ABSTRACT

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In the jurisprudential literature, much attention has recently been given to the role of language within law, with various writers asserting that certain theories of meaning or theories of interpretation offer new insights into the nature of law. My survey of portions of this on-going debate will have two overlapping foci: the issue of legal determinacy and the application of Ludwig Wittgenstein's ideas to legal theory. In the context of a number of different discussions, I argue that a proper understanding of the nature of language and its role within law compels neither the conclusion that law is radically indeterminate nor the conclusion that law is completely determinate.

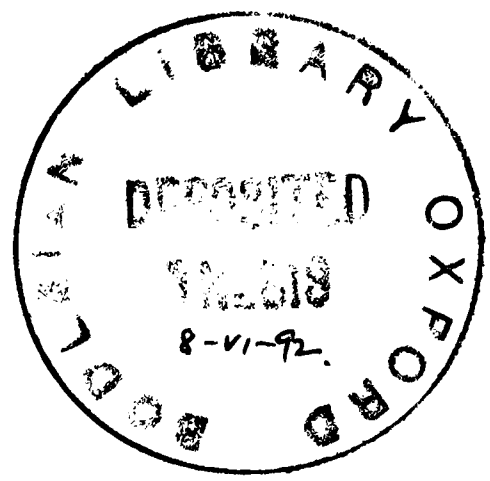
I disagree with the usual reading of H.L.A. Hart on "open texture", arguing instead that Hart's argument was as much about the proper way to apply legal rules as it was about the nature of language.

I offer a reading of Wittgenstein's rule-following considerations which differs from Saul Kripke's reading as well as from the reading some legal theorists have offered, and which I believe justifies only a modest view of the direct applicability of Wittgenstein to jurisprudence.

I argue that Ronald Dworkin's recent work leaves a number of unresolved questions regarding right-answer theories and that there are basic difficulties with his holistic-interpretative approach to law.

Finally, I discuss Wittgenstein's critique of platonism as part of an argument that Michael Moore's metaphysically realist approach to law offers no advantages compared to more conventional approaches.

WITTGENSTEIN AND LEGAL DETERMINACY



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PREFACE

There are many people I would like to thank for their help during the years in which I wrote this thesis. My greatest debt is to my supervisors, Joseph Raz and A.M. Honore, whose guidance was invaluable and whose tolerance and patience in the face of my mediocre early drafts was admirable. I also wish to thank Gordon Baker, John Finnis, Simon Blackburn, Ronald Dworkin, John Bell, John Gardner, David Helman, Alan Thomas, and Mark Addis for their helpful comments on earlier drafts of the thesis.

I should note that an earlier version of a part of Chapter 1 has been published as "H.L.A. Hart and the 'Open Texture' of Law", 10 Law and Philosophy 51 (1991), and an earlier version of Chapter 2 has been published as "The Application (and Mis-Application) of Wittgenstein's Rule-Following Considerations to Legal Theory", 3 Canadian Journal of Law and Jurisprudence 107 (1990).

INTRODUCTION

A.

Language is the medium through which law acts. The nature of the medium necessarily has a pervasive effect on what purposes can be achieved through the law and how well those purposes can be forwarded. Part of my present task is to reflect on the relationship between language and law, focusing on how the two interact within the question of legal determinacy. In looking at the question of legal determinacy, I use examples from three different approaches to legal theory: H.L.A. Hart's legal positivism, the interpretative approach of Ronald Dworkin, and the metaphysical realism of Michael Moore. Each of these approaches appears to have a different view of the role of language within law. Roughly and generally -- the details are to follow -- Hart saw language as creating a limit to legal formalism and the inevitability of judicial discretion; Dworkin believed that any problems created by language can be circumvented; and Moore viewed language, alternatively, as a path to finding the correct result and a temptation towards the wrong result that must be overcome.

I will use Hart's discussion of the "open texture" of rules as the starting point, and will consider various challenges to Hart's position on both theoretical extremes: on one side, from those who argue that legal rules or the law rarely or never determine the answer to legal questions, and, on the other side, from those who argue that the law always yields a determinate

answer to legal questions. This debate, though clearly on one continuum, has gone under two labels in the legal literature, depending usually on the position of the author being discussed: the "issue of determinacy"[1] and the "right answer thesis"[2]. The legal determinacy debate is a convenient focus for my discussions, because the role of language within law has been central to many of the various responses to the issue. I will generally consider those responses from three perspectives. First, I will analyze the theories on their own terms, assaying the consistency and cogency of the arguments offered. Second, I will consider "practical" criticisms external to the theories: for example, that a theory does not reflect the way law actually works (in a particular country).[3] Third, I will regularly offer criticisms and observations based on the writings of Ludwig Wittgenstein.

H.L.A. Hart on a number of occasions acknowledged the direct links between his approach to legal theory and the (quite different) theories of linguistic philosophy of Wittgenstein and J.L. Austin.[4] There is nothing novel about using the ideas of

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[1] See, e.g., Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma", 54 University of Chicago Law Review 462 (1987).

[2] See, e.g., Dworkin, "No Right Answer?", in Law, Morality, and Society (P.M.S. Hacker & J. Raz, eds. 1977).

[3] See, e.g., Cover, "Violence and the Word", 95 Yale Law Journal 1601, 1625 (1986).

[4] See H.L.A. Hart, The Concept of Law 234, 249; H.L.A. Hart, Essays in Jurisprudence and Philosophy 2-6 (1983). Hart also made an explicit connection between his discussion of "open texture" and Wittgenstein's discussion of "rule-following". Hart, "Theory and Definition in Jurisprudence", Proceedings of the Aristotelian Society, Supplementary Volume 29, 239, 258 n.10 (1955).

Wittgenstein to try to gain greater insight in legal theory, in or in applying those ideas to the problem of legal determinacy. At the same time, I would argue that the implications of Wittgenstein's work for legal theory have only begun to be explored, and that many of the uses of Wittgenstein in more recent jurisprudential work have depended on a false reading of him.

At present, the area of "Wittgenstein and Law" is growing in both quantity and quality[5]; it may well be that in another few years, this small field will be glutted. However, when I began work on this project, there had only been sporadic attempts to apply Wittgenstein's ideas to legal theory, and most of these were slap-dash comments made in passing by lawyers who had not invested much time in studying Wittgenstein's works. When one comes across citations (just to choose one randomly) like "See generally L. Wittgenstein, Philosophical Investigations (1958)"[6], one knows that the author is a lawyer only playing at doing philosophy rather than someone who takes philosophy seriously. The above source used the whole Philosophical Investigations as the supporting citation for the following sentence: "This is a profound error, because it assumes that the commentator comes to the question of judicial review from a fresh perspective, one outside, as it were, the process of legal argument."[7] The connection between the text and the citation is far from obvious.

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[5] A useful sampling of current work in the area can be found in 3 Canadian Journal of Law and Jurisprudence 3-192 (1990) (special issue on "Legal Theory and Wittgensteinian Thought").

[6] P. Bobbitt, Constitutional Fate 266 n.1 (1982).

[7] Id., 123 (footnote omitted).

How would someone begin who wanted to see if the citation supported the text? The Investigations is a difficult and wide-ranging text, covering a wide variety of themes and issues (for example, the Augustinian picture of language, "family resemblance", rule-following, the private language argument, and aspect-seeing); the reader needs more guidance than the instruction to "see, generally," the whole text. If one is going to try to apply Wittgenstein's ideas to legal theory, one must at some point explain what those ideas are, preferably with citations to particular passages, relevant quotations from the primary texts, references to major secondary sources, and some discussion on why those ideas are correct and useful.

I have heard some people describe the use of Wittgenstein in discussing jurisprudential issues as merely a matter of fashion. This attack derives from the way legal theorists in American law reviews seem to absorb theories from a wide variety of different disciplines and, collectively, to move from one to another like a spoiled child quickly tiring of new toys. There recently have been many esoteric ways of filling in the blank "____ and law": hermeneutics, deconstruction, Nietzsche, Habermas, structuralism, and semiotics, just to name a few. I am ambivalent about Wittgenstein being added to this list. On one hand, I think it is a good thing that people consider Wittgenstein worth reading, and from my own work one can see that I believe he has something to add to some of the on-going debates. On the other hand, many of the legal theorists trying to apply ideas or theorists from other disciplines do so in an impressionistic way that does not do justice to the project. As

I noted earlier, this was particularly true of many of the earliest attempts to use Wittgenstein's work.

Part of my purpose in this thesis is to act as a moderating force, to argue that Wittgenstein's ideas, when carefully considered, do have something to offer legal theorists, but not as much as some writers have claimed. At the least, I want to slow down the discussion, to give us time to consider carefully whether particular views can actually be attributed to Wittgenstein, and what consequences for our debates follow from the ideas that can be attributed to him.

My primary focus will be on the philosophy of the later Wittgenstein, and it is in that area that my research has been most extensive. However, the discussion will not be confined to Wittgenstein alone. The ideas of a number of other philosophers of language, including Hilary Putnam, Donald Davidson, Michael Dummett, and Saul Kripke, make regular appearances in the following pages, though not because I believe either that I have great expertise regarding all of these writers or that all of their writings can be effectively discussed in the limited space available to me. I felt the need to discuss these many different philosophers of language in part because the legal theorists whose work I am explicating refer to them, and the discussion would be of dubious value if those philosophers were not considered on their own terms. A second reason for considering a number of philosophers of language other than Wittgenstein is that even if past legal theorists have not referred to them, recourse to such ideas would be a natural response in many cases to my Wittgensteinian approach to language and law. It would not

be a fair treatment of the issues if I described a Wittgensteinian approach while ignoring the likely responses or alternative approaches.

B.

John Finnis has warned that an undue emphasis on legal interpretation tends to distort one's description or conception of law.[8] Finnis' point is that if one is to follow H.L.A. Hart, Joseph Raz, and many other modern theorists in positing the guidance of future conduct as a principal point or function of law, then the interpretation of texts (constitutions, statutes, contracts) must be considered relatively unimportant compared to the initial creation of those texts and the deliberation which precedes that creation.[9] In Finnis' words, "Interpretation resists being taken for the whole of practical reasoning."[10] The initial legislative choices, which create reasons for action for both judges and for other citizens, do not comfortably fit within the category of "interpretation" or "interpretation of a practice".[11] Where the objective is to focus on judicial

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[8] Finnis, "On Reason and Authority in Law's Empire" (Book Review), 6 Law and Philosophy 357, 361-363 (1987).

[9] This is not to imply a naive distinction (between, say, a statute as pure object and a statute as an interpreted object) that neither I nor Finnis intend. Finnis referred to "part of [law's] reality [being] symbols or formulations ... brought into being by legislation (including judicial fiat) and thereafter imbued with a reality independent of the intentions and choices of their makers(s) -- a reality which thus creates a problem for interpretation distinct from the problem of interpreting those intentions and choices as acts." Id., 361.

[10] Id., 363.

[11] Ibid.

interpretation, there is a danger of focusing too closely on the theoretical aspects of that topic. It is too easy for theorists to project their activity onto the subject of their work: for example, to see legal interpretation as being abstract and philosophical, analogous to or constituted in part by theories of legal interpretation. Legal interpretation cannot be fully understood unless its context of institutional processes, politics, and coercion is also considered. It is not being melodramatic to conclude, with Robert Cover, that "[l]egal interpretation takes place in a field of pain and death."[12] By its place and function, legal interpretation is inextricably linked to the signalling of or the justification for deprivations of a person's goods or the imposition of violence or forcible constraints upon a person.[13]

As interpretation, the issue of legal interpretation involves inquiries into the nature of language. However, as legal interpretation, these inquiries occur against a background of political debates and practical problems. For example, issues of judicial practice often turn on how much power we wish to delegate to the judiciary, to what extent the judiciary should cooperate with the legislature, and how clearly the legislature must speak in order for citizens to be bound by the enactments.

"Language questions" and "political questions" seem to occur at different levels of discourse, separable within a discussion of legal interpretation. Under this view, one would first ask

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[12] Cover, "Violence and the Word", 1601 (footnote omitted).

[13] Ibid.

what range of interpretations of a text are allowed given the nature of language, and then one would delimit that range in the name of judicial restraint, due notice, parliamentary sovereignty, and so on. This distinction does not in fact hold up on closer inspection. Even a superficial look at the relevant literature is enough to show that the two levels of discourse cannot be kept apart. The debate in the legal literature often occurs simultaneously on more than one level: to the conservative claim that judges have been acquiring too much power, some writers reply that given the nature of language and legislation judges can (should) do no less than they have done[14]; and to the claim that judges should respect the rights of parties in hard cases, other theorists answer that given the nature of language and practical reasoning, in those cases neither party can be said to have a legal right to succeed.

Legal interpretation is (1) an interpretation (2) in the aid of practical reasoning (3) which is both influenced by and influences the distribution of power among branches of government and between the government and the citizenry. My emphasis in this thesis will be primarily on the first aspect with considerable attention given also to the second, but relative

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[14] See, e.g., R. Posner, Law and Literature 210 (1988) (if legal deconstructionists are correct, "'judicial activists' no longer need apologize for reading things into the Constitution that do not seem to be there; that is simply the nature of what we naively call 'interpretation'").

inattention to the third. I leave the latter to political philosophy.[15]

C.

Legal philosophy, like many forms of philosophy, is a hybrid of conceptual analysis and empirical description. Many of the misunderstandings in the field -- both among theorists and between theorists and their readers -- can be ascribed to a failure to distinguish the two aspects. For example, a discussion of whether moral principles are part of the law may focus on the way judges actually act within a legal system or the way people actually use the term "law", or it may focus on a conceptual analysis of that term. Admittedly, the two types of analysis are normally linked. The conceptual analysis is usually meant to reflect, or at least be constrained by, the empirical observations, and the empirical observations usually support, explicitly or implicitly, some conceptual point. Nonetheless, the two types of investigation should not be confused. I see my work as primarily, though not exclusively, conceptual. Most of my conclusions are meant to turn on the nature of language (and on the interpretation of particular philosophical theories)

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[15] This statement requires some clarification. The distribution of power within government would be relevant to my discussion in at least one way. A judge will have a particular conception of what role the judiciary does play and should play within the legal system and within society. That conception cannot but affect the way he or she proceeds: for example, in how much deference the judge gives the legislature when interpreting a statute. What I am disclaiming in this paper is the taking of any position on what role the judiciary <u>should</u> play (<u>e.g.</u>) in the American or British legal system.

rather than on how legal officials generally act or on how legal terms are generally used.[16]

The extent to which problems of legal interpretation may not actually turn on the nature of language was summed up by A.W.B. Simpson's comment: "difficulties in interpretation ... seem to be difficulties about words [but] are really difficulties about the applicability of rules to facts."[17] The statement hints that while judges and legal commentators claim to be trying to discover (and be bound by) what the words of a statute or a constitutional clause actually mean, something else entirely might be going on. In one type of situation, for which H.L.A. Hart's "no vehicles in the park"[18] is an example, there may be no answer forthcoming from language. Neither the usage nor the authoritative definitions of the term "vehicle" may be sufficiently clear or narrow to conclusively include or exclude (say) skateboards. A decision must still be made in the relevant case, and the decision will be binding precedent for the correct interpretation of "vehicle" (for the purpose of that statute) in the future, but it would be misleading to attribute the decision to (or to blame it on) language.

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[16] Michael Moore has argued that legal theory is constituted by conceptual analysis and empirical description only for the metaphysical conventionalist. A metaphysical realist would, he wrote, also include (and probably emphasize) the study of "law as such", the study of the nature of law as a "functional kind". Moore, "The Interpretive Turn in Modern Theory: A Turn for the Worse?", 41 Stanford Law Review 871, 886-888 (1989). I discuss Moore's approach infra, in Chapter 5.

[17] Simpson, "The Ratio Decidendi of a Case and the Doctrine of Binding Precedent", in Oxford Essays in Jurisprudence 158 (A. Guest, ed. 1961) (emphasis omitted).

[18] See H.L.A. Hart, "Positivism and the Separation of Law and Morals", 71 Harvard Law Review 593, 607 (1958).

A second type of situation is Dworkin's favourite example of Riggs v. Palmer[19] where a murderer claimed the murdered man's estate under a simple wills statute. There was no difficulty about what the words of the statute meant; there was only an unease about the outcome the words seemed to command in that particular case, which would have allowed someone to benefit from a murder he had committed. These are the situations Frederick Schauer discussed extensively in his article "Formalism": in extreme cases, where the clear application of a rule to particular facts seems to lead to a particularly unjust result, decision-makers are (often) authorized to decide contrary to the rule's clear meaning.[20]

The point is that while understanding language plays an important role in understanding law, many other factors play significant roles in the legal process, so that even a major change in one's philosophy of language may not require a substantial shift in how one believes a legal system does -- or should -- work. My narrow focus on language and interpretation in law may mean that my conclusions about law will not be radical or surprising, but that does not take away from the value of the inquiry.

D.

Chapter 1 offers a close reading of H.L.A. Hart's discussion in The Concept of Law of "open texture", while also comparing

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[19] Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889); see R. Dworkin, Law's Empire 15-20 (1986).

[20] Schauer, "Formalism", 97 Yale Law Journal 509, 515-520 (1988).

Hart's notion of "open texture" with similar ideas in the writings of Wittgenstein and Friedrich Waismann. Chapter 2 summarizes Wittgenstein's rule-following considerations and criticizes the way various legal theorists have tried to apply those arguments to the problem of legal determinacy. Chapter 3 considers the paradigmatically uncontroversial "easy cases" in law, and investigates what such cases can show us about the role of language within law and the problem of legal determinacy. Chapter 4 discusses various aspects of Ronald Dworkin's right-answer theory and his interpretative approach to law. Finally, Chapter 5 offers a critique of Michael Moore's metaphysically realist approach to law.

Chapter 1: H.L.A. HART AND THE "OPEN TEXTURE" OF LANGUAGE

A.

In The Concept of Law[1], H.L.A. Hart argued for a position on judicial interpretation halfway between formalism and rule-scepticism.[2] Hart's middle position between formalism and rule-scepticism was based on -- or, at least, was justified by -- a theory of the open texture of language.[3] This concept comes from the work of Friedrich Waismann[4], which was in turn probably based on a constructivist view of language Wittgenstein put forward in the early 1930's.[5]

In a chapter in The Concept of Law called "Formalism and Rule Scepticism", Hart argued that legal rules, whether promulgated by a legislature or derived as the ratio of a prior case, characteristically have a core of plain meaning. The decision whether a rule applies to a particular situation often turns on the meaning -- on delimiting the range of meaning -- of a general term. For example, the application of the rule, "No vehicles in the park", will usually turn on whether a particular object is a "vehicle" for the purpose of the rule (or whether a

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[1] H.L.A. Hart, The Concept of Law (1961).

[2] Id., 121-144.

[3] Id., 120-132.

[4] See id., 249; Waismann, "Verifiability", Proceedings of the Aristotelian Society, Supplementary Volume 19, 119-150 (1945).

[5] See Baker, "Defeasibility and Meaning", in Law, Morality and Society 51 & n.76.

particular area is a "park" for the purpose of the rule). In plain cases, "the general terms seem to need no interpretation ... the recognition of instances seems unproblematic or 'automatic', ... there is a general agreement in judgments as to the applicability of the classifying terms."[6] However, in cases in the "penumbra" of the term's meaning (for the purpose of the rule), it no longer seems clear whether the general term should apply or not. "[T]here are reasons both for and against our use of the general term, and no firm convention or general agreement dictates its use."[7] The tendency of rules to have "a fringe of vagueness"[8], to become indeterminate in their application to borderline cases, Hart called the "open texture" of rules (and of language in general).[9] Hart added that the "open texture" of legal rules should be considered an advantage rather than a disadvantage, in that it allows rules to be reasonably interpreted when they are applied to situations and to types of

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[6] H.L.A. Hart, The Concept of Law 123.

[7] Id., 123-124.

[8] Id., 120.

[9] Id., 124-125. Hart cited Waismann's article, "Verifiability", Proceedings of the Aristotelian Society, Supplementary Volume 19, 119-150 (1945), for the idea of "open texture", and cited Dewey, "Logical Method and the Law", 10 Cornell Law Quarterly 17 (1924); J. Stone, The Province and Function of Law chapter 6 (1946); Hart, "Theory and Definition in Jurisprudence", Proceedings of the Aristotelian Society, Supplementary Volume 29, 258-264 (1955); and Hart, "Positivism and the Separation of Law and Morals", 71 Harvard Law Review 593, 606-615 (1958), for the relevance of "open texture" to the problem of legal reasoning. H.L.A. Hart, The Concept of Law 249. I discuss the relationship between these sources and Hart's ideas below.

problems that their authors did not foresee or could not have foreseen.[10]

In this chapter, Hart was concerned with the problem of social control through law: not questions of strategy or political theory, of how social control could best be effected, but the preliminary question of how social control could be possible. How can a government guide its population's actions on the basis of legislation and precedent, and to what extent will those means necessarily need supplementation? Hart stated: "If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion arose, nothing that we now recognize as law could exist."[11]

Hart considers two forms of guidance, corresponding to two sources of law: examples, analogous to precedent, and verbal instructions, analogous to legislation.[12] Between those two, examples seem far less clear and determinate. When someone tells us to do as he does, we cannot be certain what aspects of his performance must be imitated and where deviation is condoned

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[10] H.L.A. Hart, The Concept of Law 125-126. Compare Anthony Quinton's discussion of Waismann's idea of the "open texture" of concepts: "[T]he kind of linguistic indeterminacy it implies is a positive advantage. It allows for the continuous development of a language to accommodate new discoveries, as exemplified by the progressive amplification of the scope of the concept of number from the positive integers to complex numbers." Quinton, "Introduction", in F. Waismann, Philosophical Papers xiii (B. McGuinness, ed. 1977). On the similarities and differences between Hart's and Waismann's ideas of "open texture", see infra sections B and C.

