COLLECTED ESSAYS IN LAW

Thomas Morawetz

Law's Premises, Law's Promise

Thomas Morawetz

Law's Premises, Law's Promise

Jurisprudence
after Wittgenstein

Ashgate
DARTMOUTH
Aldershot • Burlington USA • Singapore • Sydney

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

Ashgate Publishing Company
131 Main Street
Burlington
Vermont 05401
USA

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

British Library Cataloguing in Publication Data
Morawetz, Thomas
Law's Premises, Law's Promise: Jurisprudence after Wittgenstein. – (Collected Essays in Law)
1. Wittgenstein, Ludwig, 1889–1951 – Contributions in Jurisprudence 2. Law – Philosophy 3. Jurisprudence
I. Title
340.1

US Library of Congress Cataloging-in-Publication Data
Morawetz, Thomas, 1942–
Law's Premises, Law's Promise: Jurisprudence after Wittgenstein / Thomas Morawetz
p. cm. – (Collected Essays in Law 3)
1. Jurisprudence 2. Law – Philosophy 3. Wittgenstein, Ludwig, 1889–1951. I. Title II. Series
K230.M665L38 1999
340'.1 21–dc21 99–039396

ISBN 0 7546 2013 1

Printed in Great Britain by
Antony Rowe Ltd, Chippenham, Wiltshire

Introduction

1. On Method: Games, Rules, Practices

Anyone writing philosophy in the shadow of Wittgenstein is likely to be preoccupied by the metaphor of games. Wittgenstein seems to recommend that we look at familiar subjects of philosophical scrutiny, such as knowledge claims and moral judgments, on the model of games. Judgments and claims are analogous to moves within games (practices) whose rules are mutually understood and taken for granted. Accordingly, what appear to be philosophical conundrums are, it is suggested, misunderstandings of the contextual nature of the subject.

The metaphor has been influential and controversial. Philosophical writers following Wittgenstein find the metaphor inescapable and inexhaustible. And they may find it as intriguing and seductive for what it conceals as for what it illuminates.

The phrase 'language game' is associated with Wittgenstein. The phrase is misleading if it implies that his interest is primarily with moves in language. To be sure, language is our main medium of communication, and Wittgenstein draws our attention to the publicity of language. But the shared practices that involve language are shared practices of understanding, interpreting, and experiencing. Thus, the shared practices that a philosopher, following Wittgenstein's example, must explicate are habits or modes of cognition, behavior, and feeling as much as they are dispositions to use language.

It is obvious that we use language to speak about language. On such occasions, we are both inside and outside a particular language, inside insofar as we are practitioners or users of it, outside insofar as we make it the object of scrutiny. This inside/outside circumstance may be complex, but it is hardly puzzling or paradoxical.

Philosophical investigations embody a problematic form of this situation. Our modes of understanding and experience are practices that we come to identify with our nature. They are so familiar that we may appropriately be bewildered if asked to describe them. And yet philosophy is the

activity of giving just such descriptions. Indeed, the philosophical task is hard for several reasons.

First, we tend to see our values and modes of understanding as marks of our individuality, elaborations of our nature, features of a private domain of thought and feeling. In considering the extent to which the things we say and think are practices bounded by rules, we are forced to rethink the private/public relationship. We learn from others what counts as a 'move' in discourse, what counts as evidence or justification for a knowledge claim or for an assertion of value. How we think about these matters is mirrored by what we are disposed to say, and what we are disposed to say constitutes a learned practice that is public and shared with others.

Such practices are describable as rule-governed. But the notion of a rule in this context is itself complex and problematic. We can set down the rules of chess or baseball with some hope of objectivity and completeness. But any similar hope vis-a-vis the 'rules' of value discourse and inquiry is likely to seem illusory.

A second reason that the philosophical task is daunting is the complexity of the relevant practices. Once we concede the relevance of the metaphors of games and rules, we begin to appreciate how many and varied are the moves that must be explained. For example, an account of the 'game' of value discourse-and-thinking must not only describe the criteria of good and bad acts, of good and bad persons, and of rightness and wrongness. It must not only describe relations among these notions. It must also, in tacit acknowledgment of the controversial character of these matters, explain the 'rules' for agreeing and disagreeing about such matters. It must account for instances of both closure and unresolvability in such disagreements. It must distinguish between unintelligible judgments, intelligible and disputable judgments, and uncontroversial ones. And it must explain the scope and nature of disagreements about these second-order questions.

