COLLECTED ESSAYS IN LAW

Dennis Patterson

Meaning, Mind and Law

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ASHGATE

Published by
Dartmouth Publishing Company Limited
Gower House
Croft Road
Aldershot
Hampshire GU11 3HR
England

Ashgate Publishing Company
Suite 420
101 Cherry Street
Burlington, VT 05401-4405
USA

Ashgate website: http://www.ashgate.com

British Library Cataloguing in Publication Data
Patterson, Dennis
Meaning, mind and law. - (Collected essays in law)
1. Law - Philosophy 2. Jurisprudence
I. Title
340.1

Library of Congress Cataloging-in-Publication Data
Meaning, mind and law / edited by Dennis Patterson.
p. cm. – (Collected essays in law)
Includes bibliographical references and index.
ISBN 978-0-7546-2749 4
1. Law–Philosophy. 2. Jurisprudence. I. Patterson, Dennis M. (Dennis Michael), 1955-

K235.M43 2008
340'.1–dc22

2007031499

ISBN 978 0 7546 2749 4

Printed in Great Britain by TJ International Ltd, Padstow, Cornwall

Acknowledgements

The editor and publisher wish to thank the following for permission to use copyrighted material.

Canadian Journal of Law and Jurisprudence for the essay: (1989) Realist Semantics and Legal Theory, *Canadian Journal of Law and Jurisprudence*, **2**, pp. 175–9.

Columbia Law Review for the essays: (1990) Law's Practice (Review of The Case Law System in America by Karl Llewellyn), *Columbia Law Review*, **90**, pp. 575–600; (1993) Conscience and the Constitution (Review of Constitutional Interpretation by Philip Bobbitt), *Columbia Law Review*, **93**, pp. 270–307.

Northwestern University Law Review for the essay: (1995) Langdell's Legacy, *Northwestern University Law Review*, **196**, pp. 196–203.

Oxford Journal of Legal Studies for the essay: (2006) Dworkin on the Semantics of Legal and Political Concepts, *Oxford Journal of Legal Studies*, **26**, pp. 545–57.

Oxford University Press for the essays: (2007) Moral Evaluation and Conceptual Analysis in Jurisprudential Methodology (with John Oberdiek), in Michael Freeman and Ross Harrison (ed.) *Law and Philosophy*, Oxford: Oxford University Press, pp. 60–75; (2006) Notes on the Methodology Debate in Contemporary Jurisprudence: Why Sociologists might be Interested, in Michael Freeman (ed.) *Law and Sociology*, Oxford: Oxford University Press, pp. 254–8.

Blackwell Publishing for the essay: (2006) Wittgenstein on Understanding and Interpretation (Comments on the work of Thomas Morawetz), *Philosophical Investigations*, **29**, pp. 129–39. Copyright © 2006 Blackwell Publishing.

San Diego Law Review for the essay: (2005) Interpretation in Law, *San Diego Law Review*, **42**, pp. 685–709. Copyright © 2005 *San Diego Law Review.*

Southern Methodist University Law Review for the essay: (1999) Explicating The Internal Point of View, *Southern Methodist University Law Review*, **52**, pp. 67–74.

Texas Law Review for the essays: (1994) Wittgenstein and Constitutional Theory, *Texas Law Review*, **72**, pp. 1837–55. (2003) Fashionable Nonsense, *Texas Law Review*, **81**, pp. 841–94.

Villanova Law Review for the essay: (1984) Interpretation in Law: Toward A Reconstruction of the Current Debate, *Villanova Law Review,* **29**, pp. 671–94.

Virginia Law Review for the essay: (1990) Law's Pragmatism: Law as Practice and Narrative, *Virginia Law Review*, **76**, pp. 937–96.

William and Mary Law Review for the essay: (2001) Normativity and Objectivity in Law, *William and Mary Law Review*, **43**, pp. 325–63.

Series Editor's Preface

Collected Essays in Law makes available some of the most important work of scholars who have made a major contribution to the study of law. Each volume brings together a selection of writings by a leading authority on a particular subject. The series gives authors an opportunity to present and comment on what they regard as their most important work in a specific area. Within their chosen subject area, the collections aim to give a comprehensive coverage of the authors' research. Care is taken to include essays and articles which are less readily accessible and to give the reader a picture of the development of the authors' work and an indication of research in progress.

