Faultless Disagreement in Matters of Law

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The paper focuses on legal predicates (‘constitutional’, ‘obligatory’ etc.) and their so-called faultless disagreement effects. The authors argue that among such predicates, ‘binding’ presents a novel challenge even for semantic theories that have recently been put forth, or construed, to deal with faultless disagreement in areas of discourse dwelling on matters of taste, aesthetics, ethics and knowledge. After putting a number of such theories to test, they find two styles of solution. The paper thus serves a twofold aim of addressing both semanticists and legal theorists. On the one hand, it introduces in the literature on faultless disagreement a fresh bone to bite on. On the other hand, it critically discriminates between various semantic models that have been understood so far as having a particular appeal for lawyers.

1. Introduction

Consider the following fragment from an overruling precedent explicitly referring to the overruled one:

Bowers was not correct when it was decided and it is not correct today. It ought not to remain binding

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precedent. *Bowers v. Hardwick* should be and now is overruled.


In *Bowers*,\(^1\) the Supreme Court of the United States of America upheld the Georgian anti-sodomy laws as constitutionally not prohibited. It thus confirmed the attorney general Bowers’ claim that anti-sodomy laws are not unconstitutional. However, seventeen years later the same court declared in *Lawrence* that any law against certain intimate sexual conduct is unconstitutional—therefore confirming a claim of citizen John Lawrence.

Even though Atty. Gen. Bowers and citizen John Lawrence (or his defence attorney) never entered into a linguistic exchange with one another (i.e. a dispute), one may speak of a rational conflict of attitudes, say (1a) and (1b), which they put on display:\(^2\)

\begin{align*}
(1a) & \text{Atty. Gen. Bowers:} \\
& \text{Anti-sodomy laws are not unconstitutional.}
\end{align*}

\begin{align*}
(1b) & \text{J. Lawrence:} \\
& \text{Anti-sodomy laws are unconstitutional.}
\end{align*}

This is what we take to be a crisp legal example of a ‘faultless disagreement’ (Kölbel 2004a)—that is, a phenomenon vigorously discussed in linguistics and the philosophy of language in the past ten years, but almost unheard of in these terms in jurisprudence,\(^3\) despite the fact that ‘disagreement’ is among the blue chips of contemporary legal-philosophical debate.\(^4\)

Given the seminal definition of faultless disagreement discussed in the literature (Kölbel 2004a: 53–4), it is said that:

\[\text{FD Aye and Bee faultlessly disagree just in case (i) Aye believes that } p \text{ and Bee believes that not-} p, \text{ and yet (ii) neither Aye nor Bee is at fault.}\]


\(^2\) Cappelen and Hawthorne (2009: 60-61) would say this case exhibits a disagreement as a *state*, rather than a disagreement as an *activity*.

\(^3\) Exceptions that we know of are Moreso (2009), Ferrer Beltrán (2010), Kristan & Vignolo (2012ur), and Luque Sánchez (2013).

\(^4\) The importance of this topic is a consequence of Dworkin’s disagreement-based argument against Hart’s positivism and in favour of his own interpretivism. We will skip the obvious references here, for we choose to put our debate on different grounds.
We will later precise this definition, but for now let us say why is it that (1) is a clear example of faultless disagreement. To be sure, the ‘disagreement’ (1) is not one over the actual purpose and potential use of anti-sodomy laws; if you read the case materials, you would rapidly conclude that both parties to the disagreement had the same understanding of their contents and consequences. So, there is no empirical disagreement between them. Instead, (1) is a disagreement over the correct interpretation of the constitutional document and it is ‘faultless’ inasmuch as the contents of both claims, (1a) and (1b), got confirmed by final court decisions as legally correct and binding inter partes litigantes. We will later distinguish other senses of faultlessness in the case at hand, and other varieties of faultless disagreement in general, but this one will remain of our main concern.

The key message to retain from this example is that when the adjective ‘(un)constitutional’ is used, disagreement and joint correctness can be compatible properties of either thought (beliefs) or talk (assertions).

Now, of course, ‘(un)constitutional’ is not the only adjective of this sort. Many more have been identified in the areas of discourse dwelling on matters of taste, aesthetics, ethics, and knowledge. The literature on this linguistic phenomenon is exhaustive⁵ and the fact that someone adds a legal example to that list should be unsurprising. What is interesting, though, is that the problems posed specifically by legal predicates displaying faultless disagreement effects⁶ could have an important impact on the general debate (or so we would wager).

The paper is structured as follows. In §2 we introduce a well-known challenge to the very possibility of ‘faultless disagreement’. We then distinguish between two senses of legal correctness in play in (1) and submit that we capture them by disambiguating ‘correctness’ into bindingness inter partes and bindingness erga omnes. We claim that these two predicates put in place another piece of the faultless disagreement phenomenon (we call it the Puzzle of Bindingness) and one that a sound semantic model of legal discourse should take into account. After highlighting some particularities of faultless disagreements in matters of law vis-à-vis other kinds of normative (and non-normative) faultless disagreements, we end the section with a brief overview of the major theories of legal interpretation.

The following four sections (§3–§7) are devoted to assessing different ways of accommodating faultless disagreement and the puzzle of

⁵ It goes back to Wright’s (2001) ‘disputes of inclination’.
⁶ E.g. ‘legally permitted’, ‘legally obligatory’, ‘legally forbidden’.
bindingness. We find three suitable solutions and conclude (§8) with some broad meta-theoretical considerations concerning theory choice.

2. Law and Faultless Disagreement
Let us start by looking at the challenge of faultless disagreement.

2.1. The Challenge of Faultless Disagreement
For ease of exposition, we can break down the above mentioned definition of faultless disagreement as follows:

**Propositional Inconsistency**: The two parties display the same attitude towards two inconsistent propositional contents, \( p \) and \( \neg p \).

**Faultlessness**: Neither party is at fault.

If you feel confident of having grasped the concept of faultless disagreement in law after these considerations, you shall definitely like to rebut an impossibility argument that has been the cornerstone of much literature on the topic.\(^7\)

The challenge is that it is hard to see how to accommodate Propositional Inconsistency and Faultlessness if certain standard views about meaning, truth, and logic are correct. Namely:

**LAW OF NON-CONTRADICTION**: Propositions \( p \) and \( \neg p \) cannot be simultaneously true.

**ABSOLUTE TRUTH**: Propositions do not vary in truth-value across contexts.

**DETERMINATE TRUTH**: Propositions are determinately true or determinately false.

**TRUTH-NORM**: It is a mistake to hold something that is not true.

Now, of course, we are not obliged to assume all these things together for, as

\(^7\) The argument is presented in Kölbl (2003) and Wright (2006). We shall cast the challenge in a slightly different form here. Nothing substantial hinges on this.
always, if some purported data and theory conflict, one of the two must give way. We are thus going to explore a number of strategies to respond to the challenge.

But before we do, it seems necessary to point to some particularities of faultless disagreement in matters of law (§2.3) and, to that end, pause by another example that will give us further food for thought (§2.2).

2.2 The Puzzle of Bindingness

Apart from (1), the fragment cited above presents an explicit discrepancy between the Supreme Court majority in Lawrence (2003) and that in Bowers (1986):

(2a) SCotUS 1986:
Anti-sodomy laws are not unconstitutional.

(2b) SCotUS 2003:
Anti-sodomy laws are unconstitutional.

This too is a ‘disagreement’ over the correct interpretation of the constitutional document. And it is also ‘faultless’ inasmuch as neither the majority of 2003 nor the one of 1986 committed any judicially reproachable mistake. This stems from the fact that the two decisions are final.

The point can easily be made if we compare the Supreme Court’s decision in Bowers (1986) with the Texas Appellate Court decision 41 S.W.3d 349.8 They could have had the exact same wording:

(2a) SCotUS 1986:
Anti-sodomy laws are not unconstitutional.

(3a) Tex. App.:
Anti-sodomy laws are not unconstitutional.

This is because the appellate court of Texas relied on Bowers as controlling precedent—and affirmed John Lawrence’s conviction for violating a Texan law classifying consensual, adult homosexual intercourse as illegal sodomy. So, the said decisions are both based on the same interpretation of the U.S. Constitution (‘The U.S. Constitution does not forbid anti-sodomy laws’). But whereas Lawrence reversed and remanded the appellate court decision (3a) for committing an ‘error of substantive law’, it could not but leave the

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8 41 S.W.3d 349 (Tex. App.—Houston, 14th Dist., 2001).
case of Bowers closed, the decision (2a) unchanged and binding inter partes litigantes⁹—offering to Michael Hardwick no authority for claiming legal remedies against it. This is sufficient reason to conclude that the SCotUS majority of 1986 committed no judicially reproachable mistake, whereas the Texas Appellate Court did.

In this sense one could say that Bowers (1986) was not incorrect. But as you see from our fragment above, there is another sense of correctness here in play, for Lawrence (2003) reads: ‘Bowers was not correct when it was decided and it is not correct today. It ought not to remain binding precedent.’