Besides all this, it must give an account of how we think and talk about value systems that are not our own, those of other times and cultures. It must explain when and why such 'alien' systems sometimes lead us to change our own way of proceeding and sometimes do not. And it must explain debates about the very nature and purpose of value inquiry and judgment insofar as such debates are events in the practice itself.

In brief, the 'game' or practice of value discourse-and-thinking is fluid, multi-leveled, and self-reflective. It is fluid insofar as different players may play by somewhat different rules but are capable of recognizing and addressing the fact that they are doing so. Virtually every situation of moral judgment can give rise to disagreement. Thus, 'players' are playing the same game not because they are playing by the same rules but because they are capable of recognizing and acknowledging the variations among their individual styles of play.

The practice is multi-leveled insofar as rules for making judgments coexist with rules for examining the process of making judgments. Rules

for disagreeing coexist with rules for understanding such disagreements and the existing strategies for resolution, and so on. The practice is self-reflective insofar as moves within the practice meld indistinguishably with moves in discourse *about* the practice. We make moral judgments often in full awareness of our disagreements about both the methods and the point of making moral judgments. We discuss moral judgments prepared to slip into a defense of and a debate about those methods, that point.

It follows that the third reason philosophy is hard is that our practices are works in progress, moving targets. These practices themselves – making value judgments, gaining knowledge – are constantly under re- and deconstruction. Each of us as player/practitioner inhabits a place within these practices. Each of us is prepared to carry out a particular way of playing, assessing evidence, drawing conclusions, trying to resolve disagreements, and each of us is prepared to defend our way of playing even as we are also prepared, ordinarily, to reexamine it.

We leave none of this behind when we are asked to do philosophy. Derrida says that 'we inhabit the structures that we deconstruct.' The window through which the philosopher looks when asked to address a domain of understanding, thought, experience, and discourse is the window of her own spontaneous practice. To be sure, she must be self-conscious about the window, scrutinizing it for partiality and preference. And yet, she remains in tension: she is at once inside and outside the practice. Or rather she is inside but has the task of examining it self-consciously, questioning as much as possible the biases that come with insideness.

Therefore, games are defective and misleading, if indispensable, metaphors for practices. Standard examples of games have discrete rules and assign players defined goals. Instances of games begin and end, and one is a player as long as the game lasts. There is no conceptual tension between the roles of player of a game and describer of the game from outside.

2. Law

Philosophers of law are understandably seduced by the metaphor of games. More than most practices, law is identified with rules. When we talk about rules of morality or rules of cognitive or scientific understanding, the notion of a rule is used metaphorically. But talk about rules of law is hardly metaphorical; rules are a familiar, arguably essential, aspect of the practice.

Accordingly, schools of jurisprudence are marked by the lessons they draw from the metaphor of games. Positivism identifies law with social order imposed and maintained through rules. H.L.A. Hart's model of rules distinguishes primary rules, rules that impose obligation on all citizens, from secondary rules that define law's institutions and instruct officials about

making, interpreting, and applying primary rules. Hart and Joseph Raz emphasize the game-like ways in which law makes certain kinds of behavior significant and non-optional and the availability of game-like formal criteria for law's rules. Their account implies that among the most interesting ways in which law differs from a game are that, from birth to death, we never cease playing and that the game's rules are constantly changed and reconceived (in accord with formally prescribed procedures) as the process goes forward.

For positivists, the relationship between the internal and external perspectives in law is analogous to such relationships in games or languages. One may be a player qua citizen (or lawyer or judge) and, assuming a different role, one may describe law in its generality qua theorist. Positivists see little tension between these roles.

Such tension becomes apparent when one takes law seriously as a vehicle, perhaps the primary vehicle, for realizing shared social aspirations, for applying social morality. Raising this possibility involves questioning the point of law. This is a much more problematic issue in regard to law than it is with regard to games or languages. Games such as chess or basketball have an internal point, namely whatever it takes to win, and an external point, such as the pleasure of playing or the thrill of victory. Language has the point of communication, along with such secondary points as self-realization. But the point of law, and the controversies that envelop it, occupy the players of the game, the participants of the practice, at many points. Legislators who create law, judges who apply it, and officials who execute it shape their decisions around their conception of the purposes law serves. And they are not likely to agree.

