Dworkin's Fallacy, Or What the Philosophy of Language Can't Teach Us About the Law

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INTRODUCTION

ALTHOUGH philosophers of law display an impressive diversity of opinion, they usually agree about one thing: Their discipline is closely connected to the philosophy of language.[1] The extent of agreement on this point can be seen in the recent flood of books and articles exploring the connections between the two fields.[2]

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[1] Ronald Dworkin, Law's Empire 4–6, 31–37 (1986) [hereinafter Dworkin, Law's Empire]; Ronald Dworkin, Taking Rights Seriously 81 (1977) [hereinafter Dworkin, Taking Rights Seriously]; Dennis Patterson, Law and Truth 3–21 (1996) [hereinafter Patterson, Law and Truth]; Ronald Dworkin, Introduction *to* Philosophy of Law 1, 1–9 (Ronald Dworkin ed., 1977) [hereinafter Dworkin, Introduction]; Brian Leiter, Why Quine Is Not a Postmodernist, 50 SMU L. Rev. 1739, 1739 (1997); Michael S. Moore, The Interpretive Turn in Modern Theory: A Turn for the Worse?, 41 Stan. L. Rev. 871, 872 (1989); Dennis M. Patterson, Law's Pragmatism: Law as Practice & Narrative, 76 Va. L. Rev. 937, 937–40 (1990).

[2] See Stanley Fish, Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies (1989); Andrei Marmor, Interpretation and Legal Theory (1992); Wittgenstein and Legal Theory (Dennis M. Patterson ed., 1992); Ahilan T. Arulanantham, Breaking the Rules?: Wittgenstein and Legal Realism, 107 Yale L.J. 1853 (1998); Brian Bix, Michael Moore's Realist Approach to Law, 140 U. Pa. L. Rev. 1293 (1992); David O. Brink, Legal Theory, Legal Interpretation, and Judicial Review, 17 Phil. & Pub. Aff. 105 (1988) [hereinafter Brink, Legal Theory, Legal Interpretation, and Judicial Review]; David O. Brink, Semantics and Legal Interpretation (Further Thoughts), 2 Can. J.L. & Jurisprudence 181 (1989); Stephen M. Feldman, The New Metaphysics: The Interpretive Turn in Jurisprudence, 76 Iowa L. Rev. 661 (1991); Stanley Fish, Fish v. Fiss, 36 Stan. L. Rev. 1325 (1984); Stanley Fish, Working on the Chain Gang: Interpretation in the Law and in Literary Criticism, 9 Critical Inquiry 201 (1982); Stanley Fish, Wrong Again, 62 Tex. L. Rev. 299 (1983); Ken Kress, The Interpretive Turn, 97 Ethics 834 (1987); Sanford Levinson, Law as Literature, 60 Tex. L. Rev. 373 (1982); George A. Martinez, The New Wittgensteinians and the End of Jurisprudence, 29 Loy. L.A. L. Rev. 545 (1996); Russell Pannier,

In this Essay, I will argue that much of this literature is based upon a mistake. The philosophy of language generally has no jurisprudential consequences. The fact that so many philosophers of law have thought otherwise has seriously hampered progress in the field, and not just because time, effort, and paper have been wasted. Theories about the law have been accepted or rejected for the wrong reasons—on the basis of arguments about language that fail to support or undermine these theories at all.

The philosophy of language appears to have jurisprudential consequences because of a mistake, which I will call "Dworkin's fallacy" in honor of the most famous philosopher of law to have succumbed to it. This Essay will analyze the fallacy and describe its negative effects.

In Part I, I will describe an example of a debate in the philosophy of language that has wrongly been thought to have jurisprudential consequences. This debate concerns realism about reference. Can words refer in ways that transcend our current beliefs? For example, can the word "law" refer to something that people do not currently believe is law? In Part II, I will provide two examples of philosophers of law—Ronald Dworkin and Michael Moore—who misderive jurisprudential conclusions from this debate.

In Part III, I will describe a second example of a debate in the philosophy of language that has wrongly been thought to have jurisprudential consequences. This debate, which is inspired by Ludwig Wittgenstein's remarkable discussion of rule-following, concerns the fundamental question: How is it that we can intend

D'Amato, Kripke, and Legal Indeterminacy, 27 Wm. Mitchell L. Rev. 881 (2000); Dennis Patterson, Normativity and Objectivity in Law, 43 Wm. & Mary L. Rev. 325 (2001) [hereinafter Patterson, Normativity and Objectivity]; Dennis Patterson, The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory, 72 Tex. L. Rev. 1 (1993); Dennis Patterson, Wittgenstein and Constitutional Theory, 72 Tex. L. Rev. 1837 (1994); Margaret Jane Radin, Reconsidering the Rule of Law, 69 B.U. L. Rev. 781 (1989); Pierre Schlag, Fish v. Zapp: The Case of the Relatively Autonomous Self, 76 Geo. L.J. 37 (1987); James Seaton, Law and Literature: Works, Criticism, and Theory, 11 Yale. J.L. & Human. 479 (1999); Joseph William Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L.J. 1 (1984); Mark V. Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 Harv. L. Rev. 781, 799 n.51 (1983); Louis E. Wolcher, Ronald Dworkin's Right Answers Thesis Through the Lens of Wittgenstein, 29 Rutgers L.J. 43, 47 (1997).

to use a word in one way rather than another? How can we make "law" mean *law* instead of, say, *Nilla Wafers*? In Part IV, I will provide two examples of philosophers of law—Dennis Patterson and Margaret Radin—who misderive jurisprudential conclusions from this second debate.

Although Dworkin, Moore, Patterson, and Radin agree about little in the philosophies of language and law, Dworkin's fallacy causes each to see a relationship between the two disciplines. Given the pervasiveness of the fallacy, we should be skeptical whenever a philosopher of law relies on the philosophy of language. Chances are, she is discussing issues that are irrelevant to her true concerns. I will end the Essay with a brief discussion of three situations to which Dworkin's fallacy does not apply and in which the philosophy of language has genuine, if limited, relevance for the philosophy of law.

I. FIRST QUESTION: WHAT ARE OUR WORDS ABOUT?

The first example of a debate in the philosophy of language that many have thought relevant to the philosophy of law concerns the following question: What determines a word's reference, that is, the set of things that fall under the word?

A. Traditional Theories

It is traditional in the philosophy of language to identify the meaning of a word by the set of criteria that an individual or, more commonly, a linguistic community uses to determine whether something falls under the word. For example, the meaning of "gold" is something like "heavy, yellow, ductile metal," because those are, roughly, the criteria used to determine whether something falls under the word "gold."[3] It is this mean-

[3] To say that the meaning of "gold" is a particular set of criteria is to say that occurrences of the word "gold" could be replaced by that set without a change in meaning. For example, the sentence, "Gold was discovered at Summer Hill Creek in New South Wales, Australia on February 12, 1851," would be equivalent in meaning to the sentence, "A heavy, yellow, ductile metal was discovered at Summer Hill Creek in New South Wales, Australia on February 12, 1851."

ing that determines the word's reference.[4] "Gold" refers to anything that is, in fact, a heavy, yellow, ductile metal.[5]

The traditional approach to meaning and reference is tied to essential issues of philosophical method. Philosophers often analyze, or claim to analyze, the meanings of words by making explicit the criteria that constitute these meanings. Just as "bachelor" can be analyzed as "unmarried male," philosophers analyze the meanings of more important and controversial words, such as "freedom," "knowledge," and "law." This form of analysis is intended to identify not merely what the words mean, but also what must be the case for freedom, knowledge, or law to exist in the world—that is, the existence conditions for these things.[6] Knowledge of existence conditions is analytic in the sense that it can be obtained, not through empirical investigation of the world, but solely through reflection on our knowledge of the meanings of words. The synthetic

[4] See, e.g., Brink, Legal Theory, Legal Interpretation, and Judicial Review, supra note 2, at 112–14. Gottlob Frege and Bertrand Russell adopt this traditional approach with respect to proper names. Proper names (for example, "Gottlob Frege") can be analyzed as definite descriptions (for example, "the sole author of the 1892 paper entitled 'Über Sinn und Bedeutung'"). Gottlob Frege, On Sense and Meaning, *in* Translations from the Philosophical Writings of Gottlob Frege 56, 57–58 (Peter Geach & Max Black eds., 1952); Bertrand Russell, On Denoting, *in* Logic and Knowledge: Essays 1901–1950, at 39, 41 (Robert Charles Marsh ed., 1956). The definite description theory of names is discussed in Simon Blackburn, Spreading the Word: Groundings in the Philosophy of Language 306–08 (1984); Michael Devitt & Kim Sterelny, Language and Reality: An Introduction to the Philosophy of Language 45–65 (2d ed. 1999); William G. Lycan, Philosophy of Language: A Contemporary Introduction 13–21 (2000); Mark de Bretton Platts, Ways of Meaning: An Introduction to a Philosophy of Language 135–37 (2d ed. 1997). For the view that general terms (for example, "chair") are also disguised descriptions, see Rudolf Carnap, Meaning and Necessity: A Study in Semantics and Modal Logic § 4 (2d ed. 1956); J.S. Mill, A System of Logic, Ratiocinative and Inductive: Being a Connected View of the Principles of Evidence and the Methods of Scientific Investigation 34–41 (8th ed. 1961). The description theory of general terms is discussed in Devitt & Sterelny, supra, at 83–88; Lycan, supra, at 66.

[5] This means that the reference of "gold" is not rigid—the term does not refer to the same stuff in every possible world. For example, imagine that we were in a world in which some element other than gold was a heavy, yellow, ductile metal. According to the traditional theory, "gold" would refer to this other element. For the use of such examples to criticize traditional theories of reference, see Saul A. Kripke, Naming and Necessity 116–35 (1980); Hilary Putnam, The Meaning of 'Meaning,' *in* 2 Mind, Language and Reality 215, 215–71 (1975) [hereinafter Putnam, The Meaning of 'Meaning']; Hilary Putnam, Reason, Truth and History 22–48 (1981) [hereinafter Putnam, Reason, Truth and History].

[6] See, e.g., Nicos Stavropoulos, Hart's Semantics, *in* Hart's Postscript 59, 64 (Jules Coleman ed., 2001).

sentence "Bachelors tend not to have full sets of cookware," must be discovered to be true by taking a poll of bachelors. "A bachelor is an unmarried male," however, is true because we say it is—because of individual or collective decisions to assign meanings to words.[7]

Traditionalists freely admit that analytic knowledge cannot supplant scientific inquiry because it cannot tell us whether existence conditions are actually satisfied.[8] Knowing that a person must be an unmarried male to be a bachelor is different from knowing that any particular person actually is male and unmarried. Nevertheless, analytic knowledge *is* knowledge of an important type.

Analyzing meanings does not require empirical investigation into the world, but that does not mean it is easy. We generally have only practical knowledge of the meanings of words—knowledge that gives us competence in the language. Having this practical knowledge is compatible with finding it difficult to articulate what this knowledge is. We may feel confident when we say that being unmarried and male exhaust the existence conditions of bachelorhood, thereby overlooking our practical knowledge that the Pope and two-year-old boys should not be called "bachelors."

There is another problem that only qualifies, without undermining, the philosophical project of discovering existence conditions by analyzing meanings: It may be impossible to describe exhaustively the meaning of a word. That is, it may be impossible to come up with a set of conditions, each member of which is necessary and the totality of which is sufficient, for a thing falling under a term. Instead, meanings may consist of clusters of conditions, not all of which are necessary and no specific set of which is sufficient. The applicability of the word may simply be the result of the satisfaction of a sufficiently large number of conditions within the cluster. To use Ludwig Wittgenstein's example, the standards governing the appropriate application of the word "game" do not appear to

[7] That analytic knowledge does not require empirical investigation of the world is not to say that it does not depend upon empirical inquiry of any sort. Someone analyzing meanings will have to investigate his own and others' dispositions to use words. Such investigation is presumably empirical in nature.

[8] E.g., Frank Jackson, From Metaphysics to Ethics: A Defense of Conceptual Analysis 43–44 (1998).

be reducible to a set of necessary and sufficient criteria.[9] To be sure, the following are relevant to whether something should be called a "game": specified rules, winners and losers, and entertainment for the players. Yet, examples of games can be found that fail to have these features.[10] Tossing a ball in the air can be a game even though there are no specified rules; solitaire is a game even though it has only one player; and professional football is a game even though the players' primary motivation may be financial.

Even if meanings are constituted by clusters, the project of uncovering existence conditions by analyzing meanings can still occur, albeit in a more modest fashion.[11] Criteria in a cluster are still identified, not through empirical inquiry into the world, but by reflection on our knowledge of the meaning of a word. Consider our knowledge that being an unmarried male of marriageable age, although perhaps not sufficient for bachelorhood (because the Pope is not a bachelor), is relevant to it. We arrive at this knowledge, the traditional philosopher argues, not by taking a poll of bachelors, but by reflecting on what the word "bachelor" means. It remains analytic because it can be known by anyone who has competence in using the word.

One final qualification is in order. Philosophers do not commonly analyze the entire meaning of a word. The word "law," for example, can be used to refer not merely to statutes, judicial decisions, and the like, but also to scientific or mathematical laws. Philosophers of law generally are interested in the word "law" only as applied to items of the former type.[12] Indeed philosophers almost always examine meanings that are so fine-grained (or abstract) that they will fail to correspond perfectly to the meaning of any commonly used word.[13] In such a case, the philosopher is best under-

[9] See Ludwig Wittgenstein, Philosophical Investigations §§ 71, 75 (G.E.M. Anscombe trans., 1953).

[10] Id.

[11] For the cluster theory employed with respect to proper names, see P.F. Strawson, Individuals: An Essay in Descriptive Metaphysics 180–83, 190–94 (1964); John R. Searle, Proper Names, 67 Mind 166 (1958); see also Devitt & Sterelny, supra note 4, at 50–54 (describing and criticizing Strawson's and Searle's approaches to proper names); Lycan, supra note 4, at 42–43 (describing Searle's theory).

[12] See, e.g., Jules L. Coleman & Ori Simchen, "Law," 9 Legal Theory 1, 1 n.1 (2003).

