

**HOW TO DO THINGS WITH WITTGENSTEIN: THE RELEVANCE OF  
WITTGENSTEIN'S LATER PHILOSOPHY TO THE PHILOSOPHY OF LAW**

David M. Finkelstein\*

**Abstract:** This Article explores the later Wittgenstein's contribution to our understanding of legal norms. Wittgenstein's philosophy of language is widely credited with having important consequences for the debate over the determinacy of legal judgments and the objectivity of legal norms. One can't help but be struck, however, by the extent to which critics disagree about what Wittgenstein actually thought. According to some proponents of the critical legal studies movement, Wittgenstein shows that judgments about the law are indeterminate. More sophisticated defenders of critical legal studies have argued that Wittgenstein shows that legal judgments are rendered true or false by community consensus. A third view holds that Wittgenstein rejects as nonsense the sorts of theories of legal objectivity that proponents of the first two positions attribute to him.

This Article considers and rejects all three of the above-mentioned positions, and proposes an alternative interpretation, according to which Wittgenstein shows how facts about what the law requires can be objectively true without being reducible to empirically verifiable, non-legal facts.

## 1. Introduction

Ludwig Wittgenstein is routinely credited with changing the philosophical conversation by de-emphasizing the sorts of epistemological concerns that philosophers had inherited from the likes of Kant,<sup>1</sup> Hume,<sup>2</sup> and Descartes,<sup>3</sup> and emphasizing instead questions concerning the nature of language and how

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<sup>1</sup> See IMMANUEL KANT, *CRITIQUE OF PURE REASON* (N. Kemp Smith trans. 1965).

<sup>2</sup> See DAVID HUME, *AN ENQUIRY CONCERNING HUMAN UNDERSTANDING* (Eric Steinberg ed., 1993).

<sup>3</sup> See RENE DESCARTES, *MEDITATIONS ON FIRST PHILOSOPHY* (John Cottingham ed., 1986).

language gets its grip on the world.<sup>4</sup> Subsequent generations of philosophers have named this change in scholarly focus that Wittgenstein helped to bring about the “linguistic turn.”<sup>5</sup>

Because Wittgenstein was concerned throughout his philosophical career with the nature of language, meaning, and interpretation, it is not surprising that legal philosophers have sought to draw from his work. After all, legal constraint is one species of linguistic constraint. Legal scholars have been principally—indeed, almost exclusively—concerned with Wittgenstein’s discussion of rule-following, which appears in his *Philosophical Investigations* and throughout Wittgenstein’s later work. Unfortunately, legal scholars have almost without exception missed the point of the rule-following considerations, or, at any rate, so I will argue.

Moreover, the various interpretations of the rule-following considerations in the legal community correspond to interpretations that have been more thoroughly explored in the philosophical literature. In what follows, I attempt to place the various jurisprudential interpretations of Wittgenstein in the context of the corresponding debates that have taken place in academic philosophy. My modest thought will be that the juxtaposition of the various philosophical and jurisprudential interpretations of Wittgenstein will help us to better understand the commitments of the legal philosophers that rely on Wittgenstein’s work. Section Three of this Article summarizes and then criticizes what I will call the skeptical interpretation of Wittgenstein’s rule-following considerations. Section Four summarizes and then criticizes the interpretation of the rule-following considerations offered by proponents of the critical legal studies movement. And Section Five considers and criticizes what I call the “quietist” interpretation of the rule following considerations, according to which we can’t so much as *ask* about the nature of legal facts. In the final section, I propose and defend an alternative to the standard interpretations of the rule-following considerations, which I call anti-foundationalism.

But my aim is to do more than categorize the different ways in which legal philosophers have interpreted Wittgenstein. My more ambitious thought is that the rule-following considerations are relevant to jurisprudence in a way that legal philosophers haven’t fully appreciated. On the account I defend, Wittgenstein shows that linguistic norms—of which legal norms are one species—can be fully objective without being reducible to something more

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<sup>4</sup> See, e.g., MICHAEL DUMMETT, *ORIGINS OF ANALYTIC PHILOSOPHY* (1994).

<sup>5</sup> MICHAEL DUMMETT, *Can Analytical Philosophy be Systematic, and Ought it to Be?* 442 *TRUTH AND OTHER ENIGMAS* (1978); see generally *THE LINGUISTIC TURN* (Richard Rorty ed., 1967).

basic. We are inclined to suppose that legal norms *must* have some extra-legal foundation because we want to be able to show that claims about the law rest on something more secure than facts about what we happen to find reasonable at a particular moment in history. However, the rule-following considerations show that *all* rationality, including the least subjective seeming forms of reasoning – including logical and mathematical reasoning – depends on facts about our social nature, or to use Wittgenstein’s phrase, our “forms of life.” Contrary to the skeptical interpretation of Wittgenstein’s rule-following considerations, this does not mean that legal reasoning can’t aspire to objectivity. On the contrary, it is precisely the point of the rule-following considerations that the skeptic expects too much—that *nothing* can count as an “objective fact” by the skeptic’s lights.

Properly thought through, this conclusion undermines a popular picture of legal reasoning. Both the originalist—who thinks that legal judgments are reducible to empirically verifiable judgments about what certain words meant at a particular moment in history—and the legal skeptic—who thinks legal judgments are unconstrained—appear to make the same assumption: both assume the existence of disagreement and uncertainty about what the law requires shows that that legal reasoning is too “squishy” to be genuinely answerable to the world. I will attempt to show that the real lesson of the *Investigations* is that this assumption is dispensable.

## 2. The Rule-Following Considerations

Ludwig Wittgenstein changed the course of Anglo-American (or “analytic”) philosophy not just once but twice. During the first phase of his philosophical career, which culminated in the release of the only work he published in his lifetime, the *Tractatus Logico-Philosophicus*,<sup>6</sup> Wittgenstein left his home in Vienna where he had trained as an engineer to study philosophy of mathematics with Bertrand Russell.<sup>7</sup> Although he had limited command of the English language and no formal philosophical training, Wittgenstein is credited with being one of the first to use new methods of logical analysis to solve philosophical problems. His work inspired the logical positivists, who acknowledged him as the father of their movement.<sup>8</sup>

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<sup>6</sup> LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* (C.K. Ogden trans., 1922) (henceforth the “*Tractatus*”).

<sup>7</sup> See generally RAY MONK, *LUDWIG WITTGENSTEIN: THE DUTY OF GENIUS* (1990).

<sup>8</sup> *Id.*

After World War I, Wittgenstein abandoned philosophy and attempted various non-scholarly careers, working, for instance, first as a schoolteacher and later as a gardener.<sup>9</sup> Eventually, John Maynard Keynes convinced Wittgenstein to return to Cambridge,<sup>10</sup> whereupon he began the work for which he is principally known. As the story goes, Wittgenstein's later work completely repudiates the philosophical commitments that formed the basis of his early work.<sup>11</sup> The *Philosophical Investigations*, on which Wittgenstein worked until his death and which was published posthumously, was his most sustained attempt to express his mature philosophical convictions.

Central to Wittgenstein's later philosophy is his discussion of following a rule, which is principally contained in the early middle parts of the *Investigations*—roughly §§ 185-242.<sup>12</sup> In these sections Wittgenstein discusses what he characterizes as a skeptical paradox that threatens our ordinary ways of thinking about “understanding, meaning, and thinking.”<sup>13</sup> He dramatizes this paradox by imagining a student's effort to develop a simple mathematical rule: “starting from zero, add by twos.”<sup>14</sup> Imagine that we begin the series up to 8—that is, we write “2, 4, 6, 8” on the chalkboard—and ask the student to continue. Imagine further that she carries on as expected up until 1000, and thus appears to show that she really has mastered the relevant rule, but that when she reaches 1000 she begins adding by fours. (That is, she writes “... 996, 998, 1000, 1004, 1008 ...” on the chalkboard.) Perhaps we might attempt to correct her by saying something like, “no, after you reach 1000, you're to keep going on as

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> On the standard account, the early Wittgenstein endorsed a “realist” theory of language, according to which language “mirrors” the world. *See, e.g.,* Dennis M. Patterson, *Law's Practice*, 90 COLUM. L. REV. 574, 576 n.9 (1990). Wittgenstein would later speak of being “forced to recognize grave mistakes in what I wrote in [the *Tractatus*.]” LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* x (G.E.M. Anscombe trans., 1958) (henceforth “*Investigations*”).

As I say, this is the standard history. It has become increasingly popular to argue that there is a continuity to Wittgenstein's thought, and that many of the principal insights of the late Wittgenstein were already expressed in the *Tractatus*, albeit in a different form. *See generally* Alice Crary, *Introduction*, in *THE NEW WITTGENSTEIN* 11-17 (A. Crary and R. Read eds., 2000) (henceforth “*The New Wittgenstein*”) (discussing the literature defending the non-standard reading of the *Tractatus*).

<sup>12</sup> Material from the rule-following considerations also shows up in *THE BLUE AND BROWN BOOKS: PRELIMINARY STUDIES FOR THE “PHILOSOPHICAL INVESTIGATIONS”* (1942), and in *REMARKS ON THE FOUNDATIONS OF MATHEMATICS* (G.H. von Wright, R. Rhees & G.E.M. Anscombe eds., G.E.M. Anscombe trans., 1978). I will have more to say about the latter below.