Since precedents are binding erga omnes (like statutes) we can, at this point, disambiguate ‘correctness’ into bindingness erga omnes and bindingness inter partes. These are both potential properties of ‘internal legal statements’, which are normative statements made from the point of view of an adherent of the legal system (Hart 1961/94: vi, 89, 102–103).¹⁰ Hereinafter, we shall sometimes call the properties in question acronymically as BEO (for binding erga omnes) and BIP (for binding inter partes). Now, here comes the tricky part:

**The Puzzle of Bindingness:** When adherents to a given legal system assess for bindingness internal statements of others, or their own previous internal statements, the two properties may come apart. (For the SCotUS majority of 2003, the statement in Bowers (1986) is binding inter partes and not erga omnes.) But when adherents to a given legal system assess their own internal statements from the same context in which they were made—or when we are about to decide what internal statements to make—the two properties appear to be inseparable. (For the majority of 1986, their own internal statement in Bowers is binding inter partes as well as erga omnes; and the same holds for the majority of 2003 regarding their decision in Lawrence.)

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¹⁰ ‘External legal statements’, on the other hand, are statements of fact which an observer of the system might make even if he did not accept it. (cf. Hart 1961/94: 108).
It is our contention that this context-dependent *inseparability* of BEO and BIP attributions (or two senses of correctness) is conceptual and not contingent, in the following sense. The predicate uses of BEO (like in ‘S is binding *erga omnes*’) display the same faultless disagreement effects as the predicate uses of ‘(un)constitutional’ in the above examples (1) and (2). The predicate uses of BIP (like in ‘S is binding *inter partes*’), on the other hand, do not have these effects. Instead, they may serve to indicate, just like in our previous examples, the very sense of ‘joint correctness’ that figures as a possible property of disagreements over whether a given internal statement is binding *erga omnes* or not.

We think that the Puzzle of Bindingness is a special case of the faultless disagreement phenomenon and that a sound semantic model of legal discourse should account for them both. We will look for such a model in this paper, but first we need to dwell on some particularities of faultless disagreement in matters of law.

2.3 The Particularities of Faultless Disagreements in Matters of Law

The first characteristic—and you might have noticed it already—is that in legal discourse faultlessness may be a property exclusively of some ‘cross-context’ or ‘inter-conversational’ disagreements.\(^{11}\) Indeed, ‘same-context’ disagreements in matters of law are bound to involve a fault in so far as only one of the two conflicting parties can win in court.

A second feature is that the kind of legal disagreements of our concern are cases of *intra*-jurisdictional (or intra-systemic) rather than *inter*-jurisdictional (or inter-systemic) discrepancies.\(^{12}\)

Thirdly, we can only speak of disagreements in cases of retrospective overruling, and not prospective ones.\(^{13}\)

A fourth characteristic has to do with what Wright (2012) calls

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11 Cf. Spencer 2014 (cross-context disagreement) and MacFarlane 2014 (inter-conversational disagreement).

12 Substituting *persons* for jurisdictions, we obtain the distinction between *intra*-personal disagreements (i.e. disagreements with one’s past self) and *inter*-personal disagreements. This distinction is familiar from other kind of discourses.

13 Overrulings of the European Court of Human Rights, for example, are only *prospective*. Indeed, the ECtHR firmly repeats that her interpretation is dynamic and evolutive (seminally, *Tyrer v. United Kingdom*, 25 April 1978, no. 5856/72).
Parity. The idea is that a significant ingredient of faultless disagreements, especially about taste, is that the relevant faultlessness is reflectively endorseable, i.e. can be appreciated from an internal-committed perspective, rather than only from an external-neutral one. In other words, each party to the dispute should recognize and potentially judge that his opponent is fault-free. In legal discourse, on the other hand, we think there is no parity in faultless disagreements: the claim in Lawrence (‘Bowers was not correct…’) is flatly incompatible with parity.

Other characteristics require some further elaboration of Kölbl’s (2004a: 53–4) definition mentioned above. For the purposes of the theory of legal discourse—and, therefore, of this work—we shall depart from his definition in three ways; two modifications affect the so-called ‘disagreement’ condition of the definition (§2.3.1), one the part on ‘faultlessness’ (§2.3.2).

2.3.1. Cross-Context Disagreement in Matters of Law
First, we need not speak of genuine beliefs in the theory of legal discourse—for judges and attorneys do not need to be sincere. What matters are various attitudes they put on display. For this reason, we shall talk of acceptance—a broader attitude, which includes belief, but also assumption and pretence. Moreover, instead of making reference only to beliefs and belief-like states, we shall also want to refer to preferences, desires and other conative mental states; all of which are attitudes just like beliefs.

The substitution of beliefs with attitudes as only a more abstract term assures that, at this point, there is no substantial discrepancy between Kölbl’s definition and the one we are going to adopt here. Note, however, that we wish to speak of both, doxastic (cognitive, propositional, theoretical) attitudes and non-doxastic (normative, dispositional, practical) ones. This will further on permit us to dwell on various senses of disagreement (i.e.

15 One might want to speak of parity in disagreements between legal dogmatists, but we will not treat this issue here.
16 A notion of acceptance like this is used, among others, by Stalnaker (2002) in connection with his definition of ‘common ground’. Van Fraassen (1980) also famously employed the concept to characterize the attitude that scientists and informed laymen have towards theories they regard as successful in a certain discipline. However, like Stalnaker and unlike van Fraassen, we shall use the term as a catch-all label for a class of propositional attitudes that includes beliefs.
doxastic and non-doxastic disagreements).

Second, we shall precise that the class of ‘disagreements’ includes both the oppositions of contrary attitudes and those of contradictory attitudes. Saying that Aye and Bee disagree just in case one holds that \( p \) and the other holds that \( \neg p \) leaves this question out of view. Indeed, if we take that the majority of 1986 held in Bowers that \( p \) (anti-sodomy laws are not unconstitutional), then \( \neg p \) stands for ‘it is not the case that anti-sodomy laws are not unconstitutional’. But while the majority of 2003 may well be committed to this latter (negative) claim, it actually made an even stronger (positive) one: ‘[it is the case that] anti-sodomy laws are unconstitutional’.

For the sake of simplicity, we choose to spell out contradiction and contrariness not in terms of symbolic logic (\( p \) and \( \neg p \), etc.),\(^{17}\) but rather in terms of ‘non-cotenability’ (MacFarlane 2014: 121)—a property shared both by oppositions of contraries and contradictories: Two attitudes, say \( \text{ATT}(p) \) and \( \text{ATT}(\neg p) \), are non-cotenable if, and only if, an agent with one of them cannot adopt or display the other one without dropping the first—or falling in a state of inconsistency (cf. Kölbel 2004b: 304–305).

Schroeder (2008: 48) called this ‘A-type inconsistency’ in order to distinguish it from ‘B-type inconsistency.’ The former covers all cases of the same attitude toward inconsistent contents. The latter covers all cases of two distinct and apparently logically unrelated attitudes toward the same content. Schroeder’s work, however, shows that the identification of a given disagreement as an A-type or a B-type inconsistency is theory-laden. This is why, for now, we prefer to abstract from the issue and speak of attitude-content pairs or mental states.

It may be necessary to repeat that, despite the term ‘mental states’, we are not interested in what is going on in an agent’s head and will not engage in any psychological endeavour. Instead, we will be looking for the mental states as attitude-content pairs that agents put on display by means of language use. (And so we will sometimes be making reference to an act of assertion or retraction as expressions of judgments, preferences, etc.) We will assume that bits of discourse express the mental states for which they convey to the audience that the agent is in it. The appropriate redefinition of non-cotenability thus reads as follows:

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\(^{17}\) In propositional logic, contradiction can be represented as the relation of \((p \land q)\) to \((p \rightarrow \neg q)\), whereas contrariety is the relation of \((p \land q)\) to \((p \land \neg q)\). In predicate logic, there is a relation of contrariety between \(Pp\) and \(P\neg p\), and a relation of contradiction between \(Pp\) and \(\neg Pp\).
Non-Cotenability*: Two attitude-content pairs are non-cotenable if, and only if, an agent with one of them cannot adopt or display the other one without dropping the first or falling in a state of ambivalence or incoherence (which is not to be confused with indifference).

But non-cotenability is not enough for our analytical work. Although a necessary element, non-cotenability suffices only for a flimsy sort of disagreement—or none at all if we take, as lawyers usually do, that disagreement is a kind of conflict.

To see this point, think of an extra-legal example of non-cotenability: think of Jane and Bob trying to divide their hitherto shared collection of works of J. L. Borges. Now, imagine Jane loving Otras inquisiciones, and Bob being indifferent toward that book. Their attitudes, which have the same content (the same book), are contrary in force (love and emotional indifference). They are non-cotenable—in the sense that Jane could not adopt Bob's without dropping her current attitude—, but they are not in conflict. In fact, they seem to fit one another perfectly in the given context, for they can be jointly satisfied.

By contrast, the disagreement (2) between the SCotUS majorities of 1986 and 2003 shows something more than non-cotenability. It constitutes what MacFarlane (2014: 123) calls ‘preclusion of joint satisfaction’: unlike Jane and Bob, the majority of 2003 in Lawrence and that of 1986 in Bowers not only have or display two non-cotenable attitudes toward the same content, but are in a state of tension that can only be resolved by one or both parties to the disagreement changing their mind or emotions, desires, preferences, or similar.18

Note that whether two attitude-content pairs are (non-)cotenable depends only on their attitudinal forces and contents. But whether they can both be satisfied or not depends also on the contexts in which they occur—for example, on who has them and when (cf. MacFarlane 2014: 124).

For the purposes of legal theory, we shall therefore say at least that

**FD** Aye and Bee faultlessly disagree just in case their attitude-content pairs are (a) non-cotenable, (b) jointly unsatisfiable, and yet (c) neither Aye nor Bee is at fault.

