Columbia Law School
Scholarship Archive

Faculty Scholarship | Faculty Publications

1995

Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein

Christian Zapf
Coumbia Law School

Eben Moglen
Columbia Law School, moglen@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship

 Part of the Rule of Law Commons

Recommended Citation

Christian Zapf & Eben Moglen, *Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein*, 84 GEO. L. J. 485 (1995).
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/3003

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein

CHRISTIAN ZAPF* AND EBEN MOGLEN**

The central article of faith of the traditional understanding of the Rule of Law is that precedent uniquely determines the outcome of legal cases. Skepticism about that faith, however, is widespread. Critical Legal Scholars, as well as their intellectual ancestors, the Legal Realists, have frequently attacked the legitimacy of the received model and the formalist view of the relationship between the law and its individual applications that underlies the model. The common aim of these attacks is to demonstrate that the law is indeterminate in outcome and that the supposed constraints of the Rule of Law on judges are fictions.

Not all of these antiformalist criticisms are equally well founded and this article seeks to refute one of them. The article takes issue with an attack that might be called "the argument from the indeterminacy of language," which, roughly speaking, denies that legal texts—and, for that matter, all texts—have meaning in and of themselves. Advocates of the linguistic indeterminacy argument maintain that the applications of words cannot be "read off" from those words in a straightforward way. Their claim is not simply that some words are ambiguous or vague and that we therefore cannot be certain of proper application in some instances. More radically, the argument's proponents assert that the application of all words is indeterminate if one only looks to the words themselves to determine their meaning. They argue that certainty of application depends on the consensus of an interpretive community about how a word should be applied. The lack of textual guidance, so the argument proceeds, opens the door to an unwarranted judicial freedom in the interpretation of legal texts that is incompatible with the certainty in the application of words required by the traditional understanding of the Rule of Law.

In seeking to refute the argument from the indeterminacy of language, the first aim of this article is to demonstrate that the logical relation between words and the applications that we read off from them is unproblematic. That is, the article aims to show that the skeptics of meaning have created a problem where none previously existed. The second aim is to show that the skeptics of meaning misunderstood the account of language offered by Ludwig Wittgenstein in his *Philosophical Investigations*. We argue not only that the proponents of the linguistic indeterminacy argument mistakenly perceived the *Philosophical Investigations* to be supportive of their skeptical challenge, but also that, in fact, Wittgenstein offers an entirely persuasive account of why the relation between words and their applications is unproblematic. Finally, the article considers the intellectual history of skepticism about meaning in American legal theory,

* J.D., Columbia Law School, 1992. Associate, Cleary, Gottlieb, Steen & Hamilton.
** Professor of Law and Legal History, Columbia Law School.

showing that the same issues have been raised before. Legal Realists, following the invitation of Oliver Wendell Holmes, Jr., explored the same thicket, reaching the same disheartening, but deceptive, results.

Part I of the article describes the linguistic indeterminacy argument and its intellectual history. It traces the antiformalists' attacks on the Rule of Law from Lon Fuller's challenge to semantic formalism to the efforts of his heirs to replace semantic formalism with certain "nonformalist" accounts of the relationship between words and their applications. We argue that these nonformalist alternatives—the account of language as a calculus of rules and the interpretive community account—do not offer viable accounts of meaning. Part I concludes that the linguistic skeptics' failure to find a viable alternative account of meaning to semantic formalism leaves them without an account of language, even though, as a matter of common sense, it is quite plain that language does, in a manner of speaking, "work" and that words do mean things. As an incidental matter, the overview of the intellectual history of the linguistic indeterminacy argument offered in Part I also shows how antiformalists sometimes misused Ludwig Wittgenstein's work in the *Philosophical Investigations* to support their skeptical challenge to the Rule of Law.

Part II describes Wittgenstein's account of language. It explains that Wittgenstein's work, although antiformalist, cannot sensibly be thought to support the linguistic indeterminacy argument, and that, instead, his description of the relation between words and their applications provides a workable nonskeptical account of meaning. Part III argues that the legal community could have avoided this misreading of Wittgenstein if it had not been so particularly useful to the political agenda of Critical Legal Scholars. Part IV shows that this process is not unique to the contemporary context, having occurred during the heyday of legal realism, when problems of interpretation first took center stage for legal theorists.

I. THE LINGUISTIC INDETERMINACY ARGUMENT

A. THE MODEL OF THE RULE OF LAW AND ITS SKEPTICS

It is the claim of our political tradition that authority is not vested in individuals who may exercise it arbitrarily, but in laws, which individuals apply without personal discretion. We are governed by laws, not by men, because legitimate government must rule by "settled, standing Laws" not by "Absolute Arbitrary Power."[1]

This supposed divide between the Rule of Law and the Rule of Men requires legal precedent to determine the application of law, free from the influence of men's discretion. But a precedent can only determine the outcome of new cases if the precedent, in a manner of speaking, "contains" the applications to new

1. JOHN LOCKE, *Of the Extent of the Legislative Power*, *in* TWO TREATISES OF GOVERNMENT 337 (Peter Laslett ed., 1960).

cases. That is, it must be possible to tell what applications of the precedent are proper from the precedent itself. The relationship between the rule and its applications must be "analytic."[2]

An analytic relation between the legal rule and its applications, in turn, requires that the words that make up a particular rule have an analytic relation to the particular objects for which they stand. Unless words have definite applications that can be "read off" from them, the rules that consist of these words will not have an analytic relation to their applications. One way of expressing these conclusions is to say that the Rule of Law requires a formalist conception of the relationship between rules and their applications (rule formalism), and that, in turn, requires a formalist conception of the relationship between individual words and their applications (semantic formalism).[3]

Skepticism about the legitimacy of this model and the formalism it seems to require is widespread.[4] The skeptics argue that, for one reason or another, the constraints imposed on judges by the Rule of Law are illusory. The skeptics claim that precedent does not determine new cases and that the law is indeterminate in outcome. Instead, they maintain that the law is incapable of expressing rules or principles that genuinely constrain judges and, conversely, is subject to manipulation to reflect the personal preferences of judges. Accordingly, to the skeptics, the Rule of Law proper, as opposed to the Rule of Men, seems impossible to secure.[5]

Not all variants of this skepticism trace indeterminacy in law to an underlying indeterminacy in language. The skeptics have many arrows in their quiver—the

---

2. We use "analytic" in a pre-Quinean way simply to mean that the application logically follows from the rule itself. *See* WILLARD V.O. QUINE, *Two Dogmas of Empiricism*, *in* FROM A LOGICAL POINT OF VIEW 20 (2d ed. 1961).

3. *See* Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 793-95 (1989) (introducing the expressions "rule-formalism" and "semantic formalism").

4. *See, e.g.*, Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205 (1986) (arguing that the Realists' indeterminacy thesis, and the subsequent Critical Legal Scholars' utilization of that thesis, raise serious questions about mainstream legal philosophy); James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985) (discussing different strands of the Critical Legal Studies movement that reject formalism and share an assumption about the social power of rational discourse); Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982) (arguing that one does not have to accept rule formalism in order to appreciate "the centrality of textuality to the lawyer's enterprise"); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985) (agreeing with Critical Legal Scholars that legal reasoning is political, not formal, but arguing that policy balancing is itself a value choice that excludes other modes of discourse); Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984) (arguing that Critical Legal Scholars' rejection of objectivity in legal reasoning is not necessarily followed by nihilism); Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1989) (arguing that attempts to circumvent judicial subjective preferences in legal reasoning, revealed by liberalism's rejection of formalism, are inconsistent with a liberal standpoint).

5. In contrast, Christopher Kutz argues that the indeterminacies revealed by skeptical challenges to the traditional model of the Rule of Law do not undermine the justifiability of legal conclusions. Christopher L. Kutz, Note, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 YALE L.J. 997 (1994).

linguistic indeterminacy argument is just one of them, and it is only this argument that we take issue with in this article.[6]

The linguistic indeterminacy argument denies that semantic formalism properly describes the way words work.[7] Its proponents maintain that not words themselves but readers' dispositions about how to apply words determine their applications. As an extension of this contention, they argue that not laws themselves but judges' dispositions about how to apply laws determine their applications. Judges are thought to "simply beat[] the text into a shape which will serve [their] own purpose."[8] The only debate among the linguistic skeptics concerns the existence and nature of extratextual constraints on this brutality against the text. They ask whether the reader's dispositions about how to apply a word are entirely unrestrained,[9] or are instead limited either by the collective understanding of readers about how a word should be applied,[10] or at least by certain principles concerning a word's application. Efforts to find determinate meaning in a text by looking at the intent of the author[11] or shared canons of legal interpretation[12] fall into this last category.

---

6. For example, Mark Kelman has claimed that the linguistic indeterminacy argument is a legacy of Realism and is not an important element of Critical Legal Studies. He argues that the more contemporary indeterminacy argument is concerned not with the open-textured nature of language, but with the choices judges have between a multiplicity of rules to apply—all of which determine a different outcome. *See generally* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987). Duncan Kennedy's work is, of course, of seminal significance for Critical Legal Studies on this theme. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); *see also* Altman, *supra* note 4 (discussing a variety of skeptical arguments); Kutz, *supra* note 5 (same).

7. *See generally* Stephen Brainerd, *The Groundless Assault: A Wittgensteinian Look at Language, Structuralism, and Critical Legal Theory*, 34 AM. U. L. REV. 1231 (1985) (analyzing structuralist ideas about the independence of the subject through a Wittgensteinian lens); Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984) (attacking positivism on the ground that rules constraining individual interpretation are themselves in need of interpretation); Levinson, *supra* note 4 (demonstrating that constitutional and textual interpretation inevitably require a leap of faith); Pierre Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37 (1987) (exploring work of skeptic Stanley Fish); Singer, *supra* note 4 (arguing against reliance on an explanation of legal rules that requires assumption of determinacy); Tushnet, *supra* note 4 (criticizing Herbert Wechsler's neutral principles from a supposedly Wittgensteinian position). Some of these essays and other useful pieces are collected in INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (Sanford Levinson & Steven Mailloux eds., 1988).

8. RICHARD RORTY, *Nineteenth-Century Idealism and Twentieth-Century Textualism*, *in* CONSEQUENCES OF PRAGMATISM (ESSAYS: 1972-1980), at 151 (1982).

9. The main exponents of this nihilist view are Levinson, Schlag, and, probably, Brainerd. *See* Brainerd, *supra* note 7; Levinson, *supra* note 7; Schlag, *supra* note 7.

10. *See* SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982); Dietrich Busse, *Normtextauslegung als Regelfeststellung? Zur Rolle von Wittgensteins Regelbegriff fuer die Juristische Methodenlehre*, *in* PHILOSOPHY OF LAW, POLITICS AND SOCIETY 207 (Ota Weinberger et al. eds., 1988).

11. Classically, Lon Fuller represents this position. *See* Lon Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). Current scholarship often attacks this view, although ordinarily the direct target is originalism as a method of constitutional interpretation. Originalism presents problems not faced by ordinary intentionalism. *See, e.g.*, Levinson, *supra* note 4; Tushnet, *supra* note 4.