<sup>13</sup> *Investigations* § 81.

<sup>14</sup> *Investigations* § 185.

before.” But what if her response is “I know; that’s what I’m doing.” What would we say then?

The challenge is to point to something in virtue of which “... 998, 1000, 1002 ...” is the right answer and “... 998, 1000, 1004 ...” the wrong answer. But it’s harder to do so than we might have thought. After all, the initial sequence we wrote on the board doesn’t rule out our student’s behavior—*that* sequence is equally compatible both with what we had hoped she would do and what she actually did. (Viz. the sequence “2, 4, 6, 8 ...” is compatible with  $f(x)=2x$ ; but it’s also compatible with  $(x \leq 500)(f(x)=2x)$  &  $(x > 500)(f(x)=4(x-250))$ ).

Because the initial sequence can be interpreted in various ways, we might think that all we need to do is tell our student how we would like her to interpret the series. Thus, we might say: “when I said continue on as before, I meant *keep on adding by twos*.”<sup>15</sup> But our interpretation of the series suffers from the safe problem as the initial sequence on the chalkboard: our instruction, no less than the series itself, can itself be interpreted in different ways. The instruction “add by twos” is just words. You and I may understand the words in the same way, but the words themselves don’t tell us how to understand them. For instance, “keep on adding by twos!” could be interpreted to mean “continue adding by twos *until you get to 1000*.” (Since the problem arises when we imagine someone who interprets our initial behavior in a non-standard way, it would stand to reason that such a person might interpret our subsequent behavior in non-standard ways as well.) The same, of course, would be true if we were to try to interpret our interpretation.<sup>16</sup> As courts have recognized, definitions “only

<sup>15</sup> Cf. Frank H. Easterbrook, *Levels of Generality in Constitutional Interpretation*, 59 U. CHI. L. REV. 349, 360-61 (1992) (“An external interpretive community could discover whether the speaker embraced a rule carrying addition past 10,000 by asking questions and evaluating the answers.”). At the risk of getting ahead of ourselves, it’s worth noting that Easterbrook misses Wittgenstein’s point. The point is that no matter how many answers the speaker gives, there will be infinitely many rules compatible with those answers.

<sup>16</sup> Do not suppose that it helps matters if we conceive of interpretation as some private mental act rather than an external performance. Imagine that the formula “ $f(x)=2x$ ” flashes before my mind’s eye as I write the initial series on the chalkboard. It’s unclear how this would be of any help. Clearly it wouldn’t help the student, since she would have to guess what’s in my mind. More importantly, what’s in my mind is just a mental picture of a possible physical expression of the rule. Pictures, no less than that which they depict, are susceptible to various interpretations.

To the extent that we find ourselves inclined to deny this—to insist that mental pictures *are* somehow different from objective expressions of interpretations—we have in effect insisted that the problem is solved by magic. Cf. SAUL KRIPKE, *WITTGENSTEIN: ON RULES AND PRIVATE LANGUAGE* 51 (1982) (henceforth “*Rules and Private Language*”) (“Such a move ... seems desperate: it leaves the nature of this postulated primitive state ... completely mysterious.”).

push[] the problem back to the meaning of the defining terms.”<sup>17</sup> Or as Wittgenstein says, “any interpretation hangs in the air along with what it interprets lending it no support.”<sup>18</sup>

We might characterize the trouble we find ourselves in when we attempt to explain ourselves to our student as follows: the problem is that bits of objective reality considered as such are *normatively inert*. The marks we made on the chalkboard are mere squiggles, and our subsequent instructions just noise; neither the squiggles nor the noise considered in itself tell our student what to do.<sup>19</sup> For one thing, a set of squiggles can be invested with *any* semantic significance, or with no semantic significance at all. There’s no particular reason that “2” should denote *the number two*—we could just as well have used “ii”, or some altogether different sign. Further, even if we allow ourselves to assume that “2” refers to *the number two*, “4” to *the number four*, and so on, as we’ve just seen, the finite series is equally compatible with infinitely many mathematical interpretations.<sup>20</sup>

Moreover, what’s true of the chalk marks is equally true of what I go on to say in order to rule out unintended interpretations of the chalk marks. In the climax of the rule-following dialectic, Wittgenstein summarizes the point as follows:

This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict.<sup>21</sup>

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<sup>17</sup> *Goldstein v. SEC*, 451 F.3d 873, 878 (D.C. Cir. 2006).

<sup>18</sup> *Investigations* § 198.

<sup>19</sup> *Id.* at § 432 (“Every sign *by itself* seems dead.”). Cf. LAWRENCE TRIBE & MICHAEL DORF, ON READING THE CONSTITUTION 81-82 & n.5 (1991). (“all meaning is external to text ... [viz. for any text] there will remain an irreducible minimum of meaning that the reader will have to supply on her own.”).

David H. Finkelstein (to whom I am not related) explores the impulse to refuse to credit bits of objective reality with semantic content in much greater detail in his *Wittgenstein on Rules and Platonism*, in *The New Wittgenstein*, *supra* note 11.

<sup>20</sup> To properly express this thought, it helps to have a bit of set theory: we want our student to extend a particular function, namely  $f(x)=2x$ . Since the function with which we’re concerned is defined on the naturals, it will be an infinite set. (Functions are sets of ordered pairs.) However, the instructions we gave our student at most pick out some finite subset of the infinite set we had in mind. So we give our student a finite sequence and ask her, “which set, which unique function, does this belong to?” The problem, of course, is that any finite sequence by definition belongs to infinitely many sets. (In fact, it must belong to uncountably many.)

<sup>21</sup> *Investigations* § 201.

### 3. Skepticism

Before we attempt to unpack all this, let's pause to consider why rule-following matters. Wittgenstein himself suggests that rule-following illuminates meaning, thinking, and understanding.<sup>22</sup> The philosopher Saul Kripke is credited with most clearly unpacking this connection. Kripke sought to show how Wittgenstein's "regress of interpretations" threatens the very idea that there are facts concerning what our words mean.<sup>23</sup> The problem we sketched earlier was on its face one of *justification*: what justifies our understanding of what the rule requires in a given instance? Kripke's insight was that our seeming inability to point to objective facts that justify our understanding of the correct way of following a rule leaves us unable to tell a satisfying account of what our words *mean*. Recall that when our imaginary student began adding by fours, we found ourselves inclined to correct her by telling her to "add by twos." In virtue of what, however, am I entitled to conclude that when I use the word "add" what I tell her to do is *add*? In other words, how do I know that I mean *plus* by "plus"?<sup>24</sup> Certainly nothing about my past use of the word fixes it that I mean *plus* rather than some other, non-standard arithmetic function. Consider the "quus" function: quus is just like plus, only it yields different values when one plugs in large inputs. Imagine, for instance, that "x quus y" equals x plus y when x and y are less than one million, but is otherwise equal to five.<sup>25</sup> As it happens, I'm fairly confident that I've never actually added (or quadded) numbers larger than one million. Nothing in my past behavior, therefore, settles it that by "plus" I mean *plus* and not *quus*. Nor does anything that flashes before my mind.<sup>26</sup> Nor, for that matter, do my *dispositions* concerning how the word "plus" is to be used.<sup>27</sup> According to Kripke, it is precisely Wittgenstein's point that there is *no* fact as to what I mean by "plus." Kripke's Wittgenstein "does not

<sup>22</sup> *Id.* at § 81.

<sup>23</sup> *Rules and Private Language*, *supra* note 16 at 7 ("the relevant skeptical problem applies to all meaningful uses of language.").

<sup>24</sup> *Id.* at 8-9.

<sup>25</sup> *Viz.*  $[(x,y \leq 1,000,000)(f(x,y)=x+y) \ \& \ (x,y > 1,000,000)(f(x,y)=5)]$ .

<sup>26</sup> Recall *supra*, note 16. See also *Rules and Private Language*, at 15 ("my past mental history is equally compatible with the hypothesis that I meant quus."); cf. *Investigations*, at 217e ("If God had looked into our minds he would not have been able to see there whom we were speaking of.").

<sup>27</sup> I am not perfect; my dispositions include the tendency to make arithmetic *mistakes*. This doesn't mean "plus" means something other than *plus*: "where common sense holds that the subject means the same addition function as everyone else but systematically makes computational mistakes, the dispositionalist seems forced to hold that the subject makes no computational mistakes, but means a non-standard function ('skaddition') by '+'." *Rules and Private Language*, at 30.

give a ‘straight’ solution, pointing out to the silly skeptic a hidden fact he overlooked, a condition in the world which constitutes my meaning addition by ‘plus’. In fact, he agrees with his own hypothetical skeptic that there is no such fact.”<sup>28</sup> Thus, “[t]here can be no such thing as meaning anything by any word.”<sup>29</sup>

The moral that Kripke attempts to tease out of the rule-following considerations has obvious implications for jurisprudence.<sup>30</sup> Consider: there’s nothing special about the word “plus.” If there’s no fact as to what I mean by “plus”, then there’s no fact as to what I mean by *any word*.<sup>31</sup> And you’re just like me: if there’s nothing that constitutes *my* meaning, then there’s no such thing as meaning anything by *any word*. Thus, there can be no fact of the matter as to what legal texts mean either: legal texts don’t tell us what to do; nor, for that matter, do decisions putatively interpreting legal texts.<sup>32</sup> Paraphrasing Wittgenstein, every course of action can be made out to accord with the law and can also be made out to conflict with it; thus, talk of accord and conflict is misplaced.<sup>33</sup>

A surprising number of legal philosophers have embraced this skeptical conclusion. For instance, Daniel Stroup appears to celebrate the fact that “Wittgenstein frees legal words from the tyranny of rigidly fixed meanings.”<sup>34</sup>

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<sup>28</sup> *Rules and Private Language*, at 69.

