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Halpin on Dworkin's Fallacy: A Surreply

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HALPIN ON *DWORKIN'S FALLACY*: A SURREPLY

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PROFESSOR Halpin claims to read my 2003 Essay *Dworkin's Fallacy* generously, by "accept[ing] that Green is correct in rejecting the assumed connection between the philosophy of language and the philosophy of law."[1] We later discover, however, that he believes it is possible to "refute Green's arguments that there is no necessary connection between [the philosophy of law] and the philosophy of language."[2]

Is the generosity feigned? Perhaps not, for there are really two arguments in my Essay and Halpin might be understood as accepting the first and rejecting the second. The first argument is that a particular confusion of linguistic and legal practices—which I call Dworkin's fallacy—can motivate the philosopher of law to misderive jurisprudential conclusions from semantic premises. Halpin might be generous in accepting that Dworkin's fallacy is indeed a fallacy. But I also claim that this fallacy is the cause of much, if not most, jurisprudential interest in the philosophy of language. For this reason, I argue that "[t]he philosophy of language generally has no jurisprudential consequences"[3] and that "philosophers of law would have been better off if the philosophy of language had been set aside entirely."[4]

Halpin is wrong to attribute to me the view that there is *no* necessary connection between the two fields.[5] I devoted the conclusion of my previous Essay to describing three cases where Dworkin's fallacy does not apply, and the philosophy of language is relevant

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[1] Andrew Halpin, Or, Even, What the Law Can Teach the Philosophy of Language: A Response to Green's *Dworkin's Fallacy*, 91 Va. L. Rev. 175, 175 (2005).

[2] Id. at 180.

[3] Michael Steven Green, Dworkin's Fallacy, Or What the Philosophy of Language Can't Teach Us About the Law, 89 Va. L. Rev. 1897, 1898 (2003).

[4] Id. at 1946.

[5] Id. at 1947 ("I *cannot* . . . *make a categorical claim* about the irrelevance [of the philosophy of language for the philosophy of law]." (emphasis added)).

to jurisprudential concerns.[6] But even in these three cases I am skeptical that the philosophy of language will provide us with much of jurisprudential interest. Halpin, it seems, disagrees.

I'll begin by identifying Dworkin's fallacy and distinguishing it from the legitimate connections between the philosophies of language and law that are Halpin's area of interest. This will be followed by a discussion of whether these connections, although legitimate, are significant. Finally I will discuss another substantive disagreement between the two of us—whether Dennis Patterson's legal theory suffers from Dworkin's fallacy.

I. DWORKIN'S FALLACY

Dworkin's fallacy is the belief that a jurisprudential theory—a theory of the nature of the law—can be arrived at by applying a semantic theory to the word "law." To get a feel for the fallacy, it is important to understand some of the jurisprudential and semantic theories at issue.

There is a long-standing jurisprudential tradition according to which the existence of law is ultimately a question of convention. For example, according to this approach, the Constitution is valid American law because it has been *accepted* as law by American officials or the American people as a whole. H.L.A. Hart is a member of this tradition, for he explains the ultimate source of law in a *rule of recognition*—that is, a practice among officials of enforcing certain norms (such as the Constitution) and not others (such as the Articles of Confederation) according to whether they satisfy accepted criteria for legality. Ronald Dworkin, in contrast, is anti-conventionalist. A norm can be law, he argues, even if it is not accepted by officials in a jurisdiction as law, provided it is revealed as law through a process of interpretive reflection on the underlying moral purposes of legal practices.

There is a seemingly parallel debate concerning conventionalism in semantics. According to the semantic conventionalist, a term's reference (that is, the set of things that fall under the term) is determined by the accepted criteria for employing the term. In the sixteenth century the term "gold" referred to everything that was a heavy, yellow, ductile metal, because those were the criteria asso-

[6] Id. at 1946–52; see also id. at 1927 n.76.

ciated with the use of the term. In the twenty-first century, however, "gold" refers to everything that has the atomic number 79, because *that* is now the accepted criterion (at least among scientists).

