OXFORD

ANDREI MARMOR

THE LANGUAGE OF LAW

The Language of Law

Andrei Marmor

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First Edition published in 2014

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2013957962

ISBN 978–0–19–871453–8

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

Acknowledgments

In working on this project over the years, I have been helped by many colleagues and friends. A particular debt of gratitude I owe to Scott Soames; without his help and collaboration, in teaching, co-editing a collection on this topic, and comments on earlier drafts, I would not have managed to complete this project. I am also grateful to Gideon Yaffe, Joseph Raz, Robyn Carston, Alon Harel, David Enoch, Scott Altman, and Hrafn Asgeirsson for their comments on some earlier drafts of this work.

The book incorporates, though mostly in substantially revised form, some of my earlier publications on language and the law. In chapter 2, I used, with significant revisions, some parts of my earlier paper on the topic "Can the Law Imply More than It Says?" in Marmor & Soames, eds., *Philosophical Foundations of Language in the Law* (Oxford, 2011), ch. 5. Chapter 3 is a slightly revised version of "Truth in Law," in Freeman & Smith, eds., *Law and Language: Current Legal Issues* (Oxford, 2013), 45. In chapter 4, I used parts of a contribution I wrote for Sartor et al., eds., *Handbook of Legal Reasoning and Argumentation* (Springer, 2014). Chapter 6 is a revised version of my contribution to a symposium issue on constitutional interpretation, published in *Fordham Law Review* (82 Fordham L Rev (2013), 577).

Contents

Introduction 1

1. What Does the Law Say? 11
   1. Enactment as a Speech Act 12
   2. Pragmatic Enrichment 22
   3. Near-Side Pragmatics in Law 28

2. What Does the Law Implicate? 35
   1. Varieties of Implication 36
   2. Strategic Speech 43
   3. Strategic Speech in the Law 49

3. Truth in Law 61
   1. Propositional Content of Exhortatives 61
   2. Truth-Evaluable Content of Laws 70
   3. Imperatives without Imperator? 74
   4. The Lewis Fallacy 77

4. Varieties of Vagueness in the Law 85
   1. Varieties of Vagueness 85
   2. Vagueness in the Legal Context 92

5. Textualism in Context 107
   1. Textualism as Opposed to What? 110
   2. How Helpful Is Textualism? 117

6. Meaning and Belief in Constitutional Interpretation 131
   1. The Scalia–Dworkin Debate 132
   2. The Externalist Model: Natural Kinds 136
   3. The Internalist Model: Essentially Contested Concepts 143

4. Super-Polysemy and the Pragmatics of Conceptions 146
5. The Moral Debate and the Nature of the Conversation 150

Bibliography 157
Index 161

Introduction

There is hardly any aspect of our lives that is not regulated by law in one way or another. The legal domain is vast in quantity and varied in sources. In every modern legal system there is a huge amount of regulation—constitutional, statutory, administrative, and judicial—that aims to guide our conduct, in various capacities or roles we occupy, and for a great variety of purposes. Most of this vast amount of legal content is a direct result of enactments by legal authorities. And there is only one way in which authorities can convey the legal content they aim to introduce: by communicating in a natural language. Language is to lawyers what a piano is to the pianist: the tool of her trade. Some may use it better than others, but none can conduct their business without it. The main purpose of this book is to show that a better understanding of the tool, language in the legal case, may help us to a better understanding of the trade, that is, of how the law works and how legal directives can convey the kind of legal content they aim to convey.

There is nothing new, of course, about a philosophical interest in language in the legal context. The analytical tradition in jurisprudence has always regarded philosophy of language as an integral part of legal philosophy—and not only for the simple reason that a better understanding of linguistic communication may help us to a better understanding of legal regulation. For many decades, philosophy of language has been seen as playing a foundational role in philosophy of law, underscoring its main method, as it were, the ways in which we go about doing philosophy of law itself. But this is not what I aim to do in this book. I want to put philosophy of language to a more modest and limited use, one that is focused on linguistic communication as a means of conveying legal content. Let me use a very brief historical survey to explain this difference.

