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# Revolutiou Without Foundation: The Grammar of Scepticism and Law

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Scepticism about the legitimacy of law and adjudication is popular and pervasive. In this article the author assesses certain "strong" sceptical claims concerning the law, the rule of law, and constitutional adjudication. In particular, he refutes the argument that scepticism based on the "indeterminacy of language" can be derived from the philosophy of Ludwig Wittgenstein. The author argues that the implications of Wittgenstein's philosophy are in fact antithetical to scepticism, and that a sensitive reading of Wittgenstein offers insights into the viability of law, legal discourse and legal critique. These insights enable us not only to see the error of strong indeterminacy critics who invoke Wittgenstein, but also to understand the mistakes made by others who invoke an external — sometimes, but not always economic — analysis of law.

Le scepticisme quant à la légitimité du droit jouit d'une grande popularité et tire profit d'une imposante diffusion. Dans cet article, l'auteur considère certains arguments radicaux relatifs au droit, à la règle de droit et au processus judiciaire en matière constitutionnelle. Plus particulièrement, il rejette l'argument à l'effet que le scepticisme fondé sur l'imprécision du langage soit tiré de la philosophie dc Ludwig Wittgenstein. L'auteur soutient que les implications de la philosophie de Wittgenstein constituent une antithèse du scepticisme, et qu'une lecture attentive de Wittgenstein permet d'entrevoir la viabilité du droit, du discours légal et de la critique du système juridique. Par cette démonstration, nous sommes à mêmc de constater la faiblesse des arguments formulés par les critiques de l'imprécision qui invoquent Wittgenstein, mais aussi cellc d'autres critiques qui, quant à eux, recourent à une analyse externe du droit — fût-elle économique ou autre.

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*Synopsis*



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*Scepticism and solutions to scepticism ... make their way in the world mostly as lessons in hypocrisy; providing solutions one does not believe in to problems one has not felt.*[1]

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## I. Introduction

This essay is about the nature of constitutional critique. It takes as its starting point a set of strong sceptical arguments invoked by certain constitutional sceptics. Although I identify and discuss other strong sceptical arguments, I am interested most especially in strong claims made about the indeterminacy of language and the impact of this alleged indeterminacy upon our ideas about the nature of constitutional discourse. The strong sceptics draw very powerful lessons from many philosophical sources and they argue that these lessons are corrosive of fundamental ideas about law,

[1]S. Cavell, *The Claim of Reason: Wittgenstein, Skepticism, Morality and Tragedy* (New York: Oxford University Press, 1979).

the rule of law, and constitutional adjudication. In this essay I trace the reliance of these strong sceptics (labelled in this essay "strong internal sceptics") upon the philosophy of Ludwig Wittgenstein. My claim is that strong internal sceptics misuse this potent source of inspiration, reading in sceptical conclusions which Wittgenstein would regard as nonsense. But my claim also goes beyond mere exegetical detail. It is my view that strong sceptics are quite correct in turning to Wittgenstein in their efforts to understand law, and that an alternative and non-sceptical reading of Wittgensteinian philosophy is available. This non-sceptical reading, far from corroding our ideas of law, permits insight into the fundamental nature of legal and constitutional discourse. The word "fundamental" carries a lot of freight here. Reading Wittgenstein will not solve concrete constitutional cases. As Wittgenstein repeatedly emphasized "philosophy leaves everything as it is". But, and this is the critical claim, the lessons of Wittgensteinian philosophy let us see what we do when we argue and decide constitutional cases.

The essay also contains another claim. The non-sceptical reading of Wittgenstein leads us not only to reject the conclusions of the strong internal sceptics relying upon him, but also to understand and reject another form of scepticism, which I call strong external scepticism. Those in this latter class reject legal discourse, and believe that law must be analysed from perspectives external to legal discourse, for example "economic" discourse.

Thus the basic argument of the essay is of the following form. Strong internal sceptics are correct in seeking inspiration in Wittgensteinian philosophy, but draw the wrong conclusions. In studying the arguments of strong internal sceptics, an alternative and better account of legal discourse is revealed. This account lets us reject not only the conclusions of the strong internal sceptic, but also lets us understand the fundamental flaw in the position of the strong external sceptics.

The essay proceeds in the following fashion. First, I identify and talk about strong internal scepticism. Second, I identify four "critical arguments" repeatedly invoked by the strong internal sceptics. These arguments I label "indeterminacy of language", "radical subjectivity of ethics", "contradiction", and "mystification". For the purposes of the essay the most important argument is the first. Third, I show that these arguments are doing a lot of work in the writings of well known Canadian constitutional critics, especially Professors Hutchinson, Monahan and Petter. Fourth, I undertake a re-evaluation of the strong internal critics' reliance upon Wittgenstein. Fifth, I briefly make the claim that this non-sceptical reading of Wittgenstein is, and should be more explicitly, at the forefront of our philosophizing about law. Sixth, I turn the non-sceptical account of law upon those I have identified as strong external sceptics. My selection of candidates and works for discussion here is somewhat arbitrary, but I believe the general point not

to require anything more than *some* examples. Finally, I conclude with some very general remarks about where all of this leaves us and our constitutional law.

### *Strong Internal Scepticism*

Scepticism about law is fashionable and scepticism about law is easy. Almost all first year law students suffer a severe bout of it and some, it seems, never recover. Indeed, it seems clear that a prime purpose of first year legal education is to expose students to this very contagious point of view.[2] The question is, do we and should we do that in order to inoculate them against the disease of scepticism, or with the view that scepticism is itself the cure for some other disease, say formalism?

Interpretation is also a fashionable idea. Critical legal scholars[3] sparked or at least rekindled our current interest in both scepticism and problems of interpretation[4] but recently the flames so created seem to have lept the political fireline from left toward the right and are raging there among "liberal" legal scholars.[5] The "turn to interpretation" as we now understand it is sometimes viewed as a "liberal" or "mainstream" reaction to the critique of critical legal studies,[6] but its recent origins lie on the critic's side. This is to their credit, and we are all in their debt.

But while there are many important and compelling ideas and insights in this new literature and many uses of ideas such as "indeterminacy", I

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[2]For example, see J. Swan & B. Reiter, *Contracts*, 3d ed., (Toronto: Emond Montgomery, 1985), where the first case, *Peevyhouse* v. *Garland Coal & Mining Company* (1963), 382 P.2d 109 (Okla.S.C.) is utilized to immediately de-stabilize the apparently clear rule conceruing "expectation level damages" enunciated by Lord Atkinson in *Wertheim* v. *Chicoutimi Pulp* [1911] A.C. 301.

[3]There is of course great diversity among those scholars identified with the critical legal studies movement. See for example D. Kairys, ed., *The Politics of Law* (New York: Pantheon, 1982); The symposium on Critical Legal Studies, (1984) 36 Stan. L. Rev. A bibliography of C.L.S. Scholarship by D. Kennedy and K. Klare is contained in (1984) 94 Yale L.J. 461. See also the sources cited below. A useful overview of the major lines of development within C.L.S. Scholarship is contained in J. Boyle, "The Politics of Reason" (1985) 133 U. Penn. L. Rev. 685.

[4]G. Peller, "The Metaphysics of American Law" (1985) 73 Cal. L. Rev. 1151; S. Levinson, "Law as Literature" (1982) 60 Tex. L. Rev. 373; J. Singer, "The Player and the Cards: Nihilism and Legal Theory" (1984) Yale L.J. 1; Boyle, *supra*, note 3; M. Tushnet, "Following the Rules Laid Down" (1982) 96 Harv. L. Rev. 781.

[5]O. Fiss, "Objectivity and Interpretation" (1982) 34 Stan. L. Rev. 739; O. Fiss, "Conventionalism" (1985) 58 S. Cal. L. Rev.; R. Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1984); R. Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap Press, 1986); R. Fallon, "A Constructivist Coherence Theory of Constitutional Interpretation" (1987) 100 Harv. L. Rev. 1189.

[6]D. Kennedy, "The Turn to Interpretation" (1985) 58 S. Cal. L. Rev. 251.

am primarily interested in a particularly strong sceptical argument about interpretation which recurs in some well known and recent writing. It is a simple but powerful thesis about the indeterminacy of language and the rule of law. It may roughly be summarized as follows. In a democratic political culture dedicated to the virtues of the rule of law, a central jurisprudential issue and political concern is that of unelected judges imposing upon others their own ideas of how things should be. The legitimacy of the judicial process is at stake in this debate. That legitimacy turns upon the power of the "law" to constrain, direct, and limit judges in the exercise of their power "according to law". This in turn trades upon the capacity of language (the language of common law precedents, of statutes, of our constitutional document) to constrain, direct, and limit judicial decision-making. In the critical literature this point is made by insisting that "mainstream legal thought"[7] or "liberal legalism"[8] requires that this be the case. In short, if the law is to constrain judges, then language as law's universal medium must be capable of doing so. But language is indeterminate, unstable, subject to manipulation and incapable of expressing rules and principles which constrain judges. Thus the law is a failure on its own terms and the virtues of the rule of law are impossible to secure.

In the strands of literature to which I refer, this strong argument is embraced and "proved" with enthusiasm, and reliance is placed upon many different ideas and theories in the philosophy of language.[9] But the three-part central message remains constant across this variety of inspirational sources. That message is first, that the rule of law requires certainty and constraint of a certain sort. Second, this does not exist because law's universal medium, language, is unstable. Law is therefore political choice. Third, the critics add that any certainty we see is simply the product of our own contingent conventions and arbitrary choices. It is one particular variation upon this theme that seems to me most interesting and potentially illuminating. It is the reliance of certain critical scholars upon the later philosophy of Ludwig Wittgenstein, the "first philosopher of our age",[10] in order to make out their sceptical claims. For reasons which I hope become clear, I believe this to be a shallow but "deeply shallow"[11] approach to

[7]Singer, *supra*, note 4 at 6.

[8]See R. Gordon in Kairys, *supra*, note 3, 281 at 284.

[9]For example, Gary Peller, *supra*, note 4 relies upon the deconstructive philosophy of Jacquest Derrida; Joseph Singer, *supra*, note 4 relies upon the pragmatic philosophy of Richard Rorty; Sanford Levinson, *supra*, note 4, relies upon the new literary criticism of Stanley Fish and others; Mark Tushnet, *supra*, note 4 relies upon the later philosophy of Ludwig Wittgenstein.

[10]A widely acknowledged description — see P.F. Strawson, "Review of the *Philosophical Investigations*" (1954) 63 Mind 70; Hacker, *Insight and Illusion*, rev'd ed. (New York: Clarendon Press, 1986), preface.

[11]I borrow this phrase and idea from Bernard Williams in "Anto-da-Fe" *New York Review of Books* (28 April 1983) 33 at 35.

Wittgenstein's philosophy and its significance for law. It is deeply shallow because while I believe the sceptical reading of Wittgenstein's message is a misguided one, there *is* great significance and potential for illumination in an alternative understanding of that philosophy.

The basic argument which I have just outlined is what I shall refer to as the "simple indeterminacy" thesis or alternatively the "indeterminacy of language" thesis. But a reading of the literature upon which I am focusing leads to the conclusion that there are other strong and central ideas at play in the most dramatic forms of the sceptical assault and that these ideas intermingle and are interwoven with the strong indeterminacy of language critique. It is useful to distinguish: 1) the simple indeterminacy thesis, 2) the "subjectivity of value" or "logical positivism" thesis, 3) the "contradiction" thesis and 4) the "mystification" thesis.

The first three of these are critical ideas which contain the main intellectual ammunition in the strong critical attack upon the "rule of law" or "liberal law" or "mainstream legal thought". The "mystification" thesis operates by way of supplementary explanation of how and why law can and does operate in spite of the fact that the first three theses are valid.

I focus upon the strong versions of these critical arguments, and their limitations, because I believe it illuminating to do so and because it is this strong form of critique which is invoked in the Canadian constitutional context by Canadian constitutional critics.[12] Through an examination of these strong critical arguments and the Canadian literature relying upon them, some insight into our constitutional practice may be possible.

## II. The Critical Arguments

My purpose here is to review in a brief way the four strong versions of the critical arguments listed above. I shall concentrate upon the indeterminacy of language argument which, it seems to me, is most central to the current vogue of scepticism, and also most central to the recent less sceptical theorizing based upon the philosophy of language.[13]

### *A. Indeterminacy of Language*

This is the most important of the four strong critical arguments, important in the sense of its place in the literature but also because of the

[12]The essays I concentrate upon are: a) A. Petter, "The Politics of the Charter" (1986) 8 Sup. Ct Law Rev. 473; b) P.P. Monahan, "Judicial Review and Democracy: A Theory of Judicial Review" (1987) 21 U.B.C. L. Rev. 87; c) A.C. Hutchinson and A. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter", forthcoming in 38 U.T.L.J.

[13]See the sources cited *supra*, note 5.

potential for a reconsideration of the argument to provide positive assistance in understanding our practice of constitutional, and other, interpretation. While my main focus will be upon the Wittgensteinian version of this argument, there are many lines of development of the indeterminacy thesis, and it is a thesis which has an honourable history in our jurisprudential literature.[14] The central issue here is, to put it somewhat crudely, that of "law and order".[15] The essential argument is that language is sufficiently unstable that "law and order" is impossible. There are obviously two sorts of claims being made here. One is a claim about what "mainstream" or "liberal" legal thought or the "rule of law" requires, and the other necessitates a demonstration that these conditions do not obtain. Thus, for example, Singer writes:

> Determinacy is necessary to the ideology of the rule of law, for both theorists and judges. It is the only way judges can appear to apply the law rather than make it. Determinative rules and arguments are desirable because they restrain arbitrary judicial power.[16]

And Singer goes on to explicate the requirements of determinacy in the following words:

> A legal theory or set of legal rules is completely determinate if it is comprehensive, consistent, directive and self-revising. Any doctrine or set of rules that fails to satisfy any one of these requirements is indeterminate because it does not fully constrain our choices.[17]

And having set the requirements strong critics have had no hesitation in expressing language's failure to meet them. A particularly strong version of this thesis is found in Gary Peller's "The Metaphysics of American Law".[18] Legal theory, according to Peller, "consistently appeals to the image of legal discourse as a neutral medium which merely reflects social events."[19] But the language of the law is "merely one instance in a series of (arational) attempts to capture social experience in a reproducible form."[20] There is no "pure form of communication which merely represents rather than creates context" and all "representational practice ... inevitably is ideologi-

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[14]F.S. Cohen, "Transcendental Nonsense and the Functional Approach" (1935) 35 Columbia L. Rev. 809 may be cited as a classic example of the relevant realist and post-realist literature.

[15]D.F. Pears, *Wittgenstein* (Cambridge, Mass: Harvard University Press, 1986).

[16]Singer, *supra*, note 4 at 12.

[17]*Ibid.* at 14.

[18]Peller, *supra*, note 4.

[19]*Ibid.* at 1159.

[20]*Ibid.* at 1155.

cal."[21] Language is not a transparent vessel for expressing meanings, rather, meaning is dependent upon language[22] that is the "categories of communication available in the linguistic community."[23] Peller states his conclusion in this way:

> [T]here is no determinative way to know this world separate from the socially created representation systems through which we approach the world. Knowledge and social power are inseparable .... [I] am not arguing that we never communicate or understand each other when we speak or act. That would be absurd. Rather, there is no way to achieve closure with respect to the meaning of expressions or events. The distribution of meaning depends on socially created and contingent representational conventions. Each attempt to fix meaning is belied by the dependence of meaning on language. Meaning is dependent on artificial and differential signification practices.[24]

> When particular representation categories for dividing up the world are reified and achieve a hegemony in a particular community, description is taken as fact rather than "mere" opinion or ideology. In such a context, the social conventions for representing the world are viewed as flowing from the way the world really is. Their contingent and provisional status is suppressed. Fiction is presented as truth.[25]

A concern over the workings of language and its impact upon "law and order", that is the need for determinacy, is long standing. It was, for example, one of the key issues in one of the most famous jurisprudential debates within "mainstream" legal theory, that between Hart and Fuller.[26] This is of interest not only for historical reasons but also because we see here a very early sign of the influence upon legal theory of the later views of Ludwig Wittgenstein.[27] This influence has carried forth directly into the modern strong indeterminacy argument. In his debate with Fuller, Hart saw the problem which the new critics now point to, and he wrote:

> If we are to communicate with each other at all, and if as in the most elementary forms of law, we are to express our intention that a certain form of behaviour be regulated by rules, then the general words we use must have some standard instances in which no doubts are felt about its application. There must be a core of settled meaning, but there will as well be a penumbra of debatable cases.[28]

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[21]*Ibid.* at 1159.