[13] See Joseph Raz, Two Views of the Nature of the Theory of Law: A Partial Comparison, *in* Hart's Postscript, supra note 6, at 1, 7–8 (expressing skepticism that any

stood as analyzing *concepts*—such as the (or a) concept of law—rather than linguistic meanings. Nevertheless, for the traditional philosopher, the analysis of concepts is not significantly different from the analysis of meanings. What falls under the concept is determined by the criteria that an individual or community uses when applying the concept.[14] For this reason, I speak of the traditional theory of the meaning (and reference) of words, even though the theory could apply equally to concepts.

B. Realist Theories

Since the 1970s, there has been a strong movement against the traditional theory—even in its more modest cluster form—in favor of theories that can be called "realist." According to these critics of the traditional theory, the reference of a word is not determined by criteria that are accepted by individuals or linguistic communities.[15] For example, whatever criteria English speakers in the sixteenth century might have had concerning the word "water," the reference of the word was determined by a criterion about which they were completely unaware. "Water" actually referred to everything that had the physical structure H_2O. Sixteenth-century criteria for using the word may have led them to call stuff that was not H_2O "water" and to refuse to call stuff that was H_2O "water," but this made no difference to the reference of the term.[16] It was the case then, as it is now, that "water" referred to anything that was, in fact, H_2O.

commonly used word would have a meaning that corresponded with a concept that would be an interesting candidate for analysis).

[14] See id. at 6–14.

[15] See, e.g., David O. Brink, Legal Interpretation, Objectivity, and Morality, *in* Objectivity in Law and Morals 12, 21 (Brian Leiter ed., 2001).

[16] For this rejection of the traditional theory with respect to proper names, see Kripke, supra note 5, at 91–97; Keith S. Donnellan, Proper Names and Identifying Descriptions, *in* Semantics of Natural Language 356 (Donald Davidson & Gilbert Harman eds., 1972). For a rejection of the traditional theory with respect to those general terms, such as "gold" or "tiger," that refer to natural kinds, see Kripke, supra note 5, at 116–35; Putnam, The Meaning of 'Meaning,' supra note 5, at 215–71; Putnam, Reason, Truth and History, supra note 5, at 22–48. Natural kind terms are general terms "that refer to natural substances or organisms, like 'gold,' 'water,' 'molybdenum,' 'tiger,' and 'aardvark.'" Lycan, supra note 4, at 66. Putnam appears to reject the traditional theory even as applied to general terms, such as "pencil," that are not natural kind terms. See Putnam, The Meaning of 'Meaning,' supra note 5, at 242–45.

Of course, there must be some connection between the reference of a word and people's beliefs about the proper use of the word. Even if it is true that what falls under the word "water" is determined by the underlying structure of some stuff in the world, the question remains *which* stuff is relevant, and it would be very strange if the relevant stuff were utterly unrelated to people's beliefs about how the word should be used.[17] Otherwise, what would keep the reference of "water" from being determined by the structure of Nilla Wafers or some unknown liquid from a distant planet?

The critics provide this connection by arguing that the relevant stuff is whatever has an appropriate causal and historical relationship to the original uses of the word.[18] "Water" refers to everything that is H_2O because the first users of "water" picked out certain stuff and that stuff has the natural physical structure of being H_2O.[19] Although language users determine the paradigm sample for "water," the structure of the paradigm sample itself determines the set of things that falls under the word. In this sense, the world determines what words refer to, which is why the critics' theory can be called "realist."

Inverting the traditional relationship between meaning and reference, the critics often argue that the reference of a word determines its meaning.[20] "Water" meant H_2O for sixteenth-century English speakers even if they would have called some other transparent, odorless, and potable liquids "water" as well. When calling this other stuff "water," they would be saying something false be-

[17] Cf. Brie Gertler, Explanatory Reduction, Conceptual Analysis, and Conceivability Arguments about the Mind, 36 Noûs 22, 29 (2002) ("[T]he subject can know, through reflection alone, how 'the substance instantiated by the items over there, or at any rate, by almost all of them' fixes the reference of her term 'gold.' Particular non-ascriptive facts (e.g., that the items over there have atomic number 79) are relevant to reference only insofar as ascriptive factors render them relevant.").

[18] See Brink, supra note 15, at 22–23.

[19] This theory of general terms (and particularly natural kind terms) is discussed in Devitt & Sterelny, supra note 4, at 88–90; Lycan, supra note 4, at 66–68. A similar theory with respect to proper names is discussed in Devitt & Sterelny, supra note 4, at 66–69; Lycan, supra note 4, at 63; Platts, supra note 4, at 133–60.

[20] E.g., Coleman & Simchen, supra note 12, at 15; Brian Leiter, Naturalism in Legal Philosophy, Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., Fall ed. 2002), at http://plato.stanford.edu/entries/lawphil-naturalism/ (July 15, 2002) (on file with the Virginia Law Review Association) ("Thus, if on the old view the 'meaning' of an expression (the descriptions speakers associated with it) fixed the reference of the expression, on the new theory, the referent fixes the meaning.").

cause they would be acting contrary to what their word "water" meant.[21]

A virtue of realism about meaning is its ability to explain how disagreement about the proper criteria for using a word can be nontrivial in nature.[22] If the meaning of "gold" is determined by an individual's criteria for applying the word "gold," then people disagreeing about the proper criteria are simply attributing different meanings to the same word. Their disagreement would be trivial since it could be resolved through simple disambiguation. We are all familiar with such trivial disagreements. If you claim that banks are where money is deposited, and I disagree, claiming that banks are strips of land immediately adjacent to bodies of water, our disagreement can be resolved simply by recognizing that the word "bank" has two different meanings. Once the word is disambiguated, there is nothing left about which to disagree. Not *all* disagreement about the proper use of a word, however, seems trivial in this sense.

There are three ways that traditional theories can make sense of nontrivial disagreement about criteria for using a word. First, even if two individuals agree in their practical knowledge of how to use a word, they can nevertheless nontrivially disagree about the proper description of that practical knowledge. I can disagree with someone who claims that "male" and "unmarried" exhaust the criteria for using the word "bachelor," on the grounds that she is misdescribing her own criteria for using the word. Like me, she would refuse to apply "bachelor" to the Pope and to two-year-old boys. Since having criteria for using a word is compatible with having poor knowledge of what these criteria are, there is ample room for

[21] It should be noted that the causal theory is a metasemantic theory, not a semantic one. It is not, for example, the theory that "water" *means* "anything that has the same structure as the first stuff pointed to in connection with the word 'water.'" See Coleman & Simchen, supra note 12, at 18. This is not to say that such a theory could not be imagined. See Devitt & Sterelny, supra note 4, at 61; Kripke, supra note 5, at 88 n.38; Gertler, supra note 17, at 25–26. But under the causal theory, the semantic content of "water" is determined by what that word refers to, namely the natural kind, H2O. The causal theory explains how a word gets the reference and thus the semantic content that it has. For a discussion of the distinction between semantic and metasemantic accounts, see David Kaplan, Afterthoughts, *in* Themes from Kaplan 565, 573–76 (J. Almog et al. eds., 1989); Coleman & Simchen, supra note 12, at 12, 18.

[22] See Brink, Legal Theory, Legal Interpretation, and Judicial Review, supra note 2, at 114–16; Brink, supra note 15, at 22.

nontrivial disagreement about criteria even if the traditional approach is correct.[23]

Furthermore, disagreement about criteria should be distinguished from disagreement about whether these criteria are in fact satisfied. Consider two people who share criteria for the use of the word "lake": They both think that something should be called a "lake" if it is a body of still water of a certain size. When looking at a shimmering image at a great distance, they may disagree about whether it should be called a "lake" because they disagree about whether the evidence is sufficient to conclude that their shared criteria are satisfied. One, being more wary about mirages, may consider the evidence insufficient, whereas the other may consider it sufficient. What appears to be trivial disagreement about the meaning of the word "lake" is in fact nontrivial disagreement about evidentiary support. The latter form of disagreement is compatible with the traditional approach.[24]

Finally, one may adhere to a communal version of the traditional theory, under which meaning is determined by the criteria accepted by a linguistic community—or by experts, whose authority on the matter is acknowledged by the members of the community.[25] In this case, disagreement between two individuals about criteria can be nontrivial because it can be about whose criteria line up with those of the linguistic community as a whole. If someone says that he has arthritis in his femur, I can disagree with his criteria for using the word "arthritis"—and legitimately refuse to accept that disambiguation dissolves the disagreement—because his criteria for the use of the word are contrary to those of the linguistic community. As far as the linguistic community is concerned, only joints—not bones—can have arthritis.[26]

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[23] E.g., Coleman & Simchen, supra note 12, at 9.

[24] E.g., Dworkin, Law's Empire, supra note 1, at 4–5.

[25] E.g., Coleman & Simchen, supra note 12, at 16–17 ("[A] committed criterialist [or traditionalist] can accommodate the phenomenon of division of linguistic labor by simply shifting on the issue of possession of content from individual speakers to the entire speech community. Thus it can still be claimed that contents are invariably extension-fixing criteria, except that it turns out that individual speakers do not typically grasp them. Individual speakers merely contribute in various ways to the entire linguistic community's 'grasp' of contents.").

[26] See, e.g., Tyler Burge, Individualism and the Mental, 4 Midwest Stud. Phil. 73 (1979); Coleman & Simchen, supra note 12, at 9.

There remains, however, a type of disagreement concerning criteria that threatens the traditional theory. Consider the disagreement between Einsteinians and Newtonians over what should be considered mass. This disagreement was not about how to describe shared criteria for use of the term. Criteria were not shared—Einsteinians used the word "mass" differently than Newtonians did.[27] Nor could their disagreement have been resolved by appealing to the criteria accepted by the linguistic community as a whole. To be sure, at one time the linguistic community used Newtonian criteria, and later it used Einsteinian criteria. The triumph of the Einsteinian over the Newtonian conception of mass, however, was far more than a decision on the part of the linguistic community to change the meaning of the word "mass."[28] Indeed, it appears that the word "mass" did not change meaning. The Newtonians simply got its meaning wrong, and the Einsteinians (we think) got it right. Even when the linguistic community was Newtonian, the minority that accepted the Einsteinian approach was correct about the proper use of the word. Meanings, it seems, are not reducible to the criteria accepted by individuals or linguistic communities. Instead, it is the world that determines what our words mean.

The realist approach threatens the traditional project of analyzing meanings, at least in connection with scientific terms. To the extent that the meaning of the word "water" is dependent upon the world, determining the existence conditions of "water" is of a piece with scientific inquiry generally. Once we have engaged in this inquiry, we are free to say that the existence condition of water is having the composition H_2O, but it becomes unclear in what sense we are doing anything but articulating, in an abstract way, certain scientific truths. We do not make certain sentences true by convention or agreement.

Of course, much more can be said about this battle, and I do not want to argue, or even suggest, that the realists have won it.[29] My

[27] For the same reason, it was not a disagreement about whether the evidence was sufficient to show that shared criteria were satisfied.

[28] See Brink, Legal Theory, Legal Interpretation, and Judicial Review, supra note 2, at 114–16; see also Michael S. Moore, A Natural Law Theory of Interpretation, 58 S. Cal. L. Rev. 277, 293–300 (1985) (criticizing the traditional theory of meaning).

[29] After all, the more meanings outstrip what we actually do with our words, the less inclined we are to think that they are the meanings of our words. Who knows where investigation of the physical structure of our world may take us? We may find out that

purpose here is solely to identify the debate between realists and traditionalists in order to explore its ramifications for the philosophy of law.

C. Interpretive Theories

A prominent example of someone who thinks the debate does have such ramifications is Ronald Dworkin. Dworkin employs arguments about meaning similar to those of the realists in order to attack the jurisprudential position that the law is exhausted by agreement or convention. In this Section, I discuss only Dworkin's views about meaning, saving what he thinks are the jurisprudential consequences of these views for Part II.

Dworkin begins his book, *Law's Empire*, by noting that there are

> two ways in which lawyers and judges might disagree about the truth of a proposition of law. They might agree about the grounds of law—about when the truth or falsity of other, more familiar propositions makes a particular proposition of law true or false—but disagree about whether those grounds are in fact satisfied in a particular case . . . . Or they might disagree about the grounds of law, about which other kinds of propositions, when true, make a particular proposition of law true.[30]

The first type of disagreement is not a problem for the traditionalist, as we have seen, because agreement about criteria for the use of the word "law" is compatible with disagreement about whether the evidence is sufficient to conclude that the criteria have been satisfied.

For the traditionalist, however, the second form of disagreement is problematic because it suggests that people are simply attributing different meanings to the word "law." The proper response

much less or much more than what we currently call "water" has the same physical structure as our paradigm sample of water. Must we therefore admit the possibility that the oceans are not composed of water or that the sun is? The realist approach, in short, may be too successful in divorcing meaning from the criteria that we actually make use of when speaking. Cf. Coleman & Simchen, supra note 12, at 36 n.43 ("[S]peakers cannot be plausibly ascribed [an intention to refer to anything having the same structure as some paradigm sample] because it requires attributing to them a robust metaphysical notion that is simply not likely to be part of their conceptual repertoire.").

[30] Dworkin, Law's Empire, supra note 1, at 4–5.

should be disambiguation. Dworkin names this problem for the traditionalist the "semantic sting."[31] The traditionalist is forced to treat such disagreement as trivial.[32] Those disagreeing "are only talking past one another. Their arguments are pointless . . . like an argument about banks when one has in mind savings banks and the other riverbanks."[33] Yet, Dworkin argues, these disagreements do not feel trivial—indeed, their resolution seems vitally important.[34]

The semantic sting is just as much a problem for the traditionalist if she claims to be analyzing a concept of law rather than the meaning of the word "law." Under the traditional approach, a concept's content is likewise determined by currently accepted criteria for applying the concept. This means that people who disagree about criteria are simply using different concepts, once again making their disagreement trivial.