[11] H.L.A. Hart, The Concept of Law 121.

[12] Ibid.

because irrelevant. Transforming the example into a verbal rule seems to avoid these problems. Now the citizen need "only" "'subsume' particular facts under general classificatory heads and draw a simple syllogistic conclusion."[13] However, Hart showed how general rules can take on both the character and the problems of guidance by example. According to Hart, when the rule (for example, "No vehicles in the park") is enacted, both the legislators and the public have in mind a particular problem, particular situations that are to be brought about or avoided. In the "no vehicles" example, the image is of excluding normal motor-car, bus, and motor-cycle traffic from the park.[14] Interpretation of the rule is thus seen as similar to reading a rule off an example, here the example being the problem the legislation was meant to meet.

Hart used a mixture of a "paradigm" and a "criteria" approach to meaning. According to Hart, our first move in defining a general term for the purpose of a rule is to invoke the image, example, or particular situation at which the rule was aimed. In interpreting the rule, "No vehicles in the park", we might begin by thinking "'If anything is a vehicle a motor-car is one'"[15]. In deciding whether, for the purpose of the rule, "vehicle" applies to roller skates or toy cars, one would "consider ... whether the present case resembles the plain case 'sufficiently' in 'relevant' respects."[16] We begin with the

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[13] Id., 122.

[14] Id., 125-126.

[15] Id., 123.

[16] Id., 124.

plain case or the paradigm (the motor-car) and then consider a list of criteria which allow us to begin to evaluate how similar a purported extension would be. For example, like a motor-car, roller skates make noise (but not nearly as much) and they threaten safety and order (though the threat is on much lower scale). Further dissimilarities include the facts that roller skates are far smaller than motor-cars and that they do not pollute the air. There are both similarities and dissimilarities; some criteria are fulfilled, others are not. In Hart's language, "there are reasons both for and against our use of a general term."[17] This is the "open texture" of rules, that particular situations arise that we were not thinking of when proffering the rule and which are different in some ways from the situation we had in mind (the paradigm) at that time.[18]

Sometimes the extension of a general term from the original paradigm case to a different case is clear, not because there are no differences between the two cases, but because the problem of extension has come up many times before, and a consensus has

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[17] Id., 123.

[18] Cf. White, "What Can a Lawyer Learn From Literature?" (Book Review), 102 Harvard Law Review 2014, 2035 (1989):

> It is ... the genius of law that it is not a set of "commands," but a set of texts meant to be read across circumstances that are in principle incompletely foreseeable. This is what it means to pass a piece of legislation, or to decide a case -- or even to draft a contract -- at one point in time, with the knowledge that it will in the future be brought to bear by others (or ourselves) in contexts, and with meanings, that we cannot wholly imagine.

developed as to whether the term should apply.[19] For Hart, the problem of "open texture" will recur regularly, because there are "fact-situations, continually thrown up by nature or human invention, which possess only some of the features of the plain cases but others which they lack."[20] The slow building of a consensus about whether to apply a general term to particular, relatively common, borderline cases will do little to mitigate the problem of "open texture", for life will soon provide more uncertain borderline cases to replace those convention has transformed into "plain cases".

B.

I want to digress for a moment to consider the intellectual origins of Hart's concept of "open texture". I will trace the concept back to the writings of Friedrich Waismann, and will also consider whether it can be traced one step further back to the work of Ludwig Wittgenstein.[21] This account of "open texture",

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[19] See H.L.A. Hart, The Concept of Law 123: "The plain case[s] ... are only the familiar ones, constantly recurring in similar contexts, where there is general agreement in judgments as to the applicability of the classifying terms."

[20] Ibid.

[21] While Hart's idea of "open texture" was derived from Waismann, his talk of "a core of certainty and a penumbra of doubt", H.L.A. Hart, The Concept of Law 119, may have come from Bertrand Russell, though no attribution for those ideas was given. See Russell, "Vagueness", in 9 Collected Papers of Bertrand Russell 149 (1988) ("The fact is that all words are attributable without doubt over a certain area, but become questionable within a penumbra, outside which they are again certainly not attributable."). (That article was first read to the Jowett Society in 1922, and published in the Australasian Journal of Psychology and Philosophy in 1923.)

though analogous to Waismann's account that Hart credited[22], differs from it in a number of ways.[23]

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[22] H.L.A. Hart, The Concept of Law 249.

[23] In this section and the following one, I will discuss Waismann's ideas in some detail. In this note, I will briefly summarize the other sources Hart gave in his endnote to the "open texture" discussion.

Chapter 6 of Julius Stone's The Province and Function of Law (the 1968 edition I used was identical to the 1946 edition Hart cited) discussed in general terms the use and limits of logic in legal analysis. J. Stone, The Province and Function of Law 137-146 (1968). The only part that seems relevant to "open texture" was section 6, where Stone wrote about how societies tend to change faster than their legal concepts, resulting in either out-of-date concepts or updated concepts which no longer not fit together smoothly within the legal-logical system. Id., 142-144. Though this analysis does not seem directly apt to Hart's concerns, one sentence within the analysis is: "The human relations which legal propositions seek to govern are always, by reason of the uniqueness of successive situations, or even concurrent situations, outrunning the propositions available for the settlement of disputes concerning them." Id., 143.

John Dewey, in his article "Logical Method and Law", 10 Cornell Law Quarterly 17 (1924), argued that the logic used by lawyers and judges is quite different from traditional formal logic. Towards the end of the article, he explained why both legal concepts and legal reasoning should change with changing circumstances. In that context, he made the following comment relevant to "open texture":

> But statutes have never kept up with the variety and subtlety of social change. They cannot at the very best avoid some ambiguity, which is due not only to carelessness but also to the intrinsic impossibility of foreseeing all possible circumstances, since without such foresight definitions must be vague and classifications indeterminate.

Id., 26.

Finally, the two excerpts from earlier Hart articles, "Theory and Definition in Jurisprudence", Proceedings of the Aristotelian Society, Supplementary Volume 29, 258-264 (1955), and "Positivism and the Separation of Law and Morals", 71 Harvard Law Review 593, 606-612 (1958), are slightly less detailed, slightly less sophisticated versions of the discussion of "open texture" that would appear in The Concept of Law.

To understand Waismann's concept of "open texture", it is useful to see it within the larger context of his work in general. Waismann's work was devoted largely to presenting Wittgenstein's ideas in a more accessible form; however, some of Waismann's concepts were his own extension of Wittgensteinian ideas. The concept of "open texture" belonged to the second group; it exemplified his particular approach to the philosophy of language.[24] Waismann, like Wittgenstein, disagreed with the metaphysically realist approach to language but also distanced himself from many of the positions that had been offered as alternatives to metaphysical realism.[25] For example, the concept of "open texture" was presented as an argument against the phenomenalist position that material object statements are

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[24] See Quinton, "Introduction", in F. Waismann, Philosophical Papers xii-xiii (1977).

[25] What Waismann and Wittgenstein opposed was metaphysical realism, the narrow sense of realism associated with platonism (and supported in the legal literature by Michael Moore). There is a use of realism in the philosophical literature broader than the way I am using the term. For example, Simon Blackburn distinguished between two types of realism, between "real realists" and internalists/quietists. The two types are similar in that both accept the commitments within an area of discourse as capable of literal truth, descriptive of the world, and answerable to independent facts of a particular kind. The two kinds of realism differ in that internalists/quietists do not seek -- because they do not believe possible -- a (metaphysical or transcendental) meta-theory about the area of discourse. All argument for them must occur within an area of discourse and never about an area of discourse. See S. Blackburn, "Options for the World", 1-16 (unpublished manuscript). While it is clear that Wittgenstein cannot be read as a supporter of "real realism" (what I call in this paper "metaphysical realism"), some commentators have (tenably) read him as a supporter of a type of quietism. See generally J. Heal, Fact and Meaning (1989); S.L. Hurley, Natural Reasons (1989).

equivalent to (can be reduced to) some combination of sense-datum statements.[26]

"Open texture" was introduced to elucidate a particular problem for verification theory.[27] It is because of the "open texture" of empirical concepts, Waismann argued, that material object statements cannot be translated into sense datum statements and that empirical statements cannot be conclusively verified.[28] "[A] term like 'gold', though its actual use may not be vague, is non-exhaustive or of an open texture in that we can never fill up all the possible gaps through which a doubt may seep in."[29]

Like Hart, Waismann wrote about uncertainty arising from situations we have not foreseen: "there will always remain a possibility, however faint, that we have not taken into account something or other that may be relevant to [the] usage [of terms in a statement]; and that means that we cannot foresee completely all the possible circumstances in which the statement is true or in which it is false."[30] Elsewhere, Waismann wrote that a complete definition of a term cannot be constructed: because "we can never eliminate the possibility of some unforeseen factor

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[26] Waismann, "Verifiability", 120-121.

[27] Cf. Margalit, "Open Texture", in Meaning and Use 141, 149-151 (A. Margalit, ed. 1979) (suggesting that "open texture" also creates problems for the doctrine of possible-world semantics).

[28] Waismann, "Verifiability", 121-123.

[29] Id., 123. Waismann's original label for this idea, die Porositaet der Begriffe, id., 121 n.*, could be translated "the porosity of concepts".

[30] Id., 123.

emerging", "the process of defining and refining an idea" to meet each new factor "will go on without ever reaching a final stage."[31]

To try to understand Waismann's argument better, I will consider similar arguments from his other writings. Though discussions of verification are often the context for Waismann's analysis of "open texture", the concept is not concerned exclusively with problems in that area. In fact, in The Principles of Linguistic Philosophy[32], Waismann seemed almost indifferent regarding the question of verification. He wrote: "We were asking the question whether the assertion that a ball is lying on the table can be finally verified. The answer to this question is that can be decided on our part by an arbitrary determination."[33] It all depends on what we mean by "verified", and there is no a priori reason, according to Waismann, to choose one approach over another; and under some approaches, the statement would never have final validity.[34]

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[31] Id., 125.

[32] Waismann's long work, cited as often as an explication of Wittgenstein's ideas as it is to show Waismann's ideas. F. Waismann, The Principles of Linguistic Philosophy (1965). There are two long segments in the work relevant to the concept of "open texture". See id., 68-86, 221-225. It is difficult to date the material as Waismann revised the text continually over the last decades of his life, at some places even incorporating or responding to ideas from the Philosophical Investigations. The text was not published until nine years after Waismann's death. Quinton, "Introduction", in F. Waismann, Philosophical Papers ix.

[33] F. Waismann, The Principles of Linguistic Philosophy 74.

[34] Id., 74-75.

Waismann argued that our language, as well as our usual approaches to verification, is organized to respond to normal background conditions and to the small-scale problems of everyday life. Our language and our grammatical rules do not serve us well if we start to imagine wildly unusual circumstances or deceptions of a Cartesian magnitude.[35] Here Waismann's comments are quite relevant to "open texture":

> The laws of any age are suited to the predominating characteristics, tendencies, habits and needs of that age. The idea of a closed system of laws lasting for all time, and able to solve any imaginable conflict, is a Utopian fantasy which has no foundation to stand upon. In actual fact every system of law has gaps which are, as a rule, noticed and filled out only when they are brought to light by particular events. Similarly we must admit that grammar is incomplete, and that should the circumstances arise we would make it more complete by introducing new rules to provide for such situations. No language is prepared for all possibilities. To deplore the insufficiency of language would be merely misguided.[36]

In a later chapter, he came back to a similar theme, but under the topic of definition, of delimiting concepts (whether

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[35] Id., 75-76.

Anthony Quinton, in his reading of Waismann, chose to emphasize changes in "background conditions" rather than the emergence of new circumstances unrelated to those background conditions:

> Waismann's point is not so much that words of common speech are vague, that there are borderline cases in which we cannot decide whether to apply them or not, though he would not have denied that; it is rather that operative criteria for their application are in practice only satisfied when certain other conditions, not included among those criteria, are satisfied as well. What we should say in a conceivable case where the criteria are satisfied but the ordinarily accompanying conditions are not is thus indeterminate.

Quinton, "Introduction", in F. Waismann, Philosophical Papers xiii (1977).

[36] F. Waismann, The Principles of Legal Philosophy, 76.

there is "anything at all like an exhaustive definition -- a definition which limits the concept in all possible directions?"[37]). He started by considering hypothetical strange situations: e.g., a table that everyone can see but nobody can grasp, and an element that reacted chemically like gold but emitted a new kind of radiation.[38] Again, his conclusions echo his comments on "open texture":

> Try as we may, no concept is outlined in such a way that there is no room for any doubt. We introduce a concept and limit it in some directions; we say, for example, 'This is gold' in contrast to silver, platinum, etc. This suffices for most practical purposes, and we do not probe any farther. We forget that there are other directions in which we have not limited our concept. And if we did, we could imagine hundreds of situations which would necessitate new limitations. Are our concepts therefore incomplete, inexact? But what then would be an exact concept? One which anticipated all cases of doubt, one which is outlined with such precision that every nook and cranny is blocked against entry of doubt? But then we have to own, that no concept satisfies this demand; and we begin to see that there is something utopian in the demand for absolute precision. A concept is good if it fulfils the purpose for which it has been devised.[39]

In the article "Language Strata"[40], Waismann argued that different types of statements -- e.g., sense datum statements, material object statements, aphorisms, and natural laws -- must be analyzed in different ways. "Statements may be true in different senses, verifiable in different senses, meaningful in

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[37] Id., 222.

[38] Id., 222-223.

[39] Id., 223.

[40] Waismann, "Language Strata", in Logic and Language, Second Series, 11 (A. Flew, ed. 1961). Though not published until 1961, the article is an unrevised version of the paper that had been read to the Jowett Society in 1946. Ibid.

different senses. Therefore the attempts at defining 'truth', or at drawing a sharp line between the meaningful and the meaningless, etc., are doomed to fail."[41] It is a mistake to try to apply the analytical tools of one language stratum to another, or to try to reduce one stratum to another (as Phenomenalism and Behaviourism attempt to do[42]). Here, and throughout the article, Waismann's discussion of different language strata resembles Wittgenstein's discussions of different "language games".

There are two arguments in "Language Strata" relevant to the concept of "open texture". First, material object statements cannot be reduced to a collection of sense-datum statements: "a statement about a cat is a statement about a cat: and not a truth-function of sense-datum statements, or an infinite class of perspectives, or an infinite group of sensibilia, or heaven knows what."[43] Second, the description of material objects (as contrasted with, e.g., geometrical figures) is never complete:

> However many features I may assert of a thing, say of this chair, or however many relations I may state which hold between it and other things, or however many statements I may make about its life history, I shall never reach a point where my description can be said to be exhaustive, that is, such that no further increment in knowledge is possible. Any real thing is inexhaustible. My knowledge of it is always extensible. There is no maximum description.[44]

Both of these arguments coincide with arguments given in the article "Verifiability".

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[41] Id., 26.

[42] Id., 28-29.

[43] Id., 29.

[44] Id., 27.

C.

Though Waismann's concept of "open texture" is said to derive from a middle period of Wittgenstein's thought, corresponding with the material eventually published as Philosophical Remarks and Philosophical Grammar, related ideas remain in Wittgenstein's later writings as well. The following quotations are from Philosophical Investigations[45]:

> I say "There is a chair." What if I go up to it, meaning to fetch it, and it suddenly disappears from sight? -- "So it wasn't a chair, but some kind of illusion." -- But in a few moments we see it again and are able to touch it and so on. -- "So the chair was there after all and its disappearance was some kind of illusion." -- But suppose that after a time it disappears again -- or seems to disappear. What are we to say now?[46]

> It is only in normal cases that the use of a word is clearly prescribed; we know, are in no doubt what to say in this or that case. The more abnormal the case, the more doubtful it becomes what we are to say.[47]

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[45] Which was published eight years after the article which contained Waismann's primary discussion of "open texture".

[46] L. Wittgenstein, Philosophical Investigations section 80 (1958); cf. L. Wittgenstein, Philosophical Grammar 220 ff (1974).

[47] L. Wittgenstein, Philosophical Investigations section 142; see generally G.P. Baker & P.M.S. Hacker, Wittgenstein: Rules, Grammar & Necessity 229-232 (1985). There is even one place where Wittgenstein seemed to be discussing an analysis similar to "open texture" in a legal context:

> "It is as if our concepts involved a scaffolding of facts."
>
> That would presumably mean: If you imagine certain facts otherwise, describe them otherwise, than the way they are, then you can no longer imagine the application of certain concepts, because the rules for their application have no analogue in the new circumstances. -- So what I am saying comes to this: A law is given for human beings, and a jurisprudent may well be capable of drawing consequences for any case that ordinarily comes his way; thus the law evidently has its use, makes sense. Nevertheless its

Despite these surface similarities, Gordon Baker and Peter Hacker claimed that there is actually a large conceptual distance between Waismann's concept and the ideas of the later Wittgenstein, at one point stating: "according to the outlook of the Investigations", "Waismann's concept of open texture is doubly incoherent".[48] They offered two criticisms of Waismann's concept. The first criticism was that Waismann's "hypotheses" of material object statements inappropriately "transcend[] all possible experience."[49] The criticism refers to an earlier Wittgenstein comment:

> [H]ow can I even make the hypothesis if it transcends all possible experience? How could such a hypothesis be backed by meaning? (Is it not like paper money, not backed by gold?)[50]

The second criticism was that Waismann's concept "presupposes a distorted conception of what it is for a set of rules to be complete (or incomplete)."[51] I will consider the two criticisms in turn, for the moment not to determine whether Waismann's analysis was correct, but to determine whether or to what extent

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> validity presupposes all sorts of things, and if the being that he is to judge is quite deviant from ordinary human beings, then e.g. the decision whether he has done a deed with evil intent will become not difficult but (simply) impossible.

L. Wittgenstein, Zettel section 350 (1970).

[48] G.P. Baker & P.M.S. Hacker, Wittgenstein: Understanding and Meaning 383 n.12 (1980).

[49] Id., 432.

[50] L. Wittgenstein, The Blue and Brown Books 48 (1960).

[51] G.P. Baker & P.M.S. Hacker, Wittgenstein: Understanding and Meaning 432.

Waismann's analysis actually differs from that of Wittgenstein (as Baker and Hacker implied).

I am not sure how the first criticism, "transcending all possible experience", pertains to Waismann. Waismann wrote that material object statements cannot be reduced to a long (or even an infinite) list of sense-datum statements and that our concepts always have the possibility of vagueness because we do not know how they would be applied in unforeseen (unforeseeable) situations. For Waismann, our concepts take into consideration all experiences we have had up to now; they do not, because they cannot, take into consideration experiences that we have not yet had or that we could not even imagine having. Wittgenstein's criticism, something "transcend[ing] all possible experience", thus seems singularly inappropriate here. In context, it seems that Wittgenstein's comment was directed at a different target altogether: those who believed that we could extend our knowledge beyond our experience through thought and logic.[52]

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[52] See L. Wittgenstein, Zettel, section 260. (In fact, the comment's context in Zettel is more confusing than helpful in trying to determine the reference of "transcending all possible experience". However, it may not even be appropriate to rely on context in Zettel for one's interpretations. The arrangement of the comments in that book was not done by Wittgenstein, but by the text's initial compiler, Peter Geach. See Anscombe & von Wright, "Editor's Preface", in L. Wittgenstein, Zettel v.)

In a recent conversation, Gordon Baker stated that he now agreed with my conclusions regarding the non-applicability of the "transcending all possible experience" criticism to Waismann. Personal discussion, 22 October 1990.

I should also note that Peter Hacker made what I consider a more reasonable reading of the "transcending all possible experience" argument in his one-volume discussion of Wittgenstein's thought, Insight and Illusion. Discussing Wittgenstein's criticism of solipsism in his middle period, Hacker described how a "tough-minded solipsist" would have no

The second criticism, even if conceded, would only be a mild corrective for Waismann's approach. Waismann agreed with Wittgenstein that our concepts are not completely defined/fully delimited/completely verifiable, that this "ideal" could not be reached, and that this "deficiency" had no negative consequences for our use of language in normal circumstances.[53] The problem with Waismann's writings here from a Wittgensteinian point of view is that he did not then make the distinctive Wittgensteinian continuation: if it does not make sense to speak of there being a complete set of rules defining and delimiting concepts, then one should not characterize concepts as being "incomplete" or "indeterminate".[54] Though on this matter of characterization I find the Wittgensteinian approach superior (usually clearer, but in some contexts more confusing), I see this dispute as only a matter of philosophical writing style.[55]

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basis for believing that other people have experiences: "For 'experience' [for the solipsist] means something which is uniquely mine. To suppose that there could be other subjects is nonsense, for I alone am the locus of all experience. To believe that others have experience is to make a hypothesis which transcends all possible experience. And such a hypothesis would not be backed by meaning." P.M.S. Hacker, Insight and Illusion, Revised Edition 263-264 (1986) (citing L. Wittgenstein, The Blue and Brown Books 48; Philosophical Investigations section 302). I find this reading of Wittgenstein's fully reasonable: amongst other things, it has the advantage of being consistent with the comment's context in the Blue Book. See infra note 56.

[53] See, e.g., Waismann, "Verifiability", 123-126; F. Waismann, Principles of Linguistic Philosophy 76, 223; Waismann, "Language Strata", 26-28.

[54] See, e.g., G.P. Baker & P.M.S. Hacker, Wittgenstein: Understanding and Meaning 383, 432-433.

[55] There is an analogous (partly stylistic, partly substantive) argument regarding whether defeasible, criteria-based claims should be characterized as "knowledge" in circumstances where no more certain (non-defeasible) claims are possible. See C. Wright, "Second Thoughts about Criteria", in

Finally, Baker & Hacker attempted to rebut the concept of "open texture" by stating that "[i]t is internally related to the concept of hypothesis (Hypothese), being the correlate of the thesis that an hypothesis can be made only more or less probable by any relevant evidence ...."[56] The belief that material object statements are "hypotheses" made more or less probable -- but never completely verified or falsified -- by our experiences apparently intrigued Wittgenstein during his "middle period"[57] and has some resonance with an early Waismann article,

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Realism, Meaning and Truth 268-275 (1987).