12. For the most prominent account, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) (arguing that interpretive principles accepted by consensus of legal community limit judges' freedom). *See also* Fish, *supra* note 7 (arguing that extratextual conventions and practices limit judges); Owen M.

When words themselves do not determine their applications, all the action is with the reader and hence "all readings . . . become songs of oneself."[13] The debate about the collectivity of that song provides small comfort to our common sense faith in the fact that the words in texts, legal or otherwise, have determinate meanings and confine our applications of them.

How did we arrive at this peculiar state of affairs?

B. THE HISTORY OF THE LINGUISTIC INDETERMINACY ARGUMENT

1. Lon Fuller's Challenge to Semantic Formalism

While it is generally thought today that the linguistic indeterminacy debate between H.L.A. Hart[14] and Lon Fuller[15] belongs to a prehistoric era in legal thought, Fuller is plainly the forebear of linguistic skeptics and antiformalists, and it is from his criticism of Hart that their later positions derive. Thus, to understand fully the skeptics' current arguments, it is necessary to explore the Fuller-Hart debate and the subsequent interpretations of Fuller's position.

Fuller was the first to challenge the view that the applications of words can be read off from the words themselves. While Hart maintained that the general words we use have a core of settled meaning that allows for their straightforward application in standard cases, Fuller argued that understanding a word is not straightforward and is a matter of understanding a rule for the application of that word.[16] Second, Fuller argued that these rules for the application of words were to be discovered by looking at the intentions, or purposes, of their authors.[17] Fuller was unimpressed by the many cases in which it seemed intuitive and obvious that a particular application of a word was proper. To him, this did not show either that his account of meaning was overly cerebral and complicated or that the applications of words could indeed be read off from the words themselves as Hart had maintained. Rather, to Fuller, it showed merely that, in many cases, the particular application of a word obviously falls within the purpose of the rule for its application.

Hart's response to Fuller's challenge was to concede a "penumbra of uncertainty"[18] in the applications of words. Scholars generally found Hart's response sufficient, and semantic formalism survived the day as the received doctrine of linguistic stability—at least with regard to those applications of words that were not in the "penumbra."[19]

Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982) (arguing that institutional "disciplining rules" constrain judges).

13. Levinson, *supra* note 4, at 383.

14. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

15. Fuller, *supra* note 11.

16. *See id.*

17. A summary of the Hart-Fuller debate is provided in Andrei Marmor, *No Easy Cases?*, CAN. J.L. & JURIS., July 1990, at 61, 65-68.

18. Hart, *supra* note 14, at 607.

19. Despite the common characterization, set out in the text, of the "core" of applications Hart described, he was probably not a formalist. *See* Peter Lin, *Wittgenstein, Language, and Law*, 47 U.

However, bigger rumblings were on the linguistic horizon, and this time legal academics took the indeterminacy challenge more seriously. Although, for the reasons discussed in Part II below, Ludwig Wittgenstein was not, in fact, a linguistic skeptic at all, he did vigorously attack semantic formalism in his *Philosophical Investigations*.[20] That attack seemed to the linguistic skeptics to reinvigorate Fuller's challenge to the view that a word's application could be read off from the word itself and, as a consequence thereof, to jeopardize the certainty of application of laws once again.

Over time, legal scholars became convinced that Wittgenstein had succeeded in the *Philosophical Investigations* where Fuller had failed and that the "post-Wittgensteinian view of language"[21] destroyed Hart's formalism. As a result, James Boyle, for example, writes:

> (1) Words do not have "essences."
>
> (2) Words do not have "core meanings."
>
> (3) Language is, or *can* be, used in an infinite number of ways: it is a malleable instrument for communication.
>
> (4) That a word is most commonly used to mean X does not mean that X is the "core," or "plain," or "essential" meaning of that word.[22]

By the same token, Boyle proclaims:

> [I]t seems that the success that such writers as Foucault and Derrida have had in Britain and in the United States is partly due to the particularly corrosive effect that the post-Wittgensteinian view of language has had on all the academic discourses within those countries. . . . Wittgenstein's outstanding contribution was that he flushed the medieval fascination with essences from its most secure hiding-place—right under our noses—in the everyday objectification of linguistic meaning.[23]

Mark Tushnet comments along a similar line. He maintains that the lesson of realism is that legal rules have no objective content, and that this challenge to the Rule of Law can be traced to "the problem of language to which Wittgenstein directed our attention."[24]

TORONTO FAC. L. REV. 939 (1989); *see also* Brian A. Langille, *Revolution Without Foundation: The Grammar of Scepticism and Law*, 33 MCGILL L.J. 451, 458-59 (1988) (arguing that a common characterization, which sees Fuller as making a Wittgensteinian attack on semantic formalism, is mistaken).

20. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., 3d ed. 1958) [hereinafter PHILOSOPHICAL INVESTIGATIONS].

21. Boyle, *supra* note 4, at 707 n.75.

22. *Id.* at 708-09 (footnotes omitted).

23. *Id.* at 707 n.75.

24. Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205 n.69 (1981).

While the skeptics' attacks on semantic formalism, in part inspired by Wittgenstein's work, truly did relegate semantic formalism to the garbage heap of history, their success also created a serious problem. All at once, there was a need for an entirely new, viable theory of language. What such a theory might be was unclear. Fuller's theory—that certainty of application for words could be obtained by looking to a rule for their application, which, in turn, was to be discovered by looking at the intentions or purposes of their authors—did not appear to be a strong candidate. At the common sense level, it was difficult to see how, if words themselves could not determine their own applications because semantic formalism was false, the purpose of the text, clearly a much vaguer notion, could provide that certainty. The purposes and intentions of the authors of legal texts were often many, sometimes contradictory, and occasionally impossible to apply to circumstances that the authors could not have foreseen.[25] " 'Purposes' and 'intentions' were obviously just as conceptually reified as 'plain meanings.' "[26]

Second, there were profound conceptual problems with rule-based accounts of language of the kind that Fuller offered. Unfortunately for the new skeptics, Wittgenstein had attacked rule-based accounts of language in the *Philosophical Investigations* with at least equal vigor as he had attacked semantic formalism.[27] The fatal flaws of this account, elaborated below, once again left the antiformalists without a proper theory of language.

2. Rule-Based Accounts of Language

Rule-based accounts "conceive of a language as a highly complex calculus of rules, and . . . conceive of understanding [the meaning of words] as a hidden process of operating this calculus or depth-grammar."[28] Such accounts conceptualize the application of words as governed by rules for their application. As a corollary of that fact, rule-based accounts see understanding the meaning of a word as equivalent to grasping the rule for its application. The approach likens language to other rule-governed activities such as chess or baseball: in each case, normative constraints (i.e., rules) guide human action, and individual actions, or moves, can be described as either correctly following a rule or failing to do so.[29]

As an empirical matter, these rules for the application of words were (and are), of course, suspect—no less suspect than semantic formalism's objects of

25. These criticisms of intentionalism are elaborated in Levinson, *supra* note 4; Tushnet, *supra* note 4. *But see* Charles Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention*, 100 HARV. L. REV. 751 (1987) (arguing that it is empirically false that the intention of authors of old texts cannot be discovered).

26. Boyle, *supra* note 4, at 712.

27. *See infra* text accompanying notes 35-40.

28. G.P. BAKER & P.M.S. HACKER, SCEPTICISM, RULES AND LANGUAGE at viii-ix (1984).

29. For a brief description of Wittgenstein's own use of the term "rule," see Brian Bix, *The Application (and Mis-Application) of Wittgenstein's Rule-Following Considerations to Legal Theory*, CAN. J.L. & JURIS., July 1990, at 107.

faith[30] that the rules replaced:

> Rules which no [ordinary person] cites in explanations of [how to apply a word], which no one refers to in justifying [how he has applied a word] or in criticizing others who have [applied a word incorrectly], which need high-powered philosophers and linguists to discover them, and which, once formulated, are unintelligible to most people who allegedly follow them, are indeed dubious objects.[31]

However, the empirical unlikeliness of these linguistic rules was not the argument that grabbed the imagination of the legal community. Instead, a second argument that, even if linguistic rules existed as an empirical matter, they could not, as a matter of logic, guide new applications of words, seemed particularly relevant to the concerns of lawyers.[32] If linguistic indeterminacy generally was a matter of obvious importance to the viability of the Rule of Law ideal, the claim that rules could not guide new applications seemed doubly relevant to that ideal: law was much more clearly a rule-governed activity than language, and skepticism about the capacity of rules to govern new cases introduced a new source of instability into the Rule of Law.[33]

3. Rule-Skepticism

Both the argument that linguistic rules have no empirical foundation[34] and

---

30. For example, such "objects of faith" included "universals," "forms," or Wittgenstein's own "simples," which he subscribed to in his earlier work. *See* LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (1922). *See generally* BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 119-32 (1945) (explaining Plato's theory of "ideas" or "forms" in *The Republic*).

31. BAKER & HACKER, *supra* note 28, at ix.

32. One of the most obvious means of access to these arguments was Charles Yablon's book review of Kripke's *Wittgenstein on Rules and Private Language*. Yablon concluded that "[l]awyers ... considering the issues raised by Kripke's book in light of their own experience of the ... indeterminacy of legal argument ... should find their understanding of what they do altered, and perhaps enriched." Charles M. Yablon, *Law and Metaphysics*, 96 YALE L.J. 613, 636 (1987). The clearest application of the rule-based account of language to law was Mark Tushnet's *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, *supra* note 4, as is perhaps self-evident from the title of that article. But the pervasiveness of that conception in legal academia is also apparent from other articles. *See, e.g.*, Scott Landers, *Wittgenstein, Realism, and CLS: Undermining Rule Scepticism*, 9 LAW & PHIL. 177 (1990) (arguing against focusing on "expressive" aspect of rules in order to transcend problems posed by rule-skeptics); James Penner, *The Rules of Law: Wittgenstein, Davidson, and Weinrib's Formalism*, 46 U. TORONTO FAC. L. REV. 488 (1988) (attempting to show that law can properly be based on formalism of Ernest Weinrib).

33. For example:

> Regardless of who has the better of the debate [about what, if anything, constitutes following a rule for the application of a word], it remains the case that the debate itself has an obvious relevance to those of us who think about regulative rules, the rules governing our moral conduct, our manners, our religious practices, and perhaps most obviously, our conduct as citizens in a nation of laws.

Frederick Schauer, *Rules and the Rule-Following Argument*, CAN. J.L. & JURIS., July 1990, at 187.

34. *See* COLEN MCGINN, WITTGENSTEIN ON MEANING 1-58 (1984); Gene A. Smith, *Wittgenstein and the Sceptical Fallacy*, CAN. J.L. & JURIS., July 1990, at 155.

that, as a matter of logic, rules cannot determine the applications of words are laid out in paragraphs 143 through 242 of the *Philosophical Investigations*—the so-called "rule following section."[35] We now focus on the latter argument, known as "the problem of induction."[36]

The argument proceeds as follows. We formulate rules on the basis of observed patterns. When we have enough experimental evidence, we feel confident that we can extrapolate a rule, even a natural law, from the observed occurrences with which future occurrences will comply. Yet any experimental evidence necessarily underdetermines any extrapolated hypothesis—i.e., no experience(s) can sufficiently establish a rule about future experiences. Further, infinitely many hypotheses are compatible with any number of observed occurrences—that is, any series of experiences can be explained in many different ways. Past observed regularities can never, as a matter of logic, determine future occurrences. Hence, so-called natural laws, or more mundane rules, are merely generalizations about observed regularities in the past, combined with an expectation of a future that resembles the past.