<sup>29</sup> *Id.* at 55.

<sup>30</sup> James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 709-10 (1985) (“On the most basic level [the post-Wittgensteinian] view of language seems to undermine the picture of the neutral interpretive function of the judiciary.”); *see also* Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984) (“Determinacy is necessary to the ideology of the rule of law ... It is the only way judges can appear to apply the law rather than make it.”).

<sup>31</sup> *Rules and Private Language*, at 7 (“the relevant skeptical problem applies to all meaningful uses of language.”).

<sup>32</sup> The indeterminacy of judicial precedent is a common theme. Justice Scalia complains that law students are taught to envision the great judge as “the man (or woman) who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken field running through earlier cases that leaves him free to impose that rule.” ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 9 (1997).

<sup>33</sup> *Investigations* § 201.

<sup>34</sup> Daniel G. Stroup, *Law and Language: Cardozo's Jurisprudence and Wittgenstein's Philosophy*, 18 VAL. U. L. REV. 331, 358 (1984); *see also* Ahilan T. Arulanantham, *Breaking the Rules?: Wittgenstein and Legal Realism*, 107 YALE L.J. 1853, 1869 (1998) (“The rule cannot by itself determine correct applications (because there is no fact of the matter that makes the rule inconsistent with one application and consistent with another.”); Stephen Brainerd, *The Groundless Assault: A Wittgensteinian Look at Language, Structuralism, and Critical Legal Theory*, 34 AM. U. L. REV. 1231, 1238 (1985) (“Wittgenstein’s theme, hopefully, is familiar by now; he contends that the

Echoing Stroup, Margaret Radin also purports to embrace the “liberating potential” of Wittgenstein’s putative skepticism: “If we accept the Wittgensteinian view of rules,” she writes,

we must reject the conception of the separation of powers that pictures a rigid distinction between the legislature as rule-maker and the judges as rule-apppliers; indeed, we must reject, as well, the more general distinction between government as rule-maker and citizens as rule-followers.<sup>35</sup>

For Stroup and Radin, it seems, Wittgenstein’s rule-following considerations provide an intellectual justification for judicial activism.<sup>36</sup>

### 3.1 Problems with Skepticism

Notwithstanding the enthusiasm with which it was embraced by some of the less thoughtful proponents of the critical legal studies movement, there are at least two problems with the skeptical interpretation of Wittgenstein. Perhaps the less important of the two problems is that it completely ignores Wittgenstein’s own response to the skeptical paradox. In what can fairly be called the climax of his discussion of rule-following, Wittgenstein says,

This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule ... *It can be seen that there is a misunderstanding here* from the mere fact that in the course of our argument we give one interpretation after another ... *What this shews is that there is a way of grasping a rule which is not an interpretation*, but which is exhibited in what we call “obeying the rule” and “going against it” in actual cases.<sup>37</sup>

The skeptical interpretation simply ignores Wittgenstein’s claim that the paradox rests on a *misunderstanding*, and that *there is a way of grasping a rule which is not an interpretation*. By calling the paradox a “misunderstanding,” Wittgenstein suggests that, rather than being held in place by an irrefutable argument, he is

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meanings of our concepts have no firm grounding. Instead, he believes they are arbitrarily applied and perpetuated.”)

<sup>35</sup> Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 815-16 (1989).

<sup>36</sup> See also Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 824-27 (1983).

<sup>37</sup> *Investigations* § 201 (emphasis added).

proposing to find fault with the reasoning that leads to the paradox.<sup>38</sup> Again, Wittgenstein's conclusion is *not* that there is no such thing as rules; his conclusion is that "there is a way of grasping a rule that doesn't require interpretation." In what follows, I consider various proposals for understanding Wittgenstein's discussion of how skepticism may be overcome. For the time being, I note only that the skeptic is in no position to make sense of these remarks at all.

Of course, an additional problem is that skepticism about meaning is plainly incoherent. We need to assume words have meaning to try to show that they don't. Thus, to get skepticism about meaning off the ground, you have to assume it's false. Thus expressed, the argument against skepticism risks seeming glib. The point, however, is not that there is anything wrong with what mathematicians call "indirect arguments"—viz. assuming a proposition true in order to prove it false. Rather, the point is that there is something incoherent about the skeptic's attitude toward her own argument. The skeptic takes her argument to be *persuasive* and the propositions on which it rests as deserving of *credence*. Thus, the skeptic attitude toward the skeptical argument is illegitimate by her own lights. As the philosopher Crispin Wright says, "nobody can coherently accept the skeptic's response to the regress: the power of this response can only be that of a paradox."<sup>39</sup>

No serious philosopher takes Wittgenstein to have endorsed skepticism about meaning.<sup>40</sup> On the contrary, philosophers with wildly different interpretations of the rule-following considerations agree that the whole point of the rule-following considerations is to show how skepticism can be overcome.<sup>41</sup> One

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<sup>38</sup> John McDowell, *Meaning and Intentionality in Wittgenstein's Later Philosophy*, in MIND, VALUE, AND REALITY 267 (1995).

<sup>39</sup> *Rule-Following, Meaning and Constructivism*, in RAILS TO INFINITE: ESSAYS ON THEMES FROM WITTGENSTEIN'S PHILOSOPHICAL INVESTIGATIONS 58 (2001) (henceforth "Rails to Infinite").

<sup>40</sup> Kripke himself is no exception. One point that is largely unappreciated in the law review literature is that Kripke's Wittgenstein accepts a "redundancy" theory of truth, according to which "p is true" (or "it is a fact that p") just means *p*. E.g., *Rules and Private Language*, *supra* note 16, at 86. Thus, because Kripke's Wittgenstein thinks that claims about meaning are legitimately assertable—for reasons we will not explore—he also thinks that they are factual in some minimal sense. (Since he endorses "p", and since "it's a fact that p" just means *p*, he must also endorse "it's a fact that p.") What Kripke's Wittgenstein denies is that such claims are factual in any "superlative" sense. *Id.* at 69. Although he is much less clear about this than he might have been, Kripke appears to take this to mean only that we can't give conceptually independent truth-conditions for claims about meaning. See, e.g., *id.* at 77. Understood in this way, Kripke's Wittgenstein is an antirealist, not a skeptic.

<sup>41</sup> See, e.g., Dennis Patterson, *Law's Pragmatism: Law as Practice & Narrative*, 76 VA. L. REV. 937, 973 (1990) ("The discussion of rules in *Philosophical Investigations* is addressed to the emptiness of skepticism and is aimed at showing that rules make sense in practices.").

can't help but be struck, however, by the range of incompatible positions that are attributed to him. The most popular interpretation takes Wittgenstein to have shown that facts about meaning are based on community consensus, and therefore are not "objective" in nature. Another interpretation, however, credits Wittgenstein with showing that facts about meaning are as objective, as robustly real, as any. On a third interpretation, Wittgenstein neither affirmed nor denied the objectivity of meaning, but instead rejected the entire issue as nonsense.

In the legal literature, one finds proponents of the first (critical) and the third (quietist) interpretation of the rule-following considerations, but not so much the second (realist). Let us, therefore, consider these interpretations first.

#### 4. Antirealism

The first alternative to skepticism that I will consider attempts to build an account of meaning out of Wittgenstein's observation that following a rule is a "custom." In the section of the *Investigations* where Wittgenstein discusses the "regress of interpretations," Wittgenstein asks "what has the expression of a rule—say a sign-post—got to do with my actions? ... Well, perhaps this ... *I have been trained to react* to this sign in a particular way, and now I do so react to it."<sup>42</sup> Put otherwise, the *content* of my action is a function not of interpretation but *custom*.<sup>43,44</sup> This remark is of a piece with his comment much earlier in the *Investigations* that "language is part of an activity, or of a form of life."<sup>45</sup>

One might think that Wittgenstein's conception of "custom" can be used to respond to the skeptic as follows: when the skeptic challenged us to account for what meaning consists in, essentially she was inviting us to find something that *constrains* our linguistic behavior. The regress of interpretations seems to show that no fact *about me*—either about my past use of a linguistic sign or about what flashes before my mind when I observe the sign—can be a genuine source of constraint. But even if I am not constrained by my own past behavior, perhaps I am constrained *by custom*—by *other people's* dispositions to respond to my linguistic behavior. Put otherwise, perhaps Frances' meaning *plus* by "plus" consists in the community's *taking her* to mean *plus* by "plus."

<sup>42</sup> *Investigations* § 198 (emphasis added).

<sup>43</sup> *Id.* ("a person goes by a sign-post only in so far as there exists a regular use of sign-posts, a custom."); *see also id.* at § 199 ("To obey a rule, to make a report, to give an order, to play a game of chess, are *customs* (uses, institutions).").