18 Cf. MacFarlane 2014: 123 and 175, n. 35 (change of mind).
You will furthermore observe that when we speak of doxastic attitudes, preclusion of joint satisfaction (b) amounts to preclusion of their being jointly accurate (cf. MacFarlane 2014: 125); but this is just a terminological matter.

That having been established, we can now move on to precise what it means to be at fault.

2.3.2. Two Degrees of Faultlessness

On the strongest understanding of this term, one is at fault for not having or displaying an attitude that is correct (either because its content is inadequate for the attitude in question or because the attitude is inadequate for the given content). This understanding, however, covers three different types of situations, which in turn will help us distinguish three degrees of faultlessness in general—and two degrees of faultlessness in disagreements.

The three cases of not having or displaying an attitude that is correct are:

(i) having or displaying no attitude toward what is in question (that is, being at fault for omission or indifference; not to confuse with ambivalence),

(ii) having or displaying an attitude that is not correct, and

(iii) having or displaying an attitude that is incorrect.

Some observations are in place. The first interpretation of fault—(i)—leaves no interesting sense in which one could speak of faultless disagreements; one may of course be at fault for omission or indifference, but then she is not engaged in any disagreement. (If she is said to be involved in one, it is only because the other party considers to be in a disagreement with her.) On the other hand, interpretations (ii) and (iii) are a different case entirely. While distinguishing between these two interpretations is harmless and has no effect for who assumes the principle of bivalence (according to this principle, a content is either is true or false; there is no truth-value gap or third value), it will prove to be useful for who rejects bivalence—and for the analysis of those domains of discourse where one could, arguably, reject bivalence (not to confuse with the law of excluded middle: a content or its negation is true). Indeed, the distinction between interpretations (ii) and (iii) lets us split the difference between two degrees of faultlessness in disagreements:
FD1  Aye and Bee faultlessly disagree just in case their attitude-content pairs are (a) non-cotenable, (b) jointly unsatisfiable, and yet (c-ii) neither Aye’s attitude nor Bee’s attitude is incorrect.

FD2  Aye and Bee faultlessly disagree just in case their attitude-content pairs are (a) non-cotenable, (b) jointly unsatisfiable, and yet (c-iii) both Aye’s attitude and Bee’s attitude are correct.

For those who reject bivalence, an instantiation of FD2 presents a stronger case of faultlessness than FD1. The reason is that we have faultlessness in the sense of FD1 not only when both Aye’s attitude and Bee’s attitude are correct, but also when both of them are neither correct nor incorrect. As you shall see, a theory which delivers faultless disagreements of the type of FD1 does not necessarily deliver the ones of the type of FD2.

The point is of particular importance for legal theorists. Some of them (legal realists) define ‘law’ so as to include the contents of final judicial decisions and therefore their theory will have to get to FD2. Indeed, both Bowers and Lawrence are final decisions and so (2a) and (2b), but also (1a) and (1b), will therefore be correct in their respective contexts as by definition. On the other hand, that is for those who define ‘law’ so that there is no conceptual or necessary connection between the ‘law’ and the contents of final judicial decisions, a theory explaining (1) or (2) as FD1 will do fine.

That having been said, let us lay out the main theories of legal discourse, before we finally turn to see how they may respond to the challenge of faultless disagreement.

2.4 Our List of Options

Taking lessons from the recent philosophical debate on faultless disagreement, we will show how competing theories of legal interpretation from both the cognitivist and the noncognitivist camp might accommodate the phenomenon in question. In particular, we will look into objectivism, interpretivism, indexical contextualism, dialetheism, truth-value indeterminism, relativism, and—the most viable kind of noncognitivist views—expressivism about legal thought and talk. To facilitate the understanding of some less common views, here is a list with their concise descriptions:

Objectivism is the view that legal statements all express truth evaluable contents and that their truth values depend on some fixed and
objective criteria, such as the legislative intent, the literal meaning and alike.

**Interpretivism** also holds that sentences containing legal predicates express truth evaluable contents. However, their truth-values depend not on fixed criteria but rather on the normative or evaluative facts that best justify the total set of practices in which the concept invoked by the predicate is used (cf. Dworkin 2011).

**Indexical Contextualism** is the view that syntactically complete sentences express underdetermined contents. In order to obtain truth evaluable contents, completion is needed from the information available in the context of utterance. The idea is that the completion is provided through pragmatic processes that are not linguistically driven (cf. Villa 2010).

**Dialetheism** is the view assuming the existence of truth-value gluts that make some sentences both true and false (cf. Priest 2006a).

**Truth Value Indeterminism**, on the other hand, assumes the existence of truth-value gaps for which some truth-apt sentences are neither determinately true nor determinately false (cf. Hart 1961).

**Relativism** is the view that sentences, apart from those containing overt context dependent expressions, express truth evaluable contents but their truth values are relative to contexts. (In legal theory, the view is assumed at least by Kristan and Vignolo 2012ur.)

**Expressivism** opposes all of the previous six views inasmuch as it assumes that legal sentences do not, strictly speaking, express truth-evaluable contents. Rather, it is thought that they express noncognitive, desire-like states of mind. (In legal theory, this view is currently advanced by Toh 2011 and finds its precursors as far as in Hägerströrm1911.)

We will say much more about these jurisprudential views in what

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19 It is somewhat controversial how best to characterize expressivism. The problem is a familiar one and is known in the literature as the problem of 'creeping minimalism', after Dreier (2004). In a nutshell, the trouble is that by adopting a minimalist view on truth and related notions, new-style expressivists (like Blackburn and Gibbard) generally accept the claim that normative sentences are truth-apt, though in a minimal sense. But how can we then formulate the expressivist view and how can we distinguish it from its cognitivist rival? The 'strictly speaking' hedge is an admittedly quick and dirty way to dodge this problem.
follows. Along our way, you will find that more than one of them has the re-
sources to deliver the sort of faultless disagreement we desire to explain.
What we shall perhaps hint at from the start is that one can try to accom-
modate disagreement effects both on the level of semantics or pragmatics,
and appeal either to the cognitive, belief-like attitudes or to non-cognitive,
desire-like ones. This opens up the following logical space of four possibilit-
ies: semantic rendering of cognitive disagreement, pragmatic rendering of
cognitive disagreement, semantic rendering of non-cognitive disagreement,
pragmatic rendering of non-cognitive disagreement.

With this in mind, we can now proceed by exploring different pos-
sibilities to account for faultless disagreement in matters of law and explain
the puzzle of bindingness.

3. Rejecting Propositional Inconsistency
A first solution to the challenge of faultless disagreement may consist in
denying Propositional Inconsistency.

**Propositional Inconsistency**: The two parties display the same attitude
towards two inconsistent propositional contents, \( p \) and \( \neg p \).

This strategy is open to expressivists, contextualists, and more generally to all
who would follow Plunkett & Sundell (2013a) in order to explain (2) as a
legal example of what they termed as ‘metalinguistic negotiation’. We will
explore the first two options before we go meta.

But first recall how we set up the challenge: we had some purported
data that did not square with some widely held theoretical principles. The
different views we shall review in this section reject one of the starting data.
Note that they need not, and generally do not, claim that there is no
inconsistency whatsoever in play. Rather, they contend that the available
linguistic evidence does not speak in favour of a propositional (contrast: non-
propositional) inconsistency at the semantic (contrast: pragmatic) level.

3.1. Expressivism
According to what we may call Propositionalism, the semantic value of a
declarative sentence \( \phi \) relative to a context of utterance \( c \) is a proposition
(where a proposition is, or at least determines, its truth-conditions, i.e. the
set of possible worlds in which \( \phi \) is true). Expressivists deny Propositional
Inconsistency by denying Propositionalism.

Expressivism is the view that normative language does not express truth-evaluable contents. Rather, it is thought, it expresses non-cognitive, desire-like states of mind (Schroeder 2008: 3).

In legal theory, precursors of expressivism may be found in the works of Hägerström (1911) and other Scandinavian realists, who offered the ‘emotivist’ analysis of normative thought and talk. Nonetheless, we choose to use Schroeder’s (2008) model of expressivist semantics in this section for two reasons: (i) it is sufficiently advanced to cope with numerous known problems of the older views, including the so-called Frege-Geach problem and (ii) it is sufficiently detailed to serve our analytical purposes with no risk of over-interpretation.

According to expressivism, the SCotUS majorities of 1986 and 2003 are not affirming or denying any proposition whatsoever; they are merely expressing their preferences, desires, emotions, or some other type of non-cognitive attitudes. This understanding surely offers us a way out of the faultless disagreement challenge—but it also reduces the variety of senses in which one can speak of disagreement between Lawrence (2003) and Bowers (1986). What is lost are all the senses of cognitive disagreement; that is disagreement of beliefs, belief-like states and, generally speaking, of propositional attitudes.

That said, our expressivists can still identify various senses of non-cognitive disagreement between the majorities of 1986 and 2003. But the question is whether the senses of disagreement one can identify on this view are enough for a descriptive theory of legal discourse. We will now see that this is not the case.