By analogy, it is clear that past instances of linguistic performance, that is, past occasions on which a speaker has properly applied a word, cannot give rise to a rule for the application of a word that determines which future applications are proper. Rules for the application of words are extrapolations from past instances of usage. As with natural laws, any future application is compatible with such an extrapolation because the extrapolation can be nothing more than a generalization about past applications.[37] Thus, Wittgenstein states:

> This was our paradox: no course of action could be determined by a rule,

---

35. Baker and Hacker, for example, use that description. *See* BAKER & HACKER, *supra* note 28, at 2.

36. The problem of induction originates with Hume. *See* DAVID HUME, ENQUIRIES CONCERNING THE HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS § IV (L.A. Selby-Biggs ed., 1980) (1949). The straightforward form of Hume's argument is elaborated in the modern literature. *See, e.g.*, BERTRAND RUSSELL, THE PROBLEMS OF PHILOSOPHY 60-69 (Galaxy 1959) (1912); P.F. STRAWSON, INTRODUCTION TO LOGICAL THEORY 233-63 (1952). In this form, the argument is simply that inductive generalizations cannot guarantee that the future will be like the past. It is impossible to guarantee that, as a matter of logic, the sun will not rise in the West tomorrow. In this form, the argument might be thought to be inapplicable to linguistic rules: while we cannot guarantee that the world will go on as before, we can guarantee that we will go on as before in the applications of our words. It is the denial of this last proposition that gives the problem of induction bite for linguistic rules. *See* NELSON GOODMAN, *The New Riddle of Induction*, *in* FACT, FICTION AND FORECAST (1955).

37. Wittgenstein develops this point with a mathematical example. Consider the rule for the application of the words "plus two." Understanding the meaning of that expression, or having grasped the rule for its application, involves being able to successfully "add two" to any number we might choose. But suppose someone claims that for a particular number, on which we have not performed this operation before, say 1002, "plus two" results in 1005. How would we respond to this "bizarre skeptic?" Because rules consist of extrapolations from past applications, and, by hypothesis, we have not added two to this number before, the rule provides no guidance for this new case. As we show in the text above, and as Wittgenstein makes clear in the *Philosophical Investigations*, any new application is compatible with the rule, including the skeptic's proposition. Hence, whatever it is that provides for stability of application in language, and makes it obvious that the proper response is 1004, cannot be a rule for the application of the expression "plus two." *See* KRIPKE, *supra* note 10, at 10-22.

> 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 here.[38]

Wittgenstein did not conclude from his rejection of the rule-based account of language that words really do not guide their applications or that language is impossible because words have no meaning. As we explain in Part II, Wittgenstein was not skeptical about the capacity of words to determine their applications. Nevertheless, a reading of the *Philosophical Investigations* that imputes skepticism to Wittgenstein has had real prominence both in the philosophical[39] and law review literature.[40] In this vein, Saul Kripke states:

> The skeptical argument, then, remains unanswered. There can be no such thing as meaning anything by any word. Each new application we make is a leap in the dark; any present intention could be interpreted so as to accord with anything we may choose to do. So there can be neither accord, nor conflict. This is what Wittgenstein said in § 202.[41]

4. The Implications of Rule-Skepticism in Legal Circles

If language is not a calculus of rules, what is it? Once again, the linguistic skeptics were staring into the nihilist abyss. Having discarded semantic formalism and now a rule-based account of language, they were again without a theory about the relationship between words and their applications.

This time, however, the situation was far more traumatic. While it seemed conceivable that one might find yet another theory of language, this appeared much less likely for a theory of law. Law, after all, is quintessentially a rule-governed activity. Skepticism about the capacity of rules to determine their applications seemed to threaten the whole legal enterprise: If precedents are not rules for future cases, what can they possibly be?

---

38. PHILOSOPHICAL INVESTIGATIONS, *supra* note 20, § 201.

39. *See* ROBERT J. FOGELIN, WITTGENSTEIN 166-85 (2d ed. 1987); KRIPKE, *supra* note 10, at 7-113; CRISPIN WRIGHT, WITTGENSTEIN ON THE FOUNDATIONS OF MATHEMATICS 21-38, 223-38 (1980); Christopher Peacocke, *Rule-Following: The Nature of Wittgenstein's Arguments*, *in* WITTGENSTEIN: TO FOLLOW A RULE (Stephen H. Holtzman & Christopher M. Leich eds., 1981).

40. *See* Radin, *supra* note 3; Daniel G. Stroup, *Law and Language: Cardozo's Jurisprudence and Wittgenstein's Philosophy*, 18 VAL. U. L. REV. 331 (1984); *see also supra* note 4 (citing articles that assume words in legal texts are unavoidably ambiguous without reference to extratextual sources).

41. KRIPKE, *supra* note 10, at 55. What Wittgenstein actually says in § 202 is:

> And hence also "obeying a rule" is a practice. And to *think* one is obeying a rule is not [the same thing as] to obey a rule. Hence it is not possible to obey a rule "privately" [by only looking to your own intentions about how to apply a word]: otherwise thinking one was obeying a rule would be the same thing as obeying it.

PHILOSOPHICAL INVESTIGATIONS, *supra* note 20, § 202. Kripke probably means to refer to § 201. *See* KRIPKE, *supra* note 10, at 12.

Thus, rule-skepticism had implications far beyond the rejection of Lon Fuller's account of linguistic stability. For example, the lessons of rule-skepticism seemed relevant to Herbert Wechsler's Neutral Principles of Adjudication.[42] Wechsler, of course, maintained that judges could combat legal indeterminacy by applying the same principles of legal decisionmaking in relevantly identical future cases. He argued that consistency of application is the principle that guides judges and that the law is saved from indeterminacy so long as judges "go on as before,"[43] following the rules laid down,[44] applying them indifferently.

Yet going on as before is not a determinate business. *Many* principles can be extracted from precedents. It is precisely the rule-skeptic's point that any future application of a rule is compatible with its past applications; that because a rule is an extrapolation from past instances, it cannot guide future applications.[45] The assertion that neutral principles for application provide determinacy in that application skirts the very issue raised by the induction problem, namely, that nothing about past application determines how one should go on. Neutral principles do not constrain the judge's interpretive freedom, since no new application of a law could conceivably fail to count as going on as before in accordance with such neutral principles.

5. The Rule-Skeptics' Proposed Solution

a. The Interpretive Community Account. Rule-skepticism threatened both the stability of language and the Rule of Law. Once again the linguistic skeptics needed a theory to explain why new applications of words and the laws constructed from them were not blind leaps in the dark by judges guided by nothing but personal disposition.

Their new theory, dubbed the interpretive community account, looked to a source of linguistic stability outside the text—thereby incorporating the rule-skeptics' conclusion that words by themselves cannot determine their applications. The theory basically asserts that the common consensus about how a community of language users should apply a word introduces the stability in language that we experience in daily life. More loosely stated, the fact that my dispositions about the applications of words agree with the dispositions of other language users in the interpretive community justifies my applications. The

42. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

43. PHILOSOPHICAL INVESTIGATIONS, *supra* note 20, § 180.

44. This expression is taken from the title of Mark Tushnet's *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, *supra* note 4. The Wittgensteinian nature of Tushnet's argument against Wechsler is particularly evident in his use of the example of the continuation of a mathematical series that permits an infinite number of extrapolated rules for future applications. *Id.* at 822; *see also* KRIPKE, *supra* note 10, at 18 (arguing that an indefinite number of rules are compatible with any finite numerical segment); Fish, *supra* note 7 (rejecting Owen Fiss's "disciplining rules" as constraints on judges because they are rules for interpretation of rules).

45. *See supra* notes 31-35 and accompanying text.

collective dispositions of language users about how to use words becomes the extratextual yardstick for proper application. What a word means is not given by the text, but rather by how most people would be inclined to use it.

The interpretive community account is often attributed to Wittgenstein,[46] and almost as often this view can be traced to Saul Kripke's *Wittgenstein on Rules and Private Language*.[47] Although, as we discuss in Part II, this attribution to Wittgenstein is mistaken, the interpretive community account has enjoyed considerable prominence in the law review literature. Tushnet, for example, argues that a "community of understanding" in which we "develop a shared system of meanings" is required to sustain the legitimacy of judicial decisions.[48] Stanley Fish argues that a "larger structure of a field of practice[]," including "norms, standards, definitions, routines, and understood goals that both define and are defined by [that field]," a structure that lawyers come to absorb in the course of their professional education and that preselects the meanings available to them as readers, provides linguistic constraint.[49] Stanley Cavell maintains that our capacity to use words is grounded in shared "routes of interest and feeling, modes of response, senses of humor . . . all the whirl of organism that Wittgenstein calls 'forms of life.' "[50]

Other legal academics have tried to find extratextual interpretive guidance in the moral principles that judges allegedly share with their community. Joseph Singer, for example, argues that even if it is conceded that moral principles cannot offer specific guidance about how to apply a word in most ordinary circumstances,[51] they nevertheless can limit judges in a broader way in the kinds of decisions that they can make and the principles that they can sensibly appeal to in order to justify those decisions. He writes:

> When judges decide cases, they should do what we all do when we face a moral decision. . . . [T]here is really nothing about legal reasoning that gives

---

46. *See, e.g.*, Radin, *supra* note 3, at 48; Singer, *supra* note 4, at 34-35; Stroup, *supra* note 40, at 356. Stanley Fish, whose work is "clearly heavily influenced by Wittgenstein," Langille, *supra* note 19, at 461, also adheres to an interpretive community view. *See* Fish, *supra* note 7, at 1335. There have been a number of recent articles, however, that reject the attribution of the interpretive community approach to Wittgenstein. *See* Bix, *supra* note 29, at 107 n.3; Landers, *supra* note 32, at 178; Langille, *supra* note 19, at 455-56; Smith, *supra* note 34, at 177; Kutz, *supra* note 5, at 1009-10.

47. KRIPKE, *supra* note 10; *see also* Fish, *supra* note 7; Radin, *supra* note 3; Singer, *supra* note 4; Stroup, *supra* note 40; Kutz, *supra* note 5. For an additional source emphasizing interpretive communities in the critical literature, see THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

48. Tushnet, *supra* note 4, at 826.

49. Fish, *supra* note 7, at 1332-33, 1339.

50. STANLEY CAVELL, *The Availability of Wittgenstein's Later Philosophy*, *in* MUST WE MEAN WHAT WE SAY? 44, 52 (1969).

51. This is perhaps not so self-evident. While it is hard to imagine that, as a general matter, there could be moral considerations determining the application of all words, in the legal context, perhaps all applications do have moral consequences. So, arguably in the legal context, a moral consensus of a community, if it exists, could provide adequate guidance for the application of words. For a very good, brief description of the problem of collapsing the meaning of laws with the question of their normative desirability, see Schauer, *supra* note 33.