[22]*Ibid.* at 1160.

[23]*Ibid.* at 1161.

[24]*Ibid.* at 1170.

[25]*Ibid.* at 1181.

[26]See H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harv. L. Rev. 533; L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71 Harv. L. Rev. 630.

[27]As contained mainly in L. Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscombe (Oxford: Blackwell, 1953) [hereinafter *Philosophical Investigations*].

[28]Hart, *supra*, note 26 at 607.

Hart's key point was that penumbral cases, which involved an appeal to something (such as statutory purposes, context, or values) beyond the words on the page, were rare.[29] It is precisely this point and Hart's reasons for making it (that law and communication would be impossible) which Fuller attacked. Fuller, relying upon Wittgenstein, insisted that meaning is always dependent upon the context, and purpose within which and for which the language is used. What Hart takes to be the "easy" cases of inert "core" meaning (when a staute prohibits the taking of "vehicles" into a park it must include an ordinary Chevrolet automobile being driven into the park) are no different from the "hard", "penumbral" cases. They are the same and involve the same judgment of meaning in light of context and purpose. A neutral text is never determinative. The "easy" cases are simply those in which "however one might formulate the precise objective or purpose of the statute, *this* would come within it."[30] In conducting this argument in the pages of the Harvard Law Review Hart appears, in retrospect, as the champion of "law and order" against the Fuller or Wittgensteinian view[31] which, it is alleged, makes law and language impossible. Many of those advancing the strong indeterminacy thesis still rely heavily upon a version of Wittgenstein's theory as their theoretical base, and they utilize that theory to come to conclusions much harsher than those advanced by Fuller. References to Wittgenstein have become, as Boyle observes, "ubiquitous"[32] and his work is referred to as "basic".[33] The view of the modern critic is that Wittgenstein's work is "corrosive"[34] for legal theory. Thus, Tushnet writes:

> Since the Realists wrote, we have come to understand that the problems they described arose from the concept of rules and from the nature of language.[35]

Tushnet states that Wittgenstein is his "fancy citation"[36] for this proposition. And Boyle writes:

> I draw ideas about the breakdown of rationality in the study of linguistic philosophy from an interpretation of Wittgenstein's later works, an interpretation that Wittgenstein did not seem to share.... [I]t seems that the success that such writers as Foucault and Derrida have had in Britain and the United States is partly due to the particularly corrosive effect that the post-Wittgen-

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[29]*Ibid.* at 607, 615.

[30]Fuller, *supra*, note 26 at 663.

[31]Fuller explicitly acknowledges the Wittgensteinian nature of his views at 669 of his reply to Professor Hart, *supra*, note 26. Hart's position here is an odd one in light of his obvious indebtedness to and command of Wittgensteinian theory — something I discuss below in text accompanying notes 218-24.

[32]Boyle, *supra*, note 3 at 713.

[33]*Ibid.*, note 28 of that text.

[34]*Ibid.* at 711.

[35]M. Tushnet, "Legal Scholarship, Its Causes and Cure" (1981) 90 Yale L.J. 1205.

[36]*Ibid.*

> steinian view of language has had on all the academic discourses within those countries.... One could say that the anesthetic hold of essentialism is broken in precisely the moment when it is realized that the question "what is law, art, science, etc?" is literally meaningless. Wittgenstein's outstanding contribution was that he flushed the mediaeval fascination with essences from its most secure hiding-place — right under our noses — in the everyday objectivication of linguistic meaning.[37]

There are really two lines of development of Wittgensteinian theory in the strong critical literature. The first is straightforward and aims at exploding Hart's attempt to cabin the Wittgensteinian insight, which Fuller pointed out, that the text has no plain, core, or essential meaning. Thus Boyle describes Hart's efforts and his failure as follows:

> As with a medical inoculation, the patient was going to be given a weakened form of the disease — linguistic indeterminacy — in order to acquire a resistance to it. Hart's attempt at inoculation theory accepted that words were sometimes indeterminate but insisted that there was a "core meaning" to every word and, provided the judge only dealt with cases that fell in "core", no subjectivity or discretion was involved. Thus the rule of law was saved, if weakened, and the judge need only have recourse to political factors such as policy argument in the "penumbra" of legal rules.[38]

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[37]*Ibid.* note 75 of that text at 707.

[38]Boyle, *supra*, note 3 at 711; see also Singer, *supra*, note 4 at 13 (speaking of the "right mix" of determinacy and indeterminacy). Fuller's point in his debate with Hart was, as has been indicated, that context always plays a key role, even in the "core" cases, not solely in the gray area of the "penumbra". A passage from Wittgenstein's *Philosophical Investigations*, *supra*, note 27, which Fuller referred to as "a sort of running commentary on the way words shift and transform their meaning as they move from context to context" (Fuller, *supra*, note 26 at 669), has become almost well known in law schools. I refer to Wittgenstein's famous discussion of "games":

> Consider for example the proceedings that we call "games". I mean board-games, card-games, ball-games, Olympic-games, and so on. What is common to all of them? — Don't say: "There *must* be something common, or they would not be called "games" — but *look and see* whether there is anything common to all. — For if you look at them you will not see something that is common to *all*, but similarities, relationships, and a whole series of them at that. To repeat: don't think, but look! — Look for example at board-games, with their multi-various relationships. Now pass to card-games; here you find many correspondences with the first group, but many common features drop out, and others appear. When we pass next to ball-games, much that is common is retained, but much is lost. — Are they all "amusing"? Compare chess with noughts and crosses. Or is there always winning and losing or competition between players? Think of patience. In ball-games there is winning and losing; but when a child throws his ball at the wall and catches it again, this feature has disappeared. Look at the parts played by skill and luck; and at the difference between skill in chess and skill in tennis. Think now of games like ring around the rosies; here is the element of amusement, but how many other characteristic features have disappeared! And we can go through the many, many other groups of games in the same way; can we still see how similarities crop up and

The importance of all of this is that Boyle believes that the "post-Wittgensteinian view of language"[39] is "corrosive":[40]

> Once the step to purposive interpretation has been taken, it appeared that there was no going back. "Purposes" and "intentions" were obviously just as conceptually reified as "plain meanings". Who knows what Congress intends? What if there were conflicting viewpoints? ... In other words, this view of language subverts the possibility of a method of adjudication that is separable from political argument in general, since the Court must go beneath the words into the political producing them.[41]

This position is simply asserted — law becomes politics.

Other strong indeterminacy critics, such as Sanford Levinson, come to their sceptical views through the work of literary critics such as Stanley Fish, who, in spite of the fact that he nowhere cites him, is clearly heavily influenced by Wittgenstein.[42] Levinson writes, setting up the problem:

> Any writer, including a framer of a constitution, presumably imagines the following relationship between text and reader: "the reader sets himself to make out what the author has designed and signified through putting into play a

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disappear.

> And the result of this examination is: we see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail.
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> I can think of no better expression to characterize these similarities than "family resemblances"; but the various resemblances between members of a family: build, features, colour of eyes, gait, temperament, etc. etc. overlap and criss-cross in the same way. — And I shall say: "games" form a family. (Wittgenstein, *Philosophical Investigations*, *supra*, note 27, para. 66 and 67.)

Fuller himself was particularly fond of quoting Wittgenstein's example of "teach the children a game":

> Someone says to me: "shew the children a game." I teach them gaming with dice, the other says "I didn't mean that sort of game." Must the exclusion of the game with dice have come before his mind when he gave me the order? (*Ibid.* at 33.)

This is actually a nice question in many areas of law — such as "frustration" in contract law — see L. Fuller and D. Eisenberg, *Basic Contract Law*, 4th ed. (St. Paul: West, 1981) at 852; and L.E. Trakman, "Winner Take Some" (1985), 69 Minn. L. Rev. 471.

These famous passages are actually ones in which Wittgenstein is making a complex double barreled argument about the nature of language in general as well as about the concept of a "game". (See P.F. Strawson's review of Wittgenstein's *Philosophical Investigations* (1954) 63 Mind 70, reprinted in G. Pitcher, ed., *Wittgenstein: The Philosophical Investigations* (Notre Dame, Ind.: University of Notre Dame Press, 1968) at 22.) But for our purpose the importance of the passage lies in its use by legal scholars to drive home the "anti-essentialist" point that words do not have "literal", "core", "plain" or "essential" meaning.

[39]Boyle, *supra*, note 3 at 708.

[40]*Ibid.* at 711.

[41]*Ibid.* at 712, 713.

[42]"Wittgenstein" does not appear in the index of Fish's *Is There a Text in This Class?: The Authority of Interpretive Communities* (Cambridge, Mass.: Harvard University Press, 1980).

> linguistic and literary expertise that he shares with the author. By approximating what the author undertook to signify the reader understands what the language of the work means." And, of course, in the case of those particular texts called legal, by understanding the meaning the conscientious adjudicator/reader becomes authorized to enforce it.[43]

And Levinson believes, or at the very least is deeply worried by,[44] the influence of literary critics such as Stanley Fish upon this vision of the nature of constitutions, the purpose and process of interpretation, and thus the possibility of legitimate adjudication. In Levinson's view, critics such as Fish are disturbing because they attack the "stability of meaning at *any* given moment."[45] He believes that the "plain meaning" and intent of the framers' approach cannot salvage stable "meaning":

> The view endorsed by Fish regards "human beings as at any moment creating the experiential spaces into which a personal knowledge flows." Meaning is created rather than discovered, though the source of creative energy is the particular community within which one finds him or herself.[46]

And Levinson concludes:

> It would obviously be nice to believe that *my* Constitution is the true one and, therefore, that my opponent's versions are fraudulent, but that is precisely the belief that becomes steadily harder to maintain. They are simply *different* Constitutions. *There are as many plausible readings of the United States Constitution as there are versions of Hamlet*, even though each interpreter, like each director, might genuinely believe that he or she has stumbled onto the one best answer to the conundrums of the texts. That we cannot walk out of offending productions of our national ethic poem, the Constitution may often be anguishing, but that may be our true constitutional fate.[47] [emphasis added]

Still other strong indeterminacy critics, such as Mark Tushnet, draw upon the other and deeper line of Wittgensteinian argument in order to justify their views. This is the "rule following critique". This line of development flows directly from the work of the "later" Wittgenstein in the *Philosophical Investigations*. The rule following critique is best viewed as another string in the critic's bow. But it is this critique which comes closest to the heart of Wittgenstein's theory. It argues that indeterminacy at a most fundamental level, a truly radical scepticism, flows from Wittgenstein's the-

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[43]Levinson, *supra*, note 4 at 376.

[44]See S. Levinson, "On Dworkin, Kennedy and Ely: Decoding the Legal Past" (1984) 51 Partisan Rev. 248.

[45]Levinson, *supra*, note 4 at 377.

[46]*Ibid.* at 383.

[47]*Ibid.* at 391-92. As a result of this Levinson was labelled a "nihilist" by Owen Fiss, in "Objectivity and Interpretation", *supra*, note 5. See Levinson's response in the Partisan Review, *supra*, note 44, and in "Law as Literature", *supra*, note 4 at 392. See also J. Stick's view of Levinson's Nihilism, in "Can Nihilism Be Pragmatic?" (1986) 100 Harv. L. Rev. 332 at 332-33 n. 2, 342 n. 32, 344 n. 42.

ory of language. It is an assault upon the easiest of cases, an assault which Neil MacCormick was able to say in the 1970s "no one has ever advanced...."[48] Welcome to the 1980s. The rule following critique has an obvious link to the basic indeterminacy assault. But there is clearly a more direct link between scepticism about the possibility of knowing what it is to follow a rule, and law. If rule following is an illusion, the law, quintessentially viewed as a rule following (normative) activity is brought directly into question. The link between the critique of rule following and the fundamental critique of the rule of law ("liberal legalism") is clear. The fundamental critique postulates a view of the world in which law is the objective arbiter between conflicting individual interests and in which, in order to fulfill the objectives of the rule of law and not "men"(!), the law must be objectively knowable and formally manipulable. The concept of a rule, which can be known in advance, guide behaviour in the world, and direct, generate, and demand certain judicial responses is central. In short, *rules* are central to the "*rule* of law". If rule following is an illusion, then law is as well, at least if "law" is to fulfill the requirements said by the critic to be required by the rule of law.

The use in context idea ("Teach the children a game") is the simple message of the later Wittgenstein's theory. Many lawyers have a superficial acquaintance with this notion. The rule following critique is a more complex argument but the idea of "rule following" is the "centre of Wittgenstein's later theory of meaning."[49] It is also true that Wittgenstein's ideas on rule following have recently come to be seen as more central to his later work.[50] The publication of Kripke's *Wittgenstein: On Rules and Private Language*[51] was an important if controversial[52] moment in the ascendancy of the problem of rule following. A recent review of Kripke's book in the pages of the *Yale Law Journal*[53] draws attention to the importance of Kripke's sceptical views for law and legal scholarship.

Mark Tushnet invokes the rule following critique in his essay "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles"[54] by making use of a version of a famous Wittgensteinian puzzle

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[48]N. MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978).

[49]Pears, *supra*, note 15 at xv.

[50]See G.P. Baker & P.M.S. Hacker, *Language, Sense and Nonsense: A Critical Investigation Into Modern Theories of Language* (Oxford: Blackwell, 1984); S.H. Hotzman & C.M. Leich, eds, *Wittgenstein: To Follow A Rule* (Boston: Routledge & Kegan Paul, 1981), at xi-xii.

[51]S.A. Kripke, *Wittgenstein On Rules and Private Language: An Elementary Exposition* (Cambridge, Mass.: Harvard University Press, 1982).

[52]See the preface in Baker & Hacker, *supra*, note 50; P. Winch, "Facts and Superfacts" 33 Philosophical Q. 398 (review of Kripke, *supra*, note 51).

[53]C.M. Yablon, "Law and Metaphysics" (1987) 96 Yale L.J. 613.

[54]*Supra*, note 4.

utilized by Peter Winch in his important book *The Idea of a Social Science.*[55] Tushnet writes:

> Consider the following multiple choice question: "Which pair of numbers comes next in a series 1, 3, 5, 7?'
>
> (a) 9, 11;
> (b) 11, 13;
> (c) 25, 18.
>
> It is easy to show that any of these answers is correct. The first is correct if the rule generating the series is "list the odd numbers"; the second is correct if the rule is quote "list the odd prime numbers"; and the third is correct if a more complex rule generates the series. [One possible rule is the following: $f(1) = 1$; for $n > 1$, if n is divisible by 5, $f(n) = n^2$; if $(n - 1)$ is divisible by 5, $f(n) = f(n - 1) - f(n - 2)$; if neither n nor $(n - 1)$ is divisible by 5, $f(n) = 2n - 1$.] Thus if asked to follow the underlying rule — the "principle" of the series — we can justify a tremendous range of diversion answers by constructing the rule so that it generates the answer that we want. As the legal realists showed, this result obtains for legal as well as mathematical rules. The situation in law might be thought to differ, because judges try to articulate the rules they use. But even when an earlier case identifies the rule that it invokes, only a vision of the contours of the judicial role constrains judges' understanding of what counts as applying the rule. Without such a vision, there will always be a diversity of subsequent uses of the rule that could fairly be called consistent applications of it.
>
> ...
>
> [T]here is, however, something askew in this anarchic conclusion. After all, we know that no test maker would accept (c) as an answer to the mathematical problem; and indeed we can be fairly confident that test makers would not include both (a) and (b) possible answers, because the underlying rules that generate them are so obvious that they make the question fatally ambiguous. Another example may sharpen the point. The examination for those seeking driver's licenses in the District of Columbia includes this question: "What is responsible for most automobile accidents? (a)The car; (b) The driver; (c) Road conditions." Anyone who does not know immediately that the answer is (b) does not understand what the testing enterprise is all about.
>
> In these examples, we know something about the rule to follow only because we are familiar with the social practices of intelligence testing and drivers' education. That is, the answer does not follow from a rule that can be uniquely identified without specifiying something about the substantive practices.[56]

We should pause for a moment to notice the essential ingredients of this point of view and to consider its implications. First, the fundamental starting point is that "liberalism" requires neutral application of rules. Second, that multiple choices for continuation of the series (multiple "inter-

[55]P. Winch, *The Idea of a Social Science and Its Relation to Philosophy* (New York: Humanities Press, 1958).