Some philosophers of language—call them "realists"—disagree. Although people in the sixteenth century would have applied the word "gold" to a heavy, yellow, ductile metal that did *not* have the atomic number 79, even in the sixteenth century the term actually referred only to stuff with that atomic number. The underlying structure of gold, not accepted use, determines the reference of the word.

Underlying structures seem unavailable, however, to explain the reference of terms like "justice" or "law." Nevertheless, some philosophers—call them "interpretivists"—argue that semantic anti-conventionalism is possible here as well. The reference of these words can still outstrip accepted use, because the practice of using the words can reform itself through a process of reflective equilibrium, revealing criteria for use of which participants were previously unaware. Although most Americans in the early nineteenth century would have called slavery "just," slavery did not in fact fall under the term (even for them), because the practice of using the term has reformed itself over time.

Dworkin argues that Hart's conventionalist semantics is responsible for his conventionalist jurisprudence. Because Hart takes the reference of the term "law" to be determined by accepted use, he concludes that a norm is law only if officials within a jurisdiction agree that it is law. Furthermore, in his famous "semantic sting" argument, Dworkin uses the failure of conventionalist semantics to argue that Hart's conventionalist jurisprudence likewise fails.

This is Dworkin's fallacy. To see why it is a fallacy, consider the simpler example of the word "convention."[7] If interpretive semantics applied to this word, its reference would be determined, not by accepted use, but by whatever criteria eventually resulted from reflective equilibrium. But even though the practice of using the word "convention" is not determined by agreement, it does not fol-

[7] As I noted in my prior Essay, I borrowed this example from Michael Moore, Law as a Functional Kind, *in* Natural Law Theory: Contemporary Essays 188, 205 (Robert P. George ed., 1992). See Green, supra note 3, at 1931 n.89.

low that *conventions* are not determined by agreement. It is entirely possible—indeed overwhelmingly likely—that, after reflective equilibrium is over, we will have arrived at the conclusion that a practice is a convention only to the extent that there is agreement among its participants.

Conventions can be conventional even when the practice of talking about them is not for the simple reason that the practice of talking *about* practices is different from the practices talked about. Analogously, Dworkin confuses legal practices—in particular, rules of recognition—with the linguistic practice of talking about these legal practices. Even if one assumes that interpretive semantics applies to the word "law," the fact remains that, at the end of reflective equilibrium, we could still conclude that a norm deserves to be called the "law" of a jurisdiction only if officials in that jurisdiction *agree* that it should be enforced.

Dworkin does not merely conflate semantic and jurisprudential conventionalism—he also conflates semantic and jurisprudential interpretivism. In *Law's Empire*, he treats the semantic sting argument as a sufficient reason to adopt his interpretive jurisprudence. But simply because the proper criteria for using the word "law" are whatever will result from reflective equilibrium among the participants in the *linguistic* practice of using the word is *not* a reason to conclude that the law of a jurisdiction is whatever will result from critical reflection by the participants in its *rule of recognition*, much less critical reflection on the *moral* purposes of that legal practice, as is the case in Dworkin's interpretive jurisprudence.[8]

Of course, Dworkin's interpretive jurisprudence or any number of other nonconventionalist theories of law could result from reflective equilibrium on the linguistic practice of using the word "law." (Another nonconventionalist jurisprudence is classical natu-

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[8] We should not be distracted by the fact that Dworkin provides a further argument against conventionalism from within the framework of interpretive jurisprudence. Ronald Dworkin, Law's Empire 114–50 (1986). Dworkin considers whether reflection upon the moral purposes of our legal practices should not lead us to conclude that the law is best limited to norms concerning which there is official agreement, in order to respect citizens' settled expectations. (He ultimately rejects this argument in favor of his theory of law as integrity.) But the question remains why Dworkin's methodology of interpretive jurisprudence is justified in the first place. And he arrives at this methodology, via Dworkin's fallacy, through his semantic sting argument. Green, supra note 3, at 1920 n.63.

ral law theory, in which a norm must satisfy independent moral criteria to qualify as law.) But that simply shows that there is no essential connection between semantics and jurisprudence of the sort that Dworkin assumes.

