

ESSAYS

OR, EVEN, WHAT THE LAW CAN TEACH THE PHILOSOPHY OF LANGUAGE: A RESPONSE TO GREEN'S *DWORKIN'S FALLACY*

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IN his recent Essay Michael Green has developed a generous form of argument, in allowing that the basic insights of his opponents' theoretical positions are correct, but he nevertheless pulls them up for failing to see that none of those insights is able to support the general relationship between the philosophy of language and the philosophy of law which they commonly maintain. In this brief response to his Essay I shall follow his generous prompting and accept that Green is correct in rejecting the assumed connection between the philosophy of language and the philosophy of law, but I shall nevertheless suggest that he has failed to consider another potential connection between the two disciplines.

I. THE MEANING OF WORDS AND THE LAW

Green's most effective strategy is to demonstrate, by considering other things to which words are used to refer, that a position within the philosophy of language on how to understand what a word properly applies to does not help us understand the thing to which the word applies—or, where it might be appropriate to speak in

* Professor of Legal Theory, University of Southampton. This is a response to Michael Green, *Dworkin's Fallacy, or What the Philosophy of Language Can't Teach Us About the Law*, 89 Va. L. Rev. 1897 (2003). It does not seek to respond to the wealth of insights that Green's Essay contains, but rather tackles his important central theme and aims to expand upon it. I have avoided using footnotes to provide detailed references in order to preserve the flow of the response. The specific points in Green's work, and the other sources he mentions, which I discuss, are easily found within his well structured Essay. A more detailed account of the approach I take to Wittgenstein within this response can be found in Chapter 7 of my *Reasoning with Law*, and further discussion of the significance of judgment is to be found in Chapter 1 of my *Definition in the Criminal Law*. See Andrew Halpin, *Reasoning with Law* (2001); Andrew Halpin, *Definition in the Criminal Law* (2004).

such terms, does not justify us in taking the same sort of position within the philosophy, or theory, of that thing.

So, for example, if we adopt a Dworkinian interpretive approach within our philosophy of language in order to understand to what thing a word applies, and so embark upon a critical reflection on our existing practice of calling things “gold” in order to determine whether something should be called “gold” or not, this obviously does not lead us to conclude that gold is an interpretive practice. Similarly, the same approach taken within the philosophy of language does not entitle us to conclude that law is an interpretive practice.

Green goes to some lengths to convince us that whatever position we adopt within the philosophy of language is immaterial to the position we might adopt within the philosophy of law, which must be justified on its own merits. So, for example, an interpretive position within the philosophy of language could be adopted alongside a conventionalist theory of law, or vice versa. Since there is no necessary connection between the two endeavors, however, a position in one neither includes nor excludes a position in the other. It follows that there might still happen to be reasons for adopting the same sort of position in both.

This observation provokes us to consider what it might be about the thing(s) to which “law” is used to refer that makes it at all likely for us to end up with the same sort of position in both endeavors. The stark contrast constructed in Green’s illustrations, between the nature of language and the nature of the thing to which language refers, is particularly illuminating in answering this question. Language is a practice, gold is a substance, so whatever we might think of language, we are going to have to do some additional work on getting our ideas clear on gold. Even where the thing to which language refers is a practice, it will be a practice to which language refers, and not itself a language practice, so that we will have to come up with a clear understanding of *that* practice. So, to take an example provided by Green, if we are considering a conventional practice, our understanding of it, as a convention, cannot be affected by our adopting an interpretive approach in our philosophy of language. The convention of meeting under the central clock at Grand Central Station has to be understood as a conventional practice, even if we have accepted that it is properly

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called a "convention" from a position within our philosophy of language that is interpretive.

The point about law that makes it less easy to continue these sharp contrasts, between language and that to which language refers, is that law is, among other things, a practice of using words. It is possible then that the position we take on the practice of using words within our philosophy of language is the same position we adopt on the practice of using words in our philosophy of law. (This is not to suggest that we might on that basis conclude that the one philosophy should be subsumed under the other, for there might well be grounds for requiring either philosophy to deal with matters that are not captured by our understanding of the core language practice that we have identified as common to both.)