[56]Tushnet, *supra*, note 4 at 822-23.

pretations" are available) is always the condition under which even the simplest act of adjudication takes place. Choice is inevitable. Third, this unlimited choice is limited by the "mind set", "point of view", "bias", "ideological perspective" or selective training of the adjudicators. And it is *only* this collective "vision", to use Tushnet's term, that makes the problem of the continuation of the series or "following the rule", for practical purposes,[57] unambiguous. This is a specific three-part rendition of a general three-part indeterminacy argument, based upon the notion of rule following said to be found in Wittgenstein's thought.[58]

Note the result of Tushnet's philosophising — it is to destabilize all rules, and thus to destabilize language. The only salvation is found in the habits of the community. Tushnet's skepticism about the continuation of the series[59] of numbers may be viewed as a simplistic version of the more complex and controversial argument put forth by Kripke. While the book has received a "mixed" reception from Wittgensteinian scholars[60] its attraction for lawyers has been significant.[61] Yablon in his review states that lawyers "will ultimately find Kripke's work most valuable."[62]

The important point is that the strong indeterminacy critic reads Wittgenstein as denying that language itself can constrain because it is always malleable and open to the politics of context. Furthermore, rules themselves do not guide, determine, or direct what results flow from them. That is, nothing is in the text or the rule — all of the action is with the reader. In short we do not have rule by law (language or text) but rule by the politics of our judges (readers). The cat is out of the bag.[63]

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[57]*Ibid.* at 823.

[58]The actual Kripkean rule following argument is more complex. Kripke believes he can demonstrate that following even the simplest rule ("addition", using the word "red") is "impossible". Past precedents always "underdetermine" the application of the rule to a new situation. And any appeal to an "intention" I have in my mind would take the form of a "rule for following a rule". To appeal to a rule to explain how I follow a rule is the equivalent of buying two copies of the morning newspaper in order to make certain what the first one contained is true. (There can be no rule for following a rule . . .) Kripke believes this to lead to the paradox that language is "impossible". The only way out is the appeal to a "community *consensus*" which chooses or selects the correct "interpretation" from the many available. It is a "sceptical conclusion", as Kripke calls it, to a sceptical argument.

[59]See also Tushnet, *supra*, note 35.

[60]See Baker & Hacker, *supra*, note 50; Hacker, *supra*, note 10 at 247 ("a complete distortion").

[61]See, for example, citations by Owen Fiss in "Conventionalism", *supra*, note 5; Stick, *supra*, note 47 at 344; Posner, *infra*, note 79.

[62]Yablon, *supra*, note 53 at 615.

[63]I borrow this metaphor from: G. Graff, "'Keep off the Grass', 'Drop Dead', and Other Indeterminacies: A Response to Professor Levinson" (1982) 60 Tex. L. Rev. 405. I return to it later.

### *B. The Radical Subjectivity of Ethical Judgment*

The question of the status of ethical or political judgment is pervasive in our philosophical heritage and it would be obviously inaccurate to suggest that our modern legal critics are responsible for a radical reassessment of these problems.[64] Nevertheless some of the strong legal critics have clearly identified themselves with those who have severely devalued the currency of ethical discourse. In a modern, scientific, empiricist age it is in fact true, I believe, that "logical positivism" and a general value scepticism associated with liberal pluralism have become, as John Stick puts it, part of the "general intellectual heritage of American Law".[65] "Logical positivism" is the philosophical doctrine identified with the Vienna Circle of the 1920s which held that only propositions which are empirically verifiable or analytic can be meaningful. All else, including ethical and political discourse, is nonsense. As Searle puts it "propositions of ethics had only a kind of second class meaning, an emotive meaning, because they weren't really verifiable, analytically or empirically, but were just used to express feelings and emotions."[66] A famous English exposition of this position is A.J. Ayer's *Language, Truth and Logic.*[67] Of course general scepticism about the "objectivity of ethics" and the status of ethical judgments has the longest tradition in Western philosophy. Such scepticism "finds its polite and conservative expression in Hume and its radically demonic expression in Nietzsche"[68] but for our immediate purposes it is again the direct link from Wittgenstein to the modern critics which is illustrative of the central thesis. In the *Tractatus Logico-Philosophicus*[69] Wittgenstein deployed a vision of philosophy (the aim of philosophy is to determine the bounds of sense) and

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[64]While it is impossible to give a representative sampling of the sources, modern and well known readings on this point would include A.C. McIntyre, *After Virtue: A Study in Moral Theory*, 2d ed. (Notre Dame, Ind.: University of Notre Dame Press, 1984); J.L. Mackie, *Ethics: Inventing Right and Wrong* (New York: Penguin, 1978). And very important recent contributions include B. Williams, *Ethics and the Limits of Philosophy* (Cambridge, Mass.: Harvard University Press, 1985); T. Nagel, *The View from Nowhere* (New York: Oxford University Press, 1986), c. 8-11; J. Finnis, *Fundamentals of Ethics* (Washington: Georgetown University Press, 1983); S. Hampshire, *Morality and Conflict* (Cambridge, Mass.: Harvard University Press, 1983), c. 6, 7.

[65]Stick, *supra*, note 47 at 332-33 n. 2.

[66]J. Searle in B. Magee, *Men of Ideas* (New York: Viking Press, 1979).

[67]A.J. Ayer, *Language, Truth and Logic* (New York: Oxford University Press, 1936). See especially c. 6.

[68]Finnis, *supra*, note 64 at 7. For a general description of the "naturalistic fallacy" ("ought from is") see B. Williams, *supra*, note 64 at 121-124. For discussions important to this theory see J.R. Searle, *Speech Acts* (London: Cambridge University Press, 1969) at 175-199 and S. Cavell, "Must We Mean What We Say?" in S. Cavell, ed., *Must We Mean What We Say?* (New York: Cambridge University Press, 1976) 1.

[69]L. Wittgenstein, *Tractatus Logico-Philosophicus*, trans. D.F. Pears & B.F. McGuiness (London: Routledge & Kegan Paul, 1961) (First published in 1921, and in English in 1922).

of the nature of language (the "picture theory") which led him to a view of the limits of sensical discourse which entailed the rejection of ethical discourse as "nonsense", meaning that such discourse exceeded the bounds of sense, that is, what can be said.[70] This classical positivist conclusion was summed up in this famous last cryptic line in the *Tractatus*: "What we cannot speak about we must pass over in silence."[71] The link between Wittgenstein and the strong ethical scepticism in some strands of the critical literature is found in the life work of Arthur Allen Leff of the Yale Law School.[72] Leff was the true heir to the realists in the sense that he believed he was facing up to the true meaning of their legacy. This is made apparent in the following:

> Let us start with a couple of vicious intellectual parodies. Once upon a time there was Formalism. The law itself was a deductive system, with unquestionable premises leading to ineluctable conclusions. It was, potentially at least, all consistent and pervasive. Oh, individual judges messed up, and even individual professors, and their misperceptions and mispronouncements needed rationalization, connection, and correction. But that was the proper job of one of the giants we had in the earth in those days. The job of legal commentators, and a fortiori of treatise writers, was to find the consistent thread in the inconsistent statements of others and pull it all together along the seam of what was implicit in "the logic of the system". When you found enough threads and pulled them just hard enough, you made a very neat bag — say, Beale's *Conflict of Laws*.
>
> Then, out of the hills, came the Realists. What their messianic message was has never been totally clear. But it is generally accepted that, at least in comparison to the picture of their predecessors which they drew for themselves, they were much more interested in the way law actually functioned in society. There were *men* in law, and the law created by men had an effect on other men in society. The critical questions were henceforward no longer to be those of systematic consistency, but of existential reality. You could no longer criticize law in terms of logical operations, but only in terms of operational logic.
>
> Now such a move, while liberating, was also ultimately terrifying. For if you were interested in a society, and with law as an operative variable within that society, you would have to find out something about that subject matter and those operations. You would, it seems, have to become an empiricist. That, as we shall see, is no picnic when the facts you are searching out are social facts. But there is a worse worry yet. If you no longer are allowed to believe in a deductive system, if criticism is no longer solely logical, you no longer

[70]For an excellent introduction to these points generally see Hacker, *Insight and Illusion*, *supra*, note 10 and J.V. Canfield, *Wittgenstein, Language and the World* (Amherst: University of Massachusetts Press, 1981). For a positive and inspirational account of Wittgensteinian ethics see J.C. Edwards, *Ethics without Philosophy: Wittgenstein and the Moral Life* (Tampa: University Presses of Florida, 1982).

[71]*Tractatus*, *supra*, note 69, para. 7.

[72]See the Memorials in (1985) 94 Yale L.J. 1843 and also A. Leff, "The Leff Dictionary of Law: A Fragment" (1985) 94 Yale L.J. 1855.

> can avoid the question of *premises*. Premises, in terms of logic, are just that: those things you don't talk about. But if you are under an obligation to talk about non-foreordained conclusions, you must start to talk about non-given starting points. Any (mostly implicit) assumptions that one's premises in some mysterious manner are at least congruent with the commands of the universe would (and did) come under increasing pressure. If "good" were seen solely in terms of effects, the only good premises were those that came up with good effects. Thus, by dropping formalism we (quite rightly) fell into the responsibility of good and evil.
>
> But not, alas, the knowledge thereof. While all this was going on, most likely conditioning it in fact, the knowledge of good and evil, as an intellectual subject, was being systematically and effectively destroyed. *The historical fen through which ethical wanderings led was abolished in the early years of this century (not for the first time, but very clearly this time); normative thought crawled out of the swamp and died in the desert.* There arose a great number of schools of ethics — axiological, materialistic, evolutionary, intuitionist, situational, existentialist, and so on — but they all suffered the same fate: either they were seen to be ultimately premised on some intuition (buttressed or not by nose counts of those seemingly having the same intuitions), or they were even more arbitrary than that, based solely on some "for the sake of argument" premises. I will put the current situation as sharply and nastily as possible: there is today no way of "proving" that napalming babies is bad except by asserting it (in a louder and louder voice), or by defining it as so, early in one's game, and then later slipping it through, in a whisper, as a conclusion.[73]

The authority cited for the underlined portion of this passage is Wittgenstein's *Tractatus*. Much of Leff's work involved examining the theories offered by others on both the left and right and exposing the values inevitably smuggled in by those theorists, and on this basis challenging the legitimacy of the theory.[74] Leff believed in certain values but he did not believe his values could be in any way justified. In one of his most famous passages he wrote:

> As things now stand, everything is up for grabs.
> Nevertheless:
> Napalming babies is bad.
> Starving the poor is wicked.
> Buying and selling each other is depraved.
> Those who stood up to and died resisting
> Hitler, Stalin, Amin, and Pol Pot — and General
> Custer too — have earned salvation.
> Those who acquiesced deserve to be damned.
> There is in the world such a thing as evil.
> [As together now:] Sez who?
> God help us.[75]

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[73]A. Leff, "*Economic Analysis of Law*: Some Realism about Nominalism" (1974) 40 Virginia L. Rev. 451 (Review of R. Posner, *Economic Analysis of Law*).

[74]See A. Leff, "Memorandum" (1977) 29 Stan. L. Rev. 879 (Review of Unger, *Knowledge and Politics*); Leff, "Law and Technology: On Shoring up a Void" (1976) 8 Ottawa L. Rev. 530; Leff, "Unspeakable Ethics, Unnatural Law" (1979) 6 Duke L.J. 1229; Leff, *supra*, note 73.

[75]Leff, "Unspeakable Ethics, Unnatural Law", *supra*, note 74.

Arthur Leff had read the *Tractatus* and he never changed his mind. And if Leff is the most honest heir to the realists, current strong sceptical writing is directly linked to his legacy. In fact, Levinson dedicates his essay "Law as Literature"[76] to the memory of Leff and in his final footnote he recites the passage just set out. And Mark Tushnet finishes a pessimistic essay about legal scholarship with the following observation:

> That ... leads to the final possible responses to the argument I have made. Legal scholars can devote themselves to replaying the Realist line each time someone comes up with some clever but, the chances are, unfounded way around Realism's critique of the rule of law. The work of Professor Leff is my example.[77]

While it would be terribly unfair to label all or most C.L.S. Scholarship as strongly sceptical there is clearly in some strands of that literature a direct and strong adoption of the radically sceptical thesis.[78] Such scepticism is of course not necessarily limited to those identified with the critical legal studies movement.[79] In labour law we have a classic example of strict ethical scepticism in our current debates about the idea of the duty to bargain in

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[76]*Supra*, note 4.

[77]Tushnet, *supra*, note 35 at 1223. See also M. Brest, "The Fundamental Rights Controversy: The Ethical Contradictions of Normative Constitutional Scholarship" (1981) 90 Yale L.J. 1067, who begins his essay with the quote in the text accompanying note 75. And see Singer, *supra*, note 4 at 39:

> The point is that morality is not a matter of truth or logical demonstration, it is a matter of conviction based on experience, emotion and conversation.... Since legal reasoning uses and systematizes all of the conflicting arguments that people find plausible, there is no reason to expect it to provide a basis for decision making that transcends these ordinary conflicts.

[78]See Stick, *supra*, note 47 for a balanced and careful approach to different lines of C.L.S. Scholarship measured against the standard of nihilism. And see J. Radin, "Risk of Error Rules and Non-Ideal Justification" in J.R. Pennock & J.W. Chapman, eds, *Justification* (New York: New York University Press, 1986) (Nomos XXVIII) 33 at 47-48 [hereinafter Nomos XXVIII].

> Some members of the "critical legal studies" movement ... have enthusiastically debunked the notion of neutral principles separate from politics or ethics. They seem to think this automatically knocks out the rule of law. But it does not, unless the rule of law is defined as synonymous with such neutral principles, or unless ethics is itself necessarily arbitrary, subjective, just a matter of preference, etc. So far this assumption has seemed implicit in much "C.L.S. writing", yet this isolationist view of ethics is contrary to the communitarian spirit of their enterprise. A renewed interest in varieties of objectivity, or in dissolving this subjective/objective dichotomy, seems to be on the horizon....

[79]See O. Fiss, "The Death of the Law?" (1986) 72 Cornell L. Rev. 1 for an equation of law and economics and C.L.S. scholarship on this point. See also R. Posner "Conventionalism: The Key to Law As An Autonomous Discipline!" 1987 Wright Lecture, University of Toronto Law School, (forthcoming in University of Toronto Law Journal) (bracketing C.L.S. and law and economics in this way is now a "cliché").

good faith in the negotiation of a collective agreement.[80] Indeed it was Alan Hyde, a C.L.S. labour lawyer, who offered the less sceptical response in this case.[81]

There is an obvious synergy and link between the subjectivity and indeterminacy thesis. Indeterminacy leads to choice and choice is a problem because of inherent subjectivity. In fact, as we shall see, all four of these theses interact together and can be utilized to arrive at extremely sceptical conclusions.

### C. *Contradiction*

It is difficult to separate completely the notions of indeterminacy, subjectivity, and contradiction. However the idea of "contradiction" is central to some of the most powerful of the new critical work which aims at revealing the antinomies or contradictions in the thought or value system espoused by liberal legal theory.[82] Although now "repudiated"[83] the critical thesis is a "strong one".[84] As Michelman puts it:

> It speaks of "contradiction" not just "tension" or "ambivalence", meaning thus to insist that the resultant element of arbitrariness in law is pervasive and inescapable — not manageable, for example, by fracturing social life into subrealms with individualistic rules and principles for one and socialistic rules for another.[85]

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[80]See M.G. Freed, D.D. Polsby & M.L. Spitzer, "Unions, Fairness and the Conundrums of Collective Choice" (1983) 56 S. Cal. L. Rev. 461.

[81]A. Hyde, "Can Judges Identify Fair Bargaining Procedures?: A Reply to Freed, Polsby & Spitzer, "Unions, Fairness and the Conundrums of Collective Choice" (1984) 57 S. Cal. L. Rev. 415.

[82]The foundational writing here is contained in R. Unger, *Knowledge and Politics* (New York: Free Press, 1975). The most oft quoted statement of the contradiction thesis is that of the "fundamental contradiction" of D. Kennedy in "The Structure of Blackstone's Commentaries" (1979) 28 Buffalo L. Rev. 205 at 211-13. See also R. Unger, "The Critical Legal Studies Movement" (1983) 96 Harv. L. Rev. 563.

[83]See P. Gabel and D. Kennedy, "Roll Over Beethoven" (1984) 36 Stan. L. Rev. 1.