Expressivists can surely say that the majority of 2003 disagrees with the majority of 1986 in virtue of the latter’s disposition to the effect that anti-sodomy laws remain applicable. — In fact, their respective decisions

20 As before (cf. footnote 19), we should immediately qualify this claim. Most contemporary expressivists don’t deny that normative sentences express propositions. Instead, they claim that talk about propositions is to be understood differently from how the cognitivist, standard, picture has it. In particular, they either (i) endorse a deflationary conception of propositions and truth-conditions or (ii) go for a different, non-truth-conditional view of propositions. Schroeder (2008, 2013), for example, suggests (ii) on behalf of expressivism, by construing propositions as ‘pairs of entailing properties’. For this reason, an expressivist could accept that there are propositions understood in those ways (that is, (i) and (ii)).
*Lawrence* and *Bowers* display different non-cognitive attitudes toward such laws. Taking up the proposal of Schroeder (2008: 58), we will analyse them in terms of the non-cognitive attitude called *being for* and assume that all normative predicates correspond to *being for* plus some relation that is contributed by the predicate. Simplifying a bit, we will say that the predicate uses of ‘unconstitutional’ correspond to *being for dis-applying*, so that ‘anti-sodomy laws are unconstitutional’ expresses FOR(dis-applying anti-sodomy laws) where the small caps are used to denote the mental state of *being for*.

On this analysis, the claims of the SCotUS majorities of 1986 and 2003 display the following two mental states:

(E2a) SCotUS (1986): FOR(applying anti-sodomy laws)

(E2b) SCotUS (2003): FOR(disapplying anti-sodomy laws)

The *Lawrence* majority’s dispositional attitude toward anti-sodomy laws, (E2b), is ‘practically non-cotenable’ (MacFarlane 2014: 122–3, 130) with the *Bowers* majority’s one, (E2a). In other words: the majority of 2003 could not adopt that same dispositional attitude as the majority of 1986—that is, an attitude with the same dispositional content (say, $b$) and force (being for)—without dropping her current attitude (with $\neg b$ as its dispositional content). If she were, we would be facing a case of practical incoherence or ambivalence as one can easily see from this representation: FOR($b \& \neg b$).

Apart from not being practically cotenable, the two dispositional attitudes cannot be jointly satisfied, since one is satisfied if we dis-apply anti-sodomy laws whereas the other one is satisfied if we apply them.

Now, this sense of non-cognitive (non-doxtastic, dispositional) disagreement—given by practical non-cotenable and preclusion of joint satisfaction—is all the disagreement that adepts of expressivism would recognize in our case. The question, then, is whether and how could they distinguish a disagreement between final interpretive decisions (such as *Lawrence* and *Bowers*) from non-faultless disagreements, such as the disagreement (3) between the Supreme Court decision in *Lawrence* (2003) and the Texas Appellate Court decision in the same case:

(3a) Tex. App.: *Anti-sodomy laws are not unconstitutional.*

(3b) SCotUS (2003): *Anti-sodomy laws are unconstitutional.*
Or, on the expressivist analysis:

\[(E3a) \quad \text{Tex. App.: FOR}(\neg b)\]
\[(E3b) \quad \text{SCotUS (2003): FOR}(b)\]

As you see, the expressivist analysis gives the same result in both cases, (2) and (3), and cannot really tell them apart. As a matter of course, the disagreement (3) is as much a case of practical non-cotenability and preclusion of joint satisfaction as the former. However, in order to distinguish (2) and (3) we need to be able to say that the Texas Appellate Court in the disagreement (3) was (somehow) wrong or incorrect. Indeed, we need to be able to say that it is incorrect both in the sense of BIP and BEO—which we cannot do if we follow the expressivists in assuming that normative and evaluative sentences, like (3a), express no cognitive contents. With no cognitive content there is no objective criteria to tell which pronouncement is (in)correct. We shall therefore conclude that expressivism cannot serve a descriptive theory of legal discourse.

One could here consider some hybrid versions of expressivism, but since we are still evaluating alternative ways of answering the FD challenge by rejecting Propositional Inconsistency, the only hybrid versions of an interest for us would be those that combine expressivism with some variety of indexical contextualism. We will do that in §3.3, that is, after we evaluate the said view on its own.

3.2. Indexical Contextualism

Indexical contextualism is the view that syntactically complete sentences express underdetermined contents. In order to obtain truth-evaluable contents, completion is needed from the information available in the context of utterance. The idea is that the completion is provided through pragmatic processes that are not linguistically driven (cf. Recanati 2004). In legal theory, versions of indexical contextualism are explicitly adopted by Villa (2010, 2012), for example. His views imply, however, that the theoretical role of the context of utterance is sometimes taken by the context of norm-application.

Indexical contextualism drops Propositional Inconsistency by saying that there is no single proposition \( p \) that was accepted in Lawrence (2003) and denied in Bowers (1986). This is because the two majorities, first, do not share a single context of norm-application and, secondly, their contexts of norm-application do not provide the same values to the indices which play a
role in the process of completion of the meaning of 'unconstitutional'. *Bowers* (1986) and *Lawrence* (2003) are thus thought to express two logically unrelated propositions:

(C2a) SCoTUS (1986):

\[ \text{Anti-sodomy laws are not unconstitutional}_{\text{[Bowers]}} \]

(C2b) SCoTUS (2003):

\[ \text{Anti-sodomy laws are unconstitutional}_{\text{[Lawrence]}} \]

On the other hand, Texas Appellate Court and *Lawrence* (2003) do share the same context of norm-application and can thus be analysed as expressing two logically related propositions, namely:

(C3a) Tex. App.:

\[ \text{Anti-sodomy laws are not unconstitutional}_{\text{[Lawrence]}} \]

(C3b) SCoTUS (2003):

\[ \text{Anti-sodomy laws are unconstitutional}_{\text{[Lawrence]}} \]

This is why indexical contextualism can effectively distinguish disagreements (2) and (3). But it has another problem, as you have probably noticed already. We will refer to it as the Problem of Disagreement Lost:

**Disagreement Lost:** If indexical contextualists were right, (2) is an example of what is often termed as *talking past*, or talking at cross-purposes—and the majority in *Lawrence* (2003) is simply pretending, or mistaken, in thinking that it is opposing the majority in *Bowers* (1986). (Recall the fragment reported in the incipit: "*Bowers* was not correct when...")

In order to explain such a generalized mistake or pretence, indexical contextualists would need to add an error theory. But we are not interested in following this path—at least until we still have other options.

One possible way out without an error theory is in a hybrid version of indexical contextualism and expressivism (§3.3). Another possibility is going meta or, in other words, accommodating the disagreement effects on the level of pragmatics (§3.4), rather than semantics.

In the terms of our earlier fourfold taxonomy, the first option consists in a *semantic* rendering of non-cognitive disagreements, whereas the second presents a *pragmatic* rendering of either cognitive or non-cognitive disagreements.
3.3. Semantic Hybrids

A merger of indexical contextualism and expressivism could distinguish between (2) and (3), though it would not get much further. On the one hand, the expressivist features of such a hybrid could explain the perceived tension between the SCotUS majority of 2003 and that of 1986 by confirming our intuition that (2b) is a negation of (2a). Remember the analysis (E2)! The expressivist features would thus account for disagreement. The contextualist features, on the other hand, could successfully tell the disagreements (2) and (3) apart by pointing to the respective contexts of norm-application, thus showing that in (3) there is a single proposition which Texas Appellate Court accepts and the Supreme Court in Lawrence (2003) denies; whereas no logically related propositions are involved in the faultless disagreement (2) between the Supreme Court majorities in Lawrence (2003) and Bowers (1986). In other words, the contextualist features would account for faultiness in (3).

In legal theory, one such hybrid view has recently been proposed by Toh (2011), who is also attributing it to Hart’s analysis of what he called ‘internal legal statements’ (Toh 2005: 112). As we have already seen (§2.1), internal legal statement are normative statements made from the point of view of an adherent of the legal system, just like (2a) and (2b). 21

One problem arises in such views, however, when we are to compare the faultless disagreement (2) between two interpretive decisions with another kind of faultless disagreement in matters of law. Take (4) as its paradigm example:

(4a) Defence Atty. Robert Kardashian:  
*O. J. Simpson did not murder Nicole Brown.*

(4b) Civil litigation Atty. Daniel Petrocelli:  
*O. J. Simpson murdered Nicole Brown.*

Just like in (2), both claims in (4) got confirmed by final court decisions as correct and binding *inter partes litigantes.* 22 And while they are

21 Ridge’s (2014) *ecumenical expressivism* exemplifies this hybrid strategy in meta-ethics.

practically non-cotenable and jointly unsatisfiable like the claims in (2), any lawyer would tell why the disagreement (4) is—unlike the other—far from being substantive. In (4), speakers fail to mean the same things by their words. Kardashian was speaking of murder under the (higher) standards of criminal law, while Petrocelli’s claim is governed by the (lower) civil litigation threshold. If one makes this explicit by specifying the threshold, the conflict in (4) disappears. But no specification affects in the same way the conflict in (2). There, the tension is prevailing. This is why lawyers would never put (4) and (2) under the same hat. Yet, our hybrid analysis makes no distinction between them—and cannot point to anything that would explain the (substantive) tension prevailing in (2).

We will now see how this tension can be explained as metalinguistic negotiation. This approach may be of help to hybrid theories in splitting the difference between (2) and (4) as well as to (non-hybrid) indexical contextualists in rebutting the objection from Lost Disagreement. But it still leaves us with the Puzzle of Bindingness, as we will see.

3.4. Metalinguistic Neg(oti)ation

Recall the linguistic exchange between the majorities in Bowers (1986) and Lawrence (2003):

(2a) SCotUS 1986: 
Anti-sodomy laws are not unconstitutional.