> the judge[s] an edge on difficult political and moral questions. . .... Their power is legitimate only to the extent we view their [moral] decisions as good.[52]

Margaret Jane Radin makes a similar appeal to a moral context that limits the judge's interpretive possibilities:

> [J]udges are an interpretive community conscious of their obligation to act as independent moral choosers for the good of a society, in light of what that society is and can become. . . . There are still rules. But there are no rules that can be understood apart from their context; nor are there rules that can be understood as fixed in time.[53]

b. The Inadequacy of the Interpretive Community Account. Ultimately, the interpretive community account is no better a response to the threat of linguistic indeterminacy than is semantic formalism or a rule-based account of language.

The interpretive community account's first failing is that it makes the notion of consensus central to the guidance of the application of words and laws. Hence, it has nothing to say when the community has not reached a consensus. Yet in the legal context the only time the meaning of the text of law is of genuine significance is when opposing parties dispute that meaning. Indeed, it is the traditional assumption of a lack of consensus that necessitates the Rule of Law as an impartial decisionmaking mechanism in the first place.[54] As Radin points out:

> Disputes *do* break out among lawyers and judges, and litigants *do* come to blows, at least metaphorically. If our only way to find out what result is compelled by a rule is to be part of a community that recognizes [a particular] action as rule-following, then there is no way to bring any truly disputed cases . . . .[55]

The second reason that the linguistic community account cannot provide a sufficient response to the rule-skeptics' indeterminacy challenge is that the appeal to consensus as a guide for the application of words is itself a rule for the application of words. As a result, the interpretive community account falls prey to the rule-skeptics' argument that rules cannot guide new applications because of the problem of induction. The interpretive community account assumes that an appeal to an extratextual source of stability for the application of words circumvents rule-skepticism. But the problem of induction presented by the rule-skeptic is equally applicable to extratextual rules such as community consensus because community consensus, like any other rule, can be nothing

52. Singer, *supra* note 4, at 65-66.
53. Radin, *supra* note 3, at 817.
54. *See* Tushnet, *supra* note 4.
55. Radin, *supra* note 3, at 803.

over and above an extrapolation from past applications by members of the linguistic community. A community can only reach a consensus about what has counted as a proper application of a word thus far.

The interpretive community account fails to rescue linguistic stability from the indeterminacy challenge. For the skeptics, each new application of a word or legal rule remains "a leap in the dark" and the stability of language that we take for granted continues as a mystery. On the one hand, it is self-evident to all that words do have meaning and that something guides our applications of them. On the other hand, the lack of a viable theory about the relationship between words and their applications pushes us towards an empirically indefensible linguistic nihilism where words mean whatever we want them to mean.[56] These, indeed, are the perils of misunderstanding Wittgenstein.

II. WITTGENSTEIN AND THE NATURE OF LANGUAGE

We argue in this second part of our article that Wittgenstein's work in the *Philosophical Investigations* provides a viable antiformalist account of the relationship between words and their applications. Further, we argue that Wittgenstein's work does not lend support to any kind of indeterminacy argument about language, and that skeptical readings of the *Philosophical Investigations* are mistaken.

A. WITTGENSTEIN AND SKEPTICISM

The basic error of a skeptical reading of the *Philosophical Investigations* is that it mistakes Wittgenstein's skeptical voice for his real voice. As Frederick Schauer puts it:

> [This mistake] sees Wittgenstein's interlocutor as the chief player in the drama, rather than as a Thrasymachus-like philosophical foil. Consequently, the challenges posed by the interlocutor are taken to be unanswerable and thus sound. The result of reading Wittgenstein in this way, of course, is the

56. Legal academics who attack the interpretive community account of linguistic stability do not regard the empirical indefensibility of linguistic nihilism with sufficient seriousness. Levinson insists that "[t]he united interpretive community that is necessary to Fiss' own argument simply does not exist." Levinson, *supra* note 4, at 401. However, he does not remark on the self-refuting absurdity of his conclusion that therefore "there are as many plausible readings of the United States Constitution as there are versions of *Hamlet*." *Id.* at 391. Levinson remarks in a footnote on "the existence [of] an earlier generation of 'nihilist' individuals who were led by their own arguments to eschew writing itself," *id.* at 402 n.121, but draws no conclusions from this for his own efforts. Similarly, Pierre Schlag confesses that "one can't find a good philosophical answer to [the question of why deconstruction should stop at the level of interpretive communities,]" Schlag, *supra* note 7, at 47, but that this somehow does not matter because there is a "good rhetorical answer," *id.*, namely, that we feel comfortable with the idea of an interpretive community. *But see* Fish, *supra* note 7, at 1346 ("[N]ihilism is impossible; one simply cannot 'exalt the . . . subjective dimension of interpretation' or drain texts of meanings, and it is unnecessary to combat something that is not possible.") (quoting Fiss, *supra* note 12, at 746).

> generation of a profoundly skeptical conclusion about the possibility of following any rule, including a legal rule.[57]

Section 201 of the *Philosophical Investigations* itself, on which the skeptics and, most prominently, Saul Kripke rely heavily, supplies the most obvious textual evidence *against* the skeptical reading. Kripke quotes only the first part of that paragraph:

> 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 here.

But, in fact, Section 201 continues as follows:

> *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; as if each one contented us at least for a moment, until we thought of yet another one standing behind it. What this shows 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.[58]

Even this solitary paragraph suggests that Wittgenstein thought that the skeptics' perennial search for the justification of the proper applications of words was misguided. For the skeptic, every rule is necessarily incapable of justifying the applications of words because of the problem of induction, and every inadequate rule prompts the futile search for "another one standing behind it." But Section 201 makes plain that Wittgenstein did not think that it follows from the skeptics' rule regress problem that we should resign ourselves to a skeptical conclusion about the capacity of words to guide applications. Instead, he says that the rule regress problem shows that the skeptics' understanding of "rule" is mistaken in this context and that there must be another way to understand the concept of "rule" that avoids seeing it as a justification for the application of words and, thereby, avoids the regress problem.[59] Section 201 of

---

57. Schauer, *supra* note 33, at 187.

58. *Id.* (emphasis added); *see also* Langille, *supra* note 19, at 488-89 (arguing that skeptics misunderstand Wittgenstein's central idea of language as an activity); Smith, *supra* note 34, at 162 (arguing that reliance by critical theorists on Wittgensteinian arguments involves serious misinterpretation).

59. Our argument here relies most heavily on MCGINN, *supra* note 34, at 42-43 (stating that "understanding" of a rule is "an unmediated propensity to act"), and on BAKER & HACKER, *supra* note 28, at 61 (noting that Wittgenstein thought it wrong to suppose that a rule and its application are connected only through mediation of interpretation).

the *Philosophical Investigations* thus does not support a skeptical reading. Rather, it sows the seed of suspicion that a skeptical reading is a mistake.[60]

Wittgenstein's general attitude towards skepticism substantiates the suspicion of a skeptical account. At the very beginning of his philosophical career he wrote:

> Skepticism is *not* irrefutable, but *obvious nonsense* if it tries to doubt where no question can be asked. For doubt can only exist where a question exists; a question can only exist where an answer exists, and this *can* only exist where something *can* be said.[61]

Near the end of his life he expressed an extension of the same notion:

> The queer thing is that even though I find it quite correct for someone to say "Rubbish!" and so brush aside the attempt to confuse him with doubts at bedrock,—nevertheless, I hold it to be incorrect if he seeks to defend [these bedrock beliefs].[62]

It is hard to believe that a man who thought throughout his philosophical career that skepticism was a kind of nonsense and who felt that attempts to confuse someone about the bedrock of his beliefs were to be brushed aside as "rubbish" would make a skeptical argument about the nature of language the centerpiece of his later work.[63]

B. A NONSKEPTICAL READING OF THE PHILOSOPHICAL INVESTIGATIONS

If we grant that a skeptical exegesis of the *Philosophical Investigations* is implausible, we still must determine what Wittgenstein *did* say about language. As we shall see, Wittgenstein's aim was to dislodge a particular picture of language that is articulated in Saint Augustine's *Confessions* and which opens the *Philosophical Investigations*:[64]

> When they (my elders) named some object, and accordingly moved towards something, I saw this and I grasped that the thing was called by the sound they uttered when they meant to point it out. . . . Thus, as I heard words repeatedly used in their proper places in various sentences, I gradually learnt

60. A full textual refutation of a skeptical reading is outside our present scope and would merely duplicate the work of specialists with whom we have no reason to disagree. The most complete textual refutation of Kripke's reading of the *Philosophical Investigations* is given in BAKER & HACKER, *supra* note 28.

61. LUDWIG WITTGENSTEIN, NOTEBOOKS 1914-16, at 44 (G.H. von Wright & G.E.M. Anscombe eds. & G.E.M. Anscombe trans., 2d ed. 1969).

62. LUDWIG WITTGENSTEIN, ON CERTAINTY 65 (1969).

63. *See* BAKER & HACKER, *supra* note 28, at 5-10.

64. THE CONFESSIONS OF ST. AUGUSTINE (Rex Warner trans., 1963) [hereinafter AUGUSTINE].

> to understand what objects they signified; and after I had trained my mouth to form these signs, I used them to express my own desires.[65]

Wittgenstein comments as follows:

> These words, it seems to me, give us a particular picture of the essence of human language. It is this: the individual words in language name objects—sentences are combinations of such names. In this picture of language we find the roots of the following idea: Every word has a meaning. This meaning is correlated with the word. It is the object for which the word stands.[66]

Ray Monk, in his biography of Wittgenstein, sums up the enterprise this way:

> The rest of the *Philosophical Investigations* was to examine the implications of this idea and the traps into which it led philosophers, and to suggest routes out of those traps. These routes all begin by dislodging the (pre-philosophical) picture of language expressed by Augustine.... In this way, Wittgenstein hoped to dig out philosophical confusion by its pre-philosophical roots.[67]

Wittgenstein's own description of his task is characteristically laconic: "A simile that has been absorbed into the forms of our language produces a false appearance, and this disquiets us."[68] Further, "[a] *picture* held us captive. And we could not get outside it, for it lay in our language and language seemed to repeat it to us inexorably."[69]

The false picture described by Wittgenstein is, of course, the picture painted by semantic formalism—the theory that a word applies to particular items in the world because the word stands for an object that captures what the particular items have in common. This object that the word stands for gives the word its meaning. Accordingly, for semantic formalists proper application of a word involves checking the particular item in the world against the object for which the word stands and from which the word's applications can then be read off in an analytic fashion.

Wittgenstein's argument against this depiction of language has three components. The first part of the argument is that the most popular candidate for the object against which we might check the applications of words, namely a mental concept, has no empirical basis: we simply do not experience inner states that guide us in applying words.[70] The second part of the argument is that,

---

65. PHILOSOPHICAL INVESTIGATIONS, *supra* note 20, § 1 (quoting AUGUSTINE, *supra* note 64, at bk. I, ch. 8).

66. *Id.*

67. RAY MONK, LUDWIG WITTGENSTEIN: THE DUTY OF GENIUS 364 (1990).

68. PHILOSOPHICAL INVESTIGATIONS, *supra* note 20, §§ 112, 115.

69. *Id.*; *see also* MONK, *supra* note 67, at 364-65.