H. L. A. Hart, the forebear of the analytical tradition in jurisprudence, was quite explicit about his view that philosophy of language played a foundational role in his theory of law. But what exactly that role is remained somewhat unclear and controversial over the decades that followed the publication of his seminal work, *The Concept of Law*. Both the title of his book, and the dominating views about philosophy at the time, gave the impression that Hart regarded philosophy of law as a form of conceptual analysis, and aimed to articulate the concept of law and related concepts that play a central role in law, such as the concept of a rule, or a legal obligation and the like. Hart wrote *The Concept of Law* when the so-called ordinary-language analysis, led by Wittgenstein, Austin, and Ryle, dominated the philosophical scene at Oxbridge. These philosophers held the view that most philosophical problems arise from conceptual confusions, and that careful and nuanced analysis of concepts is the main tool philosophers have to avoid those confusions and make some philosophical progress.

Concepts were not viewed as abstract objects or things of any kind. Rather, concepts stand for the myriad ways, or "functionings," as Ryle called them,[1] in which words are used by competent speakers of a natural language in a given setting or "language game." Philosophers tried to articulate the ways in which the use of words/concepts play specific roles in making moves within an interlocking set of other concepts and arguments. To be sure, they were not looking at a set of necessary and sufficient conditions for the use of concepts. Rather, ordinary-language philosophers were looking at piecemeal examination of families of conceptual connections, and ways in which the functioning of a word is dependent on the functioning of others. Furthermore, the assumption was that conceptual connections are epistemically transparent, and should be evident to any competent user of the language in question. Because we know the meaning of the words we use as competent members of the linguistic community, we should be struck with the undeniable correctness of any genuine conceptual connection whenever presented to us by the relevant philosophical elucidation.

There is no doubt that, in some respects, Hart shared these views and saw himself as working in the tradition of his peers at Oxford at the time. However, it is far from clear how much of his work in philosophy of law is, actually, a form of conceptual analysis. There

[1] *Dilemmas*, 32.

is not much of it in *The Concept of Law*. In only a handful of places in the book, Hart actually engages in anything that can be seen as analysis of concepts or conceptual connections. As I argued elsewhere at some length, most of *The Concept of Law*, and Hart's legal philosophy in general, is concerned with the possibility of reduction. The main question for Hart was whether law, and our shared understandings of what law is, can be fully reduced to facts of a nonnormative kind. Hart's theory of law is essentially a reductionist account of law, aiming to show that the legal phenomena can be fully explained by social facts—facts about how people behave, the kind of beliefs they share about their conduct, and attitudes that tend to accompany those beliefs. Whether this reductionist project can succeed is controversial, of course, but as I argued elsewhere, I do not think there is much by way of conceptual analysis grounding it.[2]

The irony, or perhaps the source of some of the confusion, is that by the time *The Concept of Law* gained worldwide recognition in the early 1960s,[3] the ordinary-language analysis in philosophy began to lose some of its appeal. Significant advances in philosophy of language, building on earlier foundational work by Frege and Russell, started to replace the interest in Wittgenstein-style analysis of conceptual connections. Philosophers became interested in the more ambitious project of constructing a theory of meaning for natural language. The aim was to provide a general theory of what meaning consists in, how it is related to truth, and how language relates to the reality it aims to represent.[4] Davidson's truth-conditional semantics, Putnam's theory of natural kind predicates, and, more generally, the interest in the possible connections between language, truth, and reality, became the more exciting philosophical projects in philosophy of language and, in a way, they spilled over to jurisprudence as well. Nevertheless, the widely shared conception (or misconception, in my view) that analytical legal philosophy is, essentially, an attempt to elucidate the concept of law

[2] See my *Philosophy of Law*, ch. 2, and "Farewell to Conceptual Analysis (in Jurisprudence)."

[3] *The Concept of Law* was published in 1961, but it was written earlier; as we know from numerous sources, Hart worked on a draft of the book during the early 1950s but waited years (some say until after Austin's death) to publish it.