II. BEYOND DWORKIN'S FALLACY: OTHER CONNECTIONS BETWEEN THE PHILOSOPHIES OF LANGUAGE AND LAW

Dworkin's fallacy rests upon the conflation of the linguistic practice of using the word "law" with rules of recognition. But as Halpin rightly notes, it is not a fallacy to assume that there are other connections between linguistic and legal practices that could make the philosophy of language relevant to the philosophy of law: "[L]aw 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."[9]

Halpin is correct that lawyers and judges talk (a lot) and so legal practices cannot help but incorporate linguistic practices. Furthermore there is no reason to believe that the semantics that applies to words outside the law would not also apply to them when they are used within the law.

I provide an example illustrating just this point in the conclusion to *Dworkin's Fallacy*. If a constitutional amendment establishes the gold standard, the semantics of the word "gold" should be relevant to a judge interpreting the scope of the amendment. This could have an important impact on our understanding of the legal practice of adjudication. Under realist or interpretive semantics, the judge could show fidelity to the meaning of the amendment even if she took it to apply to stuff that its drafters would not have called "gold."

I make the same point earlier in the Essay as well.[10] If interpretive semantics is right, jurisprudential conventionalists like Hart must admit that this semantics applies to the words used to articulate the criteria in the rule of recognition.[11] For example, assume there is a crude rule of recognition under which officials enforce

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[9] Halpin, supra note 1, at 177.
[10] Green, supra note 3, at 1927 n.76.
[11] Id. at 1927 n.76.

only norms that are on a tablet. According to interpretive semantics, a norm might properly be described as "on the tablet"—and so be law according to the rule of recognition—even though the participants in the rule of recognition don't think it is.[12]

This connection between linguistic and legal practices might be a reason to think that my second argument is wrong, but not my first. Dworkin's fallacy depends upon the belief that rules of recognition are *the same thing* as the linguistic practice of using the word "law," not the belief that legal practices cannot incorporate linguistic practices. Dworkin's fallacy is tempting because anyone participating in a rule of recognition—for example, a judge adjudicating a case—will call the norms that she enforces "law," which makes the rule of recognition look like the practice of using the word "law." And if they were the same practice, then Dworkin's fallacy would not be a fallacy. The norms governing our employment of the word "law" would *be* legal norms, and linguistic and legal anti-conventionalism would amount to the same thing.

But the two practices are *not* the same. Although Halpin finds the distinctions I draw between the two practices unconvincing, he does not address the fundamental difference that I pointed out in my previous Essay. Dworkin's fallacy, I argued, "depends upon confusing the practice of describing a practice with the practice described."[13] Participating in a practice of talking *about* legal practices is clearly not the same thing as participating in the practices described. It is possible to speak of American, French, and German law in the same breath. It is not possible to sit simultaneously on the Supreme Court, the *Conseil Constitutionnel*, and the *Bundesverfassungsgericht.*

It is the linguistic practice of talking about legal practices that establishes the meaning and reference of the word "law" and thus the conditions for the existence of law in various jurisdictions. If the participants in the linguistic practice determine that a norm should be called the "law" of a jurisdiction only if it meets independent moral requirements, then even if all the judges in the jurisdiction enforce norms that violate these moral requirements, such norms are *not* the law of that jurisdiction. To be sure, most people con-

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[12] Id.
[13] Id. at 1919.

sider the fact that judges enforce a norm to be a reason to conclude that the norm is the law of that jurisdiction. But that is simply a reflection of the fact that we, as participants in the linguistic practice, are inclined toward conventionalist jurisprudence.