70. Wittgenstein's claim is that proper application of a word like "cube" does not depend on the mental image of a cube coming into one's mind. He argues that it is empirically false that we associate

even if such mental concepts did exist or other candidates could fill that role, such concepts could not guide any new applications of a word because of the problem of induction.[71] Or, to put the point differently, objects for which a word is supposed to stand cannot guide the word's application because these objects do not have inherent meaning. The last part of the argument is that the semantic formalists' picture of language that we are trying to escape prompts an erroneous search for a justification for the application of words because it makes us think that the meaning of a word, that is, the object for which the word stands, is prior to and distinct from the applications that can be read off from the word. Wittgenstein maintains on this last part of the argument against semantic formalism that there is no gap between meaning and application that must somehow be bridged by an elusive justification.[72]

It is plain that Wittgenstein does not present a skeptical argument. Although the skeptics are right that the second part of the argument concludes, intermediately, that there is no justification for the application of words, Wittgenstein's ultimate position and conclusion is that the absence of such a justification is unproblematic because the search for a justification is out of place and unnecessary. This third and least intuitive of the steps in the argument deserves further amplification because it is the most difficult part of Wittgenstein's argument and, crucially, because it is the part of the argument that brings us back from the nihilistic abyss towards which the skeptical reading of the *Philosophical Investigations* lured us.

C. PROPER RULE-FOLLOWING: APPLYING WORDS WITHOUT JUSTIFICATION

The rule-skeptic argues that rule-following, that is, applying a word in accordance with its meaning, is a matter of extrapolating guidance from past applications of a word. But, the skeptics' argument continues, because of the problem of induction, these past instances of word usage never justify any new application; each new application is a leap in the dark.

---

the application of words with a particular mental state. Wittgenstein contends: "What is essential is to see that the same thing can come before our minds when we hear the word and the application still be different. Has it the same meaning both times? I think we shall say not." PHILOSOPHICAL INVESTIGATIONS, *supra* note 20, § 140.

Further, he argues:

> Try not to think of understanding as a "mental process" at all.—For *that* is the expression which confuses you. But ask yourself: in what sort of case, in what kind of circumstances, do we say, "Now I know how to go on," when, that is, the formula *has* occurred to me?—
>
> In the sense in which there are processes (including mental processes) which are characteristic of understanding, understanding is not a mental process. (A pain's growing more and less; the hearing of a tune or a sentence: these are mental processes.)

Id. § 154; *see also* MCGINN, *supra* note 34, at 3-6; *supra* text accompanying notes 30-32.

71. *See* PHILOSOPHICAL INVESTIGATIONS, *supra* note 20, §§ 198-201. That part of Wittgenstein's argument, of course, is the centerpiece of the rule-skeptics' attack on a rule-based conception of language. *See supra* text accompanying notes 35-41

72. *See* PHILOSOPHICAL INVESTIGATIONS, *supra* note 20, § 201.

In Section 201 of the *Philosophical Investigations*, Wittgenstein characterizes this way of conceptualizing the application of a word as a "misunderstanding." "What [the regress of justifications] shews," he writes, "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."

Wittgenstein supports this claim by reminding us, first of all, what it is actually like to apply a word.[73] The rule-skeptic makes it seem as if, in applying a word correctly, we consult something (the meaning of the word) that tells us that a certain application is correct—as one might consult a recipe in baking a cake. But this description of how we apply words is overly cerebral. We do not experience the application of words as a rational process at all: it is unreflective and automatic. It is automatic in the sense that we do not have any doubt about how properly to apply a word. By the same token, we do not experience a feeling of having a choice about how to apply a word. In the absence of such choice, the skeptic's demand for a rational justification for the application in a particular case is out of place. It makes no sense to ask for a justification of an unreflective process.

Thus, Wittgenstein writes:

> "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 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."
>
> . . . .
>
> When someone whom I am afraid of orders me to continue the series, I act quickly, with perfect certainty, and the lack of reasons does not trouble me.
>
> . . . .
>
> When I obey a rule, I do not choose. I obey the rule *blindly*.[74]

The demand for a justification is out of place because applying a word is not the sort of activity that one can justify: it is habitual rather than rational; it is the product of training rather than the result of reflection.

This seemingly innocuous observation about the phenomenology of rule-following in the context of applying words has revelatory consequences. To see this, one must recall that certain kinds of rules are applied by rational reflection. These are the rules that scientists make about the empirical world. A scientist formulates a hypothesis about the data he or she observes. This extrapolation of a rule from a chaotic set of observations is indeed a reflective, cerebral task. One can imagine a scientist laboring for many months or years before finding a hypothesis that describes the observed data. On the basis of this hypothesis, the scientist makes predictions about the future. Of course, as the rule-skeptic points out, each of these hypotheses is always inadequate for predicting future

73. *See* MCGINN, *supra* note 34, at 19-24.

74. PHILOSOPHICAL INVESTIGATIONS, *supra* note 20, §§ 212, 217, 219.

instances because of the problem of induction. As a result, we find ourselves "giv[ing] one [justification] after another; as if each one contented us at least for a moment, until we thought of yet another standing behind it."[75]

In Section 201, Wittgenstein claims that we are making what might be called "category mistakes"[76] when we attribute the complex of problems that attaches to scientific hypotheses about the world to rules for the application of words. The scientist's task of extrapolating a rule from observed instances and predicting future instances on the basis of that rule introduces problems that are not necessarily endemic to all rules.

The first category mistake is thinking that the application of a rule, for example, applying a word in accordance with its meaning, is the product of rational reflection. Reasoned effort is only involved in formulating a rule, such as a scientific hypothesis that describes empirical data. But, unlike a scientific hypothesis, a rule for the application of a word does not describe anything: a new word can mean whatever we want it to mean. That is to say, the formulation of a rule for the application of a word is not a difficult, cerebral task because there are no empirical constraints on what kind of rule we might want to have for the application of a word.

The second category mistake is our demand for a justification of the application of a rule, a demand that arises because the scientist makes predictions about the future. While one can sensibly ask for a justification of a prediction about the future, one cannot sensibly ask for a justification of what counts as the application of a rule. That is to say, while it is legitimate to ask the scientist what justifies his or her expectation that an explanatory hypothesis is correct (to which the scientist answers: "my past observations"), it is not legitimate to ask him or her what justifies his or her thinking that a particular empirical observation validates his or her hypothesis. For example, a scientist might have the hypothesis that "all frogs are green." If he or she is asked what justifies this hypothesis, he or she will answer that all the frogs observed so far have been green (and the skeptic will then counter with the problem of induction). But suppose we find a new green frog and we then asked the scientist the different question, "what justifies your claim that this green frog counts as an application of your hypothesis?" That question surely does not make sense: one cannot question what counts as an application if one concedes that there is a hypothesis. The skeptic cannot rationally say, "I have understood your rule that all frogs are green, but I do not understand if this green frog accords with your rule." Understanding a rule consists of the ability to specify what is in accord with it.

The linguistic skeptics' demand for justifications for the applications of words arises because the skeptics confuse the legitimate question about the

---

75. *Id.* § 201.

76. *See* GILBERT RYLE, THE CONCEPT OF MIND (1949). Category mistakes are systematically misleading expressions that involve "the presentation of facts belonging to one category in the idioms appropriate to another." *Id.* at 8.

justifiability of predictions about the future with the absurd question about the justifiability of the applications of a rule itself. The first question only makes sense in the context of scientific hypothesis: when we apply words there simply is no question to be asked about the future. There is no sensible, empirical question to be asked about whether we will apply a particular word in the future in the same way as we apply it today, in the sense that there is a sensible, empirical question to be asked about whether there might be some frogs in the future that are not green. And because there is no question to be asked about what the future will be like in connection with the application of words, the problem of induction does not arise.[77]

When we apply words in accordance with their meanings, there is only the question of what applications are proper. But one cannot ask, "I know the meaning of this word, but what justifies your claim that this counts as a proper application of it?" That question (the "absurd question" referred to above) is analogous to the question, "what justifies your claim that this green frog counts as an application of your hypothesis that all frogs are green?" Understanding the meaning of a word consists in being able to specify what would count as a proper application of it.[78] Being able to apply a word properly is the test for the claim that one has understood it.[79] There is no sensible question to be asked about how the meaning of a word justifies its applications because the meaning consists of the applications.

We can now summarize Wittgenstein's argument that we do not need to justify the applications of words in individual instances. The argument centers around the proposition that our picture of a rule as a scientist's explanatory hypothesis introduces a complex of problems about the scientific method that is unrelated to rule-following per se. One aspect of this picture is the overly reflective, cerebral account that the rule-skeptic gives of rule-following. In fact, we do not consult the meaning of a word, like a recipe for baking a cake, prior to applying the word. We confuse this kind of rule-following with the scientist's reasoned efforts in formulating a descriptive hypothesis on the basis of empirical observations. The picture of the scientific method also leads us to ask for a justification for the application of a rule. The scientist justifies his or her predictions on the basis of the rule that he or she has extrapolated from past

---

77. *See* BAKER & HACKER, *supra* note 28, at 92.

78. *See* Marmor, *supra* note 17, at 75. Marmor describes Wittgenstein's views on rule-following in these terms:

> To understand a rule is to be able to specify which actions are in accord with it (and hence which would go against it), just as to understand a proposition is to be able to specify its truth conditions. In other words, it simply doesn't make sense to say that one has understood a rule and yet he doesn't know the actions which are in accord with it.

Id.

79. Wittgenstein states: "It would be quite misleading, in this last case, for instance, to call the words ['Now I can go on'] a 'description of a mental state.'—One might rather call them a 'signal'; and we judge whether it was rightly employed by what he goes on to do." PHILOSOPHICAL INVESTIGATIONS, *supra* note 20, § 180.

empirical observations and, so, the problem of induction arises. But there is no such problem for identifying what shall count as a proper application of a rule for the application of a word. *Proper applications of the rule are given by the meaning of the rule itself.* We can sensibly ask for the justification of a prediction about the future, but it is irrational to question what shall count as a fulfilled prediction.

No evidence supports the skepticism about the capacity of language to guide the application of words that some have attributed to Wittgenstein. The *Philosophical Investigations* does not support a linguistic indeterminacy claim. Wittgenstein rejects the charge that the application of a word needs to be justified in a particular case. His arguments for that proposition are difficult, and it is hard to imagine that many legal academics will take the time to examine them in detail. Nevertheless, such an examination is important because it sets the record straight: the linguistic indeterminacy argument can draw no support from Wittgenstein because the skeptical reading of the *Philosophical Investigations* is wrong. It follows that language is safe and that it is not particularly malleable. It is undeniable that there are many threats to the model of the Rule of Law—but linguistic indeterminacy is not one of them.