We know that Dworkin thinks traditional theories of meaning are mistaken because he believes that the meaning of a word can be determinate and stable even if there is significant disagreement and changing beliefs concerning the proper criteria for the word's application.[35] Dworkin is not as forthcoming, however, about what he thinks the replacement for the traditional theory should be. One might expect him to conclude, in realist fashion, that meaning is determined by the reference of a word and that reference is fixed by the underlying essential structure of the stuff that people were pointing to when they first used the word. But Dworkin avoids such an approach, apparently because he worries about the intelli-

[31] Id. at 45–46.

[32] Id.

[33] Id. at 44.

[34] Id. at 46 (arguing that theoretical disagreements in the law are "genuine"). Of course, it remains possible that people share criteria for using the word "law" but simply disagree about the proper descriptions of these criteria. As we have seen, having practical knowledge of the meaning of a word is one thing, articulating it is another. Id. at 32. To show that people genuinely disagree about criteria for using the word "law," Dworkin must show not merely that people disagree about how these criteria should be described, but also that they disagree about what they actually call "law." Furthermore, because the traditional approach can take a communal form, Dworkin must show that the disagreement is not simply the result of an idiosyncratic individual using the word in a way that diverges from the criteria of the linguistic community. Let us assume, with Dworkin, that nontrivial disagreements about the use of the word "law" can be found that satisfy all these conditions.

[35] See, e.g., Dworkin, Introduction, supra note 1, at 8–9.

gibility of talk about metaphysically real entities with underlying structures that could fix this reference.[36]

For example, Dworkin rejects metaphysical realism in connection with moral terms as "archimedean," a theoretical approach that "purport[s] to stand outside a whole body of belief, and to judge it as a whole from premises or attitudes that owe nothing to it."[37] Although we are committed to the view that moral terms refer to qualities that are independent of our attitudes,[38] this commitment arises from and is dependent upon our attitudes themselves.[39] At the same time, Dworkin insists that differing attitudes concerning the proper use of a moral term do not mean that there is no fact of the matter about whether a term is appropriately applied.[40] Dworkin's theory of meaning must therefore be one in which the proper application of a word both is immanent to *and transcends* our current beliefs. How is this possible?

We can begin to answer this question by considering logic, where there are similar concerns about both traditionalism and metaphysical realism. Consider the following rule of deduction:[41]

If all *A*s are *B* and *x* is an *A*, then *x* is *B*.

This rule allows us to conclude that Dumbo is a mammal from the truth of, "All elephants are mammals" and, "Dumbo is an elephant." Yet how do we know that this rule is correct? Since the validity of the rule seems to depend upon the meanings of the terms

[36] Cf. Dworkin, Law's Empire, supra note 1, at 80–86 (denying the relevance of metaphysical realism about morality); Ronald Dworkin, My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk about Objectivity Any More, *in* The Politics of Interpretation 287, 291–92 (W.J.T. Mitchell ed., 1983) (rejecting realism with respect to literary meanings); id. at 297–301 (rejecting realism with respect to morality). A good discussion of Dworkin's views in this area can be found in Moore, supra note 1, at 949–51.

For an argument that the causal-historical account of reference, properly understood, does not suffer from the problems of metaphysical realism, see Coleman & Simchen, supra note 12, at 36 n.43.

[37] Ronald Dworkin, Objectivity and Truth: You'd Better Believe It, 25 Phil. & Pub. Aff. 87, 88 (1996).

[38] Id. at 97.

[39] Dworkin, Law's Empire, supra note 1, at 76–86; Dworkin, supra note 37, at 99.

[40] Dworkin, supra note 37, at 107–08.

[41] A rule of deduction is a rule according to which the conclusion must be true if the premises are true.

"all" and "if . . . then," one possibility is to argue, in traditional fashion, that its validity is simply the result of individual or collective decisions to attribute certain meanings to these terms. We simply define the terms such that inferences of this sort are valid ones.

But whoever adopts such an approach would fall prey to the semantic sting. Disagreements over which deductive rules are correct would become trivial since they could be dissolved through simple disambiguation of the terms "all" and "if . . . then." Furthermore, reform of our deductive practices in light of rules of deduction would not actually be reform at all: It would simply be the choice to replace one set of meanings for "all" and "if . . . then" with another.

Another option is to adopt a metaphysically realist approach, under which there is something standing outside of our uses of "all" and "if . . . then" that determines their meanings—and, thus, which rules of deduction are valid. This approach, however, means postulating the existence of strange Platonic entities, allness and if . . . thenness, that do not fit well into our standard scientific descriptions of the world.

The philosopher Nelson Goodman's resolution of this problem avoids both traditionalism and metaphysical realism.[42] Rules of deductive inference are justified in light of our deductive practices themselves.[43] As Goodman himself notes, "[t]his looks flagrantly circular."[44] Valid rules are supposed to reform our deductive practices. How can they do that if they are dependent upon our practices? Goodman responds that the "circle is a virtuous one":

> The point is that rules and particular inferences alike are justified by being brought into agreement with each other. A rule is amended if it yields an inference we are unwilling to accept; an inference is rejected if it violates a rule we are unwilling to amend. The process of justification is the delicate one of making

[42] Goodman discussed the problem of how we can arrive at valid rules of deductive inference in order to get a clearer picture of his primary topic: How we can arrive at valid rules of inductive inference—those rules that identify inferences under which the truth of the premises merely make the conclusion more probable. Nelson Goodman, Fact, Fiction, and Forecast (4th ed. 1983).

[43] Id. at 63.

[44] Id. at 64.

> mutual adjustments between rules and accepted inferences; and in the agreement achieved lies the only justification needed for either.[45]

When suggesting candidates for rules of deduction, we draw upon our prereflective deductive practices—that is, our common tendencies to make certain deductive inferences rather than others. No rule of deduction will be accepted as a candidate unless it is largely in accord with these practices. In this sense, reform is immanent to the practice itself. On the other hand, the reflective process of creating rules of deduction can provide us with a critical perspective on our deductive practices that will allow us to reform them. Having established rules of deduction, we may find that in certain cases our deductive practices are wrong. Our deductive practices are not reformed through contact with metaphysically real allness or if . . . thenness, but through the critically reflective character of our deductive practices themselves.

That this process is critically reflective explains why we do not conclude from the fact that our practices have been reformed that we have chosen to redefine terms like "all" or "if . . . then." We can say that the meanings of "all" and "if . . . then" are the same, despite changes in our practices of using these terms. This is because the changes are the products of critical reflection on the practices themselves, manifesting limitations within the practices that were not recognized at the time.

In his *Theory of Justice*, John Rawls, citing Goodman, uses the term "reflective equilibrium" for the analogous process of reaching a compromise between principles of justice and our prereflective practice of calling particular acts or institutions "just" and "unjust."[46] Once again, this approach navigates a course between the Scylla of a metaphysical realism about justice and the Charybdis of a traditional approach, under which any change in our criteria for using the word "just" becomes a trivial decision to give the word "just" a different meaning.

Goodman and Rawls refuse to rely upon a metaphysically realist explanation of theoretical development in their disciplines—that is, an appeal to our growing knowledge of the underlying nature of

[45] Id.

[46] John Rawls, A Theory of Justice 17–18, 18 n.7 (rev. ed. 1999).

logic-stuff and justice-stuff—because of the difficulty of figuring out just what this stuff is, and how, if it did exist, its underlying nature might constrain our linguistic practices. My purpose here is not to show that they were right. Platonism in logic may be a viable option. So may moral realism, which treats moral qualities like justness as existing, in some metaphysically strong sense, independently of human beings and their attitudes.[47]

Conversely, it may be that we have to use reflective equilibrium to explain continuity of meaning concerning scientific terms like "water." If it is impossible to explain how the underlying structure of water can guide our practice of using the word—because any response to this underlying structure will always be determined by the prereflective commitments of that practice itself—what appears to be scientific inquiry into the nature of water instead may be reflective equilibrium.[48] We can say that we have discovered the nature of water, but this may be no different from discovering the nature of justice or the correct rules of logic. It may be a reformation of our practices of using the word "water" in the context of those practices themselves. Our insistence that meaning is constant despite changes in our linguistic practices may have no more metaphysically realist implications in the case of the word "water" than it does in the case of the word "just" or "all." I do not mean to suggest that this theory of critical reflection *should* be applied to scientific terms. My point is only that it has the potential to incorporate realist intuitions about continuity of meaning within an otherwise anti-realist framework.

Because Dworkin eschews both traditionalism (as evidenced by his semantic sting argument) and metaphysical realism (as evidenced by his rejection of archimedeanism), his theory of meaning must be similar to the theory that I have outlined above.[49] A word will have constancy and determinacy of meaning, despite changes and disagreement concerning the criteria for its use, because the

[47] See, e.g., Essays on Moral Realism (Geoffrey Sayre-McCord ed., 1988); Michael S. Moore, Moral Reality Revisited, 90 Mich. L. Rev. 2424 (1992).

[48] It is unclear whether Dworkin wants to adopt an interpretive approach with respect to scientific concepts. See Moore, supra note 1, at 943 & nn.299–300.

[49] Michael S. Moore attributes a similar theory of meaning to Dworkin in Law as a Functional Kind, *in* Natural Law Theory: Contemporary Essays 188, 220–21 (Robert P. George ed., 1992).

practice of using the word evolves through critical reflection, which reforms it in light of its prereflective commitments. The meaning of the word remains the same despite changes in the practice of its use because critical reflection manifests limitations that were, in a sense, always binding the participants. Let us call this theory of meaning "interpretive."[50]

One might think it is a mistake to attribute to Dworkin *any* theory of the meaning of words, given that he distinguishes his own positions from the "semantic" approaches of his opponents.[51] In fact, Dworkin objects only to approaches in which the meaning of words is determined by currently accepted criteria for use. He understands a "semantic" approach as one that identifies "linguistic ground rules everyone must follow to make sense."[52] An interpretive theory of meaning, which denies that meaning is determined by such linguistic ground rules, is not "semantic" in this sense. Indeed, Dworkin cannot deny that he has semantic views, since the

[50] Although there is little in Dworkin's writings that can help us decide the matter, the interpretive theory of meaning is probably a metasemantic theory in the sense that it specifies how the semantic content of words is determined, not what their content is. The content of the word "law" is not "whatever criteria for using the word 'law' will result from critical reflection." The content is instead the actual set of criteria for using the word "law" that will be arrived at through critical reflection.

Jules Coleman and Ori Simchen have noted a further ambiguity in my account of the interpretive theory of meaning. E-mail from Jules L. Coleman, Wesley Newcomb Hohfeld Professor of Jurisprudence and Professor of Philosophy, Yale Law School to Michael Green, Associate Professor, George Mason University School of Law (July 6, 2003) (on file with the Virginia Law Review Association). Is the meaning of a term whatever results from the interpretive process that actually occurs or the interpretive process as it should occur (ideally) but may not? For example, if some nuclear accident halts the process of interpretation for us all, does it follow that the meanings of our words are (and always were) limited to the level of development at the moment of the accident? As an expositor of Dworkin, I am inclined toward the first approach, since Dworkin himself tends to speak of actual rather than ideal processes of interpretation. E.g., Dworkin, Law's Empire, supra note 1, at 71. But I am afraid that I must leave this issue—as well as many others—unanswered.

The goal of this Essay is to show that theories of meaning, such as Dworkin's interpretivism, cannot generate jurisprudential conclusions. To make my argument, I must provide some account of what these theories, including Dworkin's interpretivism, are. It is not necessary to give a complete account, however, much less one that would answer all possible objections—especially since I strongly suspect that many of the objections to Dworkin's theory cannot be answered.

[51] See Dworkin, Law's Empire, supra note 1, at 46, 71.

[52] Id. at 71.

semantic sting argument itself embodies a semantic view—namely an antitraditional one.[53]

I therefore conclude that Dworkin uses an interpretive theory of meaning to account for realist intuitions about the meaning of the word "law." The meaning of the word "law" can be determinate and stable even when people disagree about the proper criteria for using the word and the conventions concerning its proper use change, because the word's current meaning is determined by future critical reflection on its appropriate use.

II. DOES THE ANSWER TO THE FIRST QUESTION MATTER TO THE PHILOSOPHY OF LAW?

We can now address the essential question of this Essay: Assuming that Dworkin's interpretive theory of meaning is correct, do any interesting jurisprudential conclusions follow? Do we learn something about the law?

A. Dworkin's Fallacy

Dworkin himself believes we do. Most notably, he argues that the failure of the traditional theory of meaning (under which the meaning of the word "law" is exhausted by agreement) is a powerful objection to jurisprudential conventionalism (under which the law is exhausted by agreement).[54] This, as we shall see, is an example of Dworkin's fallacy. But Dworkin goes further. He also takes the failure of the traditional theory of meaning as a reason to ac-

[53] To be sure, Dworkin generally speaks of the process of interpretation as elaborating concepts (such as the concepts of law, courtesy, or justice) rather than linguistic meanings. See id. at 71, 92. Nevertheless, just as the traditional approach made the content of both linguistic meanings and concepts a question of currently accepted criteria, so too will the interpretive approach make the content of both linguistic meanings and concepts a question of interpretive elaboration. If a linguistic meaning captures an interpretive concept, there is no reason that interpretation will not elaborate the linguistic meaning as well as the concept. Raz, supra note 13, at 12. Indeed, Dworkin must hold an interpretive theory of the meaning of words. If the scope of our concepts were determined by interpretation and the scope of the meanings of our words were not, we would be unable to express our thoughts to one another in language. In what follows, I will speak of Dworkin's interpretive theory of meaning, even though my argument would apply equally to his interpretive theory of concepts.

[54] Dworkin, Introduction, supra note 1, at 8; Dworkin, Law's Empire, supra note 1, at 6–11, 31–43; Dworkin, Taking Rights Seriously, supra note 1, at 81.

cept his interpretive theory of the law.[55] For Dworkin, the failure of the traditional theory of meaning indicates that the practice of using the word "law" must have the capacity to reform itself critically. This capacity is what allows the word "law" to have a stable and determinate meaning. Dworkin then associates this critically reflective linguistic practice with the legal practices that are the subject matter of jurisprudence. The result is Dworkin's interpretive jurisprudence, in which critical reflection on legal practices gives the law stability and determinacy.

