretive concept C2 are tokens of the same type T if, and only if, they are so according to the best justification of the role that T plays for us in the practices in which the tokens of T are deployed.\textsuperscript{54}

Understood that way, for Dworkin, two subjects who respectively instantiate two concepts with different structures can coordinate even if coordination requires sameness of concepts. The reason is that concept individuation doesn’t depend on structure but on (some) evaluative facts. Since Dworkin’s view (understood along those lines) makes room for sameness of concepts despite difference in structure, he has no problem accommodating the standard view of coordination alongside cases where the structures of concepts are different but coordination does obtain.

It seems to me that something similar has been suggested by Françoise Schroeter and his associates. As I interpret them, for them, concepts are individuated in terms of their casual relations.

\textsuperscript{51} See (Dworkin, 1986, 2011).
\textsuperscript{52} See (F. Schroeter et al., 2020).
\textsuperscript{53} See (Dworkin, 2011, pp. 158–163).
\textsuperscript{54} This interpretation of Dworkin’s work is admittedly imprecise in many respects. For instance, Dworkin does not talk about the individuation of concepts, but about their correct application. Dworkin doesn’t characterize the individuation of criterial concepts in terms of structures, but in terms of the criteria that set out rules of correct application (of a concept). It is only for expository reasons that I have decided to present Dworkin’s theory in such a loose way. It seems to me that there is no harm in doing that.
and the lack of radical divergence of structure. In my interpretation, for these authors, a token concept C1 and a token concept C2 are tokens of the same type if, and only if, C1 and C2 are causally related (in the appropriate way) and the information that constitutes C1 is not radically different from the information that constitutes C2.55

Thus understood, for Schroeter et al., since a difference in structures is not sufficient for conceptual difference, even if coordination requires sameness of concepts, there can be coordination between two subjects that retrieve different packages of information from long term memory. To be explicit, under this view, difference in structures is not sufficient for conceptual difference because concept individuation doesn’t not depend on structure but on the causal relations between concepts and lack of radical difference in content. In that way, along the lines of this interpretation, Schroeter and his colleagues guarantee coordination despite difference in structure without abandoning the standard view.

As noted, my presentation of the views of Dworkin and Schroeter et al is inconveniently short and to a great extent imprecise. I won’t expand any further on any of these views; for my purposes, I need not to. For my purposes, all that matters is to note that the new account represents an alternative to even these two views.56 More generally, the point I’m trying to make is that the new account represents an alternative even to views that accept the standard view of coordination but embrace a view of concept individuation that does not appeal to sameness of structure. To be clear, the new account represents an alternative to those views because it explains coordination while rejecting sameness of concepts.

55 As with Dworkin, this interpretation of the work of Schroeter et al. is imprecise in many respects. To begin, they don’t present (the relevant part of) their theory as a theory of concept individuation but as a theory of conceptual competence. They don’t talk about coordination between subjects, they rather talk about sameness of topic between thoughts. It is not even clear that for them there is a difference between sameness of topic and conceptual competence as there is between coordination and concept individuation. As before, it is only for expository reasons that I have dared presenting the theory of Schroeter and his colleagues in such a loose way. It seems to me that, for my aims, to interpret this theory in woolly terms bears no negative impact.

56 I believe there are reasons to prefer the new account of coordination over those suggested by Dworkin and Schroeter et al. Regarding Dworkin’s view, it seems to me that the new account is not committed, as Dworkin’s is, to a controversial thesis about the ontology of concepts. We need not accept Dworkin’s idea that there are concepts of different kinds, namely, criterial, natural kind, and interpretive (or at least to the thesis that concepts have different individuation conditions in different contexts). See (Dworkin, 2011, pp. 158–163). As for the work of Schroeter and his colleagues, they explicitly acknowledge that their suggestion is unable to account for coordination among causally isolated people. See (F. Schroeter et al., 2020, p. 73). This is not the case if one embraces the new account. I won’t expand on any of these considerations any further. Again, my purpose in bringing up these accounts is merely to present my own view as an alternative to them. I don’t aim to debunk any of these views.
Again, my purpose in suggesting the new account of coordination was to address in a new way the constrain imposed by accepting that the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY in PLD is constituted by beliefs that serve a representational and a motivational function complementarily. The constrain is that if (dis)agreement involves attitudes of that sort, then there must be coordination between the disagreeing parties. The new account vindicates this idea. As seen, according to the new account, coordination doesn’t (necessarily) require sameness of concepts. That is the case because coordination can be explained in terms of coreference and sufficient similarity of context and task. When we explain coordination in terms of coreference and similarity of context and task, we need not accept that if a subject’s token belief B1 (about the criteria of legal validity in S) and another subject’s token belief B2 (about the criteria of legal validity in S) belong to different types, then those subjects don’t (dis)agree because they don’t coordinate. For the last time, according to the new account, all it takes for those subjects to coordinate and thus to disagree is that the concepts that form B1 and B2 are coreferential, and the contexts and task in which and for which they are being deployed are similar enough. The new account of coordination makes disagreement possible despite content difference.

7. Conclusion

In this chapter, I have done two things. One the one hand, I have explained in full detail what it means to have a disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY. I have suggested that such disagreement involves two beliefs about the criteria of legal validity each of which is part of the structure that constitutes somebody’s concept THE CRITERIA OF LEGAL VALIDITY. On the other hand, I have addressed a theoretical difficulty that arises from accepting, as I do, that the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY is constituted by beliefs that serve a representational and a motivational function complementarily. Such difficulty concerns the idea that if disagreement involves beliefs of that type, then the disagreeing subjects must coordinate (i.e., those beliefs must share a topic and the subjects must be able to realize that). Commonly, coordination is explained in terms of sameness of concepts. I have suggested an alternative view of coordination. According to this new account, coordination doesn’t depend on sameness of concepts but on coreference and enough similarity of contexts and tasks. The new account makes room for the possibility of coordination despite conceptual difference.
(regardless of how concepts are individuated). An important advantage of the new account is that it fits better alongside some theses that, although controversial, have grown in popularity over the last years in psychology and cognitive science.
Chapter 5. The Debate around PLD

Some arguments in legal philosophy are premised on observations about PLD. In advancing such arguments, most (if not all) legal philosophers embrace the characterization of disagreement I have called the content view. The characterization of PLD developed in the precedent chapters is incompatible with the content view; thus, accepting the new characterization of PLD has an effect with respect to those arguments. To make explicit the effect in legal philosophy of dropping the content view and adopting the new account of disagreement is the main purpose of this chapter. More specifically, in this chapter, I pursue two aims. Firstly, I aim to show that three influential arguments in legal philosophy that rely on observations about PLD are committed to the content view. Secondly, I aim to show that replacing the content view with the functionalist view has consequences in terms of the correction of those arguments.

1. Introduction

In the previous chapters, I introduced a novel characterization of persistent legal disagreement (PLD). According to this characterization, PLD involves a disagreement over the content of the law (in a specific jurisdiction at a given time) that arises (despite agreement over all relevant non-legal issues) in virtue of a disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY. I have argued that disagreement is a relation sensitive to the function of the attitudes that constitute it (as opposed to a relation between incompatible contents). I have argued that each of the disagreements that form PLD involves cognitive attitudes (as opposed to non-cognitive attitudes). On speculative grounds, I have suggested that the disagreement over the content of the law in PLD involves beliefs that serve competitively a motivational function at the expense of a representational function. On speculative grounds, I have suggested that the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY in PLD involves beliefs that serve a representational and a motivational function complementarily. This characterization of PLD is exhaustive in the sense that it accounts for its form and its (most relevant) substantive features.

There is one crucial respect in which the characterization of PLD suggested in this thesis differs from the characterization adopted by most (if not all) legal theorists who are concerned with the debate around this type of disagreement. Most legal theorists embrace what I have called
the content view of disagreement. According to the content view, disagreement is a relation that obtains between two propositional attitudes when their contents are incompatible. My account of PLD rejects the content view and endorse instead what I have called the functionalist view. According to the functionalist view, disagreement is sensitive to the functions of attitudes.

I have offered independent reasons to accept the functionalist view suggested in this thesis. If those reasons are in the right track, and thus we accept the new description of disagreement, then we must reject the content view. In legal philosophy, a number of arguments draw on observations about PLD. Once we accept the characterization of PLD suggested in this thesis, those arguments need revision. To make explicit the effect of dropping the content view and adopting the new account of disagreement with respect to those arguments suggested by legal philosophers is the main purpose of this chapter. More specifically, in this chapter, I pursue two aims. Firstly, I aim to show that three influential arguments in legal philosophy that rely on observations about PLD are committed to the content view. Secondly, I aim to show that replacing the content view with the functionalist view has consequences in terms of the correction of those arguments. The three arguments that I will present are: Dworkin’s argument against criterialism; Plunkett and Sundell’s argument for a metalinguistic analysis of bedrock legal disputes and; Kevin Toh’s argument in favor of (his own version of) legal expressivism.

2. Dworkin’s Argument

Dworkin introduced (at least) two arguments based on observations about PLD.1 One was introduced in Law’s empire and is widely referred to as the semantic sting argument.2 The other was introduced in Justice for hedgehogs.3 These arguments are different in their conclusions. The semantic sting argument is an argument against theories that endorse what Dworkin called the plain fact view (roughly, the view that everything there is to jurisdiction-specific law is what legal institutions have decided in the past) and in favor of his legal interpretivism.4 The argument in

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1 Scott Shapiro and Dale Smith have argued that in chapter 1 of Law’s Empire Dworkin suggested two arguments premised on observations about disagreement. One is the semantic sting argument. The other is the argument Smith calls the argument from theoretical disagreement. If Shapiro and Smith are right, Dworkin has suggested more than two arguments based on observations about PLD. See (Shapiro, 2007; D. Smith, 2010). I won’t take a stance on this exegetic matter.
2 See (Dworkin, 1986).
3 See (Dworkin, 2011).
4 Particularly, it is an argument against Hart’s version of legal positivism. See (Dworkin, 1986, p. Chap. 1).
justice for hedgehogs is an argument for the conclusion that LAW (alongside other contested concepts like JUSTICE and DEMOCRACY) is neither a criterial nor a natural kind concept but an interpretive one.