III. TO NONSENSE AND BACK AGAIN[80]

What explains the attention that legal academics have given to Wittgenstein's *Philosophical Investigations*? One answer might be that a concern with the stability of language is part of the heritage of Legal Realism. But many philosophers have written about language, and one seldom sees references to their work in the law review literature.[81] More likely, the reason for the heightened attention to Wittgenstein's work lies in its utility to a particular political agenda. Academics who question the legitimacy of the Rule of Law model find a skeptical reading of the *Philosophical Investigations* useful because it puts in doubt the basic faith that a unique answer in a particular case can be conclusively derived from the application of a general pre-existing rule. The skeptic says: if the proper future use of words cannot be conclusively derived from a rule for their application, then the legal rules that these words embody can hardly be derived in this manner either.

A skeptical reading of Wittgenstein is doubly appealing because the interpretive community account of linguistic stability springs from that skepticism. For Critical Legal Scholars, the interpretive community account readily translates into a claim that the legitimacy of judicial decisions is to be decided not by reference to precedent (because precedent cannot guide new applications anyway), but by a supposed moral consensus about the kinds of outcomes that are

80. This phrase is used by BAKER & HACKER, *supra* note 28, at 97.

81. *See, e.g.*, J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962) (discussing functions of speech and performative versus constative utterances); W.V.O. QUINE, WORD AND OBJECT (1960) (discussing indeterminacy of language).

just in a particular case. The implications of that conclusion are twofold. First, it legitimates a disregard for precedent and, as a consequence, a politically active role for judges. In addition, the moral consensus view offers the prospect of future legal decisions that are closer in line with the academic's own moral preferences at a time when his or her views will be held by a majority. Thus, for example, Joseph Singer writes:

> This [critical] scholarship has undermined the traditional idea that legal reasoning is an objective and rational way to decide what rules and institutions we should have. We have proposed instead that legal reasoning is a way of simultaneously articulating and masking political and moral commitment. . . .
>
> The only thing that makes [judicial decisionmaking] appear mysterious is the myth that judges have an advantage that ordinary citizens do not have that allows them to adjudicate value conflicts rationally: legal reasoning. . . . [But] [j]udges have no better knowledge than anyone else of how to answer those questions. Their power is legitimate only to the extent we view their decisions as good and to the extent we view the current methods of choosing judges and allowing them to adjudicate disputes as a valid alternative to other sorts of dispute resolution and lawmaking.[82]

A number of law review articles assert that Wittgenstein supports the legitimacy of judicial activism. For example, Daniel Stroup asserts:

> Wittgenstein frees legal words from the tyranny of rigidly fixed meanings and thus . . . provides a philosophy that allows for growth. . . . [Thus], even if [legal formalism] were not fraught with such disastrous social consequences, it would still be inadequate for the simple reason that human beings just do not use words in this way—and judges are no exception.[83]

Similarly, Radin writes:

> A judge's decision in response to a rule responds necessarily to the community as a whole and not just to what the legislature has said. . . . [I]f we accept the Wittgensteinian view we must recognize that rules are not immutable. . . . The traditional notion of law as rules cannot readily accommodate the idea that the contours of the law may shift through no legislative or official act but merely through social change.[84]

The defense of a skeptical reading of Wittgenstein is particularly strident when confronted with other readings of Wittgenstein that are less destabilizing. For example, one law review author admits that "Wittgenstein might appear to

82. Singer, *supra* note 4, at 6, 63-64.
83. Stroup, *supra* note 40, at 358.
84. Radin, *supra* note 3, at 808-09.

call for an acceptance of the status quo,"[85] but then goes on to draw comfort from the following reflection:

> Wittgenstein effectively allows critical legal theory to trash structuralism's disempowering implications while retaining its liberating potential.
>
> Wittgenstein's work on the limitations of our language exposes the fundamental position of structure and its necessary location as being merely essentialist claims.[86]

Legal academics have been slow to retreat from Wittgenstein's "liberating potential." Perhaps interest in Wittgenstein will fade rapidly if his work is no longer thought useful by those who initially brought it into discussion in legal circles. Wittgenstein was not a skeptic about language, and perhaps legal scholars could have avoided a mistaken reading if his work had not seemed to have a "liberating potential" temptation. Reading Wittgenstein without such a careful eye on the perceived political consequences of his thought could have prevented the arduous intellectual journey to the interpretive community account, and the even more demanding retreat from that account to a nonskeptical reading of Wittgenstein. But however arduous, the trip is not in vain if it prepares us, independent of political consequences, to reassess Wittgenstein's relevance to legal theory in its true light. For in the nonskeptical posture that his philosophy ultimately assumes, the legal landscape takes on a familiar—if somewhat unfashionable—shape, and we rediscover the virtues of the allegedly stodgy predecessor of contemporary Critical Legal Studies. American legal theory has its own tradition of nonskeptical antiformalism, and this tradition resonates with Wittgenstein's later philosophy of language. Wittgenstein, in short, invites us to reconsider the intellectual history of Legal Realism, a brief journey on which, safely back at Ithaka, we now propose to depart.

IV. LEGAL REALISM AND ANTIFORMALISM

A. THE EARLY DEVELOPMENT OF ANTIFORMALIST THOUGHT

Wittgenstein's lifelong concern with the problems created by semantic formalism parallels one element of the broad movement in Anglo-American philosophy and social science, beginning in the last decades of the nineteenth century and described by its most insightful historian as "The Revolt Against Formalism."[87] The social and cultural pressures antecedent to the "revolt" came from many quarters. Explosive economic growth in the post-Civil War period created organizations and fortunes on a scale hitherto unprecedented. Vast immigration and the transportation revolution brought by a continental rail network joined the tragic disruptions of the war to remake American society in demographic

85. Brainerd, *supra* note 7, at 1256.
86. *Id.* at 1260.
87. MORTON G. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM (1957).

terms. The Darwinian revolution, in which all Western societies were caught up, altered the nation's intellectual experience. The immigrant working class, with its own intellectual culture, transmitted the spread of socialist, anarchist, and other radical social criticism. Rapid expansion of higher education induced changes in the organization of scholarship; newly professionalizing social scientists confidently began to shape the agenda for systematic social research. These fermenting forces resulted in an outburst of new thinking about social life. From philosophy and history to economics and law, voices urged abandonment of old ways of thinking and proposed new ones that shared important features.

Whatever the name ascribed to the new modes of thought—pragmatism, instrumentalism, institutionalism, realism, or the new history—the properties held in common included a precisely congruent disdain for the reigning verities in each of the disciplines. Each was said to be "formalist"—mired in abstractions, bogged down in conceptualism, engaged in deductive reasoning from static premises, unconcerned and uninformed about constantly changing social reality. To employ the strongest invective of Thorstein Veblen, old social thought was "taxonomy."[88]

On the other hand, recognition of the ceaselessness of change reanimated new thought. "Taxonomy" was a word of derogation to Veblen because it implied the condition of pre-Darwinian biological science, which tried to deduce the relationship among the diverse forms of life without grasping the realities of change. The Darwinian revolution pressed on systems of thought that depended on static order. Thus, the new modes of thought shared not only a distaste for the "formalism" of their predecessors, but also a set of basic commitments that Morton White has called "historicism" and "cultural organicism."[89] "Historicism," as a label, conjoined two sets of ideas, each with Darwinian roots. The first was that history matters: ideas, practices, and institutions—like Darwin's organisms—are constrained by their histories. In a world of ceaseless change, entities are what they are becoming; what they become cannot be separated from what they have been. The second component of historicism, closely related but intractably portentous in its consequences, recognized the instability of meaning. Just as Darwin's orchids[90] reflected selection of old morphology for new purposes—in which the imperfection of making do by pouring new wine into old bottles stood as the best demonstration of natural selection—the new social thinkers perceived institutions, practices, and ideas losing their old meanings and taking on new ones, often in unconscious response to what Holmes was to call "the felt necessities of the time."[91]

88. THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS (Sentry Press 1965) (1899).

89. WHITE, *supra* note 87, at 12.

90. *See generally* CHARLES DARWIN, THE DIFFERENT FORMS OF FLOWERS ON PLANTS OF THE SAME SPECIES (London, J. Murray 1877).

91. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881) [hereinafter HOLMES, THE COMMON LAW].

Economic institutions, as Veblen described them in *The Theory of the Leisure Class*,[92] like legal rules considered by Holmes in *The Common Law*,[93] altered their significance—their meaning—over time in response to social motives individuals could never consciously articulate.

Along with the historicism of the new modes of social thought came the commitment to investigate social institutions and practices in the fullest possible context. Just as society's component entities could not be divorced from their history without violence to understanding, they could not be divorced from one another. Treating social life organically meant drawing upon a plurality of perspectives for investigation. Veblen rejected utilitarian and neoclassical economic thought for its reductive limitations on the psychology of social experience and insensitivity to ethnographic data. Holmes demanded that lawyers forsake the protective concealment of logic to investigate the history, economics, and sociology of legal choice.

Taken together, historicism and cultural organicism were facets of the same inclination—to view social phenomena not in terms of fixed conceptual categories, but through their vertical extension in time and horizontal relationship to the rest of the milieu. This inclination flowered early in the legal scholarship of Holmes: in Holmes's thought from the late 1870s through the mid-1890s one can trace the development of new antiformalist legal ideas.[94]

It is not surprising to find Holmes sensitive to speculations attacking linguistic formalism. Yet American legal theory first encountered Wittgenstein through the work of John Dewey. Over the course of their long lives, Holmes's intellectual concerns recurrently meshed with those of Dewey. The parallels began from a deep shared distrust of formal approaches to thought.[95] Just as Holmes declared in the opening manifesto of *The Common Law* that "[t]he life of the law has not been logic: it has been experience,"[96] Dewey maintained that formal logic was "*fons et origo malorum* in philosophy."[97] Dewey emphatically rejected the view that experience was "a knowledge-affair," claiming instead that the cornerstone of philosophy should be a view of experience as "an affair of the intercourse of a living being with its physical and social environment."[98] Knowledge arises from our experimental interactions with the surrounding environment, and therefore as a product of the physical or social problems that stimulate us to inquire or to attempt to predict the world's behavior. "Inquiry," Dewey said, "occupies an intermediate and mediating

92. *See* VEBLEN, *supra* note 88.

93. *See* HOLMES, THE COMMON LAW, *supra* note 91.

94. *See id.*; *see also* OLIVER WENDELL HOLMES, JR., *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167 (1920) [hereinafter HOLMES, *The Path of the Law*].

95. The connection between the thought of Dewey and Holmes is one of the major themes of Morton White's book. *See* WHITE, *supra* note 87.

96. HOLMES, THE COMMON LAW, *supra* note 91, at 1.

97. JOHN DEWEY, *The Need for a Recovery of Philosophy*, *in* CREATIVE INTELLIGENCE 3 (1917).

98. *Id.*

place in the development of an experience."[99] Holmes, in a sentence more frequently repeated than comprehended, told law students to seek the meaning of legal words by locating their inquiry in precisely such a context: "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."[100]

In considering these elements of "pragmatist" or American antiformalist thought, scholars often place emphasis on the "instrumentalism," or evident consequentialism, of these concepts. But the insistence on ideas as defined by their consequences in socially situated experimentation with the environment had another implication. As Dewey maintained in the very title of his 1916 work, *Creative Intelligence*, our minds create meaning by the pattern of their inquiry. Linguistic formalism is incompatible with such a view. For Dewey, knowledge—including fundamentally the knowledge of language—could not be located externally, where we are merely spectators. Dewey believed that Augustine's account of the origin of our linguistic knowledge—that adults show us the objects to which words apply, and we learn the rules of application from them[101]—was an impermissible apriorism: "The conception that we begin with a known visual quality which is thereafter enlarged by adding on qualities apprehended by the other senses does not rest upon experience . . . ."[102] The Augustinian image that disquieted Wittgenstein also disquieted Dewey.