[84]F. Michelman, "Justifications and Justifiability of Law in a Contradictory World" in Nomos XXVIII, *supra*, note 78, 71 at 78.

[85]*Ibid.* at 78. And as Robert Gordon states:

> [C.L.S.] . . . carries the claim of law's indeterminate relation to life a significant step further [than the legal realists carried it]: the same body of law, in the same context, can always lead to contrary results. This is because law is indeterminate at its core, in its inception, not just in its applications: because its rules derive from structures of thought (collective constructs of many minds) that are fundamentally contradictory . . . Since the fundamental contradiction has never been (perhaps can never be?) overcome, legal structures represent unsuccessful and thus inherently unstable mediations of the contradiction: over time, therefore, they will tend to become unglued and therefore to collapse. R. Gordon, "Critical Legal Histories" (1984) 36 Stan. L. Rev. 57 at 62, as cited in Michelman, *supra*, note 84 at 84.

The literature of contradiction is a complex one, and many contradictions are found in many areas of our law.[86] But the engine driving the contradiction thesis is a belief in the inability of law to recognize the actuality of contradictory values and still sustain its legitimacy as law. Indeterminacy and contradiction merge and are energized by the subjectivity thesis.[87] Strong versions of the contradiction, indeterminacy, and subjectivity theses are particularly debilitating. For example, Singer writes:

> It is easy to create completely determinate legal rules and arguments. For example, an absolutely determinate private law system could be based on the rule that no one is liable to anyone else for anything and that everyone is free to do whatever she wants without government interference.... The plaintiff would always lose. The problem is that this or any other determinate system bears no relation to anything anyone would consider to be just or legitimate. The reasons is obvious. We cannot accept such a system because it would not protect other important, competing values — security, privacy, reputation, freedom of movement. We invent more complicated rule systems to accommodate our contradictory values. Thus, in our current way of thinking about law, we have to draw lines between principles and counter-principles, to determine the scope of existing rules, and decide whether to change the rules.[88]
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> ...
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> The net of theories that have been proposed to resolve the contradictions are hopelessly vague, ambiguous, or themselves entirely contradictory. Nothing tells us conclusively, when to accept or when to reject a particular argument.[89]

### *D. Mystification*

As the ideas of contradiction, indeterminacy, and arbitrariness of value judgment merge in their strongest forms in the strongest arguments within the new critical literature the idea of an alternate mode of explanation of how legal discourse actually functions becomes necessary. I am interested here only in the broadest contours of this type of alternative explanation. The central point is that there is a link between this thesis and the previous three arguments.[90] One aspect of this thesis should be cleared out of the way immediately. It is apparent that deconstructing legal doctrine, laying

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[86]See for example, Ronald Dworkin's discussion of the views of Alan Hutchinson in *Law's Empire*, *supra*, note 5 at 442 regarding contradictions in tort theory; and Unger, "The Critical Legal Studies Movement", *supra*, note 82, revealing contradictions in several areas of law including contract and "equal protection" law.

[87]See, for example, Hutchinson & P. Monahan, "The "Rights' Stuff: Roberto Unger and Beyond" (1984) 62 Tex. L. Rev. 1477 at 1483; Brest, *supra*, note 77 at 1105-1109; and Singer, *supra*, note 4 at 6, 11, 15, 16.

[88]Singer, *supra*, note 4 at 11.

[89]*Ibid.* at 16.

[90]For a useful and detailed review of these points see L.B. Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma" (1987) 54 U. Chicago L. Rev. 462.

bare the assumptions and ideas that lay behind legal rules, is an entirely familiar and useful enterprise. This resembles no more radical an exercise than simply trying to understand what in fact we are doing.[91] Although, to some people, that appears to be a radical step in itself, I wish to dissociate myself from that point of view. Rather, the point I am interested in is the idea of "legal consciousness" or "mystification" as a mode of argument and explanation of legal phenomena. Roughly put, the point I am after is this: it seems that the stronger one's identification with contradiction, subjectivity, and indeterminacy, the more one will be driven to an irrationalist mode of understanding legal discourse and argument about legal discourse. That is, strong acceptance of indeterminacy, contradiction, and arbitrariness (subjectivity) leaves one with no other ground to stand upon to offer an alternative mode of explanation. Argument, discourse, and rational disagreement must drop out as a method for understanding or dealing with law and legal issues. And in fact this is what has happened in the critical literature. Psychology, or at least social psychology, replaces philosophy.

There are certain direct ways in which this can be established and tied directly to our previous discussion. For example, the Wittgensteinian development of the indeterminacy thesis by strong sceptics points directly in this direction. The text and the rule are meaningless. What counts are the (arbitrary) social conventions of those encountering the text or invoking the rule. No guidance exists in the world, in the rule or the text. Rather, it is in the consciousness of the (interpretative?) community where the truth (fiction) resides. This is evident in Tushnet's treatment of the Wittgenstcinian problem of "rule following". Tushnet reads Wittgenstein as a sceptic. Rules do not guide. Rules are always open to several interpretations. Which one we choose hangs upon the "disposition" of our community. It is entirely "arbitrary" how we choose to interpret the rule.[92]

Much critical theory is dedicated to developing the ideas of "legitimation" and "reification" as explanatory devices for the operations of law. I do not mean to address these problems here. My point is a simple one that strong sceptical arguments drive one away from argumentative or direct modes of explanation to psychological indirect modes of explanation. There is obviously a spectrum here, and I wish to focus upon one extreme end of it, that occupied by strong sceptics.

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[91]Fuller and Purdue remark that Nietzsche said that the most common form of stupidity lies in forgetting what one is trying to do. L. Fuller & W. Purdue, "The Reliance Interest in Contract Damages" (1936) 46 Yale L.J. 52 at 52.

[92]See also on this point S. Brainerd, "The Groundless Assault: A Wittgensteinian Look at Language, Structuralism and Legal Theory" (1985) 34 American U. L. Rev. 1231.

An accessible and lucid development of the mystification argument is contained in Bob Gordon's "New Developments in Legal Theory".[93] Gordon develops the ideas of law as a "cluster of belief" or "complex cultural code" or "system of meaning". But Gordon believes there still are "promising tactics" available through the use of "ordinary rational tools of intellectual inquiry"[94] in dealing with this view of law. In his view, historical and empirical research revealing the contingency of our belief systems is of assistance. But for the strongest critics, however, such appeals to "ordinary rational tools of intellectual inquiry" are illegitimate. The argument of consciousness becomes an end in itself, the ultimate stop in intellectual inquiry. The result is that strong critics ride a paradox. Their strong theoretical scepticism runs the risk of undermining the position from which they launch their sceptical attacks. At the very least strong critics are resigned to the purely negative aspect of theorizing. This negative aspect must take the form of mere description, rather than prescription. Although in some cases it is difficult, given the theoretical suppositions of the critic, to take seriously the legitimacy of the description. This is not an end in itself — the pointing out of self-contradiction, or self-inflicted wounds. That would amount to mere game playing. A more positive agenda would be to demonstrate the inconsistency with a view to establishing the illegitimacy of the strong scepticism which is its source. That is, what is really required is a re-examination of the arguments which the strong critics believe sustain the strong critical position. Only then will their own work be able to transcend paradox.

### *E. Summary*

What does adoption of these strong sceptical arguments, or some mixture or combination of them, mean for constitutional discourse? In my view, these strong theoretical positions conspire to debilitate, trivialize, and misdirect our reflection upon the issues of constitutional interpretation and its legitimacy.[95] In what ways does this occur?

First, there is the obvious problem of theoretical self-destruction. This is not a difficult or novel insight, but the casualty rate among critics resulting from self-inflicted wounds continues to be high, even among those who are aware of the risk.[96] The simple point is that adopting either a total Leffian

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[93]In *The Politics of Law*, *supra*, note 3, 281.

[94]*Ibid.* at 289.

[95]See Stick, *supra*, note 47.

[96]*Ibid.*, and S. Fish, "Anti-Professionalism" (1986) 7 Cardozo L. Rev. 645. See also A.C. Hutchinson & P.J. Monahan, "Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought" (1984) 36 Stan. L. Rev. 199 at pp. 233-238 and 242. See also the discussion of Hutchinson and Monahan below and compare the differences in approach.

ethical scepticism, or the ethical stalemate of the fundamental contradiction, eviscerates both the criticism the critic advances, and his or her discussion of significant normative alternatives. Yet our critics insist upon both advancing strong critical arguments and at least hinting at superior (normatively superior) alternatives. Self-contradictions abound.

And adoption of strong indeterminacy of language arguments leads to a similar paradox. Our strong critics undermine language and our knowledge of the world completely.[97] These strong critics adopt a very healthy version of what Donald Davidson calls scheme/content dualism. Yet they have no trouble writing lengthy essays explaining all of this to us.[98]

The fundamental object of much of the strong criticism is that of revealing that both language and ethics are not *grounded* in anything, that is, any objective basis or foundation. Theirs is what might be called a "negative non-foundationalism". Here the strong critics somewhat ironically insist upon extraordinarily high standards of rationality and justification as necessary for the legitimacy of law. They are, if you like, "more firmly caught up in the grasp of Cartesian dualism"[99] than the "liberals" they attack. They then part company with the liberals by insisting that such necessary conditions for legitimacy do not hold. As Gerald Graff puts it, the difference between the strong critics and those they oppose is merely a "tactical or political difference".[100] That is, the formalists and the strong critics both believe in the same necessary conditions for law, but "whereas [the formalists] would presumably keep the cat in the bag, [the strong critic] would let it out."[101]

To pursue the specifically Wittgensteinian line of development, the strong critic reads Wittgenstein as saying that language is not grounded in anything. Any one of a number of arbitrary schemes could be imposed upon the content of the world, any one of a number of various "interpretations" of any rule, could be chosen, and is arbitrarily chosen, by community con-

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[97]See Peller, *supra*, note 4 and Gordon, *supra*, note 85.

[98]Donald Davidson, "On the Very Idea of a Conceptual Scheme" in D. Davidson, ed., *Inquiries into Truth and Interpretation* (New York: Oxford University Press, 1985) at 183. He writes:

> Whorf, wanting to demonstrate that Hopi incorporates a metaphysics so alien to ours that Hopi and English cannot, as he puts it, "be calibrated", uses English to convey the contents of sample Hopi sentences. Kuhn is brilliant at saying what things were like before the revolution using — what else? — our post-revolutionary idiom. Quine gives us a feel for the "pre-individuative phase in the evolution of our conceptual scheme", while Bergson tells us where we can go to get a view of a mountain undistorted by one or another provincial perspective.

[99]Stick, *supra*, note 47 at 394.

[100]Graff, *supra*, note 63 at 406.

[101]*Ibid.*

sensus or disposition. Here normativity becomes a matter of statistics. Its majority rule, a democracy of truth.[102]

When a theory accepts strong and negative non-foundationalism in ethics, epistemology, and language, the theory is driven to arational, psychological, modes of explanation — to the idea of "visions" and "complex cultural codes" and to forces that work behind the scenes which move these props around — reification, mystification, and other "subtle" ideas. Conceptual schemes, ways of looking at the world, are necessarily "arbitrary" and cannot be discussed or argued about, only mocked. There is no mediating between them — they can merely be exposed. Argument, discussion, the possibility of disagreement as a source of explanation, fall aside. Criticism takes the form of, not discussion, but the attribution or elaboration of the conceptual or ideological scheme the "other" side is using. The revealing of unarticulated assumptions and unexplored implications is a valuable part of legal scholarship, but only if connected to a critical argument or debate that goes beyond mere exchange of caricatures of world views and only if based in a set of theoretical assumptions which do not undermine critique itself.

## III. The Canadian Critics

In this part of the essay I wish to establish that these strong sceptical arguments are performing hard labour for a number of Canadian constitutional critics. I focus upon recent writings of Professors Petter, Monahan and Hutchinson. In addition to bringing our discussion to a concrete Canadian context, this focus provides explicit examples of the sorts of problems identified as the necessary consequences of strong internal supervision.

I should start by saying that I have no desire to forbid Professors Hutchinson, Monahan, and Petter their right to say "I told you so!" in connection with their views of the Charter. But I allow them this only in so far as saying "I told you so!" is taken as a warning that the Supreme Court of Canada decisions we actually see are substandard in many ways. It is true that the decisions are not wonderful and deserve criticism along many dimensions. But insofar as our Canadian critics are simply saying "I told you so!" with regard not to the outcome of the decisions, but to the validity of their views about law, I believe they are mistaken. To a large and yet unacknowledged[103] degree our Canadian critics accept the four theses just described and con-

[102]On this point see G.P. Baker & P.M.S. Hacker, *Scepticism, Rules, and Language* (New York: Blackwell, 1984) at 68.

[103]At least in the articles themselves. Professor Hutchinson has been tremendously and admirably prolific in defending his theoretical views elsewhere.

tained in the critical literature already cited. Yet these assumptions, critical to the success of their enterprise are rarely explicitly defended. The simple, largely wholesale acceptance of these theses leaves a hole in the heart of this criticism that is fatal to its success. The sorts of problems referred to above, including self-contradiction and self-inflicted wounds, are among the unfavoured intellectual practices which result.

Andrew Petter's "The Politics of the Charter"[104] is based upon and accepts without argument most of the strong sceptical theses deployed in the strand of American critical jurisprudence identified above. The clear conclusion that one draws from Petter's constitutional theorizing is that he is remarkably sanguine about the political process. There is expressed in his work a fervent belief in a simple majoritarianism as an adequate politics. Petter is driven to this point of view because of his acceptance of the critical theses. Specifically, he believes that our constitutional language is "indeterminate"[105] and empty. All of the major provisions in the Constitution, from equality rights to rights to freedom of expression, freedom of conscience, freedom of association, are "amorphous". They have no meaning at all until they are "infused with political content."[106] It seems to be Petter's view that the text of the Constitution is of little or no value. For example, it is of no significance that "protection of property" rights are omitted.[107]

But the adoption of the indeterminacy thesis is critical to Petter only because of his assertion of the "logical positivism" thesis. The belief on Petter's part that language, specifically constitutional language, is "indeterminate" and useless until it is "infused with political content" would not be particularly tragic if Petter did not also believe that all such "infusion" is in its nature "arbitrary" and based upon "personal economic and social beliefs."[108] In adopting this thesis wholesale Petter inflicts upon himself the basic wounds suffered by so many of the strong critics. Having denied the possibility of anything but an arbitrary and personal ethics or politics, he then proceeds directly to make strong ethical/political claims. Petter's main argument about the distributional nature of rights also embodies and reflects his quiet adoption of the basic ideas of indeterminacy and subjectivity.

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[104]Petter, *supra*, note 12 at 473.

[105]*Ibid.* at 486.

[106]*Ibid.* at 477.

[107]*Ibid.* at 489.

[108]*Ibid.* at 477 citing Dickson J., as he then was in *Harrison* v. *Carswell* [1976] 2 S.C.R. 200. In this pre-*Charter* case Dickson wrote at 218:

> The submission that this Court should weigh and determine the respective values to society of the right to property and the right to picket raises important and difficult political and socio-economic issues, the resolution of which must, by their very nature, be arbitrary and embody personal economic and social beliefs.

Conferral of rights is a "zero sum game".[109] Someone wins at someone else's expense. But this is so only because, as we have seen, he assumes that there is no metric or concept of what is to constitute a "win" and what is to constitute a "loss" — that is, who *ought* to win (the state or the accused, the property owner or the picketer). It is a zero sum game only because Petter is a sceptic about our ability, or the Constitution's ability, to make or at least assist in making those judgments.

Petter also briefly, but without development, associates himself with the "mystification" thesis. In his view it is ingrained in the judicial ethos that property rights are part of the "natural order of things".[110] This is not necessarily "conscious". Petter therefore is not only a sceptic about language and value but also a sceptic about judges. Petter's version of the "mystification" thesis is in part a familiar and useful story with a respectable pedigree.[111] Relying upon ideas articulated by J.A.G. Griffith in the *Politics of the Judiciary*[112] Petter draws attention to the background and inclination of the sort of people who adorn the bench in Canada.[113]

Implicit in Petter's writing is a faith in the idea of a simple majoritarianism as an adequate account of democracy. This idea is given patent expression in Patrick Monahan's "Judicial Review and Democracy: A Theory of Judicial Review".[114] Monahan brings to Canadian constitutional theory the central thesis of American scholar John Hart Ely's well known *Democracy and Distrust*[115] and he invites us to accept wholesale its controversial and discredited majoritarian thesis. Although Monahan seems to acknowledge, several times, the legitimacy and strength of well known devastating criticisms of Ely's work, a central problem with his essay is its failure to account for these defects.[116]

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[109]*Ibid.* at 474. Petter also in making his distributional claims asserts that rights are negative ones ("in a liberal democracy" (at 475)) against the government. Petter cites (at 455) *Hunter* v. *Southam*, [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641, 41 C.R. (3d) 97, as his authority for this view, in spite of the fact that that case explicitly involved a constitutional freedom *from* certain interferences. He also contradicts himself by noting Rod Macdonald's reiteration of the positive/negative rights distinction (at 493).