According to Dworkin's interpretive jurisprudence, the law consists of the set of norms that would be accepted after a process in which "the interpreter settles on some general justification for the main elements of [legal] practice" and then reforms it by "adjust[ing] his sense of what the practice 'really' requires so as better to serve the justification."[56] This adjustment is like reflective equilibrium: It is neither metaphysically realist (a response to a goal or norm standing outside of legal practice as a whole), nor conventionalist (an arbitrary decision to change the legal practice, creating a rupture in its continuity). Since it is like reflective equilibrium, there are pre-existing answers to hard cases faced by judges, despite disagreement among judges about how these cases should be decided.[57] This is because critical reflection on legal practices reveals pre-existing law, just as critical reflection on linguistic practices reveals pre-existing meaning.

Dworkin is wrong, however, to see a connection between theories of meaning and theories of law. The failure of the traditional theory of meaning and the success of the interpretive alternative give us no reason to reject conventionalism or to accept interpretivism in jurisprudence.[58]

This fact is best seen by considering words other than "law." Let us assume that the interpretive theory of meaning is true of scien-

[55] See, e.g., Dworkin, Law's Empire, supra note 1, at 87 ("We have drawn the semantic sting and no longer need the caricature of legal practice offered in semantic theories. We can see more clearly now, and this is what we see. Law is an interpretive concept like courtesy . . . .").

[56] Id. at 66.

[57] Dworkin, Taking Rights Seriously, supra note 1, at 68–69.

[58] Similar criticisms of Dworkin can be found in Jules L. Coleman, The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory 180–83 (2001); Kenneth Einar Himma, Ambiguously Stung, 8 Legal Theory 145, 160–65 (2002).

tific terms like "gold." That would mean that the proper standards for using the word "gold" are those that would result from critical reflection upon our practice of calling things "gold." This critical reflection can reveal standards that, although only latent within the linguistic practice, have always been binding upon its members. If such a view is correct, there could be a pre-existing answer to the question of whether something should be called "gold," even if there is currently fundamental disagreement about what should be called "gold."

Nevertheless, it would be absurd to conclude from the fact that the meaning of "gold" is fixed by an interpretive practice that *gold* is an interpretive practice—rather than, say, a heavy, yellow, ductile metal. If the interpretive theory of meaning is correct, one determines what should be called "gold" by participating in the interpretive practice of using the word "gold." And, at this point, such participation involves calling heavy, yellow, ductile metals—not interpretive practices—"gold."

Now consider the term "convention." An example of a convention is members of a group going to the central clock at Grand Central Station when separated during a visit to New York City, even though they had not agreed upon a place to meet under such circumstances. The central clock at Grand Central Station is the appropriate place to meet only because of convergence of belief: It is only because each member thinks of it as the appropriate place to meet—and knows that the others do as well—that it is the appropriate place to meet. To the extent that there is disagreement about the place to meet, there is no appropriate place to meet—and so no convention—at all.[59]

The interpretive theory of meaning can apply just as easily to "convention" as it can to "gold" or "law." If it does, then the mere fact that we all currently agree that something should be called a "convention" would not be a sufficient reason to think it is indeed a convention. We could be wrong about what conventions are and reform our use of the term "convention" as a result, all the while preserving its meaning. In short, the practice of using the term

[59] See Thomas C. Schelling, The Strategy of Conflict 55 (1960). For an analysis of conventions and games of coordination, see David K. Lewis, Convention: A Philosophical Study 5–82 (1969).

"convention" *would not be a convention*. Instead it would be interpretive—the standards for applying "convention" would be those that result from our critical reflection on our practice of using the term.

Nevertheless, it would be absurd to conclude from this that conventions *are not conventions*—that norms of conventions can be binding upon participants even when there is disagreement. If the interpretive theory of meaning is correct, one can figure out what should be called "convention" only by participating in the interpretive practice of using the term "convention." Such participation involves calling practices "conventions" only when and to the extent that there is agreement, without looking to norms of those practices that might arise later through critical reflection.

To be sure, the practice of using the term "convention" can be transformed through critical reflection. It is highly unlikely, however, that the practice will be transformed to such an extent that conventions will turn out not to be conventional. Because critical reflection is undertaken from the perspective of the prereflective commitments of the linguistic practice itself, any change in our conception of conventions is likely to be far less radical.

Using the interpretive theory of meaning to justify an interpretive theory of the law is no less a mistake than using it to derive an interpretive theory of gold or conventions. Yet that is exactly what Dworkin does. Let us call this mistake "Dworkin's fallacy."

Could Dworkin escape this fallacy by denying that he holds an interpretive theory of meaning or that he sees any connection between such a theory and his jurisprudential views? After all, it took a good deal of interpretation on my part to draw an interpretive theory of meaning out of Dworkin's work.[60] The law, Dworkin might argue, is interpretive, not because a theory of the meaning of the word "law" tells us so, but because independent evidence shows that legal practices do in fact reform themselves through critical reflection in a manner that reveals pre-existing law.

If this is Dworkin's argument, the semantic sting has no place within it. The purpose of the sting is to show that the traditional

[60] Furthermore, when Dworkin uses the word "interpretation," he generally uses it only in the narrow sense of critically assessing and reforming social practices. Indeed, he distinguished interpretation in this sense from reflective equilibrium. See, e.g., Dworkin, Law's Empire, supra note 1, at 424 n.17.

theory of meaning, in particular as applied to the word "law," is false. If Dworkin believes that theories of meaning have no jurisprudential consequences, why does he discuss the semantic sting in the first place? Dworkin can escape his fallacy only by arguing, contrary to all appearances, that the semantic sting is irrelevant to his real concerns.

B. Linguistic and Legal Practices Distinguished

Dworkin succumbed to his fallacy because he failed to distinguish between linguistic practices concerning our use of the word "law" and legal practices, such as adjudicating hard cases. If linguistic practices are interpretive, there are norms governing our use of words (norms that are part of their meanings) that go beyond current agreement about how the words should be used. As the example of "convention" shows, however, simply because the norms for using a word that applies *to* a practice outstrip current agreement, it does not follow that the norms *of* the practice outstrip current agreement.

In short, Dworkin's fallacy depends upon confusing the practice of describing a practice with the practice described. Therefore, it cannot take hold with respect to the term "gold." There is no chance of confusing the practice of using the word "gold" with gold—gold is a heavy, yellow, ductile metal and not a practice. Dworkin's fallacy has a slightly easier time taking hold with respect to the term "convention," since conventions are at least practices. The fact that they are clearly conventional, however, makes it hard to confuse them with the potentially nonconventional practice of using the term "convention."

Dworkin's fallacy is very tempting with respect to a word like "law," however, because legal practices may indeed be as nonconventional as the practice of describing them. It may be that the norms of legal practices are binding upon their members even before they are revealed through critical reflection on the practices. Yet, if legal practices are interpretive, the interpretive character of the linguistic practice of using the word "law" is not the reason. The interpretive theory of meaning gives us no reason to accept interpretive jurisprudence.

If the interpretive theory of meaning is true of the word "law," we can figure out which norms should be called "law" only by par-

ticipating in the interpretive practice of using that word. The result of such participation could be the conclusion that "law" is akin to "pre-existing norms revealed through critical reflection," as Dworkin believes. But it could also be something more akin to "norms currently accepted by participants," as the conventionalist believes; or "norms the violation of which are likely to lead to sanctions," as the American legal realists may have believed;[61] or "norms that satisfy independent moral requirements," as classical natural law theorists believe.[62]

Whether interpretive jurisprudence, conventionalism, legal realism, or natural law theory will be the result of critical reflection on our practice of using the word "law" is the big question in the philosophy of law. It is not my goal to address that issue here. What we do know, however, is that Dworkin's interpretive theory of meaning does nothing to answer the big question, for all of the answers to the big question are compatible with his theory.[63] Indeed,

[61] For an argument that legal realists were in fact conventionalists, see Brian Leiter, Legal Realism and Legal Positivism Reconsidered, 111 Ethics 278 (2001).

[62] E.g., John Finnis, Natural Law and Natural Rights 363–64 (1980) (discussing the Thomist position that "an unjust law is not law in the focal sense of the term 'law'"). Although Dworkin's jurisprudence can be thought of as a form of natural law theory, because conformity with moral requirements is a condition for law, the relevant moral requirements are those that can be drawn out of legal practices themselves through critical reflection. For the classical natural law theorist as I understand him, the relevant moral requirements for law are not limited in this fashion. See Coleman, supra note 58, at 158–59.

[63] It might appear as if Dworkin accepts that legal conventionalism can be the result of interpretive reflection on the practice of using the word "law." Even after rejecting conventionalist theories of the meaning of the word "law," he spends a good deal of time in *Law's Empire* offering an argument against another form of conventionalism—that is, the view that the scope of the law should be limited to currently accepted norms.

This form of conventionalism, however, is a species of interpretive jurisprudence. The argument in its favor is that, after reflecting critically upon the underlying *moral* purposes of legal practices, the norms that should be called "law" are best limited to those that are currently accepted, because it is part of the moral purpose of these practices that people's settled expectations should not be upset. Dworkin, Law's Empire, supra note 1, at 117–20. Although he argues against such conventionalism, id. at 114–50, it is still an interpretive jurisprudential approach, since the only reason legal norms do not exceed shared expectations is that moral reflection on legal practices leads to such a conclusion.

Dworkin in effect offers us only two forms of conventionalism—one that is a theory of meaning and one that is a form of interpretive jurisprudence. But there is a third alternative that he ignores: one that is interpretive as a theory of meaning but conven-

all of the answers to the big question, including Dworkin's own interpretive jurisprudence, are compatible with Dworkin's interpretive theory of meaning being false. Let us assume that the meaning of the word "law" is fixed by currently accepted criteria for using the word. It could follow from these criteria that norms should be called "law" if they result from critical moral reflection on legal practices. Although our theory of meaning would be conventionalist, our jurisprudence would be interpretive.

Finally, let us assume that independent evidence (for example, about what goes on in the adjudication of hard cases) shows that legal practices are interpretive. That is, let us assume that the participants in these practices do indeed reform them critically in light of their fundamental moral commitments. It still does not follow that the word "law" refers to those sets of norms that are revealed through such interpretation. Language is flexible; there is no reason that a word that applies to an interpretive practice must capture all of those norms that will be recognized in the unfolding of the practice. The word may capture only a subset of those norms. Conventionalist philosophers of law think that "law" is precisely such a word. It refers only to those norms that are currently accepted by participants in legal practices. Nothing about the interpretive theory of meaning can prove them wrong, even when this theory is combined with the insight that legal practices unfold interpretively.

Consider an American judge who decides hard cases by reflecting upon the underlying moral purposes of American legal practices in a Dworkinian manner. Let us concede that the norms that she arrives at through critical reflection were binding upon her and other participants in the practice even before she recognized them. It does not follow that she or anyone else should call these norms "law." When determining what she should call "law," the judge participates in the linguistic practice of using the word "law." It is the critically reflective unfolding of this practice that determines the standards for using the word "law." Rather than being called "law," Dworkin's interpretive norms might instead be properly

tionalist jurisprudentially. This third form of conventionalism concludes that the law is limited to norms that are currently accepted, not because critical moral reflection on legal practices suggests this, but because the critical unfolding of the practice of using the word "law" suggests this.

called something like "the morality of the legal practice." If so, then no matter how interpretive legal practices are, no norm would be law until it is actually accepted by judges and other officials. Adjudication in hard cases would be an act of legislation rather than discovery.[64]

C. Adjudication is a Legal Rather Than a Linguistic Practice

Avoiding Dworkin's fallacy means resolutely distinguishing between the linguistic practice of using the word "law" and legal practices. The two types of practice are different in many respects. For example, all English speakers, potentially, can participate in the practice of using the word "law." (Indeed, the practice of applying the concept of law is even broader, potentially allowing for the participation of all rational beings.[65]) The participants in this linguistic practice, however, can fail to participate in any legal practice at all, either because they live in conditions of anarchy (and use the word "law" to describe what they so desperately need) or because they are civilians, and the relevant legal practices involve officials only. Furthermore, even when people participate in both the linguistic and legal practices, the legal practices will differ from jurisdiction to jurisdiction, while the linguistic practice usually will not. English speakers can participate in the legal practices of many countries while still participating in the same linguistic practice of using the word "law."

The real temptation to lapse into Dworkin's fallacy is provided by adjudication. Adjudication can look like a linguistic practice because it concerns when the word "law" should be applied to a norm. After all, when a judge resolves a hard case, she will call the norm that resolved it "law." But adjudication is in fact a legal practice in the sense that it varies in its character from jurisdiction to jurisdiction. It also involves far more than simply applying a word:

[64] See Coleman, supra note 58, at 170–71.

[65] For examples of a comprehensive conception of a linguistic community, which includes all people whose language we could ever understand, see Jonathan Lear, The Disappearing "We," *in* 58 Proceedings of the Aristotelian Society, Supplementary Volume LVIII 219 (D.R. Sainsbury ed., 1984); Jonathan Lear, Transcendental Anthropology, *in* Subject, Thought and Context 267 (Philip Pettit & John McDowell eds., 1986); Bernard Williams, Wittgenstein and Idealism, *in* Moral Luck: Philosophical Papers 1973–1980, at 144, 144–63 (1981).

When a judge calls a norm "law," she backs it up with the coercive force of the state. The legal practice of adjudication is intimately linked to the exercise of power. In contrast, when a member of the linguistic community uses the word "law," there is no essential connection to the state's coercive power at all.

Dworkin's interpretive theory of law follows unproblematically from the interpretive theory of meaning once adjudication is misunderstood as a linguistic practice. Assume with Dworkin that, when adjudicating, judges determine whether something should be called "law" interpretively, coming to their conclusions by critically reflecting upon the practice of adjudication itself. If this practice is linguistic, then it should follow from the interpretive theory of meaning that whatever they call "law" was the law before they articulated it.