[56] G.P. Baker & P.M.S. Hacker, Wittgenstein: Understanding and Meaning 383 n.12, 432. In their text, Baker & Hacker connected the discussions of "hypotheses" with the criticism of "transcend[ing] all possible experience". Id., 432. However, the connection is difficult to follow, for the passages from Wittgenstein cited for the criticism did not refer to the "hypothesis" approach. For example, Zettel section 260 seems clearly to refer back to the immediately preceding sections, which do not deal with the "hypothesis" approach:

> "Philosophers who think that one can as it were use thought to make an extension of experience ...."
>
> "Generality in logic cannot be extended any further than our logical foresight reaches. ...."

L. Wittgenstein, Zettel, sections 256, 258. (However, the context in Zettel may be irrelevant. See supra note 52.) The other citation, Blue Book page 48, discussed a particular problem in the philosophy of psychology (whether I should believe that other persons have the same sort of feelings that I do, and whether this belief should be characterized as a hypothesis), not a general "hypothesis" approach to material object statements.

[57] G.P. Baker & P.M.S. Hacker, Wittgenstein: Understanding and Meaning 432. Wittgenstein's ideas about "hypotheses", and their similarities to some of Waismann's writings, can be seen by looking at F. Waismann, Ludwig Wittgenstein and the Vienna Circle 99-101, 158-162, 210-211 (1979) (the book contains Waismann's transcriptions of Wittgenstein's conversations with members of the Vienna Circle in 1929-1932); and L. Wittgenstein, Philosophical Remarks 200-201, 282-297 (1975).

"Hypotheses", that was not published during Waismann's lifetime.[58] However, Waismann did not elaborate, or even mention, a "hypothesis" position in the later articles (discussed in detail above) where the concept of "open texture" was put forward.[59]

D.

Returning to Hart's adaptation of Waismann's analysis, what is different between the two concepts of "open texture" is the type of unforeseeability -- the type of exceptional circumstances -- that were being considered. In this, Waismann was far more extreme; he wrote of cats growing to gigantic sizes and people disappearing (asking how those events would affect our labelling of the objects as "cat" and "a friend" respectively).[60] When he referred to the "unforeseen", he meant "some totally new experience such as at present, I cannot even imagine" or "some

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[58] F. Waismann, "Hypotheses", in Philosophical Papers 38-59.

[59] In recent private correspondence, Gordon Baker argued that even if the conceptual framework of "hypotheses" is not present in Waismann's discussions of "open texture", it is likely that this conceptual framework was presupposed by or derived from the discussions. One reason for this belief is the ability to trace back some parts of the article "Verifiability" to earlier writings explicitly on the "hypotheses" approach (see Waismann, "Hypotheses", 38-59, which was composed in 1936) and to Wittgenstein's dictation on "hypotheses" (see F. Waismann, Ludwig Wittgenstein and the Vienna Circle 99-101, 158-162, 210-211). Letters from Gordon Baker, 27 March 1990 & 8 May 1990.

However, Dr. Baker also wrote that he now shared my doubts about the contrast the Baker & Hacker text had drawn between Wittgenstein and Waismann. He wrote that he now had "qualms about whether the contrast between hypotheses and [Wittgenstein's later writings on] criteria is as sharp as I once thought them to be." Letter from Gordon Baker, 27 March 1990.

[60] Waismann, "Verifiability", 121-122.

new discovery ... which would affect our whole interpretation of certain facts."[61] Compare this to Hart's legislators, who just happened to be thinking about motor-cars when they promulgated their rule about access to the park, but who certainly could have imagined the possibility of roller skates, skateboards, or golf carts in the park.[62]

One could connect the two conceptions by seeing Waismann's idea of "open texture" as Hart's idea taken to its limit. Imagine an extremely careful legislative draughtsman who spent many hours listing dozens of objects that might be in a park and that might be considered vehicles, and then writing detailed classificatory clauses to clarify the original, "No vehicles in the park". At that point, the type of "unforeseen" situations for Hart would begin to resemble those for Waismann, and the reasons why judicial discretion might still be necessary in applying even the most meticulously drafted statute would begin to resemble (without actually reaching) the reasons Waismann gave for our not being able to define an empirical term completely.

E.

Hart argued from the "irreducibly open-textured" nature of language to the need for judges in some cases to make "a fresh

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[61] Id., 127.

[62] A third analysis, which has a "family resemblance" both to Waismann's idea of "open texture" and Hart's idea of "open texture" was Waismann's discussion about whether the limit of certain concepts have been "anywhere determined accurately". He wrote that for some concepts one could speak of "a nucleus of meaning surrounded by a haze of indeterminacy." F. Waismann, The Principles of Linguistic Philosophy 222.

choice between open alternatives."[63] Even if the conclusion (partial indeterminacy) follows from the premise (the "open texture" of language), the basis for that premise is not well-established in the text. "Open texture" is more asserted than argued for. Gordon Baker claimed that Hart's argument is circular: Waismann's notion of "open texture" derives from his argument/assumption that a term's sense is constituted by the rules governing its application and that no rule can be formulated in a way such that the rule's application is never in doubt; given that indeterminacy of application is built into the idea of "open texture", it is not surprising to find it as one of the idea's consequences.[64] Baker went on to note: "Although this is not generally recognized, the notion of open texture makes sense only within a particular form of semantic theory. ... As a result it might well be impossible for Hart to incorporate it into his philosophy of law."[65] Searching for the philosophical presuppositions and consequences of Hart's concepts becomes even more complex if one believes, as I do, that his idea of "open texture" is in fact substantially different from Waismann's idea. I do not think that Hart's conclusion of partial indeterminacy -- in my view, summarized by more than based upon the idea of "open texture" -- derived from a view of language so much as from a view of how people create and think about rules. Hart was not concerned about creating, elaborating,

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[63] H.L.A. Hart, The Concept of Law 125.

[64] Baker, "Defeasibility and Meaning", in Law, Morality and Society 37.

[65] Id., 37 n.46; see id., 50-57.

or defending a particular general philosophy of language. His concern was with the way that rules are (and should be) applied. Hart had not proven from the nature of language that judges must have discretion[66]; rather, he gave reasons why legal texts should be interpreted in a way that leaves judges discretion in applying the law.

In Hart's discussion of "open texture", he often seemed to refer to words, sentences and rules interchangeably. This may reflect an inexactness in transcribing an idea, not being sufficiently careful in describing the idea's domain or scope. It may also reflect a tension within Hart's concept, which arose because he was adapting an analysis of descriptive terms (Waismann's "open texture") to an analysis of rules -- and not just an analysis of rules as such, but analysis of the application of rules by judges in modern legal systems.

Waismann was writing about language in general; Hart was writing about language in the context of law -- in particular, in the context of applying and interpreting rules -- and the problems to which his ideas responded derive from that context. If while we are walking through the park, my friend tells me about "that vehicle" while pointing towards a toy car or a skateboard, I may find her usage strange or quaint, but I understand what she said; I can understand the use of the term "vehicle" to refer to an object to which that label is not usually applied. Because the extension (from the usual usage of the term) is not radical or bizarre, I do not react by correcting my friend, as I might if she had used the term "vehicle" while

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[66] Cf. Baker, "Defeasibility and Meaning", 37.

trying to refer to a banana or a book. A certain tolerance or laxness in the application of terms is beneficial in normal conversation; all is well as long as I think I understand roughly what my friend was trying to say (and she thinks I understood roughly what she was trying to say).[67]

The situation with commands, instructions, suggestions, and so on, is different. With such uses, because the focus is on the guidance of behaviour and because such sentences are often meant to be applied ("followed") on an indefinite number of occasions, the exact scope of the rule's application -- determined at least in part by the exact scope of the rule's terms -- is important. As Gerald Graff, in a slightly different context, wrote: "... the practical concerns of the law occasion the imposition of a number of artificial restrictions on interpretive procedure, restrictions that do not apply outside the legal context. These restrictions arise from practical, ethical considerations rather than epistemological ones...."[68] When language is used to guide and coordinate behaviour, the problems of interpretation and meaning will necessarily be different from those that accompany language qua method of expressing one's thoughts and method of communication between persons.

Properly seen, Hart's approach was not based on a theory of language, at least not if that is defined as a theory about the meaning of particular terms. While Hart at times seemed to argue

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[67] See, e.g., Davidson, "On the Very Idea of a Conceptual Scheme", in Inquiries into Truth and Interpretation 196 (1984).

[68] Graff, "'Keep off the Grass,' 'Drop Dead,' and Other Indeterminacies: A Response to Sanford Levinson", 60 Texas Law Review 405, 411 (1982) (emphasis omitted).

that something about language makes it inevitable that judges will have discretion, he seemed at other times to concede that judges could interpret rules in such a way that they would not require discretion. He considered and rejected a way of clarifying the meaning of terms within rules based simply on language: attaching necessary and sufficient conditions which an object or event must satisfy if it is to be subsumed under that term.[69] He argued that any attempt to get rid of judicial discretion would have negative consequences (for example, an inflexibility, an inability to re-characterize the rules to meet changing circumstances).[70]

At this point, it is helpful to introduce a distinction between what meaning a writer (or speaker) tried to convey by his or her words, and what the words, considered by themselves, actually mean ("the well-known distinction between what a speaker means and what his words mean"[71]). This distinction appears in various forms throughout the philosophical literature. For example, the 19th century hermeneutics theorist Friedrich

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[69] H.L.A. Hart, The Concept of Law 126-127. The problems of focusing on particular terms as a way of understanding daily communication, let alone legal rules, was illustrated by Lon Fuller's "improvement" example. Fuller showed that the meaning of "improvement" in the sentence fragment "all improvements must be promptly reported to ..." cannot be understood outside the sentence's context (not only what the requirement relates to, but also who gave the order to whom, and what set of practices surround the situation). Fuller, "Positivism and Fidelity of Law", 71 Harvard Law Review 630, 664-667 (1958).

[70] H.L.A. Hart, The Concept of Law 126-127.

[71] Dummett, "A Nice Derangement of Epitaphs: Some Comments on Davidson and Hacking", in Truth and Interpretation 460 (E. LePore, ed. 1986). The same (or at least a very similar) distinction is sometimes discussed in terms of "speakers meaning versus sentence meaning". See, e.g., Hurd, "Sovereignty in Silence", 99 Yale Law Journal 945, 962-967 (1990).

Schleiermacher wrote that an act of speaking had to be understood in two separate ways: in its relation to the language (that is, the meaning of the words spoken) and as an expression of the speaker's thoughts.[72] The distinction is also illustrated by the fact that we can understand malapropisms and code-name references.[73] The distinction appears as well, explicitly and implicitly, in many of areas of law[74], as will become clear in later discussions.

The distinction can be used to clarify even some of the more obscure arguments in legal academic writing. For example, J.M. Balkin offered a "deconstruction" of the idea that a text has a clearly definable "core" of meaning independent of context, and only the text's "peripheral" meanings are affected by context. Balkin wrote: "If two parties have adopted a code for contracts involving livestock where 'cow' means 'horse,' the core meaning of 'cow' will shift radically. ... [I]t is the 'normal' context

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[72] Schleiermacher, "General Hermeneutics", in The Hermeneutics Reader 75 (K. Mueller-Vollmer, ed. 1986).

[73] See Davidson, "A Nice Derangement of Epitaphs", in Truth and Interpretation 433 (1986). As an example of code names, in American political rhetoric "States' Rights" has been used as a racist code word for racial segregation, and "cosmopolitan" in Eastern European rhetoric was (and still is) an anti-Semitic code-word for Jewish. An experienced observer hearing a politician from the American South refer to "States' Rights" would know that the politician meant to refer to racial segregation, and that the speaker knew that the relevant audience would understand the phrase that way, even though this was not the phrase's literal meaning.

[74] See, e.g., J.W. Harris, Law and Legal Science 132-143 (1979) (the "will model" and the "natural meaning model" as alternative "models of rationality" for justifying legal decisions).

in which we use the word 'cow' that gives us its 'core' meaning."[75] Balkin concluded that "core" meanings, like "peripheral" meanings, are context dependent. The problem with this argument is soon clear. Balkin's contracting partners are not using the English word "cow" in an "abnormal context"; in a sense, they are not using the English word "cow" at all. They could be described either as using the word "cow" incorrectly, or of using a language of their own, where the word "cow" has different rules for usage and different applications than it does in English.[76] In terms of the discussion above, we could distinguish the fact that (in English) the word "cow" means cow from the fact that these parties used the word to mean horse. If the point of Balkin's "deconstruction" is only that the meaning (the acontextual meaning, the "core" meaning) of a word can change as we move from a common language to an idiolect (e.g., from English to these parties' code) or from one common language to another (e.g., from English to French), then his point is correct, but not interesting.

F.

Hart's discussion of "open texture" in The Concept of Law seemed to rest halfway between emphasizing speakers' meaning and

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[75] Balkin, "Deconstructive Practice and Legal Theory", 96 Yale Law Journal 743, 780 n.106 (1987).

[76] See G.P. Baker & P.M.S. Hacker, Wittgenstein: Rules, Grammar & Necessity 332: "If one follows deviant grammatical rules it does not mean that one is saying something wrong .... Rather ... one [is] speaking of something else (which one may have to explain), just as if one follows rules other than those of chess one is playing another game." (citation omitted)

emphasizing words' meaning, and halfway between a theory of meaning and a theory of statutory interpretation. The approach focused on what the speaker meant (and resembled a theory of statutory interpretation) in that Hart seemed to want the judge to focus on the problem the rule-makers had in mind. However, Hart did not have the judge try to discover the rule-makers' aim from legislative (or judicial) records, but rather from the rule's words alone: rule-makers' aims as equated with the "clear examples" that fall under "the language used in this context".[77] Because the rule-makers formulated the rule the way they did, Hart implied, they must have had <u>those</u> cases (the "clear examples") in mind, "and [their] aim in legislating is so far determined because [they] have made a certain choice."[78]

For Hart, the rule-makers' aim is embedded in the language, and where the application of the words to a particular case is no longer clear, "[the rule-makers'] aim is, in this direction, indeterminate."[79] If Hart had been concerned only with what the rule-makers meant, or only with implementing their intentions, he would not have us reach that conclusion so quickly. He would have had us try to discover whether, the words the rule-maker chose notwithstanding, their aim might still have been determinable and determinate. He would have advised us to look through relevant records or to ask counterfactual questions (<u>e.g.</u>, "even if the rule-makers had not considered the question of skateboards in the park, what <u>would</u> they have said <u>had</u> they

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[77] H.L.A. Hart, <u>The Concept of Law</u> 125.

[78] <u>Ibid.</u>

[79] <u>Id.</u>, 126.

thought about it?") to try to discover the rule-makers' aim. However, he did not do so.

On the other hand, Hart's approach was also not dependent solely on what the words meant. In fact, for Hart decisions can sometimes actually contribute to meaning: "[w]hen the unenvisaged case does arise" and we make our decision ("by choosing between the competing interests in the way which best satisfies us"), we will have "incidentally ... settled a question as to the meaning, for the purpose of this rule, of a general word."[80]

One matter which may explain some of the more paradoxical and counter-intuitive ideas in Hart's discussion is his use of "we" throughout the relevant section: "we ... frame some general rule of conduct", "our aim ... is so far determinate", "[w]e shall have rendered more determinate our aim", and so on.[81] Hart's analysis of rule-application appeared to occur in a hypothetical context where the same person, group, or institution which had created the rule had the responsibility of applying it and modifying it.[82] Such a situation is, first, far different

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[80] Ibid. Cf. L. Wittgenstein, Zettel section 120: "'This law was not given with such cases in view.' Does that mean it is senseless?"

[81] H.L.A. Hart, The Concept of Law, 125-126 (emphasis added).

[82] This is, of course, an unrealistic and distorting model relative to the way most legal systems work most of the time, though it may be no more unrealistic and distorting than the model implicit in many theories about judicial reasoning, that "a single judge ... has decided and will in the future decide all the cases in the legal system." Kornhauser & Sager, "Unpacking the Court", 96 Yale Law Journal 82, 115 (1986). A more accurate model (for American law), according to Kornhauser and Sager, would have to take into account the factors of multi-judge panels, appellate review, and different judges (or judicial

from the most common situation in most legal systems, and, second, far less troubling. The problems legal theorists face in the area of rule-application come largely from the fact that those who apply rules usually are applying rules written by someone else; in the American context, this means judges applying statutes and constitutional provisions or judges applying rules set down by other judges. Within such a context, one's view about how rules should be applied (interpreted, modified, supplemented) must depend in part on one's theory about the proper role of various institutions and the relationships among them. For example, those who see judges' role as merely implementing the will of the legislature[83], and who believe that any judicial action that cannot be so characterized is illegitimate, would probably recommend an approach different from Hart's approach for facing an "unenvisaged case". (They would probably want judges only to make decisions that could reasonably be characterized as implementing the legislature's aims or values.) To get the most from Hart's discussion, we must disentangle the various strands: conclusions based on the nature of language, conclusions based on the nature of rules and rule-application, general recommendations for how rules could best be applied, and recommendations for rule-application that are grounded in particular types of situations or particular views of institutional relationships.

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panels) having equal authority within a jurisdiction. See id., 82-83, 115-117. I discuss this issue briefly in Chapter 4, section F.

[83] See, e.g., R. Posner, Law and Literature 220-247.

G.

Hart had not been completely clear in his description of the situation in which judges must use discretion. Are there "gaps" in the law because language, rules, or the law have "run out" entirely, or because the meanings of the relevant materials have simply "faded" so much at the periphery that they no longer determine a particular answer or interpretation, even though they do establish a range of permissible (and, by inference, a range of impermissible) answers and interpretations? The references to "gaps" in the law, the law "running out", and rules "fading" are all, obviously, metaphors. Discovering the meaning of the metaphors would involve answering some of the central questions of legal theory: to what extent can rules, within the decision-procedures of a legal system, determine unique correct answers for every -- or for any -- question presented to the courts.

On the subject of "gaps" in the law, John Gardner recently offered a helpful gloss on Hart's discussion.[84] Gardner distinguished between instances where the law provides no complete answer and where it provides no required answer. In other words, there will be occasions where there are legal materials relevant to (or adequate for) the solution of a problem, yet the materials do not collectively entail a particular decision. This situation will occur, for example, where contrary legal standards of equal weight apply to the same problem or where a permissive source of law (e.g., a treatise)

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[84] Gardner, "Concerning Permissive Sources and Gaps", 8 Oxford Journal of Legal Studies 457 (1988).

suggests the answer to the problem.[85] In such situations, contrary to the writings of Ronald Dworkin[86], the judge's decision does not involve discretion in the strong sense, but rather "judgment" or discretion in the weak sense.[87] Of equal interest, in such cases though the law does not determine the answer, neither does the answer depend on "extra-legal sources".[88]

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[85] Id., 457-460.

[86] R. Dworkin, Taking Rights Seriously 31-35 (1977).

[87] Gardner, "Concerning Permissive Sources and Gaps", 460-461.

[88] Id., 461. Though theorists seem to believe that much is at stake in the question of whether a particular source, factor, or justification is "legal" or "extra-legal", much of the discussion on this issue is confused or question-begging. The latter occurs because what is or is not part of law is as contested as whether law is or is not a closed system (with regard to judicial interpretation), and the two issues interrelate in ways that are in part a matter of substantive theory and in part a matter of stipulation or definition.

One example of this strange debate occurred when Joseph Raz argued against Ronald Dworkin that while judges are "legally required to follow certain moral standards", qua moral these standards were not part of law. Raz, "Legal Principles and the Limits of Law", in Ronald Dworkin and Contemporary Jurisprudence 85 (M. Cohen, ed. 1984). In his response, Dworkin described Raz's use of the word "law" as arbitrary, and appealed to the "ordinary usage" of the term, which would, he said, tend to characterize as "law" (at least) all the standards that judges were obligated to apply. "A Reply by Ronald Dworkin", in id., 261-263. Raz's position was that the analysis of legal systems should derive from ideas about practical reasoning and authority, and therefore he saw nothing paradoxical about not treating as identical "what is law" and "what a judge must (should) apply in resolving a dispute". Raz viewed Dworkin's approach to law as improperly focused on a judge's or lawyer's perspective. See Raz, "The Problem About the Nature of Law", 21 University of Western Ontario Law Review 203, 210-216 (1983).

It is of some importance to clarify what "discretion" means in the context of Hart's discussion of "open texture".[89] There are various, mutually inconsistent ways of defining "discretion" in this context. The way I will analyze "discretion" is as the negative analogue of the "one right answer" approach. That is, judges have discretion if it is not the case that, as a matter of law, there is only one right answer to the question before them. Thus, under this approach, judicial discretion is consistent with there being for a particular case either a range of possible right answers (along with a range of wrong answers) or there being no labelling of an answer as "right" or "wrong" before the decision is handed down.

Under this approach, discretion is certainly not equivalent with license.[90] Judicial discretion would be consistent not only with the relatively weak constraints of rationality Ronald Dworkin equated with "strong discretion"[91] and the "judicial virtues" Hart discussed[92], but also with more significant constraints (for example, that only two or three of a larger

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[89] Reflecting the distinction I employed earlier, while I have some interest in what Hart meant by "discretion", I am primarily interested in what notion of discretion can be defended here, regardless of whether the notion I come up with is the one Hart in fact intended.