[110]*Ibid.* at 489.

[111]See e.g. Cohen, *supra*, note 14 at 895.

[112]J.A.G. Griffith, *The Politics of the Judiciary* (London: Fontana, 1978).

[113]Petter, *supra*, note 12 at 489, also notes, among other things, restrictions upon access to courts.

[114]*Supra*, note 12.

[115]J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980).

[116]For example at 89 Monahan refers to "intense and often effective" criticism and at 137 refers to "widespread", "effective", and "punishing" criticism. In both instances he refers to Dworkin "The Forum of Principle" in *A Matter of Principle, supra*, note 5 at 33 and L. Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories" (1980) 89 Yale L.J. 1063.

The Ely/Monahan thesis is that judicial review is anti-democratic. But this anti-democratic thesis is based upon a strong acceptance of the indeterminacy of text and subjectivity of value arguments. Monahan expresses the indeterminacy position in a moderate fashion at the beginning of his essay by stating that the Constitution empowers judges with a "wide discretion",[117] because the text is "open-ended and abstract",[118] "vague",[119] and "inexact".[120] But very quickly Monahan takes the gloves off in his articulation of the indeterminacy thesis by maintaining that the constitutional text and its constituent rights, particularly the rights to equality and liberty, resemble "blank slates on which the judiciary can scrawl the imagery of their choice."[121]

Section 1 of the Charter will require the Court to develop a "substantive theory of freedom and democracy".[122] But in the Ely/Monahan view there are no "right answers" to these sorts of substantive ethical/political issues, and thus no right answer to the question of whether a particular piece of legislation violates the Charter. Scepticism about judgments of these sorts are at the heart of the Ely/Monahan view.[123] The acceptance of this strong thesis drives the theorists to the conclusion that issues of substance are to be avoided. As Monahan puts it:

> [T]he judiciary *should not* undertake the task of testing the substantive outcomes of the political process against some theory of the right or the good. The resolution of the *Charter* issues is not to be found in the philosophies of John Rawls, Robert Nozick or Ronald Dworkin. Rather, the central focus of judicial review should be the integrity of the political process itself.[124] [emphasis added]

The judiciary should interpret the Constitution as a vehicle for inquiry into the legitimacy of the *process* by which legislation comes into being — not as a vehicle for reviewing the substantive decisions contained therein. And by legitimate process Ely/Monahan mean majoritarianism. The textual motivation for this in Ely's case flows from the famous footnote 4 of the *Carolene Products* case.[125] Monahan has no Canadian textual equivalent.

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[117]Monahan, *supra*, note 12 at 87.

[118]*Ibid.* at 87.

[119]*Ibid.* at 89.

[120]*Ibid.* at 87.

[121]*Ibid.* at 97.

[122]*Ibid.* at 89.

[123]If one has any doubts on this score one should refer to J.H. Ely, "On Discovering Fundamental Values" (1987) 92 Harv. L. Rev. 1, which appears as Chapter 3 of *Democracy and Distrust*, *supra*, note 115.

[124]Monahan, *supra*, note 12 at 89.

[125]*United States* v. *Carolene Products Co.*, 304 U.S. 144 at 152-53 (1938).

The Ely/Monahan thesis suffers many deep flaws. Monahan, as has been pointed out, acknowledges his awareness of many of the flaws exposed by Ronald Dworkin and Lawrence Tribe. Both Tribe and Dworkin have demonstrated the futility of trying to separate process from substance. Inquiries into the legitimacy of process and acceptance of the idea of the legitimacy of process always collapse into issues of substance. But Monahan believes these criticisms relate only to the "internal logic"[126] of Ely's theory and he believes the crucial reason for the failure of Ely's project in the United States lies not in the theory, but in the data, that is in the U.S. Constitution. In Monahan's view the U.S. Constitution is not amenable to an Ely-like interpretation. But, in Monahan's view, the Canadian Constitution is. Monahan then spends considerable time making out this case. He explicitly acknowledges that his case is a *normative one.* But this gambit is deeply problematic in the following way.

The Ely/Monahan thesis is a thesis about proper constitutional interpretation. It is a view of how judges "should"[127] interpret the Constitution. It is a normative argument. The constitutional text clearly underdetermines the theory of proper interpretation (It is a "blank slate", remember?). The issue is which is the best interpretation to choose. But the theory also insists that there are no right answers to substantive and *normative* issues and that therefore *judges* should not engage in such theorizing. Yet, and this is the key point, the theory is a *normative* argument, addressed to *judges.* The problem here is one of paradox.[128] One can only accept the Ely/Monahan theory by rejecting it. This is not a difficulty which disappears at the Canadian border. This paradox Monahan completely ignores. But he ignores it in a dramatic way. In the essay Monahan clearly comes clean in pointing to the overtly normative nature of his argument. I admire the bravado of this approach, but I am still deeply puzzled by the paradox.

There is much else that could be mentioned about the specifics of Monahan's argument, but the basic point is this: the theory is one which is sceptical about right answers to ethical questions and positively hostile to judicial determination of such issues, yet it argues a right answer to the central ethical issue of constitutional adjudication and urges judges to accept and enforce it.[129] A shorthand way of noting this problem is to point out that Monahan warns us[130] that constitutional theory should not expect to find resolution in the philosophy of either John Rawls, Robert Nozick, or

[126]Monahan, *supra,* note 12 at 91.

[127]See the quotation in text accompanying note 124.

[128]As Dworkin, *supra,* note 114 and others such as Fallon, *supra,* note 5 have pointed out.

[129]J. Nagel, "The Supreme Court and Political Philosophy" (1981) 56 N.Y.U. L. Rev. 519 at 520.

[130]See the quotation in text accompanying note 124.

Ronald Dworkin. But then Monahan immediately finds his constitutional theory in what can be styled a Robert Nozick type argument favouring process over substance. The whole point of the Ely "move" to process (securing legitimacy for judicial review in a democracy) is lost.

Thus the first major deficiency with the Ely thesis is that it makes an impossible distinction between process and substance. The second is the paradox that it relies upon the very substantive normative judgments it condemns. (This is, as we have already observed, simply the price to be paid for adoption of the strong sceptical thesis.) The third difficulty, to which I turn now, is that the substantive normative judgments upon which it relies are deeply unappealing. And, contrary to Monahan's assertions, they may be even less appealing in Canada than they are in America. These judgments are driven by the same fundamental aversion to issues of substance. And Monahan believes Canadian society is on his side, that it shares his scepticism.

This third point requires two observations. First, the value of Ely's contribution to the debate was to give articulate expression to one sceptical extreme. It asserts that there is only one value expressed in the Constitution and that it is the value of a well functioning majoritarianism. Yet it is clear that our constitutional values, as expressed in the Charter, can be reduced to this "process view" only with extreme distortion of much of our constitutional language, and in the end without any real account of what is of value in majoritarianism anyway. There is more in our Constitution than a simple commitment to pure majoritarianism. As eloquent a statement of this fact as I have found is that by the distinguished American philosopher Thomas Nagel who wrote, in response to Ely:

> I would express this not by saying that my interpretation of democracy differs from Professor Ely's, but rather by admitting that my committment to democracy is weaker than Professor Ely's — *for I think there is a fairly strong connection between democracy and majoritarianism, but that these values are not the whole of our political morality.* The moral equality of equal liberty is just as fundamental as the moral equality of equal representation.[131] [emphasis added]

It requires the grossest distortion to read the Charter as being subservient to a single over-arching[132] theory of majoritarianism, even read as equal access to the democratic process. But, and this is the second observation, Professor Monahan bolsters his view that the process/majoritarian approach

[131]Nagel, *supra*, note 129 at 521.

[132]It is what Fallon would refer to as "privileged factor" theory. See Fallon, *supra*, note 5 at 1209ff.

is correct by an appeal to the "distinctive quality of the Canadian political tradition."[133] Monahan believes that those who see in the Constitution values beyond the process of simple well-working majoritarianism espouse a "profoundly individualistic philosophy (of right as "trumps" against the community).[134] Monahan also believes that those who go beyond process embrace an "impoverished conception of communal politics."[135] In Monahan's view those who believe in more than majoritarianism believe that "all roads converge on the atomistic pre-political individual maximizing his or her self-interest."[136] Monahan believes that Canada does have a less individualistic political tradition and that therefore *we should be sceptical of any substantive values and should be more willing to embrace his simple majoritarianism.* But doesn't this all sound rather odd — even counter intuitive?[137]

I am prepared to accept, for the sake of argument, Monahan's view that Canada does have a less individualistic political tradition, but the conclusion he draws is at odds with the description itself. The difficulty we encounter here may be summed up as follows. Monahan alleges that *because* we have a richer, less individualistic, less atomistic political culture we should be even more wary (!) of taking our Constitution to express values which go beyond respecting the simple counting of individualistic atomistic preferences in a strictly majoritarian regime. At the very least there is some difficulty here. Part of it has to do with Monahan's tendency to characterize rights as purely negative, that is, against the community. Here Monahan shares with Petter and Hutchinson a particularly narrow idea of substantive rights. Why must rights be so characterized?[138]

Furthermore, why cannot a self-reflective community recognize that its deepest values must sometimes be protected by constitutional text. Why cannot constitutional rights be understood as expressing a political culture's deepest values which must to some extent transcend the immediate impulse of a self-interest maximizing majoritarian calculus? These are large questions but they point to difficulties in Monahan's thesis which are simply unanswered. There is in Monahan an assumed link between a communitarian society and majoritarian politics, to the exclusion of constitutional value. And the linchpin in this assumption is Monahan's scepticism.

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[133]Monahan, *supra*, note 12 at 129.

[134]*Ibid.* See also Petter on the character of rights as negative rights, above, text accompanying note 109.

[135]Monahan, *supra*, note 12 at 130.

[136]*Ibid.* at 152.

[137]I do not wish to explore in detail the sense of perplexity which arrives with Monahan's conclusion — I do not seek to finally resolve the debate which he here explores.

[138]See, on this point, Michelman, *supra*, note 84 at 91. And see what Monahan himself has written in Hutchinson & Monahan, *supra*, note 87 at 1490.

While these are the central theoretical objections to Monahan's thesis they to some extent seem irrelevant to the concrete applications Monahan reflects upon at the end of his essay. For example, Monahan argues that the Canadian constitution does not rest upon a rigid distinction between public and private realms so that a more egalitarian, redistributive, communitarian interpretation is available and desirable. Thus, campaign financing legislation which regulates and limits spending and thus secures some equality of liberty in the political process is to be sustained.[139] The notions of formal equality and negative freedom are to be rejected in favour of a notion of real or substantive equality and positive or actual freedom.[140] But the role of Monahan's process theory is deeply ambiguous. Both the formal and substantive approaches to campaign financing legislation can be said to be carried out in the name of a "pure process". All of the weight of Monahan's argument here is borne by the appeal to substantive notions of equality.

The central question with which we are left is whether there is *one and only one* over-arching theory based upon democracy and equality of access to the political system that informs our Constitution. The idea that there is one theory that drives the Constitution is a peculiar one.[141] And in any case it is an argument that Monahan cannot sustain without contradicting his basic theoretical assumptions.

Andrew Petter and Patrick Monahan both embrace, at least in part, the indeterminacy and subjectivity thesis. A recent contribution by Professors Hutchinson and Petter broadens and deepens the involvement of our Canadian constitutional interpretation literature with the four strong lines of critique. In their "Private Rights/Public Wrongs: The Liberal Lie of the Charter" many familiar themes are assembled in what may fairly be described, I think, as a tirade against both the Charter and the dark force of "liberalism". Professors Hutchinson and Petter do not mince words when it comes to the indeterminacy thesis. They tell us that the Charter is based on *nothingness* and that all is *void.*[142] Scary stuff. They believe there is in the Charter a "vision", a "particular vision of society and social justice."[143] But unlike liberals our authors are not afraid to look over the edge and report back that they have seen nothing which could serve as the foundation to this vision, and also report that it favours the well-off at the expense of

[139]Here Monahan does seem to get inspiration not from Nozick, but Rawls. See J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press, 1971) at 244ff (on the need for "fair value of political liberty").

[140]Monahan, *supra*, note 12 at 160-61.

[141]Fallon, *supra*, note 5.

[142]Hutchinson & Petter, *supra*, note 12 at 2.

[143]*Ibid.*

the disadvantaged.[144] This is because the vision is "only partial",[145] and while not determinative of any particular case (indeterminacy is still our fate) it "energizes" and "informs" and "pushes" towards "certain types" of conclusions. But this "ideological paradigm" is implicit. Like Simon and Garfunkel's vision it is creeping and it leaves its seeds while we are sleeping.[146] We are caught in its web without knowing it. Petter and Hutchinson believe that the Supreme Court of Canada's decision in *Dolphin Delivery*[147] is deeply revealing of all these truths, and especially of the "inherent contradiction of a liberal ideology in a positivist age."[148] They tell us, again, that Charter rights are to be understood as "negative" and aim at repelling the state.[149]

Here again the technique of constructing a straw person is utilized.[150] It becomes evident that what bothers our authors is not liberalism, but libertarianism.[151] Having erected a straw target the rest is easy. All manner of normative and descriptive abuse is hurled at it and it is defenseless to respond. Note, however, that even here it is not at all clear upon which platform our authors mount their intellectual artillery, given that all is "void" and "nothingness".

On the normative side the separation of state and individual, of public and private, is taken as a central dilemma for the liberal (read libertarian), especially the positivist liberal.[152] Hutchinson and Petter know and state that there is no natural distinction between public and private — the line is chosen. We choose the free market. The distinction is "illusory" and and liberalism "covertly ideological".[153] Liberalism is also a "formal fraud that perpetuates a substantive injustice."[154] Here the Economics 100[155] or first year Contracts class insight, that the market is simply one method of or-

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[144]*Ibid.* at 3.

[145]*Ibid.*

[146]Simon & Garfunkel, "The Sounds of Silence".

[147]*Retail, Wholesale and Department Store Union, Local 580* v. *Dolphin Delivery Ltd*, [1986] 2 S.C.R. 593, 33 D.L.R. (4th) 174.

[148]Hutchsinson & Petter, *supra*, note 12 at 8.

[149]*Ibid.* at 8-9.

[150]See note 162, *infra*.

[151]See T. Nagel, "Libertarianism without Foundations" (1975) 85 Yale L.J. 136 (review of Nozick, *Anarchy State and Utopia*); see also C. Sunstein, "Two Faces of Liberalism" (1986) 41 U. Miami L. Rev. 245.

[152]Hutchinson & Petter, *supra*, note 12 at 10.

[153]*Ibid.* at 13.

[154]*Ibid.*

[155]See for example the introduction of this idea in R. Heilbroner, *The Making of Economic Society*, 7th ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1985).

ganizing social relations that is chosen,[156] is treated as an intellectual trump card which proves the covert corruption of liberal thought. This is accomplished only by assuming that it must be true that because we choose to draw a line it must be illusory, or that it is non-existent because we deny we choose it. But both of these claims are remarkable only for their invalidity.

On the empirical side Hutchinson and Petter insist that the liberal (read libertarian) vision is out of sync with Canadian reality because we have The Welfare State. Of course the Charter and its liberal defenders are bound to be off the mark, if they are consigned to the sort of implied Nozickian libertarianism with which our authors saddled them. But that's a trifle unfair as a style of argument. Even those such as David Beatty who have broken out of the public/private distinction are condemned as incoherent because, on our authors' view of "liberalism", some theory of distributive justice is now involved and thus liberalism is lost. The failures in others which are apparent to our authors are in fact the reflections of their own distorted image of what others are saying. The straw person upon whom our authors heap abuse must insist that law is neutral and apolitical, that there is an *a priori* division between the public and the private realms, and that all considerations of substantive justice are off limits to the law.