Halpin may not be arguing that the two practices are the same however. His point may be only that the philosophy of language that applies to the practice of using the word "law" will also apply to legal practices, insofar as words are used in those practices. Of course, as my gold standard and tablet examples show, I do not deny this. But Halpin's target may be my second argument—that the connections between the philosophies of language and law (those that do not suffer from Dworkin's fallacy, that is) are insignificant. Because legal practices incorporate linguistic practices, he may be arguing, we have reason to believe that the effect of the philosophy of language on the philosophy of law will be significant.

Halpin sees another very different connection between linguistic and legal practices that may threaten my second argument as well. This is his idea that "both the law and the language of the law are developed together at the point of determining what the law requires."[14] Halpin's is a general methodological point that is not tied to particular theories of the law. To show this, he assumes that we accept natural law theory:

> [I]f . . . 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 . . . applies to this particular agreement. At that point of judgment both the law and the word "contract" are clarified.[15]

Because "both the law and the language of the law are simultaneously and inextricably together clarified,"[16] the law cannot be divorced from our practices of talking about the law.

I discuss what I believe is a similar idea when outlining the conventionalist theory of meaning. This theory, I argue, "is tied to essential issues of philosophical method"[17] in the following sense: For the conventionalist, an account of the meaning of a word will also

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[14] Halpin, supra note 1, at 180.
[15] Id.
[16] Id.
[17] Green, supra note 3, at 1900.

be an account of the *existence conditions* for the thing to which the word refers. This connection between linguistic practices and the things to which these practices refer is what grounds the traditional philosopher's method. Traditional philosophers *analyze* the meanings of words like "freedom," "knowledge," or "law" to find out "what must be the case for freedom, knowledge or law to exist in the world."[18] This means that, for the traditionalist, Halpin is right—"both the law and the language of the law are simultaneously and inextricably together clarified."[19]

Of course, the traditional philosopher of law does not believe that *every* truth about the law can be revealed simply by reflecting on our practice of talking about the law. Only *analytic* truths about the law can be arrived at in this fashion. Jurisprudential theories (such as conventionalism or natural law theory) might be examples of such analytic truths, but not particular judgments about whether something is the law of a jurisdiction. And Halpin's contract example suggests that he is arguing that the practice of talking about the law is clarified *whenever* the law is. After all, that a particular agreement is a valid contract is not an analytic truth about the law—it is synthetic, in the sense that it requires information over and above knowledge of the meaning of the word "law" or "contract."

But there is a possibility of making sense of Halpin's more comprehensive claim if we turn to interpretive semantics.[20] If this semantics is correct, there is no distinction between empirical inquiry into the thing to which a word refers and the transformation, through reflective equilibrium, of the practice of talking about that thing.[21] It is not as if we have a definition of "law" and then consider the evidence to see what does and does not fit this definition. The definition is always vulnerable to reform in the process of making particular judgments. In this sense, it is true as a *compre-*

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[18] Id.

[19] Halpin, supra note 1, at 180.

[20] That the same point applies if one adopts *realist* semantics is more doubtful. The realist understands the meaning of a term as fixed by the underlying structure of the stuff first pointed to in connection with the word, to which linguistic practices may forever fail to correspond. This suggests that reality reveals itself in a way that is divorced from the development of our linguistic practices. I cannot, however, pursue this issue here.