[90] In a later essay, Hart wrote that by his notion of judicial discretion he did not mean that the judge's decision would be merely arbitrary. Hart, "Problems in the Philosophy of Law", in Essays in Jurisprudence and Philosophy 106-107. This picks up on a passage from The Concept of Law where he had written that in the filling in of "open texture", judges display "judicial virtues" (e.g., impartiality and reliance on neutral principles) in a legislative task. H.L.A. Hart, The Concept of Law 200-201.

[91] R. Dworkin, Taking Rights Seriously 33.

[92] H.L.A. Hart, The Concept of Law 200.

number of possible solutions would be acceptable). Discretion is a negative freedom, an absence of constraint, but not necessarily (or usually) an absolute freedom.

Even with the minimalist approach to discretion I have chosen, a number of complex conceptual questions remain. When I say that law does not determine a single correct answer for a particular case, what is meant by "law"? In similar contexts, "law" is used in two different ways: 1) whatever standards judges are under a legal obligation to apply or 2) a certain set of standards, usually a sub-set of those judges have an obligation to apply, that is derived from particular institutional criteria. The two definitions diverge in cases where judges have an obligation to apply standards that some theorists would characterize as "extra-legal" (e.g., moral standards).[99]

However, the problem of discretion is not merely a product of where we place the "legal"/"extra-legal" boundary line. Discretion would occur on the borderlines of whatever standards the legal system adopts in interpreting and applying standards. If judicial decisions are to be based on what the legislature would have stated about a question they had not explicitly considered, on the position of "community morality" on a question, on what the usual business practices are in some area, or on whether an action was reasonable, there will be areas of

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[99] Legal systems often give binding force to the rules of other institutions (e.g., the internal rules of a trade union or a religious institution). See J. Raz, Practical Reason and Norms, Second Edition, 152-154 (1990). There is a sense in which such standards, though enforced by legal institutions, are "extra-legal".

penumbra where there will be discretion because the standard is not dispositive.[94] The difference between Waismann's notion of "open texture" and Hart's notion of "open texture" corresponds roughly to the difference between the small number of cases where judicial discretion is due solely to the nature of language and the more common cases where judicial discretion is due at least in part to the particular legal system's structure and choice of interpretative standards.

H.

Hart's critics have claimed that the law has means or procedures for circumventing the problems of "open texture". I will briefly consider comments from three of those critics: Lon Fuller, Ronald Dworkin, and David Lyons.

Fuller, in response to an early formulation of Hart's theory of "open texture"[95], offered the following criticisms. First, judges do not usually interpret words, but rather whole sections of a statute. One cannot speak of the "standard instances" and the "penumbra" of a section in the same manner as these can be ascribed to words.[96] Second, the "core meaning" of terms in legislation derives from a consideration and application, albeit often tacit, of the legislator's purpose in enacting the

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[94] A default position in cases of uncertainty does not succeed in getting around this problem for the reasons discussed later. See infra text accompanying notes 112-113.

[95] Hart, "Positivism and the Separation of Law and Morals", 606-615.

[96] Fuller, "Positivism and Fidelity to Law", 662-663.

legislation.[97] Fuller accused Hart of subscribing to a "pointer theory of meaning, a theory which ignores or minimizes the effect on the meaning of words of the speaker's purpose and the structure of language."[98] Third, he characterized Hart as accepting meaning's dependence on function and context within formal systems (e.g., in games and in the legal system), but missing the fact that this insight could be applied more broadly to "the countless informal and overlapping systems that run through language as a whole."[99] Such systematic elements in language, Fuller argued, are what allow us to understand familiar words even when they are used in a novel sense. He asserted that this point vitiates any simple derivation of an "open texture" of law from the "open texture" of general classifying terms: "Professor Hart seems nowhere to recognize that a rule or statute has a structural or systematic quality that reflects itself in some measure into the meaning of every principal term."[100]

Under my reading of The Concept of Law, Fuller's criticisms largely miss the mark. For example, I do not think Hart would disagree with the point of Fuller's rhetorical question, "is it really ever possible to interpret a word in a statute without knowing the aim of the statute?"[101] Hart would accept Fuller's position as the starting point for judicial interpretation, but he would disagree that such resources are sufficient to avoid the

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[97] Id., 663.

[98] Id., 668-669 (footnote omitted).

[99] Id., 668 n.40.

[100] Ibid.

[101] Id., 664.

need for judicial discretion.[102] Fuller wrote: "We must ... be sufficiently capable of putting ourselves in the position of those who drafted the rule to know what they thought 'ought to be.' It is in the light of this 'ought' that we must decide what the rule 'is.'"[103] Hart's response would be that this inquiry is at least partly misguided. The rule-makers have decided "what ought to be" regarding the "plain cases" before them. (This could be seen as an answer to Fuller's criticisms about "core meaning" applying only to words. The "plain cases", the cases the rule-makers had in mind when formulating the rule, can be seen as the "core meaning" of those rules.) However, the legislators "have not settled, because [they] have not anticipated, the question which will be raised by the unenvisaged case when it occurs."[104] (I considered the difficulties of Hart's position earlier, in section F.)

Frederick Schauer has argued that Fuller overstated the importance of context in meaning and understanding. Words like "cat" and "vehicle" do have a meaning -- and, if you like, a "core meaning" -- even when they are completely shorn of any context.[105] Schauer referred to an example Fuller had proffered as a rebuttal to "core meaning": the application of the rule "no vehicles in the park" to a war monument that included a working

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[102] See, e.g., H.L.A. Hart, The Concept of Law 125-126; H.L.A. Hart, Essays in Philosophy and Jurisprudence 7-8.

[103] Fuller, "Positivism and Fidelity to Law", 666.

[104] H.L.A. Hart, The Concept of Law 126.

[105] F. Schauer, Playing By The Rules section 4.1 (forthcoming 1991).

truck.[106] Schauer wrote, and here I agree with him, that the upshot of the alleged counterexample is not that trucks are not part of the "core meaning" of "vehicle", but that the strict application of rules sometimes produces absurd results (or, at the least, results inconsistent with the rules' purposes).[107] However, Schauer did not choose to discuss what I would consider the more difficult argument to meet: Fuller's example, discussed earlier, of the way the meaning of the word "improvement" varies from context to context, and has little content when no context is present.

Fuller's arguments were directed primarily against positions that words can always be understood acontextually and that the application of legal rules usually turns on the acontextual meaning of particular terms. I think we are properly warned against taking such extreme positions in our legal theory or in our reading of Hart. However, as I have argued, a proper reading of Hart would not ascribe such positions to him.

Ronald Dworkin argued (in his early works) that there are procedural ways to circumvent the problems of "open texture", that lawyers and judges have established ways of dealing with the vagueness of words within a statute or the vagueness of a statute itself. First, there are canons of statutory interpretation "which determine what force a vague word must be taken to have on a particular occasion, or at least make its force depend upon further questions that in principle have a right answer."[108]

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[106] Fuller, "Positivism and Fidelity to Law", 663.

[107] F. Schauer, Playing By The Rules section 4.1.

[108] Dworkin, "No Right Answer?", 68.

Second, a judge might be said to have a duty to choose from among the permissible interpretations of an indeterminate statute the interpretation that "best advances the set of principles and policies that provides the best political justification for the statute at the time it was passed."[109] Third, a lawyer might argue that if a statute is indeterminate, the statute should be held to change the status quo "only to the extent justified by the indisputable core of the language employed."[110]

I do not think that Hart need be troubled by such arguments. As for the value of canons of interpretation, he wrote: "they cannot eliminate, though they can diminish, the[] uncertainties [of interpretation]; for these canons are themselves general rules for the use of language, and make use of general terms which themselves require interpretation."[111] Second, to argue that we could interpret a statute by arbitrarily delimiting the range of some term to its clear instances is to assume -- strangely -- that the line between that term's clear applications and its unclear applications can be cleanly drawn even though the line between where the term applies and where it does not cannot

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[109] Ibid.

[110] Ibid.

In the United States, a rule for interpretation similar to Dworkin's cutting-back-to-the-core rule appears to be mandated for criminal statutes. In McNally v. United States, the Supreme Court stated: "[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language. ... 'There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute.'" McNally, 107 S. Ct. 2875, 2881 (1987) (quoting Fasulo v. United States, 272 U.S. 620, 629 (1926)).

[111] H.L.A. Hart, The Concept of Law 123.

be.[112] Such a position brings many difficult questions: how much uncertainty and of what kind is necessary to signal the beginning of a term's penumbra or its borderline cases? and what if everyone agrees that the term applies to a particular case, but not everyone agrees that the case is "plain" or "clear"? A better view seems to be there is a spectrum that goes from plain case to penumbra to non-application. Dworkin seemed later to recognize the difficulty of his position, noting that "it can be hard question whether the case at hand is a hard case or an easy case."[113] (For his own theory of legal interpretation, Dworkin avoids the trouble the distinction brings by having his judge use the same method for all cases.[114])

David Lyons offered a variation on the theme of Dworkin's critique. He drew an analogy between law and ordinary language: even if we concede that law is irreducibly "open textured", "[i]t does not follow that there are determinate facts only where our current linguistic resources enable us straightforwardly to express them."[115] By analogy, Lyons argued, law has further

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[112] See J. Raz, The Authority of Law 73-74 (1979); Putnam, "The Meaning of 'Meaning'", in Mind, Language and Reality 216-217 (1975).

[113] R. Dworkin, Law's Empire 354 (1986).

[114] Id., 350-354. "Hercules does not need one method for hard cases and another for easy cases. His method is equally at work in easy cases, but since the answers to the question it puts are then obvious, or at least seem to be so, we are not aware that any theory is at work at all." Id., 354 (footnote omitted).

[115] Lyons, "Moral Aspects of Legal Theory", 7 Midwest Studies in Philosophy 223, 240 (1982).

resources which allow us to determine legal conclusions even where legal formulations have indeterminate implications.[116]

Underlying the disagreement between Lyons and Hart appear to be different assumptions regarding the nature of language or the nature of law, though these assumptions go largely unstated. Hart's position was based on the position that law is constituted by rules; that is all there is. When rules are indeterminate, law is indeterminate. It is not clear what alternative vision Lyons was defending. His argument here was that particular rule formulations are only tentative approximations of the legal truth. To evaluate that argument properly, we must be clearer about what this position asserts to be the nature of this "legal truth". There are at least two possibilities: Michael Moore's view of law as a series of platonic essences and Ronald Dworkin's view of law as a constructive interpretation of social practices. As I will consider both of these views later in this paper, I will not consider Lyons' position extensively here. However, I will briefly discuss some considerations to keep in mind when evaluating the type of arguments Lyons seemed to be invoking.

Lyons asserted that in normal language we go beyond mere words to find meaning ("reality") and, analogously, judges look beyond legal rules to find legal meaning ("the Law"). This may or may not be an argument for a distinction between a rule and its various possible formulations. However, though such a distinction would be consistent with a metaphysical realism regarding rules, it does not entail that position; we can accept the distinction between a rule and its expression in one

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[116] Ibid.

particular rule formulation without having to believe the rules are abstract (platonic) entities.[117] For example, the different rule-formulations could be like the alternative interpretations of a single rule Wittgenstein discussed in his rule-following considerations. In trying to determine the application of a particular rule, Wittgenstein wrote, we sometimes begin by offering an interpretation of the rule -- the same rule in a different formulation: "in the course of our argument we give one interpretation after another."[118] Wittgenstein's point had been that this approach would never bring us any closer to determining the correct applications of the rule than we had been to begin with. However, the various interpretations (formulations) of the rules in the example are in a sense equivalent, and they are equally powerful -- and equally impotent -- in determining the correct application of the rule.[119]

As Scott Landers argued, while both the distinction between rules and rule-formulations and the reasons for making the distinction seem clear, what is not clear is whether anything of philosophical interest follows from that distinction.[120] It is not grammatically correct to say either that a rule (rather than its formulation) has nine words or to say that Jones violated a

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[117] See G.P. Baker & P.M.S. Hacker, Wittgenstein: Rules, Grammar & Necessity 41-42; F. Waismann, The Principles of Linguistic Philosophy 82-83.

[118] L. Wittgenstein, Philosophical Investigations section 201; see also id., section 198.

[119] See id., section 198

[120] Landers, "Wittgenstein, Realism, and CLS: Undermining Rule Scepticism", 9 Law and Philosophy 177, 194-195 & n.41 (1990).

rule-formulation (rather than a rule).[121] However, the fact that we can speak of a rule separately from its formulations no more forces the conclusion that rules are entities of some platonic type than the fact that we can speak of a word's meaning separate from the definitional rules and actual applications which constitute the meaning require us to think of meanings as abstract, Fregean entities (or of understanding as a "grasp" of such entities), though Wittgenstein might note in both cases how we are "tempted" towards such misleading conclusions.[122]

Even if we accept the existence of "real rules", this may not completely solve the problem posed by the partial indeterminacy of language. For example, if there is a "real rule" which can be formulated a number of different ways, how would we choose one formulation over another? One formulation may seem to give a determinate answer to the case presented while other formulations do not, but determinacy in this case may or may not be sufficient reason to prefer one formulation over another. Further argument would be needed here.

When Lyons wrote of the law have further resources, he may have been referring to resources other than rules. Like Dworkin[123], he might have been asserting that law contains other forms of guidance: e.g., principles and policies. However, all standards -- whether canonical rules, canons of interpretation,

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[121] Id., 194 n.41.

[122] Cf. P.M.S. Hacker, Insight and Illusion, Revised Edition 325-326 & n.17 (quoting L. Wittgenstein, Philosophical Grammar 123-124 (1974), in discussing the differences between a proposition and the sentence in which it is expressed).

[123] See R. Dworkin, Taking Rights Seriously 14-45.

or general legal principles -- must be formulated in words if they are to be of use to legal actors.[124] Once we are back to dealing with language, we must worry about the indeterminacy of the borderline case.

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[124] Assuming, as most people do, that one cannot run a legal system in a complex society entirely on something as suspiciously amorphous as "an intuitive sense of justice".

Chapter 2: The Application (and Mis-Application) of Wittgenstein's Rule-Following Considerations to Legal Theory

> "I am sitting with a philosopher in the garden; he says again and again 'I know that that's a tree', pointing to a tree that is near us. Someone else arrives and hears this, and I tell him: 'This fellow isn't insane. We are only doing philosophy.'"[1]

A.

Wittgenstein's writings on "rule-following" remain an important -- and sharply contested -- part of his later thought. The reference to "rule" in those writings was both broader and more basic than the use of that term in most discussions of practical reasoning or legal theory. Wittgenstein's use of "rule" refers to all normative constraints which apply over an indefinite variety of cases, to practices where our actions might be said to be guided, to situations where characterizing actions as "correct" or "incorrect" makes sense. However, "[h]e aimed not to write a book on rules but to examine specific problems arising out of insights into the normative nature of a language, of logic and of reasoning."[2] He focused in particular on normative practices that on the surface do not seem troubling or difficult to understand: for example, using a word correctly, understanding a signpost, and continuing a simple mathematical series.[3] In such examples, the interesting question is not

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[1] L. Wittgenstein, On Certainty section 467 (1969).

[2] G.P. Baker & P.M.S. Hacker, Wittgenstein: Rules, Grammar and Necessity 39.

[3] See L. Wittgenstein, Philosophical Investigations sections 143-242.

whether a particular response or continuation is right or wrong; Wittgenstein specifically chose examples where there would be consensus on that issue. Wittgenstein's question is what is it about the rule or about ourselves which makes our responses right or wrong (or which justifies us in reaching that evaluation).

Wittgenstein's discussions on rule-following have been brought to bear on the issue of legal determinacy primarily by those who argue that law is radically indeterminate. They offer a reading of Kripke's reading of Wittgenstein[4] to support the position that rules do not have determinate applications. The argument runs along the following lines. Wittgenstein (Kripke) has shown that there is no fact of the matter to prove that I mean the same thing by my current use of a word as I did by a former use, and no fact of the matter to prove that I am applying the word (the rule that governs the word's usage) correctly.[5] Furthermore, "there is [no] fact about our past use, intention, or attitude towards a word ... that controls or restricts or

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[4] S. Kripke, Wittgenstein on Rules and Private Language (1982); see, e.g., Yablon, "Law and Metaphysics" (Book Review), 96 Yale Law Journal 613 (1987).

At one point in his book, Kripke hedged regarding the extent to which the argument he elaborated was actually Wittgenstein's. S. Kripke, Wittgenstein on Rules and Private Language 5. At other places, he was more confident about the ascription. See, e.g., id., 70-71. My view is that Kripke's reading does not accurately reflect Wittgenstein's position, and that Wittgenstein's actual position is superior to the one Kripke (more or less) ascribed to him. While I will in passing offer arguments to support both of these assertions, it is not my purpose in this paper to go into these disputes in any depth. See also infra note 11.

[5] See S. Kripke, Wittgenstein on Rules and Private Language 70-71.

limits our future uses of that word."[6] If there is no fact of the matter that tells us how to use a word, if any way we go on can be characterized as following the rule, then, it seems, anything goes.[7] The legal indeterminacy theorists then follow Wittgenstein (Kripke) in concluding that judgments of correct and incorrect (in following a rule or in the use of a word) -- that is, the whole concept of meaning -- is based on (can only be based on) the consensus of the community. We are using a word correctly if and only if our use agrees with that of the vast majority of our peers.[8] This approach fits well with the position of many legal indeterminacy theorists. They need not, and do not, deny that there are "easy cases" in the law. However, they attribute the easiness of these cases not to language but to a (temporary) consensus of the society (or the relevant legal subset of society).[9] This consensus has a

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[6] Yablon, "Law and Metaphysics", 628 (footnote omitted).

[7] See S. Kripke, Wittgenstein on Rules and Private Language 11-13, 77-78, 84-93; see, e.g., Yablon, "Law and Metaphysics", 632; cf. L. Wittgenstein, Philosophical Investigations section 201:

> This is 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.

(However, section 201 continues: "It can be seen that there is a misunderstanding here ....")

[8] See S. Kripke, Wittgenstein on Rules and Private Language 90-98, 110-112; see, e.g., Yablon, "Law and Metaphysics", 632-636.

[9] See, e.g., Yablon, "Law and Metaphysics", 632-636; Yablon, "The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation", 6 Cardozo Law Review 917,

political or ideological component, and some might assert that it has been imposed by more powerful elements of the community upon the rest. If and when the society's ideology changes, which cases are considered easy will, according to this approach, also change.[10]

B.

Wittgenstein's lessons were different.[11] Kripke was right

918-920, 929-945 (1985); M. Tushnet, Red, White, and Blue 54-56, 60-69 (1988).

[10] See, e.g., Yablon, "Law and Metaphysics", 632-636.

Cf. Goodrich, "Law and Modernity", 49 Modern Law Review 545, 556 (1986):

> Legal doctrine represents the manner in which lawyers read legal texts and those readings are by and large predictable once the history and contemporary constituents of that interpretative community have been studied. What is at issue, however, in the debate as to law and criticism is not so much the reality of the meanings and values wearily peddled by the legal doctrinal community but rather whether or not it is desirable to allow the profession to continue to transmit those values and doctrines, that ideology and those myths, without being made explicitly accountable for the political choices underlying the development of the law.

[11] It is very hard to find a Wittgenstein Scholar who is in substantial agreement with Kripke's reading. For contrary readings, see, e.g., McDowell, "Wittgenstein On Following a Rule", 58 Synthese 325 (1984); Blackburn, "The Individual Strikes Back", 58 Synthese 281 (1984); G.P. Baker & P.M.S. Hacker, Scepticism, Rules and Language (1984); C. McGinn, Wittgenstein on Meaning 59-92 (1984); Goldfarb, "Kripke on Wittgenstein on Rules", 82 Journal on Philosophy 471 (1985); N. Malcolm, Nothing is Hidden 154-181 (1986); D. Pears, The False Prison, Volume Two 463-501 (1988); Lewis, "Wittgenstein and Rule-Scepticism", 38 Philosophical Quarterly 280 (1988). (The hybrid of Wittgenstein's text and Kripke's (mis)reading is considered such a monstrosity by some that it has gained the name "Kripkenstein". Candlish, Critical Notice (reviewing R. Walker, The Coherence Theory of Truth), 99 Mind 467, 469 (1990).)

One note of caution: Wittgenstein's ideas in the

in reading Wittgenstein as asserting that there is no fact of the matter (no "superlative fact"[12]) which justifies the way we understand rules.[13] He is wrong, however, in portraying this as a "sceptical problem" which requires a "sceptical solution".[14] If the signs and symbols of the rule were somehow insufficient to allow us to know whether a certain action was or was not in accordance with the rule, how could the addition of further signs and symbols in our minds (or in the platonic realm of Ideas)

Philosophical Investigations, including the material on rule-following, is presented in short passages which are often aphoristic or cryptic. To read a particular argument or viewpoint into these comments requires an implicit or explicit filling out of details and clarification of ambiguities. The interpretation I present is by no means the only tenable one. However, it does coincide generally with those given by Peter Hacker, Gordon Baker, David Pears, John McDowell, Colin McGinn, and Simon Blackburn, among others (who, whatever their disagreements about other aspects of Wittgenstein scholarship, are in consensus or near-consensus regarding the aspects of rule-following relevant to my discussion).

[12] See L. Wittgenstein, Philosophical Investigations section 192.

[13] Simon Blackburn noted that Wittgenstein would not have expressed the point in those terms. Blackburn, "The Individual Strikes Back", 285. As an alternative more congenial to Wittgenstein's approach, Blackburn offered: "taking a term in a certain way is something different from presenting anything as an aid to understanding it, or from accepting anything as aids to understanding it." Id., 288.

[14] See S. Kripke, Wittgenstein on Rules and Private Language 61-69.