Preface

The essays collected in this volume are the product of twenty-plus years reflection on the relationship of law to philosophy. Like any work in legal philosophy, my jurisprudential point-of-view is informed by a distinct approach to philosophy and its relationship to legal theory. As these essays show, my philosophical views are grounded in the work of Wittgenstein, especially that of the *Philosophical Investigations* and subsequent work. As an argumentative practice, law is especially suited to the methodology evinced in Wittgenstein's work. From rule-following to the concepts of mind and thought, Wittgenstein's work has never been more relevant to legal philosophy. I hope the essays collected here are of value to scholars in both law and philosophy.

Over the course of the last twenty years, I have had the pleasure of working with many scholars in the United States, the UK, and continental Europe. I wish to acknowledge the many kindnesses shown to me by my friends and colleagues alike. I dedicate this work to my family and to three special friends who were especially supportive of me during my darkest hour, when I was stricken with cancer in 2001. During the many months it took me to wrest back control of my life from this dreaded curse, I received constant support from my family and my friends, who all made it possible for me to endure a very difficult time. In gratitude, I dedicate this work to them.

Dedication

To

Barbara, Sarah, and Graham

and

Three Special Friends:

Philip Bobbitt

Barry Stern

&

Jefferson White

Introduction

The task of general jurisprudence is to provide an account of law that, at least in part, identifies its principal features and explains what it is about the practice of law that gives it unity and coherence. As I see it, different schools of jurisprudence distinguish themselves from one another by virtue of the different answers each gives to the question of the distinctiveness of law. John Austin provides a clear example of this with his claim that law is the command of a sovereign. Similarly, Hart's Rule of Recognition and Kelsen's *Grundnorm* are each, in their way, distinct answers to the question of the essential features of law. As Gerald Postema has pointed out, even so great a critic of positivism as Ronald Dworkin shares the view that the nature of law is best explained in terms of the "ground rules" for identifying true propositions of law. Insightfully, Postema points out that despite his criticisms of positivism, Dworkin shares the positivist view that "the unity and coherence of law . . . depend on some formal constitutive structure."[1]

In *Law and Truth*,[2] I advanced the argument that debates in contemporary analytic jurisprudence are centered around the question of what it is that makes legal propositions true. I argued against the premise of the question, that is, that the task of general jurisprudence was identifying the "something" in virtue of which propositions of law are true. My argument was that law is a complex practice of reason-giving, one that is not best explained by the reductive accounts I saw on offer from the principal participants in contemporary debates. I retain my belief both in my critique of contemporary debates and in the alternative picture of law that I developed in *Law and Truth*. The essays in this volume take the project of *Law and Truth* further. In this brief Introduction, I shall outline the general orientation for these essays and explain what work remains to provide a full alternative approach to the issues.

It is sometimes said that the claim that "law is a practice" is a platitude. Platitude or not, I believe the question is now becoming a central focus of much work in analytic jurisprudence. Even if everyone agrees that law is a certain type of practice, that agreement will not answer the question of what sort of practice law is or how best to give an account of law. As I said, I think the question of how best to explain law as a practice is becoming the question of the day. In my opinion, the best answers to this question will proceed from a more general account of the nature of practices, accounts of meaning and

1 Gerald Postema, "'Protestant' Interpretation and Social Practices," 6 *Law and Philosophy* 283, 317 (1987).

2 Dennis Patterson, *Law and Truth* (1996).

the important role of epistemology and metaphysics in the course of any explanation of the nature of law and legal practice.

My jurisprudential perspective is directly informed by the so-called "later" work of Wittgenstein, that is, the work produced after 1929.[3] Of course, there are many perspectives on Wittgenstein's work. Some have recently taken disagreement over the proper reading of the Wittgenstein corpus to curious levels of intensity and argument.[4] For my part, the later work of Wittgenstein provides the most formidable point of reference for illumination of solutions to jurisprudential issues. But there is a further point to be made in locating this point of view and explicating its details.