<sup>44</sup> "Custom," it should be noted, translates *Gepflogenheit*. Perhaps a more felicitous translation would have been "habit." So translated, Wittgenstein's remarks about *Gepflogenheit* would not obviously support antirealism.

<sup>45</sup> *Id.* at § 23.

The idea that meaning is constituted by communal consensus is a species of what philosophers call “antirealism.” As a general matter, an “antirealist” with respect to a domain of discourse is someone who thinks that sentences in that discourse are not *objectively true*.<sup>46</sup> Philosophical antirealism, it should be noted, is not opposed to what in jurisprudence gets called “legal realism.” On the contrary, both the philosophical antirealist and the legal realist agree that there are no independent facts that constrain legal reasoning from without.<sup>47</sup>

To be more specific about the labels we use, the view that rules—legal or otherwise—are constituted by community agreement is a specific form of antirealism that the philosopher Crispin Wright calls “euthyphronism.”<sup>48</sup> Euthyphro was a character in a Platonic dialogue who thought that the word “piety” means that which is pleasing to the gods.<sup>49</sup> Similarly, for the euthyphronist, “the speed limit on the interstate,” for instance, is constituted by what the community *judges* to be the speed limit on the interstate. Thus, for the euthyphronist, there’s a sense in which claims about the law are “autobiographical”: what I am reporting on when I make a claim about what the law requires is a fact about my community, not an independent fact about the world.<sup>50</sup>

Many legal philosophers (perhaps most) understand Wittgenstein to have shown that skepticism can be answered in this way. For instance, Dennis Patterson claims that “the normativity and objectivity of legal judgment is a function not of the way the world is, but is forged in community agreement over time.”<sup>51</sup> Along the same lines, Margaret Radin—whom I quoted earlier—states that “the existence of legal rules [is] contingent ... upon the surrounding

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<sup>46</sup> See generally CRISPIN WRIGHT, TRUTH AND OBJECTIVITY (1992).

<sup>47</sup> Put otherwise, both philosophical antirealism and legal realism are a form of what Frege calls “psychologism.” See, e.g., THE BASIC LAWS OF ARITHMETIC: EXPOSITION OF THE SYSTEM 13-14 (M. Furth trans., 1964).

<sup>48</sup> Crispin Wright, *Objectivity and Modern Idealism*, in *Rails to Infinite*, *supra* note 39, at 302.

<sup>49</sup> PLATO, EUTHYPHRO, APOLOGY, CRITO (F.J. Church trans., 1987).

<sup>50</sup> As Christian Zapf and Eben Moglen have said, “[w]hen words themselves do not determine their applications, all the action is with the reader and hence ‘all readings ... become songs of oneself.’” *Linguistic Indeterminacy and the Rule of Law: on the Perils of Misunderstanding Wittgenstein*, 84 GEO. L.J. 485, 488 (1996). See also Radin, *supra* note 35, at 799-800 (“The rules do not cause the agreement; rather, the agreement causes us to say there are rules.”); Daniel S. Goldberg, *I Do not Think it Means what you Think it Means: How Kripke and Wittgenstein’s Analysis of Rule Following Undermines Justice Scalia’s Textualism and Originalism*, 54 CLEV. ST. L. REV. 273, 299 (2006) (“[Wittgenstein’s] anti-skeptical argument indicates that it is our practices that guide our rules rather than our rules that guide our practices.”).

<sup>51</sup> Dennis Patterson, *Normativity and Objectivity in Law*, 43 WM. & MARY L. REV. 325, 328 (2001).  
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social context .... to the content of surrounding social activities and understandings.”<sup>52</sup> And Ahilan Arulanantham likewise concludes that “behavior-guiding *forms of life* ... serve to fill the gap between rules and outcomes that Wittgenstein’s rule-following critique makes necessary.”<sup>53</sup>

#### 4.1 Problems with Antirealism

Although it has been enthusiastically embraced—if not explicitly defended—by many proponents of the critical legal studies movement, the antirealist interpretation of the rule following considerations is deeply problematic. For one thing, euthyphronism only *seems* to provide an answer to the skeptic. The challenge, recall, was to find something that *constrains* our attempts to follow semantic or legal rules, something that our understanding of the rule answers to. According to the euthyphronist, we are constrained by the community. But if we choose to accept the terms of the skeptical challenge, then the community’s judgments will seem like one further interpretation; the *content* of the community’s verdict will be as much in suspense as the content of the rule itself. After all, the community’s efforts to express its verdict, no less than our own actions, can be interpreted in various ways.

This point has been ignored rather than answered by the proponents of the antirealist interpretation of Wittgenstein. For instance, although Ahilan Arulanantham acknowledges that there is a puzzle as to “[w]hy ... social processes [are] more determinate than legal rules”, his answer is that “legal rules always require interpretation prior to their application, which creates the indeterminacy described in Wittgenstein’s critique. Social and ideological beliefs, however, are driven by a form of understanding more basic than interpretation, and on which interpretation itself depends.”<sup>54</sup> In other words, by Arulanantham’s lights, my meaning isn’t constituted by my own vocalizations; nor, for that matter, are my vocalizations *together with yours* sufficient to constitute my meaning. However, the story goes, if you get a whole community together, somehow the content of its collective vocalizations isn’t susceptible to skeptical doubt. By insisting that manifestations of social beliefs are somehow different without explaining how, Arulanantham in effect insists that the regress is stopped by magic.<sup>55</sup>

<sup>52</sup> Radin, *supra* note 35, at 808-09.

<sup>53</sup> Arulanantham, *supra* note 34, at 1882 (emphasis added).

<sup>54</sup> *Id.* at 1866 n.66.

<sup>55</sup> See David H. Finkelstein, *Wittgenstein on Rules and Platonism*, *supra* note 11, at 63. Cf. *Rules and Private Language*, *supra* note 16, at 51 (“Such a move ... seems desperate: it leaves the nature of this postulated primitive state ... completely mysterious.”); *The Blue Book*, *supra* note 12, at 34 (2010) J. JURIS 659

An additional problem with euthyphronism is that it implies that the community can't be wrong. As Crispin Wright once said, "the community does not go right or wrong—it just goes."<sup>56</sup> Understood as an account of semantic rules, Wright's conclusion is counterintuitive. Intuitively, it seems perfectly plausible that Frances could mean *plus* by "plus" even though her community (wrongly) judges her to mean something else. (Perhaps she speaks with a lisp?) Understood as part of a story about the content of *legal* rules, however, it would be even more counterintuitive to suggest that the community can't be wrong.<sup>57</sup> Consider: if you believe that substantive due process protects sexual autonomy, then you will probably think that the United States courts failed to protect certain fundamental rights between 1986 and 2003.<sup>58</sup> If you believe that substantive due process does *not* protect such a right, then you will probably think that the courts were right prior to 2003, but wrong thereafter. Either way, it's hard to see why anyone would conclude that a community can't be wrong about the law.

It might be tempting to object that particular members of the legal community might get things wrong in this example, but the *whole community* does not. To wit: *Lawrence v. Texas* was a 5-4 decision; either five Justices got things right, or four did. But if the majority of a community can be wrong about the law, it's not clear why it's conceptually impossible for *everyone* to be wrong. For any  $n$ , if  $n\%$  of the population can go wrong, then  $n\%+1$  can go wrong. Thus, we might think we can imagine science-fiction scenarios in which an entire community is wrong about the law: imagine, for instance, a disease that targets only non-members of the Tea Party.

The antirealist insight is that linguistic and legal norms depend on facts *about us*: linguistic norms depend on facts about how particular communities use words; legal norms depend on the sorts of rights that particular communities enforce. Consequently, there's something fishy about treating linguistic and legal norms

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("Every sign is capable of interpretation; but the meaning mustn't be capable of interpretation. It is the last interpretation.")

<sup>56</sup> Wright, *Rule-Following, Objectivity and the Theory of Meaning*, in *Rails to Infinite*, *supra* note 39, at 41. It should be noted that Wright has since repudiated this view, claiming instead that it is the *ideal* community, not the actual community, whose opinion determines meaning. Even Wright's more refined view, however, is vulnerable to the objection I sketch below.

<sup>57</sup> It should be emphasized that Wright never seeks to give an account of legal rule-following. What I go on to say, therefore, should not be understood as a criticism of Wright's own views. However, since Wright is more clear-thinking than some about what euthyphronism commits us to, I find it useful to rely on his formulation of the position.

<sup>58</sup> Compare *Bowers v. Hardwick*, 478 U.S. 186 (1996) (upholding a Georgia statute criminalizing sodomy) with *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers*).

as if they were facts that sit there like distant constellations, waiting to be discovered. It is a mistake, however, to assume that if a norm depends on us, then this means that something is true of that norm makes it so. Even though words have meaning in use, we needn't conclude that community consensus constitutes the law willy nilly.