Crispin Wright has pointed out that Kripke's reading of Wittgenstein inverts the focus of Wittgenstein's discussions. Kripke's Sceptic has us wondering how we could know what rule we are or had been following, wondering, in fact, about "the very existence of rules and rule-following". Wright, Critical Notice, (reviewing C. McGinn, Wittgenstein on Meaning), 98 Mind 289, 303 (1989). By contrast, Wittgenstein was actually concerned with "the nature and epistemology of rule-following" -- that is, how we can know what a rule requires of us in a particular situation. Ibid.

remedy this insufficiency? If we "restrict the term 'interpretation' to the substitution of one expression of the rule for another", "[w]hat 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 a rule' and 'going against it' in actual cases."[15] The idea of a "sceptical problem" comes from the philosopher's temptation, the philosopher's anxiety, to find some magical intermediary between rules and actions. As David Pears wrote,

> The point is not just that there is often a need to interpret rules by defining their terms, but also that the process of defining a term and then defining the terms in the definition cannot possibly close all gaps, because sooner or later there will have to be a leap, not guaranteed by any definition, from language to the world.[16]

There is a sense in which even Pears' discussion concedes too much to Wittgenstein's opponents: to write of "gaps" and "a leap ... from language to the world" implies that language can be understood separate from its applications to and in the world, a position Wittgenstein would not have endorsed.[17]

In easy cases at least, we all apply the rule in the same way. For example, we would all continue the series "add 2": "1000, 1002, 1004, ...".[18] The "we" of the previous two

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[15] L. Wittgenstein, Philosophical Investigations section 201.

[16] D. Pears, The False Prison, Volume Two, 432.

[17] Elsewhere, Pears himself wrote: "No rule can be completely laid down in words and the complete expression of any rule must include its actual applications." Id., 468 (footnote omitted).

[18] See L. Wittgenstein, Philosophical Investigations sections 185-187.

sentences would include all those who share the same form of life, who have been trained in the same rules in the same way. (I will discuss Wittgenstein's concept of a form of life later in this section.) In these easy cases, it is not fuel for scepticism that nothing more can be offered in justification for how the rule is applied. The sceptic's complaint is unwarranted because there is nothing more that could be offered as justification and there is nothing more that is needed as a justification.[19] To the sceptic who keeps asking why, a different form of response is eventually necessary. "If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: 'This is simply what I do.'"[20] One might also reply: "that is just what we call

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[19] See L. Wittgenstein, Tractatus Logico-Philosophicus section 6.51 (1922):

> Scepticism is not irrefutable, but obviously nonsensical, when it tries to raise doubts where no question can be asked. For doubt can exist only where a question exists, and an answer only where something can be said.

Unlike most aspects of his early thought, Wittgenstein never changed his position on or his approach to the question of scepticism. See P.M.S. Hacker, Insight and Illusion, Revised Edition, 79.

[20] L. Wittgenstein, Philosophical Investigations section 217. Cf. H. Putnam, The Many Faces of Realism 85 (1987):

> Recognizing that there are certain places where one's spade is turned; recognizing, with Wittgenstein, that there are places where our explanations run out, isn't saying that any particular place is permanently fated to be 'bedrock', or that any particular belief is forever immune from criticism. This is where my spade is turned now. This is where my justifications and explanations stop now.

'adding 2' (or 'the colour red', and so on)."[21] There is no room in the language game for further justification or for further doubt. "If after full training and all the recommended checks I still 'doubt' whether I am using a word correctly, my 'doubt' goes beyond the particular language-game and is automatically transformed into a request for an answer to the conceptual question 'What counts as following a rule?'"[22]

The way we are inclined to go on is what we call the "correct response". However, the fact that we all go on the same way is not what makes it correct (though, as I will discuss later, it is what makes our practices sensible). We do not determine whether a flower is red by first asking everyone around what they think the flower's colour is.[23]

Like H.L.A. Hart, Wittgenstein sought a middle position on rules. Wittgenstein "attempt[ed] to point to an alternative account of normativity to the 'rules-as-rails' imagery of platonism, to explain how there can be a standable middle ground between the hypostatization of rules and the denial of their

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[21] G.P. Baker & P.M.S. Hacker, Scepticism, Rules & Language 85; see also id., 78:

> If the question is: "What do you mean by 'W'?", then it is fully answered by an explanation of meaning (hence without reference to any community). If the question is "Are you sure that you know what 'W' means?" (or "Are you sure that your explanation of what 'W' means is correct?") then it is typically (though not necessarily) answered by "Yes, of course I know what 'W' means! I speak English. I have used 'W' innumerable times and heard it used innumerable times." [footnote omitted]

[22] D. Pears, The False Prison, Volume Two, 442.

[23] See L. Wittgenstein, Zettel section 431; see also L. Wittgenstein, Remarks on the Foundations of Mathematics, Revised Edition, 336-337 (1983).

existence."[24] On one hand, Wittgenstein did not want to ascribe the application of rule to the rules themselves qua metaphysical entities. On the other hand, he did not wish to deny that (it makes sense to say that) a rule determines its correct application or interpretation.[25]

C.

Wittgenstein's discussions on rule-following in Philosophical Investigations focused on easy cases, like the mathematical series "add 2".[26] In section 240, he wrote:

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

Wittgenstein focused on "easy cases" because he was interested in dispelling certain misunderstandings and mythologies regarding what makes these instances of applying a word or continuing a series easy. There cannot be a fact which determines how to go on: no mental state, inner voice, or disposition, and no Platonic rule-entity that we somehow grasp. For Wittgenstein, there is no mediating entity which can justify or explain why we all go on the same way when continuing the series "add 2" or applying the colour-word "red". It simply is the case that persons who share the same form of life and are trained in the

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[24] Wright, Critical Notice, 297.

[25] See G.P. Baker & P.M.S. Hacker, Wittgenstein: Rules, Grammar and Necessity 81-106.

[26] L. Wittgenstein, Philosophical Investigations sections 185-187.

same way go on in the same way in following rules. As John McDowell described Wittgenstein's position: "nothing ... keeps our practices in line except the reactions and responses we learn in learning them."[27]

The analysis is complicated somewhat by the recognition that for Wittgenstein concepts like "the same" and "agreement" cannot be understood a priori or otherwise independent of the problem of rule-following:

> The word "agreement" and the word "rule" are related to one another, they are cousins. If I teach anyone the use of the one word, he learns the use of the other with it.
>
> The use of the word "rule" and the use of the word "same" are interwoven. (As are the use of "proposition" and "true".)[28]

The following may help to explain Wittgenstein's point about the relation between rules and "the same": if we say that two people are going on in the same way (e.g., that they are playing the same game or applying the same concept), any attempt to explain what justifies that conclusion is likely to end up with the assertion that the people are following the same rule or set of rules.[29]

For Wittgenstein, the clarity of clear cases derives from certain background facts regarding agreement in judgments, agreement in social context, and stability of the world. In

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[27] McDowell, "Non-Cognitivism and Rule-Following", in Wittgenstein to Follow a Rule 149 (S. Holtzman & C. Leich, eds. 1981).

[28] L. Wittgenstein, Philosophical Investigations sections 224-225; see L. Wittgenstein, Remarks on the Foundations of Mathematics, Revised Edition, 344.

[29] See L. Wittgenstein, Remarks on the Foundations of Mathematics, Revised Edition, 392-393.

Philosophical Investigations section 242, he stated:

> If language is to be a means of communication there must be agreement not only in definitions but also (queer as this may sound) in judgments. ... It is one thing to describe methods of measurement, and another to obtain and state results of measurement. But what we call "measuring" is partly determined by a certain constancy in results of measurement.

Briefly, "judgments" here includes all the connections we make (through our actions) between language and the world: between a rule and its application, between how we have used a term in the past and whether we apply it to a particular new instance, between how we have been trained to understand a practice (for example, adding or measuring) and how we perform it ourselves, and so on.[30]

It is a matter of fact that we all go on the same way in the series "add 2" after we have been trained in mathematics; we do not tend to diverge in our answers upon reaching 1000. After learning how to use a ruler, all of our measurements of the same object will be the same. Similarly, after being taught the colour words by ostensive definitions, we will all agree that this particular tomato is red and that patch of grass is green.[31] If differences in individual judgments created divergences in the way persons continued the series "add 2" or if instabilities in the world caused us to get different results every time we measured the same object, then the concepts within those practices -- and the practices themselves -- would cease to have

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[30] See C. McGinn, Wittgenstein on Meaning 57 (1984) (equating "judgment" with "unreflective and 'blind' application of a sign").

[31] See L. Wittgenstein, Remarks on the Foundations of Mathematics, Revised Edition, 342.

meaning.[32]

One could say that the fact that we all go on the same way in our practices and in our uses of words after rudimentary training is just a happy coincidence[33], though a coincidence without which communication would be impossible.[34] In section 241, Wittgenstein writes:

> "So you are saying that human agreement decides what is true and what is false?" -- It is what human beings <u>say</u> that is true and false; and they agree in the <u>language</u> they use. That is not agreement in opinions but in form of life.

The following is from one of Wittgenstein's unpublished

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[32] <u>See</u>, <u>e.g.</u>, L. Wittgenstein, <u>Philosophical Investigations</u> section 142:

> The procedure of putting a lump of cheese on a balance and fixing a price by the turn of the scale would lose its point if it frequently happened for such lumps to suddenly grow or shrink for no obvious reason.

<u>See also</u> L. Wittgenstein, <u>Remarks on the Foundations of Mathematics</u>, Revised Edition, 38, 382. <u>Cf.</u> L. Wittgenstein, <u>Zettel</u> section 351:

> "If humans were not in general agreed about the colours of things, if undetermined cases were not exceptional, then our concept of colour could not exist." No -- our concept <u>would</u> not exist.

For a more detailed discussion of how agreement in judgments and stability in nature work as presuppositions in our concepts, see G.P. Baker & P.M.S. Hacker, <u>Wittgenstein: Rules, Grammar and Necessity</u> 229-251.

[33] <u>Cf.</u> D. Pears, <u>Ludwig Wittgenstein</u> 179 (1986): "We could say that this is fortunate, except that this would be like saying that it is fortunate that life on earth tolerates the earth's natural atmosphere. What we ought to say is that there is as much stability as there is."

[34] <u>See</u> L. Wittgenstein, <u>Philosophical Investigations</u> section 242, quoted above.

manuscripts[35]:

> How is the application of a rule fixed? Do you mean "logically" fixed? Either by means of further rules, or not at all! -- Or do you mean: how is it that we agree in applying it thus and not otherwise? Through training, drill and the forms of our life.
>
> This is a matter not of a consensus but of forms of life.

"Form(s) of life" in part sums up, and in part hints at an explanation for, the fact of our general agreement.[36] Rudolf Haller has shown that Wittgenstein uses this phrase in at least two different ways: 1) (in the singular, Lebensform) to summarize "the common human way of acting", that which is distinctly and universally human; and 2) (in the plural, Lebensformen) to emphasize diversity between societies and even between different communities within a single society.[37]

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[35] It is quoted in G.P. Baker & P.M.S. Hacker, Wittgenstein: Rules, Grammar and Necessity 258, and labelled "MS 160, 51".

[36] For an overview of how Wittgenstein used the concept of "form(s) of life", see R. Haller, Questions on Wittgenstein 129-136 (1988).

Stanley Cavell summarized the idea as follows:

> Our sharing routes of interest and feeling, modes of response, senses of humor and of significance and of fulfillment, of what is outrageous, of what is similar to what else, what a rebuke, what forgiveness, of when an utterance is an assertion, when an appeal, when an explanation -- all the whirl of organism Wittgenstein calls "forms of life". Human speech and activity, sanity and community, rest upon nothing more, and nothing less, than this.

S. Cavell, Must We Mean What We Say 52 (1976).

[37] R. Haller, Questions on Wittgenstein 130-136. One example of the second usage appeared in L. Wittgenstein, Lectures and Conversations on Aesthetics, Psychology & Religious Belief 58 (1978): "Why shouldn't one form of life culminate in an utterance of belief in a Last Judgment?"

The role the concept "form of life" might play in explaining disagreement will be discussed in a later part of this section. For now, one can get an overview of Wittgenstein's analysis of agreement: we go on the same way because of commonalities in our training and in our nature. It is far from inevitable that all persons will always react in the same way in all matters; where we do not go on the same way there will simply be no stable practice.

In contrasting Wittgenstein with certain Critical theorists, I do not mean to imply that there is any basis in his thought for denying the Critical theorists' point that some "clear cases" are clear because of political or ideological consensus rather than because of some more peremptory claim about the correct or incorrect use of words. That a certain practice is or is not a violation of "equal protection" may seem clear and obvious to us; but the clearness of the question may disappear if we go either forward or backward one generation in time. Finally, I am not sure that there is a bright line between those "clear cases" that fit under the rubric of Wittgenstein's rule-following considerations and those that do not. That is, I am not sure that a theorists can usually (if ever) be confident in determining which interpretative questions are completely beyond the pale of legitimate debate ("outside the language game").

D.

For an argument that Wittgenstein's phrase "form(s) of life" referred primarily to cultural rather than biological aspects of human nature, see G.P. Baker & P.M.S. Hacker, Wittgenstein: Rules, Grammar and Necessity 238-243.

"Philosophy is in fact the synopsis of trivialities."[38]

If there is a danger -- exemplified by Kripke and others -- of reading Wittgenstein's rule-following considerations as scepticism which undermines meaning and certainty, there is also an opposite danger of over-reading Wittgenstein's message of assurance. Wittgenstein wanted to assure us that despite (because of) the absence of some "internal" or platonic facts of the matter, we can speak of "correct" and "incorrect" in our most basic normative behaviour. The over-reading danger occurs when Wittgenstein's message is read as guaranteeing ascriptions of correctness or the achievement of consensus in more controversial matters. For example, while Brian Langille argued correctly that legal theorists could not use Wittgenstein to ground positions of radical indeterminacy[39], he went too far in implying that a correct appreciation of Wittgenstein could be used to rebut all sceptical analyses of law.

In his article, Langille focused on "strong claims about the indeterminacy of language and the impact of this alleged indeterminacy upon our ideas about the nature of constitutional discourse."[40] His particular targets were those theorists who claimed that Wittgenstein's writings were the basis of their

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[38] L. Wittgenstein, Wittgenstein's Lectures: Cambridge 1930-1932 26 (D. Lee, ed. 1980). The preceding sentence reads: "But the proper synopsis of these trivialities is enormously difficult, and has immense importance."

[39] Langille, "Revolution Without Foundation: The Grammar of Scepticism and Law", 33 McGill Law Journal 451 (1988); see also Hutchinson, "That's Just the Way It Is: Langille on Law", 34 McGill Law Journal 145 (1989).

[40] Langille, "Revolution Without Foundation", 452.

arguments. For the reasons given earlier, I agree with Langille that Wittgenstein did not believe that language was radically indeterminate, and that Wittgenstein's writings could not be used to support the conclusions of the indeterminacy theorists.[41] However, I must part company with Langille when he tried to take his reading of Wittgenstein one step further, writing of "the explication of the grammar of law, and ... the grammar of constitutional jurisprudence."[42]

Wittgenstein used "grammar" in a way somewhat broader than, but clearly connected to, the ordinary usage of that term.[43] "In [Wittgenstein's] sense the grammar of a term includes a wide variety of practices connected with its use and the criteria and background conditions that govern its normal application."[44] A phrase's grammar is constituted in part by the rules which determine how that phrase can be used, such that if those rules are violated the resulting sentence will have no sense. For

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[41] See id., 452-475, 486-495.

[42] Id., 498. See also Langille, "The Jurisprudence of Despair, Again", 23 University of British Columbia Law Review 549 (1989): id. at 558 ("the grammar of judicial review"); id. at 560 n.43 ("law's grammar", "the grammar of common law adjudication"); and id. at 562 ("the grammar of constitutional adjudication"). The point is simple: Wittgenstein used the term "grammar" when talking about words and concepts ("Rules of grammar are rules for the use of words" -- P.M.S. Hacker, Insight and Illusion, Revised Edition, 181), and, as I will argue below, it is at best misleading to move that analytical tool to a different set of topics -- social practices.

[43] See generally P.M.S. Hacker, Insight and Illusion, Revised Edition 181-185; G.P. Baker & P.M.S. Hacker, Wittgenstein: Rules, Grammar and Necessity 34-64. For Wittgenstein's claim that his use was not different from the ordinary use, see L. Wittgenstein, Wittgenstein's Lectures: Cambridge 1930-1932 97-98.

[44] E. Wolgast, The Grammar of Justice x (1987).

example, it is part of the grammar of numbers that colours cannot be ascribed to them and part of the grammar of pain that one cannot claim to be in doubt about one's being in pain.[45]

Wittgenstein argued that many philosophical problems resulted from violating grammatical rules (for example, by mistakenly applying the grammar of material object statements to first-person psychological statements).[46] If we would only follow strictly to a term's grammar and stay within the language game we are considering, he argued, we would avoid metaphysical muddles and temptations to scepticism.[47]

When Langille used Wittgenstein's arguments about the relevance of human nature and human practices to the meaning of simple terms to ground his own statements about "the grammar of law" and law "being grounded in a bedrock of practice"[48], he was not following Wittgenstein's ideas, he was flouting them. He was doing just what Wittgenstein warned against, taking terms -- in this case Wittgenstein's concepts of "grammar", "practice" and "bedrock" -- outside their usual context, outside their language game. These concepts belong to Wittgenstein's analysis of "clear cases" and unreflective applications.

The jump from the grammar of language to "the grammar of law" implies that, analogous to Wittgenstein's discussions of

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[45] See L. Wittgenstein, Philosophical Investigations section 246; id., page 221.

[46] See L. Wittgenstein, Zettel section 434; see also L. Wittgenstein, Philosophical Investigations section 290.

[47] See, e.g., L. Wittgenstein, Philosophical Investigations sections 90, 520.

[48] Langille, "Revolution Without Foundation", 497-498.

meanings and mathematical series, the definitions of legal terms and the moves within the legal discourse cannot sensibly be challenged and are not in need of further justification. I am not arguing that Wittgenstein's approach, or even his analysis in terms of "grammar", could never be helpful in the analysis of social institutions or social theory.[49] However, Langille makes the significant move to "the grammar of law" without either arguing for the transition or even noting that argument might be needed.

The idea of "grammar" (and the related idea of "criteria") is central to Wittgenstein's work, but it is also controversial. It is an idea that is used to turn aside challenges to (apparent) knowledge-claims (e.g., "how do you know that the next number in the series should be "12"?") and the viability of the idea is thus crucial to Wittgenstein's response to scepticism. Much of what makes the idea controversial is doubt as to whether Wittgenstein has done enough to show that certain connections are "merely grammatical".

This is why I am hostile to a casual borrowing of Wittgenstein's idea of "grammar". Even if we accept that this form of analysis is warranted where Wittgenstein used it, there is no reason to believe that it will be warranted in a completely different context (and a number of reasons to believe that it would not be warranted). The burden is always on the theorist who proposes a simple answer to scepticism. To use Wittgenstein's analysis casually and out of context is to falsely invoke his authority, to fail to recognize what was difficult in

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[49] Cf. E. Wolgast, The Grammar of Justice.

the original materials, and to make no attempt to take on the burden of showing why the analysis should be extended.

Langille's comments here are brief and cryptic, but they hint at an argument that cannot be sustained. Along with his reference to "the grammar of law" and "the grammar of constitutional jurisprudence", Langille described Owen Fiss as having created "the 'structural conditions' for a Wittgensteinian view of law -- the existence of a set of constraining rules utilized by judges as a social group"[50], and stated that "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."[51] Within its context, these comments seem to imply that for Langille the practice of law is like the series "add 2" and the application of the colour-term "red" in needing no further justification (and that any present consensus in law can be explained in much the same way as Wittgenstein explained our all going on the same way in the series "add 2").

If Langille in fact held this position -- and perhaps he did not -- than I must disagree with him. The analogy does not hold. Unlike the matters with which Wittgenstein was concerned, law is a reflective activity: the participants consider, discuss and argue over how they should go on. Contrary to Wittgenstein's descriptions of mathematicians and mathematical series[52],

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[50] Langille, "Revolution Without Foundation", 498.

[51] Id., 499.

[52] L. Wittgenstein, Philosophical Investigations section 240, quoted above; see supra text accompanying notes 26-27.

disputes do break out in law over the question of whether a rule has been obeyed or not. Legal practice, locally and generally, is subject to criticism and is in need of further justification.[53]

An initial and basic point in understanding the limitations of applying Wittgenstein's rule-following considerations to legal theory (at least the limitations of any direct application) is seeing how those considerations were meant to leave language and life just the way they are. Though Wittgenstein (and some commentators on Wittgenstein) may at first or on a superficial level seem to have been proposing a sceptical position on meaning, the only role scepticism plays in his rule-following considerations is as the absurd consequence of mistaken premises he sought to correct: "if this conception of the facts were the right one, then we wouldn't know such and such, but we do, so we need this other conception of the facts."[54] Words do have

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[53] In a recent lecture, Joseph Raz argued that H.L.A. Hart's The Concept of Law could be read as putting forward a similar Wittgensteinian practice-based view of law. However, Raz claimed, if that is the correct reading of Hart, then Hart's approach was mistaken for the reasons I outlined in this section. Lecture by Joseph Raz, Oxford University, 10 October 1990.

Though I believe that Wittgenstein's analysis is most useful in "clear cases" (where there is a consensus as to the appropriate response and choices are made automatically and unreflectively), I do not mean to foreclose the argument that a Wittgensteinian approach might have a role within a proper analysis of "hard cases" (where our judgments and choices diverge). For example, one might argue that we disagree about the meaning of terms like "democracy" because we disagree about which criteria should be used as necessary and sufficient conditions for the term's application, but that at the level of the criteria themselves, whether a criterion is met or not is a question we would decide unreflectively and about which there would be an agreement in judgments. (This argument is based on a suggestion made to me by Joseph Raz.)