[21] Green, supra note 3, at 1913.

hensive matter that "the law and the language of the law are simultaneously and inextricably together clarified."[22]

Once again, I agree with Halpin's methodological point. As I argued in my previous Essay, if the interpretive theory of meaning is true of the word "law," then "we can figure out which norms should be called 'law' only by participating in the interpretive practice of using that word."[23] The unfolding of the law and the unfolding of the practice of talking about the law will be indistinguishable. Halpin's point will also apply if one accepts a Wittgensteinian theory (or anti-theory) of meaning—and it is indeed Wittgenstein, not interpretive semantics, that Halpin is primarily thinking about. Here too, figuring out what is and is not law can be answered only "within the framework of our practices concerning the use of the word 'law.'"[24]

What all this shows is that the philosophy of language is very relevant to the questions of *jurisprudential method*. How one understands linguistic practices—and so the practice of using the word "law"—will determine what it means to inquire into the law. The conventionalist, realist, interpretivist, and Wittgensteinian will each have a different view of what a philosopher of law is doing when she provides a theory of the nature of the law.

In the conclusion to *Dworkin's Fallacy*, I identify the philosophy of language as relevant to questions of jurisprudential method in just this sense. Indeed, I apparently go further than Halpin and argue that there are cases where the philosophy of language has the potential to generate substantive jurisprudential conclusions. Theories of the nature of the law, I argue, might be *blocked* by philosophies of language, because the latter might show that we could never use the word "law" in a way that would generate the former. For example, natural law theory would not be viable if a verificationist philosophy of language told us that we are unable to speak about morality.

This is, once again, a reason to believe that my second argument is mistaken. But it is not a reason to think that Dworkin's fallacy is not a fallacy. Dworkin's fallacy arises from conflating the practice

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[22] Halpin, supra note 1, at 180.
[23] Green, supra note 3, at 1919–20.
[24] Id. at 1943.

of talking about the law with a legal practice in a particular jurisdiction, namely, the rule of recognition. One can reject the fallacy and still accept Halpin's idea that the law of various jurisdictions is revealed in the context of the linguistic practice of talking about them.

III. How Significant is the Philosophy of Language to the Philosophy of Law?

In short, both Halpin and I think there are legitimate areas of connection between the philosophies of language and law. But, unlike Halpin, I argue these connections do not make much of a difference.

For example, even though I admit that semantic theories will apply to words used within legal practices, I question whether these theories will have much effect on our understanding of legal practices. Realist and interpretive semantics, although *permitting* reference that outstrips current agreement, do not *mandate* it. The drafters of our gold standard amendment are not obligated to refer to what is actually gold. They can make it clear that they are using the word in a way that is intended to refer only to what is conventionally thought to be gold at the time of drafting.[25]

By the same token, although interpretive semantics can have an effect on the conventionalist's understanding of the criteria used within a rule of recognition, it cannot show that a conventionalist theory of law is wrong. The fact that a norm could be "on the tablet" even though the participants in the rule of recognition don't think it is does not show that the law is nonconventional. The law can still be conventional in the sense that being "on the tablet" is all that matters when determining the law of that jurisdiction, because this criterion is the only one agreed upon by participants in the rule of recognition.[26]

Halpin, in contrast, thinks the connections between the philosophies of language and law are significant. Nevertheless, I doubt

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[25] Id. at 1950–51.

[26] Id. at 1928 n.76. Furthermore, since reflective equilibrium is undertaken from the perspective of the prereflective commitments of participants in the linguistic practice reflected upon, any reform of the use of a term will not be radical. This makes it unlikely that a norm is going to suddenly be identified as being "on the tablet" that was not considered to be on the tablet before.

that the reason is that he thinks the above arguments are mistaken, since he never discusses them in his reply.

Halpin's real concern is the importance of the philosophy of language for questions of jurisprudential method. Here too, I was skeptical that the philosophy of language will yield interesting jurisprudential consequences. Even though the philosophy of language reveals what a philosopher of law is doing when she comes up with a theory of law, it does not tell us whether this theory will (or should) be natural law theory, Dworkinian interpretivism, Hartian conventionalism, or something else.[27] Indeed, even if certain theories of the nature of the law can be "blocked" by a position in the philosophy of language, I argue, there will be little in the way of jurisprudential consequences, because plenty of non-blocked jurisprudential positions will remain to choose from.[28]

Curiously, here as well Halpin does not appear to disagree with my argument. Indeed, he even joins me in suggesting that the methodological insight provided by Wittgenstein "furnishes no help in deciding between competing views of how 'law'/law should be understood."[29]

The truth is the connections between the philosophies of language and law that Halpin identifies are of a very different sort from those I entertained in *Dworkin's Fallacy*. I was concerned with whether the philosophy of language could provide substantive results in the *philosophy of law*. From what I can tell, Halpin agrees with me that it cannot. But Halpin argues that the philosophy of law has important consequences for the *philosophy of language*. Hence the title of his reply.

