11 Cautions and Caveats for the Application of Wittgenstein to Legal Theory

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> I am reminded of a moment in a discussion some fifteen years ago at which a brilliant, successful, exasperated member of the philosophical profession said, "You know, it's possible that Wittgenstein was wrong about *something*!" Recalling the unpleasantness of cults, one must not ignore the sorts of behavior that can, in the most patient, justifiably produce such exclamations. But one must not make too much of such exclamations either. You could just as helpfully say, "You know, it's possible that philosophy is wrong about something!"
>
> —Stanley Cavell (1979, p. xvii)

In the spirit of Stanley Cavell's quotation, this essay will be in part a discussion of what a particular philosopher, Ludwig Wittgenstein, can offer to legal theory, and in part a discussion of what philosophy can offer to legal theory. The essay is intended as a caution, against those who might be too quick in their applications of Wittgenstein's work, but it certainly is not intended to suggest any prohibition on attempting such applications. There is much of great value, at least in the sense of provoking useful further discussions, in the articles discussed in this piece (and in many of the other efforts to apply Wittgenstein's ideas to law and legal theory, a number of which are cited in the "References" section at the end of this piece).

It is not surprising that there is a large and growing number of examples of legal theorists applying Ludwig Wittgenstein's ideas to jurisprudential problems. American legal theorists are generous (or, if one prefers, promiscuous) borrowers of ideas and approaches from other disciplines. Ever since the legal realists, in the early decades of the twentieth century, undermined the confidence (of the legal formalists) that legal materials were sufficient to resolve all legal disputes, legal academics have been

looking to other disciplines to supplement or supplant more traditional forms of legal analysis (Bix 2003a, pp. 177–187).

As is well known, many academics have looked to economics for the needed supplement to legal reasoning, but others have looked to philosophy. Wittgenstein is a likely suspect for such assistance, as his work with language, meaning, and rules, seems to tie in well with "the interpretive turn" in legal thought (see Moore 1989).

This search for extralegal grounds for analysis sometimes coincides with a quite different, and unfortunate, tendency in academia generally—though it may well be worse in legal academia—caused, most people think, by an insecurity among theorists in what they are saying and in their right to say anything at all. The unfortunate tendency is the hiding of positions behind labels—the names of particular famous writers or of whole schools of thought. One does not merely put forward a theory of liability in tort law, one puts forward a Hegelian theory or a Wittgensteinian theory, or a liberal theory.

I do not wish to seem like I am against all labels all of the time. They can certainly serve a useful purpose. If nothing else, labels can be a convenient shorthand, allowing readers a quick estimate of the type of work they are considering. I am less concerned with the labels as a means of positioning oneself so that potential allies and potential critics can get a better sense of where one is coming from, and more concerned with those who hide behind the label or the big-name theorist as a small child might hide behind a big-brother protector. (Some of these writers structure their arguments to give the impression that if one was to be so bold as to question the conclusion, the challenge must be brought, say, to Wittgenstein, not to them.)

Like many significant thinkers from other fields, Wittgenstein has probably inspired more bad ideas than good ones, and more misunderstandings of his work than true understandings.[1]

Proving the Negative and the Misuse of Authority

I have already written in the negative about Wittgenstein and the law, arguing that his work is not as useful for legal theory as many commentators seem to believe (Bix 1993, pp. 36–62). Of course, it is never easy to prove a negative, and not terribly interesting either. There is also a danger

of discouraging those who have in good conscience tried to learn what they could from another discipline. One hears stories of philosophically trained legal theorists giving sharp rebukes to colleagues who would dare discuss a philosopher's work without doctoral training or comparable levels of rigor and commitment (cf. Leiter 1992), and the fear is that imposing such very high standards may work only to scare off most legal theorists from making any effort at all to learn from philosophers and philosophy. And I am not entirely sure that we want to leave philosophy only to the trained philosophers (or history only to the trained historians or economics only to the trained economists) either inside legal academia or generally. It is thus a difficult balance to try to maintain: to encourage others to try to become more sophisticated in their theories, but to encourage them also to have the proper respect (and, one might add, the proper humility) before the complex ideas of other disciplines (history and economics, as well as philosophy).[2]

Although one could perhaps argue persuasively that a few named commentators, in a handful of specific articles, have misread Wittgenstein's teachings, that is hardly proof that those teachings cannot be properly used in a helpful way. In part, the lesson one could learn from most past alleged misuses of Wittgenstein's work is the one already mentioned: that legal academics might be prone to using authority in place of argument in their work. Although this can be found in many of the more casual (and some of the more detailed) references to Wittgenstein in the literature, it is nothing peculiar to this approach to legal theory—with nearly every philosopher (from Hegel to Derrida to Gadamer), there is a tendency to throw out citations as a shorthand for developing an argument. As there is nothing specific to Wittgenstein studies or Wittgensteinian applications in this topic, I will not tarry here.