The arguments are also different in their structures. The semantic sting argument runs as follows. Because PLD is an important feature of legal practice, one must prefer a theory that can explain it over a theory that cannot; since theories that embrace the plan fact view (particularly, legal positivism) cannot explain PLD and legal interpretivism can, we must prefer legal interpretivism over legal positivism. The argument in justice for hedgehogs runs as follows. The concept LAW must be either a criterial concept, a natural kind concept, or an interpretive concept; if LAW is either a criterial or a natural kind concept, then disagreement about the concept LAW is not possible; since disagreement about the concept LAW is possible, then the concept LAW is neither criterial nor a natural kind concept; since LAW is neither a criterial nor a natural kind concept, it must be an interpretive one.

Beyond their clear differences, the two arguments share a disagreement-based premise that, in both cases, is fundamental. That is a premise that rejects the thesis we can call criterialism. Criterialism is the view that the meaning of the word “law” and/or the content of the concept LAW is given by the set of shared criteria that speakers/thinkers follow in using the word/concept “law”/LAW. In the semantic sting argument, the anti-criterialism premise gives the reason why legal positivism can’t, but legal interpretivism can, explain PLD. In the argument in justice for hedgehogs, the anti-criterialism premise provides the reason why the concept LAW cannot be a criterial concept.

For my aims, it is better not to present Dworkin’s arguments individually. Instead, I will present exclusively the premise against criterialism and assume that my observations about it, if

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5 Dworkin doesn’t talk about legal persistent disagreements. He talks about theoretical disagreements. I take it that the difference between theoretical disagreements and legal persistent disagreements is only terminological.
6 In using this terminology, I follow Dale Smith. See (D. Smith, 2010).
7 According to the characterization of PLD suggested in this thesis, PLD involves (although not only) a disagreement over the concept THE CRITERIA OF LEGAL VALIDITY not over the concept LAW. I have suggested in chapter 4 that someone who thinks that PLD involves a disagreement over the concept LAW is mistaken; Dworkin’s theory here being an example. However, for expository reasons, I’ll ignore this point in this chapter, and I will present Dworkin’s Dworkin’s argument against criterialism without dispute as originally stated; that is, as an argument that concerns the concept LAW. It might be worth clarifying that, in later writing Dworkin seem to have restricted the focus of his analysis to what he calls the concept of LAW in its doctrinal sense; which is “the concept of “the law” of some place or entity being to a particular effect” (Dworkin, 2006, p. 2).
correct, are valid with respect to both arguments indistinctively. Proceeding in this way is justified in the context of this thesis because this is the premise that in both cases seeks to capitalize on observations about persistent disagreement. Other points in those arguments that are not concerned with persistent disagreement are not relevant for this thesis.\textsuperscript{8} For example, with respect to the semantic sting argument, it is not relevant for this thesis whether legal positivism does endorse criterialism (as the semantic sting argument maintains).\textsuperscript{9}

Admittedly, my presentation of Dworkin’s ideas will be imprecise. A certain degree of imprecision is needed to present as one ideas that Dworkin developed in two separate ways for two different purposes. Nothing of substance will follow from this imprecision. As noted, given the focus of my observations, if they are correct, they should be so despite those aspects that make them different.

In the next subsection, my aim is to present Dworkin’s argument against criterialism in detail. For ease of exposition, I’ll focus on concepts and its contents and set aside the concern about words and their meanings.

2.1 The Argument against Criterialism

Criterialism is the view that the content of the concept LAW is given by the shared rules that people follow when they use that concept.\textsuperscript{10} According to Dworkin, subjects use concepts to identify instances. If we accept that concepts are individuated in terms of their contents, it follows from accepting criterialism, that two subjects that follow different rules of application deploy different concepts. If you apply your concept BANK to refer to riverbanks and I use mine to refer to financial institutions, we must be following different application rules. If so, according to criterialism, our concepts must have different contents, and thus, they must be different. In short, it follows from criterialism that a difference in application rules is sufficient for conceptual variance.

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\textsuperscript{8} The argument in justice for hedgehogs has another disagreement-based premise: a premise against natural kind concepts. That premise seems to be just a modified version of the argument against criterialism. I believe that parallel observations to those I make below can be made about the premise against natural kinds too. However, I won’t pursue that line of argument here.

\textsuperscript{9} In the postscript to \textit{The Concept of Law}, Hart himself denied that his theory endorsed the thesis I’m calling criterialism (at least understood as a view about the meaning of the word “the law”). See (Hart, 1994, Postscript).

\textsuperscript{10} My presentation of Dworkin’s argument against criterialism has been influenced by Dale Smith and Joseph Raz. See (Raz, 1998; D. Smith, 2010).
According to Dworkin, if one accepts criterialism, one must accept that apparent cases of PLD are cases in which the disagreeing subjects follow different rules for applying their concept LAW. In Dworkin’s view, the reason for that is that there is no other way in which the criterialist could explain why two subjects who agree about all relevant features of a particular case would still seem to disagree over whether the concept LAW applies to that case. For Dworkin, according to the criterialist, two subjects who follow the same rules to apply the concept LAW and agree about all relevant facts concerning a particular case, must agree (cannot disagree) about whether that case counts as an instance of that concept.

Here is a non-legal example that might help clarify the point. Imagine that two subjects seem to disagree about whether a particular object is a bottle. Imagine they agree over all relevant facts about that object (its shape, size, color, how it can be used, etc.). Dworkin’s idea is that, for the criterialist, if those subjects agree about all those (relevant) facts about the object and follow the same rules for applying the concept BOTTLE, they must agree (can’t disagree) about whether the object counts as an instance of the concept BOTTLE. Given what they mutually think about the object and the rules they follow to apply the concept BOTTLE, they should come to the same answer to the question “is this object a bottle?”. Since, those subjects agree about the features of the object but still seem to have a disagreement about the object being an instance of the concept BOTTLE, for the criterialist, according to Dworkin, it must be that they are following different application rules.

As noted, it follows from criterialism that people who follow different application rules deploy different concepts. Thus, Dworkin observes, if you accept criterialism, you must accept that apparent cases of PLD are cases of conceptual variance; that is, cases in which two subjects respectively deploy two different concepts LAW1 and LAW2. Dworkin presupposes that disagreement requires sharing the same concepts. Thus, according to Dworkin, the criterialist must claim that cases that appear to be instances of persistent disagreement over the application of the concept LAW are not instances of disagreement. If criterialism is right, Dworkin claims, instances of PLD must be rather instances of mere talking pass.

Dworkin argues that, in actual legal practice, judges and lawyers do engage in instances of PLD.\(^{11}\) For him, judges and lawyers do engage in disagreements over whether something is (part

\(^{11}\) Dworkin presents a series of four real cases that, according to him, are instances of persistent disagreement in legal practice. See (Dworkin, 1986, pp. 15–30).
of) the law in a particular jurisdiction at a given time (disagreements over whether the concept LAW applies to a particular case) despite their agreement over all other relevant non-legal issues concerning that case. Dworkin concludes that, since instances of PLD do occur in legal practice, but according to criterialism they can’t occur, we must reject criterialism.

2.2 Dworkin’s Argument and the Content View

I contend that, in suggesting his argument against criterialism, Dworkin is necessarily committed to the content view of disagreement. Briefly, the reason is that, if he were not, he would have no reason to accept that conceptual variance is a sufficient condition of lack of disagreement. In other words, the claim that conceptual variance is sufficient for lack of disagreement is necessary for Dworkin’s argument being correct, and since that claim can only be true if one accepts the content view of disagreement, Dworkin must endorse the content view. Let me elaborate.

As noted in chapter 2, Dworkin didn’t frame his views on disagreement in terms of (the content of) attitudes. Yet, as I argued there, that is the most charitable way to interpret his theory. I won’t repeat my arguments here, I’ll just assume the conclusion. To be explicit, I will assume that, according to Dworkin, disagreement is a relation that obtains between an attitude held by an individual and another attitude held by another individual (or by the same individual at different times). Once we accept that for Dworkin disagreement is a relation between attitudes, we can interpret him as suggesting that, for all instances of PLD, one attitude has a content with the form the concept LAW applies to X, and the other attitude has a content with the form the concept LAW does not apply to X.

As noted, according to Dworkin, there wouldn’t be a disagreement between two subjects who don’t share the same concepts, particularly, the concept LAW. For example, there would be no disagreement between a subject who holds an attitude with the content the concept LAW applies to X and a subject who holds an attitude with the content the concept LAW doesn’t apply to X. For the sake of explicitness, this is what it means to say that, for Dworkin, a conceptual difference is a sufficient condition for the lack of disagreement (alternatively, to say that lack of disagreement is a necessary condition of conceptual variance). It might be worth noticing that this is just the contrapositive of Dworkin’s explicit idea that disagreement entails sameness of concepts.
If one doesn’t accept the content view, conceptual variance is not a sufficient condition for the lack of disagreement. This point can be easily appreciated if we drop for a moment the content view and instead adopt the functionalist approach. A consequence of accepting the functionalist approach is that it is possible for two subjects to disagree despite not sharing the same concepts. For example, imagine a subject A who has an attitude with the content *the concept LAW1 applies to X* and another subject B who has an attitude with the content *the concept LAW2 doesn’t apply to X*. Suppose that the function of both attitudes is not representational but, say, (exclusively) motivational. Suppose that the formation of the first attitude (the attitude with the content *the concept LAW1 applies to X*) is explained by A being motivated to perform action R. Suppose that the formation of the second attitude (the attitudes with the content *the concept LAW2 doesn’t apply to X*) is explained by B being motivated to perform action S. Suppose that the state of affairs brought about by A performing action R and the state of affairs brought about by B performing action S cannot coexist. In terms of the functionalist view of disagreement, those subjects disagree. That is so regardless of the conceptual difference between them. By accepting the functionalist view of disagreement instead of the content view, we have made false the claim that lack of disagreement is a necessary condition of conceptual variance. This shows that if one doesn’t accept the content view, then it is false that *if there is conceptual variance, then there is no disagreement.* Contra-positively, if it is true that if there is conceptual variance, then there is no disagreement, then one accepts the content view. Since Dworkin’s argument depends on accepting that conceptual variance is sufficient for the lack of disagreement, Dworkin’s argument depends on accepting the content view.

To conclude this section on Dworkin’s views, let’s have a look at how replacing the content view of PLD with the functionalist account renders Dworkin’s disagreement-based argument against criterialism ineffective. If one drops the content view and adopts the functionalist approach, Dworkin’s argument fails to give us reason to reject criterialism.