## 4.2 The Textual Basis for the Antirealist Interpretation of Wittgenstein

Did Wittgenstein actually endorse euthyphronism? In fact, I think it's quite clear that he didn't. Wittgenstein repeatedly criticizes the notion that what he calls "rules of grammar" are arbitrary.<sup>59</sup> He says that to call mathematics arbitrary "is certainly misleading and very dangerous in a way."<sup>60</sup> Indeed, contrary to the standard account of his later philosophy, Wittgenstein goes so far as to say that our "use of a word gives us an idea of very general truths about the world."<sup>61</sup> Along the same lines, he states that "thinking and inferring (like counting) is of course bounded for us, not by an arbitrary definition, but by natural limits corresponding to the body of what can be called the role of thinking and inferring in our life."<sup>62</sup>

The manner in which what Wittgenstein calls our "rules of grammar" are constrained by our "forms of life" is an important theme of his later philosophy. To dramatize the issue, he encourages us to imagine a tribe of people who seem to be selling lumber, but where the seller appears to set prices based on the area of ground that the pile of wood covers.<sup>63</sup> This, it should be noted, would be a silly way of conducting business. A seller could extract a high price for a small quantity of lumber by spreading it across the ground. And a buyer could lower the price for a given quantity of lumber by stacking the planks in a tall pile. But imagine that we can't get the tribe to see this: imagine that we first arrange a pile in a tall pile, and then spread the same pile across the

<sup>59</sup> "Rules of grammar" is Wittgenstein's phrase for the rules for how to do things with words. I think it helps to think of "rules of grammar" as another way of speaking of the rules of *thought*. However, it should be noted that the later Wittgenstein deliberately avoided the phrase "rules of thought," probably because he took the idea to be weighed down with philosophical misconceptions.

<sup>60</sup> LECTURES ON THE FOUNDATIONS OF MATHEMATICS 143 (C. Diamond ed., 1998).

<sup>61</sup> 166 MANUSCRIPT 12ff (1944) (quoted in G.P. BAKER & P.M.S. HACKER, WITTGENSTEIN: RULES, GRAMMAR AND NECESSITY (1988)). See also *Investigations*, at 230e ("if anyone believes that certain concepts are absolutely the correct ones, and that having different ones would mean not realizing something we realize—then let him imagine certain very general facts of nature to be different from what we are used to, and the formation of concepts different from the usual ones will become intelligible to him.").

<sup>62</sup> REMARKS ON THE FOUNDATIONS OF MATHEMATICS, *supra* note 12, at I-116.

<sup>63</sup> *Id.* at I-143-50.

ground, and the tribe members insist that the second pile *should* cost more because there's now more wood.

This thought-experiment is intended to reveal the limits of our ability to imagine other forms of life. The purpose of interpretation is to locate the subject in a logical space in which the interpreter herself is at home. Thus, “pre-logicality is a trait injected by bad translators.”<sup>64</sup> In other words, any reason to think that the wood-sellers are irredeemably irrational would just show that we haven't succeeded in interpreting them. Thus, there is a sense in which there is nothing to be meant by the suggestion that we could have calculated, counted, or reasoned in radically different ways. When we attempt to imagine forms of life that are radically different from our own—in which people calculate, count, or infer differently—the forms of life we intended to imagine come apart in our hands. As Stanley Cavell has said, this shows that,

It is not necessary that human beings should have come to engage in anything we would call calculation ... But if their natural history has brought them to this crossroads, then only certain procedures will count as calculating ... and only certain forms will allow those activities to proceed.<sup>65</sup>

## 5. Quietism

The principal alternative to antirealism is often called “quietism.” A quietist in the sense that I will consider rejects rather than answers questions concerning the objectivity of meaning. Put otherwise, the quietist thinks that the questions the skeptic asks and the antirealist attempts to answer are a kind of *nonsense*.

To call a statement nonsense is not to call it false. For instance, someone who rejects the view that capital punishment deters crime,<sup>66</sup> in judging this statement to be false, would undertake a positive commitment of her own: she would think that capital punishment does not deter crime.<sup>67</sup> Thus, she would not “stay quiet” with respect to the debate. By contrast, a quietist would reject both the affirmation and the negation of a claim. After all, the negation of a piece of nonsense is just more nonsense.

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<sup>64</sup> W.V.O. QUINE, *PHILOSOPHY OF LOGIC* 81 (1970).

<sup>65</sup> STANLEY CAVELL, *THE CLAIM OF REASON: WITTGENSTEIN, SKEPTICISM, MORALITY AND TRAGEDY* 118 (1979).

<sup>66</sup> See, e.g., Cass Sunstein and Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 *STAN. L. REV.* 703 (2005).

<sup>67</sup> Jeffrey Fagan, Franklin E. Zimring, and Amanda Geller, *Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty*, 84 *TEX. L. REV.* 1803 (2006).

A number of philosophers have flirted with the notion that philosophical reflection is particularly prone to lapse into nonsense. For instance, Hume concludes that philosophical speculation is based on the illusion that we can employ concepts that are not based on our experiences. As he puts it, “if we take in our hand any volume; of divinity or school metaphysics, for instance; let us ask, *Does it contain any abstract reasoning concerning quantity or number?* No. *Does it contain any experimental reasoning concerning matter of fact and existence?* No. Commit it then to the flames: For it can contain nothing but sophistry and illusion.”<sup>68</sup> Building on Hume’s conclusion that concepts derive their content from experience, Kant famously develops a conception of philosophy according to which what is distinctive about philosophical problems is not that they’re so difficult to solve, but that they’re *impossible* to solve. As Kant explains in the opening line of the First Critique, “Human reason has this peculiar fate that in one species of its knowledge it is burdened by questions which, as prescribed by the very nature of reason itself, it is not able to ignore, but which, as transcending all its powers, it is also not able to answer.”<sup>69,70</sup>

## 5.1 Quietism with Respect to the Rule-Following Considerations

Wittgenstein also develops a conception of philosophy according to which much philosophical reflection turns out to be nonsense. As he explained early in his philosophical career, “[s]kepticism is not irrefutable, but obvious nonsense ... For doubt can exist only where a question exists; a question can exist only where an answer exists, and this can exist only where something can

<sup>68</sup> Hume, *supra* note 2, at 114. See also *id.* at 13 (“When we entertain, therefore, any suspicion, that a philosophical term is employed without any meaning or idea (as is but too frequent), we need but enquire, *from what impression is that supposed idea [viz. concept] derived?* And if it be impossible to assign any, this will serve to confirm our suspicion.”).

<sup>69</sup> Kant, *supra* note 1, at Avii. See also *id.* at B354-55 (“There exists ... a natural and unavoidable dialectic of pure reason ... one inseparable from human reason, and which, even after its deceptiveness has been exposed, will not cease to play tricks with reason.”).

<sup>70</sup> Also building on Hume—and indeed, on their interpretation of Wittgenstein’s early work—the logical positivists develop a theory of meaning according to which the meaning of a sentence is a function of the possible experiences that would render that sentence true. Thus, because metaphysical speculation is “consistent with any assumption whatsoever concerning the nature of [one’s] future experience,” A.J. AYER, LANGUAGE, TRUTH AND LOGIC 35 (1946), the words we use to putatively express such speculation are meaningless. *Id.* at 41 (“all metaphysical assertions are nonsensical”). We lapse into such nonsense when we are deceived by the superficial grammatical similarity between sentences that speak to possible experience—sentences like “there is no such thing as cold fusion”—and sentences that do not: sentences such as “there is no such thing as free will.” *Id.* at 44-45 (“the metaphysician ... lapses into [nonsense] through being deceived by grammar.”).

be said.”<sup>71</sup> In the *Investigations*, he states that “[t]he results of philosophy are the uncovering of one or another piece of plain nonsense [*Unsinn*] and of bumps that the understanding has got by running its head up against the limits of language.”<sup>72</sup>

With these remarks in mind, let us reconsider the sort of skepticism that was at issue in the rule-following considerations. The skeptic challenged our conviction that there is a fact of the matter as to what words mean. When we tried to answer the skeptic, we saw that anything we could point to—any fact either about our past behavior, our minds, or even the community’s hypothetical attitudes toward possible linguistic behavior—was consistent with multiple, inconsistent interpretations of the behavior’s meaning. But perhaps our mistake was that we attempted to *answer* the skeptic? Some legal scholars have suggested that skepticism about meaning needn’t be answered because it is predicated on problematic assumptions about language.<sup>73</sup> In particular, they suggest that it is a mistake to demand justifications for our ordinary, pre-theoretical use of words. On this view, “[t]he demand for a justification is out of place because applying a word is not the sort of activity one can justify.”<sup>74</sup>

There are various proposals in the philosophical secondary literature for *why* it is nonsense to attempt to justify one’s understanding of what the meaning of a word consists in. For instance, building on Wittgenstein’s remark that “philosophical problems arise when language *goes on holiday*,”<sup>75</sup> Cora Diamond argues that radical skepticism is a consequence of our failure to attend to the manner in which words are actually *used*.<sup>76</sup> David H. Finkelstein (to whom I am not related), by contrast, argues that the mistake is to assume that linguistic signs considered as they really are lack semantic significance.<sup>77</sup> But by far the

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<sup>71</sup> WITTGENSTEIN, NOTEBOOKS 1914-16 44 (G.H. von Wright & G.E.M. Anscombe, eds. & G.E.M. Anscombe, trans. 2d ed. 1969) (translation emended).

<sup>72</sup> *Investigations* § 119. On other occasions, Wittgenstein uses a different word for “nonsense”—*Sinnlos*—which he applies to what he calls grammatical propositions. The distinction between the *Unsinn* and the merely *Sinnlos* is not important for our purposes. But for more on this distinction, see James Conant, *The Method of the Tractatus*, in FROM FREGE TO WITTGENSTEIN: PERSPECTIVES ON EARLY ANALYTIC PHILOSOPHY 374 (E. Reck ed., 2001).