I take what might broadly be characterized as "social view" of the nature of meaning and normativity.[5] As I see it, normativity and meaning are the products of social practices. An explication of the normativity of practices is a useful preliminary to explication of legal practice. Thus, Wittgenstein's account of meaning, mind and practices provides much of what is needed to ground and develop a jurisprudence that proceeds from the assumption that law is a special sort of conventional, social practice. Let me start with the most salient of Wittgenstein's many examples of his views, that of rule-following.

Wittgenstein's discussion of rule-following[6] comes after his discussion of a variety of other topics that all devolve to the point that the meaning of our actions are best understood not from the point-of-view of the Cartesian inner theater but from the perspective of our collective interactions with others. It is the ineliminable social dimension of meaning that grounds Wittgenstein's treatment of meaning and its relationship to rule-following. As I show throughout the essays collected in this volume, it is the social character of linguistic meaning that provides us with the tools we need for a proper account of law and legal practice.

The social view of the nature of meaning begins with the rejection of all "realist" accounts of the nature of linguistic meaning, rule-following and understanding. As I argue in various of the papers collected here, even if there is some "thing" in virtue of which are meanings are grounded, we are still

3 Especially Ludwig Wittgenstein, *Philosophical Investigations* (G.E.M. Anscombe trans., 3d ed. 1958) (hereafter "PI").

4 I have in mind those "new Wittgensteinians" who think the best way to read Wittgenstein is from the point of view of a certain reading of the *Tractatus*. For a critique, see P.M.S. Hacker, "Was He Trying to Whistle It?," in *Wittgenstein: Connections and Controversies* 98–140 (2001).

5 The most insightful commentary on this aspect of Wittgenstein's thought is Meredith Williams, *Wittgenstein, Mind and Meaning* (1999).

6 The passages from 198 to 206 of the *Investigations* are sufficient to make my point but sections 143–242 are generally regarded as containing the entire discussion of meaning and understanding.

not free of the burden of establishing how that "thing" is to be taken and used to parse correct and incorrect applications of concepts and rules. There is no standard of correctness that comes with instructions for its own use. Even the Standard Metre requires a practice to establish its status *as* a standard, one capable of generating a norm of correctness. The point is that the norm of correctness is not to be found in the thing (e.g., the Standard Metre) but in the way in which the thing is used. Correctness and incorrectness can, of course, be quite firm. But the question is whence that hardness of (judgments of) measurement comes? What is it that makes the Standard Metre of the rule (or a rule) "firm"? The practice does that.

The problem of rule-following (i.e., what does it mean to "follow" a rule?) is bound up with the question of interpretation. An extremely popular view of rule-following is that when it comes to correctness and incorrectness, the matter is best explained as a question of "interpretation." In other words, the question whether or not one is following a rule or not is a matter of one's having "interpreted" the rule (or the norms of correctness) properly. Notwithstanding decades of debate over this question, fundamental differences remain over how best to understand Wittgenstein's position.[7]

Wittgenstein explodes the hermeneutic claim that "all understanding is interpretation" with his Infinite Regress and Paradox of Interpretation Arguments.[8] If the way to understand a rule is with an interpretation, there is no reason to stop at the first interpretation. All interpretations are just re-expressions of the rule in question, each requiring their own "interpretation" (the infinite regress argument). As Wittgenstein says, "Interpretations by themselves do not determine meaning."[9] Likewise, if every course of action can somehow be "interpreted" to fit the rule, then interpretations do not tell us anything (the paradox of interpretation argument). What to do?

It is at this juncture that skepticism gains a foothold. Having undermined the realist view of rule-following, one is pushed to the conclusion that nothing grounds meaning and rules and that skepticism about meaning is the only proper course. This was Kripke's view, famously.[10] But Wittgenstein has a different answer: he rejects both objectified meaning and the skepticism entailed by the rejection of objectified meaning.

Wittgenstein remarks: "there is a way of grasping a rule which is *not* an *interpretation*, but which is exhibited in what we call 'obeying the rule' and

7 These differences are discussed in my treatment of the work of Thomas Morawetz in "Wittgenstein on Understanding and Interpretation (Comments on the work of Thomas Morawetz)."