Green seems to be acutely aware of this possibility. For he allows that Dworkin's interpretive theory of law would follow from his interpretive theory of meaning *if* the legal practice of using words in adjudication were understood "as a linguistic practice." Green, however, rejects this as a misunderstanding. He seeks to establish the differences between the practice of law and a language practice on a number of grounds: the participants differ (more people speak English than can participate in the practice of law); the practice of law is linked to state coercion in a way that speaking English is not; there could be a conflict between the two practices over whether something is properly called "law."

Yet these objections fail for one or the other of two reasons. The first reason is that they extend beyond our narrow concern of identifying a necessary connection between the philosophy of language and the philosophy of law because both are concerned with the same sort of language practice, to the more ambitious project of providing a comprehensive account of the one philosophy in terms of the other. So, Green's point that law is linked to state coercion may be a reason for expecting our philosophy of law to offer something more than a philosophy of language provides, but it is not a ground for concluding that the account of a language practice will not be the same in both philosophies.

The second reason why Green's objections fail is that he confuses the recognition of diversity of practice with the need for variety in philosophical analysis. The fact that one language practice is open to all speakers of English and another open only to the prac-

tioners of law (or even the practitioners of a particular jurisdiction) does not mean that we need a different analysis of the kind of language practice involved on these occasions. If this were so, we would not be able to talk of a philosophy of language at all, for there are just the same kind of practical differences to be observed between membership of the communities engaged in speaking English and German, or American-English and British-English, or seventeenth-century English and twentieth-century English, and so on. Moreover, the same point applies to Green's observation of practical differences in the use of words between two different language communities. We do not need two different philosophies of language because we have spotted a discrepancy in the use of a particular English word between the residents of New York and the residents of London.

Green produces a stronger argument for establishing a difference between the kind of language practice involved in law and the kind involved in ordinary language when he examines the specific claim made by Dworkin that both are interpretive practices. Green points out that even if this is so, the one practice revolves around a different kind of critical reflection on existing practice than the other. Assuming for the sake of argument that Dworkin is correct in identifying a prereflective commitment to law as a moral practice, so that the critical reflection involved in adjudication will be moral in nature, such a moral commitment is not present when within the practice of ordinary language we critically reflect on our existing practice in order, for example, to clarify the meaning of the terms we use for making deductive inferences. Hence the critical reflection involved here will not be moral in character. The difference between an interpretive practice calling for moral reflection and one that calls for reflection from a non-moral perspective is sufficient in Green's estimation to indicate that we are dealing with different kinds of interpretive practices, that we are dealing with different kinds of language practices, and ultimately that we are in need of different kinds of philosophical accounts of our subject matter.

Green hammers his point home by stressing that even if the term we are examining during our process of critical reflection within the practice of ordinary language is a moral term, it does not follow that within this practice the reflection is moral. His evidence is that

a community's advance in its language practice (in clarifying the meaning of the terms "just" and "unjust") is not necessarily connected to any advance in its practice of justice. A more just community may be less articulate in discussing justice than a less just community.

The same point could be made about a community of artists. Greater advances in the practice of art might be found in a community that was less well endowed with an artistic vocabulary than another community. Could the same thing be said of a community of lawyers? In other words, could we expect greater refinement in the practice of law without achieving greater refinement in the practice of language?

The underlying issue here is twofold. There may be an indirect or instrumental connection between advances in a practice and advances in the linguistic competence to discuss that practice, as Green acknowledges in a footnote. Artistic movements find it necessary to develop a vocabulary in order to propagate their ideas and further their practices. And, as Green acknowledges, the practice of justice will be advanced by having a linguistic practice that is capable of communicating what is just or unjust. Green's point is that the connection is not direct and causal: developing a better vocabulary will not make you a better artist, or a more just person. We might be tempted to add that developing a more refined legal vocabulary will not turn you into a law-abiding citizen—but this only addresses half of the issue.