[4] The interest in a general theory of meaning did not start in the 1960s, of course; the foundational work in semantics goes back to Frege and Russell decades earlier. What happened in the late 1960s–1970s is, in a way, a resurgence of these grand theoretical ambitions, largely ignoring the later Wittgenstein anti-theory stance, and pushing aside the conceptual analysis type of philosophy that marked the Oxbridge tradition of the 1940s and 1950s.

and related legal concepts, lingered in the jurisprudential tradition for decades.[5] The advances in general theories of meaning, and particularly the connection between semantics and metaphysical realism (or anti-realism), has been employed by legal philosophers as an additional and more sophisticated tool for articulating theories about what the concept of law is and how it relates to metaphysical aspects of the normative domain. Putnam's theory of natural kinds proved particularly alluring, paving the way for legal philosophers to argue that some version of natural law can be grounded in a realist–semantic analysis of the meaning of "law" and related concepts. And then, of course, Hart's legal positivism was recast in terms of an opposing semantics, sometimes labeled conventionalism or criterial semantics, holding the view that it makes no sense to understand the concept of law on the basis of an externalist semantic theory, as if the word "law" designates some normative reality out there, irrespective of people's beliefs about the true nature of its reference.[6]

The semantic interest in law, and the perception of legal philosophy as necessarily a form of conceptual analysis, persisted even in the face of Dworkin's famous critique of this method, beginning in the 1980s. In *Law's Empire*, Dworkin argued that, in spite of Hart's explicit denials, the only way to understand his conceptual analysis is to see it as an attempt to define what the word "law" means for the linguistic community that uses it, and that conceptual analysis is essentially a semantic theory, aiming to elucidate the meaning of "law." Furthermore, Dworkin argued that Hart's analysis of law actually assumes a particular type of semantic theory, one that ties the meaning of words to some established or widely shared criteria for their correct use by members of the linguistic community in question. Dworkin claimed that this semantic project is hopelessly misguided, as it would be incapable of explaining how lawyers and judges, whose concept of "law" the theory purports to elucidate, actually have no such shared concept in mind. In fact, they explicitly disagree, often quite profoundly, about what the appropriate concept is, and certainly disagree about what would constitute the criteria for its correct use.[7]

[5] To this day, actually. See for example, S. Shapiro, *Legality*; ch. 1, J. Raz, *Between Authority and Interpretation*, 62–76.

[6] See, for example, M. Moore, "The Semantics of Judging." For more references and my own stab at this realist semantics of law, see my *Interpretation and Legal Theory* (revised 2nd ed.), ch. 5.

[7] See R. M. Dworkin, *Law's Empire*, ch. 1.

The reactions to Dworkin's critique of conceptual analysis in jurisprudence were fierce and sometimes dismissive.[8] There was a widely shared sense that Dworkin assumed a very simplistic view of the connections between meaning and definitions on the one hand, and between the meaning of words and what concepts are on the other. Hart never attempted to define what "law" means, critics pointed out, because it is not what conceptual analysis purports to do. More importantly, critics argued that criterial semantics is much more sophisticated than Dworkin had taken it to be, and that it can easily explain the kind of theoretical disagreements about the law that Dworkin alluded to. In short, the main reaction to Dworkin's critique of semantic theories of law was to defend the method of conceptual analysis by way of relying on more sophisticated semantic theories and a more nuanced approach to the relations between meaning and use.

My interest in this book, however, is not about the concept of law, and certainly not about the conditions of legal validity. The methodological question that interested Dworkin and his critics (including myself at the time), of whether language plays a foundational role in the kind of philosophy we do when trying to articulate the nature of law, is something that I will not discuss in these pages. My interest here is confined to the linguistic aspects of legal directives. Whatever else law may be, and whatever the criteria of legal validity one may favor, there is little doubt that a great part of legal content is determined by authoritative directives of legislatures, judges, administrative agencies, and the like. Whether there is more to law than authoritative directives, and the questions of what determines who is a legal authority and why, are complex issues that I have discussed elsewhere.[9] My aim in this book is to examine the boundaries between linguistic and normative considerations in the inference to legal content of statutory law, and to articulate how the linguistic determinants work, without relying on any particular theory about the nature of law, or the nature of legal philosophy, for that matter.