8 See "Normativity and Objectivity in Law."

9 PI, § 198.

10 See Saul A. Kripke, *Wittgenstein on Rules and Private Language* (1982).

'going against it' in actual cases."[11] Constraints on rule-following – the ground of correct and incorrect – arise from our actual uses of rules. Correctness and incorrectness are inculcated in the course of training. Through training, our reactions to rules are calibrated with those of others. The necessity of "agreement in judgments"[12] is the ground of normativity in that the effectiveness of rules as norms is possible only when the socialization of initiates into rule-following practices yields a collective understanding of the norms of application.

I said that Wittgenstein's account of rule-following is grounded in his account of the distinction between understanding and interpretation. Wittgenstein locates normativity in action: action is the the nerve of the distinction between understanding and interpretation ("*Im Anfang war die Tat*"). The lesson of Wittgenstein's example of the signpost in PI 85[13] is that only *action* can provide the ground for correct and incorrect judgment. Without a practice of following it – a way of acting – the signpost by itself provides us no clue as to its proper use. There are as many potential ways of "following" the signpost as there are possible conventions for determining how it is to be used and what counts as following it. But once a convention for following signposts evolves, a background of understanding evolves; for it is against this background that the need for interpretation arises.

As an account of correct and incorrect action in a practice (be it law, arithmetic, or measurement), interpretation is a non-starter because interpretation draws our attention away from the techniques that make understanding possible. Correct and incorrect forms of action are immanent in practices. Thus, correct forms of action cannot be imposed on a practice, by interpretation or otherwise. It is only when we master the techniques employed by participants in a practice that we can grasp the distinction between correct and incorrect action (e.g., in law-assertion).

The immanent nature of norms of correctness in practices provides a singularly unique focus for law. If Wittgenstein is right about practices, then his claims about the social character of normativity lead to the conclusion that

11 PI, § 201.

12 PI § 242.

13 PI § 85:

> A rule stands there like a sign-post.—Does the sign post leave no doubt open about the way I have to go? Does it shew which direction I am to take when I have passed it; whether along the road or footpath or cross-country? But where is it said which way I am to follow it; whether in the direction of its finger or (e.g.) in the opposite one?—And if there were, not a single sign-post, but a chain of adjacent ones or of chalk marks on the ground – is there only *one* way of interpreting them?—So I can say, the sign-post does after all leave no room for doubt? Or rather: it sometimes leaves room for doubt and sometimes not. And now this is no longer a philosophical proposition, but an empirical one.

the task of general jurisprudence is clarification and elucidation of the norms of correctness immanent in the practice of law. I believe the best work in this regard is Philip Bobbitt's account of the modalities of legal argument.[14] Bobbitt identifies the grammar of legal argument with such clarity that his descriptive categories are now part of the conventional account of constitutional argument. While enormously helpful, I think Bobbitt's account of legal argument is incomplete.

To complete the project of a jurisprudence informed by the later work of Wittgenstein, we need an account of interpretation in law. In this volume, I have a chapter on this topic but more needs to be done. At the moment, I am working on a completely fresh account of a jurisprudence that proceeds from the later work of Wittgenstein. A complete account of the role of interpretation in such a jurisprudence is a central feature of the project. The essays collected here are each, in their way, a preliminary effort at a synoptic account of law from the Wittgensteinian perspective. I look forward to sharing that larger work.

Dennis Patterson
Voorhees, New Jersey
July, 2007

14 See Philip Bobbitt, *Constitutional Interpretation* (1991). For my critique of Bobbitt's position, see Chapter 7 of *Law and Truth* and "Wittgenstein and Constitutional Theory" in this volume.