Critical theorists echo the positivists' insight that the rules of law meet formal rather than normative criteria. They, like positivists, claim to speak as theorists from outside legal systems looking in. But, unlike positivists, they are concerned with the relationship between the roles of participant and theorist and with its implications for normative choices. Embracing the positivistic insight that the legal system has 'open texture,' that its rules are under construction as the game proceeds, they radicalize that insight in two ways. First, they examine various internal decisions – interpretive decisions of judges, legislative choices, strategies of attorneys – as reflecting individual predilections and agendas. Such decisions may reflect personal histories and perspectives or the orientations of classes and interest groups that such individuals represent. In either case, legal decision-making is 'politics all the way down.' And second, critical theorists abandon the positivist distinction between a core of settled law and a periphery of law-in-the-making. Political choices and fluidity pervade the system.

Critical theorists seem to assume that as theorist/outsiders, they are in a position to correct the perspective of the legal insiders, the players. Even if players think of themselves as disinterested and aperspectivally

objective, the critical theorists' gloss is that they are wrong.

But this conclusion is itself paradoxical. It ignores the truism that all theorists are also participants in some legal system and the fact that *all* theoretical postures are abstracted from the experiences of participants. In any case, the conscientious and self-critical insider is more than the instantiation of a political agenda. As we have seen, she inhabits the 'game' at many levels. She is prepared to defend a set of interpretations and goals. She anticipates disagreements and has strategies for seeing choices from multiple perspectives. She strives to distinguish bias and partiality from disinterest and objectivity, and she has ways of assessing her own decisions in light of such distinctions. At the same time, she appreciates that critical theorist's skepticism. The tension between participant and theorist is expressed in the (potential or actual) awareness that her aspirations toward disinterest and objectivity will be realized only partially and provisionally.

Liberalism and legal naturalism are theories of law that take account of such aspirations. Unlike positivism and critical theory, they proceed from the insider's tentative confidence that the point of law can be harmonized with human aspirations, that, in Ronald Dworkin's terms, it makes sense to think of law as 'working itself pure.' Liberalism, as John Rawls suggests, begins with the hope that some systems of social order are self-evidently superior to others. We can rise above or put aside the interests of class and personal disposition to construct the rules of a game in which we all have a better chance of flourishing. Law becomes the quest for such rules.

The mystery at the heart of the process is whether the quest is a delusion. It may be a delusion in two senses. On one hand, there may be no possible consensus about social ideals or about the conditions that support human flourishing. Both within and between cultures, we may ever be at the mercy of warring visions. On the other hand, whether or not there are such conditions, persons may be incapable of distinguishing them from more parochial interests and agendas. The notion that each of us makes decisions from her own perspective and in light of her own experience may take an invidious turn. It may imply that claims *about* our practices and their implicit values are not just colored but tainted by the fact that they are made from *within* such practices, by theorists who are also players.

3. Essays in Jurisprudence

Philosophy, as exemplified in the essays that follow, requires humility and candor in two respects. First, the distinctive Wittgenstinian gesture is to focus on practices as collective inventions and conventions. Claims to know and understand are moves within practices. Such moves are meaningful to ourselves and others only when they conform to shared conventions that determine such practices.

Second, we must be mindful of the lesson of hermeneutics. Each of

us participates in the practice in his own distinctive way. In the light of an idiosyncratic personal history, each of us has a unique 'take' on our shared experiences, a unique way of understanding and of giving voice to that understanding. The bounds of intelligibility mirror the fact that we are playing the same game; the nuances of variation and disagreement in our play reflect the fact that we each appropriate the 'game' in our own way.

Legal philosophy is the intersection of two practices, the practice defined by law and legal institutions and the philosophical practice of scrutinizing law. One can look at *both* of these practices in the light of the distinction just made. Thus the practice of law as carried out by various role-players – judges, legislators, attorneys, citizens – comports with certain rules; there is a degree of uniformity of conduct that allows us to identify the practice. On the other hand, each legislator, judge, and so on, has a personal way of carrying out the role.