Professors Hutchinson and Petter have a great faith in the power of doctrine, of visions, of analytic distinctions, to blind us to the politics of law. They accuse many people of self-deception in this regard. They ignore the possibility, and seem to regard it as unnecessary to explore the view, that others are not duped, or blinded, or labouring under a myth — but simply disagreeing, perhaps wrongly, with them. And they ignore the truth that operating upon certain assumptions is not "bad faith", even if the assumptions are wrong. This form of "argument" or "debate" is the consequence of our authors having painted themselves into an irrationalist corner.

In the view of Hutchinson and Petter we would apparently be better off without a Charter[157] although their argument would seem to be for a broader application of that document. But in their view we have the worst

[156]Although we must be careful here about how we use the word choice. Clearly a market or free contract regime only makes sense in societies of certain sorts. That is, the grammar of contract is not automatically available everywhere. Thus our notion of choice, is tempered by our understanding that we can only choose what we are capable of knowing. See Cavell, *supra*, note 1 at 308. ("[T]he law of contract itself would only develop in a society in which that form of life already existed.") F. Kessler & G. Gilmore, *Contracts: Cases and Materials*, 2d ed. (Boston: Little, Brown, 1970), Introduction. Here Hutchinson and Petter assume an Archimedean point.

[157]Hutchinson & Petter, *supra*, note 12 at 23.

of both worlds because the courts have been using the Charter to restrict public endeavors, while ignoring private injustices.[158] Interestingly enough, this is where our authors do good work — where they abandon their insistence upon indeterminacy, subjectivity, and mystification. That is, when our authors cease explaining our problems by reference to the mind-numbing false god of liberalism and engage in concrete critique of the results which have been generated by our courts they are in many cases convincing. Here the weird and untenable distinctions the courts have managed to draw at this stage of our constitutional history are pointed out. They write, powerfully:

> When the rights of property owners and speakers collide, speakers stand dumb before the claims of property. While the courts invalidate legislation that seeks to restrict the exaggerated impact of the wealthy on electoral campaigning, they uphold manufacturers' claims that their freedom of speech is infringed by legislation that restricts television advertising for children.[159]

The power in this sort of critique lies in standard arguments about consistency, even-handedness, and equal treatment. These are familiar ideas. The arguments here cohere with our understandings of legal discourse and practice. And our authors reveal the illogic of *Dolphin Delivery* with similar aplomb. Here Hutchinson and Petter abandon the rhetoric and engage in standard constitutional discourse. That is, here they play the language game.[160] Yet, on their own theoretical terms, it is difficult to know what status these arguments have. For them, at least when they speak theoretically, the Charter and all attempts at Charter discourse are to be regarded as islands of false consciousness in a sea of nothingness. The lesson is that they are better off jettisoning their basic theoretical assumptions which are their own unique mixture of very strong versions of the four critical arguments of indeterminacy, subjectivity, contradiction, and mystification. Their strong identification with extraordinarily strong versions of these theses undermines their critique and makes their plea for a more egalitarian conception of law and social justice theoretically empty.

The purpose of reviewing these contributions to Canadian constitutional scholarship is not simply to point out their internal theoretical problems. Rather, it is the idea that this self-contradiction must point to some inadequacy in the sceptical theoretical underpinnings the authors themselves invoke. And this in turn would explain why our authors are in the end unable to live out their theoretical claims and instead revert to what we see as meaningful criticism. It is to the task of exploring this idea which I turn now. What follows is the most preliminary outline of the *foundation*

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[158]*Ibid.* at 23.

[159]*Ibid.* at 25.

[160]See also their critique of the treatment of corporations under the *Charter*, *ibid.* at 27.

of a more adequate account of law — a sketch of the most basic underpinnings of what I call "Law's Grammar".

## IV. A New Starting Point

Strong internal scepticism fails (and its own practitioners abandon it at the crunch) because it holds the idea of law hostage to a set of demands which is not just practically impossible to obtain but conceptually incoherent.

Earlier I suggested that the strong critics' use of the later philosophy of Ludwig Wittgenstein was "deeply shallow".[161] This was my starting point. The basic idea is a simple one. Strong critics misunderstand Wittgenstein's view of language in a manner which is symptomatic of their overall enterprise. Those critics demand too much from language and law (as well as ethics).[162] There were, it will be recalled, two kinds of development of Wittgenstein's later thought, particularly as found in the *Philosophical Investigations*. First is the idea of the use of words in context, and the second, the idea of "rule following". Along both lines of development the strong critics read maximum scepticism into Wittgenstein's writings. But this is wrong. Wittgenstein was not a sceptic, rather, he viewed scepticism as a form of nonsense.[163] In Wittgenstein's view the role of philosophy was not to build up theories,[164] but to dispel confusions — to reveal nonsense created by the spell which language puts on us — to, as he put it, "show the fly the

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[161]See above, text accompanying note 11.

[162]"Many observers have noted that strong critics in assembling the target of "liberal" law for destruction engage in the exercise of constructing a "straw man" — see Stick, *supra*, note 47; Burton, *An Introduction to Law Legal Reasoning* (Boston: Little, Brown & Co., 1985) at 4, 19, 169, 181, 187-89; J. Finnis, "On the Critical Legal Studies Movement" (1985) 30 Am. J. Jurisprudence 21; Dworkin, *Law's Empire*, *supra*, note 5; MacCormick, *supra*, note 48. The accusation is that the critics construct a straw target requiring an overblown and nonsensical requirement of absolute certainty and predictability as necessary conditions for the validity of the project of legal regulation. The legal theorists under attack as "mainstream" or "liberal" all hold more sophisticated theories about legal reasoning, the requirements of legal certainty or determinacy, and the ideal of the rule of law than those ascribed to them. In this regard many critics impose an "unrealizable ideal" (Burton, at 4) and in fact resort to the demands of "legal formalism" (Burton, at 169, 181, 187) in adjudication. Scepticism is the result of an overly formalistic demand upon our system of adjudication and of a severe inability to shake the grips of logical positivism as a method of understanding any form of normative or ethical discourse. (Stick, *supra*, note 5). H.L.A. Hart said that "the rule-sceptic is sometimes a disappointed absolutist: he has found that rules are not all they would be in a formalist's heaven....": *The Concept of Law* (Oxford: Clarendon Press, 1961) at 135.

[163]Baker & Hacker, *supra*, note 50 at 5ff.

[164]See Cavell, *supra*, note 1 at 15: "Wittgenstein has no philosophy of language at all. He can be better read as attacking philosophy's wish to provide theories of language...."

way out of the fly bottle."[165] And scepticism is one such form of confusion; the sceptic one more fly in a bottle.

The *Philosophical Investigations* are *grammatical* investigations involving the "eliciting of what he [Wittgenstein] calls criteria"[166] for the proper utilization of concepts. The fundamental aim of philosophy is still the same: the aim of "putting in order our ideas as to what can be said about the world."[167] Wittgenstein aims at providing a "surview" of our language obtained by a "careful description of our own ordinary uses of language."[168] And "we obtain a proper surview when we grasp the grammar of language.[169] The concepts of criteria and grammar are central. But these are obtained or grasped only by a description of our language in ordinary use. Wittgenstein wrote, "a main source of our failure to understand is that we do not *command a clear view* of the use of our words."[170] Philosophical confusion involves the misuse of language and the violation of, or the failure to understand, the grammar of our concepts. Concepts are misused when they are used out of the context in which they reside and are used. The great subjects of philosophical debate and confusion are generated when philosophers and others utilize concepts without regard to the grammar governing their use, which is discernable by careful investigation of the use of these concepts.[171] As Wittgenstein puts it "philosophical problems arise when language goes on holiday."[172] That is, philosophical problems arise when philosophers use language out of context, when it is not at work, doing its normal job in our lives.[173] And Wittgenstein continues:

> What we do is bring words back from their metaphysical to their everyday use.[174]

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[165]*Philosophical Investigations, supra,* note 27, para. 309.

[166]*Ibid.,* para. 6.

[167]Hacker, *supra,* note 10 at 51.

[168]*Ibid.* at 151-52. And "we obtain a proper surview when we grasp the grammar of language."

[169]*Ibid.* at 152.

[170]*Philosophical Investigations, supra,* note 27, para. 122 [emphasis in the original].

[171]See Hacker, *supra,* note 10 at 168 for a list of types of grammatical errors which Wittgenstein points to in the course of the *Philosophical Investigations.* Huck Finn said "You can't pray a lie." This is a grammatical point. When someone says a word is on the "tip of their tongue" we don't ask them to open their mouths. Yet we make the same sort of mistake in language all the time, in Wittgenstein's view. (This example is taken from Hacker, *supra,* note 10 at 172).

[172]*Philosophical Investigations, supra,* note 27 para. 39.

[173]See Cavell, *supra,* note 1 at 226.

[174]*Philosophical Investigations, supra,* note 27 para. 116.

> The results of philosophy are the uncovering of one or another piece of plain nonsense and of bumps that the understanding has got by running its head up against the limits of language.[175]
>
> ...
>
> Philosophy may in no way interfere with the actual use of language; it can in the end only describe it. For it cannot give any foundation either. It leaves everything as it is....[176]

The strong sceptic misses the central message of the *Investigations*, a message which is not destructive of but important for law. More than anything it is the idea of language as an *activity* (not a mental process) which resonates throughout the *Philosophical Investigations*. Wittgenstein came to view language as an activity performed by human beings in the endless variety of interactions and functions in which they are engaged. It is this message which the strong critics misunderstand and misuse. In Wittgenstein's view understanding is akin to an ability or mastery of a technique. The criteria for understanding lie in behaviour — the ability to use an expression in accord with its explanation, the rules for its use; or, to put it more plainly, the ability to play the "language game" in which the expression has a home.[177]

So, when the strong critic such as Boyle, claims that Wittgensteinian philosophy is corrosive because of the indeterminacy it creates by "referring out" to "political" context, his assertion is simply off the mark.[178] As Gerald Graff puts it, in Wittgenstein's world, indeterminacy is not the result because our language has the "determinacy of an activity".[179] Nor is the lesson of the rule following critique scepticism, but rather, insight into the idea of practice as "bedrock".[180]

Recall the sort of example which Tushnet and Kripke utilized — the example of the continuation of the series 1, 3, 5, 7. Many possible rules or "interpretations" of what the rule might be are available. And even if we state the rule ("list the odd numbers"), that rule is open to multiple interpretations. Neither precedent nor intention can govern or dictate the outcome. Although all of this is true and as we shall see, unimportant, the strong sceptics still focus upon the following remark of Wittgenstein's.

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[175]*Ibid.* para. 119.

[176]*Ibid.* para. 124.

[177]Canfield, *supra*, note 70 at 27.

[178]See above, text accompanying note 41.

[179]Graff, *supra*, note 63 at 408.

[180]See Canfield, *supra*, note 70 at 27; see also Hacker, *supra*, note 10; Baker & Hacker, *supra*, note 50; P. Winch, *The Idea of a Social Science* (London: Routledge and Kegan Paul, 1958); P. Winch, *Ethics in Action*, (London: Routledge and Kegan Paul, 1972).

> 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.[181]

But this ignores what immediately follows in paragraph 201 of the *Investigations*:

> *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 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.[182] [emphasis is added in first line]

And earlier Wittgenstein said:

> "But how can a rule shew me what I have to do at *this* point? Whatever I do is, on some interpretation, in accordance with the rule." — This is not what we ought to say, but rather: any interpretation still hangs in the air along with what it interprets: and cannot give it any support. *Interpretations by themselves do not determine meaning.*
>
> Then can whatever I do be brought into accord with the rule? — Let me ask this: what has the expression of a rule — say a sign-post — got to do with my actions? What sort of connexion is there here? — Well, perhaps this one: I have been trained to react to this sign in a particular way, and now I do so react to it.
>
> But that is only to give a causal connexion; to tell how it has come about that we now go on by these sign-posts; not what this going-by-the-sign really consists in. On the contrary; I have further indicated that a person goes by a sign-post only in so far as there exists a regular use of sign-posts, a custom.
>
> Is this what we call "obeying a rule" something that would be possible for only *one* man to do, and to do only *once* in his life? — This is of course a note on the grammar of the expression to "obey a rule".
>
> It is not possible that there should have been only one occasion in which someone obeyed a rule. It is not possible that there should have been only one occasion on which a report was made, an order given or understood; and so on. — To obey a rule, to make a report, to give an order, to play a game of chess, are *customs* (uses, institutions).

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[181] *Philosophical Investigations, supra,* note 27 para. 201.
[182] *Ibid.*

> To understand a sentence means to understand a language. To understand a language means to be master of a technique.[183]

Kripke and Tushnet believe that Wittgenstein is sceptical of language and rules.[184] They believe that there are multiple interpretations of even the simplest of rules (the rule for addition, for the use of the word "red") and that the community "decides" or "achieves consensus" or "is disposed" or "determines" which "interpretation" is to be considered correct. And "correct" here simply means that which the community is disposed to do. But this is a misconstrual. Scepticism arises only if we insist that following a rule, using an expression correctly, is a mental process (choosing an interpretation) and not a form of activity. Wittgenstein is saying that obeying a rule is not a product of thinking, but of acting. This is a point about the "grammar" of rule following. In the end our knowledge of rules is simply knowing "now to go on", and our explanations "run out". But this is not a defect in rules or in us. Rules cannot apply themselves.

This is not a point about "community consensus", or "custom", as arbiters of what is correct or incorrect in the application of a concept. It is a grammatical point about the necessary background conditions for the existence or use of concepts at all.

Kripke focuses upon several famous lines in the *Investigations* in his attempt to ground his sceptical views. Wittgenstein says:

> How can he *know* how he is to continue a pattern by himself — whatever instruction you give him? — Well, how do I know? — If that means "have I reasons?" the answer is: My reasons will soon give out. And then I shall act, without reasons.[185]
>
> ...
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> How am I able to obey a rule? — if this is not a question about causes, then it is about the justification for my following the rule in the way I do. If

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[183]7 Wittgenstein, *Philosophical Investigations, supra,* note 27 paras. 198, 199. See also para. 454:

> Everything is already there in ... How does it come about that this arrow *points*? Doesn't it seem to carry in it something besides itself? — "No, not the dead line on paper; only the physical thing, the meaning, can do that." — That is both true and false. The arrow points only in the application that a living being makes of it.
>
> This pointing is not a hocus-pocus which can be performed only by the soul.

On this idea of the guidance a sign-post can give see C. Michelman, "Politics as Medicine: On Misdiagnosing Legal Scholarship" (1981) 90 Yale L.J. 1224 at 1226-27.

[184]Owen Fiss also accepts their sceptical starting point, wrongly: see O. Fiss, "Objectivity and Interpretation" (1982) 34 Stan. L. Rev. 735 at 762. On this point see D.M. Patterson, "Interpretation in Law: Towards a Reconstruction of the Current Debate" 29 Villanova L. Rev. 671.

[185]*Philosophical Investigations, supra,* note 27, para. 211.

> I have exhausted the justifications I have reached bedrock, and my spade is turned.[186]
>
> ...
>
> When I obey a rule, I do not choose. I obey the rule *blindly*.[187]

What is Wittgenstein saying here? He is seeking to get rid of confusion created by a certain model or a notion of rule following that is based upon a mistake. Rule following cannot be in the end a matter of "interpretation", it must be a matter of application. Wittgenstein concentrates upon how we actually instruct others, and how we ourselves learn the correct application of concepts such as (+2) or "red". There is nothing we can do beyond giving examples and insisting upon practice in order to communicate all we ourselves know about the use of these concepts. This is not some deficiency in our understanding. In the end, as Wittgenstein noted in paragraph 1 of the *Investigations* "explanations must come to an end somewhere."[188] Precedent, as Kripke correctly points out, always underdetermines current correct usage. And a mental rule explaining how to follow the rule will not do the trick, for it too is subject to doubt. The lesson is not that paradox is our fate, but that we are searching for a sort of explanation inappropriate to understanding how rules actually work. Kripke's sceptical solution to the sceptical problem was to argue that the community consensus selects which of the many contending interpretations is the correct one. It looks among the contenders and chooses a winner. Kripke's mistake is archetypical. He wishes to plug the gap between the rule and following the rule. But, as Pears points out "it is logically impossible that anything in the rule followers mind should act as a substitute for the unavoidable leap from language to the world."[189] And any argument which thinks paradox or scepticism flows from noting that nothing can be found to fill the gap is wrongheaded. "Paradox is always disguised nonsense."[190] The lesson ought to be that there is no gap to be filled.[191] This is a fundamental point in Wittgenstein's philosophy in the *Philosophical Investigations*. What makes language possible, language games possible, and what permits us to follow rules, is not simply agreement in defintions, but *agreement in judgments*. Wittgenstein writes:

> "So you are saying that human agreement decides what is true and what is false?" — It is what human beings say that is true and false; and agree in the *language* they use. That is not agreement in opinions but in forms of life.If language is to be a means of communications there must be agreement not

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[186]*Ibid.*, para. 117.