Despite the fact that the practice of adjudication involves calling certain norms "law," however, it is not the linguistic practice governing the proper use of the word "law." As strange as it may sound at first, that judges or other officials have a practice of calling certain norms "law" is irrelevant as to whether the norms are properly called "law." With the possible exception of French, the meanings of words, and thus the question of whether they are appropriately or inappropriately applied, are not decided by authorities.[66]

Assume that a linguistic community, through critical reflection, accepts the natural law view that something should not be called "law" unless it meets certain independent moral requirements.[67] Now assume that judges in a certain jurisdiction call the resolution of hard cases "law," but their resolutions are contrary to the moral requirements. If the interpretive theory of meaning is correct, then the judges would simply be wrong about what the law is. Their use of the word "law" would be deviant.

[66] The potential authority in the case of the French language is, of course, the Académie Française. See Maurice Druon, Préface á la Neuviéme Édition *to* Dictionnaire de L'Académie Française Tome 1 (9th ed. 1992); Harold F. Schiffman, Linguistic Culture and Language Policy 85–89 (1996); Leila Sadat Wexler, Official English, Nationalism and Linguistic Terror: A French Lesson, 71 Wash. L. Rev. 285, 299–301 (1996).

[67] These moral requirements, I hasten to add, are binding even when they cannot be derived through critical reflection upon legal practices.

Conversely, assume that a linguistic community, through critical reflection, comes to the conclusion that Dworkin's interpretive theory of law is correct. Now assume that our judges insist that resolutions of hard cases are not the law until they are articulated. Once again, they would be wrong. Their use of the word "law" would be deviant.

That judges' practice of calling certain norms "law" when adjudicating seems to decide what should be called "law" is simply a consequence of the fact that all of us, as participants in a linguistic community, have come to the conclusion that judges calling norms "law" is a sufficient reason to call those norms "law."

In short, even though some legal practices involve decisions to use the word "law," they are not the linguistic practices that will determine what should be called "law." This reasoning applies even when legal practices expand to the point that they include everyone within a country. The fact that everyone in the United States calls certain norms "law" is not the fundamental reason they are the law. It is not up to the citizens of the United States to determine what law exists within its borders. Instead, their practice of calling certain norms "law" is relevant to whether these norms should be called "law" only because we, as participants in a linguistic community that potentially includes all English speakers, have come to the conclusion that something is the law (of a jurisdiction) only if its citizens say it is.

If legal practices involving the use of the word "law" really were the linguistic practices that determine the meaning of the word "law," it would follow that "law" has a different meaning as one moves from one legal system to another. Predictably, Dworkin himself sometimes suggests that this is the case.[68] But this means he has turned his back on his own interpretive theory of meaning and adopted the traditional approach. The whole point of his interpretive theory of meaning is that we should not take disagreements concerning how the word "law" is used as a reason to think that the word is being used with different meanings. Instead, the meaning of the word is revealed through critical reflection that seeks to resolve these differences. The forum for this critical reflection is the language we share with members of other legal systems.

[68] See, e.g., Dworkin, Law's Empire, supra note 1, at 102–04.

D. Two Forms of Interpretation Distinguished

Another reason to believe that Dworkin has conflated linguistic and legal practices is his failure to note the very different ways in which the two types of practice are reformed through interpretation.

Consider Dworkin's example of the practice of courtesy, which he believes is analogous to legal practices in its ability to reform itself through critical interpretation.[69] Such reform occurs when people consider the underlying moral purpose of the practice (for example, respect) and change the practice in light of that purpose:

> [P]eople begin to demand, under the title of courtesy, forms of deference previously unknown or to spurn or refuse forms previously honored, with no sense of rebellion, claiming that true respect is better served by what they do than by what others did. Interpretation folds back into the practice, altering its shape, and the new shape encourages further reinterpretation, so the practice changes dramatically, though each step in the progress is interpretive of what the last achieved.[70]

Because the process is interpretive, reformers can legitimately consider past participants to have been bound by rules of courtesy that have only now been revealed. This is because the practice is not reformed in light of some external moral critique; rather, the moral critique is undertaken from the perspective of the practice itself.[71]

In contrast, people engaging in critical reflection on their linguistic practices do not reform these practices in light of the moral purposes animating them. For example, assume that establishing valid rules of deductive inference is in fact a form of critical reflection on the linguistic practices of using terms like "all" and "if . . . then." It hardly follows that rules of deduction are achieved by reflecting on the moral purpose of the practices of using these terms. It is not clear that there is such a moral purpose—the purpose of

[69] See id. at 46–49.

[70] Id. at 48.

[71] For this reason, some moral critiques of practices can fail to be interpretive. Although they may be valid from the moral perspective from which they were undertaken, if the principles of the moral critique cannot be found within the practice itself, the reform will change the practice rather than reveal its inner nature. Dworkin, Taking Rights Seriously, supra note 1, at 101–05.

the practices is instead using the terms in accordance with what they really mean. The reason that reform of these practices is interpretive is that any reform (through a discovery of what these terms really mean) is undertaken from the perspective of the prereflective commitments of these practices themselves, rather than through some contact with allness or if . . . thenness.

Critical reflection on a linguistic practice does not involve reflection on the moral purposes of the practice, even when the linguistic practice is one of using a moral term. Consider Rawls's method of reflective equilibrium.[72] The method does not proceed by uncovering the moral purpose standing behind our practice of using the words "just" and "unjust." Once again, the purpose of this practice is simply using the words "just" and "unjust" in accordance with their real meanings. There is nothing essentially just (or unjust) about this linguistic practice at all. A community could be perfectly just and yet not have the linguistic practice (because it has no words "just" or "unjust"). Conversely, an unjust community might have the linguistic practice—its members could, for example, show great facility in describing their atrocities as "unjust" and the acts of those they persecuted as "just." The practice of calling things "just" and "unjust" does not have a moral purpose the way those practices that make a society just have moral purposes.[73] What makes reform of the practice of using the word "just" interpretive is not that one reflects upon its moral purposes, but that any reform of the practice is undertaken in light of the prereflective commitments of the practice itself.

The same must hold true of our practice of using the word "law." All it means for this practice to be interpretive is that any reform (through a discovery of the real meaning of the word—whether this real meaning turns out to be conventionalism, interpretive jurisprudence, legal realism, or natural law theory) will be undertaken from the perspective of the prereflective commitments of the practice itself. Therefore, there is no reason to assume from the application of the interpretive theory of meaning to the word "law" that there should be any reflection on the moral purposes of prac-

[72] See supra notes 46–48 and accompanying text.

[73] If the linguistic practice has a moral purpose, it is surely indirect, for example, because justice itself depends practically upon being able to recognize and describe what is just and unjust.

tices of the sort that plays a crucial role in Dworkin's theory of law. Dworkin thought there was such a connection because he confused the linguistic practice of using the word "law" with the specific legal practices, particular to jurisdictions, of adjudicating cases. These latter practices, being nonlinguistic, may indeed be like courtesy and thus may be reformed through reflection on their moral purposes. But nothing about the interpretive theory of meaning tells us that this must occur or, if it does occur, that it is relevant to what should be called "law."

E. Hart's Rule of Recognition is a Legal Rather Than a Linguistic Practice

Dworkin's discussion of his primary jurisprudential rival, H.L.A. Hart, offers further evidence that he confuses linguistic and legal practices. For Hart, determining what norms should be called "law" involves looking for a rule of recognition—that is, a practice among officials of enforcing norms only if they satisfy certain criteria.[74] A crude example of a rule of recognition is the practice of enforcing only those norms inscribed on a particular tablet. If a rule of recognition is found, the laws of a jurisdiction are those norms that satisfy the criteria of the rule. In our crude example, the law would be whatever norms are mentioned on the tablet.

Hart insists that the rule of recognition is a matter of agreement among officials.[75] As a consequence, Hart's jurisprudence is conventionalist. No norm is law unless it satisfies criteria generally accepted by officials.[76]

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[74] H.L.A. Hart, The Concept of Law 94 (2d ed. 1994).

[75] Id. at 115–17. Hart in fact had no need to insist that the rule of recognition, understood as a practice, is purely conventional. He could have accepted that it evolves interpretively as Dworkin describes. The conventionalism of the practice constituting the rule of recognition is not essential to showing the conventionalism of the law. No matter how interpretive the rule of recognition is, the linguistic practice of using the word "law" may be such that we call, or should call, "law" only those norms that satisfy criteria currently accepted by participants in the rule of recognition.

[76] The interpretive theory of meaning seems to undermine conventionalist jurisprudence at this point. After all, if the interpretive theory of meaning is true, what falls under a criterion in the rule of recognition is a question that outstrips the current views of its participants. This, it seems, is incompatible with conventionalism. Hart and other conventionalists, however, could happily concede that the criteria used in the rule of recognition are not exhausted by convention. Consider the crude rule of recognition, under which every norm on a particular tablet, and nothing else, is the

In keeping with his fallacy, Dworkin assumes that the rule of recognition is a linguistic practice of what should be called "law."[77] Given this interpretation, Dworkin's conclusion that Hart suffers from the semantic sting makes sense.[78] If Hart believes that the rule of recognition is a linguistic practice and insists that the norms of this practice are exhausted by convergence in opinion, he must think that meaning is exhausted by convergence in opinion, which is incompatible with nontrivial disagreement over what should be called "law."

The rule of recognition, however, is not a linguistic practice. Average Americans generally do not participate in the American rule of recognition, but they do participate in the practice of using the word "law." The same is true of English speakers living in other jurisdictions or under conditions of anarchy. According to the interpretive theory of meaning, it is this larger practice that fundamentally determines which norms should be called "law."

Once it becomes clear that the rule of recognition is not a linguistic practice, Dworkin can no longer argue that Hart suffers from the semantic sting. Hart's conventionalism in jurisprudence is entirely compatible with anticonventionalism concerning meaning (or concepts). Hart could, and probably did, accept that his con-

law. If the interpretive theory of meaning applied to "on the tablet," what was on the tablet would not be determined by shared criteria. A norm could be on the tablet even though it would not be considered to be on the tablet by the participants in the rule of recognition. It should be obvious that this does not get us any closer to Dworkin's interpretive theory of law. Even if "on the tablet" is an unfolding interpretive concept, there is no reason to believe that the unfolding occurs through reflection upon the underlying moral purposes of legal practices. The reflection that will occur, unsurprisingly enough, will be upon what it means for something to be on the tablet.

Furthermore, applying the interpretive theory of meaning to the criteria employed in the rule of recognition is perfectly compatible with jurisprudential conventionalism. The conventionalist is not interested in denying the possibility that the scope of "on the tablet" might expand or contract through an interpretive process. The point is only that "on the tablet" is the criterion for law because of agreement.

[77] E.g., Ronald Dworkin, Thirty Years On, 115 Harv. L. Rev. 1655, 1658 (2002) (reviewing Jules Coleman, A Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory (2001)) ("Hart argued that every legal system necessarily depends on a master rule, or 'rule of recognition,' for identifying any and all valid propositions of law. This rule exists only because it is accepted (at least by officials) as a matter of convention."). The rule of recognition, Dworkin suggests, is used to determine valid (or true) propositions of law—such as "The Clean Air Act is law." This makes it a linguistic rule for applying a word (or a rule for applying a concept).

[78] Dworkin, Law's Empire, supra note 1, at 45–46.

ventionalist theory of the law was the result of critical reflection upon the practice of using the word "law" (or the concept of law).[79] Like Dworkin, Hart thought that a word could have a stable meaning, or a concept a stable content, even if there was fundamental disagreement about its use.[80]

F. Michael Moore and Dworkin's Fallacy

Dworkin is not the only philosopher of law who misperceives a connection between the debate over realism and particular positions in the philosophy of law. Another is Michael Moore.

Like Dworkin, Moore takes seriously the view that the meanings of words can outstrip current linguistic practices.[81] Moore, however, adopts a realist rather than an interpretive explanation of this phenomenon: The meanings of words have constancy, despite changes in our criteria for using the words, because of the way the world itself is.[82]

Moore identifies three types of realism concerning meaning that could be relevant to legal theory. In what he calls "first-level" realism, scientific and moral terms refer in a manner that is not dependent upon current linguistic practices.[83] As Moore puts it, "it is reality, not convention, that fixes the meaning of terms like 'intend,' 'cause,' or 'culpability.'"[84] In the second level, realism is extended to terms that arise solely in legal contexts, such as "malice." These terms too have a meaning that is fixed by something beyond agreement about use[85]—in particular, by functional kinds.[86] That a

[79] But see Stavropoulos, supra note 6, at 59 (arguing that the semantic theory Hart relied upon was in fact conventionalist).

[80] Hart, supra note 74, at 246 ("[T]he criteria of the application of a concept with a constant meaning may both vary and be controversial.").

[81] Moore, supra note 28, at 289–301.

[82] For this reason, Moore insists that Dworkin's interpretive theory of meaning is really a form of conventionalism. Michael S. Moore, Metaphysics, Epistemology and Legality, 60 S. Cal. L. Rev. 453, 457–75 (1987) (reviewing Ronald Dworkin, A Matter of Principle (1985)). Not surprisingly, Moore claims that Rawls, who uses a similar interpretive method, is a conventionalist as well. Moore, supra note 47, at 2446; see also Patterson, Law and Truth, supra note 1, at 8 n.18 (recognizing the difference between the realisms of Dworkin and Moore).

[83] E.g., Moore, supra note 1, at 882–83; Moore, supra note 28, at 294.

[84] Moore, supra note 1, at 883.

[85] Id. at 884–86.

thing falls under a functional kind term is not a question of linguistic convention; it is instead a question of whether the thing in fact performs the relevant function.

Moore goes on to argue that a "third-level . . . realist will say that 'law' itself names a functional kind and that general jurisprudence, rightly conceived, should study the nature of that kind."[87] Moore distinguishes this realism about the law from the "legal conventionalist," who

> extracts a concept of law from both ordinary language analysis of the linguistic conventions governing the use of the word 'law' and from a sociology that describes the conventional legal practices of some or all legal systems. Such conventions will exhaust her subject, leaving no room for reflection about the nature of the thing, law.[88]

In the passage quoted immediately above, Moore, like Dworkin, identifies conventionalism concerning meaning and conventionalism concerning the law. Moore's conventionalist is a conventionalist about meaning in the sense that she looks to "linguistic conventions governing the use of the word 'law'" to determine what falls under the word, and she is a jurisprudential conventionalist in the sense that conventional legal practices will "exhaust her subject." By identifying the two, Moore suggests that the failure of conventionalism concerning meaning is a reason to believe that jurisprudential conventionalism has also failed.