Where Dewey considered the general nature of our knowledge, Holmes concerned himself with knowledge of legal rules. For Holmes, interested though he was in philosophical issues, the matter at hand was not linguistic formalism or the spectator theory of knowledge. But just as Dewey saw linguistic and other knowledge constructed by experimentation, resulting in predictions about the future rather than eternal deductive certainties, Holmes denied that "knowing" the law could be other than a history of experimental contact with legal behavior. Dewey said that "*[k]nowledge is always a matter of the use that is made of experienced natural events*, a use in which given things are treated as indications of what will be experienced under different conditions;"[103] Holmes made the same idea concrete for legal theory in one of the most famous of all his aphorisms: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[104] "Knowing" a legal rule, in Holmes's sense, could not imply an ability to "read off" the applications of the rule by logical processes. Disagreement over the meaning of legal words, and

---

99. *Id.*

100. HOLMES, *The Path of the Law*, *supra* note 94, at 171.

101. *See* AUGUSTINE, *supra* note 64, at 25 (describing how children learn from adults the names of objects).

102. DEWEY, *supra* note 97, at 49.

103. *Id.* at 47.

104. HOLMES, *The Path of the Law*, *supra* note 94, at 173.

the incidence of the rules they compose, is endemic rather than exceptional:

> I once heard a very eminent judge say that he never let a decision go until he was absolutely sure that it was right. So judicial dissent often is blamed, as if it meant simply that one side or the other were not doing their sums right, and, if they would take more trouble, agreement inevitably would come.[105]

When judges apply rules to cases, Holmes believed, they respond to the "felt necessities of the time,"[106] a bedrock of examined and unexamined belief, prejudice, and intuition, rather than the demands of logical entailment. The judge gains legal knowledge in a Deweyan fashion by struggling to predict and control the social environment. Yet "[t]he language of judicial decision is mainly the language of logic."[107] In this sense, Holmes asserted in both *The Common Law* and *The Path of the Law* that legal development had been blind: as the theorist sought the meaning of legal rules in the logical entities they appeared to represent, the judges decided cases in relation to an unexpressed groundwork of fundamental belief. Meaning is contingent not on logic, but on processes easier to describe as "habit" or "inarticulate and unconscious judgment."[108] Hence, "[w]e do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind."[109] Our discomfort with this contingency of meaning leads us to favor formal expressions: "[T]he logical method and form flatter that longing for certainty and for repose which is in every human mind."[110] Standing before Boston University law students in 1897, Holmes precipitated the legal theory of the coming century into confrontation with that uncomfortable contingency: "But certainty generally is an illusion, and repose is not the destiny of man."[111]

Even if meaning in the law is inescapably dependent upon the "habit" of "public mind" and "felt necessity," Holmes did not concede that it is therefore indeterminate. While logic could not be used to replace such dependency, judging nonetheless constrained interpretation. For example, Holmes wrote:

> Suppose a contract is executed in due form and in writing to deliver a lecture, mentioning no time. One of the parties thinks that the promise will be construed to mean at once, within a week. The other thinks that it means when he is ready. The court says that it means within a reasonable time. The parties are bound by the contract as it is interpreted by the court, yet neither of them meant what the court declares that they have said.[112]

---

105. *Id.* at 180.
106. HOLMES, THE COMMON LAW, *supra* note 91, at 1.
107. HOLMES, *The Path of the Law*, *supra* note 94, at 181.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 177-78.

For Holmes, objectivism in the law—refusing to tailor the scope of liability to the "will" of the parties—ensured that meaning, however contingent, remained determinate. We must predict on the basis of experience what the court will regard as "a reasonable time," but we (and the judge) need not engage in the philosophically sterile attempt to assess the past mental states of the contracting parties.[113] Making a contract is an affair of action—an exchange of signs. Meaning, and hence contractual liability, results neither from logical rules of contract interpretation nor from the local meaning the signs had for the parties who exchanged them:

> In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties' having *meant* the same thing but on their having *said* the same thing.[114]

At best, however, objectivism of the Holmesian kind merely postpones the encounter with the problem of meaning. If formal rules cannot govern the application of law to social situations, like language to the world, we must be able to give some other justification for the particular applications made by particular judges if we are to save the coherence of the law. According to Holmes, we should ultimately be able to save the meanings of our legal words by replacing individual formalist accounts with realist ones, in which logical propositions give way to articulations of our previously inarticulate mental habits or felt necessities. Holmes stated that "a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words."[115] Our grounds for desiring our ends, of course, cannot be offered as logical propositions, or defended by proof. We cannot use rules to justify applying rules.

We may now draw some tentative parallels between the effect of antiformalist accounts of linguistic meaning on American legal thought in the early twentieth century and the situation created by Wittgenstein's *Philosophical Investigations*. The antiformalist conception of experience and Wittgenstein's argument from the problem of induction offer related but distinct reasons to discard rule-based

---

113. This single point by no means exhausts the significance of objectivism in Holmes's thought. For a broader consideration of its importance, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 33-63, 109-43 (1992). The account of Holmes's thought given here differs from Horwitz's in several respects, including, most importantly, Horwitz's belief in the formalism of the "early" Holmes. *See* Eben Moglen, *The Transformation of Morton Horwitz*, 93 COLUM. L. REV. 1461 (1993) (reviewing *The Transformation of American Law*).

114. HOLMES, *The Path of the Law*, *supra* note 94, at 178. The same notion of contract formation as a semiotic event is found in HOLMES, THE COMMON LAW, *supra* note 91, at 242.

115. HOLMES, *The Path of the Law*, *supra* note 94, at 186.

accounts of language. Dewey found inquiry to be "intermediate and mediating" in our development of knowledge; Wittgenstein argued that the meaning of our words rested on beliefs or habits that are philosophically erroneous to defend by rational argument. In the long metaphorical identification between rationality and sight in our philosophical tradition, language was said to be applied "blindly."[116]

Blindness, however, was a more serious problem for lawyers than for linguists. The application of words in the philosophy of language is a problem with a low normative stake, whereas an inability to give any defense of our application of legal rules threatens our basic conception of legality. In *The Path of the Law*, Holmes offered for the first time the hope that a science of values would allow us to give rational but nonformal justifications of rule applications, by stating the consequences desired and the reasons for desiring them. This aspiration was to be frequently repeated in the work of those Legal Realist scholars who followed Holmes.

B. THE LATER HISTORY OF REALISM—RULE-SKEPTICS AND FACT-SKEPTICS

By the early 1930s, a group of active and talented young scholars had accepted the challenge posed by Holmes to the formalist tradition in legal theory. A diverse and complicated movement,[117] the new "Realist" jurisprudence explicitly acknowledged its combined philosophical debt to American pragmatism and "logical positivism," which it associated with Wittgenstein and Carnap. Felix Cohen undertook the most sophisticated and insightful discussion of the relations between these intellectual developments.[118]

In *Transcendental Nonsense and the Functional Approach*,[119] Cohen returned to the antiformalist starting point, with the proposition that the language of

---

116. The historicist element in antiformalist legal thought accepted the consequences readily, particularly because the "blindness" of biological evolution was one of the most exciting and distressing insights of the Darwinian revolution. *The Common Law* could well be said to have as its major theme the blind evolution of our legal ideas.

117. *See, e.g.*, JEROME FRANK, LAW AND THE MODERN MIND (1930); Francis H. Bohlen, *The Rule in* Rylands v. Fletcher, 59 U. PA. L. REV. 298 (1911); William A. Clark et al., *The Business Failures Project—A Problem in Methodology*, 39 YALE L.J. 1013 (1930); Charles E. Clark & David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255 (1961); John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947); L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages (pts. 1 & 2)*, 46 YALE L.J. 52, 373 (1936-37); Leon Green, *The Duty Problem in Negligence Cases (pts. 1 & 2)*, 28 COLUM. L. REV. 1014 (1928), 29 COLUM. L. REV. 255 (1929); Nathan Isaacs, *Fault and Liabilty*, 31 HARV. L. REV. 954 (1918); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); Underhill Moore, *Rational Basis of Legal Institutions*, 23 COLUM. L. REV. 609 (1923); Hessel E. Yntema, *Legal Science and Reform*, 34 COLUM. L. REV. 207 (1934).

118. The role of Felix Cohen and his father, the philosopher and legal theorist Morris Raphael Cohen, in the Realist project has been underemphasized in much of the subsequent scholarship. For a current attempt to reduce the influence of Karl Llewellyn's grasp on Realism, restoring the Cohens to a more prominent position, see HORWITZ, *supra* note 113, at 160-68, 190-210.

119. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 823 (1935).

traditional legal explanation was "transcendental nonsense" because it defined legal words by their relation to one another, rather than through their perceived consequences. Cohen stated:

> Our legal system is filled with supernatural concepts, that is to say, concepts which cannot be defined in terms of experience, and from which all sorts of empirical decisions are supposed to flow. Against these unverifiable concepts modern jurisprudence presents an ultimatum. Any word that cannot pay up in the currency of fact, upon demand, is to be declared bankrupt, and we are to have no further dealings with it.[120]

Such sentiment led, as one would expect, to adoption of two of Holmes's central ideas: first, that law is a function of actual judicial decision, and successful prediction of judicial decision is, therefore, the goal of the lawyer; and second, that " '[s]ocial policy' will be comprehended not as an emergency factor in legal argument but rather as the gravitational field that gives weight to any rule or precedent."[121] Cohen took pains to show in several areas of doctrine that reifications of conceptions without empirical consequences (such as the "location" of a corporation, or the "property right" in words used as tradenames) led to decisions answering questions, which, quoting Wittgenstein, he derided as "of the same kind as the question whether the Good is more or less identical than the Beautiful."[122]

As Cohen demonstrated, escaping the empty circularity of formalist legal analysis required abandonment of the basic belief that legal meaning could be ascertained by following rules of legal reasoning. Cohen represented the "rule-skeptic" version of Legal Realism, which elucidated legal phenomena in relation not to the logic of the rules, but rather in relation to the mental habits and bedrock beliefs of the judges. But Cohen perceived more fully than did Holmes in *The Path of the Law* the alternative courses that followed from the rejection of rule-following. If prediction of the individual judicial decision was the essence of law and involved familiarity with the bedrock beliefs of the judges, then legal study ought to be directed at compiling a "publication, showing the political, economic, and professional background and activities of our various judges. . . . Our understanding of the law will be greatly enriched when we learn more about how judges think, about the exact extent of judicial corruption, and about the techniques for investigating legally relevant facts."[123]