<sup>73</sup> DENNIS PATTERSON, LAW AND TRUTH 127 (1996).

<sup>74</sup> Zapf and Moglen, *supra* note 50, at 503; *id.* at 504 (“one cannot sensibly ask for a justification of what counts as the application of a rule.”).

<sup>75</sup> *Investigations* § 38 (emphasis in the original).

<sup>76</sup> Cora Diamond, *Wittgenstein and Metaphysics*, in THE REALISTIC SPIRIT 13 (1991) (“we ... make meaning ... into mysterious achievements that ... call for philosophical explanation. Seeing [it] as [it is] in our life and giving up the desire for such explanations go together.”).

<sup>77</sup> David H. Finkelstein, *supra* note 11, at 69 (“A philosopher who asks, ‘How is it that the statement of a rule is connected to its meaning?’ has—even before she’s offered any answer to the question—already succumbed to the idea that some link is needed if our words are to

most popular diagnosis of the mistake on which the rule-following paradox putatively rests is due to John McDowell, who argues that the mistake the skeptic makes is to attempt to view meaning “from sideways on.”<sup>78</sup> The skeptic, in other words, attempts to “get outside” of our ordinary ways of thinking because she assumes that how things really are must be conceived of independently of how they strike the occupants of this or that particular point of view.<sup>79</sup> Dispense with this assumption, the thought goes, and the rule-following paradox can’t arise.

McDowell’s suggestion that the skeptic’s mistake is to attempt to account for meaning “from sideways on”—that is, from a point of view outside our ordinary ways of carrying on—is also the dominant form of quietism in the legal secondary literature. For instance, Louis Wolcher suggests that “confusion stems from an inability or refusal to resist the influence that is exerted on his philosophizing by a certain method of depicting language—one which insists always on portraying words ... as standing side by side with something else: namely, a thing called the words’ ‘meaning.’”<sup>80</sup> Along the same lines, Douglas Lind claims that “Wittgenstein saw a fundamental mistake of understanding in what I call the externalist method of standing outside any central human activity ... to evaluate, criticize, or justify the results of judgment, the concepts used, or the linguistic meanings employed.”<sup>81</sup>

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have significance; she presupposes that there is always a gulf between words and their meanings.”).

<sup>78</sup> John McDowell, *Non-Cognitivism and Rule-Following*, *supra* note 38, at 207-08. McDowell’s diagnosis is obviously related to Diamond’s. However, McDowell is more specific. While the two agree that the skeptic loses sight of our ordinary uses of words like “meaning” and “justification,” McDowell explains that the *reason* she does is that she attempts to occupy an external point of view of reality.

<sup>79</sup> *Id.* at 198.

<sup>80</sup> Louis E. Wolcher, *Ronald Dworkin’s Right Answers Thesis Through the Lens of Wittgenstein*, 29 RUTGERS L. J. 43 (1997); *see also id.* at 60 (“If the skeptical claims is not seen to be false, but rather just nonsensical, then the negation of the skeptic’s claim ... is not a report about the world at all.”).

<sup>81</sup> Douglas Lind, *Constitutional Adjudication as a Craft-Bound Excellence*, 6 YALE J.L. & HUMAN. 353, 362 (1994). *See also id.* at 393 (“Externalism ... perpetuates illusion. The externalist method of abstracting the supposedly true spirit or moral vision of the Constitution from the text or other sources, and then positing formal rules of interpretation so as to cull from that spirit or vision the ‘real’ definitions of constitutional terms rests on what Wittgenstein characterized as the ‘strange illusion’ that from outside practice one can discern ‘essences’ or ‘laws’ not grasped in practice.”); Patterson, *Law’s Pragmatism: Law as Practice & Narrative*, 76 Va. L. Rev. at 942 (“Wittgenstein believed that ... there is no way to ‘step outside’ of language in order to survey its connection with reality.”); Thomas Morawetz, *Understanding Disagreement, the Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging*, 141 U. PA. L. REV. 371, 379 (1992) (“*all* persons-theorists and practitioners alike—inhabit ways of proceeding (thinking, acting, taking things for granted) and cannot step outside.”).

Because the above quoted remarks may be less than perfectly clear, I think it helps to have an example. Consider a variant of a language-game that Wittgenstein describes in the beginning of the *Investigations*: imagine that Frances and I work as a team in a guitar shop. I assist the customers, and she fetches inventory from the basement. Imagine further that a customer enters the store and says that he is interested in trying out guitars that are like his Fender Stratocaster.<sup>82</sup> I hold up a black Stratocaster that's hanging on the wall and tell Frances to fetch me something like that. Now, there would be any number of guitars that Frances could bring me. For instance, she could bring me a Gibson Les Paul,<sup>83</sup> a Gibson Flying V,<sup>84</sup> or an Ibanez Destroyer.<sup>85</sup> Any one of these things would be perfectly satisfactory. However, a Gibson ES-175 would not count as something just like the Stratocaster.<sup>86</sup> Nor, for that matter, would a black Fender P-Bass.<sup>87</sup>

Assume that I'm right that a red Ibanez Destroyer is in some sense just like a black Fender Stratocaster, but a black Fender P-Bass is not. This would not be obvious to someone who was unfamiliar with rock guitars. After all, the Strat and the Destroyer are different colors; they were manufactured in different factories that are probably located in different parts of the world; both the bodies and the necks are made of different kinds of wood; and their shapes are quite different. (Indeed, someone who was only familiar with classical and jazz music might not even recognize that the Destroyer is a guitar.) The Strat and the P-Bass, by contrast, have the same shape, are manufactured by the same company, and are probably made out of the same types of materials. (Viz. they are made of the same type of wood and have the same general electrical plumbing.) Of course, the Strat probably has six strings and the P-Bass probably has four, but this isn't essential. Imagine, for instance, that the Strat has two broken strings. Or imagine that the P-Bass that Frances passes over in the basement is a six-string bass: there are such things.<sup>88</sup> The point is that the similarities between the Destroyer and the Strat and the differences between the Strat and the P-Bass come into view only to those who are acquainted with rock music. Because Frances is familiar with rock guitars, she recognizes that the Destroyer and the Strat have the same tonal range, but also that both guitars are comparatively easy to play in high registers, produce distortion and

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<sup>82</sup> [http://en.wikipedia.org/wiki/Fender\\_Stratocaster](http://en.wikipedia.org/wiki/Fender_Stratocaster) (visited 8/17/09).

<sup>83</sup> [http://en.wikipedia.org/wiki/Gibson\\_Les\\_Paul](http://en.wikipedia.org/wiki/Gibson_Les_Paul) (visited 8/17/09).

<sup>84</sup> [http://en.wikipedia.org/wiki/Gibson\\_Flying\\_V](http://en.wikipedia.org/wiki/Gibson_Flying_V) (visited 8/17/09).

<sup>85</sup> [http://en.wikipedia.org/wiki/Ibanez\\_Destroyer](http://en.wikipedia.org/wiki/Ibanez_Destroyer) ("Photo Gallery") (visited 8/17/09).

<sup>86</sup> [http://en.wikipedia.org/wiki/Gibson\\_ES-175](http://en.wikipedia.org/wiki/Gibson_ES-175) (visited 8/17/09).

<sup>87</sup> [http://en.wikipedia.org/wiki/Fender\\_P-Bass](http://en.wikipedia.org/wiki/Fender_P-Bass) (visited 8/17/09).

<sup>88</sup> [http://en.wikipedia.org/wiki/Six\\_string\\_bass](http://en.wikipedia.org/wiki/Six_string_bass) (visited 8/17/09).

feedback when amplified, etc. That someone unfamiliar with rock guitars would not have recognized this does not make it any less true. Perhaps this is the solution to skepticism about meaning as well: perhaps it is from within the practice of performing arithmetical operations that we can recognize that our linguistic community means *plus* by “plus” even if this wouldn’t be apparent to an outsider.

### 5.3 Problems with Quietism

The quietist interpretation of the rule-following considerations rests on two commitments: first, that skepticism rests on our efforts to “jump outside of our own skins,”<sup>89</sup> to reflect on our linguistic behavior as if from above; and second, that this putatively external perspective on our linguistic behavior is in fact just the illusion of a perspective, and the insight we think we generate from this external perspective is really just nonsense. The problem is that both of these premises appear to be false. The first premise, in particular, is either false or unhelpful. It would be false if we were to insist that we have to step outside of our ordinary ways of thinking altogether to get Wittgenstein’s regress going. After all, when we recognized that a finite arithmetical sequence is compatible with infinitely many mathematical functions, we viewed the sequence as a reasonably sophisticated student would, someone with some background in set theory. Along the same lines, when Wittgenstein’s interlocutor asks “How does it come about that this arrow >>>-----> points?” and suggests that the “dead line on paper” when considered by itself doesn’t *point*,<sup>90</sup> he appears to view the arrow as for instance a physicist would. The physicist abstracts from the semantic properties of the inkblot and considers only the physical properties. However, insofar as physics and set theory are human endeavors, they represent different ways that we have of making the world intelligible to fellow humans.