[54] S. Blackburn, Spreading the Word 99 n.17 (1984).

meaning, and there are unique correct answers to simple mathematical questions. These are the starting points both for us in our daily use of language and for Wittgenstein in his rule-following considerations. Wittgenstein's aim is "to alter our conception of the facts we take ourselves to know"[55]; but whether he succeeds or fails in persuading us, we have no reason to create or apply rules differently from the way we do now. Most, if not all, of the problems in law and legal theory occur at a different level of abstraction (or in a different area of philosophy altogether).[56]

E.

Dennis Patterson used discussions of legal theory to offer a possible solution to problems raised in Wittgenstein's rule-following considerations. He then, in turn, used his reading of Wittgenstein as the basis for a particular view of law.[57] His emphasis was on constructing a new approach to law and to legal interpretation. Going somewhat against the focus of the article, I will discuss it primarily in terms of how well it works as a discussion of and application of Wittgenstein's ideas. Though Patterson's approach is more sophisticated than Langille's, I fear that it is vulnerable to many of the same criticisms.

Within Wittgenstein's discussions of rule-following, it remained a difficult question what it was that made one

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[55] Ibid.

[56] See F. Schauer, Playing By The Rules section 4.3.

[57] Patterson, "Law's Pragmatism: Law as Practice & Narrative", 76 Virginia Law Review 937 (1990).

application (extension) of a rule rather than another correct. Patterson considered two responses within the secondary literature on Wittgenstein: those who believe that it is the rule itself which somehow determines "how to go on" and those who believe that only a community-consensus about how to go on makes one approach rather than another correct.[58] In thinking about the problem of rule-following within law, Patterson offered an approach half-way between those two. According to this third approach, the extension of a rule is not determined by the rule alone or merely by a consensus within the relevant community about the right answer. There is a reference to the community, but it is to determine the rule's point or purpose, and it is by reference to this point or purpose that the extension of the rule can be determined.[59]

Once we are talking about interpreting law according to the purpose of particular statutes (or the purpose of the area of law in general or the purpose of law itself), a collective, ongoing debate to "construct" the purpose, and "law as narrative", the similarities between Patterson's approach and that of Ronald Dworkin (or Lon Fuller) become obvious.[60] I do not want to focus here on the end-product, on the merits of Patterson's (or Dworkin's) approach to law, but rather to focus on the way he

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[58] See id., 942-952.

[59] Id., 953-957.

[60] See id., 959-965, 980-989. While Patterson did not discuss the affinities between his approach and Dworkin's, he did point out the similarities between his approach and Fuller's. Id., 960-963.

claimed that his approach was grounded in Wittgenstein's ideas.[61] The first thing worth noting is the strangeness of applying Wittgenstein's rule-following considerations to law at all. Though the name is the same, "rules" within Wittgenstein's discussions are quite different from "rules" in legal theory and practice.

Wittgenstein was concerned with the way we follow the "rules" in the use of descriptive language and in simple mathematics, the unreflective way in which we (for example) apply colour terms to objects and continue simple mathematical series (for example, "2, 4, 6, 8, 10, ..."). Wittgenstein's purpose in his discussions was not to teach us how to continue series or apply terms in more complicated cases, or to assert in the easier cases that we were not in fact following a rule. His purpose was to deny some philosophers' views about what goes on when we follow a rule and to begin work towards creating an alternative

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[61] The published article pulled back somewhat from the exegetical claims that had been made in an earlier, unpublished version of the same paper. In one footnote in the published article, Patterson wrote in passing: "[t]he present Article is an explicit attempt to move beyond Wittgenstein", id., 940 n.11, and in another footnote he added, "[f]or the sake of accuracy, I should reaffirm that my primary interest in discussing Wittgenstein's thoughts on rule-following is not in rendering an authoritative interpretation of Wittgenstein." Id., 971 n.124.

Nevertheless, much of the article was devoted to a detailed discussion of Wittgenstein's works and the relevant secondary literature, so I believe a focus on Patterson's ideas as a reading of Wittgenstein is proper (though more detailed exegetical questions will not be raised). For example, I do not think one can invoke Wittgenstein's discussions of rule-following, and then reply to the criticism that one is using a completely different idea of "rules" than Wittgenstein did by stating merely that correct exegesis is not one's primary objective. If one is deviating in substantial ways from the original project, then it is misleading at best to invoke that project (without further substantial justificatory work) in support.

view.[62]

In Wittgenstein's terms, one is confusing language games if one tries to use the concepts and analyses of the unreflective application of colour-terms to understand the application of rules which attempt to guide and coordinate human behaviour. To see the difficulty, consider one of Patterson's conclusions: hard cases in the application of legal rules are decided by the construction of plausible narratives of the point of the practice (whether that is the point of the practice of law in general or the point of a practice within law, like making wills).[63] Whatever value this analysis might have for difficult legal cases, it is out of place in the areas Wittgenstein used to discuss rule-following: the application of colour-terms, simple mathematical series, reading, and so on. Wittgenstein might have found some sense in the notion that the practice of mathematics has a point (perhaps some connection with the way we operate in commercial life), but reference to that purpose would not help us to solve a difficult mathematical problem (or to create a consensus in a solution where none had been before).

Wittgenstein did urge us to look at language from the perspective of the role the words play in our lives. For Wittgenstein, emphasizing use within a process of ascertaining

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[62] The extent to which his discussions include a full alternative view rather than simply some suggestions and questions regarding an alternative view remains controversial in the secondary literature, but it is not important for our purposes.

[63] Id., 983-995.

meaning[64] is a way to avoid imputing inappropriate metaphysical overtones to the concepts we have. As the problem of metaphysicizing concepts is as problematic in law as anywhere[65], I certainly would not deny that Wittgenstein's approach could be usefully applied to law. In fact, I think it would be fair to describe the approach Hart used in two of his early articles in analyzing legal concepts as Wittgensteinian in his emphasis on how concepts are actually used.[66] Patterson's approach may have great merit on its own terms; however, as an explication of or a derivation from Wittgenstein's rule-following considerations I believe it fell short.

F.

Wittgenstein's discussions of rule-following centre on what explanations can and cannot be given in understanding the

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[64] Patterson claimed that Wittgenstein equated meaning with use. Many commentators believe that this claim is too strong, that Wittgenstein emphasized use but did not reduce meaning to use alone. One argument for this second view is that Wittgenstein never stated simply "meaning is use". Patterson's quotation to that effect, "Law's Pragmatism", 956, is in fact taken out of context. The relevant sentence from Philosophical Investigations section 43 reads in full:

> For a large class of cases -- though not for all -- in which we deploy the word "meaning" it can be defined thus: the meaning of a word is its use in the language.

[65] A good discussion of this problem is given in Cohen, "Transcendental Nonsense and the Functional Response", 35 Columbia Law Review 809 (1935).

[66] H.L.A. Hart, Definition & Theory in Jurisprudence (1953); Hart, "Theory and Definition in Jurisprudence", Proceedings of the Aristotelian Society, Supplementary Volume 29, 239-264 (1955).

consensus that pervades most of our uses of language (and mathematics). My interest in this paper has been in whether those remarks, though aimed specifically at "clear cases" -- in particular, at explaining (causally and conceptually) our agreement in such cases[67] -- can also help us understand what explanations can and cannot be given for our failure to reach consensus in other ("hard") cases. There are ample reasons to believe that we cannot directly apply Wittgenstein's ideas, meant for clear cases, to hard cases. As Simon Blackburn has pointed out, it is the "automatic and compelling nature of rule-following" in clear cases that made them interesting to Wittgenstein.[68] The way we think about clear cases -- and about "correct" and "incorrect" in clear cases -- differs sharply from our thinking in hard cases. As Blackburn wrote, "we [may] have some title to regard ourselves as thinking the truth when (as when we accept a proof) we can form no conception of what it would be to think differently. But it would not follow at all that we have the same title when we are all too aware of the possibility of thinking differently."[69]

John McDowell offered some suggestions on how Wittgenstein's

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[67] Cf. D. Pears, The False Prison, Volume Two, 432:

> It is important and worth emphasizing that [Wittgenstein] was not specially interested in the kind of doubt that rule-followers often feel about borderline cases. ... What interested him was the possibility of always capping a doubt that had been settled up to a point with a further doubt which still remained to be settled beyond that point.

[68] Blackburn, "Rule-Following and Moral Realism", in Wittgenstein: to Follow a Rule 170.

[69] Id., 170-171.

ideas about clear cases might be extended to hard cases (though he admitted that these thoughts might be extensions of Wittgenstein's ideas[70]). First, in cases where there is no consensus on whether to apply some word or concept (particularly common with evaluative concepts), it might still be the case that, to one person, how to go on seems obvious. Though that person knows that other people disagree, he may not be able to understand how they could. His reaction to them might be: "'But surely you can see...?'"[71] That quote from Philosophical Investigations continued: "That is just the characteristic expression of someone who is under the compulsion of a rule."[72] In other words, McDowell is suggesting that in many hard cases, some persons have the same feelings that they have in clear cases, in cases of consensus.[73] In an analysis that parallels the work of Stanley Fish, he hints that the difference between clear cases and hard cases might reflect the difference between people who share the same "whirl of organism"[74] and those who

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[70] McDowell, "Non-Cognitivism and Rule-Following", 160 n.14.

[71] L. Wittgenstein, Philosophical Investigations section 231; McDowell, "Non-Cognitivism and Rule-Following", 151-152.

[72] L. Wittgenstein, Philosophical Investigations section 231.

[73] Cf. L. Wittgenstein, Remarks on the Foundations of Mathematics, Revised Edition, section 115: "But if I simply reply: 'Different? -- But this surely isn't different!' -- what will you do? That is: somebody may reply like a rational person and yet not be playing our game."

[74] McDowell, "Non-Cognitivism and Rule-Following", 151-153; Fish's analogous concept is "interpretive communities", Wittgenstein's is "forms of life". For an elaboration of Fish's analysis, see S. Fish, Is There a Text in This Class? 1-17, 167-173, 303-371 (1980); S. Fish, Doing What Comes Naturally 82-84, 141-160, 302-305, 580 n.3 (1989).

have (belong to) different ones. Thus, there could be seen to be a variety of intermediate situations between the clearest of clear cases and the hardest of hard cases. There are two parameters: the extent of agreement amongst persons and how many believe that their chosen result is obvious (they could not imagine a contrary conclusion). For example, there could be consensus about the result without any participant having the same (type of or level of) certainty he or she would have in (e.g.) continuing the series "add 2".[75]

McDowell's second suggestion was that in the background of hard cases there might be an underlying agreement about what constitutes reasonable or acceptable arguments.[76] This reflects a viewpoint that seems to have strong intuitive appeal within the legal community.[77] Lawyers and legal theorists often argue that though there may be little agreement about results, legal practice is kept relatively stable and orderly by some rough consensus regarding what kind of arguments lawyers and judges can use. I will not consider the validity or power of that position at this point.

If we cautiously move forward from Wittgenstein's comments -- knowing that generally what we say cannot be ascribed to him,

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[75] Cf. L. Wittgenstein, Remarks on the Foundations of Mathematics, Revised Edition, section 1: "... people ... who react to [the order 'add 3'] with perfect certainty , but each one in a different way."

[76] McDowell, "Non-Cognitivism and Rule-Following", 160 n.14.

[77] See, e.g., Bell, "The Acceptability of Legal Arguments", in The Legal Mind 45-65 (N. MacCormick & P. Birks, eds. 1986); Fiss, "Objectivity and Interpretation", 34 Stanford Law Review 739 (1982).

but at best can only be said to follow from his ideas or to be in the same spirit as his writings -- there are a number of ways in which we might begin to analyze or explain the disagreement in hard cases. In such cases, everyone involved does not react the same way; there is no broad "agreement in judgments". We can follow McDowell and Fish -- and even have some warrant in ascribing the position to Wittgenstein -- and say that in some cases people react differently because they have (or "participate in") different forms of life.[78] The social contexts, cultures,

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[78] Cf. L. Wittgenstein, Philosophical Investigations section 185:

> Now we get the pupil to continue a series (say +2) beyond 1000 -- and he writes 1000, 1004, 1008, 1012.
>
> We say to him: "Look what you've done!" -- He doesn't understand. We say: "You were meant to add two: look how you began the series!" -- He answers: "Yes, isn't it right? I thought that was how I was meant to do it." --- Or suppose he pointed to the series and said: "But I went on in the same way." -- It would now be no use to say: "But can't you see ....?" -- and repeat the old examples and explanations. -- In such a case we might say, perhaps: It comes natural to this person to understand our order with our explanations as we should understand the order: "Add 2 up to 1000, 4 up to 2000, 6 up to 3000 and so on."
>
> Such a case would present similarities with one in which a person naturally reacted to the gesture of pointing with the hand by looking in the direction of the line from finger-tip to wrist, not from wrist to finger-tip.

Cf. J. Mackie, Ethics: Inventing Right and Wrong 37 (1977):

> Disagreement about moral codes seems to reflect people's adherence to and participation in different ways of life. The causal connection seems to be mainly that way round: it is that people approve of monogamy because they participate in a monogamous way of life rather than that they participate in a monogamous way of life because they approve of monogamy.

practices, and training are different. Within the subgroups of people who share the same form of life, there would (by definition) be no divergence in reaction, and these same cases would seem to be "clear cases".[79]

There would also be hard cases where the divergent reactions could not be ascribed to the fact that the people had (come from) divergent forms of life. In some cases, different individuals might simply tend to go on differently even when given the same initial training. Along this line, W.B. Gallie suggested that the controversy over the use of terms like "democracy" and "work of art" might be explained by the fact that different persons interpret differently (in Wittgenstein's terminology, "go on in different ways from") paradigm examples to which all agree that the terms should apply (analogous to the initial ostensive definition).[80] Such concepts, which allow for substantive disagreement about the concept and not just differences about which concept to apply, Gallie termed "essentially contested concepts". S.L. Hurley gave the following, more technical summary of Gallie's position: "essentially contested concepts [are] appraisive and applicable to objects of an internally complex character that may be described in various ways by altering one's view of the significance of descriptions of their

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[79] Fish, in his analysis of "interpretive communities", is particularly good in describing the scenarios in which issues seem obvious within a subgroup but highly controversial across subgroups. See, e.g., S. Fish, Is There a Text in This Class? 272-292; S. Fish, Doing What Comes Naturally 298-305.

[80] Gallie, "Essentially Contested Concepts", 56 Proceedings of the Aristotelian Society 167 (1955-56).

component features."[81]

To see whether Gallie's discussion has added anything to our understanding of substantive disagreement, his analysis must be considered more closely. What would it mean for two people to disagree about the application of a concept but to agree that the touchstone for understanding the concept is a particular example? There seem to be two possibilities, which I will describe as a strong paradigm and an absolute paradigm.

In a strong paradigm case, a person would say, for example, "if anything is law, a traffic statute is law"[82] or "if any place ever had a democratic form of government, ancient Athens did". Here the paradigm coincides well with one's pre-reflective intuition about the concept ("law" or "democracy"), but it is not used to set the terms of the concept. It is possible, if unlikely, that one may someday conclude that this particular example does not, in fact, instantiate the concept.[83] For example, upon deeper reflection, one might conclude that ancient Athens excluded too many of its residents from the polis to be considered a democracy, or one might learn that new archaeological discoveries rebut the picture of ancient Athens one had accepted. In the strong paradigm case, it is the criteria we derive from (or associate with) the paradigm rather than the paradigm itself which are important.

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[81] S.L. Hurley, Natural Reasons 46. It is interesting to note that Hurley believed that concepts of what ought to be done and what the law requires, and concepts of distributive justice and contract are all essentially contested concepts. Id., 46-47.

[82] See R. Dworkin, Law's Empire 87-91.

[83] See id., 87-90.

In the absolute paradigm case, the paradigm defines the concept, such that the paradigm could never be understood as not exemplifying the concept and any change in belief about the paradigm would result in a change in belief about the concept. An instance of this approach appears in religious thinking: for example, some people believe that living a good life consists in living as much as possible like Jesus lived.[84] If such people were to be convinced that their beliefs about how Jesus had acted or what he had commanded were wrong, they would make analogous modifications in their beliefs about what ought to be done. This approach is always sensitive to some version of Socrates' challenge: is something holy because it is dear to the gods or is something dear to the gods because it is holy?[85] If the good can be separated from what God commanded (or from how a divine figure had lived), then, at least in principle, the concept of good could be defined and delimited independent of the paradigm and the paradigm might even be found to have diverged from goodness at some point. In other words, there is always the risk that an absolute paradigm case will evolve into a strong paradigm case. Only if the respondent would be willing to answer Socrates that something is good because and only because God ordered it are we still in an absolute paradigm case.

The absolute paradigm case itself is nothing more than an elaborate form of guidance by ostensive definition -- "do as I do" or "follow me" -- with all of the confusions and

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[84] Cf. Gallie, "Essentially Contested Concepts", 168, 180-181.

[85] Plato, Euthyphro 10c-11b, in The Dialogues of Plato, Volume I, 319-320 (B. Jowett, trans. 1953).

uncertainties that come with that process.[86] Gallie's analysis seems to offer nothing new in understanding the source or the nature of disagreement in such cases. If essentially contested concepts usually reduce to a set of criteria, as they appear to, then disagreement about concepts is nothing more and nothing less then disagreement about which criteria are sufficient and necessary for that concept to apply. Gallie's analysis described a convergence -- the reference to a particular example as a paradigm -- that may be due merely to custom or practice.[87] The problem of disagreement is at best pushed back one step: for whatever reason, we may agree on a paradigm, but derive different criteria from the paradigm; why we do so is not explained.

Perhaps I have given too flat a reading of Gallie's idea. S.L. Hurley attempted a richer characterization of essentially contested concepts. She wrote that the "component features" or criteria to which the concepts are responsible "characteristically compete with one another to influence" the concept's application.[88] According to Hurley, we judge whether our disagreement with another person is a "substantial disagreement" (i.e., a disagreement about the nature or application of the same thing) rather than a "conceptual disagreement" (talking about different things) by determining whether there is a baseline of agreement regarding paradigm cases, the relevant criteria, the rules for constructing theories about the criteria (how to determine whether the concept applies

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[86] See, e.g., H.L.A. Hart, The Concept of Law 122-123.

[87] See R. Dworkin, Law's Empire 65-66, 87-91.

[88] S.L. Hurley, Natural Reasons 46-47.

when the criteria conflict), and paradigm examples of such theorizing.[89]

Even if we sense that someone else agrees with us regarding Hurley's component features of an essentially contested concept and regarding the general process of creating a theory about that concept which is some function of those features, we may still wonder about the situation when the other person disagrees with us about which theory is the best.[90] Perhaps our disagreement at the level of theory represents a conceptual difference rather than a substantive difference. Hurley's response was that both at the level of the specific practices the theories are about and at the level of theorizing, "the distinction between conceptual and substantial difference is drawn by reference to practices."[91] At both levels, "the conceptual locus of disagreement is participation in world-embedded practices and customs and the criterion of conceptual divergence is inability to participate in those practices."[92] Here, Hurley was appealing indirectly to a Wittgensteinian idea that meaning does not come from self-interpreting entities, but that it derives in part from the practices, customs, and institutions in which the speaker

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[89] Id., 47-48.

[90] For Hurley, essentially contested concepts are "non-centralist" in that the identification of discrete specific values or criteria are the starting point for analyzing more general concepts, and a theory must be constructed to give an account of the relationships of interdependence between the particular values or criteria and the general concept. Id., 11. The best theory is the one "that gives the best account of the relationships among the specific values [or criteria] that apply to the alternatives in question". Ibid.

[91] Id., 48.

[92] Id., 49.

participates (and which collectively constitute a "form of life").[93]

Hurley's re-characterization of Gallie's work may make it sufficiently subtle and sophisticated for use in other philosophical discussions, but in the context of my project, it only brings us back to where we began: sharing a "form of life" may explain how we come to talk about the same things or to understand them in the same way, but we still lack an explanation (at least an explanation more nuanced than "differences in 'form of life'") as to why we sometimes seem to understand the same things differently.

G.

Hurley's elaboration of Gallie's work might not have resulted in a better explanation of why we disagree, but that was not her intention. Hurley was not trying to salvage the idea of "essentially contested concepts" as an explanation, but as a description: a description of theoretical disagreement as substantive disagreement, which allows that there is conceptual common ground for the disputants.[94] When there is significant disagreement about the definition or application of some term, and there seems to be no hope that further discussion will bring the various sides closer to consensus, there is always the suspicion that the disputants are not actually talking about the same thing.[95] This issue is relevant to my inquiry indirectly.

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[93] See id., 33-38.

[94] See id., 30-33.

[95] See, e.g., id., 175-176.

The fact that a disagreement is a substantive disagreement rather than just two people talking past one another does not answer the question why we diverge in our understanding or application of a concept. However, it is a prerequisite for asking the question.

At the level of concepts -- as contrasted with words which refer to particular material objects -- some theorists wonder if it is even possible for people who ascribe different meanings to concepts to be talking about the same concept. For example, Colin McGinn wrote:

> we have not, in the case of concepts, the idea of a single meaning-bearing item (word) about which we can press the question what establishes constancy in its meaning; there isn't the gap between a concept and its content that there is between a word and its meaning -- a concept is (so to speak) its content.[96]

Perhaps in part to get around this argument, Ronald Dworkin wrote of having "different conceptions of [the same] concept".[97] He is not always clear, however, about what it is that makes these different "conceptions" different conceptions of the same concept rather than simply being different concepts. To the extent that we could show that the former is the case, we would be justified in thinking of our disagreements as substantive.

In Law's Empire, Dworkin explained the difference between concept and conception (for the purpose of that book) as being "a contrast between levels of abstraction at which the

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[96] C. McGinn, Wittgenstein on Meaning 146 (1984); see also id., 147 ("we cannot ... make sense of employing a concept with a different content from that originally intended -- it would just be a different concept.").