[187]*Ibid.*, para. 219.

[188]*Philosophical Investigations*, *supra*, note 27.

[189]Pears, *supra*, note 15 at xx. See also E. Lepore, ed., *Truth and Interpretation* (Oxford: Basil Blackwell, 1986).

[190]Baker & Hacker, *supra*, note 50 at 19.

[191]See Graff, *supra*, note 63 and text accompanying notes 213ff, *infra*.

> only in definitions but also (queer as this may sound) in judgments. This seems to abolish logic, but it does not do so. — It is one thing to describe methods of measurement, and another to obtain and state results of measurements. But what we call "measuring" is partly determined by a certain constancy in results of measurements.[192]

What is this idea of "agreement ... in judgments" and "agreement in ... form of life"? There is general consensus among Wittgensteinian scholars that paragraph 242 of the *Investigations* is of central importance. What makes language possible and what provides the stability which language has is our agreement in "judgments". Hacker unpacks this critical point as follows:

> Grammar cannot come into conflict with reality, anymore than can rules of a game.... Grammatical rules ... determine what makes sense not what is true ... But we apply our grammars, use our languages, against a context of normality conditions consisting of general regularities of nature. Like a legal system ... our concepts can be said to rest upon such normality conditions not in the sense of being made true or correct by them, but in the sense of having a point only in such contexts. Unless average human beings had the normal capacities for self-control, foresight, recollection, forming intentions and decisions, much of the criminal law concerning intention, recklessness, negligence etc. would be pointless. Similarly, in the absence of certain kinds of regularity of constancy of specific natural phenomena the applicability of concepts would be undermined and the point of kinds of concept-laden activities would be lost. Our concepts of weights and measures only have application and point in a world with relatively constant gravitational field and relatively stable rigid objects ....
>
> It is, of course, not only the constancy of the physical world which in this sense, conditions are formed of representations, but also the constance of our common human nature. Without shared discriminatory capacity we would not have a common vocabulary of perceptual quality expressions which we characteristically explain by reference to samples. Red/green colour-blindness excludes the possibility of mastering the use of expressions "red" and "green", since the colour-blind cannot employ the samples we employ in ostensive definitions that constitute standards for the correct applications of these colour names. If, as a matter of fact, there were radical disagreements in application of expressions defined by reference to samples, there would no longer be these language games ...."[193]

And Cavell, in explaining the importance of paragraphs 241 and 242 writes:

> In order for there to "be such things as rules, we have to agree in our judgment that a rule has been obeyed (or not). (*The rule itself is dead*). In order for there to be such things as (what we call) measurements, we have to agree in our judgment that a particular thing turns out to have such and such measurements. It is one thing to know that you measure length by successive layings down of a stick; it is something else to know that this object is just under 14 sticks long. (The stick itself is dead. It doesn't tell you where to begin laying it down;

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[192]*Philosophical Investigations, supra*, note 27 paras. 241 and 242.

[193]Hacker, *supra*, note 10 at 190-91.

> what counts is succession, and when, and what you do if, the last laying down goes just over). It would be empty to say that wincing is a criterion of being in pain if we never accepted any occurrence as wincing (it would be like being able to count i.e. run up the integers, without being able to count things.) And while you have a criterion for some things being a wince ... eventually, soon further criterion are added in.[194]

This is a truly remarkable and radically different view of language to that propounded in the *Tractatus*. It rests, as Pears points out, on an "extreme Anthropocentrism".[195] It is a form of "linguistic naturalism".[196] What is crucial for our purposes to see is that while Wittgenstein may here be in a sense promoting a form of conventionalism[197] it is not a form of conventionalism in the sense of it being arbitrary, or a matter of "consensus". The conventionalism which Wittgenstein points to here is prior to any form of conscious human agreement or consensus. The point is that agreement in judgments is a necessary precondition of language, the background "given" which makes language possible, but "agreement does not enter into our language"[198] and only in this sense are the rules of grammar "arbitrary".[199]

Scepticism of the sort which Kripke promotes, and Yablon and others celebrate, results from a refusal to take the Wittgensteinian explanation as an explanation. The skeptic is driven by a desire to go further. As Wittgenstein put it, in typical Wittgensteinian terms, "[i]n order to find the real artichoke we divest it of its leaves."[200] Far from providing a rich source of inspiration or a straighforward indeterminacy of language argument, Wittgenstein establishes language in our "agreement and judgments". This is just the way things are. There is as much stability as there is[201] and Wittgenstein's appeal to the community here is a vastly different appeal to the community than that commonly asserted by Kripke, Yablon, Fiss, and others who share the general framework of the skeptical or nihilist approach to language. There are not a multitude of contending interpretations or meanings of the expressions we use in language. These are not then somehow evaluated, voted upon, or in any way chosen by the community. There is no community "consensus". There is a community agreement, but this does

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[194]Cavell, *supra*, note 1 at 36.

[195]Pears, *supra*, note 15 at 179.

[196]*Ibid.* at 197.

[197]Fiss, "Conventionalism", *supra*, note 5; and see Hacker, *supra*, note 10 at 190-92.

[198]L. Wittgenstein, *Zettel*, ed. by G.E.M. Anscombe & G.H. von Wright, trans. G.E.M. Anscombe (Los Angeles: University of California Press, 1970), para. 430.

[199]*Philosophical Investigations*, *supra*, note 27, para. 7; Hacker, *supra*, note 10 at 192.

[200]*Philosophical Investigations*, *ibid.*, para. 164. See also Baker & Hacker, *supra*, note 50 who quotes at 10 from Dr. Johnson: "Truth, sir, is a cow, which will yield such people no more milk, and so they are gone to milk the bull."

[201]Pears, *supra*, note 15 at 179.

not "enter into"[202] our language. It is the framework condition with which language makes language possible. The result is that rules and language are possible and exist.

In the end, of course, the sort of justification one can give in explaining the use of an expression or the application of a rule must give out: "Explanations come to an end somewhere."[203] This is not a source of skepticism, but a point about the nature of justification, given our understanding of how language actually works, that it is an activity. In *On Certainty*, Wittgenstein wrote: "As if giving grounds did not come to an end sometime. But the end is not an ungrounded presupposition: it is an ungrounded way of acting."[204]

Baker and Hacker expand upon this point as follows:

> The supposition that the skeptic can rationally outstrip my justifications is false. What Wittgenstein says is "If I have exhausted the justifications I have reached bedrock". That quote "exhausting the justifications" does not mean: having no justification. It means: having run through them all. When I have spent my last penny paying off all my debts, it is true that I have no money left but it is also true that I have no more debts! If I am asked what an expression means, I can explain it. An explanation of meaning is a norm of correct use. If my explanation is not understood, I can clarify it, i.e. I can give a further explanation of my explanation (a rule for the application of the rule). Ultimately, perhaps, I would explain by giving a series of examples with an "and so on" rider. *This too is an expression of the rule.* Now my explanations will terminate at the point of showing that *this and this* ... is what I call "going on the same." If I am *now* asked "Why?", I can only say "This is simply what I do." I have no *further* justification but I have given a justification for what I do, so I cannot be accused of having made a stab in the dark.... Absence of grounds is a criticism if grounds are at least possible and if doubt about justification is reasonable. But neither of these conditions obtains here, where justification is terminated. Precisely because a rule and its extension [application] are internally related, because this nexus is grammatical, there can be no such thing as justifying it. For there is no such thing as justifying grammatical, conceptual connections by reference to reality.... What justifies calling rubies "red"? ... What makes it correct? Nothing. This is what we call "applying "red" correctly". There is not room for justification.
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> And as there is no room for justification, so too there is no room for genuine doubt.[205]

As Wittgenstein himself put it:

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[202]See above, text accompanying note 184.

[203]*Philosophical Investigations*, *supra*, note 27, para. 1.

[204]L. Wittgenstein, *On Certainty*, ed. by G.E.M. Anscombe & G.H. von Wright, trans. D. Paul & G.E.M. Anscombe (New York: Harper & Row, 1969)[hereinafter *On Certainty*].

[205]Baker & Hacker, *supra*, note 50 at 82-84.

> You must bear in mind that the language-game is so to speak, something unpredictable: it is not based on grounds. It is not reasonable or unreasonable. It is there, like our life.[206]

The simple indeterminacy argument, the argument from uncertainty because of use in context, and the skepticism based on Wittgenstein's remarks on rule-following are ill-founded. All three of the major steps contained in the general critical argument, and based upon these sources, are illegitimate ones. First, it is a misunderstanding of rules to insist that they somehow be "self-enforcing" or contain within themselves the projection of their own application. That this is a necessary condition of liberal theory is equally and for the same reason an untenable view. This view of rules misunderstands the idea of rule-following. It insists that rules be some sort of platonic mechanism located in a metaphysical realm unconnected to the real world. The critic is held captive by the sort of image of rule-following Wittgenstein sought to condemn. Far from being a source of inspiration on this count, Wittgenstein rejects this view as nonsense.

Second, the allegation that the rule of law fails to secure the ideal because of the possibility of multiple interpretations is wrong. In the end, the application of a rule does not turn upon an interpretation, but on a way of acting.

The third ingredient in the skeptics' basic argument is that we are rescued from a sea of uncertainty (multiple interpretations) by a community consensus as to which interpretation ought to be considered the correct one. This is a complete misunderstanding of the nature of language. Community consensus does not enter into our agreements and judgments, but rather is a framework condition for the possibility of language. To insist, as Kripke and Tushnet do, that the community consensus rescues us is to deny rules of all their normativity.[207] When a child is taught to use a word like "red" she is not taught "this is what most people call red", but rather simply, "this is red."[208] A majority of people can be wrong, and often have been. As Baker and Hacker point out, there is a world of difference between the normative notion of following a rule correctly and the statistical notion of acting the same way as most people are disposed to. There is a difference, that is, between empirical and normative statements.[209] The result then is that these most fundamental forms of skepticism are unsound.

The upshot of Wittgenstein's view of language is that all of our language has meaning only within the language games and "forms of life" in which

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[206]*On Certainty*, *supra*, note 204, para. 559.

[207]*Ibid.* at para. 46.

[208]Baker & Hacker, *supra*, note 50 at 72; D. Cornell, "Convention and Critique" (1986) 7 Cardozo L. Rev. 679.

[209]Baker & Hacker, *ibid.* at 71.

they are imbedded. One must understand the use, the context, the activity, the purpose, the game which is being played. One must have mastered the technique for an expression's use. To understand an expression is to understand its place in our lives. There are many important lessons here for law, but skepticism is not one of them.[210]

These are very basic lessons, lessons about utilizing the simplest of rules, and the simplest of concepts. What does all of this have to do with law and constitutional interpretation? The beginnings of an answer to this question are in the fact that this is the level at which the strong sceptics launch their attack. They assert that language is unstable and indeterminate at this basic level and in regard to these straightforward rules and simple concepts. Their critique claims that if there is instability here, well.... The benefits of attacking this assertion are not simply to refute the sceptics on their own ground. There is positive benefit in beginning at this simple level. The sceptic's view is not only shallow but "deeply shallow". What we see is that *even* the simplest and most concrete use of simple language, manipulation of straightforward concepts, and application of the most basic rules can only be understood within the framework of the language game or "form of life" in which the language, concept, or rule, is embedded. This is the lesson of the meditations upon rule following. And the critics are right in thinking that what we learn at this basic level is generalizable. The generalizable lesson from Wittgenstein's thoughts on rule following is that, as Peter Winch puts it, "human rationality is essentially social in character."[211] In the Wittgensteinian world language is public, not private, and in the world, not in the mind. In following rules, in using language we participate in forms of life and language games. This is the point which John Searle made against Jacques Derrida in a now well known essay "The Word Turned Upside Down":

> Now, in the 20th century, mostly under the influence of Wittgenstein and Heidegger, we have come to believe that this general search for ... foundations is misguided. There aren't, in the way classical metaphysicians supposed, any foundations for ethics or knowledge. For example we can't in the traditional sense found language and knowledge on "sense data" because our sense data are already infused with our linguistic and social practices. Derrida correctly sees that there aren't any such foundations, but he then makes the mistake that marks him as a classical metaphysician. The real mistake of the metaphysician was not the belief that there were metaphysical foundations, but rather the belief that somehow or other such foundations were necessary, the

[210]Some of the positive lessons regarding "interpretation" are explored tentatively in B. Langille, "Language, Scepticism and the Rule of Law" forthcoming in Canadian Institute for Advanced Legal Studies, ed., *The Cambridge Lectures 1987* (Montreal: Yvon Blais, 1988).

[211]See P. Winch, "Nature and Convention" in Winch, *Ethics and Action*, *supra*, note 180, 50 at 60 referring to Winch, *The Idea of A Social Science*, *supra*, note 180.

> belief that unless there are foundations something else is lost or threatened or undermined or put in question.
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> It is this belief that Derrida shares with the tradition he seeks to deconstruct. Derrida sees that the Husserlian project of a transcendental grounding for science, language, and commonsense is a failure. But what he fails to see is that this doesn't threaten science, language, or commonsense in the least. As Wittgenstein says, it leaves everything exactly as it is. The only "foundation", for example, that language has or needs is that people are biologically, psychologically, and socially constituted so that they succeed in using it to state truths, to give and obey orders, to express their feelings and attitudes, to thank, apologize, warn, congratulate, etc.[212]

To revert to Gerald Graff's wonderful metaphor about letting the cat out of the bag, the lesson which Searle points to is that while the formalist would keep the cat in the bag and the strong critic would let it out, the fact is there is no cat in the bag.[213]

What I have called "negative non-foundationalism" in the assessment of language and ethics is what Wittgenstein would call a grammatical mistake.[214]

And it is this Wittgensteinian idea regarding rule following and thus human rationality as being grounded in the bedrock of practice which we now have begun to see as central to an understanding of law. It is this idea which is at the core of the recent non-sceptical "turn to interpretation". It

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[212]J. Searle, "The Word Turned Upside Down" *New York Review of Books* (27 October 1983) (Review of J. Culler, *On Deconstruction: Theory and Criticism After Structuralism*).

[213]Graff, *supra*, note 63 at 406-07.

> Levinson actually makes the same mistake committed by those whom he is attacking. Like them, he believes that if meaning is not an inner essence in utterances, meaning is then indeterminate and disputes over meaning are susceptible to rational procedures of adjudication. The difference between Levinson and those he opposes is purely a tactical or political difference: whereas they would presumably keep the cat in the bag, Levinson would let it out. The mistake of both parties is in supposing that there is any radical consequence in letting the cat out, or indeed that there is any cat in the bag to begin with.

[214]But some refuse to take this point, believing that every question which sounds like a sensical question is a sensical question:

> The only true scepticism about knowledge is the radical one — as irrefutable as it is empty — that denies that controversies over particular truths could ever reveal anything about the world other than the stratagems of our self-deception or that they could even allow us to pursue our practical interest more successfully. It does no good to answer to radical sceptics by protesting that no form of knowledge familiar to us ever could possess the unconditional self-validation that he requires for knowledge. He will merely answer: that's just the point: Unger, "The Critical Legal Studies Movement", *supra*, note 82 at 564.

On this type of bullheadedness see generally Nagel, *supra*, note 64.

is the explication of the grammar of law, and more particularly the grammer of constitutional jurisprudence.

*Hart, Fiss, Dworkin*

It is this sort of Wittgensteinian hermeneutical project which has recently occupied Owen Fiss[215] and Ronald Dworkin.[216] Both attempt to secure law against the strong sceptical or "nihilist"[217] attack and both find solace and inspiration in a common pool of resources in literary theory and the philosophy of language which is Wittgensteinian in content.

Fiss attempts to defend law by establishing what might be called the "structural conditions" for a Wittgensteinian view of law —the existence of a set of constraining rules utilized by judges as a social group. Dworkin, on the other hand, has sought to describe and articulate the content or nature of the actual practice carried on within the structures described by Fiss.