Alternatively, we might think that the problem is our desire to step outside of *particular practices* rather than *all of our practices*. For instance, when we view the finite number series as belonging to infinitely many sets, we are not viewing the series as someone performing basic arithmetic would; and when we view the signpost as a hunk of metal—or as a small amount of matter surrounded by a vast amount of empty space—we are occupying a different point of view from the one we take when we engage in the practice of following signposts.

<sup>89</sup> Cf. GOTLOBE FREGE, THE BASIC LAWS OF ARITHMETIC: EXPOSITION OF THE SYSTEM 15 (M. Furth trans., 1964).

<sup>90</sup> *Investigations* § 454; see also *id.* at § 432.

The problem with the suggestion that skepticism can be avoided so long as we are careful not to step outside of our ordinary practices of following rules is that, as with euthrphronism, the cure may be worse than the disease. Generally speaking, there is nothing wrong with “stepping outside of”—viz. reflecting on and criticizing—the ways of thinking that characterize immersion in a practice. Indeed, sometimes stepping outside of a practice is positively required by reason. Consider the linguistic practices adopted by many food writers. In its review of the restaurant Per Se, the New York Times characterized its signature cocktail as “elusive to the point of erudition,” and went on to call it “so subtle as to be potentially banal.”<sup>91</sup> Needless to say, I have no idea what this means. My best guess is that “so subtle as to be potentially banal” means something along the lines of *disappointingly non-alcoholic*. However, to confirm this, the writer would have to step outside of his martini-reviewing practices.

Consider this point from a different direction. The same philosopher who was responsible for the idea that Wittgenstein’s skeptical paradox gets going when we attempt to view rationality—meaning, thinking, and understanding—from “sideways on” also famously said that “There is no guarantee that the world is completely within the reach of a system of concepts and conceptions as it stands at some particular moment in its historical development. Exactly not; that is why the obligation to reflect is perpetual.”<sup>92</sup> Thus, the fact that Wittgenstein’s skeptical paradox looms as a threat only when we step outside our system of conceptions as it is presently configured—when we “put reason on trial”<sup>93</sup> — can’t be the solution to our difficulties because we have independent reason to think that we *must* step outside of our ordinary ways of viewing the world if we are to be entitled to the notion that we are (for the most part) getting things right. To suggest otherwise is to insist, not that reflecting on language is like fixing a ship while still at sea,<sup>94</sup> but rather that that we’re stuck with the ship we’ve got.

Recall that “quietism” as I have proposed to understand the term involves two commitments: in the preceding paragraphs, I have argued that the first commitment—the idea that we can avoid skepticism by refraining from taking an external view of our practices—is either false or unhelpful. The second commitment was that it is *nonsense* to suppose that we can get outside of our

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<sup>91</sup> William L. Hamilton, N.Y. TIMES, Sunday Styles at 9 (May 9, 2004). Along the same lines, the Wall Street Journal once called a wine “cognitive but not visceral.” Alas, I lost the reference.

<sup>92</sup> JOHN McDOWELL, MIND AND WORLD 40 (1996).

<sup>93</sup> Cf. JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 11 (William Rehg trans., 1996) (endorsing a conception of “reason that puts itself on trial.”).

<sup>94</sup> Otto Neurath, quoted in W.V.O. QUINE, WORD AND OBJECT 3f (1964).

practices in the way that the skeptic invites. This idea is of high currency in certain philosophical circles.<sup>95</sup> In my view, the quietists' obsession with nonsense is an unhelpful distraction. I will not attempt to defend my view here. I will note only that conceiving of skepticism (and thus the rejection of skepticism) as "nonsense" rests on what philosophers have called the "contrastive theory of meaning," according to which "for a sentence to have *content* requires a contrast between what would make the proposition true and what would make it false, and hence requires that there be conditions under which the proposition is true and under which it is false. If there is no such contrast, then there is no claim being made by the sentence; it lacks *meaning*."<sup>96</sup> Wittgenstein makes remarks that give the impression that he himself accepted the contrastive theory of meaning.<sup>97</sup> Be that as it may, and loathe as I am to disagree with the greats, I note in passing that the contrastive theory of meaning is hardly obligatory and may well be quite objectionable.<sup>98</sup>

## 6. Antifoundationalism

Having said so much about what I take to be the wrong lessons to take from Wittgenstein, I should say something about how *not* to misunderstand the rule-following considerations. On the interpretation I will defend, the skeptic's mistake is to assume that the objectivity of claims about another's meaning (or about the rule that she follows) depends on our ability to tell a non-trivial story about what meaning (or rule-following) consists in. The skeptic assumes, in other words, that we need to *reduce* claims about meaning and rule-following to other sorts of claims, claims that do not draw on the conceptual resources of the disputed discourse. But perhaps this is a mistake. In roughly the middle of the rule-following chapter, Wittgenstein writes

<sup>95</sup> Many of the proponents of this view have written essays that are collected in *The New Wittgenstein*, *supra* note 11. See, e.g., Alice Crary, *Introduction*, at 6 ("the point of view on language that we aspire to or think we need to assume when philosophizing—a point of view on language as if from outside from which we imagine we can get a clear view of the relation between language and the world—is no more than the *illusion* of a point of view.") (emphasis in the original). See also Cora Diamond, *Throwing Away the Ladder*, *supra* note 76, at 185 ("Wittgenstein ... tried to show us how to come out of the intellectual illusion that we are ... asking anything [when we attempt to justify the answers we give when we are unselfconsciously inside the ordinary practice.]").

<sup>96</sup> Warren Goldfarb, *Metaphysics and Nonsense: On Cora Diamond's The Realistic Spirit*, 22 J. OF PHILOSOPHICAL RESEARCH 15 (1997).

<sup>97</sup> See, e.g., *Tractatus* §§ 2.172-74, 4.12, 4.0641, and 5.634; see also *Investigations* § 13.

<sup>98</sup> I argue against the contrastive theory of meaning on pages 171-85 of my doctoral dissertation, [http://etd.library.pitt.edu/ETD/available/etd-02122006-115848/unrestricted/d\\_finklestein\\_etd.pdf](http://etd.library.pitt.edu/ETD/available/etd-02122006-115848/unrestricted/d_finklestein_etd.pdf).

“How am I able to obey a rule?” –if this is not a question about causes, then it is about the justification for my following the rule in the way I do. If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: “This is simply what I do.”<sup>99</sup>

Elsewhere he says that “The mistake is to say that there is anything that meaning something consists in.”<sup>100</sup>

That I hit bedrock when I attempt to account for what meaning consists in does not, as some have supposed, mean that there is no fact of the matter. Surprisingly, given his endorsement of anti-realism, Wright puts this point as forcefully as anyone. According to Wright,

there is an explicit and unacceptable reductionism involved at the stage at which the skeptic challenges his interlocutor to recall some aspect of his former mental life which might constitute his, for example, having meant addition by “plus”. It is not acceptable, apparently, if the interlocutor claims to recall precisely that. Rather, the challenge is to recall some *independently characterized* fact, in a way which does not simply beg the question of the existence of facts of the disputed species, of which it has to *emerge*—rather than simply be claimed—that it has the requisite properties (principally, normative content across a potential infinity of situations). The search is thus restricted to phenomena of consciousness which are not—for the purposes of the dialectic—permissibly assumed “up front” to have a recollectable *content*.<sup>101</sup>

In other words, the fact in which my having meant *plus* by “plus” consists is *the fact that I meant plus*. Nothing more needs to be said. Paul Boghossian summarizes this point as follows: “[m]eaning properties appear to be neither eliminatable, nor reducible. Perhaps it is time we learned to live with that fact.”<sup>102</sup>

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<sup>99</sup> *Investigations* § 217.

<sup>100</sup> ZETTEL § 16 (G.E.M. Anscombe & G.H. von Wright eds., G.E.M. Anscombe trans., 1981); see also *Remarks on the Foundations of Mathematics*, *supra* note 12, at VI-31 (“our disease is one of wanting to explain.”).

<sup>101</sup> *Wittgenstein’s Rule-Following Considerations and the Central Project of Theoretical Linguistics*, in *Rails to Infinite*, *supra* note 39, at 176.

<sup>102</sup> Paul Boghossian, *The Rule-Following Considerations*, 98-392 MIND 548 (1989).

The picture I sketch above according to which discourse about meaning can be justified even though it is not reducible to some other discourse is based on what is sometimes called a “default-and-challenge” picture of justification.<sup>103</sup> Under the default-and-challenge standard, a belief is justified in the absence of a positive challenge. Relative to this standard, there’s simply no way to get the skeptical paradox going.

There is a sense in which this response to the skeptic—which I propose to call anti-foundationalism—splits the difference between antirealism and quietism. Like the antirealist, I concede that we can’t tell a substantive story about what meaning and rule-following consists in. Like the quietist, I think our inability to do so says *nothing* about the objectivity of semantic norms.

## 7. Conclusion

The later Wittgenstein spends a surprising amount of time talking about Martians, children and animals. The opening moments of the *Investigations*, for instance, concern an utterly prosaic, putatively autobiographical account St. Augustine gives of learning to speak. On Augustine’s account, his elders would point to objects and name them, and he, as a child, grasped that the thing was called by the sound they uttered.<sup>104</sup> As Wittgenstein goes on to say, one interesting thing about Augustine’s account is that he seems to imagine that learning a first language is a bit like learning a second: the child comes pre-wired with awareness of the sorts of things she later learns the words for.<sup>105</sup> The problem, according to Wittgenstein, with this way about thinking about language—with locating the child in a logical space in which we are home—is that it doesn’t do justice to the close connection between language and thought.