[97] R. Dworkin, Taking Rights Seriously 128.

interpretation of the practice can be studied."[98] In that discussion, the concepts are concepts of a practice; what ties different conceptions together is that (echoing Gallie's work) they purport to describe the same practice.[99] In Dworkin's discussion of creative interpretation of social practices, the disputants are by definition talking about the same thing: a particular practice (defined tentatively at a "'pre-interpretive'" stage[100]) in a particular community. The interpretations are kept convergent by a requirement of substantial fit with the pre-interpretive content and by a shared world-view.[101]

I note in passing that Dworkin may have too quickly dismissed the possibility that lawyers and legal theorists talking about law could be talking about different things. At most, Dworkin's discussion[102] showed that "the law" has a relatively stable single reference in that a number of inter-related institutional processes go on every day under that name.

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[98] R. Dworkin, Law's Empire 71.

[99] Id., 43-49, 68-76; see also id., 424-425 n.20 (discussing why this analysis would not work as well with "justice and other higher-order moral concepts" which have a global claim and no strong connection with any particular community's practices).

[100] Id., 65-66.

[101] Id., 87-89. However, since Dworkin's interpretative approach is meant to act on the level of prescription for the practice as well as on the level of description of the practice, see, e.g., Finnis, "On Reason and Authority in Law's Empire", 357-363, the extent to which the practice limits the scope of possible interpretations is different in kind from (and probably less restrictive than) the way (e.g.) Gallie's paradigms would limit different understandings of those paradigms.

[102] Id., 44.

However, the fact that lawyers (and social scientists) are not talking past each other about "the law" -- the rules and procedures that operate within a particular community at a particular time -- does not show conclusively that they are not talking past one another when they talk about "Law" -- a particular form of social institution common to many communities.[103]

Dworkin's fleeting discussions of concepts and conceptions may conflate two different types of analytical moves. When he wrote of different conceptions of the same concept, John Rawls' earlier use of that distinction is implicitly invoked. Rawls wrote about people having a shared concept of justice in the sense that "they understand the need for, and they are prepared to affirm, a characteristic set of principles for assigning basic rights and duties and for determining what they take to be a proper distribution of the benefits and burden of social cooperation."[104] For Rawls, there is an agreed concept (of which there are varying conceptions) because "justice" is used merely as the name of a particular subsection of moral thought. To the extent that the shared concept has substantive content, it is only whatever (if anything) is presupposed ("a priori" or

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[103] Some might argue that Dworkin's conflation here of "Law" with "the law" reflects a similar conflation that permeates and defines his approach to legal theory. See Hart, "Comment on Dworkin", in Issues in Contemporary Legal Philosophy 36 (R. Gavison, ed. 1987); Finnis, "On Reason and Authority in Law's Empire", 6 Law and Philosophy 357, 367-370 (1987).

[104] J. Rawls, A Theory of Justice 5 (1972).

"grammatically") by a moral approach to social ordering.[105]

On the other hand, when Dworkin wrote in Law's Empire about different conceptions of the same concept of courtesy, he was closer to Gallie's analysis of "essentially contested concepts", discussed above. For Gallie, divergent theories are sometimes related by being different interpretations of the same practice. The Rawls approach is not suited for interpretation of practices, and the Gallie approach is not suited for purely abstract concepts, and imprecise analysis might result if the two approaches are confused.

H.

In Wittgenstein and Moral Philosophy, Paul Johnston claimed that in at least some cases the divergence of opinions in hard cases could be understood within Wittgenstein's approach to language and to morality. In the terms of the prior section, Johnston's argument was that disagreements about the application of evaluative terms are not really substantive disagreements. The analysis was based on "the grammatical differences between ethical and non-ethical language games"[106], between the application of descriptive and evaluative terms. Whether a

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[105] See ibid.: "no arbitrary distinctions are made between persons ... and ... the rules determine a proper balance between competing claims"; though, of course, what distinctions are considered legitimate and what is considered a proper balance of claims is left to the various conceptions of the concept of justice.

It would be left open, I believe, for other theorists to argue that there is no necessary or a priori content (or structure) to theories of justice.

[106] P. Johnston, Wittgenstein and Moral Philosophy 93 (1989).

particular descriptive term ("red", "banana", "table", and so on) should be used turns on applying the rules which constitute the term's meaning and certain agreed procedures for verification (for example, comparison of an object with an authoritative colour sample to determine whether the object is indeed red).[107] The language game for descriptive terms both assumes and depends upon substantial agreement in the application of rules and verification procedures.[108]

In contrast, evaluative terms serve a different function and are grounded differently. Terms like "good" and "noble", according to this analysis, reflect the speaker's approval of the object or activity described, the object's congruence with the speaker's ethical system -- the speaker's way of looking at and living in the world. "Here agreement in reactions is presupposed [only] in the sense that our being able to use words such as 'good' involves our reacting in ways mutually recognizable as reactions of approval, etc."[109] There are no set criteria for applying evaluative terms; since the application of such terms will reflect different persons' different ethical systems, divergence in use is to be expected and does not undermine the language game.[110]

Johnston's reading of Wittgenstein would give us one way to explain the existence of disagreement where moral or evaluative phrases (e.g., "reasonable rates", "bad faith", "due process")

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[107] See id., 95-96.

[108] Id., 96.

[109] Ibid.

[110] Id., 99-101.

were involved, and would tell us why we should not expect to reach consensus in such cases.

Both proponents and opponents of radical legal indeterminacy have tried to use Wittgenstein's discussions on rule-following to ground their positions. In my opinion, both sides find more in Wittgenstein than is actually there. The rule-following considerations do, however, have some limited use in understanding the problem of clear cases and hard cases.

Some clear cases are clear because of the (short-term) determinacy of descriptive terms. Our consensus in applying such terms is due to some combination of our common human nature, our common training, and our common way of life. Wittgenstein did not discuss extensively cases the situation when consensus was absent, though some potential explanations for hard cases can be derived from his writing: e.g., that the people involved have different forms of life or that the key terms are evaluative rather than descriptive.

Chapter 3: Clear Cases

> "I conclude that there is no such thing as a language...."[1]

A.

I have been using the problem of legal determinacy as a context for considering the role of language within law. The usual focus within this area is the question whether there are unique correct answers even for the most difficult and controversial legal problems (sometimes given the shorthand "hard cases"). Before exploring that issue, I want to see what can be learned from the other extreme: legal questions that seem so obvious that there is no question as to what their proper resolution should be (these go under various names in the literature: "clear cases", "consensus cases", "easy cases").[2] Hart stated: "Particular fact situations do not await us already marked off from the each other, and labelled as instances of the general rule, the application of which is in question; nor can the rule itself step forward to claim its instances."[3] Yet in

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[1] Davidson, "A Nice Derangement of Epitaphs", in Truth and Interpretation 446 (E. LePore, ed. 1986) (the sentence continued "... not if language is anything like what many philosophers and linguists have supposed.").

[2] The labelling of a legal problem as a clear case or a "hard case" itself plays a role in American substantive law. For example, it is relevant to the "qualified immunity" defense government officials have when charged with a constitutional violation in a civil rights action for damages. Under this defense, "an official would not be held liable under [section] 1983 unless the constitutional right he was alleged to have violated was 'clearly established' at the time of the violation." Butz v. Economou, 438 U.S. 478, 498 (1978); see Davis v. Sherer, 468 U.S. 183, 194-195 (1984).

[3] H.L.A. Hart, The Concept of Law 123.

clear cases, judges do speak of having a sense of being confined, of the answer being (pre-)determined.[1] "Clear cases" were part of the focus of the previous chapter, in that (according to my argument) such cases were the focus and the starting point of Wittgenstein's analysis in his rule-following considerations. The discussion in this chapter will be on related issues, though the emphasis will be on "clear cases" themselves, while the last chapter emphasized the proper reading of Wittgenstein's analysis.

It may be only a coincidence that everyone believes that a certain case should come out a particular way. It may be that the consensus is made up of people who would give different answers if asked why the case should come out that way or how difficult they thought the case was. However, the convergence of opinion may well be more than coincidence; the consensus may be due to a shared belief regarding the meaning of words or the scope of legal concepts. Most of the writing about "clear cases" is not about the sociology of chance convergences; it is about this language-based determinacy. Of course, there may be other reasons behind the convergence of opinion -- for example, a consensus about moral or political matters -- but those situations are not directly relevant to the present project.

That it is not just the chance convergence of opinion that we are seeking is clearest if we consider J.W. Harris' exclusion of the "deviant" or "non-serious" interpreter in determining

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[1] Cf. S. Kripke, Wittgenstein on Rules and Private Language 17: "Normally, when we consider a ... rule, ... we think of ourselves as guided in our application of it to each new instance."

whether a consensus about a legal interpretation existed.[5] The fact that some person or small group of persons disagreed could be discounted, Harris argued, if the dissenters were clearly wrong. However, this only brings us back to the beginning: by what standard are we judging the dissenters as clearly wrong and their opinions not relevant to determining whether a case is a clear case, if it is only by reference to consensus that we feel comfortable in characterizing the case as easy in the first place?[6] We must ask: at what point are the number of dissenters sufficiently large or sufficiently high in proportion that we are no longer allowed to dismiss their interpretations even though we find them untenable? Is the majority or established interpretation immune by definition from ever being labelled as "untenable" or "off-the-wall"?

In law, we want to be able to say that some interpretations are "objectively right"; at the least, we want to be able to say that some are "objectively wrong". However, as Gerald Frug argued in the context of "bureaucratic theory", there is no

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[5] J.W. Harris, Law and Legal Science 6 (1979).

[6] See R. Alexy, A Theory of Legal Argumentation 8 (1989):

> Whoever claims that a decision is uncontroversial is to be understood as asserting that there are no arguments which might give rise to serious doubts. Such arguments are, however, always conceivable. The assertion that every such counter-argument is bad or legally irrelevant does not follow conclusively from the set of presupposed norms. In view of this one might wish to assert that the categorization of a case as 'clear' constitutes a 'negative value-judgment' with respect to all potential counter-arguments. [footnote omitted]

See also D'Amato, "Aspects of Deconstruction: The 'Easy Case' of the Under-Aged President", 84 Northwestern University Law Review 250, 251 (1989).

separating the objective from the subjective, at least when considering human practices and institutions.[7] Objectivity, in the sense of a "correct" interpretation of a written text or spoken words, refers to getting the meaning right. The problem is that the correctness of a meaning is usually seen to be determined directly or indirectly by consensus: either agreement as to the correct interpretation, agreement as to which authority to defer, or agreement about which decision-procedure to use. The "objective" (neutral, independent) is thus, in a sense, only a sum (or a particular function of) the "subjective" (individual, perspectival).

In language -- and to a lesser extent in law -- there is a continual tension between consensus/dissent and authority, between whether whatever everyone does is right and the imposition of a standard of correctness (and the branding of "error") from without. If some persons started using "cow" to mean horse, the writers of dictionaries and other guardians of proper usage would label that usage as "incorrect". However, if enough people took up that usage, with time it would become acceptable, and perhaps standard (moving from idiolect to dialect to accepted usage). Similarly, at a certain level of legal analysis, there is no practical difference between an evaluation (of whether officials' statements about what the law is were correct) and a description (of what the officials' statements were); again, in certain circumstances, whatever is, is right.[8]

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[7] Frug, "The Ideology of Bureaucracy in American Law", 97 Harvard Law Review 1276, 1286-1292 (1984).

[8] See, e.g., H.L.A. Hart, The Concept of Law 144-150 (uncertainty in the rule of recognition).

Dworkin has argued that the clarity of a clear case is a conclusion we reach after considering the interpretative question, not a matter which is present ahead of time.[9] He based this argument in part on our willingness to read exceptions into apparently unambiguous language (e.g., inheritance according to a will's clear language ... except for murderers; no vehicles in the park ... except for statues; and so on). For Dworkin, clear cases are cases where only one theory of the law adequately fits the historical materials in the light of our ideas of justice and fairness. The latter clause is important; it is not merely a question of fit. For it is our feelings about justice and fairness which may compel us to read an exception into an apparently clear rule. Thus, "someone whose convictions about justice and fairness were very different from ours" would disagree about which cases were "easy cases".[10]

Frederick Schauer made a similar argument: that determining that a directly applicable legal rule could be mechanically applied to resolve a particular legal problem is only the first step in the analysis.[11] Almost all legal systems contain a variety of "rule-avoiding norms", and may also authorize judges to create new ones. These "escape routes" allow judges "to ameliorate the rigidity of rules" "to avoid the arguably unjust consequences of mechanical application of the most directly

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[9] R. Dworkin, Law's Empire 350-354.

[10] Id., 354.

[11] Schauer, "Formalism", 515-520.

applicable rule."[12] Such rule-avoiding norms might include general references to justice or equity as well as "less locally applicable general principle[s] [like] no person should profit from his own wrong."[13] Until one considers such escape routes, Dworkin's favourite case, Riggs v. Palmer[14], would be a clear case coming out the other way (allowing the murdering heir to inherit).[15] Our understanding of clear cases must thus factor in not only the clarity or non-clarity of language in general and the language of a particular text, but also the availability of rule-avoiding norms and the conditions under which judges feel compelled (or, to put the same point from the opposite perspective, under which judges feel free) to use them.

The clarity, simplicity, or straightforward nature of the language in a legal rule relative to the relevant facts is not sufficient (and perhaps may not be necessary) for a case involving that rule to be a clear case. Even if we disregard situations where other rules may apply and indicate a contrary result, we must still consider the "outlet" or "safety valve" moves a legal system may authorize (or order) a judge to make in extreme circumstances: e.g., either rejecting the literal reading of a rule in this case in favour of one consistent with the rule's purpose, or refusing to follow the plain meaning of

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[12] Id., 519. Schauer noted that it is in theory possible for there to be legal systems "in which no rule-avoiding norms exist at all." Id., 520. This would, however, be a wholly static system incapable of adapting to new situations.

[13] Id., 518 n.31.

[14] 115 N.Y. 506, 22 N.E. 188 (1889).

[15] Schauer, "Formalism", 518 n.31.

the rule in this case because it would lead to an absurd or unjust result (these two analyses overlapping to some extent).

J.W. Harris ascribed the clarity of clear cases not to the clarity of the words used, but to the clarity of intention.[16] He gave the example of the rule, "No child under the age of ten years may be convicted of any criminal offense", and then considered whether a judge might nonetheless conclude that this exclusion should not be granted to a particular 7 year old boy (justified on some ground -- for example, that he was from an "inferior" ethnic group). Harris concluded that if such an interpretation were proffered, "legality would manifestly have been breached".[17] He argued that the interpretation is not excluded logically but on the basis of the author's intent -- more specifically, our understanding of the author's intent: "it would be clear to everyone that that was not the purpose of the rule."[18] He relied on intention but he offered no source for his

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[16] J.W. Harris, Law and Legal Science 3-7.

[17] Id., 4.

[18] Id., 5. To avoid the problem of the "deviant interpreter", Harris later clarified that "everyone" need mean only all persons who would be "accepted as serious participants in such a debate." Id., 6.

As I noted earlier, this attempt to brush aside the problem of deviant interpreters has hints of circularity. Whether someone would be accepted as a serious participant in a debate may turn on whether we find that person's proffered argument tenable or off-the-wall. Consensus is thus maintained only be excluding from consideration anyone who disagrees.

There is one set of circumstances in which Harris' response to the problem of the deviant interpreter would not be circular. If someone had an established reputation in a legal system, built on many examples of rational (and occasionally wise) interpretations, we would probably accept him or her as a serious participant in a debate on a new issue, even if for once the interpretation this person offered on this occasion struck us as

conclusion regarding intention other than the words of the rule themselves; "intent" is inferred more than determined. We could conclude that his interpretation of what a speaker meant did not in fact depend on intention; to the contrary, what "intention" Harris would have us ascribe to an author must depend on how we had already interpreted the author's words.

Wittgenstein's approach to psychological statements may help us to understand (and evaluate) Harris' approach. According to Wittgenstein, there is a first person/third person asymmetry for psychological concepts like "intend", "hope", and "plan".[19] When I say "I plan to go to London tomorrow" or "I intend by 'bank' to refer to the financial institution, not the side of a river", I am not describing something, at least not in the sense that one describes a room or a painting. The grammar is different; the grammar of a description is that the descriptive proposition could be wrong (false), according to whether it does or does not correspond to the object described. By contrast, when I express my plans or intentions, I am not describing some inner state. If such expressions were like descriptions, it would make sense to be wrong about the matter, and to say later "I thought I was planning to go to London, but I was wrong" or "I was mistaken in believing I intended 'bank' to refer to the financial

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untenable. Because of that person's good reputation, we might give the "untenable" interpretation more serious consideration than we otherwise might.

[19] See L. Wittgenstein, Philosophical Investigations sections 288-303, 574, 585-586; pp. 221-225; see generally P.M.S. Hacker, Insight and Illusion, Revised Edition, 276-306.

institution." However, such comments are without sense.[20]

By contrast, third-person psychological statements do follow the model of descriptive statements: one can speak of knowing another person's plans or intentions, and one's claims about such matters could be wrong. It is not that one cannot speak of "knowing" what another person intended by a statement when one has only the statement itself to go by; it is only that this knowledge is defeasible. When one tries to determine what meaning another person intended by a particular utterance, the utterance itself is the primary (and usually the only) evidence. However, there may be other evidence as well: other past utterances, the gestures made while speaking, answers to the follow-up question "what did you mean by that?", and so on. When the only information we have for determining what someone intended is the utterance itself, our guess of the speaker's intent could be rebutted (or at least made uncertain), for example, by the speaker's later declaration that he had meant something different. Rephrasing Harris' position in the terms used by some Wittgensteinians, we can be "certain" what a speaker meant when she used a particular phrase, but it is a certainty which allows that we could change our opinion should further, contrary evidence come to light.

For Harris, the clarity of clear cases comes from a

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[20] See L. Wittgenstein, Philosophical Investigations sections 246, 408. Such statements, however, would make sense if we moved from present-tense first-person psychological statements to past tense (or future tense) psychological statements, where, like with third-person psychological statements, the model of description is appropriate. See P.M.S. Hacker, Insight and Illusion, Revised Edition, 197 & n.11, 301-302.

consensus or convention about what the drafter's intention must have been in using particular words ("no child under age ten ..."). There is a tension in his position, in that he has constructed a judgment purportedly independent of individual views -- the clear case for interpretation, the interpretation with which no serious participant could disagree -- from a series of individual views -- what the legislators intended. In the terms of the above analysis, he has not allowed for the defeasibility of claims that derive intention directly from the primary text. There is no reason why a legislator could not, on one occasion, intend an age restriction to be read flexibly rather than absolutely. If that occurred, Harris' standard would disaggregate, and the judge would need to choose between convention and legislative intent. In the terms of the distinction discussed earlier, Harris has tried to equate what the speaker meant with what the words meant, despite the fact that these two do diverge from time to time. (There are, however, limits to the divergence, limits probably derived from the nature of thought and the nature of language. It simply is quite difficult to say (or write) "it is cold here" while meaning "it is warm here", or to say "the sky is clouding over" while meaning "there is no odd perfect number".[21])

The limited importance of subjective intention (as contrasted with interpretations of intention derived from the primary text) probably reflects an aspect of the nature of legal

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[21] Dummett, "A Nice Derangement of Epitaphs: Some Comments of Davidson and Hacking", in Truth and Interpretation 471; see L. Wittgenstein, Philosophical Investigations section 510.

systems. It is characteristic of certain types of social systems, including legal systems, to favour words' meaning over speakers' meaning. The effectiveness of legal rules in guiding and coordinating behaviour depends on citizens generally being able to figure out without great effort how the rules will be applied.[11] If judges often preferred the rule-makers' (actual or subjective) intention over the linguistic meaning and if those intentions often diverged sharply from that meaning, then the ability of citizens to act according to the rules (that is, to predict how they would be later interpreted by the judges) would be undermined.

One can approach the problem of interpretation in an entirely different way, a way which allows one to accept Harris' conclusion without incurring the disaggregation problem (discussed earlier) that comes with relying on legislative purpose. The argument would be that there are conventions within language not only regarding the meanings of words and phrases, but regarding the amount of discretion in interpretation (and application) delegated to the listener. For example, our conventions seem to hold that general descriptive terms (e.g., "a mature person") delegate a great deal of discretion, while numerical descriptions (e.g., "a person at least 35 years old") greatly curtail that discretion. "Buy me an inexpensive chess book" leaves a greater role to my listener's judgment than "buy me a chess book that costs less than ten pounds". Such conventions are understood by all competent users of the language and are seen as obvious and certain, even though they are only

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[11] See L. Fuller, The Morality of Law 33-94 (1969).

contingent aspects of our language. Assuming such a convention is present in the case of numerical limitations, we need no recourse to purpose. It would be no more necessary in that case to ponder whether legislators wanted us to use our discretion when they used a numerical limitation than it would be to ponder whether they meant "horse" when they wrote "cow".

B.

I want to consider one way in which the meaning of a term might be said to change when we move from descriptive to normative discourse. One (Fregean) approach would be to claim that there is and could be no such change. According to that approach, sentences can be analyzed into content and force, and a change of force should not be confused with a change in content.[23] For example, under this approach there is only a change of force between "there are no vehicles in the park" ("no vehicles in the park" plus declarative force) and "no vehicles in the park!" ("no vehicles in the park" plus imperative force).[24]

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[23] See, e.g., Dummett, "Can Analytic Philosophy be Systematic and Ought it to Be?, in Truth and Other Enigmas 449-450 (1978); Dummett, "Frege's Distinction between Sense and Reference", in id., 117-118.