Philosophy is in flux, of course, and paradigms shift every few decades. The focus on theories of meaning in philosophy of language has given way, in the last few decades, to a considerably broader approach, driven by an increasing realization that pragmatic aspects of

[8] I should not exclude myself from this trend. See my *Interpretation and Legal Theory* (revised 2nd ed.), 3–8. See also J. Raz, *Between Authority and Interpretation*, ch. 2.

[9] See my *Philosophy of Law*, ch. 1–4.

communication play a much greater role in our use of language than previously thought. I am not suggesting that there is a consensus among philosophers of language about the role of pragmatic determinants of linguistic communication; in fact, even the boundaries between semantics and pragmatics are contested and debated. But there is an increasing awareness that semantic theories, sophisticated and illuminating as they may have become, are just not going to suffice to explain how people manage to convey a great deal of communicated content in their everyday linguistic interactions. Contextual knowledge shared by parties to the conversation, norms governing their mutual expectations, and sometimes other local and context-sensitive factors, are essential ingredients in the inference to communicated content on an occasion of speech. Semantics and syntax are, of course, essential vehicles of communication; their features enable and constrain what people can say to each other, but they are rarely sufficient to determine what has been actually communicated. Furthermore, as Kent Bach reminds us,[10] even when a speaker intends to convey exactly what his expression literally means, and nothing else, the speaker's intention of doing so is partly what determines what his expression conveys on that occasion of speech (after all, he could have said the same thing ironically or in jest, or merely as a hypothetical in a philosophy class). In short, an increasing interest in pragmatic (and speech-act) aspects of linguistic communication marks the last few decades in philosophy of language.

My purpose in this book is to employ some of these recent advances in philosophy of language to elucidate some key aspects of legal communication, mostly in the context of statutory law. At the same time, I hope to show that some of the unique features of communication in the legal domain—in particular, its strategic nature—can be employed to put some pressure on certain assumptions in philosophy of language, enabling a more nuanced picture of how semantic and pragmatic determinants of communication work in complex and large-scale systems such as law.

Since it is the main assumption of this book that we can make some philosophical progress by paying close attention to the kind of speech act that legal enactments are, and how they determine the content of the enacted law, the assumption that legislation is a speech act needs to be substantiated. The defense of this rather commonsensical assumption

[10] See, for example, K. Bach, "Context *ex Machina*" at 27.

forms the topic of the first part of chapter 1. The second part goes on to lay down the foundations of what communicated content might consist in, focusing on what the law says or asserts. In chapter 2, I turn to the availability of implicated content, examining the possible roles of conversational implicatures and utterance presuppositions in statutory law. The main argument of chapter 2 consists in the idea that the strategic nature of legal communication calls into question the reliability of implicated content in the law. I will try to show that both the legislatures and the courts have an interest in maintaining a certain level of uncertainty about the normative framework that governs their conversation, which allows them, at least sometimes, to manipulate content that may have been implicated but not quite asserted.

Chapter 3 takes up a familiar question, but one that has strangely received very little attention in the literature—namely, whether legal directives have any truth-evaluable or propositional content. The answer to this question is of crucial importance to our ability to explain the idea of legal inferences. If laws have no propositional content, if their communicated content is not truth-apt, then the very possibility of a legal inference becomes doubtful. Inferences must take propositions as their premises. Thus, in chapter 3, I employ a speech-act analysis to show that legal directives do have truth-evaluable content. I also deal with some structural aspects of legal inferences, drawing on some analogies with David Lewis's work on truth in fiction, to show that law is one of those cases in which, under certain conditions, the saying so makes it so.

Thus, the first three chapters set up the main theoretical framework that I suggest about the role of language in the law. The next three chapters aim to apply this framework, and the limits it sets, to some particular legal controversies, mostly in the context of statutory interpretation. Chapter 4 is devoted to the issue of vagueness in the law. I argue that vagueness of legal language comes in different forms, and those engender different kinds of normative considerations that should be brought to bear on the judicial resolution of borderline cases of vague statutory terms. The issue of vagueness in law demonstrates very nicely how linguistic and normative considerations are closely entangled in the legal context, but also how important it is to keep them separate when possible. In other words, some conclusions about the content of the law follow from linguistic considerations, but not all, and often not the important ones. Vagueness and similar linguistic indeterminacies we find in legal language demonstrate some

important limits of linguistic considerations in statutory interpretation. I try to show how those limits are drawn and how they might affect the different kinds of normative considerations called for.