Rule Following and Interpretation

Probably the most common use of Wittgenstein's work in recent legal commentary has been the reference to his considerations of rule-following (Wittgenstein 1958, §§ 185–242)[3] in the course of discussions of legal interpretation. The initial problem is quite easily stated: Wittgenstein did not write on legal philosophy or legal interpretation. Even what he did write on both philosophy of language and philosophy of mind remains

frequently exegetically uncertain, and, even where the message is relatively clear, the validity of the claims is far from unanimously received. Thus, mere rough analogy between Wittgenstein's writings and one's jurisprudential work may be something worth noting, but it is far, far short of showing that one's conclusions are right. There is much argument that needs to be made, and it is on those arguments that the focus must lie.

As regards Wittgenstein's rule-following considerations, this influential collection of comments in *Philosophical Investigations* involves questions about the proper understanding of "the rules" ("rules" here broadly understood) by which we apply concepts ("blue," "chair," or "add two") in a context new to us (that is, in a context where, for our purposes, the application of the concept has not already been determined or decided).

The fact of the matter is that there is a great deal of consensus in the application of words and concepts, and that this consensus often occurs after quite minimal training (often involving ostension: "'leaf' means objects like *this one* [pointing]"). The mystery is how or why we all go on the same way on these occasions—and what insight, if any, the answer to that question might give to the nature of language and the nature of meaning.

My argument in the past (Bix 1993, pp. 36–62) has been that the rule-following considerations do not have any *direct* applications to law, at least not to the issues in legal interpretation to which Wittgenstein's work is usually applied. The rule-following considerations are about the proper explanation of a phenomenon: the phenomenon of general agreement in practices regarding the simplest terms and mathematical concepts. The subject of Wittgenstein's discussion are rules so simple that he can state:

> Disputes do not break out (among mathematicians, say) over the question of whether a rule has been obeyed or not. People don't come to blows over it, for example. This is part of the framework on which the working of our language is based (for example, in giving descriptions). (Wittgenstein 1958, § 240)

By contrast, law and legal interpretation seem, and seem obviously, to be some distance from the practices inspiring the rule-following considerations. Law and legal interpretation are not practices characterized by consensus or lack of disagreement. To the contrary, one might say that the practice of law is substantially, perhaps even pervasively contested.[4] The question in legal interpretation is not how to explain agreement, but how

to resolve *dis*agreement. Given the differences in the practices and the questions being answered, one would have thought that there was a heavy burden on those who believe that the rule-following considerations apply directly to the legal context (see Langille 1988; Patterson 1990). In the end, it may well turn out that the only jurisprudentially helpful use of a proper understanding of Wittgenstein's rule-following considerations is for rebuttal to legal theorists who ground their theories on an improper understanding of those same texts (see Bix 1993, pp. 36–62).

The "Language Game" of Law

At least as frequently as his rule-following considerations are co-opted for jurisprudential purposes, Wittgenstein's work on language, meaning, and rules is cited for a more general proposition: that meaning is use (Wittgenstein 1958, § 43) and that many philosophical problems would dissolve when linguistic practices are seen as merely rules in our game (Wittgenstein 1958, §§ 7, 96) rather than as reflecting some deep metaphysical or ontological truth.

Of course, something like this deflationary move can be seen in the work of some of the American legal realists: for example, in writers like Felix Cohen (1935), who chided the formalists writing at the time for deriving significant moral and legal conclusions from the "nature" of certain legal concepts. However, some recent theorists have made a more substantial argument based on a similar analytical approach.