### 2.3 Where Dworkin’s Argument Goes Wrong

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12 It is worth making explicit my assumption that either there is no explanation(s) of disagreement other than the content view and the functionalist view or, if there are, any other characterization different from those two entails that there can be disagreement despite conceptual variance.
If the content view is incorrect, as I have argued, Dworkin’s argument cannot be right. Dworkin’s argument is not right simply because it is built upon a false characterization of disagreement. This should be enough to discard it. However, for the sake of clarity, I’d like to make explicit what exactly is the effect that replacing the content view with the functionalist approach has with respect to Dworkin’s argument against criterialism. I contend that, once we drop the content view and replace it with the functionalist approach, Dworkin’s argument proves incapable of delivering its conclusion; that is, one proves it false that, if one endorses criterialism, then one must accept that PLD is impossible.

As noted above, the claim that for the criterialist PLD must be impossible, follows from accepting that, for her, in every supposed instance of PLD, subjects do not share the same concept LAW (and therefore cannot disagree). As argued, the claim that two subjects can’t disagree unless they share the same concepts can only be true if we think of disagreement as a relation between the content of attitudes. Disagreement between subjects who don’t share the same concepts is possible if we think of disagreement as a relation between the function of attitudes. What follows from this consideration is that, if we adopt the functionalist view, even if by accepting criterialism we would be accepting that in instances of PLD subjects don’t share the same concepts, we need not accept that the parties to PLD don’t disagree.

We can expand on that point a little further. Suppose that criterialism is correct. That is, suppose that the content of a concept is given by the rules people follow to apply it. Suppose that Dworkin is right in saying that, for the criterialist, two people who engage in an instance of PLD follow different rules to apply the concept LAW. Suppose that concepts are individuated in terms of their contents. It would follow then that, as Dworkin claims, for the criterialist, two subjects who engage in an instance of PLD have different concepts LAW1 and LAW2. Does it follow from here that they don’t disagree? If we conceive of disagreement along the lines suggested by the functionalist view, the answer is no, or at least not necessarily. The example in the previous subsection illustrates this point. Insofar as A’s belief and B’s belief serve exclusively (or primarily) a motivational function, and the states of affairs which would be brought about by A and B performing the actions that respectively motivated the formation of their beliefs couldn’t coexist, A and B disagree. The example shows that, if one adopts the functionalist view, subjects A and B disagree even if they have different concepts LAW1 and LAW2. More generally, the example illustrates that,
provided we accept the functionalist view of disagreement, disagreement is possible despite con-
ceptual variance.

Dworkin might be right in saying that, for the criterialist, subjects in any instance of PLD have different concepts LAW1 and LAW2; but Dworkin is wrong in saying that from here it follows that, for the criterialist, PLD must be not an instance of disagreement. The criterialist can make sense of PLD as an instance of disagreement despite its commitment to conceptual variance if the functionalist view is correct. Since we have reason to accept the functionalist view, Dworkin’s argument is unsuccessful.

One quick note before concluding: the observations above prove Dworkin’s argument ineffective by proving wrong Dworkin’s claim that criterialism cannot make room for the possibility of PLD. Nothing is said (or implied) about whether legal interpretivism can account for that possibility. In fact, it seems to me that the functionalist view of disagreement and legal interpretivism are compatible. The point I’m trying to make in this subsection is not that Dworkin is mistaken in thinking that legal interpretivism can account for the possibility of PLD. My point is that, given that disagreement in general, and PLD in particular, involve a relation between the function of attitudes instead of a relation between incompatible contents, a disagreement-based argument like Dworkin’s fails to support the view that, if criterialism is true, then PLD must be impossible. Dworkin’s argument doesn’t do what Dworkin thought it would; that is, the argument doesn’t show that legal interpretivism has the crucial theoretical advantage over theories that endorse criterialism that Dworkin thought it had.

Dworkin’s arguments, particularly the semantic sting argument, have given rise to a vast literature. Defenders of legal positivism have suggested several arguments against Dworkin’s views; defenders of Dworkin have contested some of them.13 In a recent article, David Plunkett and Timothy Sundell have offered one of those arguments against Dworkin.14 Plunkett and Sundell offer an alternative account of the type of disputes that, according to them, are the focus of Dworkin’s argument. They don’t reject Dworkin’s idea that theories that explain such disputes should be favored over theories that doesn’t, nor they deny that Dworkin’s interpretivism can

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13 For arguments against Dworkin, see (Dare, 2010; Duarte d’Almeida, 2016; Himma, 2002; Kramer, 1999, p. Ch.6; Leiter, 2009; Raz, 1998; Shapiro, 2011, p. Ch.10). For arguments defending Dworkin, see (Johnson, 2020; D. Smith, 2009, 2010).

14 (Plunkett & Sundell, 2013b) In a series of co-authored and single-authored works, Plunkett and Sundell have developed an analysis of a number of disputes of philosophical interest as metalinguistic negotiations. See (Plunkett, 2015, 2016; Plunkett & Sundell, 2013a, 2013b, 2014; Sundell, 2011, 2012, 2016a, 2016b).
account for that type of disputes. Instead, they challenge Dworkin’s contention that a theory sympathetic to legal positivism cannot explain such disputes. In the next section, I’ll examine Plunkett and Sundell’s analysis. I’ll argue that their analysis presupposes the content view. I’ll argue that, by dropping the content view and adopting the functionalist account, we make Plunkett and Sundell’s theory less appealing than it might seem at first sight.

3. The Metalinguistic Analysis of Bedrock Legal Disputes

I have reconstructed Plunkett and Sundell’s metalinguistic analysis of bedrock legal disputes at length in chapter 1. I won’t do that again here. In this subsection, I’ll present a summary of their ideas. This summary should be just enough to proceed with our current discussion.

3.1 Bedrock Legal Disputes as Metalinguistic Negotiations

To begin, it is important to recall that there is a distinction between disagreements and disputes. Plunkett and Sundell explicitly endorse this distinction. Plunkett and Sundell’s way of distinguishing between disputes and disagreements is in line with the way in which we have drawn the distinction in this thesis. More explicitly, for them, disputes are “linguistic exchanges that seem to evince or reflect a disagreement”\(^\text{15}\), whereas disagreements “involve a rational conflict in the attitudes (for example, the beliefs) actually held by the subjects, irrespective of whether those subjects enter into a linguistic exchange with one another”.\(^\text{16}\)

Plunkett and Sundell present their account of bedrock legal disputes as an alternative to Dworkin’s.\(^\text{17}\)

\(^{15}\) (Plunkett & Sundell, 2013b, p. 247)
\(^{16}\) (Plunkett & Sundell, 2013b, p. 247)
\(^{17}\) (Plunkett & Sundell, 2013b, p. 244)
Plunkett and Sundell suggest analyzing bedrock legal disputes as *metalinguistic negotiations*. In Plunkett and Sundell’s theory, metalinguistic negotiations are a subtype of a class of disputes they call *metalinguistic disputes*. They suggest that metalinguistic disputes are a subtype of another class of disputes they call *non-canonical disputes*. Let me expand briefly on these ideas.

Plunkett and Sundell observe that disagreement can be expressed through different linguistic mechanisms; more specifically, according to them, disagreement can be expressed via semantics or via pragmatics. Plunkett and Sundell label disputes in which disagreement is expressed via semantics *canonical*. In canonical disputes, the disagreement expressed by the utterances made by the speakers revolves around the information semantically encoded by those utterances. Plunkett and Sundell label disputes in which disagreement is communicated via pragmatics *non-canonical*. In non-canonical disputes, the disagreement between the speakers do not revolve around the information encoded by the semantic content of their utterances but around information that is communicated pragmatically.

In Plunkett and Sundell’s view, there are different pragmatic mechanisms that speakers can use to express disagreement when they engage in a non-canonical dispute. For them, depending on the pragmatic mechanism speakers use, we can identify different types of non-canonical disputes. One of the pragmatic mechanisms that can be used to express disagreement is what Plunkett and Sundell call a *metalinguistic use of a term*.18

According to Plunkett and Sundell, a term is used metalinguistically if it is used to communicate information about its own use. For example, in an utterance of “it is not cold”, a speaker might use the term “cold” to inform the hearer which standard of coldness is operative in the context of their conversation (a context with which the hearer might not be familiar), rather than to give information about the temperature. A speaker that uses “cold” in that way, uses it metalinguistically. Plunkett and Sundell label non-canonical disputes in which the pragmatic mechanism employed by speakers to communicate disagreement is the metalinguistic use of a term *metalinguistic disputes*.

Sometimes the linguistic facts about the use of a term (e.g., the operative standard of coldness) are already settled in the conversational context when a speaker makes an utterance. When two speakers have a metalinguistic dispute around a term in which that is the case (in which the

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18 In using this vocabulary, Plunket and Sundell claim to be following Chris Barker. See (Barker, 2002, 2013).
linguistic facts about that term are already settled), their disagreement concerns their conflicting views on what is the most precise way to characterize the conversational context.

But sometimes the linguistic facts are not settled. Plunkett and Sundell suggest that, when two speakers have a metalinguistic dispute in which the relevant facts of the conversational context are not settled, their disagreement is a negotiation in which each disputant advocates for their own use of the term in question. Plunkett and Sundell call metalinguistic disputes of this second type *metalinguistic negotiations*.

For Plunkett and Sundell, bedrock legal disputes are better analyzed as metalinguistic negotiations around the term “the law”. They claim that when two speakers engage in a bedrock legal dispute, they disagree about how “the law” should be used (about which concept that term should be used to express in the context of their conversation). In a bedrock legal dispute, understood as a metalinguistic negotiation, each speaker advocates for her own way of using the term “the law”.

Someone who accepts that bedrock legal disputes are metalinguistic negotiations over the term “the law” must accept that disputants in a bedrock legal dispute mean different things by that term. For Plunkett and Sundell, the difference in meaning between the utterances of speakers in bedrock legal disputes seems to be sufficient for the semantic contents of those utterances being compatible. This is arguably the reason why, according to Plunkett and Sundell, speakers in a metalinguistic negotiation don’t disagree over the semantic contents encoded by their utterances.