(2b) SCotUS 2003: 
[No,] anti-sodomy laws are unconstitutional. Bowers was not correct when it was decided and it is not correct today.

Now, let us first assume that ‘unconstitutional’ in (2) is mentioned (meta-represented, quoted, echoic) rather than used. This means that we are dealing with a special ‘non-truth-functional negation’ (Horn 1985) such as (5.b) below, which operates over utterances and needs to be distinguished from descriptive truth-functional negation of semantic contents (propositions or concepts), like (5.a):

(5) We didn’t see the hippopotamuses.
    a. We saw the rhinoceroses.

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23 See Carston (1996: 323–324) who exposed this as the only essential property of metalinguistic negation.
b. We saw the hippopotami. (Carston 1996: 221)

Obviously, (5.b) could also be taken descriptively, so that “hippopotamuses” (the word) would refer to ‘hippopotami’ (the concept)—but then we would have a contradiction between (5) and (b). In circumstances in which contradiction is implausible, the analysis in terms of the metalinguistic use of ‘hippopotamuses’ (with the word and not the concept as its reference) is the only option.

Our legal example is different from this one inasmuch as there is no straightforward motivation to prefer one reading over the other. In this sense, metalinguistic analysis of ‘unconstitutional’ in (2) is a matter of theoretical choice independent of how the speakers themselves understood their exchange. And note that even when this choice is made, there is still a range of linguistic mechanisms one could dwell on to explain the disagreement effects. We have assumed that ‘unconstitutional’ in (2) is mentioned, rather than used, but one could also say the opposite and still remain on the level of pragmatics. Among legal philosophers, such a path was taken by Plunkett & Sundell (2013a: 3) who speak of ‘metalinguistic negotiation’. Here is what one could say from their standpoint:

The parties in (2) agree on what anti-sodomy laws are; they know their purpose and potential use. So there is no empirical disagreement between them. They also agree on what ‘unconstitutional’ means; they know what its consequences are in their legal culture (to wit, the inapplicability of the object of predication) and have no interpretive disagreement over this word. Instead, they negotiate over which of a range of competing concepts is to be used in a given context. They are perfectly aware that two different conceptual imports of the ‘US Constitution’ are presupposed in their dispute. (Let us call them ‘Constitution_{LWRNC}’ and ‘Constitution_{BWRBS}’.). So, they are not exchanging factual information about world or language. Rather, they are negotiating the concept choice—which explains both, the prevailing tension and the judicial opinions explicitly motivating their choice. (Note that this proposal is neutral with regard to the cognitive or non-cognitive nature of the metalinguistic disagreement. The conflict, that is, is located on a different level, that of pragmatics, but this is compatible with both cognitive and non-cognitive analyses thereof).

Adhering to these views, an indexical contextualist could respond to the challenge of Disagreement Lost by showing how disagreements can be expressed via a metalinguistic negation, which—as we have seen—does not require that speakers literally assert and deny one and the same proposition. Turning, moreover, to the idea of metalinguistic negotiation, indexical
contextualists and adepts of a hybrid theory alike could explain the tension in disagreements (2), (3) and (4)—as well as its eventual disappearance in the latter (when negotiation stops thanks to a specification of the parties’ non-conflicting interests).

These combinations seem to give a pretty good result—if it wasn’t for their inability to explain the puzzle of bindingness introduced in §2.2 above (or so we think). That does not mean that one could not explain it if one rejects Propositional Inconsistency, but from what we have seen we can conclude that it is not sufficient. So, let us move on to explore other strategies to accommodate faultless disagreement and see if with them one could also solve the Puzzle.

4. Revising Faultlessness

Another way to respond to the challenge of faultless disagreement is to distinguish not only various degrees but different sorts of faultlessness—and reject Faultlessness as it stands (‘Neither party is at fault’). More precisely, one could qualify Faultlessness as follows:

**Faultlessness**: Neither party has committed any judicially reproachable mistake.

This means that although one of the parties has committed a mistake and holds something that is false, his view is nonetheless judicially unassailable. Indeed, something is judicially assailable if we can attack it in a court of law. But once a controversy in a concrete case is decided by a final court decision, we have no possibility to reproach it judicially.

This move seems to be the most straightforward option for objectivists. According to objectivism, legal statements express truth-evaluable contents with truth values depending on some fixed and objective criteria, such as the legislative intent, the ratio legis and alike. This view fits semantic invariantism (i.e. the view that the truth-conditions and thus truth-values of some class of sentences do not vary across contexts) and could be read into the cognitivist theory of legal interpretation advanced by Hernández Marín (2012), or into some particular originalist views, like those of Whittington (2010: 121) for example.

If an objectivist were to admit the existence of faultless disagreement in matters of law, she could do so if she used an argument that Schafer (2011) introduced to defend aesthetic realism. To make his argument smoothly fit our purpose, we will build on Palmira’s (2014: 4) distinction, in
matters of taste, between ‘propositional faultlessness’ and ‘normative faultlessness’. Whereas the former stems from the fact that a propositional attitude like belief is true, the latter depends on whether it has been formed in compliance with a second-order norm of belief-formation. To this, we will add that apart from second-order norms of belief-formation there are also second-order norms concerning how to consider or qualify first-order beliefs (cf. Schafer 2011: 272 and n. 11). Accordingly, we propose to extend our definition of normative faultlessness to compliance with such second-order norms as well.

The analysis of disagreement (2) along these lines could go as follows (cf. Schafer 2011: 272–73). Each interpreter has and/or displays various first-order beliefs about what is constitutional and what is not. As a matter of course, the majority of 1986 displayed the belief (2a) to the effect that anti-sodomy laws are not unconstitutional and the same justices formed various other beliefs in other constitutional cases. On the other hand, the majority of 2003 displayed the belief (2b), among others, saying that anti-sodomy laws are unconstitutional. Since these first-order beliefs cannot both be true, according to the standard views on truth and logic, we have in (2) a disagreement as you would expected. It is a cognitive one and it is not propositionally faultless. However, the argument continues, in addition to various first-order beliefs each interpreter will also accept certain second-order norms concerning how to consider or qualify first-order beliefs. The compliance with such second-order norms gives us different sorts of normative faultlessness as this was defined in the preceding paragraph.

For example, a second-order norm $N_f$ may tell you to consider all interpretive beliefs displayed in final court decisions as judicially irreproachable and binding inter partes litigantes—just as one of such norms found in every mature legal system actually does. Consequently, all interpretive beliefs confirmed by final court decisions—including those from cross-context disagreements (1), (2) and (4)—will be F-faultless, although they are not propositionally faultless.

By multiplying second-order norms concerning how to consider or qualify first-order beliefs, adepts of objectivism could distinguish between all sorts of normatively faultless disagreements, including (2) and (4). It is easy to imagine a plethora of second-order norms necessary to complete this task, so we will skip the exercise of distinguendo and jump directly to the Puzzle of Bindingness.

Arguably, one could hold that the predications of two sorts of bindingness (BIP and BEO) are governed by two different second-order
norms, and that in certain circumstances both of them apply. It seems natural to think that BEO-predications are governed by a simple second-order norm \( N_T \), which tells you to consider only true interpretive beliefs as binding \textit{erga omnes}. (In other words: bindingness \textit{erga omnes} would coincide with propositional faultlessness.) On the other hand, BIP-predications seem to comply with a complex second-order norm \( N_{FT} \) telling you to consider as binding \textit{inter partes} all interpretive beliefs that are F-faultless or—if there is yet no final court decision in the case at hand—only those beliefs that are propositionally faultless or, in other words, T-faultless. These two norms explain the Puzzle of Bindingness according to the objectivist views: for the majority of 1986, their belief (2a), displayed in Bowers, is binding \textit{inter partes litigantes} just because they found it binding \textit{erga omnes}. For the majority of 2003, on the other hand, the belief (2a), displayed in Bowers, is binding \textit{inter partes} even though they are of the opinion that it is not (and was not) binding \textit{erga omnes}.

This is how qualifying faultlessness permits the objectivist to escape from the challenge of faultless disagreement and explain the puzzle of bindingness, while retaining an invariantist semantics.

5. Rejecting the Law of Non-Contradiction: Dialetheism

A few authors have considered the possibility of dropping the Law of Non-Contradiction (LNC), that is the principle according to which \( p \) and \( \neg p \) cannot be simultaneously true. This view goes under the heading of ‘Dialetheism’. More precisely, dialetheism is the view which assumes the existence of \textit{true contradictions} or truth-value \textit{gluts} (Priest & Berto 2013). The latter means that there are propositions which are both true and false, whereas the former means that there are true propositions whose contradictory counterparts are true as well. Such a proposition is called a \textit{dialetheia}. In contemporary legal theory, their existence has been defended by Priest (2006a). As a solution for the problem of faultless disagreement about matters of taste, dialetheism has been advanced by Beall (2006) and Parsons (2013).

If we assume that (2a) is a dialetheia, then both it and its negation (2b) are true. Moreover, (2a) is at the same time true \textit{and} false. This would explain why the Supreme Court majority of 2003 could say that Bowers (1986) was not correct when it was decided. And it could explain why neither party in our linguistic exchange (2) is at fault. Dialetheism thus straightforwardly accounts for faultlessness, and in its strongest sense, that is the one described in FD2.
You might think that dialetheism has an easy time accounting for the disagreement effects too. Indeed, the attitudes of the two parties are about the very same content \( p \), rather than two distinct contents, as per the Contextualist. Put in other terms, on the dialetheist story (2a) and (2b) are inconsistent in that they license an inference to a sentence of the form \( \phi \) and \( \neg \phi \), where \( \phi \) contributes the same content across different contexts of use/application. On this analysis, thus, we have genuinely contradictory propositions, rather than consistent indexical contents or non-propositional creatures.