If that is in fact Moore's view, he has succumbed to Dworkin's fallacy. Let us assume that conventionalism about meaning is indeed false—that is, that the meaning of the word "law" is not ex-

[86] A functional kind is understood in terms of "the end served by the kind" and "the causal relations that exist so that the end is in fact served by the item performing its function." Id. at 885–86. Moore insists that realism about functional kinds is as valid as first-order realism: "If one is a realist about values and about causal relations, one should also be a realist about functional kinds, for belief in their existence is no more than an application of one's moral and scientific realism." Id. at 886. The reference of a functional kind is determined by two factors: the proper scope of the values the kind serves and the proper means of realizing those values. Because these factors are not fixed by our current beliefs, what falls under a functional kind can outstrip our current criteria for identifying such a kind.

[87] Id. at 887.

[88] Id. at 888. Since identifying functional kinds means identifying proper ends, the law has a necessarily moral dimension. Moore, supra note 49, at 188.

hausted by linguistic conventions. Indeed, let us assume that this is true of all terms.

One term for which it should be true, as we have seen, is "convention." If we hold a realist theory about the meaning of the term "convention," the nature of conventions themselves—not our shared views about how the term should be used—will determine what the term means. Just because we currently disagree about whether something should be called a "convention" does not mean that there is no fact of the matter about whether it is indeed a convention. We may learn more about conventions over time and come to see them where they were not previously visible. It would be a mistake, however, to conclude from realist theories of meaning that conventions themselves are not conventions—that their norms are not exhausted by agreement.

Since Moore's realism about meaning is applicable to the term "convention" as well as "law," this realism alone gives us no reason to believe that "law" is not closer to "convention" in meaning than it is to functional kind terms. If so, then it is still entirely possible that "conventional legal practices" will "exhaust [the legal theorist's] subject."

What we learn from Moore's realism about meaning is that the meaning of "law" is fixed by LAW out there in the world, not our beliefs about law. That, however, does not answer the question of what LAW is. Conventions exist in the world, just as much as functional kinds do. By adopting Moore's realism about meaning, we have no reason to come to any conclusion about which of those things out there in the world law is like. Not surprisingly, we can answer this question only by looking at LAW.[89]

[89] At other times, however, Moore himself warns against confusing conventionalism in meaning and conventionalism in jurisprudence, although he argues that it is the conventionalists who are confused:

Often those who adopt the conventionalist line on words like 'law' confuse two different ways in which conventions might be relevant to the meaning of 'law.' Such persons often confuse conventions being part of the nature of a thing, on the one hand, with our linguistic conventions (concepts) fixing that nature as a matter of analytic necessity, on the other. Take the phrase 'coordinated solution,' as it is used by game theorists. A coordinated solution is a convention that forms around some salient feature of a co-ordination problem. But that does not mean that the kind of thing that can be a co-ordination solution is fixed by our linguistic conventions (concepts) about the correct use of the phrase, 'co-ordination solution.' We study the nature of co-

Moore lapses into Dworkin's fallacy because he confuses the practice of using the word "law" with legal practices. Since he believes that the meaning of the word "law" is independent of the former type of practice, he falsely concludes that the law is independent of the latter.

To be fair to Moore, however, Dworkin's fallacy arises only occasionally in his works. Indeed, I will argue later that Moore provides us with examples of philosophy of language that is actually relevant to the philosophy of law. But the fact remains that Moore cannot use an anticonventionalist theory of meaning to outflank his conventionalist opponents in the philosophy of law. To think otherwise is to succumb to Dworkin's fallacy.

III. SECOND QUESTION: CAN WE INTEND TO USE A WORD ONE WAY RATHER THAN ANOTHER?

So far we have been concerned with the impact of the following debate on the philosophy of law: Is a word's reference determined by currently accepted criteria, or can it be determined by criteria of which people are unaware or about which they disagree? The second example of a debate that has wrongly been taken to have jurisprudential consequences concerns a much more fundamental problem: How can people intend to use words one way rather than another?

ordination solutions as a matter of better or worse theory; we do not study them only by attending to the concept of co-ordination solution in use in our language.

Moore, supra note 49, at 205. It is hard to imagine a clearer warning against Dworkin's fallacy than this. Indeed, I take advantage of Moore's example in this Essay.

But Moore appears to slip back into Dworkin's fallacy later. The law, he argues, can be understood as a nominal kind or as a functional kind. Id. at 206. A nominal kind is one whose "only nature is given by the common label attached to its various specimens." Id. If "law" picks out a nominal kind, "[g]eneral jurisprudence would become the study of whatever was *called* 'law' by native speakers of English as they observed their own and others' societies." Id. The alternative, he claims, is a conception of the law in which its essence is given by its function. Id. at 206–07. But retreating from a conventionalist theory of the meaning of "law" does not mean that one must understand the law as a functional kind. The possibility still remains of understanding "law" in a manner similar to the way we understand "co-ordinated solution."

A. Rule Skepticism

In *Wittgenstein on Rules and Private Language*,[90] Saul Kripke offers a powerful and startling interpretation of Wittgenstein's discussion of rule-following in *Philosophical Investigations*.[91] Kripke argues that Wittgenstein responds to a rule skeptic, who questions whether an individual can intend to use a term one way rather than another—that is, establish a rule with respect to which her subsequent use of a term can be correct or incorrect. She cannot establish such a rule, the rule skeptic argues, because no fact can be found that determines what rule she established.

Kripke first formulates rule skepticism as the following question: How can I know that one response rather than another is in accordance with my past intentions? For example, how can I know whether "125" is the correct response to the problem "68 + 57 = __," given my past understanding of the "+" function? The rule skeptic denies that there is any fact that will show that "125," and not "5," is in accordance with what I intended.

The question is not about whether my response is in accordance with the laws of mathematics or with societal conventions concerning the proper use of the symbol "+." We want to answer how I know that "125" is in accordance with the way I personally intended to use the symbol "+," even if this intention is idiosyncratic. Furthermore, the accuracy of my memory is not in question. Every fact available to me when I supposedly intended to use "+" one way rather than another is assumed to be fully available to me now. Yet, the skeptic argues, none of these facts tells me that I should respond with "125" rather than "5."

Since no fact can be found, the preliminary question gives way to the more fundamental question of whether I intended anything at all (and whether I can intend anything right now). How can there be such intentions if it can never be determined whether I am acting in accordance with them?

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[90] Saul A. Kripke, Wittgenstein on Rules and Private Language (1982).

[91] Wittgenstein, supra note 9, §§ 143–252. Kripke's interpretation of Wittgenstein has taken on a life of its own, spawning an enormous literature, even though many—and perhaps most—Wittgenstein scholars reject it as an interpretation of Wittgenstein's thought. See Paul A. Boghossian, The Rule-Following Considerations, 98 Mind 507, 507 (1989). Nothing in this Essay depends upon the validity of Kripke's reading of Wittgenstein.

To respond to the rule skeptic, it seems we must find something that happened as a result of my intention, which, if accurately recollected, will guide me to the response of "125." This fact will make the response "125" appropriate. It is, as Wittgenstein says, "as if [the responses] were in some *unique* way predetermined, anticipated—as only the act of meaning can anticipate reality."[92]

Simply appealing to my past behavior with respect to the "+" function (for example, my responses "2 + 3 = 5" or "5 + 7 = 12") is not sufficient. For this behavior is as much in accordance with a bizarre rule for which the outcome is "5" for "68 + 57 = __," as it is with a rule for which the outcome is "125." We can call this bizarre rule "quus."[93]

Kripke next looks at the mental states I had when I first established an intention concerning the symbol. He argues that facts of this sort must be interpreted in order to suggest anything, and they can just as easily be interpreted such that I should respond with "5" as "125."[94] Certainly this is true for the image of the symbol "+" itself, which might have appeared in my mind when I established an intention. I can interpret this symbol as suggesting that I respond in a quus fashion as easily as a plus fashion. The same, however, can be said for any instructions, either given verbally or in images, that I might have had at the time. I have to determine what I meant by these instructions, and nothing in the instructions themselves will favor a plus interpretation over a quus interpretation.

In short, it seems that any response to "68 + 57 = __" can be suggested by the mental states I had in the past, given the right interpretation. Therefore, no fact about my mental states in the past can tell me what I intended. If this is so, then what does it mean to intend something with respect to "+" right now? To say to myself, "I know what '+' means to me now, anyway—it means plus," is merely to bring into existence another set of indeterminate mental states. As Kripke puts it:

[92] Wittgenstein, supra note 9, § 188.

[93] Of course, taking myself to have meant quus rather than plus is incompatible with other rules I take myself to have intended at the time. I cannot have intended "+" to mean quus and intended "-" to mean minus, if my rules concerning the relationship between the "+" and the "-" symbols were as I currently believe I intended them to be. But the rule skeptic can simply apply the skeptical argument to my intentions concerning the "-" symbol and the relationship between the "+" and the "-" symbols.

[94] Kripke, supra note 90, at 11, 19–21.

> Sometimes when I have contemplated the situation, I have had something of an eerie feeling. Even now as I write, I feel confident that there is something in my mind—the meaning I attach to the "plus" sign—that *instructs* me what I ought to do in all future cases . . . . But when I concentrate on what is now in my mind, what instructions can be found there? How can I be said to be acting on the basis of these instructions when I act in the future? . . . What can there be in my mind that I make use of when I act in the future? It seems that the entire idea of meaning vanishes into thin air.[95]

There is, it seems, no way I can meaningfully suggest to myself that I do one thing rather than another.[96]

Facts about my mental states fail to answer the rule skeptic because there is nothing about them that constrains me in any way. What about answering the rule skeptic by appealing to what actually brings me to say "125"? That is, why not appeal to my disposition to respond with "125?" Intending would not be a mental state, but a tendency to act in a certain way.

The problem with the dispositional account is that it seems to follow that I cannot respond improperly. Since my intention is my disposition to respond, performance is equated with correctness. For example, I hastily perform a calculation and accidentally say that "5" rather than "125" is the answer to "68 + 57 = __." According to the dispositional theory, I will have answered in accordance with my intention, since I acted as I was disposed to.

Of course, one might try to associate my intention with only one disposition I have, excluding dispositions to make mistakes. How am I to choose which disposition this is, however, unless I antecedently know what it is I intended? Such an approach assumes a solution to the very question it was supposed to answer.

Here is one way of thinking of the problem. Although a disposition was to act as a constraint upon what I do (it was to be that with respect to which what I do could be in error), my choice of this disposition is itself something that I do. I must assume that

[95] Id. at 21–22.

[96] Boghossian, supra note 91, at 509–14. For the application of the rule skeptic's argument to the will, see Michael Steven Green, Nietzsche and the Transcendental Tradition 116–24 (2002).

what I do is not in error in order to think that I can correctly choose the disposition. If I do make this assumption, I have equated performance and correctness again. If I do not, then the dispositional account fails.[97]

B. Straight Answers: Platonism and Communitarianism

The rule skeptic's challenge is as follows: Intending one thing rather than another requires a distinction between one's subsequent responses seeming to be in accordance with one's intention and one's responses actually being in accordance with one's intention. Dispositional accounts simply equate performance (seeming to be right) with correctness (being right). Facts other than one's dispositions, such as mental states or past answers, recommend responses only when given interpretations. Since various interpretations are possible, one must assume that the interpretation one is inclined toward is correct. This means we are simply equating performance and correctness again.

Some have taken the rule skeptic's argument to recommend a form of Platonism about intentions: When one intends something, a relationship is established to a special non-natural object—a meaning or rule—and it is by virtue of our relation to it that there can be a distinction between seeming to be right and being right.[98] Non-natural meanings, unlike mental states or dispositions, carry their own interpretations within them, so to speak. This allows them to recommend responses, with respect to which one's actual responses can be correct or incorrect. The problem with Platonism, however, is making sense of how we can have any relationship to these meanings, since they appear to stand outside the natural world.[99]

[97] For an excellent discussion of the dispositional argument, see Boghossian, supra note 91, at 527–40.

[98] Id. at 547–48.

[99] Id. at 548–49; cf. Dennis Patterson, Normativity and Objectivity, supra note 2, at 325, 330–34 ("[A]nything that serves as a standard can be variously interpreted. And if a standard is amenable to various interpretations, one interpretation must be chosen. But the standard does not tell us which interpretation is the 'correct' one. Thus, the very thing (the objective standard) introduced to solve the problem serves only to recapitulate the dilemma.").

A more common response is that moving from the individual to the societal level can reintroduce the distinction between performance and correctness that is essential to rule-following.[100] What it means to act contrary to what I intended is for my actions to be checked or resisted by the rest of the community. Let us call this approach "communitarian."

It should be noted at the outset just how odd the communitarian approach is. The question it should answer is how I personally can intend to respond one way rather than another in connection with the symbol "+." It seems strange that what I intended should depend upon how others react to my responses. It is one thing to say that the *conventional meaning of* "+" is dependent upon the community's responses. If a conventional meaning has been established under which "+" means plus, then an individual who intends to use "+" in a quus fashion, and who acts in accordance with her intention, can be considered mistaken vis-à-vis the convention. On the other hand, if she acts in a plus fashion, she may be correct vis-à-vis the convention, but she would be incorrect vis-à-vis her own intention. What we are trying to explain is the latter notion—how it is that an individual can intend something in connection with "+" so that what she does later can be in or out of accordance with her own intention.

Indeed it seems that for there to be a convention, there must be a fact of the matter concerning what individuals intend. To say that there is a convention under which "+" means plus is to say, inter alia, that individual participants in the convention intend "+" to mean plus and know that the other participants do so as well. It is because of this agreement in individual intentions that a convention exists.

Our problem, therefore, is how there can be a fact of the matter concerning what individuals intend. The communitarian approach to rule-following will claim that these individual intentions—including idiosyncratic ones that are contrary to conventional meanings—are themselves determined by the community's re-

[100] Patterson, Law and Truth, supra note 1, at 14. Patterson calls this approach weak anti-realism. For a discussion of such approaches, see Boghossian, supra note 91, at 519–22. In what Patterson calls "strong" anti-realism, there is no attempt to draw a distinction between truth and falsity at all. Patterson, Law and Truth, supra note 1, at 15–16.

sponses. For example, the fact that I intended something bizarre will be determined by the fact that if I respond in a normal way, the community will check me.