Plunkett and Sundell argue that Dworkin’s disagreement-based argument rely on an unargued premise. That premise is that bedrock legal disputes are canonical. They claim that Dworkin fails to provide reason to accept this premise. That is, for Plunkett and Sundell, Dworkin’s argument doesn’t give a reason to accept that the disagreement between the speakers in a bedrock legal dispute revolves around the information semantically encoded by their utterances. Since the

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19 As noted in chapter 1, this might be a misrepresentation of Plunkett and Sundell ideas. Perhaps they don’t claim that bedrock legal disputes are better analyzed as metalinguistic negotiations but only that they can be. Perhaps they don’t claim that all legal disputes are better analyzed as metalinguistic negotiations, but only that some are. As I argued in chapter 1, beyond the textual evidence being unable to rule out clearly such an interpretation, the reason to support my interpretation of Plunkett and Sundell’s view is that it seems to do a better job at presenting the metalinguistic analysis as a genuine alternative to Dworkin’s. Weakening Plunkett and Sundell’s claims comes at the cost of rendering their view unable to be considered a response to Dworkin.

20 Strictly speaking, this is not how Plunkett and Sundell present Dworkin’s unargued premise. They write “[t]he premise is that the best way to explain how an exchange between two speakers serves to express a genuine disagreement is, in almost all circumstances, to suppose that those speakers mean the same thing—that is, express the same concepts—with the words they use in that exchange”. (Plunkett & Sundell, 2013b, p. 246)
argument gives no reason to accept that premise, it gives no reason to reject an analysis of bedrock legal disputes that conceives of them as non-canonical disputes (more precisely, as metalinguistic negotiations).

Plunkett and Sundell argue that, since their analysis is compatible with legal positivism, it poses an objection against Dworkin’s disagreement-based argument. The objection is that, if we accept Plunkett and Sundell’s account (which, according to them, we should do based on some theoretical advantages it has over Dworkin’s), we need not accept Dworkin’s conclusion that positivist theories of law cannot account for bedrock legal disputes.

According to Plunkett and Sundell, their metalinguistic analysis of bedrock legal disputes earns its keep due to the fact that it has some theoretical advantages over Dworkin’s. For instance, unlike Dworkin’s analysis, the metalinguistic analysis doesn’t “involve posting the existence of any new kind of concept…” 21 Another theoretical advantage the metalinguistic analysis has over Dworkin’s according to Plunkett and Sundell is that, unlike the later, “it is neutral on a major and divisive issue in the philosophy of law [whether jurisdiction specific law is grounded on moral and social facts or only social facts] and thus can be drawn on by positivist and antipositivists alike”. 22 For Plunkett and Sundell, after consideration of these theoretical advantages, we should prefer their analysis over Dworkin’s.

It seems to me that, for my purposes in this chapter, this reconstruction of Plunkett and Sundell’s work should suffice. We can show now how Plunkett and Sundell’s analysis of bedrock legal disputes entails the content view of disagreement.

3.2 The Metalinguistic Analysis and the Content View

Plunkett and Sundell seem to explicitly express their commitment to the content view when, in explaining how in some disputes speakers fail to express (genuine) disagreement, they write:

[…] in each of these three cases, speakers use their words to refer to different things—different locations, different foodstuffs, different properties. Owing to that

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21 (Plunkett & Sundell, 2013b, p. 273)
22 (Plunkett & Sundell, 2013b, p. 275)
fact, they assert and deny propositions that in fact are entirely consistent. The seeming disagreements in (2) to (4) are thus not disagreements at all; or, if you prefer, they are disagreements, but not genuine disagreements.\textsuperscript{23}

In this paragraph Plunkett and Sundell seem to suggest that, at least for some disputes, difference in meaning entails compatibility (consistency in Plunkett and Sundell’s vocabulary) and that the reason of lack of (genuine) disagreement, at least for those disputes, is compatibility of contents.\textsuperscript{24} They seem to accept that compatibility is sufficient for lack of disagreement. This seems to be a strong indication that they endorse the content view.

More textual evidence that Plunkett and Sundell endorse the content view seems to be found in the following passage:

There is a wide range of quite unexotic disagreements that demonstrate this point [some non-canonical disputes can express disagreement], but to save time, we consider just one before moving on to the cases most relevant to Dworkin’s argument.

So consider the exchange in (5):

(5a) There are forty-nine states in the United States.
(5b) No, there are fifty states in the United States.

\textsuperscript{23} (Plunkett & Sundell, 2013b, p. 258)
\textsuperscript{24} The three cases Plunkett and Sundell refer to are:

(2a) Nell is at the bank[financial].
(2b) No, Nell is not at the bank[river].

(3a) Burgers come with chips[crisps].
(3b) No, burgers do not come (with) chips[French fries].

(4a) Ivan is tall[for a philosopher].
(4b) No, Ivan is not tall [for a basketball player].

To be precise, this paragraph is part of a fragment of Plunkett and Sundell’ theory in which they aim to separate what they call genuineness (the property of disputes of expressing an actual disagreement) and canonicalness (the property of disputes of expressing disagreement throughout semantic content). Moreover, in that fragment they seem to be reconstructing what has been the common view in philosophical discussion instead of presenting their own. Notice that even if they were to explain exchanges (2), (3) and (4), as instances of disputes in which a disagreement is expressed, such disagreement would not revolve around the information semantically encoded by the speakers; and the reason for that would be that, as they seem to acknowledge, those contents are consistent. See (Plunkett & Sundell, 2013b, p. 257).
There is a widely held if not entirely uncontroversial view among linguists and philosophers of language according to which number words of the kind that appear in (5) literally express only a “lower-bound” reading. On such a view, an utterance of the expression in (5a) literally expresses the proposition that there are at least forty-nine states in the United States, while an utterance of the expression of (5b) literally expresses that the proposition there are at least fifty states in the United States. But of course those two propositions are consistent. Indeed, they are both true.

That there are exactly forty-nine states is communicated by the speaker of (5a), but it is part of the pragmatic upshot of the utterance in context, not the semantic content of the speaker’s assertion. Nevertheless, we submit that no plausible account of genuineness could exclude disagreements like that expressed in (5).

Although Plunkett and Sundell are not entirely explicit, in this long quote, they seem to suggest that the disagreement between the speakers of (5a) and (5b) revolves around the contents “there are exactly forty-nine states (in the US)” and “there are exactly fifty states (in the US).” The fact that those contents are communicated via pragmatics seems to be the reason why, for Plunkett and Sundell, disagreement in a dispute like (5) revolves around information expressed pragmatically. They seem to suggest that since those are the contents that are incompatible, they are the contents around which speakers disagree in that interaction. This interpretation of the passage quoted, if correct, strongly suggests that Plunkett and Sundell endorse the content view.

Let’s say that I misinterpreted Plunkett and Sundell’s text. Let’s say that neither of the quotes above express a commitment to the content view. It still seems to me that there is reason to attribute them with such a commitment. In making the case for this claim, the first thing to be noticed is that, as seen, according to Plunkett and Sundell, bedrock legal disputes are non-canonical.

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25 (Plunkett & Sundell, 2013b, pp. 258–259)

26 It seems to me that (5) is not a good example. To my view, the example fails to clearly illustrate a scenario in which speakers don’t disagree around the semantic contents of their utterances. It seems to me that the contents “there are at least forty-nine states in the United States” and “there are at least fifty states in the United States” entail an incompatibility. The former entails that it is possible that there are only forty-nine states, the latter denies that possibility. If that’s correct, it is not clear that in (5) speakers don’t disagree over the information semantically encoded by their utterances.
disputes. Arguably, this is not only an explicit claim in Plunkett and Sundell’s theory, but also a necessary condition of it. To say that bedrock legal disputes are non-canonical disputes entails that the disagreement expressed by speakers in linguistic exchanges of that kind cannot revolve around the semantic contents encoded by their utterances.

The claim that, in bedrock legal disputes, speakers don’t disagree over the semantic contents encoded by their utterances can only be true if we accept the content view. We must think that disagreement is a relation that obtains between incompatible contents to maintain that, in disputes in which the utterances of speakers encode compatible semantic contents, disagreement cannot revolve around information encoded semantically. It is precisely because one conceives of disagreement as a relation between incompatible contents and one conceives of the semantic contents of the speakers’ utterances in bedrock legal disputes as compatible, that one must conclude that in bedrock legal disputes disagreement cannot revolve around semantic contents.

As before, to see that point more clearly, let’s drop for a moment the content view of disagreement and let’s assume instead the functionalist view. The functionalist view of disagreement is compatible with the possibility that there are bedrock legal disputes in which disagreement revolves around the semantic contents of the speakers’ utterances despite those contents being compatible. If we accept the functionalist view of disagreement, there is no reason to rule out that possibility. To repeat, this is so because, according to the functionalist view, disagreement doesn’t turn on content but on the function of attitudes. The conclusion to be drawn here is that, if we accept the functionalist view of disagreement, there is no reason to reject the possibility that bedrock legal disputes can be canonical disputes. Hence, if Plunkett and Sundell were to reject the content view, they would have to accept that there can be canonical bedrock legal disputes. In other words, they would have to drop the idea that, in bedrock legal disputes, disagreement cannot concern the contents semantically encoded by the speakers’ utterances. But if they accept that disagreement in bedrock legal disputes can concern information semantically encoded, then they need to revise their claim that bedrock legal disputes are non-canonical disputes. If by rejecting the content view, we can accept that disputants in bedrock legal disputes (might) disagree over the semantic contents of their utterances, Plunkett and Sundell need to do more work to show that bedrock legal disputes are non-canonical disputes. Since Plunket and Sundell don’t do that work and yet contend that bedrock legal disputes are non-canonical disputes, they cannot reject the content view of disagreement.
The observations above, if correct, give reason to accept that the metalinguistic analysis of bedrock legal disputes suggested by Plunkett and Sundell entails the content view. Since the content view must be dropped and replaced with the functionalist account, the metalinguistic analysis needs revision. To conclude this section, I’ll point out some of the consequences that abandoning the content view has with respect to the metalinguistic analysis suggested by Plunkett and Sundell.

3.3 Where the Metalinguistic Analysis Goes Wrong

By adopting the functionalist view of disagreement instead of the content view, one doesn’t prove Plunkett and Sundell’s analysis of bedrock legal disputes wrong. At least at first sight, the functionalist approach and the metalinguistic analysis do not seem to be incompatible. What dropping the content view and accepting the functionalist approach does is to change the balance of reasons we might have to accept that bedrock legal disputes are metalinguistic negotiations.