But does the view really escape the Lost Disagreement problem? The answer, we think, is negative. First of all, \( \phi \) and \( \neg \phi \) despite being syntactically inconsistent, are not semantically inconsistent: on the dialetheist story, their conjunction is true after all. Like the contextualist, thus, the dialetheist is unable to capture the sense in which \( \phi \) and \( \neg \phi \) can't both be true relative to the same interpretation of their compounds. Perhaps this is unfair. Surely, the dialetheist can't understand inconsistency in that way. So let us leave behind truth-conditions and truth-values and let us switch to the attitude/content pairs formulation. This doesn't lead us very far either. Indeed, if (2a) is a dialetheia then both it and its negation (2b) are true simpliciter. But holding two true beliefs can't be a problem, of course. Consequently, the account predicts that the attitudes of the two parties are both co-tenable and jointly accurate. And this means that we no longer have a disagreement as this was defined above in FD*. In order to sustain that in (2) we do have a disagreement, the dialetheist will need to redefine disagreement.

Instead of saying that Aye and Bee disagree just in case their attitude-content pairs are (a) non-cotenable and (b) jointly accurate (see §2.2 above), the dialetheist might say that Aye and Bee disagree just in case one of them accepts the content which the other one rejects. The trick is to split accepting/asserting not-\( p \) and rejecting/denying \( p \), where a rejection of \( p \) is a mental state which is distinct from a belief in the negation of \( p \), and a denial of \( p \) is a speech act that is distinct from an assertion of \( p \)'s negation.\(^{24}\)

On this view, (2) would still be a disagreement, for even if one can accept a dialetheia and its negation, one cannot accept it and reject it at the same time (cf. Coliva & Moruzzi 2014).

Further problems of distinguishing between various sorts of faultless and non-faultless disagreement—namely, (2), (3), and (4)—can be

\(^{24}\) For the distinction between rejection/denial of \( p \) and belief in/assertion of \( \neg p \), see, e.g., Priest (2006a).
overcome if, in conjunction with rejecting LNC, the dialetheists also introduced higher-order norms in the same vein as we have seen with the objectivists in the preceding section. Like them, dialetheists could thus resolve the puzzle of bindingness, although their second-order norms concerning how to qualify first-order beliefs would be, of course, somewhat different. A dialetheist could hold that BEO-predications are governed by a simple second-order norm $N_{p}$, which tells you to consider as binding *erga omnes* those true beliefs which you prefer. BIP-predications, on the other hand, might be thought of as being governed by a complex second-order norm $N_{f/p}$ telling you to consider as binding *inter partes* all interpretive beliefs that got confirmed by final court decisions or—if there is yet no final court decision in the case at hand—only those beliefs that are P-faultless.

This is how dialetheists could respond to our challenge. *Or not.* For one of the dialetheist norms of rationality goes like this: one ought to reject something if there is good evidence for its untruth (Priest 2006a: 110). Therefore, if (2a) really is a dialetheia, the mentioned dialetheist norm dictates that it is a mistake to reject it.\textsuperscript{25} A dialetheist would thus need an error theory to explain *either* why it is not common knowledge that (2a) is a dialetheia or why speakers fail to comply with the relevant norm of rationality.\textsuperscript{26} But you have already understood that we are not interested in error theories in here, so let us move on to our next candidate.

### 6. Rejecting Absolute Truth

We will now turn to consider one preferred solution to the faultless disagreement challenge, namely Truth-Relativism. A truth-relativist in matters of law could hold that legal sentences such as (2a) contribute the same content or proposition across contexts, but that its truth-value can shift across contexts. Consequently, one would reply to the challenge by accepting the data and rejecting one of the theoretical principles, precisely ABSOLUTE TRUTH.

$$\text{ABSOLUTE TRUTH: Propositions do not vary in truth-value across contexts.}$$

There are two different ways in which truth can be relativised. One possibility is to speak of truth relative to contexts of utterance. Another

\textsuperscript{25} This is so because for the dialetheist something can be false without being untrue. And a dialetheia is true and false, but not true and untrue.

\textsuperscript{26} An objection along these lines is raised by Coliva & Moruzzi (2014).
possibility is to relativise it to contexts of assessment. We will first show how these options work in separation (§§6.1 and 6.2) and will then conclude with a presentation of how the puzzle of bindingness is solved when they are combined (§6.3)

6.1. Moderate Relativism (Non-Indexical Contextualism)

Moderate Relativism builds on the contextualist framework. As we have seen (§3.2), indexical contextualists take that full-fledged contents of a sentence depend on contextual information. Therefore, they can explain (propositional) faultlessness of some cross-context disagreements by saying there is no single proposition that one party accepts and the other one denies. The problem is, let us repeat, that indexical contextualists have difficulties to explain the very disagreement effects of such cross-context linguistic exchanges. Indeed, under indexical contextualism some cross-context disagreements simply ‘go missing’ (Spencer 2014: 2).

In order to avoid this problem of Disagreement Lost while still endorsing the contextualist view that a sentence-out-of-context is never true or false, one could assume that the faultlessness of certain disagreements stems from context-dependence of sentential truth-values (rather than of truth-evaluable contents that sentences express). This is why some have called this view non-indexical contextualism (MacFarlane 2009; Weatherson 2009; Davis 2013), though others speak of moderate relativism (Recanati 2008).

According to a moderate relativist, there is in faultless disagreements a proposition that one party accepts and the other one denies. So, we are facing cognitive disagreements. Nonetheless, these are at the same time propositionally faultless insofar as the truth-values of propositions depend on their context of utterance.

If you adopted this semantic model, you could thus hold that (1a) and (2a) are true relative to the context of Bowers (1986), whereas (1b) and (2b) are true relative to the context of Lawrence (2003)—just as it stems from what the courts have affirmed in these contexts. But how would you explain under this model the linguistic data from our faultless disagreement (2) (‘Bowers was not correct when it was decided...’), and how would you resolve the puzzle of bindingness?

If what the SCotUS majority said in (2a) is true relative to the context of Bowers (1986), whereas the proposition expressed in (2b) is true relative to the context of Lawrence (2003), then the court could well say in Lawrence that the interpretation put forth in Bowers is not correct and ought
not to remain binding precedent—but it should not have said what it also said: that is, that *Bowers* (1986) was not correct when it was decided. (Indeed, when Bowers was decided in 1986, (2a) was true.) We shall thus conclude that moderate relativism gives us the right semantic model for explaining bindingness *inter partes litigantes*, but that it is unfit for explaining bindingness *erga omnes*.

A way to explain the linguistic data reporting BEO-predications is offered by non-indexical relativism (§6.2).

6.2. *Non-Indexical Relativism (Interpretivism)*

Non-indexical relativism builds on a distinction between two types of context that appears with clarity only in cross-context disagreements. On the one hand, we have one single context in which a sentence is used and on the other one we have a plurality of contexts from which it is assessed. In same-context disagreements the parameters of these two types of context coincide. It therefore seems that we are in violation of parsimony if we make use of the distinction. But as soon as we acknowledge the existence of cross-context disagreements this objection falls. An assertion made in one context is sometimes assessed from a different context—and if we assume that truth values are context-sensitive, the question of which of these two contexts actually determines the truth value becomes important.

Non-indexical relativism holds that truth values get determined not by the parameters of the contexts of utterance in which a proposition is put forth, but rather by the parameters of the ‘contexts of assessment’. In other words, truth-values are assessment-sensitive, not use-sensitive (MacFarlane 2014: 64). This is why an utterance that once is rightly considered true as used in a given context, can later be considered false (and rightly so) as used in that same context, just like this seems to be the case with (1a) and (2a) from our examples.

As Kölbel (2007, 2008) shows, non-indexical relativism, as spelt out in the text, can be implemented without introducing contexts of assessments. To be sure, all we need is a definition of truth which allows us to say that the very same utterance (i.e. sentence-context pair) may vary in truth-value depending on the circumstance of evaluation (index) relative to which one evaluates it. MacFarlane thinks that the relevant index is determined by the context of utterance and, accordingly, has to posit extra contexts of assessments to allow for truth-value variation of the same utterance. In Kölbel’s framework this assumption is given up, and the utterance-truth relativity is captured without departing from the standard double-index framework. The two frameworks are
In legal theory, this semantic model arguably fits the interpretivist views. Interpretivism holds, similarly to objectivism (§4 above), that sentences containing legal predicates express truth-evaluable contents. However, their truth-values depend not on fixed criteria (as they do for the objectivists) but rather on the normative or evaluative facts that best fit and justify the total set of practices in which the concept invoked by the predicate is used (cf. Dworkin 2011). And since the quantity of data to fit and justify grows along with time, it may well be that the theory that best fits and justifies some legal practice as a whole at time (t1) is different from the one that best fits and justifies it at (t2). Consequently, propositions $p$ and $\neg p$ could be true in case of some cross-context disagreements, such as (1) and (2).