Contents

[1]
Moral Evaluation and Conceptual Analysis in Jurisprudential Methodology
(with John Oberdiek)

Analytic general jurisprudence has become increasingly attentive to its own methodology in recent years. No longer content with its traditional first-order questions revolving around the varieties, commitments, and defensibility of legal positivism, the discipline of jurisprudence has turned inward, asking the second-order question, How should one do jurisprudence?[1] This second-order methodological question is not unrelated to jurisprudence's traditional first-order concerns, to be sure, as the role of evaluation, and indeed the role of moral theorizing more specifically, figures prominently in the methodological inquiry much as it does in the first-order debate among positivists, interpretivists, and natural law theorists about the role that morality plays or can play as criteria of legality. But the methodology debate has a cast all its own—it is not a mere proxy war between rival positivists and their mutual foes. In the first instance, second-order methodological positions on the role of moral evaluation in jurisprudence do not correspond directly to first-order positions regarding the relationship between legality and morality. Furthermore, the methodology debate focuses on one of the few planks in nearly all of the contenders' platforms, forcing legal philosophers to justify or jettison their shared commitment to conceptual analysis. It is the purpose of this discussion to introduce the methodology debate, draw attention to the merits and shortcomings of various positions already staked out, and to contribute to the debate by, albeit briefly, defending the claims that moral evaluation has (at least) a modest role in analysing the concept of law and that conceptual analysis, or rather, many of its incarnations, is defensible and indeed inescapable in jurisprudence.

[1] See, for example, L Green, 'General Jurisprudence: A 25th Anniversary Essay' (2005) 25 OJLS 4, 575; J Dickson, 'Methodology in Jurisprudence: A Critical Survey' (2004) 10 Legal Theory 117, 117–56; J Dickson, *Evaluation in Legal Theory* (Oxford, 2001); as well as Jules Coleman, *The Practice of Principle* (New York, 2001) 179–217, which is substantially reproduced as 'Methodology,' in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (New York, 2002) 311–51.

I. A Brief History of the Debate

In his seminal 1961 book, *The Concept of Law*, HLA Hart advanced a powerful case for legal positivism, which he characterized as 'descriptive jurisprudence.'[2] A central feature of Hart's project was the clarification of legal practice through a perspicuous description of its principal features. Chief among these elements, in his view, was the conjunction of primary and secondary rules, where primary rules apply directly to citizens while secondary rules regard the identification, interpretation, and modification of primary rules. The keystone in Hart's scheme was a particular secondary rule, namely, the Rule of Recognition. The Rule of Recognition was the master rule within Hart's system because it alone provided the criteria determining whether a given rule was valid or not. Thus, by appeal to the Rule of Recognition, lawyers and non-lawyers alike could identify legal norms as legal norms and, in that way, decide what the law is on any given question.[3]

Ronald Dworkin, the most persistent critic of legal positivism, has consistently contested the possibility of the descriptive jurisprudence that Hart envisioned. One of Dworkin's central claims—advanced most systematically in his magisterial 1986 book *Law's Empire*[4]—is that 'law' is what Dworkin terms 'an interpretive concept'. Law is an interpretive concept because to understand the concept, one needs to grasp its point or purpose.[5] In Dworkin's view, one of the key dimensions of law is its coerciveness, and consequently, any explication of the concept of law must be able to explain and justify this important aspect of state action.[6] For Dworkin, justifying state coercion is a (if not *the*) fundamental task of jurisprudence. More importantly, it is an enterprise that is inescapably normative and not, *pace* Hart, merely descriptive.

The second edition of *The Concept of Law*, published posthumously in 1994, contained a rich and controversial *Postscript*, wherein Hart maintained that he and Dworkin were engaged in different philosophical enterprises, and that both enterprises were legitimate methodologies for jurisprudence. In reply, Dworkin remained unpersuaded, maintaining that his was the only appropriate methodology for jurisprudence.[7]

Thus, the debate within analytic general jurisprudence has turned increasingly to methodology, asking not 'What is law?', but, more self-consciously, 'How should one do philosophy of law?' As noted above, this second-order debate is related to the older first-order debate about the nature of law in that the methodology

[2] HLA Hart, *The Concept of Law* (2nd edn, Oxford, 1994) preface, i.

[3] See Hart, ibid 94–9 (describing the Rule of Recognition).

[4] R Dworkin, *Law's Empire* (Cambridge, MA, 1986).

[5] Dworkin, ibid 190 ('A conception of law must explain how what it takes to be law provides a general justification for the exercise of coercive power by the state. . .').

[6] Dworkin, ibid 94.

[7] R Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (2004) 24 OJLS 1. This essay is reprinted in R Dworkin, *Justice in Robes* (Cambridge, MA, 2006) 140–186.