The practice of law may have as an ultimate objective the existence of a law-abiding community, but is far from being exhausted by that outcome. In fact, such an outcome might be regarded as aspirational or even utopian when it comes down to the actual practice of the law, which involves itself with the more elementary concerns of working out exactly what is required to be law-abiding (what the law requires). Since the requirements of the law are expressed in language, it is impossible to gain any improvement in clarifying these requirements without having a corresponding improvement in linguistic competence. The connection here is direct.

Two comments are called for on the nature of this direct connection between law and language. First, we have not yet established that the direct link between law and language is a causal link, and more needs to be said about the precise nature of that link. Second,

we have not established that it is a link that is peculiar to law. We could in fact make a similar point about justice (or morality) in so far as we were prepared to acknowledge that the practice of justice involved not merely the living of a just life but also the process of deliberating, deciding, and expressing what the requirements of justice are.

Returning to the particular setting for this part of Green's argument, it would then be possible to contradict his assertion that, accepting Dworkin's view of law and language as interpretive practices, there will be a different kind of critical reflection in the one practice as opposed to the other, for both the law and the language of the law are developed together at the point of determining what the law requires. The more general point, not dependent on adopting a Dworkinian viewpoint, is that at the point of judgment when, for example, a particular agreement is held to be a valid contract, or particular conduct is held to be criminally reckless, both the law and the language of the law are simultaneously and inextricably together clarified. At that point the philosophy of language needs to provide an account of the very same practice of which the philosophy of law is concerned to provide an account.

It may be readily assumed, if not by Green then by others, that the position I have just developed is simply taking a partisan conventionalist view of the law: It identifies what "law" properly applies to with the judgments of the courts. But no mention was made of the courts in the preceding paragraph. In any of the positions within the philosophy of law that Green discusses there is recognition of the practice of judgment, whatever degree of formality that practice involves and whoever is regarded as competent to make it. So even if, adopting a natural law perspective in our philosophy of law, we reject the court's judgment that a contract is valid because it fails to satisfy an independent moral requirement, we still need a judgment as to how that independent moral requirement (together with all the other precepts of natural law) applies to this particular agreement. At that point of judgment both the law and the word "contract" are clarified. Without taking up a particular position in the philosophy of law, it is then possible to refute Green's arguments that there is no necessary connection between that discipline and the philosophy of language. We have yet to consider what benefits might accrue from recognizing the connection.

II. LAW, PRACTICE, AND THEORY

In his Essay, Green addresses two basic issues for the philosophy of language: How do we know to what a word refers, and how do we know that a word is to be used one way rather than another? As Green sees it, the second issue is more fundamental, for if we can never be sure that a word should be understood to mean one thing rather than another, we can never be sure that it means anything at all, and the first issue becomes otiose. In effect, the two issues both express the central problem for our understanding of language. Any mechanism we identify to explain how a word means x , must also be able to show how that word can mean x and not y . So the real quest in the philosophy of language is to find the mechanism which links a particular meaning to a word.

This mechanism is extraordinarily elusive, as Green's discussion indicates. Yet there seems to be an overpowering awareness among those examining the problem that the mechanism exists, for despite every setback they continue on the quest. Even those resorting to skepticism are driven to account for the significance of their skepticism, and paradoxically by their efforts only serve to energize the quest. So Saul Kripke's investigation of Wittgenstein's treatment of rule skepticism, which figures prominently in Green's discussion, itself requires us to be able to understand the difference between the conventional meaning of "+" as plus and the aberrant meaning as quus *within* the skeptical discussion. Otherwise, we would not appreciate that there was any point to be skeptical about: the alleged "plus" understanding might as easily be understood as meaning quus, and the alleged "quus" understanding as plus, and there would be no basis whatsoever for noticing any difference between the purportedly conventional plus meaning and the purportedly aberrant quus meaning. (Indeed, the terms "conventional" and "aberrant" would similarly lose any distinctiveness.)