Suppose that the best theory in 1986, say $T_1$, was different from the best theory in 2003, say $T_2$. Now, if Bowers complies with $T_1$ and Lawrence complies with $T_2$, both (2a) and (2b) are true as assessed from their very own contexts of utterance. But as soon as we move from one context of assessment to another, their truth-values might change. This explains why the Supreme Court could rightly say in 2003 that Bowers (1986) was not correct when it was decided; the reason is that (2a) is not true according to $T_2$.

We have thus identified an adequate semantic model for explaining bindingness erga omnes, but we have not resolved the Puzzle for on this model one cannot explain why (2a) remains binding inter partes.

In order to meet the objective and account for both these predications with a single model, we shall consider adopting a full-fledged relativist framework in which the contexts of utterance specify the role of certain contexts of assessment. Here is how this would work.

6.3. Full-Fledged Relativism

Under the full-fledged relativist framework proposed by MacFarlane (2014), one would hold that the SCotUS majority of 2003 denies the very same proposition that was accepted in Bowers by its majority of 1986. This is because the adjective ‘unconstitutional’ has the same meaning in both 1986 and 2003, namely ‘unconstitutional_{USA}’. And so we get the following analysis of the disagreement (2):

(R2a) SCotUS 1986:

notational variants.
Anti-sodomy laws are not unconstitutional_{USA}.

(R2b) SCotUS 2003:
Anti-sodomy laws are unconstitutional_{USA}.

But the truth values of (R2a) and (R2b) are not absolute and therefore identical for all possible assessors whatsoever. That means that they are not fixed by their contexts of utterance. Instead, they are relative to contexts of assessment (which sometimes overlap with contexts of utterance).

As a result, (R2a) may well be true as used at and assessed from the context of Bowers (1986) but false as used at the context of Bowers (1986) and assessed from the context of Lawrence (2003) in which (R2b) is true. This explains the faultlessness of (2). Moreover, if we now say that in 1986 the majority in Bowers was wrong in claiming that anti-sodomy laws are not unconstitutional, this does not mean that it was wrong for that majority to make the claim that they are (cf. MacFarlane 2014: 240, n3). The making of assertions is governed by what is true as assessed from their very context of utterance—and (R2a) is true as assessed from that context.

On the basis of what has been said, the Puzzle of Bindingness can be explained like this: A final court decision is binding inter partes litigantes inasmuch as it is true as assessed from its context of utterance. And it is binding erga omnes inasmuch as it is true as assessed from the actual context. The relevant parameters of these two types of context sometimes overlap and that is when BIP- and BEO-predications coincide.

7. Rejecting Determinate Truth and/or Truth-Norm: Truth-Value Indeterminism

A further (and last) option we would like to scrutinize consists in dropping DETERMINATE TRUTH, namely the claim that (2a) is either determinately true or determinately false. On this view, call it Truth-Value Indeterminism, (2a) and (2b) express a truth-conditional content, but one which is neither determinately true nor determinately false.

The version of truth-value indeterminism that we choose to put on the table builds on an analogy with the supervaluationist treatment of indeterminacy—that is, vagueness and ambiguity (Fine 1975; Lewis 1982). It is compatible with the views of legal theorists who, like Hart (1961/94), speak of strong discretion in uneasy cases and define ‘law’ so that there is no conceptual connection between the law and the contents of final judicial decisions. We will look at two varieties of truth-value indeterminism that
match up with two distinct forms of supervaluationism.

Standard supervaluationism, henceforth supervaluationism\textsuperscript{1}, defines truth as supertruth, viz. as truth in all interpretations. In this framework indeterminate expressions are associated with a range of interpretations\textsuperscript{28} and a sentence with an indeterminate expression is supertrue if it is true on every (admissible) interpretation, superfalse if it is false on every (admissible) interpretation, and neither true nor false if it is true on some (admissible) interpretations and false on others. (It is unimportant for this work what admissible here means.) Supervaluationism, drops the principle of bivalence (a sentence is either true or false). However, by denying truth-functionality it holds on to the law of excluded middle (\textit{contra} three-valued logics à la Kleene, for example) and to the law of non-contradiction (\textit{contra} dialetheism).

Non-standard supervaluationism, henceforth supervaluationism\textsuperscript{2}, uses two notions of truth—correspondence or determinate truth and disquotational truth or truth simpliciter. Determinate truth (which is not equated with truth) is defined as truth on all admissible interpretations, which corresponds to super-truth of supervaluationism\textsuperscript{1}. On the disquotational conception of truth, on the other hand, which has no straightforward equivalent in supervaluationism\textsuperscript{1}, the T-schema—\textquoteleft \textit{\(\phi\)} is true if \(\phi\) and \textquoteleft \(\neg\phi\) is false if \(\neg\phi\)\textquoteright—is meaning-constitutive for our term ‘true’.

The disquotational conception of truth entails that if it is indeterminate whether \(\phi\), then it is likewise indeterminate whether \(\phi\) is true. Following Eklund (2010) we shall refer to this notion of indeterminacy as second-level indeterminacy: on this model, indeterminacy doesn’t entail a truth-value gap or a third truth-value—this would be first-level indeterminacy; rather, what is indeterminate is which classical truth-value (i.e. the true or the false) the sentence has. Consequently, second-level indeterminacy doesn’t give up bivalence.

Now, does the ordinary language truth-predicate ‘true’ denote correspondence truth, i.e. supertruth (henceforth truthC) or disquotational truth (henceforth truthD)? According to supervaluationism\textsuperscript{1}, it either denotes truthD, or it is somehow ambiguous or indeterminate between the two concepts.\textsuperscript{29}

\textsuperscript{28} In case of vague expressions, an interpretation corresponds to a precisification as a way to determine the meaning of a given vague expression so that it becomes precise. In case of ambiguous expressions, interpretations correspond to disambiguations.

\textsuperscript{29} A view like this is advocated by Field (1994) and McGee & McLaughlin
The two resulting views, let us call them truth-value indeterminism\textsubscript{1} and truth-value indeterminism\textsubscript{2}, may deliver the same result with respect to disagreement. Assuming that (2a) is neither determinately true nor determinately false, one could successfully adopt this view to explain why (2a) and (2b) are non-cotenable and can’t be jointly accurate. Since (2a) is indeterminate in truth-value, its negation, (2b), will be indeterminate in truth-value as well. Nonetheless, the conjunction of (2a) and (2b) comes out determinately false or (super)false on every interpretation—and so the disagreement condition (i’) from FD* still obtains.

What about faultlessness? Things get a bit trickier here. On a widely accepted view, truth is the weakest norm of belief/assertion.\textsuperscript{30} Now, you may think that if $\phi$ is indeterminate in truth-value, then $\phi$ is not true. And even if assertively uttering something that is not true may be better than assertively uttering something that is outright false, it still counts as a fault of sort. However, the two majorities in (2) didn't commit any fault. Or at least this was one of our starting data. How can this be right? It can't. Something has to give way.

The problem can be set out as an inconsistent triad of \textit{prima facie} plausible claims:

(C1) If $\phi$ is indeterminate in truth-value (or, equivalently, not determinately true), then $\phi$ is not true.

(C2) \textit{Truth} is the weakest norm of belief/assertion: if $p$ is not true, then it is not correct to believe/assert that $p$.

(C3) The majorities in \textit{Bowers} and \textit{Lawrence} are faultless.

Granting that the three claims are incompatible, one could choose to deny (C1). This would somehow fit indeterminism\textsubscript{2}, insofar as this semantic model subscribes to the ‘two-concept view’ on truth briefly explicated above—either by holding the indeterminacy or ambiguity hypothesis, or alternatively by claiming that ‘true’ in ordinary language just

\textsuperscript{30} That is, no matter what the right norm of belief/assertion turns out to be, it is at least indisputable that it is not correct to believe/assert something that is not true.
denotes ‘trueD’ rather than ‘trueC’. The two-concept view on truth would bring in its wake a two-concept—or two-degree view—view on faultlessness (cf. §2.3.2). More precisely, truthC would track FD1 faultlessness (if \( \phi \) is neither determinately true nor determinately false, then two inconsistent attitudes towards \( \phi \) will be such that neither is incorrect) and truthD would track FD2 faultlessness (if \( \phi \) is disquotationally true on interpretation \( i \) and disquotationally false on interpretation \( i^* \), then two inconsistent attitudes towards \( \phi \) will be both correct).

Alternatively, one might respond by giving up (C2). One might do so by adopting Beall’s (2006) analtheism which suggests a revision of the truth-norm along the following lines: ‘one ought (rationally) to believe what is at least not false’. This option, which fits indeterminism, would thus require the dropping of TRUTH-NORM (see §2.1). By so doing, a legal analtheism could get us FD2 faultlessness by saying that it is correct to believe/assert whatever is not false. But denying TRUTH-NORM is a tough bullet to bite.

This leaves us with C3. The option we shall consider on behalf of indeterminism goes as follows. We stick to a weaker version of TRUTH-NORM, i.e. C2, by making use of the distinction between two degrees of faultlessness. More precisely, we simply reject the entailment from ‘not correct’ to ‘incorrect’. Next, we revise C3 as follows:

\[ (C^*) \] The majorities in Bowers and Lawrence are neither correct nor incorrect.