For example, as noted in chapter 1, there seems to be a powerful intuition to the effect that, when engaged in an instance of PLD, subjects disagree (although not only) over the content of the law in a specific jurisdiction at a given time. As argued there, such disagreement is typically expressed via semantics by the utterances that the disagreeing subjects make when they engage in a linguistic exchange of the type Plunkett and Sundell call bedrock legal disputes. As argued in chapter 1, if we accept Plunket and Sundell’s analysis, we must drop that intuition.

Perhaps the intuition is wrong. Perhaps it is worth dropping. However, considering that there is an alternative view of disagreement that makes the intuition easy to keep, we should provide further reason before accepting a view that requires us to reject it. Plunkett and Sundell need to argue why their explanation of bedrock legal disputes is a better explanation than an alternative account that simply replaces the content view for the functionalist approach. They need to give further reason as to why their account is to be preferred even though it rejects that intuition which the alternative does not.27

Another consequence that follows from accepting the functionalist view instead of the content view with respect to Plunkett and Sundell’s proposal is that they need to give further reason

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27 Clearly, plunkett and Sundell might reply that bedrock legal disputes and the disputes in which PLD is expressed are not coextensive. So, even if the intuition is predicated of the latter, it needs not be predicated of the former. As I observed in chapter 1, the problem with so arguing is that it makes it harder to conceive of Plunkett and Sundell’s theory as an alternative to Dworkin’s.
for their view that canonicalness and non-canonicalness are mutually exclusive categories. Once we accept the functionalist view, further argument is needed before accepting that, in bedrock legal disputes, speakers disagree over either the right way to use “the law” (which they express pragmatically) or the information semantically encoded by their utterances (which they express semantically), but not both. The functionalist view makes it possible that, in bedrock legal disputes two disagreements are expressed: one pragmatically, say, about the right way to use “the law”; and one semantically, say, about the content of the law. Unless Plunkett and Sundell’s revise their way to conceive the relation between canonicalness and non-canonicalness, their view might rely on a false claim (i.e., that relation is a dichotomy), and thus be less plausible.

Lastly, it seems that the theoretical advantages that, according to Plunkett and Sundell, their analysis has over Dworkin’s, are advantages that an alternative account of bedrock legal disputes which adopts the functionalist approach also has. Just like Plunkett and Sundell’s analysis, a functionalist alternative does not involve (at least it doesn’t need to involve) positing the existence of any new type of concepts. Particularly, it wouldn’t require introducing the type of concepts Dworkin called *interpretive*. Similarly, just as Plunkett and Sundell’s proposal, an account of bedrock legal disputes that endorsed the functionalist view would be neutral with respect to the debate between positivists and antipositivists.28 One may be a positivist or an antipositivist and still accept the functionalist explanation of PLD.

In short, it might be true that the metalinguistic analysis suggested by Plunkett and Sundell has all those theoretical advantages over Dworkin’s, but it is not true that it has them over an alternative explanation of bedrock legal disputes that accepts the functionalist view of disagreement. Further argument is needed if we are to prefer their theory over a functionalist account, based on a difference in explanatory merits; as things stand, we have no reason to prefer the metalinguistic analysis over the functionalist alternative.

It seems to me that, put together, the observations above cast enough doubt on Plunkett and Sundell’s account of bedrock legal disputes to justify a revision. In that sense, conceiving of PLD as suggested by the functionalist view, proves the metalinguistic analysis ineffective.

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28 For the sake of explicitness, it might be worth pointing out that Plunkett and Sundell conceive legal atipositivism as “the view according to which what the law is in a given jurisdiction at a given time is ultimately grounded in moral facts as well as social facts.” (Plunkett & Sundell, 2013b, p. 275); and they conceive legal positivism as “the view according to which what the law is in a given jurisdiction at a given time is ultimately grounded in social facts but not moral facts.” (Plunkett & Sundell, 2013b, p. 275).
Dworkin’s disagreement-based arguments and those that revolve around them are not the only ones in legal philosophy based on observations about PLD. A recent example of an argument premised on considerations about PLD that doesn’t relate (at least not directly) to the discussion around Dworkin’s work is Kevin Toh’s argument for (his version of) legal expressivism. Kevin Toh has suggested a disagreement-based argument for the view that (internal) legal statements are best understood as expressions of a non-cognitive attitude he labels *plural acceptance of norms*. In the next section, I take on Toh’s argument.

4. Legal Expressivism and the Content View

Kevin Toh recently suggested a novel expressivist theory of legal discourse. Broadly, Toh claims that the best way to conceive of (internal) legal statements is as expressions of a psychological non-cognitive attitude he calls *plural acceptance of a norm*. To support this claim, Toh advances a disagreement-based argument.

Toh takes his account of legal statements to be an improvement of (an expressivist interpretation of) Hart’s and justifies this modification based on some observations about PLD. Roughly, Toh argues that Hart’s expressivist account of legal statements is unable to characterize this type of statements as instances of guidings (as opposed to groanings). In Toh’s view, this can be appreciated if we look at how Hart (understood as an expressivist) would explain the linguistic exchanges Toh calls *fundamental legal disputes*. On the other hand, according to Toh, an alternative Harman-like understanding of (Hart’s theory of) legal statements should also be rejected. Such an account should be discarded not because it fails to portray legal statements as instances of guidings but because it fails to portray fundamental legal disputes as instances of disagreement. We have reason to keep Toh’s own view because it doesn’t have either of the flaws respectively attributed to the expressivist Hart and a Harman-like view.

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30 As noted in chapter 3, as understood in this thesis, non-cognitive attitudes are propositional attitudes that cannot be evaluated in virtue of their truth or falsity. It is commonly said that someone who holds a non-cognitive attitude does not *endorse* a certain content as true or false but, instead, holds some kind of *preference* towards a certain content See (M. Smith, 1994, p. 10; Stevenson, 1963, pp. 79–84).

31 Toh’s analysis focuses on internal legal statements. For my purposes, the distinction between internal and external statements is not relevant. For that reason, in this chapter I’ll talk simply of “legal statements”.

32 Toh argued for an expressivist interpretation of Hart’s theory of legal statements in an earlier work. See (Toh, 2005).
In this section, I peruse three aims. First, I aim to reconstruct extensively, although not exhaustively, Toh’s disagreement-based argument for his legal expressivism. Second, I aim to show that Toh’s argument presupposes the notion of PLD suggested by the content view. Finally, I aim to show how replacing the content view with the functionalist view renders Toh’s argument ineffective. Let’s start by having a closer look at Toh’s argument.

4.1 Toh’s Disagreement-Based Argument

The first move in Toh’s disagreement-based argument is to assume that legal discourse is “generally in good standing”\textsuperscript{33} as opposed to “systematically flawed”\textsuperscript{34}. Toh observes that this assumption imposes a theoretical constrain: we should try to portray the parties to any legal dispute as being able to proceed with their dispute in good faith even if they were to know what is going on between them.

Toh calls some disputes in legal practice \textit{fundamental legal disputes}. As understood by Toh, fundamental legal disputes are disputes about the (content of the) law within a legal system in which the disputants subscribe to conflicting fundamental norms. Toh observes that portraying disputants in fundamental legal disputes (and legal disputes in general) in the required way (as being able to proceed with their dispute in good faith) can only be done if the meta-normative theory that we employ to characterize legal discourse makes a clear distinction between profferings of reasons and instances of browbeating. In other words, according to Toh, a theory that is unable to make that distinction is unable to portray disputants in the right way.\textsuperscript{35}

Toh then focuses his analysis on rejecting an expressivist reading of Hart’s theory of legal discourse. In Toh’s view, Hart’s expressivist position fails to provide the required portrayal of discussants. Hart’s theory fails because, with respect to fundamental legal disputes, it is unable to make the necessary distinction. For Hart, Toh claims, a dispute between two speakers who subscribe to conflicting norms as the fundamental norm of their legal system is indistinguishable from “a session of mutual browbeating”\textsuperscript{36}.

\textsuperscript{33} (Toh, 2011, p. 111)  
\textsuperscript{34} (Toh, 2011, p. 111)  
\textsuperscript{35} According to Toh, it is a common objection against expressivist theories in metaethics that they cannot draw this distinction.  
\textsuperscript{36} (Toh, 2011, p. 117)
I won’t reconstruct (Toh’s interpretation of) Hart’s analysis of legal statements here. I won’t reconstruct either Toh’s reasons to believe that Hart’s view is unable to make the necessary distinction. For my purposes, that is not important. It will suffice to notice that, as seen by Toh, Hart’s conception of legal statements needs to be modified because it fails to meet the challenge of distinguishing between guiding and goading (particularly, contexts of fundamental legal disputes). I’ll grant Toh’s objection against (his expressivist interpretation of) Hart.

To amend Hart’s expressivist view of legal statements, Toh suggests two modifications. The first modification is to change the way in which we think of the role that the attitude of acceptance plays in uttering a legal statement. For Hart, according to Toh, acceptance is presupposed; for him (Toh), acceptance is pitched. The second modification is to change the way in which we think of the attitude of acceptance itself. According to Toh, Hart suggests that the attitude expressed by making a legal statement is a simple acceptance; Toh’s suggestion is that such an attitude is rather a plural acceptance. As seen, Toh suggests that legal statements are to be analyzed as expressions of plural acceptances.

For my purposes in this chapter, it is not necessary to reconstruct Toh’s expressivist view of legal statements at full length. For instance, we need not be precise about the difference between simple and plural acceptances of norms. My purpose in this chapter is not to debunk Toh’s argument but rather to illustrate the consequences of adopting the functionalist view. Hence, I’ll grant that Toh’s modified version of legal expressivism meets the challenge of distinguishing between guidings and goadings just as he thinks it does.

Hart’s expressivist theory of legal statements is not the only one that, according to Toh, should be rejected based on observations about disagreement. Another characterization of legal statements that should also be discarded is an interpretation of Hart’s theory inspired by Gilbert Harman’s analysis of moral statements. In terms of a Harman-like understanding, legal statements are made by speakers who presuppose that there is a common normative framework between them (i.e., speakers that presuppose that they accept the same fundamental norm). Toh claims that an account of legal statements along those lines should be rejected because it portrays fundamental legal disputes as instances of talking at cross purposes.

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37 Toh’s expressivist interpretation of Hart has recently come under criticism. See (Kramer, 2018).
38 A different challenge against Toh’s version of legal expressivism has been suggested by Matthew Etchemendy. See (Etchemendy, 2016).
I’ll present the Harman-like characterization of legal statements and why, according to Toh, it should be rejected in further detail in the next sub-section. For now, it is enough to notice that, for Toh, a Harman-like characterization of legal statements must be discarded because it fails to portray fundamental legal disputes as instances of disagreement.