One way out of this apparently endless quest is to read Wittgenstein as using rule skepticism for the didactic purpose of revealing that there is no separate mechanism between our ability to engage in a practice and our ability to engage in the language practice which refers to it. The quest for the mechanism will lead us into skepticism (and our awareness of our skepticism will continue to provoke the quest), until we realize that there is no mechanism to

be found. Dennis Patterson promotes this view of Wittgenstein, and provides another target for Green's allegation that theorists who take a position within the philosophy of law from their position in the philosophy of language are committing a fallacy.

Again Green runs his argument by considering something other than law in order to provide a sharp contrast between that thing and the language practice that refers to it. On this occasion, however, his argument becomes confused at an earlier stage. He suggests that Patterson would be mistaken in developing a theory that gold existed "only because people have facility with certain argumentative practices." But these argumentative practices are associated in Patterson's theory not with gold but with law. The Patterson-Wittgenstein position in the philosophy of language is that the capacity we possess in our language practice relates directly to the capacity we possess in the practice we engage in with the thing to which our language refers. There is no intermediary mechanism. If this approach is to be applied to gold we then need to consider what practices are associated with gold, which, if we have a non-technical grasp of the subject, will amount to something like touching, looking at, and using in different shapes, a heavy, yellow, ductile metal.

From this viewpoint, there simply is no mechanism to connect (or to correct a false connection) between the language practice and the practice of dealing with the thing to which the language refers. Capacity to participate in the one practice directly involves the capacity to participate in the other. A failure to participate properly in the one practice amounts to a failure to participate properly in the other. So, following Patterson and regarding the practice of law as exercising the facility to employ legal argument, a mistake in describing a proposition as "law" amounts to an error in using the forms of legal argument.

There is not then the possibility, if this viewpoint is accepted, of committing the Dworkinian fallacy that Green attributes to Patterson. Unlike the possibility of showing that a Dworkinian interpretivist theory of language can end up with a conventionalist theory of law, in Patterson's case his two philosophical positions are ineluctably linked. One takes both or neither. Green mistakenly describes Patterson as concluding from his position on the meaning of "law" as being derived from participation in one sort of practice

that a position on understanding law must depend upon participation in another sort of practice. For Patterson, however, the one practice can do nothing apart from expressing the other, and so to accept the one necessarily involves accepting the other.

Of course, Green would be entitled to give reasons to reject Patterson's position in its entirety, but that is not the strategy he has adopted. The failure of Green's strategy to deal with the Patterson-Wittgenstein viewpoint has something in common with his failure to notice the necessary connection between law and language described at the end of the previous Part. In both cases the connection between the philosophy of language and the philosophy of law is maintained due to a point of inseparable connection between the language practice and the practice of law. In the earlier case this point of connection was the simultaneous and inextricable development of law and language together at the moment of judgment; in the later case it came from a more general view of the nature of language. Without embarking here on a full appraisal of the Patterson-Wittgenstein viewpoint, I want to consider how some of the insights to be gathered from our understanding of a legal judgment might be used to test that viewpoint more fully.

Although the Patterson-Wittgenstein viewpoint is not susceptible to the fallacy which Green identifies in his Essay, it does possess a vulnerability that is traceable to the basic methodological approach taken by Wittgenstein in his later philosophy. Wittgenstein's account of a language game, and his insistence on the direct connection between a language practice and the practice to which that language refers, are offered precisely as a philosophical method unburdened by the need to provide detailed answers to philosophical problems. In this light, Green's accusation against Patterson—that it may turn out that the practice of law consists not in the use of the forms of argument that Patterson recognizes but in the use of independent moral requirements favored by natural law theorists—provides potential grounds for challenging Patterson's view of legal practice but no basis for challenging his connection between the philosophy of language and the philosophy of law. If the natural law theorists turn out to be correct about the nature of legal argument they can still be accommodated within Wittgenstein's basic methodology. The meaning of "law" will be understood from the practice of using the word, which relates directly to

the practice of law which provides us with our understanding of law. The only difference is that the practice of law is now recognized as involving the use of independent moral requirements.