The faultlessness condition thus obtains in view of FD1 (‘neither Aye’s attitude nor Bye’s attitude is incorrect’). It should be clear how this option fits indeterminism: a truth-value gap, i.e. a sentence being neither true nor false, would give rise to a normative gap, a certain assertion of/attitude towards the content expressed by that sentence, being neither correct nor incorrect. This, however, leaves us with two issues to resolve. One refers to

31 Similarly, Maudlin’s (2004) solution to the liar paradox rests on the introduction of a notion of permissibility (and permissible assertion), which is divorced from truth.

32 It may be worth clarifying the difference between this proposal and one according to which contents that are neither true nor false require a distinct type of attitude or speech-act. In the latter case the idea would be that: if \( p \) is neither true nor false, you ought neither to believe/assert that \( p \) nor not to believe/assert that \( p \). In the former, i.e. the one we’re considering in the text, we would have that: if \( p \) is neither true nor false, you neither ought to believe/assert...
splitting the difference between disagreements (2), (3), and (4)—all of which now qualify as FD1. The other one regards the puzzle of bindingness.

Both these issues could be resolved if truth-value indeterminists opted for distinguishing between (simple and complex) second-order norms concerning how to consider or qualify first-order beliefs. Indeed, they could easily think of simple second-order norms to show the difference between disagreements (2), (3), and (4). But, more importantly, they could solve the Puzzle of Bindingness as follows. They might say that BEO-predications are governed by a simple second-order norm \( N_{NP} \), which tells you to consider as binding *erga omnes* those neither true (correct) nor false (incorrect) beliefs that you endorse/prefer. BIP-predications, on the other hand, might be thought of as being governed by a complex second-order norm \( N_{F/NP} \) telling you to consider as binding *inter partes* all interpretive beliefs that got confirmed by final court decisions or—if there is yet no final court decision in the case at hand—those neither true (correct) nor false (incorrect) beliefs that you endorse/prefer, or, in other words, NP-faultless beliefs.

This is how the truth-value indeterminists could respond to the challenge. The same solution could be adopted by indeterminists—although, of course, they would construe truth-value indeterminacy as second-level rather than first-level.

The proposed solution could also be accommodated to work for the expressivist views discussed in §3.1 above (cf. Schafer 2010: 268, n. 6). Indeed, nothing in the Puzzle bears on whether one qualifies (2a) and (2b) as neither true nor false because she considers them non-propositional rather than propositional but indeterminate in truth-value. This means that the expressivist could deliver faultlessness and resolve the puzzle of bindingness if, apart from rejecting Propositional Inconsistency, she invoked the second-order norms \( N_{NP} \) and \( N_{F/NP} \) just like our truth-value indeterminists.

### 8. Taking Stock

Let’s take stock. *Interpretive discrepancies* have long been a challenge for the philosophy of law. In this paper we chose to tackle this puzzle from a new perspective opened up by the literature on ‘faultless disagreement’. We showed in what sense faultless disagreement in matters of law resembles the same phenomenon in other areas of discourse (we found two discordant and yet in a sense irreproachable judicial decisions) and in what sense it is

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that \( p \) nor ought not to believe/assert that \( p \). If the negation (precisely the ‘neither’) takes wide-scope we could then say that the assertion is neither correct/permmissible nor incorrect/impermissible.
different (faultlessness may only concern cross-context and intra-jurisdictional disagreements and need not be endorsed from an internal perspective). Next, we scrutinized a number of semantic theories with respect to their ability to model the linguistic behaviour of legal predicates ‘(un)constitutional’ and ‘binding’, and in particular their faultless disagreement effects.

We found three suitable solutions in some versions of invariantism (objectivism), relativism and indeterminism. One upshot of our analysis, thus, is that more than one semantic framework has the resources to get the linguistic data right, i.e. to accommodate faultless disagreements in matters of law and to solve the puzzle of bindingness. Indeed, our objections to the proposals examined have always been internal rather than external. We have tried to show, that is, that some theories fail to capture the intuitions elicited by certain linguistic exchanges, such as (2), and/or are not able to distinguish cases like (2) from cases like (3) and (4). Granting that this under-determination hypothesis is correct, what lessons should we draw?33

The first lesson is that we can get a general recipe for building a semantically adequate account of legal discourse. The trick, we suggest, is to have the resources for explaining:

(i) The two senses of legal (in)correctness corresponding to BIP and BEO.

(ii) The context-dependent inseparability of these two senses of legal (in)correctness.

This result can be achieved in two ways. On the one hand, one can do it by distinguishing between (simple and complex) second-order norms concerning how to consider or qualify first-order beliefs, as we have seen with objectivists, dialetheists and truth-value indeterminists (this could also be accommodated for expressivists and, as far as we see it, for other views as well). On the other hand, one can adopt the full-fledged relativist framework.

The second lesson is that although the aforementioned theories score

33 We are not the first to suggest a partially sceptical take on the semantic significance—or, better, decisiveness—of faultless disagreement data. Two much stronger verdicts than ours are reached in Palmira (2014) and Coliva & Moruzzi (2014). The former presents a dilemma both horns of which deflate the semantic role of faultless disagreement. The latter flag the possibility that the very concept of faultless disagreement is incoherent (has a ‘glitch’) and, accordingly, that no descriptive (as opposed to revisionary) account thereof is likely to be forthcoming.
equally well in capturing a certain set of linguistic data, further linguistic
and/or non-linguistic data can break the tie. Think, for example, of assertions
about future contingents like this one: 'The final court decision will be in
your favour.' If one takes them seriously as a challenge for a theory of legal
discourse (cf. Kristan & Vignolo 2012ur), then one would have to go for a
relativist framework, which seems to be the only model that can
accommodate the linguistic data given by our assessments of such assertions
(cf. MacFarlane 2003). Or so we think.

As for the non-linguistic data, let us first clarify that we refer both to
broadly philosophical considerations (e.g. metaphysical or epistemological)
and to so-called theoretical virtues (like simplicity, conservativeness, unifying
power, explanatory power, etc.). We shall give four examples to illustrate
how these considerations can bear on the theory choice—three of them
concern the former kind of data, and one concerns the latter.

First: Suppose we are legal realists. We think, that is, that the law
coincides with the contents of final judicial decisions either because we
assume that these are constitutive of legal norms (e.g. Tarello 1974) as the
building blocks of law, or because we take that they help us determine what
the law in force actually is (cf. Ross 1958). One might have very good
arguments for subscribing to such a view even today (cf. Guastini 2011), but
this is not the place to discuss the merits or dis-merits of this position. What
we shall flag, though, is that legal realism could work with, or be maintained
on, various semantic theories, though not on just any one of them. For
example, it could work with the relativist framework or with
indeterminism, but it is incompatible with what we called indeterminism,.
Indeed, if the law just is the content of final judicial decisions and one such
content is that p (e.g. that anti-sodomy laws are not permissible), then p is
true, rather than neither true nor false.34

Second: We presented invariantism as a suitable option because we
granted that the linguistic data are neutral with respect to the right
characterization of the faultlessness at issue. However, consider what we may
call the challenge from undetectable errors against invariantists. Adapting a
passage from MacFarlane (2007a: 17), one could say that if there are wholly
objective properties of being legally forbidden, permitted, required, etc. then
most judges must be defective in their capacity to detect them. Of course,
there is arguably less subjectivity in matters of law than there is in matters of

34 Of course, as a well-worn slogan goes, one man's modus ponens is another man's
modus tollens. One may have good reasons for sticking to indeterminism, and
could thus perform a modus tollens on the conditional: 'If legal realism is true,
then indeterminism, is false'.
taste to which the author refers. But the main point still holds. MacFarlane thinks that this would lead to scepticism. Never mind whether this worry is legitimate. The core problem remains that the invariantist has to ascribe errors to subjects (experienced lawyers and judges) that do no seem guilty of any (legally relevant) cognitive shortcoming.

Third: Suppose you’re torn between full-fledged relativism and indeterminism. Suppose, next, that you’re a deflationist about truth, i.e. you think that the concept of truth is exhausted by some equivalence schema (such as \( p \) is true iff \( p \)). Suppose, finally, that you are convinced by arguments to the effect that deflationism is incompatible with truth-value gaps. Again, this may be a tiebreaker and favour relativism.

Turn now to theoretical virtues. Some semantic frameworks are only compatible with one or two positions in legal theory, while others could perhaps accommodate almost any one of them. The relativist framework has, as we believe, this advantage inasmuch as it takes that truth values are relative to circumstances of evaluation (e.g. Kölbel 2008). If we add a count-as parameter in the circumstance of evaluation (cf. MacFarlane 2007b, Vignolo 2012), different theories of law could model it so that it delivers exactly what they aim for. A legal realist, as we have proposed above, would say that if something coincides with the content of a final court decision then it counts as law, while others could say that something counts as law if it coincides with the legislative intent (the originalist), the theory that best fits and justifies the legal practice as a whole (the interpretivist), the conventional meaning of legal sources, and so on. If this is correct, the relativist framework shall be preferred over other suitable candidates for its unifying power.

On the other hand, some people think that for reasons of conservatism and simplicity we should stick to the (Fregean) view that propositions ‘instantiate the fundamental monadic properties of truth simpliciter and falsity simpliciter’ (Cappelen and Hawthorne 2009: 1; just as ABSOLUTE TRUTH says, see §2.1). A commitment like this would obviously rule out the relativist option.

To be clear, we are not endorsing any of these arguments here. That was not in our agenda. Regardless, we hope the big-picture methodological considerations just sketched will suggest new ways in which the dialectic may proceed.

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35 See, e.g. Dummett (1978).
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