But such a result, however attractive to the antiformalist for its rhetorical effect in stimulating rage among the less irreverent, was normatively unsatisfactory. Regarding individual judicial decisions as the product of "hunch" was anathema to Cohen. Legal meaning threatened to become like linguistic mean-

120. *Id.* at 823.
121. *Id.* at 834.
122. *Id.* at 823-24 (quoting LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (1922)).
123. *Id.* at 846.

ing—an artifact of idiosyncrasy, irreproducible and inexplicable. Confronted by his intellectual collaborators' tendency in this direction, Cohen undertook another move we have seen before:

> [A]ctual experience does reveal a significant body of predictable uniformity in the behavior of courts. Law is not a mass of unrelated decisions nor a product of judicial bellyaches. Judges are human, but they are a peculiar breed of humans, selected to a type and held to service under a potent system of governmental controls. Their acts are "judicial" only within a system which provides for appeals, rehearings, impeachments, and legislation. The decision that is "peculiar" suffers erosion—unless it represents the first salient manifestation of a new social force, in which case it soon ceases to be peculiar.
>
> . . . .
>
> A truly realistic theory of judicial decisions must conceive every decision as something more than an expression of individual personality, as concomitantly and even more importantly a function of social forces . . . .[124]

The claim of empirical demonstration in the first sentence, bolstering *a priori* statements of faith in the second, is a sign of the intellectual struggle underway in the passage. But Cohen is clearly formulating the idea of interpretive community.[125] Meaning is socially constructed, as a result of the "social forces" that bring judges ultimately to agree, and what the community agrees upon is what the law means. Thus, Cohen writes:

> A judicial decision is a social event. Like the enactment of a Federal statute, or the equipping of police cars with radios, a judicial decision is the intersection of social forces: Behind the decision are social forces that play upon it to give it a resultant momentum and direction . . . . Only by probing behind the decision to the forces which it reflects, or projecting beyond the decision the lines of its force upon the future, do we come to an understanding of the meaning of the decision itself.[126]

Like Holmes, Cohen recognized that a theory of law based on predictions of judges is not useful to judges, who must do more than predict their own decisions. A positivism resting all legal meaning on the behavior of the judges—however informed by an understanding of the social "forces" involved—cannot fully replace the formalism Cohen put aside. For while the conceptualist judge can reach the "right" result solely on the basis of logic, the Realist judge cannot go home satisfied after merely reflecting the current balance of social forces. Ethical criticism, or a "science of values," remained, for Cohen as for Holmes,

---

124. Cohen, *supra* note 119, at 843.

125. The notion of an interpretive community of judges under the institutional and ideological constraints of the legal tradition has more recently made its appearance in the Fiss-Fish debate. *See* Fish, *supra* note 7.

126. Cohen, *supra* note 119, at 843.

a necessary element of legal knowledge. The philosopher of language may rest content with the conclusion that our linguistic behavior is bound by rules that cannot be justified by logical argument. Not so the legal theorist. Returning to the ubiquitous metaphor linking sight with the rational faculty, Cohen concludes that "[l]egal description is blind without the guiding light of a theory of values."[127]

Cohen's convening of the interpretive community was not the only Realist approach to the problem of meaning. Jerome Frank, for example, took the route of "fact-skepticism." Frank's famous argument in *Law and the Modern Mind*[128] was that judges, lawyers, and lay people cooperated in maintaining a mythologized conception of the certainty of law. This false picture of legal certainty arose from individual psychology—from our neurotic need for an omnipotent father. Unsurprisingly, in view of his starting point, Frank concluded that trial court factual findings are the indeterminate outcomes of an inherently biased and imprecise process.[129] Thus, legal certainty was a myth precisely because factual certainty was impossible. Frank's skepticism also explicitly rejected the notion that legal meaning could be determined by the application of rules.[130]

For Frank, like Cohen, the danger of radical skepticism was apparent. If the supposedly stable meaning of legal texts depends on application of purported general rules to indeterminate facts, can the concept of the Rule of Law be saved? Frank's rescue attempt rested on his invocation of music to express the substance of legal interpretation.[131] Comparing legal interpretation to musical

---

127. *Id.* at 849.

128. FRANK, *supra* note 117.

129. This line of argument embodied what has been called fact-skepticism, as opposed to the rule-skepticism represented by Felix Cohen.

130. *See generally* Jerome Frank, *Words and Music*, 47 COLUM. L. REV. 1259 (1947) [hereinafter Frank, *Words and Music*]; Jerome Frank, *Say It With Music*, 61 HARV. L. REV. 921 (1948) [hereinafter Frank, *Say It With Music*].

131. *See* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1949) [hereinafter FRANK, COURTS ON TRIAL]; Frank, *Words and Music*, *supra* note 130. In describing the similarities between musical interpretation and statutory interpretation, Frank writes:

> Krenek, a brilliant modern musical composer, criticizes those musical "purists" who insist on what they call "work-fidelity." The performer of a musical piece . . . should, say the purists, engage in "authentic interpretation" which eliminates the interpreter altogether, by the "actual rendition" of the musical symbols just as they were written, in order to "serve the true intention of the composer." Krenek shows that often such literalism is absurd . . . .
>
> . . . .
>
> There is a middle ground, between disregarding the composer's intentions and being intelligently imaginative.
>
> . . . .
>
> No more than in the case of music, can differences in [statutory] interpretation be prevented. Yet the wise legislature will be in accord with Krenek's attitude towards musical performers: A judge with an imaginative personality supplies "an increment of vitality that is . . . desirable . . . and truly necessary in order to put" the legislative "message across," for only such a judge can read a statute "with an insight which transcends its literal meaning."

FRANK, COURTS ON TRIAL, *supra* at 295-96, 297, 300.

performance, Frank emphasized the antiformalist, Gestalt character of legal thought:

> In deciding any case where the testimony is in conflict or where credibility is otherwise a pivotal factor (and most cases fit in that category), a court contrives, so to speak, an individual song (a song for that particular case) in which the legal rules are the music and the "facts" are the words. Those two elements fuse in a composite (a *gestalt*), the unique character of which derives principally form the "facts."[132]

Jerome Frank's point about the nature of musical as compared to legal interpretation precisely parallels the arguments against formalism in language. The impossibility of demonstrating one's musical understanding by logic precisely matches Wittgenstein's conclusion about language application. Law, for Frank, became at best a "guessy art."[133] Our meanings are incapable of rational demonstration, resting on indeterminately inaccurate factual perceptions. Though Frank never expressly acknowledged failure, his critical weakness was the problem of normative justification for these "guessy" and contingent outcomes.

The writings of Felix Cohen and Jerome Frank demonstrate that the debate over linguistic indeterminacy and its consequences for legal theory has occurred twice in twentieth-century America, under the impetus of differing but closely related lines of philosophical speculation. Antiformalism in the philosophy of language joined the persistent antiformalist theme in the intellectual history of law to bring into doubt the stability of legal meaning by denying the coherence of rule-following. In the writings of Holmes and Felix Cohen we perceive the same uncertainties that beset later readers of the *Philosophical Investigations* who, like the rule-skeptic Realists, wanted to find justification for the Rule of Law in an antiformalist environment. The fact-skeptics' responses were less sophisticated than the more recent attempts to avoid the same basic pitfall, but then Jerome Frank did not have a copy of the *Philosophical Investigations* to ponder. The Road to Nonsense was shorter in 1949, and the way back was even more obscure.

C. RECOVERING REALISM—A CALL FOR LEGAL INVESTIGATIONS

As we have tried to show in the first three Parts of this article, a primary enterprise of Wittgenstein's *Philosophical Investigations* was the criticism of semantic formalism without risk to the integrity of linguistic meaning. Wittgenstein's resolution lay in recognizing limits to skepticism. This approach coincides with the descriptive legal theory advocated by Holmes and the rule-skeptic Realists. For Holmes and his intellectual descendants, the limits of skepticism were implicit in the pragmatism they adopted, in full accord with the

132. Frank, *Words and Music*, *supra* note 130, at 1277.

133. FRANK, COURTS ON TRIAL, *supra* note 131, at 37 (comparing trial court tasks with job of historian, both of which rely on second-hand constructions of past rather than actual knowledge of past events).

notion that "doubt can only exist where a question exists; a question can only exist where an answer exists, and this can only exist where something *can* be *said*."[134]

It would be charming to find that the disease of which Realism fell ill, and which much Critical Legal Studies evinces in its florid state, could be cured by an application of the true *Philosophical Investigations*—with its signature distaste for radical skepticism. Unfortunately, as readers will have surmised, this is not the case. Wittgenstein's project offers to save linguistic rules from a hypothesis of indeterminacy: when we obey a linguistic rule we need not burden ourselves with an obligation to justify the application—to know a rule is to know its applications. But legal rules, unlike linguistic ones, cannot be "blindly obeyed." Our conception of the Rule of Law requires that our rules be more than the commands of an Austinian sovereign. The law must give reasons when rules conflict and explain why only one rule is "right" in the specific case. Justice may be blind, but only if it is not mute.

Wittgenstein's *Philosophical Investigations* by no means licenses abandonment of meaning. That linguistic meaning rests on bedrock habits and beliefs that are fruitless and erroneous to defend fully satisfies the needs of the project on which Wittgenstein embarked—the removal of problems created by adherence to semantic formalism from philosophical discourse. The normative status of the resulting human language system is, for Wittgenstein, a prime example of a meaningless concept.

But the intellectual enterprise of legal theorists, who enlisted the *Philosophical Investigations* in the first place, is intrinsically normative. As Felix Cohen recognized, skepticism about rules as generators of legal meaning makes problems regarding those preformal habits and beliefs that shape legal outcomes. Wittgenstein's language model can readily dispense with justifications for applications of words. But one cannot consistently embrace both the Rule of Law and an absence of justification for the application of legal rules. It was the hope of Holmes, Felix Cohen, and other rule-skeptic Realists that the Rule of Law could be divorced from rule formalism, by substitution of a more complete "science of values." Such legal investigations would replace formal justifications of the application of rules, thereby rescuing both the Rule of Law and the meaning of words.

Scholars have advanced other normative accounts of the origin of "rules" or "standards" in the legal system. As Mark Kelman notes, the approaches central to Critical Legal Studies have not always extended their skepticism to the level of linguistic meaning, but they have all rejected the concept of the Rule of Law. But both Realists committed to rescuing the Rule of Law and adherents of Critical Legal Studies who have chosen other ideological viewpoints have confronted the problem of the decay of linguistic meaning, and Wittgenstein's *Philosophical Investigations* has much to say to both camps. Those who mis-

134. WITTGENSTEIN, *supra* note 61, at 44.

read may find themselves approaching nonsense at an accelerated pace. This appears to have happened, for reasons we suggest above, to those whose ideological commitments counsel less prudence in attacking meaning. For those who read Wittgenstein properly, the situation is sufficiently grave, but not hopeless. The Realist position, seeking to save the concept of the Rule of Law, has long been silent, and we can only hope that the news that meaning is alive and well may help to stir a revival. For those who believe in the Rule of Law—to paraphrase a less sincere retrospective on intellectual developments of the 1930s—it should be perfectly clear that "we're all Realists now."