A serious problem with the communitarian approach is that we seem no less inclined to draw a distinction between seeming to be right and being right on the collective level than we do on the individual level.[101] Let us assume that what it means for an individual member of the community to have intended plus rather than quus at time *t* is that when she responds with quus later, she will be checked by other members of the community. What happens when the dispositions of the community as a whole suddenly go awry, and everyone starts responding in a quus fashion? The communitarian must say that what she intended at time *t* suddenly changed from plus to quus. That seems wrong. With respect to the community, as with the individual, we draw a distinction between performance and correctness.

C. Rule-following, Meaning, and Truth

It should be evident that the rule skeptic's problem is much more fundamental than the problem addressed in Part I. If the rule skeptic is right, then no theory offered in Part I can be correct. If neither individuals nor communities can intend to do one thing rather than another in connection with a word, then the meaning of a word—however it might be characterized—is impossible.[102] Indeed, the rule skeptic's argument is a broadside attack on the very idea that we are intentional beings at all.[103] If the rule skeptic is right, we are nothing but automata, moving our limbs randomly and barking out gibberish.

[101] Patterson, Law and Truth, supra note 1, at 15 ("[I]t seems that the community can never say anything that is not true . . . . What if the entire community agrees that the earth is flat? Or that 2 + 2 = 6? Is the community correct? Are these 'truths'?").

[102] All of the approaches in Part I assume that intentions are possible. For example, for Moore's realist, these intentions are necessary to determine the paradigm samples whose underlying natures fix the reference of words. If no one can intend one thing rather than another, then neither individuals nor a community can pick out paradigm samples. Likewise, in Dworkin's interpretive theory of meaning, reflection on linguistic practices cannot occur if there are no initial intentions concerning the use of words upon which to reflect.

[103] Boghossian, supra note 91, at 509–14.

The rule skeptic's attack on linguistic meaning is also an attack on the possibility of our judgments or sentences being true (or false). If words can have no meaning, then "cat" and "mat" are no different from "kfeajwgv" and "hhhhh." If so, then, "The cat is on the mat" can be no more true or false when uttered than, "The kfeajwgv is on the hhhhh."

If one adopts a Platonist solution to the rule skeptic's problem, however, any of the accounts of a word's meaning in Part I will probably be viable. For example, let us assume that the traditional theory is correct and that a word's meaning is dependent upon the community's current criteria for using the word. These criteria are the result of a convergence of individual intentions concerning proper use of the word. What these individual intentions are, under the Platonist approach, is a question of relationships between these individuals and the Platonic meanings they intend. Therefore, although the Platonist response to rule skepticism is "realist" in a sense, since individual intention is not a matter of community response, it is compatible with the traditionalist's conventionalism about the meanings of words.

Conversely, let us assume that the realist theory is correct and that the meanings of words will depend solely on the structures of the paradigm samples identified through the first uses of the words. Which paradigm samples were first identified is a question of individuals' intentions concerning the use of the words. For the Platonist, that will be a question of relationships between individuals and Platonic entities.

If one adopts a communitarian solution to the rule skeptic's problem, however, none of the theories of meaning spelled out in Part I will look the same. All of the theories in Part I depend upon the existence of individual intentions. If these intentions are established, not by individuals, but by community responses, then, in a fundamental sense, the meaning of words—however it is characterized by the theories in Part I—will always be a question of community responses.

Furthermore, since meaning is connected to truth, there will be an important sense in which, for the communitarian, a sentence's truth is determined by how the community responds when the sentence is uttered. This is a far stronger (and stranger) claim than the traditionalist's view that certain analytic sentences (such as, "A

bachelor is an unmarried male") are true by community agreement. Even sentences that the traditionalist would consider to be determined by the nature of the world (such as, "Bachelors tend not to have full sets of cookware") will be true by virtue of shared responses. This is because the meanings of words like "bachelor" or "cookware" will be essentially determined by such responses.

D. Dennis Patterson's Dissolution of the Rule Skeptic's Problem

Dennis Patterson has offered a comprehensive attack on the two types of response to the rule skeptic's problem outlined above, which he calls "realism" and "anti-realism."[104] Patterson argues that both the realist and the anti-realist hold a "modernist" view about meaning, according to which the rule skeptic's worries about meaning must be answered. "Despite their differences, both the realist and the anti-realist claim that the meaning of our propositions *comes from somewhere*; the disagreement is not over the question of how there is meaning, only of its *source*: the world (realism) or

[104] As we have seen, see supra Section III.C, the communitarian solution to the rule skeptic's problem in the end makes not merely the content of individual intentions but also the meaning and truth of sentences in public languages a question of community responses. Undoubtedly for this reason, Patterson tends to speak of "anti-realism" simply as the view that meaning and truth in public languages are questions of agreement. E.g., Patterson, Law and Truth, supra note 1, at 12–14, 165 & n.57. This makes it easy to think that Patterson's anti-realist is simply an advocate of the traditional theory of meaning, described in Part I. This impression is reinforced by his tendency to speak of Moore's theory of meaning, which is primarily a critique of the traditional theory, as an example of "realism." E.g., id. at 44; Dennis Patterson, Conscience and the Constitution, 93 Colum. L. Rev. 270, 288–89 (1993) (reviewing Philip Bobbitt, Constitutional Interpretation (1991)).

Patterson's anti-realist thinks that meaning and truth are matters of agreement in a much stronger sense than the traditionalist. *All* sentences, not merely analytic sentences like "A bachelor is an unmarried male," are true by virtue of agreement. Indeed, I have argued that both Moore *and the traditionalist* must reject anti-realism in Patterson's sense of the term, because both assume the possibility of individual intentions to use words that do not depend upon community responses. See supra Section III.C. It appears that Patterson treats Moore's realism not merely as a rejection of traditionalism, but also as a distinctive theory of individual intentions (in which the world provides the Platonic entities that give our intentions content), because Patterson thinks Moore himself understood his theory that way. Dennis Patterson, Normativity and Objectivity, supra note 2, at 325, 331–33. Although Patterson may be right in his reading of Moore, see Moore, supra note 1, at 900–01; Moore, supra note 47, at 2495, we should keep in mind that a Pattersonian realist need not hold Moore's theory of meaning. He could instead be a traditionalist about meaning.

conventional criteria (anti-realism)."[105] Modernism about meaning also expresses itself in the desire to spell out the conditions under which our sentences are true:

> For realists, a proposition is true in virtue of some feature of the empirical, conceptual, or normative realm that makes it true . . . . The anti-realist opposes the realist picture of truth with a variety of alternative pictures. For example, conventionalists assert that there are no features of the world that make propositions true or false. Rather, truth and falsity are a function of agreement among participants in a given practice.[106]

In contrast, Wittgenstein's approach, according to Patterson, is postmodernist:

> The reason the later Wittgenstein's approach to language is so revolutionary is the fact that his attack on modernist philosophical methods breaks down the distinction between explanation and the phenomenon to be explained. All understanding occurs *in language* . . . . [t]he idea of language "corresponding" with something outside itself can never be cashed out because all talk about language is still *use of language*: no part of language can be torn apart from the whole and valorized as a "metalanguage," a superlanguage or "language about language."[107]

Rule skepticism is generated by the concern that any source of meaning can be interpreted in various ways. Yet, "interpretation is of necessity a secondary endeavor; the very existence of practices of interpretation is dependent upon understanding already being in place."[108] Therefore, rule skepticism need not, and indeed should not, be answered. To try to answer it is to try to take a position with respect to language that we cannot occupy.

Although Patterson emphasizes that the language we inhabit depends upon shared responses by members of the linguistic community, he disagrees with the anti-realist, who seeks to explain why one interpretation is correct rather than another by reference to these shared responses. Instead, Patterson argues, it is only in the

[105] Patterson, Law and Truth, supra note 1, at 167.
[106] Id. at 165.
[107] Id. at 162.
[108] Id. at 127.

context of the shared responses that various interpretations of a rule can be entertained. As a result, skepticism about meaning cannot get off the ground.[109]

Once again, I am not concerned with whether Patterson has in fact solved (or dissolved) the rule skeptic's problem or whether he has offered an adequate account of the later Wittgenstein. Let us assume that everything Patterson has said so far is correct. Our question is whether the debate between realists, anti-realists, and postmodernists has any consequences for the philosophy of law.

IV. DOES THE ANSWER TO THE SECOND QUESTION MATTER TO THE PHILOSOPHY OF LAW?

A. Patterson and Dworkin's Fallacy

Patterson clearly thinks that it does.[110] In keeping with this assumption, he offers his own postmodernist jurisprudential theory, which he believes follows from his postmodernist theory (or anti-theory) of meaning. According to the theory of meaning, knowledge is not "the grasp of a relation (truth condition) between word and object; rather, knowledge will be unpacked in terms of linguistic competence, facility in the languages of man."[111] All determination of meaning is already undertaken in the context of linguistic practices. Patterson then takes this theory of meaning to justify a theory of the law, under which the law depends upon participants having facility in practices of legal argument. Lawyers, he notes, "have no difficulty in reaching for the forms of argument to show the truth of propositions of law. The practice of law is conducted in the language of the forms: without them there is no law."[112]

[109] For the argument that Patterson is indeed an anti-realist, see Leiter, supra note 1, at 1739, 1743–45.

[110] E.g., Patterson, Law and Truth, supra note 1, at 4. It is not surprising therefore that Patterson's critique of Dworkin does not question Dworkin's conviction that there is a relationship between the philosophy of language and the philosophy of law. Id. at 6–11. Instead, Patterson argues against Dworkin's interpretive jurisprudence by arguing that his interpretive theory of meaning is disguised modernism. Similarly, Patterson argues against Moore's realist jurisprudence by revealing the modernism standing behind his realist theory of meaning.

[111] Id. at 169.

[112] Id. at 178.

This is Dworkin's fallacy all over again. Once again, the best place to start is by considering a word other than "law," like "gold."

How is it that the word "gold" can have a meaning? The rule skeptic questions the ability of an individual or group to establish an intention with respect to which subsequent uses of the word "gold" can be correct or incorrect. To be sure, we think that "gold" should be applied to heavy, yellow, ductile metals, but alternative interpretations are possible. Perhaps we intended it to refer to Nilla Wafers. Nothing can be found to constrain us such that "gold" should be applied to the former and not the latter. According to Patterson's theory of meaning, this question of what gives "gold" meaning is improper because it is posed independently of language. We cannot even begin to offer interpretations of the meaning of the word "gold" without participating in our linguistic practices concerning the word.

Let us assume that Patterson is right. It would nevertheless be a serious mistake to draw a theory of gold from this theory (or antitheory) of how "gold" gets meaning—for example, a theory under which gold itself exists only because people have facility with certain argumentative practices. Adopting Patterson's antitheory of the meaning of the word "gold" means setting aside rule skepticism and participating in the practice of using the word "gold." Such participation means speaking of gold as a heavy, yellow, ductile metal, not as something constituted by argumentative practices. Indeed, a postmodernist theory of gold is contrary to the postmodernist theory of meaning, because it would involve acting in a way that is contrary to our linguistic practices concerning the word "gold."

Patterson's argument makes the same mistake—he derives a postmodernist theory of the law from a postmodernist theory of the meaning of the word "law."[113] All that follows from his postmodernist theory of meaning is that any discussion of the meaning of "law" must set aside rule skepticism and situate itself within the framework of our practices concerning the use of the word "law." The very fact that there is controversy about what the law is, how-

[113] This problem with Patterson's legal theory is identified in Benjamin C. Zipursky, Legal Coherentism, 50 SMU L. Rev. 1679, 1694, 1708–09 (1997).

ever, means that participating in these practices only starts the debate about the law. It does not answer the debate. We can use Patterson's theory to respond to the rule skeptic who questions whether the word "law" refers to Nilla Wafers. Such skeptical questions occupy a position outside language. But once one re-enters language, there is still a debate between conventionalists, interpretivists, legal realists, and natural law theorists. None of these positions is outside language. Patterson cannot use his views in the philosophy of language, no matter how plausible they might be, to defeat his opponents in the philosophy of law.

As with Dworkin and Moore, Patterson succumbs to Dworkin's fallacy because he fails to distinguish linguistic practices from legal practices. Consider the differences between the communities at issue in his theory of the meaning of the word "law" and in his theory of the law. The community that one re-enters, after having set aside rule skepticism with regard to the word "law," is comprehensive and consists potentially of all English speakers or even all rational beings. This community includes people living in conditions of anarchy and people participating in a multitude of different legal systems. In contrast, the community with facility in forms of argument upon which the existence of the law depends under Patterson's jurisprudential theory is a community (presumably consisting of lawyers, judges, and other officials) particular to a jurisdiction.

Patterson misconcludes from the fact that the meaning of the word "law" requires participation in the first sort of practice that the law depends upon participation in the second sort of practice. The truth is that when we, as participants in the first sort of practice, immerse ourselves in it, we may conclude that the law is not a question of participation in the second practice. We may, for example, conclude with the classical natural law theorist that the law is a question of conformity with independent moral requirements.

Of course, many people are inclined to think that the law exists whenever a group of people within a jurisdiction have facility in the use of certain forms of argument involving the word "law."[114] They are inclined to accept this view, however, precisely because the linguistic community as a whole tends toward a conventionalist theory of the law, under which agreement, in a particular jurisdiction,

[114] See Leiter, supra note 1, at 1742–43.

that a norm should be called "law" is a reason for all of us to call it "law."[115] I believe Patterson's jurisprudential theory is indeed conventionalist. It is not necessary, however, to argue that here. Whatever Patterson's jurisprudential theory is, he cannot argue for it on the basis of a theory (or antitheory) about meaning.

B. The Anti-realists and Dworkin's Fallacy

Patterson is far from being the only person to misderive jurisprudential theories from philosophical responses to rule skepticism. It is common for Patterson's "anti-realists"—those who claim that rule-following is possible only because of community agreement—to conclude that the law itself is constituted in some sense by community agreement.