This idea that language and thought are inextricably connected ends up being one of the great themes of the *Investigations*: thinking and speaking—and indeed living—all come as a package. To imagine beings whose lives are very different from ours, Wittgenstein thinks, would be to imagine beings whose *concerns* would be very different from ours, who would *see the world* in different ways, and who would accordingly express themselves, if at all, in different ways.<sup>106</sup> As Wittgenstein says, “If a lion could talk, we could not understand him.”<sup>107</sup>

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<sup>103</sup> See, e.g., ROBERT BRANDOM, MAKING IT EXPLICIT: REASONING, REPRESENTING, AND DISCURSIVE COMMITMENT 174-76 (1994).

<sup>104</sup> *Investigations* § 1.

<sup>105</sup> *Id.* § 32.

<sup>106</sup> *Id.* at 230e.

<sup>107</sup> *Id.* at 223e.

Properly thought through, this idea implies that our ability to open our minds to one another through speech depends on what Stanley Cavell has called shared “routes of feeling.” Wittgenstein expresses a related point when he says, “if language is to be a means of communication there must be agreement not only in definitions but also (queer as this may sound) in judgments.”<sup>108</sup> I translate Wittgenstein’s remark as follows: in order for two people to understand each other, to speak a shared language consisting of words with agreed upon meanings, they must belong to a community consisting of what are in some sense like-minded individuals. Reasoning together, and indeed meaning anything by a word, is possible only against the backdrop of a great deal of agreement, including agreement about what *matters*. And we don’t reason our way into this agreement. (This was the point of Wittgenstein’s remarks about attempting to “dig below bedrock.”)<sup>109</sup> So the foundation of our responsiveness to reasons—of our ability to give and ask for reasons for what we say and do—consists of contingent facts about us. Worse: it rests on social facts.<sup>110</sup> (This is what Wittgenstein means when he says “to imagine a language is to imagine a form of life.”) Worse still: it rests on facts about our emotional makeup, our “routes of feeling.” And Wittgenstein shows that this is true even of logical and mathematical reasoning: there’s a sense in which even the hardest, most objective-seeming norms rest on squishy facts about human non-cognitive dispositions.

(This, incidentally, explains why Wittgenstein spends so much time thinking about children,<sup>111</sup> martians,<sup>112</sup> and animals:<sup>113</sup> these sorts of beings aren’t capable of, happen not to share, or haven’t yet acquired the non-cognitive propensities which account for our agreement in judgments, and thus which, according to Wittgenstein, makes meaning, thinking and understanding possible.)

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<sup>108</sup> *Id.* at § 242.

<sup>109</sup> *Id.* at § 217; *id.* at §§ 211, 219.

<sup>110</sup> As Stanley Cavell puts it, “We learn and teach words in certain contexts, and then we are expected, and expect others, to be able to project them into further contexts. Nothing insures that this projection will take place (in particular, not the grasping of universals nor the grasping of books of rules) ... That on the whole we do is a matter of our sharing routes of interest and feeling, senses of humour and of significance and of fulfillment, of what is outrageous, of what is similar to what else, what a rebuke, what forgiveness, of when an utterance is an assertion, when an appeal, when an explanation—all the whirl of organism Wittgenstein calls ‘forms of life.’” *Must We Mean what We Say?*, in *MUST WE MEAN WHAT WE SAY?* 52 (1969).

<sup>111</sup> *Investigations* §§ 1, 32.

<sup>112</sup> *Id.* at 54(a).

<sup>113</sup> *Id.* at §25; *see also id.* at 174e, 223e.

It would be a mistake, however, to conclude that because meaning depends on our shared sense of what matters, there can be no objective facts as to what we mean. Consider again the remark on which the last two paragraphs were largely based: meaning depends on agreement about judgments; “[t]his seems to abolish logic, but does not do so.”<sup>114</sup> The proposition seems to abolish logic because it makes meaning seem arbitrary, insubstantial, subjective, fictitious. The greater part of the *Investigations* is dedicated to showing, as he says, that this does *not* abolish logic. Wittgenstein’s point is that it’s a mistake to suppose that the dependence of meaning, thinking and understanding on feeling, interest, and a shared sense of what matters saddles us with vulgar conventionalism.

### 7.1 Wittgenstein’s Relevance to Jurisprudence

Properly thought through, this point can shed light on legal reasoning, and, in particular, on the sense in which the law tells us what to do. Wittgenstein’s response to the skeptic is meant to disabuse us of a particular picture of what giving and asking for reasons must look like. In Wittgenstein’s target sites is the notion that to justify a particular understanding of a word’s meaning, we need to show how our use of the word approximates a calculus operating according to fixed rules.<sup>115</sup> Consider, for example, our use of normative terms like “good.” In ordinary life, we don’t hesitate to call things “good.” (E.g. “That was a good dinner.”) However, on reflection, we might worry that there aren’t really objective facts about whether the possible subjects of normative evaluation are truly describable in normative terms. For instance, we might be troubled by the existence of what appears to be ineliminable disagreement about what qualifies as “good.” (Imagine that I think the steak is perfect, whereas you think it’s undercooked.) This disagreement seems symptomatic of the absence of objective criteria governing the applicability of the relevant concept. (I can’t give a general theory of what makes a dinner good that I can appeal to in defense of my judgment. *A fortiori*, I can’t point to independent features of reality that all good things must share.) And once we admit that there are not independent criteria for the use of a word—no rule that we could use to distinguish the good from the bad—the worry is that we’ll have to admit that what we’re doing when we call something “good” isn’t really *describing* at all. Perhaps what we’re doing is merely expressing our feelings. If so, our use of the word “good” is more or less of a piece with our use of the word “yum.”

Underlying these concerns is the notion that in order to vindicate the objectivity of a discourse, we must be able to specify in non-trivial terms the

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<sup>114</sup> *Id.* at § 242.

<sup>115</sup> *Id.* at § 81.

rules for how the relevant words must be used.<sup>116</sup> This idea, in turn, appears to be based on a certain conception of the natural world, a conception according to which the world as it really is consists only of the sorts of things that science can describe. After all, the concepts of the physical sciences *can* be given rigid limits: an electron’s “spin” is its tendency to fly off in various directions when it passes through a magnetic field; the “addition” function is a recursively specifiable function from pairs of numbers to numbers; and etc. If we think that all that there is must be describable in the language of physics, we will think that there should be strict rules for the use of putatively non-physical concepts as well.

It is against *this* temptation that the rule-following considerations is directed. The regress of interpretations shows that if we accept the terms of the skeptic’s challenge, then mathematical reasoning will seem as problematic as any. But mathematical concepts are the gold standard: we *can* give mechanical definitions of such concepts.<sup>117</sup> Thus, because mathematical reasoning is indistinguishable from ordinary reasoning as far as the skeptic is concerned—because we can’t vindicate *any* rule in the way the skeptic demands—this shows that the skeptic was asking for too much to begin with.

Assume that all this is right: what relevance does this have for the philosophy of law?<sup>118</sup> The answer, I think, is a little, but not none. If legal judgments can be objectively true without being reducible to more basic terms, then they needn’t be reducible to the sorts of concepts to which jurisprudence has traditionally looked to build an account of legal constraint: morality, utility, legislative intent, original public meaning, etc. That is to say, once we rid ourselves of a bad picture of the kind of objectivity to which linguistic norms can aspire, we needn’t think that we need to find something outside the law to constrain legal judgments on the one hand, or conclude that there is *nothing* constraining legal judgment on the other. Both reductionism and skepticism seem to rest on the assumption that legal judgments themselves are too squishy to be answerable to the world. I think the real lesson of the *Investigations* is that this assumption is dispensable.

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<sup>116</sup> I say “non-trivial terms” because we can always say something along the lines of “x is good” iff *x is good*. What the reductionist wants is to give *conceptually independent* rules for our use of words.

<sup>117</sup> Of course, that this isn’t *always* true is the whole point of recursion theory. Nevertheless, it is true enough for the mathematical concepts with which most non-mathematicians are familiar.

<sup>118</sup> Cf. Michael Steven Green, *Dworkin’s Fallacy, or What the Philosophy of Language Can’t Teach us About the Law*, 89 VA. L. REV. 1897, 1946-47 (2003) (arguing that philosophy of language is irrelevant to our understanding of law).

This isn't to deny that there may be cases in which the law gives out and the judge must simply act.<sup>119</sup> Nor is it to deny that there may be excellent prudential reasons for preferring a particular reductive proposal. Jurisprudence is unlike the philosophy of language precisely because factors other than language's relation to reality may be relevant to our account when legal judgments are justified. Be that as it may, having seen that reductionism is not obligatory, the hope is that we will see the various reductive proposals are often (if perhaps not always) a confused response to a form of skepticism that itself is based on an impoverished conception of the sort of objectivity to which thinking about language can aspire.

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<sup>119</sup> See generally RICHARD A. POSNER, HOW JUDGES THINK (2008).  
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