But it was H.L.A. Hart in the *Concept of Law*[218] who first developed the notion of regarding law as a practice or set of social rules, taken seriously by judges, that is, in demonstrating the relevance of Wittgensteinian views about rule following to an understanding of law. The central theoretical advance in the *Concept of Law* was the bringing of Wittgensteinian hermeneutics to bear upon the classic problems of jurisprudence.[219] The cornerstone of Hart's attempt to elucidate the concept of law was the Wittgensteinian and Winchian idea of a "social rule". What characterizes a social rule is its internal aspect which distinguishes it from a mere regular pattern of behaviour or habit.[220] Law is one set of social rules. The key to a legal system, in Hart's view, lies in the existence of "secondary" rules. The most important of these is the "rule of recognition", which is a social rule imposing duties upon, and accepted from the internal point of view, by judges regarding the identification of the sources of legitimate law.

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[215]See Fiss, "Objectivity and Interpretation", *supra*, note 5; Fiss, *supra*, note 79; Fiss, "Conventionalism", *supra*, note 5.

[216]R. Dworkin, "Law as Interpretation" (1982) 60 Tex. L. Rev. 527; Dworkin, *A Matter of Principle, supra*, note 5, Part 2; Dworkin, *Law's Empire, supra*, note 5.

[217]Fiss, "Objectivity and Interpretation", *supra*, note 5.

[218]*Supra*, note 162.

[219]See P.M.S. Hacker, "Hart's Philosophy of Law" in P.M.S. Hacker & J. Raz, eds, *Law, Morality and Society: Essays in Honour of H.L.A. Hart* (Oxford: Clarendon Press, 1977) 1.

[220]*Ibid.* at 12: "Where rules, with their internal aspect exists, then there is room for two distinct points of view with respect then, an external and an internal point of view." For a full elaboration of the conditions which must be met for a social duty-imposing rule to exist see Hacker, *ibid.* at 17.

While Hart's project focused upon the elaboration of the rule of recognition and other secondary rules, Owen Fiss speaks more loosely of a set of "constraining" rules. Yet the key to both Hart and Fiss is the hermeneutic idea central to Wittgenstein's philosophy of rule following. Hart's development of the idea of social rules (as opposed to habits) is a direct continuation of the work of Peter Winch and Wittgenstein.[221] In *The Idea of A Social Science* Peter Winch distinguished rules from habits.[222] Winch states, correctly I think, that Wittgenstein's ideas about rule following, while developed in relation to the nature of language, also have deep relevance to "other forms of human interaction", and indeed any form of "meaningful behaviour".[223] Meaningful behaviour consists of a move in a game, that is following a rule; it is not merely "conditioned" response as behaviorists would have it. Hart's idea of judges utilizing social rules from the internal point of view is the bringing of Wittgenstein's fundamental point about rule following to the judicial rule. In continuing this tradition Fiss and Dworkin are surely correct.[224]

Others, however, reject the tradition wholesale. They deny that the internal, interpretive, Wittgensteinian hermeneutic approach is vital to our understanding of law. Strong internal sceptics overread and misunderstand Wittgenstein's hermeneutics. But external sceptics deny the relevance of rules at all. It is to these strong external sceptics that I now turn briefly.

## V. Strong External Scepticism

Strong external sceptics deny the internal rationality of legal discourse and hold that legal decision making can be understood and analyzed in terms of forces or ideas external to the actual concepts or reasons which those engaged in the practice allege that they utilize. Strong external sceptics say that self-understanding is irrelevant to a proper and "scientific" view of the law. Strong external sceptics are law's behaviorists. Behaviorism is a phenomenon of both the left and the right. Our most obvious example of legal behaviorism lies in the work of many law and economics scholars such as Judge Richard Posner. Arthur Alan Leff in his standard debunking mode draws attention to the law and economics movement as a form of behaviorism in the posthumously published "fragment" of his never completed legal dictionary:

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[221]See Hart, *supra*, note 218 at 242, 249.

[222]See Winch, *The Idea of a Social Science*, *supra*, note 180 at 48-51.

[223]*Ibid.* at 45.

[224]Although each, in my view, makes errors in carrying on within the tradition.

> Behaviorism:
>
> An approach to psychology which, either for methodological or ideological reasons, abandons any consideration of mental processes, and focuses upon the objective behavior of animals, including and especially people. In effect, the subjects are considered as *black boxes*; one sees what they do under various conditions, and seeks to generate the laws of their behavior without reference to any subjective happenings. It should be pointed out that behaviorism does not require a firm belief that there is no such thing as mental process ("dogmatic behaviorism"), but only that paying attention only to objective actions is scientifically fruitful, and perhaps necessitated by the "invisibility" of the subjective ("methodological behaviorism"). Many modern economists, including most practicing *economic analysis of law*, are implicit behaviorists in this last sense.[225]

Judge Posner has self-consciously addressed this issue in terms of what he calls the decline of the autonomy of law.[226]

The explanations offered by economic analysts of legal decisions lies in theories of behavior totally unconcerned with the reasons given by the participants in the process for what they do. Externalism or behaviorism of this sort is precisely the approach to social phenomenon and institutions, such as law, which Winch revealed as conceptually illegitimate in *The Idea of a Social Science*.[227] Causal explanations of the sort offered by the scientific behaviorists rob the world of normative explanation. Rule following behavior, meaningful behavior is not possible and the basic Wittgensteinian insight that it is only within the language game or form of life that meaning is possible is lost. Law's behaviorists make a common and recurring mistake and like all of those who take an external view to phenomenon, invite misunderstanding:

> Normative behavior, reviewed externally, in ignorance of the norms which *inform* it, may seem altogether unintelligible. The story is told of a Chinese mandarin passing through the foreign legations' compound in Peking. Seeing two European staff playing an energetic game of tennis, he stopped to watch. Bemused, he turned to a player and said, "If it is, for some obscure reason, necessary to hit this little ball back and forth thus, would it not be possible to get the servants to do it?"[228]

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[225]Leff, *supra*, note 72 at 2146.

[226]R. Posner, "The Decline of Law as an Autonomous Discipline 1962-1987" (1987) 100 Harv. L. Rev. 761; Posner, "Conventionalism: The Key to Law As an Autonomous Discipline!", *supra*, note 79. Posner thinks he can reject conventionalism, but he cannot. He believes that ideas from economics and elsewhere have "penetrated" law — but he does not and cannot — offer any account of how, or why that happens or even what it is for that to happen. He needs "conventionalism" to do that.

[227]*Supra*, note 180.

[228]Baker & Hacker, *Language, Sense and Nonsense*, *supra*, note 50 at 257. What we see here, is typically, a mistake being made in law which was made in other social disciplines twenty or thirty years ago. And now we struggle to get it right, again with the time lag of twenty or thirty years.

Like the mandarin the external legal sceptic, by refusing to account for the meaningfulness of legal behavior, misses the point, the purpose, the meaning of the activity involved. Instead external, irrelevant, and often perverse assumptions and purposes and meanings are imposed upon the activity. And this is done in the name of objectivity! Such an approach is like that of the drunk who loses a set of keys in the dark, but looks for them under the street light. When asked the point of looking there, and not where the keys were lost, the person explains "Because it's light here." The Wittgensteinian response is terribly straightforward — you must look where the keys are. And further, as Winch points out, if you attempt to get a picture of law you will find that it will not develop under the light of the external viewpoint. It is only within a practice, culture, and form of life that meaning is possible. To refuse to engage in normative explanation is to miss the crucial dimensions of human life that matter to law. This is not to deny that there are other ways of viewing human life beyond that of internally meaningful behaviour; it is only to deny that one cannot explain normativity, and thus law, from a totally external perspective.

Strong external scepticism is not, however, a phenomenon of the right exclusively. Recent papers by Judith Fudge and Harry Arthurs offer proof of that. Of the two, Harry Arthurs is the more ambiguous on this point. He begins by pointing out the dreary predictability of anti-labour judicial decision making, but then he says he has no explanation for the continuation of this phenomenon. Arthurs' most dramatic claim is set out as follows:

> Law cannot rule. Law does not make itself. Law does not interpret itself. Law does not enforce itself. It is people who do all of these things in the name of the law, and it is therefore people who rule, not law.[229]

But then (and this is where the ambiguity in the position becomes apparent) Harry Arthurs spends the rest of his essay explaining how the *Charter* (law) directly and indirectly does affect, if only slightly, the way things turn out. And it is bad for labour. The key point is Harry Arthurs' opposition of the rule of law and rule by people. This is, as Wittgenstein demonstrated, a false opposition. In Wittgensteinian terms, which sound much like Arthurs', "the rule is dead."[230] A rule only has such meaning and normative significance as our normative practices infuse it with. This is not fatal to normativity, rather, as we have seen, it is necessary to normativity. Arthurs points out that the law is not all there is in the world. This is a healthy tonic for lawyers. Insofar as law is a part of our world, it is not a flaw that it exists in the practices of people. It could not be otherwise. And it is only within

[229]Forthcoming in proceedings of conference on "Labour Law Under the *Charter*", Queen's University, September 1987.

[230]Cavel, *supra*, note 1 at 36.

those practices that the criticisms Arthurs makes of decisions past, present, and anticipated in the future, make sense. I think that this is why Arthurs too could not resist his catalogue of direct and indirect effects of the *Charter*, which on his own theory would be idle chatter.

Judith Fudge is not so ambivalent in her rejection of the internal perspective. She is clearer in arguing that (internalist) argument does not determine, and reasons given are irrelevant to, legal outcomes.[231] Reasons are relevant in her world only as a smokescreen, as an ongoing attempt to legitimate what is illegitimate, to separate law and politics.[232]

Fudge's starting point is that the *Charter* transfers "virtually untrammeled power"[233] to the judges, resulting in a "massive legalization of political discourse"[234] which is a "grave threat to our committment to a liberal political democracy."[235] No grammar or method of discourse is available to avoid controversial judgments. The only proper approach to *Charter* analysis is one which simply looks to *results*. Merely counting outcomes in terms of success or failure of *Charter* challenges and labelling a court as "activist" or "passive" misses the point in her view. Useful *Charter* analysis of results involves looking at results analyzed in terms not merely of success or failure of a challenge, but in terms of the "concrete interest" involved[236] — who wins (employers or unions) and on what sort of challenge? The search is for patterns of outcomes. As one reads her analysis of the cases it becomes clear that Fudge is serious about sticking to this externalist analysis. While pointing out that court decisions are predictable in light of the *status quo* she never pauses to consider or to ask whether the decision in question is justified, whether it is rightly or wrongly decided. The analysis is constantly cast in terms of what courts are "prepared" or "not prepared" to do — not whether they were correct, justified, or wrong in so doing.[237] Reasons, justifications, arguments, are all irrelevant. And Fudge's conclusion bears this out:

> The cumulative *effect* of the decisions is to reinforce the legitimacy of legal relations and categories essential to a liberal political economy.[238] [emphasis added]

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[231]J. Fudge, "Labour, the New Constitution, and Old Style Liberalism", forthcoming in proceedings of conference on "Labour Law Under the *Charter*", Queen's University, September 1987.

[232]*Ibid.* at 27.

[233]*Ibid.* at 5.

[234]*Ibid.* at 6.

[235]*Ibid.* at 13.

[236]*Ibid.* 26.

[237]See for example *ibid.* at 82-83 where there is a particularly heavy barrage of "prepareds" and "not prepareds".

[238]*Ibid.* at 83.

But is this surprising? And more importantly, is it "illegitimate"? Fudge notes:

> The decisions of the various courts, boards and arbitrators ... confirm that the Charter will not be used in ways which threaten the economic and political status quo.[239]

The key words here are "*will not*". These words have no critical edge. It is mere externalist observation. It is a note on the behaviorist's clipboard. The crucial and truly critical question is — should this be so? On her own approach Fudge has, literally, nothing to say on these issues. Her only critical comment comes at the end of the paper when she is forced to revert to a conspiratorial theory of the reasons for judicial action or inaction.[240] This, I think, is grossly inadequate as a basis for criticism, at least without a great deal being said or demonstrated.[241] I believe the problem with Fudge's analysis here is that she wants to have it both ways — to maintain an externalist perspective, and yet offer criticism which has bite within our legal discourse. But having adopted a vigorously externalist perspective she is left with a simple allegation of bias. Furthermore, it should be noted that an assertion of bias can be transformed from a neutral observation into a basis for reproach only by speaking to values that have meaning within our ideas about law.

The benefit of Fudge's analysis should not, however, be overlooked. It is her view that legal argument and discourse, the language game of the law, takes place within a larger form of life — our social, economic and political form of life. This is certainly true. And it is a Wittgensteinian truth. It is also a truth that is important for thinking about various ways of analyzing law. What Fudge points out, that legal discourse takes place within a large form of life, is in one sense an important truism. Not every concept is "available" in every form of life.

> Consider, for instance, the practice of child sacrifice in pre-Abrahamic Hebrew society. This is a practice which, in terms of our own way of living and the moral ideas which go along with it, is just unintelligible. To try to understand it is to try to understand something of what life and thought must have been like in that society. What I want to emphasize here is that the main problem about this is one of *understanding* what was involved; not just one of taking up an attitude, for without understanding we should not know what we were taking up an attitude *to*. And it would be no more open to anyone to propose that this practice should be adopted in our own society than it is open to

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[239]*Ibid.* at 85.

[240]*Ibid.* at 88.

[241]And Harry Arthurs' at least casual observations lead him to a contrary conclusion on this point. See Arthurs, *supra*, note 229 at 7.

> anyone to propose the rejection of the second law of thermodynamics in physics.[242]

And this *is* true for concepts like "contract" and "property" as well.[243] Externalist analysis of the conditions under which certain concepts are "made available" within a form of life is a viable enterprise. But while all of this is true, it seems implicit in Fudge's analysis (otherwise, what's the point?) that there is a perspective beyond our form of life from which it may be *critically* analyzed. Here she shares the mistake of the strong internal critics.

What Fudge really objects to is a "liberal political economy" and to the institutions of property and contract as she portrays them. Fudge does not offer *arguments* about these. She rests content with observations about the link between the forms of life within which these institutions have meaning, and the legal system which resides and is imbedded within that form of life. The critical force in her paper must come from (unarticulated) ideas about the legitimacy of those institutions. Such criticism in turn must be comprehensible — it must play a recongizable role — strike a chord, be understandable. And to do that it must be criticism which operates within a normative practice. Externalist observation, while interesting in its own dimension, cannot amount to criticism which involves invoking normative concepts. Normative concepts only have meaning within forms of life. Political theory does permeate law. The relationship between the legal language game and the form of life in which it is embedded ensures that. To *criticize* one must argue political theory, not point it out. This is what Fudge, as a constant and strong externalist, cannot do, although she comes to it eventually in the end with her argument about bias.

## VI. Conclusion

Fudge and other strong external critics thus reject the necessary theoretical ground for understanding and criticism. Hutchinson, Monahan and Petter are in the end only slightly different and can be seen as a variation upon this theme. Their strong internal critique also leaves them with no critical ground from which to undertake such criticism. They too can merely point. But in the end they too break down, and do offer critique.

When strong sceptics, both internal and external, abandon their self-imposed critical exile they offer proof of Simone Weil's observation that: "like all human activities, the Revolution draws all its vigour from a tradition."[244] The rebel is no exception to the fact that "ideas are intelligible

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[242]Winch, "Nature and Convention", *supra*, note 211 at 54-55.

[243]See above, text accompanying note 156.

[244]S. Weil, *The Need For Roots* (New York: Harper & Row, 1952) at 49.

only within a certain context and to understand them will require some understanding of the way of life and the traditions to which they belong."[245] For our purposes the philosopher John Searle put the point in a remarkably useful way:

> Proudhon said: "Property is theft". If one tries to take this as an internal remark it makes no sense. It was intended as an external remark attacking and rejecting the institution of private property. It gets its air of paradox and its force by using terms which are internal to the institution in order to attack the institution.
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> Standing on the deck of some institutions one can tinker with constitutive rules and even throw some other institutions overboard. But could one throw all institutions overboard ... ? One could not and still engage in those forms of behavior we consider characteristically human.[246]

Abandoning strong scepticism, either external or internal, lets us make sense of our agreements and disagreements. It makes criticism, and even rebellion, meaningful.

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[245]R.W. Beardsmore, *Moral Reasoning* (London: Routledge & Kegan Paul, 1969) at 55.
[246]J. Searle, *Speech Acts, supra*, note 68 at 186.