If I understand him correctly, Halpin's point is this: Jurisprudential disagreements concerning the proper theory of law are the result of the contentiousness of individual judgments about what is law. Of course, this is not in itself surprising, since in any area of inquiry disagreement in individual judgments about the thing investigated will tend to express itself in competing theories of that thing. If people disagree in their judgments about what is gold, they are likely to come up with different theories of gold. Just as reality

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[27] Id. at 1948.
[28] Id. at 1950.
[29] Halpin, supra note 1, at 184.

and our practice of talking about reality are revealed together, they are obscured together.

But in the law, Halpin argues, "the very use of judgment is posited on controversy."[30] There are practical considerations impelling us toward a judgment about what is law, considerations that do not exist elsewhere. For this reason "the co-relationship between law and language breaks down."[31] Practical necessity will mean that legal judgment will *precede* the evolution of our practice of talking about the law. In this sense, "the practice of language depends on the practice of law."[32] It is this important insight, Halpin claims, that "the law can teach the philosophy of language."[33]

Unfortunately without further elaboration on these suggestive remarks, I cannot come to a conclusion about whether I agree with him. It is fair to say that even if he is correct (and I am not saying that he is not), we are quite far from the concerns of my previous Essay, which had to do with whether the philosophy of language could generate substantive *jurisprudential* consequences.

IV. DENNIS PATTERSON AND DWORKIN'S FALLACY

One aspect of Halpin's reply for which I am particularly thankful is his discussion of Dennis Patterson's legal theory. In my previous Essay I argued that Patterson suffers from Dworkin's fallacy. Halpin disagrees. This difference between us provides me with the opportunity to elaborate upon what was a very compressed argument in the original.

Let us begin with Patterson's position in the philosophy of language. Patterson accepts what he describes as Wittgenstein's view that "the modernist picture of propositional, representationalist truth [is] unintelligible."[34] The idea of a sentence being true or false through its relation to the world should be replaced "with an account of understanding that emphasizes practice, warranted assertability, and pragmatism."[35] Rather than seeing knowledge as an ac-

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[30] Id. at 185.
[31] Id.
[32] Id.
[33] Id.
[34] Dennis Patterson, Law and Truth 160–61 (1996); see also Green, supra note 3, at 1933–42.
[35] Patterson, supra note 34, at 161.

curate picturing of reality, it "will be unpacked in terms of linguistic competence, facility in the languages of man."[36]

This should be familiar, since it is very much akin to Halpin's idea that "the law and the language of the law are simultaneously and inextricably together clarified."[37] The truth of statements about law will depend fundamentally upon facility in linguistic practices. The attempt to articulate "the ways in which legal language represents, depicts, and captures the world"[38] must be abandoned.

But no theory of the nature of the law follows from this insight. And deriving a theory of the law is just what Patterson tries to do. The foundation of Patterson's argument is that justifications are demanded within our legal practices before norms will be enforced. These justifications, he argues, have certain *forms*. Patterson then claims that it follows from the Wittgensteinian insight that "without [these forms] there is no law."[39]

This is an example of Dworkin's fallacy. If the Wittgensteinian insight is correct, then the truth of statements about law (for example, the statement "The Securities Exchange Act is valid law in the United States") is not a question of correspondence to some external state of affairs—it is instead a matter of facility in talk about the law. Such facility is manifested by familiarity with certain forms in which statements about the law are justified. But no theory of the nature of the law follows from this, not even Patterson's theory that "without [the forms] there is no law."[40]

Patterson thinks a theory of the law follows from the Wittgensteinian insight because he conflates the linguistic practice of talking about law with the legal practice of *the rule of recognition*—that is, the practice *within a jurisdiction* of enforcing norms only if they satisfy certain criteria. The confusion is easy to make because, as Patterson himself notes, participants in the rule of recognition will often demand a satisfactory argument before a norm is enforced, and this argument will have to satisfy certain forms.