Very roughly, Toh’s argument for (his version of) legal expressivism has the following structure: a theory of legal statements cannot be successful unless it portrays fundamental legal disputes as (i) instances of disagreement (as opposed to instances of talking past) and (ii) it is able to distinguish between instances of guiding and browbeating (while characterizing legal statements as instances of guidings); since Hart’s expressivist analysis fails to meet condition (ii), we have reason to reject it; since a Harman-like analysis of legal statements fails to meet condition (i), we have reason to reject it; given that Toh’s own version of legal expressivism meets both conditions, we have reason to accept it.

Before concluding this subsection, one important clarification is in order. Strictly speaking, Kevin Toh doesn’t present his argument as I have suggested in the previous paragraph. At least explicitly, he seems to be interested in presenting his argument as an objection exclusively against the expressivist reading of Hart’s theory. His objection against a Harman-like understanding of legal statements is more of a secondary argument aimed at reinforcing the points made in the (primary) argument against the expressivist interpretation of Hart. I have decided to slightly modify the structure of Toh’s argument for expository reasons. It seems to that my observations would be correct (if they are) and would have the effect I claim they have, even if I had decided to present Toh’s argument in a stricter way.

So, admittedly, my characterization of Toh’s argument is incomplete and even imprecise. However, as noted, for my aims, that should not be a problem. The observations that follow do not capitalize in any of those aspects of Toh’s argument that I have left unmentioned or those I have slightly modified for the sake of exposition. In the following subsection, my aim is to show that Toh’s argument endorse the content view of PLD.

4.2 Toh’s Argument and the Content View

I contend that Toh’s argument entails the notion of persistent disagreement suggested by the content view. Toh’s commitment to the content view is not explicit. Little to no textual
evidence is provided in Toh’s work to establish such an interpretation of his theory. In this subsection, I present some observations that, if correct, give reason to believe that if one accepts Toh’s disagreement-based argument, then one must accept the content view of PLD. These observations draw on Toh’s considerations against a Harman-like understanding of legal statements.

One way to conceive of legal statements is as being addressed to people who accept the same fundamental norm as the speaker. As presented by Toh, this way of understanding legal statements is an extension of the conception of moral statements suggested by Gilbert Harman.39 Toh presents Harman’s view as follows: “[a]ccording to him, a moral claim is not simply correct or incorrect, but instead correct or incorrect only in relation to a normative framework, or a set of norms to which a community of people have agreed at least implicitly.”40

More specifically, applied to legal statements, the view is that a speaker, in making a legal statement, necessarily accepts a particular norm as the fundamental norm of her legal system and presupposes that her audience (or at least the officials in that legal system) do too. Two speakers who accept conflicting fundamental norms, have conflicting presuppositions.

According to Toh, a clear disadvantage of a Harman-like understanding of legal statements is that:

…such a conception would make it very difficult to make sense of legal disagreements between people who subscribe to different fundamental norms; for the effect of the proposal seems to be to limit genuine legal disagreements to contexts in which common fundamental norms are assumed. According to this view, people who subscribe to conflicting fundamental norms and persist in their disputes would be talking at cross-purposes. In other words, well informed and unconfused people who subscribe to conflicting fundamental norms would not take part in a dispute with each other about the most fundamental norms.41

39 See (Harman, 2000).
40 (Toh, 2011, p. 116)
41 (Toh, 2011, p. 116)
Harman seems to accept that a consequence of accepting his conception of moral statements is that one must portray instances of seeming disagreement between people who accept conflicting (moral) fundamental norms as instances of talking past. He writes:

If two relativists disagree, one saying simply that it is morally wrong to cause pain and injury to animals, the other saying simply that this is not wrong, they do mean to be disagreeing with each other. They presuppose that they are making these judgements in relation to the same relevant moral demands. Of course, they may be mistaken about that, in which case they really are talking past each other, despite their intentions.\[^{42}\]

Toh insists that by adopting a Harman-like understanding of legal statements:

We would be forced to portray people who subscribe to different rules of recognition either: (a) as having a non-legal normative (possibly a moral) dispute as to which rule of recognition is (morally) superior and hence should be adopted; or (b) as talking past each other, and in this latter case disputants would be disposed to stop their dispute and walk away from each other upon discovering that they subscribe to different rules of recognition. In other words, this particular interpretation of […] legal statements leads us to overlook the possibility of genuine legal disagreements in which well-informed and unconfused discussants subscribe to and advocate different and conflicting fundamental norms of law. In sum, a common-framework conception of legal statements, along the lines of Harman's conception of moral statements, seems to fail to do a better job than the straight expressivist conception in explaining legal disagreements. While avoiding the problem of distinguishing guidings from goadings, it runs into the problem of accounting for genuine legal disputes in which discussants subscribe to conflicting fundamental legal norms.\[^{43}\]

\[^{42}\] (Harman, 2000, p. 36)
\[^{43}\] (Toh, 2011, p. 118) Strictly speaking, Toh is talking here about an interpretation of Hart’s theory of legal statements along the line suggested by Harman’s view.
I must admit that I couldn’t find either in Toh’s work or in Harman’s an explicit elaboration of the reasons why, according to them, two subjects who subscribe to conflicting fundamental norms would necessarily fail to disagree even if they seem to do so when they engage in a fundamental legal dispute. In the legal case, why exactly is it that, provided norms n1 and n2 cannot be applied to case X, if a subject A subscribes to the fundamental norm N1 and a subject B subscribes to the fundamental norm N2, there would be no disagreement between them when A accepts n1 (valid according to N1) and B accepts n2 (valid according to N2)?

It seems to me that the answer to that question, adopted implicitly by Toh (and Harman for the case of moral statements), is given by the content view of disagreement. It is because one thinks that the content of an acceptance of n1 (valid according to the fundamental norm N1) and the content of an acceptance of n2 (valid according to the fundamental norm N2) are compatible, that one thinks that a subject that holds the former and a subject that holds the latter don’t disagree. It is because we think that disagreement obtains if, and only if, the content of two attitudes is incompatible that we take cases like that to be instances of talking past.

If subject A accepts that “according to N1, n1 applies to X (or is valid)” and a subject B accepts that “according to N2, n2 applies to X (or is valid)”, they accept compatible contents (it might be true that n1 does apply to X according to N1 and n2 does apply to X according to N2). That is so even if n1 and n2 cannot apply simultaneously to X or cannot be both valid norms of the same legal system. Insofar as one accepts the content view, one would say that A and B don’t disagree despite their taking themselves to be having a disagreement. For someone who accepts the content view, when subjects A and B in this example engage in a linguistic exchange in which they express their respective attitudes, they merely talk past one another.

Harman seems to evidence his implicit commitment to the content view when he says:

But it is important to avoid or evade the objection raised against moral judgement relativism, namely, that it represents certain real disagreements as mere pseudo-issues. If two people—even two relativists—disagree about whether it is morally wrong to cause pain and injury to animals, they really do disagree and are not just talking past each other. It is not just that one says that causing pain and injury to
animals is wrong in relation to our morality, while the other says that it is not wrong in relation to Hopi morality.\textsuperscript{44}

As can be seen, in this passage, Harman seems to suggest that the reason why two subjects don’t disagree if they accept different moralities is that they would be committed to compatible contents (that what they would say would be compatible). In the case at hand, those compatible contents would be something like “causing pain and injury to animals is wrong in relation to our morality” and “causing pain and injury to animals is not wrong in relation to Hopi morality”. It should be clear that those contents might be true at the same time. Then, it seems to be Harman’s idea that it is because those contents could be true at the same time that one subject who endorses the former and another who endorses the latter don’t disagree. For Harman, two subjects who accept those contents, in expressing their acceptances in a linguistic exchange, would be talking past one another.

Although Toh is not explicit in this respect, it seems that he, following Harman, thinks that in cases where two speakers accept conflicting fundamental norms, speakers don’t disagree because the contents they accept (and express in their linguistic exchange) are compatible. Toh seems to assume that only views (like his) that can depict the parties to fundamental legal disputes as expressing acceptances with incompatible contents can depict such disputes as instances of disagreement. Put shortly, accepting the content view seems to be necessary for accepting that two speakers who subscribe to conflicting fundamental norms don’t disagree. Because Toh thinks that two speakers who subscribe to conflicting fundamental norms don’t disagree, Toh must endorse the content view.

The point can be made clearer if we substitute the content view by the functionalist view of disagreement. If one thinks that disagreement is a relation between the functions of two attitudes, one need not accept that A and B in our example above don’t disagree. To show this, consider again the same example. Let the attitudes of A and B have the same contents as before. Suppose that A’s acceptance is formed because A is motivated to perform action Y. Suppose that B’s acceptance is formed because B is motivated to perform action Z. Suppose that the state of affairs brought about by A performing Y and the state of affairs brought about by B performing Z

\textsuperscript{44} (Harman, 2000, pp. 35–36)
cannot coexist. Suppose that the function of those attitudes is (exclusively or competitively) motivational. According to the functional account of disagreement, A and B disagree. That is so despite the contents of those attitudes being compatible and despite A and B accepting conflicting fundamental norms. These considerations point towards the idea that, if one thinks that two subjects who subscribe to different fundamental norms necessarily don’t disagree, one must accept the content view. If one doesn’t accept the content view, one can accept that subjects who subscribe to compatible fundamental norms can engage in disagreement.

Here is how the idea works with respect to Harman’s example. Suppose the functionalist view of disagreement is correct. Now, imagine a subject who accepts that “causing pain and injury to animals is wrong in relation to our morality” and another subject who accepts that “causing pain and injury to animals is not wrong in relation to Hopi morality”. Imagine that the function of both attitudes is (exclusively) hedonic such that, the formation of each is explained by its helping its respective subject release some anxiety. Imagine that were each of those subjects to have the other’s attitude, they each would be caused to have the opposite emotional reaction (feeling anxious). According to the functionalist view of disagreement, those subjects disagree. That is so, despite the contents of their attitudes being compatible and despite those subjects subscribing to different normative frameworks. Once again, these observations point towards the conclusion that, for the contents of two attitudes being compatible to be a sufficient condition of the lack of disagreement, one must accept the content view.