The problem with Wittgenstein's methodology is then all too apparent. Since it can be used to relate any meaning of "law" to a corresponding understanding of law, it furnishes no help in deciding between competing views of how "law"/law should be understood. By a rather more circuitous route we seem to have reached again Green's general thesis that a position in the philosophy of language does not necessarily lead to a position in the philosophy of law. The critical difference is that the position within the philosophy of language now being considered as not leading to a particular position in the philosophy of law is a methodological position. A connection is still maintained between the substantive positions adopted within the two philosophies, and this connection is open to further investigation.

Instead of abandoning the debate over which philosophy of law is acceptable, from this methodological perspective within the philosophy of language, we might seek to further the debate by testing empirically what is involved in the practice of law. There is obviously an empirical element in Patterson's identification of the specific forms of legal argument he favors. Could we not test these empirical claims against, say, the claims made by natural law theorists, as to what is involved in legal argument? This is clearly a legitimate path to take. The problem is that nobody can convince everybody else exactly where it leads. Less metaphorically, our empirical data and/or our abilities to comprehend it are insufficient to provide an uncontroversial picture of what exactly our practice involves. So even if we start with a position in the philosophy of language, as Patterson does, which necessarily involves a connection between language practice and the practice of law, and thereby a connection between the philosophy of language and the philosophy of law, we end up unable to resolve the controversy over which philosophy of law is acceptable. More than that, we must conclude that the Patterson-Wittgenstein position in the philosophy of language suffers from limitations in not being able to resolve the controversy over the nature of law *and* in being unable to fully account for how we reach our understanding of what "law" means.

How might our understanding of a legal judgment assist at this point? The answer comes from recalling the observation that at the point of judgment on, for example, a contentious contract, both the law and the word “contract” are clarified together. At this point, in order to continue with both our practice of law and our language practice, there is something beyond our accumulated practice of either upon which both depend. Whatever we regard as taking place within the process of judgment, and whatever we consider that it draws upon (personal politics, established policy, independent moral requirements, true enlightenment, and so on), the very use of judgment is posited on controversy. Without the controversy, there would be no need for judgment. The controversy effectively obstructs the continuation of existing practice (the recognition of valid contracts by the law, the proper application of “contract” in our language) until judgment is given.

The use of judgment to resolve controversy over a specific part of the practice of law, and its related language practice, cannot simply be transposed to the wider setting of controversy within our theories of law and language. There is no tribunal of philosophers. What it can do, however, is to teach us something about what those philosophical endeavors are facing—for each of them needs to give some account of judgment—and, possibly, thereby to reduce the controversy if not actually resolve it. The fundamental point to be made is that if the controversy within those philosophical endeavors remains in part due to the sort of lower-level controversy we have encountered in the process of judgment, then we must recognize that, inasmuch as the need for judgment reveals a limitation within those practices, we should expect a corresponding limitation in our philosophical endeavors. More particularly, within the overlap of the practices of law and language we have noticed that the limitations are repaired not by addressing the limitation of language but by addressing the limitation of the accumulated practice of law. This suggests that, at the point the co-relationship between law and language breaks down, something that may not be so apparent when they enjoy a harmonious coexistence: that the practice of language depends on the practice of law. This is perhaps the most important thing that the law can teach the philosophy of language. There is also a lesson here that the practice of law offers to those who would theorize about it. The limitations of the accumu-

lated practice of the law need to be repaired by reaching beyond it, so neither can the philosophy of law content itself with providing an understanding merely of the practice of law.