And the same goes for those who look at law philosophically. Certain observations are common currency and reflect a shared conceptual understanding. And yet each asks different questions, weighs relevant evidence differently, reaches different conclusions.

The essays in Part I of this collection fall within analytical jurisprudence. They discuss the concept of law and the roles of actors within the practice. In doing so, they assess the various understandings of law and legal decision-making offered by legal positivists, legal naturalists, and critical theorists in the light of Wittgenstein's notion of a practice and the insights of hermeneutics.

The first three essays ('The Rules of Law and the Point of Law,' 'The Concept of a Practice,' and 'Understanding, Disagreement, and Conceptual Change') are about the usefulness and limitations of the metaphor of games. In particular, they make clear the oddness and significance of the fact that law is a 'game' in which the point – the goals, the purpose, the ideals – of the practice is itself an element of scrutiny and disagreement by the players.

Two other essays in Part I apply ethical theories and hermeneutical understanding to the role of judging. Utilitarianism can be invoked as a general theory of moral value and as a possible theory of judicial decision. With regard to both kinds of applications, many writers oppose utilitarian decision-making to decisions based on rights. 'A Utilitarian Theory of Decision-Making' argues that these two strategies can be reconciled and locates utilitarian aspirations within a system that takes rights seriously. A more recent article, 'The Epistemology of Judging: Wittgenstein and Deliberative Practices,' examines the link between a judge's predilections in deciding cases and the judge's implicit commitment at a jurisprudential level to views about the point of the practice.

The last two articles in Part I ('Understanding Disagreement, the Root Issue of Jurisprudence' and 'Law as Experience: The Internal Aspect of Law') explore the consequences for theory of seeing law as a delibera-

tive practice, a practice in which both the rules and the point of the practice undergo constant internal examination and redefinition. One consequence is jurisprudential, the conclusion that different schools of theory about law offer partial views. Positivitic, naturalistic, and critical approaches to law reflect useful but limited aspects of a practice that remakes itself through self-reflection by its participants. A second consequence is that what Hart calls 'the internal aspect of law' is dauntingly complex and, at the same time, the key to unpacking law as a practice. Traditional antinomies in legal theory can be bridged by an understanding of these complexities.

The essays in Part II take up liberalism in legal theory. Liberal political theory has had an uneasy coexistence with naturalistic legal theory. In the work of Jeremy Bentham and John Austin, liberalism coexisted with a positivistic characterization of law. The ideals of liberalism guided legal reform, while law itself was a malleable product of collective institutional acts. For contemporary theorists such as Ronald Dworkin, by contrast, law has at its core a conception of rights that evolves over time through refinement of such liberal ideals as autonomy and respect. For Dworkin, positivism offers an inadequate picture of the place of such natural values at the core of the law, values that give the practice its point.

For critics of liberalism and naturalism, the notion of an evolving consensus about such values being realized through law is a disingenuous myth. Generalities about autonomy realized through rights lack content until they are informed by political conceptions. These conceptions in turn are informed by interests. The essays in Part II ('Persons without History: Liberal Theory and Human Nature' and 'Liberalism and the New Skeptics') defend liberalism against such criticisms. They describe it not so much as a shared system of value but rather as a shared framework of discourse-and-thought through which conflicting values and goals can be acknowledged and within which such conflicts can be bridged.

The essays in Part III examine noteworthy links between law and morality in criminal law. Arguably, criminal law is special in three ways. It addresses the problem of social disorder and personal security directly. Whatever other purposes law serves, its minimal aspiration is to secure social order.

Second, criminal prohibitions seem, to a significant extent, to reflect the coincidence of law and morality. The most serious crimes are often violations of fundamental moral norms. Positivists are likely to concede that criminal law offers the natural law theorist's best case for a moral core in law, and critical theorists are likely to admit that the most serious criminal offenses show a consensus of shared interest that transcends race, class, and gender.