Since, one cannot think that compatibility of contents is sufficient for lack of disagreement unless one accepts the content view, and Toh accepts that compatibility of contents is sufficient for lack of disagreement, Toh must accept the content view. If he didn’t accept the content view, he wouldn’t have reason to believe that a Harman-like account of legal statements could not depict fundamental legal disputes as instances of disagreement. Put very briefly, in presenting his argument against a Harman-like understanding of legal statements (which is a part of his argument in favor of his version of legal expressivism), Toh evinces his commitment to the content view.

Toh argues that the reason to prefer his version of legal expressivism over a Harman-like understanding of legal statements is that the latter fails (while the former doesn’t) to portray linguistic exchanges between two subjects who subscribe to conflicting fundamental norms as instances of disagreement. I claim that, if we adopt the functionalist view, this is not a reason in favor of Toh’s legal expressivism and against a Harman-like conception of legal statements. It
follows from accepting the functionalist view of disagreement that both views could portray such exchanges as genuine legal disputes. This would prove Toh’s argument ineffective. To conclude this section, I will elaborate on this idea.

4.3 Where Toh’s Argument Goes Wrong

I claim that by dropping the content view and adopting instead the functionalist approach, one makes Toh’s disagreement-based argument for (his version of) legal expressivism to be ineffective. I don’t claim that, if we accept the functionalist view, Toh’s legal expressivism fails to portray fundamental legal disputes as instances of disagreement. I don’t claim either that, if we accept the functionalist view, Toh’s legal expressivism fails to distinguish between guidings and goadings (or to portray legal statements as instances of profferings of reasons). I claim that the argument fails because it doesn’t fulfill its purpose of allowing us to choose between rival theories. The argument fails to give us sufficient reason to prefer Toh’s legal expressivism over a Harman-like understanding of legal statements.

As noted, Toh claims that the reason to prefer his view over a Harman-like view is that the latter but not the former necessarily portrays fundamental legal disputes as instances of talking past. As seen, by replacing the content view of disagreement with the functionalist view, we make room for the possibility that two subjects who engage in a fundamental legal dispute disagree even if we conceive of legal statements as made from a common normative framework. If we think of disagreement as a relation between the function of attitudes instead of a relation between their contents, we can endorse a Harman-like analysis of legal statements without being committed to the idea that fundamental legal disputes are necessarily instances of talking past.

Even though, by accepting a Harman-like understanding of legal statements, one commits to the view that two speakers who subscribe to different fundamental norms accept compatible contents, provided one accepts the functionalist view of disagreement, one needs not accept that they (those speakers) talk past each other. It could be that those speakers disagree because their attitudes serve a motivational function, and the states of affairs that would be brought about if each subject were to perform the action that motivated the formation of her belief cannot coexist.

Toh explicitly acknowledges that a Harman-like understanding of legal statements succeeds at distinguishing guidings from goadings (and portraying legal statements as instances of
guidings). If, besides that, a Harman-like understanding succeeds at portraying fundamental legal disputes as instances of disagreement, then the reasons that, according to Toh, we have to accept his theory of legal statements are reasons that we have to accept a Harman-like understanding of legal statements. If this is correct, then there no longer exists in Toh’s argument the disagreement-based consideration in favor of his analysis (but against a Harman-like analysis) that he thought there was.

To say as much is not to say that there are no reasons to prefer Toh’s analysis over others, (particularly, over a Harman-like view). Perhaps there are some. Moreover, it is not to say that there are no disagreement-based considerations that would favor Toh’s expressivist analysis. Perhaps there are some. It is merely to say that the disagreement-based reasons there might be, are not present in Toh’s argument as it currently stands. More needs to be said before we can accept the conclusion that Toh’s legal expressivism makes a better job at explaining fundamental legal disputes than a Harman-like analysis. This is the sense in which accepting the functionalist view instead of the content view proves Kevin Toh’s argument ineffective.

To conclude this subsection, I’d like to anticipate a possible response to my observations. One might argue that by endorsing the functionalist view of disagreement, one solves one problem to create another. One might accept that, if we accept the functionalist view, a Harman-like analysis of legal statements is able to portray fundamental legal disputes as instances of disagreement, but argue that, by doing so, one commits to the view that, for a Harman-like understanding, legal statements are goadings. If all that speakers are doing in making legal statements is to express their respective motivational attitudes, it sounds plausible to say that they do fail to pose on each other legitimate reasons for action. If we accept the content view, it might seem that, according to a Harman-like understanding of legal statements, speakers in a fundamental legal dispute are brow-beating each other rather than offering reasons.

I don’t see why that would be necessarily the case; however, there is no need to make such an argument here. I grant that it follows from accepting the functionalist view of disagreement that a Harman-like analysis of legal statements would be unable to portray legal statements (particularly those made in fundamental legal disputes) as profferings of reasons. As noted, my point is that, if one accepts the functionalist view of disagreement, Toh’s disagreement-based argument needs revision. The observation above is just a confirmation of my point. If we endorse the content view, Toh’s reason to discard a Harman-like analysis of legal statements is not the reason he argues
but a different one, and his argument needs to be modified accordingly. It is still true that Toh’s argument, as it stands, fails to deliver its conclusion.

5. Conclusion

Adopting the functionalist view of disagreement instead of the content view has consequences with respect to most (if not all) arguments that rely on considerations about PLD in legal philosophy. In this chapter, the last of this thesis, I have illustrated just that.

I don’t claim that every argument in legal philosophy that is premised on considerations about PLD is, because of that, ineffective. I don’t discard the possibility that observations about disagreement might shed light on some features of legal practice. What I claim is that, in presenting a disagreement-based argument, one should conceive of disagreement as a relation between the function of attitudes, not between their contents. Not doing so would render your argument ineffective. Since most (if not all) disagreement-based arguments suggested in legal philosophy adopted the content view of disagreement, they need revision.

Ultimately, the observations in this thesis draw attention to the need of reconsidering the role PLD plays within the philosophical discussion around legal practice. The correctness of the considerations made throughout this thesis may lead to the depuration of our current disagreement-based arguments (as I tried to illustrate in this chapter, especially, in Toh’s case), the development of new ones, or even the renunciation of the idea that legal theory can benefit from the analysis of persistent disagreements. I take this to be an open question. This might be a fruitful area for future research.
Conclusions

The literature around persistent legal disagreements in law is vast and growing. Arguments that draw on observations about disagreements of this type have been suggested in favor of, at least, three different (types of) claims.

Ronald Dworkin offered an argument for the claim that legal positivism was a defective theory of law and thus should be abandoned in favor of legal interpretivism. Dworkin’s argument is supposed to be, so to speak, a metatheoretical tool that allows us to choose between two competing theories of law. Most of the literature in legal philosophy that touches on the topic of persistent legal disagreements revolves around Dworkin’s ideas.

In response to Dworkin, David Plunkett and Timothy Sundell have suggested an analysis of the class of linguistic exchanges through which speakers express persistent legal disagreements. The analysis offered by Plunkett and Sundell can be, and have been, extended to explain other types of philosophically relevant disputes, for example, the dispute between positivists and antipositivists. In that sense, the observations about persistent legal disagreements suggested by Plunkett and Sundell have helped open new research paths in legal philosophy.

Kevin Toh has suggested an argument that relies on observations about persistent legal disagreements to support his expressivist theory of legal discourse. Toh’s argument is neither a reply nor a defense of Dworkin’s argument. Toh’s disagreement-based argument is not inserted in a discussion about which theory of law we should favor but in a discussion around legal statements. In that sense, Toh’s argument has extended the scope of disagreement-based argumentation in legal philosophy.

In this thesis, my goal was to provide a complete analysis of persistent legal disagreement (PLD) and to assess the merits of disagreement-based arguments in legal philosophy. The results of this work are (i) an original conception of the structure and substantive features of PLD and (ii) the finding that current disagreement-based arguments in legal philosophy need revision.

In terms of the structure of PLD, I have argued in chapter 1 that this type of disagreement is constituted by two disagreements and a relation between them. One of those disagreements is a disagreement over the content of the law in a given jurisdiction at a given time. This disagreement
persists despite there being agreement between subjects about all other relevant non legal issues. The disagreement over the content of the law in PLD arises in virtue of another disagreement. This second disagreement is a disagreement over the criteria of legal validity. Disagreements of this kind concern the concept THE CRITERIA OF LEGAL VALIDITY (i.e., the conceptual representation a subject has of the criteria of legal validity of a particular jurisdiction). The two types of disagreements that constitute persistent legal disagreements are explanatorily related. The disagreement over the criteria of legal validity explains the disagreement over the content of the law. That explanation is causal—the disagreement over the criteria of legal validity explains, at least partially, the disagreement over the content of the law— and asymmetrical—the disagreement over the criteria of legal validity explains the disagreement over the content of the law but not vice versa.

I have argued for this description of the structure of persistent legal disagreement based on the following reasons. To begin, the description succeeds at depicting PLD as instantiating all its theoretically relevant features. First, it depicts PLD as involving a disagreement over the content of the law. Second, it depicts PLD as involving a persistent disagreement. Third, it captures the causal relation between the disagreement over the content of the law and a more fundamental disagreement.

Further reason to endorse this description is that it is to be preferred over an incompatible depiction of PLD that is entailed by an analysis of the disputes in which this type of disagreement is expressed; namely, the analysis of so-called bedrock legal disputes suggested by David Plunkett and Timothy Sundell. In general, the reason to prefer my description is that there are independent reasons to reject Plunkett and Sundell’s analysis. Against Plunkett and Sundell’s analysis, I have argued, first, that it requires that subjects deploy the term “the law” in bedrock legal disputes but, in fact, they need not to. I have also argued that Plunkett and Sundell’s analysis requires dropping an intuition we might want to keep; that intuition is that PLD involves a disagreement over the content of the law. Finally, I have argued that Plunkett and Sundell’s analysis entails a misrepresentation of our linguistic practice. The disputes that express PLD cannot be (metalinguistic) disputes of the type alleged by Plunkett and Sundell because in everyday life speakers don’t use the relevant terms in the way required by their analysis.

The overall conclusion of chapter 1 is that there is good reason to accept that PLD is a relation in which a disagreement over the content of the law arises in virtue of a disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY.
There are two substantive characteristics of PLD for which a full description of this type of disagreement should account. First, the description should provide a characterization of the relation of disagreement. That is, it should provide a characterization of what it takes for two attitudes to enter into such a relation. Second, it should provide a characterization of the type of attitudes that constitute the disagreements that make up PLD. It should provide an answer to the question “are those attitudes cognitive or non-cognitive?”