Theorists like Dennis Patterson and Philip Bobbitt have argued that legal practice generally, or constitutional theory more particularly, are best understood under this sort of rubric: as a game with set rules (Patterson 1996; Bobbitt 1991). Patterson has put greater emphasis on the connection between his own work and Wittgenstein's (1994); Bobbitt, though he does cite Wittgenstein, does not emphasize the connection.[5]

Bobbitt describes six forms of argument that are used for interpreting the United States Constitution (Bobbitt 1991, pp. 12–13).[6] A judicial decision involving the interpretation or application of the Constitution is justified when it is made according to one (or more) of the accepted forms of argument. The legitimacy of a practice—the evaluation of the practice as a whole under the criteria of justice or some other value—is another matter,

to be sharply distinguished from justification, which can only be done in terms of the "accepted moves" within the practice of American constitutional interpretation (ibid., pp. 31–42, 151–54). Patterson's analysis can be understood, broadly, as generalizing Bobbitt's approach, and seeing *all* legal analysis in the same way Bobbitt views American constitutional law: Patterson discusses "the role of the forms of arguments as the grammar of legal justification" (Patterson 1996, p. 178); and asserts that "law is an identifiable practice, one with its own argumentative grammar . . . [and] that this grammar is [not] reducible to the forms of argument of another discipline" (ibid., p. 182). At the same time, Patterson clarifies (in a way that seems to distinguish his view from Bobbitt's) that he accepts that legal argument can change over time, and can be responsive to social pressures in those changes (ibid.).

A Wittgensteinian "language game" analysis depends on the practice in question being substantially autonomous.[7] And it is just this autonomy that is in contention in the analyses of both language and law. Wittgenstein's assertion that language, and the grammatical rules within language,[8] are autonomous is itself highly controversial and requires a great deal of argument, particularly in the face of the general or naive view that language can and should be viewed according to its success in representing or capturing reality, as well as the less naive "natural kinds" view that meaning is determined in part by the way the world is.[9] To speak of a similar autonomy of legal practices would be controversial, but for different reasons. The general or naive view here is that law both reflects and responds to external forces: conventional morality, custom, and power are three likely candidates, depending on one's sociological, political, and/or skeptical inclinations. More sophisticated commentators might also argue that the law reflects, or by its nature strives to reflect, basic moral truths, justice, or transcendent legal categories.

Of course, the idea of law as an autonomous discipline has its own history, and not an entirely happy one. An overstatement of the autonomy and resources of law was the major error of the formalist judges and commentators: the formalism criticized by the American legal realists of the early twentieth century (Bix 2003a, pp. 179–180). More modest assertions of legal autonomy are not so obviously erroneous, and they have fared better, but the autonomy asserted is still very far from being a self-evident truth (Bix 2003b).

One can follow Wittgenstein's lead in a more nuanced manner, as Thomas Morawetz has done (1990, 1992, 1999). Morawetz's point is that Wittgenstein's lesson is to pay close attention to actual practices—the attitude and actions of people within a practice. The Wittgensteinian inquiry (still following Morawetz's discussion) is whether law is best seen as being like chess—a game with (generally) fixed rules, which must be accepted in whole if one purports to be playing that game—or whether it is more like conventional morality—an activity where there is ongoing discussion about the merits of present practices, with those practices being very much subject to internal criticism and change over time (Bix 1999, pp. 19–21; see also Martinez 1996).

However, the difference between Wittgenstein (and Morawetz's reading of Wittgenstein) on one hand, and some of the other commentators trying to apply his work to legal theory on the other hand, is that Wittgenstein meant this close observation as a means of avoiding misunderstanding by (philosophical) observers, not as a basis for prescribing behavior to participants. A proper Wittgensteinian observation of constitutional law practice would help avoid tangled or overly metaphysical misunderstandings of that practice, one would think, but it would not (or should not) be the basis, for example, for telling advocates what arguments they may and may not make before a court.[10] To the contrary, Wittgenstein insisted that proper philosophical investigations leave the subject of investigation just as it was[11]—and "as it was" is a matter for the participants to tell us (directly or through their actions), not for us to tell them.

Thus, it is not so much that Wittgenstein's analysis could not possibly apply to law, but rather that the question of whether application is appropriate or not will be determined simultaneously by the justification for using that approach, and in the same way. (Thus, Wittgenstein's work, if properly used, will end up doing little work, for one will be proving his conclusions as much as one's own, and likely against roughly the same sets of objections.)

Wittgenstein and Skepticism

Another unfortunate application of Wittgenstein—though, luckily, a rare one—involves applying Saul Kripke's (1982) highly dubious skeptical reading of the rule-following considerations as the basis for a skeptical

(radically indeterminate) view of legal interpretation (e.g., Yablon 1987; Radin 1989). The view here, whether properly ascribed to Wittgenstein or not, is that since one cannot ground the truth of our use of words (or mathematical series) in some Platonic version of the terms to be applied, the only possible source of truth is the agreement of people within the practice—those who are considered competent practitioners of the language. It is not surprising that some scholars otherwise inclined toward a skeptical view of legal practice would be attracted by this approach, for it seems but a short step to the critical (or Foucaultian) view that truth is whatever the powerful say it is (e.g., Foucault 1980; cf. Yablon 1985, pp. 918–920, 929–945; Tushnet 1988, pp. 54–56, 60–69).