Margaret Radin provides a good example.[116] She begins with what she calls Wittgenstein's "social practice conception [of rules] in which agreement in responsive action is the primary mark of the existence of a rule."[117] From this she argues that a conception of legal rules follows. A legal rule "would cease to exist if we (the relevant community) stopped apprehending it as a rule and stopped recognizing ourselves and others as acting under it."[118]

Radin's theory of law is conventionalist. She argues that the existence of a legal rule is a question of convergence of belief and action within a particular community. Nothing about this theory of law, however, follows from the social practice conception of rules that she attributes to Wittgenstein. Let us assume that she is correct that "agreement in responsive action is the primary mark of the existence of a rule."[119] Understood as a response to rule skepticism, Radin must mean the following: What it is for me to intend to use "+" in a plus rather than quus fashion is for people to check my quus-like behavior. This fact will be relevant to the meaning of words in public language as well—no matter how that meaning is conceived. In some sense, the meaning of the word "law" will be a matter of how people check one another when using the word.

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[115] See Zipursky, supra note 113, at 1707–13.
[116] See Radin, supra note 2; Singer, supra note 2, at 34–35.
[117] Radin, supra note 2, at 798–801.
[118] Id. at 807.
[119] Id. at 798.

Nothing about this conception of rules, however, tells us how people will check one another. Perhaps anyone who offers Radin's conventionalist theory of the law will be met with general resistance, and those who offer a natural law theory will be accepted with open arms. If so, then under Radin's own theory of meaning her theory of law will be false. Radin, too, has fallen prey to Dworkin's fallacy.[120]

CONCLUSION: THE RELEVANCE OF THE PHILOSOPHY OF LANGUAGE TO THE PHILOSOPHY OF LAW

Given the prevalence of Dworkin's fallacy, the conviction that the philosophy of law can be usefully illuminated by issues in the philosophy of language should be seriously questioned. I believe that the influence of the philosophy of language on the philosophy of law has been largely negative. Philosophers of law would have been better off if the philosophy of language had been set aside entirely.

This is particularly true of Wittgenstein's discussion of rule-following. Although rule skepticism is a very important problem in the philosophy of language and the philosophy of mind, this importance is the very reason that it is irrelevant to the philosophy of law. The rule skeptic's argument is important because it undercuts the idea that we are intentional beings. The law is the least of our worries if the rule skeptic cannot be answered. Our primary concern should be that everything we do and say is meaningless.

Furthermore, if the rule skeptic can be answered, that answer will simply reintroduce human intentionality. This is a prerequisite

[120] Radin makes this mistake not merely because of Dworkin's fallacy, but also because she is confused about the "rules" that are at issue for Wittgenstein. Wittgenstein is concerned about our ability to establish personal intentions to respond one way rather than another in the future. Given this understanding of "rule," the communitarian position is startling: The content of our personal intentions is determined by how others respond to us. Radin appears to treat "rules" not as personal intentions, but as public conventions. So understood, the view, which she attributes to Wittgenstein, that "agreement in responsive action is the primary mark of the existence of a rule," id. at 798–801, is anything but startling. Public conventions clearly require agreement in responsive action. Having misunderstood Wittgenstein's "rules" as public conventions, Radin then argues that legal "rules" must be public conventions as well.

for many things we hold dear, including law, but its reintroduction does not cut one way or another concerning particular theories of the law.[121]

I cannot, however, make a categorical claim about the irrelevance of those positions that were explored in Part I. Rather, I will identify three circumstances where those positions can indeed be relevant to jurisprudential concerns.

A. Questions of Jurisprudential Method

If someone purports to give a theory of the law, it is not unreasonable to demand an account of what method she employs when doing so. Is she engaging in empirical inquiry, whether scientific, psychological or sociological? Or is she engaging in inquiry into the meaning of the word "law" (or the concept of law)? If it is the latter, what is her response to arguments that the purported analysis of meanings (or concepts) cannot occur?[122] There are a number of

[121] Brian Bix, The Application (and Mis-Application) of Wittgenstein's Rule-Following Considerations to Legal Theory, *in* Wittgenstein and Legal Theory, supra note 2, at 209, 211–12; Jules L. Coleman & Brian Leiter, Determinacy, Objectivity, and Authority, 142 U. Pa. L. Rev. 549, 570–72 (1993); Christopher L. Kutz, Just Disagreement: Indeterminacy and Rationality in the Rule of Law, 103 Yale L.J. 997, 1008–12 (1994).

[122] Another reason to question the possibility of the analysis of meanings is Quine's famous attack on the analytic/synthetic distinction in "Two Dogmas of Empiricism." W.V.O. Quine, Two Dogmas of Empiricism, 60 Phil. Rev. 20, 20–34 (1951); see, e.g., Brian Leiter, Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis, *in* Hart's Postscript, supra note 6, at 355, 357. Since this attack, it has been common for philosophers to at least pay lip service to the idea that analytic truth, even in its cluster version, cannot exist. But in fact this is usually just lip service, because many philosophers refuse to accept a basic premise for Quine's argument—and for good reason.

Quine attacks analyticity by attacking the idea of synonymy—that is, sameness of meaning. Quine, supra, at 20–34 . If "unmarried male" is a complete analysis of the meaning of "bachelor," then "bachelor" and "unmarried male" are synonymous. But Quine's argument against synonymy is intimately tied to his view about the radical indeterminacy of meaning generally, and philosophers are less likely to accept Quine's indeterminacy thesis. E.g., Lycan, supra note 4, at 126; Paul Boghossian, Analyticity Reconsidered, 30 Noûs 360, 360–61 (1996); William G. Lycan, Definition in a Quinean World, *in* Definitions and Definability: Philosophical Perspectives 111, 111 (J.H. Fetzer et al. eds., 1991).

If philosophers accept that there is such a thing as linguistic items having determinate meanings (even if these meanings are clustery) and that we can know these meanings, it seems odd to say that it would be impossible for us to know that two items have the same meaning. See Boghossian, supra, at 370–71 ("Could there be a

philosophers of law who are interested in these issues of jurisprudential method. For this reason, they appropriately spend time addressing issues in the philosophy of language.[123]

It is important to remember, however, that simply because the philosophy of language is relevant to questions of jurisprudential method is not a reason to believe that it can tell us what the outcome of the method will be. Imagine that someone has adequately defended the traditional method of analyzing meanings. It would be perfectly compatible with this method for her to present Dworkin's interpretive jurisprudence, or Hart's conventionalism, or legal realism, or natural law theory. Any of these could be the product of the analysis of the conventional meaning of the word "law." The same thing can be true of a philosopher of law who adequately defended a realist or an interpretive method. The philosophy of language can tell us what philosophers of law are doing when they give a theory of the law—but that is a far cry from giving us a theory of law itself.

B. Blocking or Unblocking Theories of Law

Philosophers of language have the power, or believe they have the power, to show that certain areas of discourse or methods of argument are philosophically suspect. Consider the verificationist theory of meaning offered by the logical positivists—that is, the theory that the meaning of a term consists of the conditions under which the application of the term can be empirically verified.[124]

fact of the matter about what each expression means, but no fact of the matter about whether they mean the same?"). If the items have the same meaning, then we would know they have the same meaning simply by knowing what their meanings were. The only way of preserving Quine's critique of the analytic/synthetic distinction would be to argue that, in fact, no two items in English or any other language have the same meaning. But how could Quine or anyone know this about the items of natural languages in advance of investigating the languages themselves? Indeed, it would appear that our knowledge that two occurrences of the same word—e.g. "green" and "green"—are synonymous, shows that Quine is wrong. Boghossian, supra, at 372. If meaning were indeterminate, we could not know that this was true.

[123] See, e.g., Coleman, supra note 58, at 151–217 (defending the possibility of conceptual analysis in jurisprudence); Leiter, supra note 122 (critiquing the idea of conceptual analysis).

[124] E.g., Alfred Jules Ayer, Language, Truth and Logic (1952); Carl G. Hempel, Empiricist Criteria of Cognitive Significance: Problems and Changes, *in* Aspects of Scientific Explanation and Other Essays in the Philosophy of Science 101, 109 (1965).

Verificationism casts doubt upon the meaningfulness of ethical language, as well as language about abstract objects.

If a jurisprudential theory explains what the law is by using words or methods upon which a philosophy of language has cast doubt, then the truth or falsity of that philosophy of language will clearly make a difference to the viability of the theory of the law. For example, verificationism gives us reason to doubt natural law theories, under which the law has a necessarily moral element, as well as Kelsen's pure theory of law, in which legal norms are understood as abstract objects that cannot be observed empirically.[125]

By the same token, a philosophy of law that rescues areas of discourse or methods of explanation can be relevant to the philosophy of law by unblocking a previously blocked theory of law.[126] Much of Michael Moore's discussion of the philosophy of language has this character. Moore is a strong defender of a realist account of the meaning of moral terms.[127] This discussion of the philosophy of language is relevant to his jurisprudential concerns. If law is a functional kind, the scope of the law is determined in part by the proper scope of the moral ends the law serves. Such an account is viable, however, only if we can discuss these moral ends. Moore uses the philosophy of language to show how this is possible.

For the same reason, Kelsen undertakes lengthy defenses of the meaningfulness of discourse about abstract legal objects and of our ability to know these objects.[128] These excursions into the philoso-

[125] Brian Leiter has argued that naturalism supports a legal realist approach in the philosophy of law, since legal realism is naturalist in method. Brian Leiter, Rethinking Legal Realism: Toward a Naturalized Jurisprudence, 76 Tex. L. Rev. 267 (1997). This is an example of a philosophy of law being supported by blocking alternatives. Coleman and Simchen likewise argue that their metasemantic theory of how the "law" refers "imposes constraints on what can count as a plausible answer to various jurisprudential questions." Coleman & Simchen, supra note 12, at 12. Because the word "law" (like the word "pebble") is not one whose reference is fixed by reliance upon those with expertise, Dworkin's theory of the law cannot be correct. For Dworkin's theory is one in which the reference of the word "law" is determined by the eventual development of high theory about the law. Id. at 25–28.

[126] See Zipursky, supra note 113, at 1682–1706.

[127] E.g. Moore, supra note 47, at 2424.

[128] Hans Kelsen, Introduction to the Problems of Legal Theory 9 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992) (defending the view that legal norms cannot be observed through the senses). For a discussion of Kelsen's argument, see Michael Steven Green, Hans Kelsen and the Logic of Legal Systems, 54 Ala. L. Rev. 365, 381–405 (2003).

phy of language and epistemology are necessary in the face of general doubts about abstract objects.

It is important to note, however, that the philosophy of language can do nothing to show that one unblocked theory (for example, Moore's) is better than another unblocked theory (for example, Kelsen's) or is better than a theory that has not been threatened with blockage (for example, conventionalism or legal realism). Once again, the philosophy of language cannot provide us with a theory of the law.

C. Interpreting Legal Texts

Authoritative sources of law (for example, constitutions, statutes, regulations and judicial decisions) invariably contain language, and this language must be interpreted, both by officials who seek to enforce the law and by individuals who seek to conform their behavior to its requirements. The philosophy of language can be relevant to determining the scope of reasonable interpretation. For example, if the traditional approach to meaning is correct, it would appear to follow that the author of a legal text who used the word "gold" could not refer to something other than what satisfied her, or her linguistic community's, current criteria for using the word. On the other hand, if a realist or interpretive theory of meaning is correct, broader reference would be possible. Michael Moore and David Brink are examples of philosophers of law who use realist theories of meaning to argue for forms of interpretation that do not slavishly follow the narrow beliefs of the texts' authors.[129] This is an example of how the philosophy of language can have an impact on the philosophy of law.

I doubt, however, whether different theories of meaning can have much of an impact on our theories of how legal texts should be interpreted, for two reasons. First, even though interpretive and realist theories of meaning expand the referential capacities of our language beyond what is allowed under the traditional approach, they do not make meaning and reference, as the traditionalist describes them, impossible. We may use words in a manner solely in-

[129] Brink, Legal Theory, Legal Interpretation, and Judicial Review, supra note 2, at 119–24; Moore, supra note 1, at 882–83; Moore, supra note 28, at 294.

tended to pick out what satisfies the currently accepted criteria associated with the word. Consider, for example, a constitutional amendment that obligates the United States to maintain a gold standard. As the word "gold" is used in that amendment, it is entirely possible that it is not meant to pick out GOLD—that is, what in fact falls under the word (as determined by interpretive or realist theories of meaning)—but simply the stuff that satisfies current criteria for the use of the word "gold." If we discover that tens of millions of tons of some worthless metallic substance has the same structure as the stuff we call "gold," the authors of the amendment may want us to conclude that "gold," as it was used in the amendment, does not apply to the worthless metal, despite the fact that it is GOLD.

Second, authorial intent aside, what counts as an appropriate or inappropriate interpretation of texts is often itself a question of law. Even though "gold" in the amendment might have been intended by its drafters to refer to GOLD, it may simply be the law that, when interpreting the amendment, one should look only to the narrow conception of "gold" possessed by the drafters. Indeed, there may be a statute or constitutional amendment that says, "Do not use interpretive or realist theories of meaning when interpreting legal texts!" One reason for this rule may be that such a limitation on interpretation brings with it predictability.

Since the appropriate interpretation of legal texts is itself a legal question, it is difficult to see how it is a question in the philosophy of law at all. If interpretive or realist theories have an influence on the interpretation of legal texts, it will only be because the law of a jurisdiction permits it.[130]

Setting these worries aside, Dworkin's fallacy remains a fallacy no matter how relevant the philosophy of language is to the interpretation of legal texts. One must have already answered (if only unreflectively) the question of what the law is before one can know that a text is authoritative. Which texts are relevant may vary given a conventionalist, interpretive, legal realist, or natural law theory. And the philosophy of language, as we have seen, is almost entirely irrelevant to this more fundamental question of what the law is.

[130] See Brian Bix, Can Theories of Meaning and Reference Solve the Problem of Legal Determinacy?, 16 Ratio Juris 281, 286–92 (2003).

This more fundamental question can be answered, not by the philosophy of language, but by the philosophy of law.