Third, criminal law forces us to examine the boundaries of will and responsibility. Whatever purposes or cross-purposes they serve, most participants in the practice (citizens, judges, legislators, and lawyers) are as-

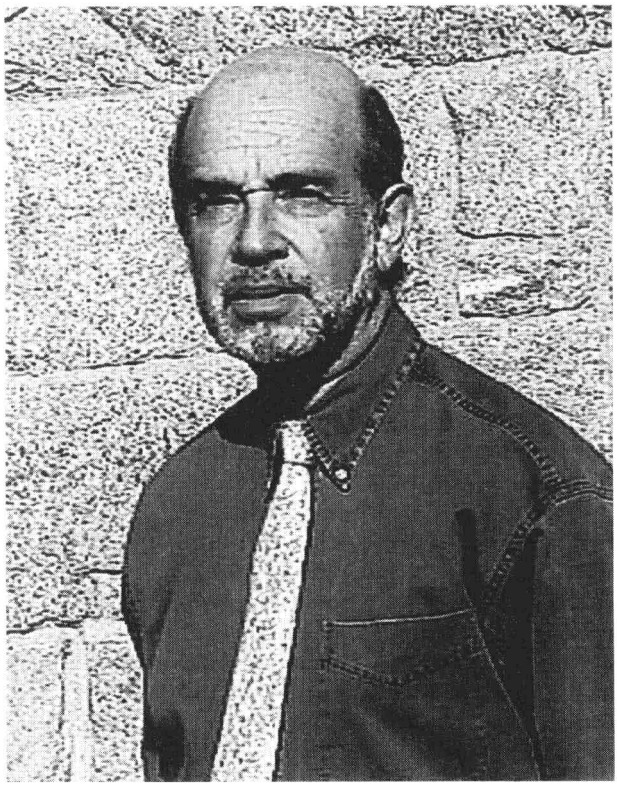
sumed to be capable of rule-following, of governing and ordering their conduct. Criminal law tests the limits of that assumption, at least for some actors in some situations.

The essay 'Retributivism and Justice' looks at a pervasive disagreement in the theory of punishment. The disagreement seems to be about the point of the practice of punishing. The disputants adopt, respectively, the rhetoric of rights-and-retribution and the rhetoric of utilitarianism. The essay argues that the conflict is something of a mirage. Our shared goals, as represented in any persuasive utilitarian theory, incorporate a prior understanding of the rights of individuals and the deserts of offenders. Thus, notions about desert, retribution, and rights do not stand in opposition to utilitarian thinking about punishment but inform it.

The more recent essay 'Reconstructing the Criminal Defenses: The Significance of Justification' is about the limits of moral responsibility. The vexed distinction in criminal law between excuses and justifications reflects the infusion of moral distinctions in law. Specifically, it requires us to distinguish judgments about the results of conduct from judgments about motives and judgments about actors' capacities. In other words, it demands that we clarify the terms and beliefs under which persons participate in joint practices in all their moral and psychological complexity.

***

A theme that runs through these essays is that theoretical polarities often reflect distortions of understanding. The theoretical wars between naturalists and positivists, between critical theorists and liberals, between utilitarians and rights theorists are often shadow-boxing, often collisions (in Wittgenstein's famous and felicitous image) between the fly and the walls of the fly-bottle. They can be criticized as examples of theory untethered to the complex awareness and strategies of the insider to the practice. Recognition of the priority of the insider as participant and attention to the insider's options for self-reflection can often bridge the austere oppositions of theory and thus yield insight.



Thomas Morawetz is currently Tapping Reeve Professor of Law and Ethics at the University of Connecticut School of Law. He taught formerly in the Philosophy Department at Yale University. His many publications are primarily on topics in jurisprudence, ethics, law and literature, criminal law, and legal professionalism.

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.

The initial volumes in the series include collections by Professors Frederick Schauer (Harvard), *Constitutional Interpretation*, John Braithwaite (ANU), *Regulation, Crime and Freedom*, Tom Morawetz, *Law's Premises, Law's Promise*, Robert Summers (Cornell), *Law's Form and Substance*, and Larry Alexander (San Diego), *Legal Rules and Legal Reasoning*. These collections set a high standard for future volumes in the series and I am most grateful to all of these distinguished authors for being in at the start of what it is hoped will become a rich and varied repository of the achievements of contemporary legal scholarship

Contents

PART I

Essays in Analytical Jurisprudence