In chapter 5, I turn attention to a particular theory of statutory interpretation, called *textualism*, which has gained considerable influence in recent years. Textualism is particularly interesting in the context of a linguistic analysis of statutory law because it purports to be based on it. Textualism urges judges to interpret the law only according to what the lawmakers have actually communicated by their enactment, eschewing any reliance on legislative intent and legislative purposes. In this chapter, I argue that some of the main insights of textualism are important, and assume a very sensible view about the determinants of law's assertive content, along the lines we explored in chapter 1. However, by building on the lessons we learned in chapters 2 and 4, we will come to see that textualism is not nearly as helpful a theory of statutory interpretation as its proponents claim. The general lesson here is similar to the lesson we learn from examining the role of vagueness in statutory language—namely, that linguistic determinants are important in shaping some of the questions that arise in statutory interpretation, but they are rarely sufficient for providing the answers.

A similar lesson, and more strikingly so, emerges in the context of constitutional interpretation. In chapter 6, I examine the role of the distinction between general evaluative concepts and their possible conceptions in the context of constitutional interpretation. The chapter presents two possible semantic models for understanding the *concept versus conceptions* distinction, arguing that neither of them is quite adequate to the task. By putting some pressure on the relations between the semantics and pragmatics of general evaluative concepts that we find in constitutional documents, I try to show that the main debates about constitutional interpretation cannot be detached from their underlying moral–political dimension. Before we can form any views on how to understand the language of general concepts deployed in constitutional documents, we must first form a view about the nature of the discourse that the constitution establishes, and views about the nature of the discourse crucially depend on the moral legitimacy of constitutionalism.

By focusing on the linguistic aspects of communication in law I hope to make some progress. But progress in philosophy is achieved in very small steps. I use some tools, borrowed from philosophy of language, to try to shed light on some of the questions that arise in the

context of legal interpretation. Along the way, I hope to show that in using such tools in the legal context, we may need to reexamine the tools themselves, and I suggest some modifications of them in light of the unique context that constitutes communication in law. It would be foolish, however, to assume that any one tool, fancy and useful as it may be, can solve all of the problems. They say that if you only have a hammer, everything begins to look like a nail. I certainly hope that I do not make this mistake. Philosophy of language is a very useful tool for an analysis of statutory law, but it is only one instrument, with limited availability, and part of what I aim to show here is precisely those limits.

1

What Does the Law Say?

There are many ways in which laws can be made. Legislatures enact laws according to some prescribed procedures; judges render legal decisions in a court of law, which sometimes creates new law or modifies existing law; and countless administrative agencies issue regulations according to the authority assigned to them by statute. In this book, I will take the fairly simple view that all of these lawmaking acts are *speech acts*, and that we may gain some insights and can make some philosophical progress by carefully examining what kind of speech acts they are and how they determine the content of the law. Whatever else we might want to say about the enactment of a law, I take it as no more than common sense that it is an instance of communication, whereby the legislature (or the relevant agency or the court) communicates a certain content that it aims to enact as the new law. Common sense, however, has never stood in the way of philosophical arguments. Mark Greenberg, for example, argues that "[l]egislation uses language to make law . . . [but in] doing so neither requires communication nor is well understood on the model of communication . . . Legislatures need not intend to communicate anything by enacting a bill," he says, and we "cannot simply assume that legislation requires communication."[1]

Greenberg is not alone, of course, in this skepticism about the use of philosophy of language in the legal context, though he is, probably, the most explicit about it. Dworkin has long argued that the content of the law is never determined simply by what lawmakers say; what the law is, is always mediated by some interpretation or other, which, in turn,

[1] See M. Greenberg, "Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication" at 256.