But because the two practices are different, so are the two sets of forms. And it could follow from the forms of the *linguistic* practice

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[36] Id. at 169.
[37] Halpin, supra note 1, at 180.
[38] Patterson, supra note 34, at 169.
[39] Id. at 178.
[40] Id.

that the law can exist perfectly well *without* the forms of the *legal* practice. Assume that it follows from the forms of the linguistic practice that a norm cannot be described as "law" unless it satisfies certain independent moral requirements. Assume further that according to the forms of a particular rule of recognition, judges do not require an argument that independent moral requirements are satisfied when determining whether a norm should be enforced. Patterson's jurisprudential theory—that the law will depend upon the forms of the legal practice—will be false, even though the Wittgensteinian insight that the law and the language of the law develop together will be true.

Of course it is possible that Patterson never meant his theory to stand in competition with natural law theory or Hartian conventionalism or Dworkinian interpretivist jurisprudence. He may instead have been objecting to the fact that the philosophers of law advocating these theories *also* offer theories of the truth of propositions about law—theories that are contrary to the Wittgensteinian insight. But if that is Patterson's point, why does he take the failure of the theories of truth to be a reason to *criticize* the jurisprudential positions with which they were conjoined?[41] That the theories of truth fail gives him no reason to believe that the theories of law are not still correct. Patterson must think the theories of truth and the theories of the nature of law are somehow *connected*. The reason, I have argued, is Dworkin's fallacy. Patterson has confused the practice of talking about the law with the rule of recognition within a jurisdiction.

As we have seen, Halpin also comes to the conclusion that Patterson's Wittgensteinian methodology "furnishes no help in deciding between competing views of how 'law'/law should be understood."[42] But he arrives at this conclusion in a more circuitous fashion, because he believes that my argument in *Dworkin's Fallacy* is confused.

The heart of Halpin's criticism is that in *Dworkin's Fallacy* I fail to observe the Wittgensteinian insight concerning "the simultaneous and inextricable development of law and language together at

[41] Id. at 44–50, 59–70, 71–98.
[42] Halpin, supra note 1, at 184.

the moment of judgment."[43] The Wittgensteinian insight shows that "both the law and the language of the law are developed together at the point of determining what the law requires."[44] I believe that Halpin has mistook my insistence that the linguistic practice of talking about the law needs to be resolutely distinguished from the rule of recognition within a jurisdiction for a denial of the Wittgensteinian insight. It was not, but my argument was compressed, and I hope that the current reformulation makes this clear. In my example above, the natural law theorist who refused to call judges' decisions "law" (because they violated independent moral requirements) came to this judgment within the context of the linguistic practice of talking about the law. The law and the practice of talking about the law were simultaneously developed when she made her judgment that the judges' decisions were not law. The Wittgensteinian insight was therefore satisfied.

What was *not* simultaneously developed was the law and the *rule of recognition* in the judges' jurisdiction. For the judges' decisions satisfied the forms of argument within the rule of recognition and yet they were not law. But Patterson was wrong to conclude that the Wittgensteinian insight gives us a reason to believe that the law develops as the rule of recognition does, for that would mean misderiving a theory of the law (namely some form of jurisprudential conventionalism) from the Wittgensteinian insight. And even Halpin agrees that this is a mistake.

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[43] Id. at 183.
[44] Id. at 180.