Kripke's analysis is all but universally rejected as a reading of Wittgenstein. Of course, the skeptical analysis might yet stand on its own merits, but the question of those merits takes us too far from the current topic. Suffice it to say that legal theorists have no basis for using Wittgenstein (without further argument) to justify a skeptical theory of law.

Conclusion

When legal theorists offer claims about the nature of language and meaning in the course of arguments about legal (and constitutional) interpretation, one would prefer that they know some philosophy of language and meaning rather than not knowing, and one might similarly prefer that they have read some Wittgenstein (and have reflected on it) than not.

At the same time, there is an irony when Wittgenstein is dragged out to buttress or to justify a radical claim about legal practice, or even a radical rethinking of legal theory. I am doubtful that there is much Wittgenstein has to tell us about law and language that someone even moderately familiar with the legal realists does not already know. Yet there are obvious benefits for legal theorists sharpening their analytical and critical teeth on the classic works in the philosophy of language (where there may be a better warranty of strong argument than there is in many volumes of American law journals) and so one should continue to encourage legal academics *to read* Wittgenstein . . . but to put the volume aside before trying to argue for a novel (or conventional) theory of legal practice or about the nature of law.

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Notes

1. For an example of how misreadings of Wittgenstein have contributed to some bad ideas about mental states—a central concept for determining criminal culpability—see Simons 1992, pp. 529–533.

2. One also wants to encourage legal scholars to look at the philosophical side of the history of ideas, and here there has been some quite good work on using the Wittgensteinian origins of certain ideas to help understand those ideas better (e.g., Sebok 1999).

3. The previous sections of the *Investigations* (Wittgenstein 1958, §§ 143–184) deal with related topics regarding the understanding and normativity of rules.

4. A point that is central to some of Ronald Dworkin's arguments against legal positivism (1986, pp. 33–44).

5. In an earlier text, Bobbitt offers the following statement—"This is a profound error, because it assumes that the commentator comes to the question of judicial review from a fresh perspective, one outside, as it were, the process of legal argument."—and then adds a footnote: "*See generally* L. Wittgenstein, *Philosophical Investigations* (1958)" (Bobbitt 1982, pp. 123 and 266, n. 1).

At the INPC Conference, Professor Bobbitt disclaimed grounding his constitutional theory on Wittgenstein's work, referring to Wittgenstein's work as one of many sources or inspirations for his views, but not an express foundation.

6. Bobbitt uses the term "modalities" to refer to these forms of argument.

7. Although Patterson expressly denies asserting that law is "autonomous" (1996, p. 182), he is clearly ascribing a kind of "autonomy" to law—which he describes various ways: e.g., that it is a practice "with its own argumentative grammar" (ibid.), and that "legal argument is 'horizontal' in nature" (ibid., p. 179).

8. Wittgenstein used "grammar" (e.g., Wittgenstein 1958, § 90: "Our investigation is therefore a grammatical one") in an idiosyncratic way, to mean the rules of language and meaning understood broadly (Glock 1996, pp. 150–155).

9. For an effort to defend a Wittgensteinian autonomy view, see Hacker 1986, pp. 179–214. For the seminal article on the "natural kinds" view that meaning is in part determined by the way the world is, see Putnam 1975, pp. 215–271.

10. There are comments within Bobbitt's work that seem to do exactly this: e.g., (1) stating, after describing six forms of argument ("modalities") within American constitutional law practice: "There is no constitutional legal argument outside these modalities" (Bobbitt 1991, p. 22); and (2) "they are the only modalities that are sanctioned by the Constitution" (ibid., p. 147). Bobbitt's position is summarized and critiqued in Bix 1999, pp. 11–21.

Although Professor Bobbitt's books generally support the constraining interpretation given above, his later writings disclaim that interpretation (and yet concede that the interpretation is so pervasive that it must have some foundation in the text) (Bobbitt 1994, pp. 1912, 1916, and 1919; Bix 1999, pp. 12–13 and nn. 21–31).

11. For example, there is Wittgenstein's famous comment:

> Philosophy may in no way interfere with the actual use of language; it can in the end only describe it.
> For it cannot give it any foundation either.
> It leaves everything as it is. (Wittgenstein 1958, § 124; see generally §§ 122–132)

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