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Russell Jackson

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Law, Language, and Legal Determinacy

Brian Bix

Oxford: Clarendon Press, 1993, 221 pp.

Reviewed by Russell Jackson[†]

As the preeminent means by which we bring concepts such as law into the material world, language can be the first thing seized upon to explain why interpretations of law may vary from person to person. In a densely-packed, yet subtle book, comprehensively entitled *Law, Language, and Legal Determinacy*, University of London lecturer Brian Bix warns legal theorists of all levels that although language may represent the sole method of presenting law, that does not mean that language is the sole, or even the most important, factor in understanding it.

Bix addresses the complex theme of legal determinacy, and language's role in it, against a backdrop of Wittgenstein's language philosophies. Taking three representative approaches to the law, H. L. A. Hart's idea of open texture, Ronald Dworkin's interpretive theory, and Michael Moore's metaphysical realism, Bix methodically assesses how each accounts for the derivation of meaning from language-comprised law.

First establishing a linguistic basis from which to proceed, Bix then analyzes Hart's open texture theory, both on its own terms and in relation to earlier and more fundamental theories of the same name propounded by Wittgenstein and his interpreter Friedrich Waismann. Hart claims that any rule encompasses a "fringe of vagueness" outside of its obvious application: does a ban on vehicles in a park include roller skates, for example?

Bix believes that this theory essentially forms an empirical rationale for judicial discretion. Bix feels that this does justice to Hart's version of open texture because it helps to identify the limitation of language when it comes to constructing exhaustive rules. But just as importantly, Bix reigns in Hart's theory to prevent the potential confusion between what Hart meant by open texture,

[†] B.A. (Western), LL. B. anticipated 1995 (Dalhousie).

and what Waismann and Wittgenstein referred to when they used the same phrase.

The possibility for confusion is increased by the shared use of the term "foreseeability." But while Hart examines a rule's interpretation of an event that the rule did not foresee and that falls on the edge of its obvious reference, Waismann and Wittgenstein entertained a more extreme experiment. They contemplated the effect that an unforeseeable shift in referential reality itself would have on the efficacy of conversational language.

It is clear, therefore, that Hart's and Wittgenstein's nominally identical theories actually investigate significantly different notions of language (rule vs. commonplace speech, respectively), as well as significantly different types of unforeseeable effects that could strain the meaning of language. Hart's use of the terms to study problems of questionable applicability represents a far narrower result than the limits of semantic intelligibility that concerned Wittgenstein. Bix sets out for the reader Hart's specific contribution and Wittgenstein's more fundamental language theories. Bix thus provides a creditable standard by which to measure the often grandiose claims for language of Hart, Dworkin, and Moore. In fact, Bix contends that legal theorists tend to "find more in Wittgenstein than is actually there."¹ Particularly, and not surprisingly, this applies to Wittgenstein's rule-following theories, which, as the name portends, would hold special appeal for legal scholars.

Contrary to the language-definitive theories of Hart, Dworkin, and Moore, however, Wittgenstein did not postulate that language contains any inherent compulsive power. Rather, Bix contends, he went precisely the opposite way, downplaying the significance of language's unique nature in any conclusion about how rules are understood and followed. Instead, Wittgenstein tied the issue of language's compulsive power in with his views on the general nature of language. He realized that meaning depends on the "determinacy of the descriptive term";² which is the collective force with which a society imbues that term. This, in turn, is a culmination of many factors, and Wittgenstein maintained that a "consensus in applying such terms is due to some combination of our common human na-

¹ B. Bix, *Law, Language, and Legal Determinacy* (Oxford: Clarendon, 1993) at 61-62.

² *Supra* note 1 at 62.

ture, our common training and our common way of life.”³ Wittgenstein’s seminal philosophy reasonably steps back from labelling any single factor, including language, *the* determinative influence on meaning. Bix juxtaposes this position against the legal theories that inflate language’s role, suggesting that such theorists have pursued language with more exuberance than insight.

If anything, this identifies a central weakness of the book, in that this underlying thesis is not identified at the beginning. If Bix had clearly stated at the outset that he intended to demonstrate that legal theorists have approached language with a misguided methodology, he would have given substance to what initially seems an unsatisfying effort, for Bix consistently reveals the inadequacy of successive language-oriented theories, but confirms nothing in their stead. As Bix’s arguments unfold, an implicit theme that legal theorists have made too much of language’s role in legal determinacy becomes apparent. His point is valid and timely, but it could have been made much more strongly if explicitly identified in the introduction.

From Hart, who fixes meaning on the words used, Bix moves to analyze Dworkin’s interpretive doctrine, which places the onus of discovering legal meaning on the judges who interpret those words. Dworkin contends that all legal conflicts contain their own proper solution which must be divined by the arbitrator. Bix criticizes Dworkin’s main contention in illuminating ways. For example, he corrects Dworkin’s inversion of the cause and effect properties of language using Darwinian evolutionary arguments.

Bix refutes Dworkin’s theory point-by-point, but discusses Moore’s metaphysical realism more broadly. While Hart proposed that rules could be inherently peremptory, and Dworkin stressed a judge’s responsibility to discern the true implication of the law’s language, Moore questioned the very connection between language and concept that makes language relevant at all.

Metaphysical realism posits that legal concepts occupy a kind of quasi-Platonic position of permanence that the words of a law can only approximate. This represents a rudimentary linguistic truism regarding semantic flexibility and, while it bears keeping in mind, Bix says that it is not something on which to base a whole theory of legal determinacy. More significantly, Bix sees in metaphysical realism the same failing he sees in Hart’s and Dworkin’s theories.

³ *Ibid.*

They extrapolate into an entire theory about understanding law merely one aspect of the whole, much more complex, process.

The connection between law and language is indisputable, Hart, Dworkin, and Moore are seduced by this fact and each attempt to build, with this idea as its starting point, a comprehensive theory of how we derive meaning from law. Bix assesses each of these theories in turn and demonstrates how they fundamentally overstate the role of language in law.

Squeezing into two hundred concise pages a comparative study of three major legal theories, selections from a language philosophy and a host of subordinate doctrines, Bix assumes in the reader a substantial working knowledge of the theories critiqued. While his analysis is incisive and succinct, it makes the book a tough first venture into jurisprudence.