In chapter 2, I have accounted for the first of those (substantive) issues. I argued there that, contrary to the standard view adopted by (legal) philosophers, the relation of disagreement does not obtain when the contents of two attitudes are incompatible. I argued that the relation of disagreement is sensitive to the function served by the attitudes that constitute it. This is a new account of the relation of disagreement. I have labeled the standard view the content view and I the new account of disagreement the functionalist view. I have argued that the functionalist view emerges as the natural candidate to characterize the relation of disagreement once we understand what is wrong about the content view.

My argument against the content view is that incompatibility between contents is neither sufficient nor necessary for disagreement. My observations rely on the finding, suggested by social psychologists, that propositional attitudes (particularly beliefs) serve not only a representational function, but also other (non-representational) functions such as the hedonic and the motivational function. Given that, in having a propositional attitude, individuals not always are in the business of representing the world accurately, it is at least possible that sometimes their disagreements do not revolve around the accuracy of their mental representations, but, for instance, the regulation of their emotional states or their motivations to carry out particular actions.

In chapter 3, I address the second substantive issue that a description of PLD should account for to be complete. There I tackled the question about what type of attitudes constitute the disagreements that make up PLD. I have argued for the conclusion that such attitudes are cognitive. For expository reasons, I focused on the disagreement over the content of the law in PLD and then generalize my conclusions.

My argument in chapter 3 has two premises which are, in turn, the conclusions of two arguments. The first premise is: if the attitudes that constitute the disagreement over the content of the law in PLD are non-cognitive, then such a disagreement is faultless. The second premise is: disagreements over the content of the law in PLD are not faultless. From these premises it follows
that the attitudes that constitute the disagreement over the content of the law in PLD are not non-cognitive. Since the logical space is exhausted by the possibilities that attitudes are either cognitive or non-cognitive, the conclusion in my argument entails that the attitudes that constitute the disagreement over the content of the law in PLD are cognitive.

To support the first premise, I draw on an analysis of the property being wrong as instantiated by a non-cognitive attitude about the content of the law. I argue that, thus understood, the property being wrong is a response-dependent property. More specifically, I argue that the property being wrong is a disposition to assess an attitude (about the content of the law) as being wrong. The disagreement over the content of the law in PLD is faultless if the attitudes that constitute it are non-cognitive, because no assessor would be disposed to assess any of them (those non-cognitive attitudes) as being wrong. That is the case because nobody with full information and lack of reasoning mistakes would assess as being wrong an attitude that is being held after having all relevant information and without making any reasoning mistakes (as it is the case in cases of PLD).

In favor of the second premise, I argued that if the disagreement over the content of the law were faultless, then problematic conclusions regarding the guiding function of law would follow. Since law’s function of guiding people’s conduct cannot be achieved unless the conditions of no contradiction and consistent application are satisfied and, if the disagreement over the content of the law in PLD is faultless, such conditions cannot be satisfied, then, one must reject that the disagreement over the content of the law in PLD is faultless. To be explicit, I argued that if the disagreement over the content of the law in PLD is faultless, then the condition of no contradiction cannot be satisfied; likewise, I argued that if the disagreement over the content of the law in PLD is faultless, then the condition of consistent application cannot be satisfied. To repeat, the general conclusion suggested in chapter 3 is that the attitudes that constitute the disagreements that form PLD are cognitive.

On speculative grounds, I have proposed that the attitudes that constitute the disagreement over the content of the law in PLD are beliefs that serve competitively a motivational function at the expense of a representational function. On speculative grounds, I have proposed that the attitudes that constitute the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY in PLD are beliefs that serve complementarily a motivational and a representational function.

Conceiving of the attitudes that constitute the disagreement that concerns the concept THE CRITERIA OF LEGAL VALIDITY as beliefs that serve complementarily a motivational and a
representational function poses an explanatory challenge: disagreement, when it involves beliefs that serve a representational function (or a representational and a non-representational function complementarily), requires that individuals understand each other, it requires some sort of coordination between them. In chapter 4, I offered a novel account of the coordination requirement.

This new account of coordination is an alternative to the standard view according to which coordination is to be explained in terms of sameness of concepts. More specifically, the standard view holds that for there to be coordination between two individuals, they must deploy the same concepts. I suggested that coordination is to be explained in terms of three conditions: concepts must be co-referential, they must be deployed in sufficiently similar contexts, and they must be deployed to perform sufficiently similar cognitive tasks.

This new conception of coordination is supported by some recent developments in cognitive science. Most importantly, it is supported by the extensive variability of conceptual representation thesis. This thesis holds that the information that constitutes the concept being deployed by an individual at a particular time varies extensively with respect to other individuals and situations. This thesis denies that any token concepts have the same contents across individuals and times. Since we accept that concepts are individuated in terms of their contents, the thesis of extensive variability entails that two individuals (or one individual at different times) never deploy the same concept. The thesis of extensive variability is defended on empirical grounds.

The new account of coordination explains coordination despite extensive conceptual variability. An immediate result of accepting the new account of the coordination requirement is that there can be disagreement without sameness of concepts. In other words, individuals can engage in disagreement even if they don’t deploy the same conceptual representations. This account of the requirement of coordination completes our analysis of PLD.

Accepting the new conception of PLD suggested in the first four chapters of this thesis bears important consequences with respect to those arguments in legal philosophy that rely on observations about this type of disagreement. In chapter 5, I illustrated some of those consequences. I focused on Ronald Dworkin’s argument against criterialism, David Plunkett and Timothy Sundell’s metalinguistic analysis of what they call bedrock legal disputes, and Kevin Toh’s disagreement-based argument for legal expressivism.

I argued that Dworkin’s argument entails the content view of disagreement. Put differently, I argued that if Dworkin’s argument is correct, then disagreement must be a relation that obtains
when the contents of two attitudes are incompatible. The reason for that is that otherwise con cep- tual variance is not enough for lack of disagreement, as Dworkin’s argument necessarily holds.

I argued that, if one drops the content view and adopts the functionalist view of disagree- ment, Dworkin’s argument is unable to support its conclusion that legal positivism is unable to explain PLD. Dworkin’s argument fails to support its conclusion because, even if he is right in saying that, according to the positivist, in cases of PLD individuals don’t deploy the same concepts, it doesn’t follow from here that they necessarily don’t disagree. If disagreement is a relation be- tween the function of attitudes instead of their contents, two individuals can disagree even if the contents of their attitudes are different.

I argued that the analysis of the so-called bedrock legal disputes suggested by Plunkett and Sundell entails the content view of disagreement. The reason is that if one rejects the content view, then one can accept that individuals engaged in a bedrock legal dispute might disagree over the semantic content encoded by their utterances. But according to Plunkett and Sundell, bedrock legal disputes are non-canonical disputes which entails that individuals necessarily don’t disagree over information encoded via semantics.

By accepting the functionalist view of PLD instead of the content view, one proves the argument in favor of the metalinguistic analysis of bedrock legal disputes ineffective. That is so because, accepting the functionalist view of PLD modifies the balance of reasons that, according to Plunkett and Sundell, one has to accept their analysis. Plunkett and Sundell argued that their analysis should be preferred over Dworkin’s because of two reasons. The first reason is that their analysis didn’t involve postulating any new kinds of concepts (Dworkin’s analysis postulate the existence of the so-called interpretative concepts). The second reason is that their analysis was neutral with respect to the debate between legal positivist and non-positivist (Dworkin analysis was supposed to be incompatible with legal positivism). If one adopts the functionalist view, one needs not postulate any new kinds of concepts and one can remain neutral with respect to the debate between legal positivists and non-positivists. Hence, the reasons in favor of the metalinguistic analysis are reasons in favor of the functionalist view. Moreover, while the metalinguistic analysis requires abandoning the intuition that when engaged in a bedrock legal dispute individuals disagree over the semantic content encoded by their utterances, the functionalist view doesn’t. Since there seems to be intuitive reason to maintain our intuitions, the functionalist account seems to have an explanatory advantage over the metalinguistic analysis.
Lastly, I have argued that Kevin Toh’s disagreement-based argument for legal expressivism entails the content view. This is so because, if one rejects the content view, one has no reason to reject, as Toh does, a Harman-like theory of legal statements. According to this theory, in making a legal statement a speaker accepts a particular norm as the fundamental norm of the legal system and presupposes that her audience does too. Toh argues that this conception of legal statements fails to portray linguistic exchanges in which the speakers accept conflicting fundamental norms as instances of disagreement. According to him, the view is committed to the claim that in such situations speakers talk past each other (or talk at cross purposes).

I have argued that Toh’s contention can only be true if one endorses the content view. It is because one thinks that disagreement obtains if, and only if, speakers accept incompatible contents that one cannot accept that speakers that endorse compatible contents can disagree.

I argued that if one drops the content view and accept the functionalist account, Toh’s argument proves ineffective. The argument is ineffective in the sense that it doesn’t provide sufficient reason (or at least it doesn’t provide the reason he claims it does) to discard a common framework theory of legal statements. If there can be disagreement despite compatibility between contents, then a Harman-like theory of legal statements can portray linguistic exchanges in which speakers subscribe to conflicting fundamental norms as instances of disagreement. If we can portray such linguistic exchanges as instances of disagreement, then we have no reason to prefer Toh’s theory of legal statements over a Harman-like theory.

Overall, the observations in chapter 5 give reason to think that all arguments in legal philosophy that draw on observations about PLD need revision. Moreover, they give reason to think that all arguments that rely on observations about PLD that endorse the content view fail to support their conclusions. This conclusion might be the major contribution this thesis has to offer to legal philosophy.

I don’t deny that arguments premised on observations about PLD can be useful to unveil some properties of legal practice, some properties of the concept THE CRITERIA OF LEGAL VALIDITY, or some properties of legal discourse. Perhaps they can. What my observations in this thesis point at is that the philosophical debate around PLD, as it stands today, is not helping us gain a better understanding of legal practice, the relevant concepts individuals deploy in such practice, or legal discourse. On the contrary, that debate is the source of acute theoretical confusion and a source of infructuous argumentation. Replacing a mistaken view of disagreement with one that is
better justified will help us make philosophical progress. It will do so by allowing us to either refining our current disagreement-based arguments or pushing us to move beyond disagreement-based argumentation. I’m a firm believer that good progress is made when we abandon discussions that are grounded on philosophical confusion.
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