[24] In passing, one should note how differently -- perhaps, how much more clearly -- one thinks about the "open texture" of "vehicle" in the descriptive sentence. If someone says, "there are no vehicles in the park", it might either be that the person did not see the skateboard or that the person did not consider skateboards to be "vehicles". However, if an emergency vehicle were present, we would correct the speaker if he continued to insist that no vehicles were present. It is only when we move from the descriptive to the normative that we are tempted to say that "vehicle" might not include emergency vehicles, and that, I suggest, is because we are being led by our judgment that applying the (otherwise reasonable) rule in a way that excluded

Under a different (arguably Wittgensteinian) approach, the fact that words occur within a rule changes their meaning.[25] In particular, absolutes -- "no", "all", "every", and so on -- seem to have a different meaning in rules compared to what they have in descriptions. The description "there are no vehicles in the park" means that there are zero vehicles in the park. However, the rule "no vehicles in the park" is taken by many commentators to mean something slightly different: that there shall be zero vehicles in the park, except under special circumstances.[26]

The point may be more general. In different "language games", the extent to which terms are understood literally rather than metaphorically, "rigidly" rather than "flexibly", varies along a spectrum. In exaggerations, "no one in class is ever prepared!" probably means that very few people are; in moral discourse, "always do what you promise" is understood to mean do what you promise unless you have a very good reason not to; and so on. Universals in rules may be just another example of a language game in which such terms are used "flexibly".

Of course, it remains possible to maintain the Fregean line even if one accepts the "prima facie" approach to absolutes in rules. Frederick Schauer would argue that the second (non-

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emergency vehicles would be "absurd" or "wrong". Cf. F. Schauer, Playing by the Rules section 4.1 (arguing that the desirability of not applying a rule in particular circumstances where to do so would lead to absurd or unjust results "ought not to be disguised in an implausible theory of meaning").

[25] For a critical evaluation of the sense/force distinction, see G.P. Baker & P.M.S. Hacker, Language, Sense and Nonsense 47-120 (1984).

[26] See J.W. Harris, Law and Legal Science 5-6; A.M. Honore, Making Law Bind 80-81 (1987) ("the prima-facie universal character of rules").

Fregean) approach confuses a theory about language (what sentences mean) with a theory about how rules should be applied. For Schauer, if we decide that "no vehicles in the park" does not justify excluding emergency vehicles, this is not because we think "no" or "vehicle" have a slightly different meaning in the normative context. We decide this way because we believe that rules should not be strictly applied if to do so in a particular instance would lead either to an "absurd" result or to a result contrary to the rule's underlying purpose.[27] According to Schauer, it remains open to us to have a strict approach to rule application, one that would never diverge from the meaning of the words in the rule formulation, one that would warrant excluding the emergency vehicle in that case. However, Schauer did not give any examples where that approach to rule application actually prevails.[28] In the end, the data we have considered seems to be indeterminate in choosing between a Fregean and a non-Fregean approach to analyzing (the meaning of absolutes in) normative discourse. (I must add, it is not clear that anything of importance turns on the choice between the two characterizations of the same phenomenon.)

C.

The non-Fregean approach is based on an analogy with other specialized or deviant forms of normal speech: dialect and jargon. The literal meaning of a word is the meaning that

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[27] See Schauer, Playing by the Rules section 4.1; Schauer, "Formalism", 524-525.

[28] Schauer, "Formalism", 520.

participants from the relevant community would unreflectively assign to it, and the same word or phrase might have different literal meanings in different contexts. The problem of appropriate context is illustrated by a problem in American Contract law. The notion of literal meaning (or, in the terms of American judicial rhetoric, "plain meaning") can be understood in terms discussed in Wittgenstein's rule-following considerations: we apply a term we know in an unreflective way; on such occasions, we are not "interpreting" the term (that is, interpreting the rule for the term's application), we simply grasp its meaning.[29]

A word can be described as having a "literal meaning" or "plain meaning" only relative to competent speakers of a particular language or idiolect. When I am listening to someone describing an ice hockey match, the "plain meaning" of "check" is different for me than it would be if I were listening to a description of a chess game: slightly different contexts (the jargon of the two different games), different meanings for the same word, yet the same immediate, unreflective grasp of meaning.

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[29] See L. Wittgenstein, Philosophical Investigations sections 201 ("there is a way of grasping a rule which is not an interpretation"), 228-232.

It is instructive to notice the contrast here between Wittgenstein's approach to understanding and that of Donald Davidson: in contrast to Wittgenstein's idea of simply grasping meaning, Davidson believed that in understanding even simple sentences (correctly used and in our native language), we are interpreting (applying a theory of meaning). On this contrast, see Dummett, "A Nice Derangement of Epitaphs: Some Comments on Davidson and Hacking", in Truth and Interpretation 464-468; Mulhall, "Davidson on Interpretation and Understanding", 37 Philosophical Quarterly 319 (1987); S. Mulhall, On Being in the World 91-106 (1990); Hacker, "Language, Rules and Pseudo-Rules", 8 Language & Communication 159, 168 (1988).

The ability of words to carry different "plain meanings" even for the same interpreter when the context is altered is exemplified by some situations in (American) Contract Law. Consider the following exchange between Richard Posner and Stanley Fish.

Richard Posner discussed the example of a contract which stated that it was a complete integration[30] and that the price agreed would be $100 per pound. He argued that the parol evidence rule would foreclose a party from claiming that the parties had in fact agreed that the price would be $120 per pound after the first ten pounds, adding emphatically: "The document is not ambiguous ... [I]t is silly to think that every document is unclear."[31] Stanley Fish criticized Posner's ascription of ambiguity or clarity to the contract itself: "The document is neither ambiguous nor unambiguous in and of itself. The document is not anything in and of itself, but acquires a shape and significance only within the assumed background of circumstances of its possible use".[32] If the context of Posner's contract had been an industry where it was the usual practice and the general understanding that a set price is only for the first ten pounds, and thereafter a 20% escalation applies, Fish argued, then Posner's contract "would have, and have obviously and without dispute, the meaning Posner scoffs at."[33]

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[30] That is, there is a clause in the contract which states that the contract is adopted by the parties as the final and complete expression of their agreement.

[31] Posner, "Law and Literature: A Relation Reargued", 72 Virginia Law Review 1351, 1371 (1986).

[32] Fish, "Don't Know Much About the Middle Ages: Posner on Law and Literature", 97 Yale Law Journal 777, 784 (1988).

[33] Ibid.

Contrary to the misleading characterizations used by both Posner and Fish, the problems of interpreting the contract come not from the strange quasi-metaphysical task of trying to locate meaning either "in" the physical document or "outside" it. The choice of interpretations here turns instead on which language the contract is read against. The "plain meaning" of a particular phrase might be quite different in a particular industry sub-community than it is in normal everyday speech. If both parties to a contract are part of a particular sub-community, it is not clear why the "plain meaning" doctrine should not be applied in terms of that sub-community's understandings.[34]

Prior to the development of the Uniform Commercial Code in America, normal business practices could not be introduced to contradict the (apparent) meaning (or clarify the true meaning) of the written terms of an agreement, unless it would be shown that the parties had intended those practices to have that priority. However, that business practices were not intended as the starting point or the reference point for interpreting the written terms was assumed rather than argued for by the courts at that time.[35] That approach was circular. When speakers treat

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[34] It is important to see why this example is different from Balkin's example discussed earlier, where two contracting partners chose to mean horse by the word "cow". In the Balkin example, the speakers are imposing a meaning on a word that does not otherwise carry that meaning. In the business contract example, the speakers are merely following the meaning they unreflectively associate with the term, the meaning that the sub-community has collectively given to the term.

[35] See Patterson, "Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code", 68 Texas Law Review 169, 186-199 (1989).

a dialect as normal or natural, they will see no need to tell each other or anyone else that they have chosen to use this dialect rather than "conventional language". Also, one cannot simply argue that since the contractual language did not explicitly mention background practices, no reference to such practices is necessary in interpreting the contractual language. The judges in the cases prior to the Uniform Commercial Code saw themselves as privileging the linguistic meaning over the authors' intentions, when in fact what they were often doing was privileging every-day speech over the dialects spoken in particular business sub-communities.

These brief discussions about linguistic determinacy have served to remind us of the relatively minor role that language actually plays in problems of legal determinacy. One can accept that there is substantial determinacy of semantic content in most cases without thereby denying the problems that speakers' intentions, dialects and idiolects, theories of rule-application, and other factors will bring to the question of legal determinacy.

Chapter 4: Ronald Dworkin's Right Answer Thesis

> I myself am often accused of thinking that there is almost always a right answer to a legal question; the accusation suggests that if I were to confess to that opinion anything else I said about legal reasoning could be safely ignored.[1]

A.

Unlike the earlier chapters on Hart's concept of "open texture" and on the application of Wittgenstein's rule-following considerations to legal theory, the focus of this chapter and the following one will be broad: an entire legal theory (for this chapter, the legal theory of Ronald Dworkin, for the next, that of Michael Moore). I want to discuss a viewpoint rather than a question, a whole way of looking at law rather than a single debate. However, the advantage of a broader scope brings corresponding disadvantages; trying to discuss so much material in so limited a space means that the resulting exegesis and critique may be only an outline, and that my discussions may be in risk of becoming either conclusory or superficial. I will do my best to keep this text substantial despite these challenges.

The beginning sections of this chapter will be about with ideas from Dworkin's earlier writings regarding whether there are unique right answers to legal questions. Part of my discussion will go beyond the scope of the main debate in the literature to consider questions of the possible scope of a right answer theory and the problem of incommensurability. The remaining sections in the chapter will deal with Dworkin's later work on an

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[1] Dworkin, "No Right Answer?", 58.

interpretative approach to law. After briefly summarizing his approach, I will consider a series of challenges to it, moving from more surface objections to objections that go to the heart of Dworkin's ideas.

B.

Much of the English-language literature on legal determinacy has focused on the work of Ronald Dworkin. He had consistently advocated the position that there is a unique right answer for the vast majority of legal cases. However, the nature of his "right answer thesis", as well as the arguments put forward in its support, have changed substantially over the years. At first, Dworkin's "right answer thesis" was a direct response to Hart's arguments about "open texture" and judicial discretion; aspects of that debate were discussed earlier in this paper.[2] Dworkin did not view the limitations and complexities of language as a serious obstacle to his "right answer thesis". As I discussed earlier, he initially argued that ambiguities and uncertainties could be overcome by burdens of proof, presumptions, and the like. As was noted, there are problems with that response, for while it concedes the difficulty of drawing border lines in one part of the analysis or definition, it assumes just that ability for some other part of the analysis or definition.[3]

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[2] See Chapter 1, section H.

[3] A different version of the right answer thesis could be derived from Dworkin's article "The Model of Rules". Dworkin, "The Model of Rules", 35 University of Chicago Law Review 14 (1967), reprinted in Taking Rights Seriously 14-45. That version would be as follows. For Hart, law was indeterminate in hard

Dworkin's more recent work has had a different focus and direction. Few of the arguments deal directly with the determinacy of language or of rules; he seemed to abandon his earlier approach to the problem of ambiguity, and replace it with a different method of circumventing that problem. If legal concepts or statutory language are ambiguous, open-textured, or otherwise unclear in their application, this uncertainty simply supports the belief that more than one statement of what the law is, is initially tenable. The uncertainty does not trouble Dworkin's judges because they have a set process for how to choose between alternative readings of what the law is. That the meaning of the relevant legal language favours one reading over another -- or that it is indeterminate between the two -- is only

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cases because rules have open texture. However, along with rules, most legal systems also contain principles (each of which has its own "weight", R. Dworkin, Taking Rights Seriously, 26, or "gravitational force", id., 112-113). With the addition of principles, the network of law is sufficiently fine that there are no longer "gaps" in the law.

In this approach, the contents of a legal system would be largely (though not entirely) a descriptive (as opposed to an interpretative) matter, and would be objective in the sense that they could, at least in principle, be determined autonomously of a particular judge's perspective. The situation would be analogous to Hart's "Rule of Recognition" in that there would be criteria for determining not only which rules but also which principles were valid in a particular momentary legal system.

(Cf. id., 343: "the law of a community [as] a distinct collection of particular rules and principles ... such that it is sensible question to ask whether, at any given moment, a particular rule or principle belongs to that collection." This is from Dworkin's "A Reply to Critics", and it is his characterization of a position from which he (at that time) wanted to distance himself. In his reply, he denied that he advocated this version, or that he had advocated it in his original 1967 article. See id., 344. More recently, though, he admitted that the summary I give may have been what he had in mind in 1967; at the least, he stated, he could understand how his readers at that time could have read him that way. Lecture by Ronald Dworkin, Oxford University, 14 February 1990.)

one aspect of evaluating the two readings (part of the evaluation of the reading's "fit" with the relevant legal materials). The final decision can always be made in part on the basis of political morality. A judge may not be able to decide whether, as a matter of linguistic meaning or legislative intent, "vehicle" includes skateboards, but the judge may be able to include or exclude skateboards on the basis of which interpretation created a better social order or which interpretation better served the value of "integrity".

However, those aspects of Dworkin's later work will not be considered until later in this chapter. First I want to consider more closely the idea of a right answer thesis, both in the abstract and as it was elaborated in Dworkin's earlier work. A.D. Woozley offered one extreme answer to the question of what it means to say that there is always a "right answer" to legal problems. His answer seemed to comport with a basic legal intuition, but in the end it proved to be quite unhelpful. Woozley argued that because "law is what the courts say", a legal problem has a right answer only if the courts have given their answer to that problem.[4] In other words, the "right answer" to a question within a particular legal system is whatever answer that system gives to the question. Until the point when an official answer is proffered, we can try to predict what the courts will say and we can argue about which judicial response would be the most reasonable (given precedent, public policy, and

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[4] Woozley, "No Right Answer", in Ronald Dworkin and Contemporary Jurisprudence 180 (M. Cohen, ed. 1984).

so on), but "we are not [thereby] saying anything about truth."[5]

Woozley seemed to assert that one cannot speak of the "truth" of a legal statement until a judge has rendered a decision in a particular case.[6] It is important to note that there is no reason why Woozley's analysis, if accepted, would not be extended to "clear cases" as well as the more controversial cases.[7] We could also extend this analysis in a different direction, and say that statements about the law have no truth value until the highest court has spoken on the subject, for the lower court's judgment could always be overturned. (And even

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[5] Id., 179.

Woozley did not deny that one could speak of a court's ruling as having been "reasonable" or "unreasonable" (or even of its having been "right" or "wrong"). Woozley, "No Right Answer", 179-181. Therefore, even if we accept Woozley's analysis, it may succeed only in pushing the analysis back one step. The question now becomes whether in difficult cases "one answer might be the most reasonable of all, even though competent lawyers disagree about which answer is the most reasonable." "A Reply by Ronald Dworkin", in Ronald Dworkin and Contemporary Jurisprudence 278.

[6] Woozley, "No Right Answer", 176-180.

[7] However, Woozley seemed to pull back a bit from that conclusion, though the position he then took is probably not consistent with the remainder of his argument.

Throughout the article he distinguished between the "truth" about legal, literary and historical matters on one hand, and speculation (what should happen or what would have happened) based on coherence with the known facts on the other. However, at one point Woozley seemed to allow the possibility that a counterfactual statement could have a truth value if the coherence of the statement (or its opposite) with known facts was "overwhelming". Id., 177. He went on to state, without further elaboration, that there are "legal analogue[s]" to these counterfactual statements. Id., 180. So it seems that Woozley might allow ascriptions of truth value to legal propositions in the clearest of clear cases even before the courts have spoken on the matter. As I noted earlier, I do not think that this position can be made consistent with what he was arguing elsewhere in the article.

with the highest court's judgment, the "truth" would be tentative, for that court could always overrule its initial decision.)

With each level of analysis, the idea of legal "truth" implicit in Woozley's discussion becomes more and more intricate. Woozley had made matters easier for himself by assuming a strange conception of "settled law":

> The judge has to try for whatever in his system counts as narrative fit, but if he is thought by higher or later courts to have failed, they will write a different ending. Eventually some ending gets accepted into the legal system, and the statement of that becomes the right answer; it was the answer which sooner or later was given and endured.[8]

It is easier to equate legally true propositions with judicial promulgation if there is a great deal of finality and stability within the system. Woozley seemed to assume that a proposed answer to a legal question eventually "becomes" a legally true proposition after (say) a sufficient number of sufficiently important courts approve of it. The problem is that the "settledness" of a legal proposition in most systems is always relative to a point in time. For example, though the "separate but equal" reading of the American constitutional requirement of equality was accepted by all courts for decades, it was eventually questioned and then rejected.[9] If it is always possible for the highest court to rethink an issue and to overturn what was until then settled law, then the language of Woozley's approach must change. Instead of being able to say "as

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[8] Id., 179.

[9] See, e.g., L. Tribe, American Constitutional Law, Second Edition 1474-1480 (1988).

of now, this proposition is (finally) legally true", we can only say "for now, this proposition is legally true".

Along with the problem of time-frame, there is also a problem of specificity. Woozley's argument tended towards the claim that only the most specific legal propositions (more specific than the rules in the rule-books, and case-law only as confined strictly to the facts of each case) can have a truth-value. The implication is that the next case, no matter how clearly it seems to be subsumed under the general rule or how similar its facts seem to be to the facts of the prior case, could be decided either way. However, there is a countervailing tension: legal opinions are given (and characterized) in words and concepts which are by nature general; any attempt to describe the result in a particular case will use or imply a legal proposition at a higher level of generality than the specific case from which it derived. In common-law systems, a judge does not merely say, "given the facts of the case as I have found them (A, B, C, ..., X), judgment for plaintiff." If that were the case, then rulings might be able to be limited tightly to the facts of the original case. Since the next case did not involve exactly the same date, time, characters, etc., the prior case would not then seem to require any result in any subsequent case, no matter how close the facts. As it is, judges must give reasons for their rulings, and those reasons will necessarily be couched in terms which will make them at least in principle applicable to other cases.[10]

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[10] Similarly, a judge must give a reason for distinguishing a prior case. The judge cannot simply say, "in that case, the events occurred on a Tuesday in March, and in this

Someone might wish to argue against my characterization of Woozley. What he was arguing, the alternative reading would go, is that a proposition is only legally true if it has been promulgated by a court; however, many judicial promulgations are quite general. I make a mistake by confusing the specific decision the court made (e.g., under this fact situation, plaintiff wins) with what legal conclusions the court promulgated in deciding the case. A court might conclude, for example, that a particular implied warranty should apply generally to all sales, even though the case before the court involved only a sale of hardware.

However, if we accept this alternative reading, Woozley is led into all the difficulties that occur in the theory of precedent in England and America.[11] Most basically, later court decisions (and legal commentators) will often read an earlier decision more narrowly (or differently) than that decision had been characterized in the original opinion. (In more technical language, even if the original opinion says that X, Y and Z are the ratio decidendi of a case, later courts and commentators may disagree; the original declaration will not be conclusive on the issue.) The only thing that is constant among the changing readings of a past case is consistency with the facts of the case and the conclusion as to which side won. If Woozley equated

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case the events occurred on a Thursday in April: therefore, even though plaintiff won in the earlier case, in this case, defendant wins." The judge must give a reason for why that difference is significant to the case, and that reasoning will have some applicability to actual or hypothetical future cases.

[11] See, e.g., Moore, "Precedent, Induction, and Ethical Generalization", in Precedent in Law 184-190 (L. Goldstein, ed. 1987).

"legally true" with whatever a judge has said, then Woozley's approach would be inconsistent with legal practice in England and America at a basic level, in that a judge's characterization of the case is often (implicitly) rejected as a correct reading of what the case "meant". That is why I prefer to read Woozley as equating legally true with the minimal holding of a case: under these facts, the court has held that this party should prevail.

Woozley's position could be viewed as a kind of extreme positivism.[12] Under this approach one must distinguish true statements from "legally true statements"[13]: a statement is legally true if and only if it has been promulgated by a proper authority (say, a judge). Woozley's position went beyond the position of most positivists by tying the set of "legally true" propositions very tightly to the set of official promulgations. It appears that for him every judicial decision adds to the set of legally true propositions. Though the proposition "no one can park on a double-yellow line" might be legally true (as the text

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[12] An alternative might be to read Woozley as simply equating the term "truth" in the legal context (or the phrase "legally true") with the description "promulgated in a judicial decision" (or "promulgated by a decision of the highest court"); that is the reason why we cannot speak of legally true statements until an official has granted judgement. However this reading would make Woozley's position both irrefutable and meaningless. It does not make sense to treat a legal positivist or a legal realist ("law is a prediction of what the courts will do and nothing else") as merely offering either a stipulative definition or a linguistic analysis. These theorists were trying to make an analytical or conceptual point about the nature of a social institution and the way its participants act.

[13] The following illustrates the difference between true and "legally true": the standard legal positivist separation of law and morality could be exemplified by saying that while it may be true that we have a duty to care for our elderly parents, it is not <u>legally</u> true (within our legal system) that we have a duty to care for our elderly parents.

of a valid statute), for him the proposition "Robert Smith cannot park on a double-yellow line" is not legally true until it is stated by a judge as part of a judicial decision (since it is not explicitly stated in the statute). Under this reading, Woozley's theory begins to resemble Hans Kelsen's theory. Kelsen wrote that when a judge decides a dispute or sentences a convicted criminal, the judge is not only applying a rule -- a general norm -- he or she is also creating an individual norm.[14] According to Kelsen, the court "does not only 'seek' and 'find' the law existing previous to its decision.... Both in establishing the presence of the conditions and in stipulating the sanction, the judicial decision has a constitutive character."[15]

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[14] H. Kelsen, General Theory of Law and State 132-136 (1945); see also J.B. White, Justice as Translation 246 (1990) (describing each application of a statute as a "translation of authoritative texts into the present moment ... always requir[ing] an act of creation.")

[15] H. Kelsen, General Theory of Law and State 135.

Though there is a surface similarity between Kelsen's ideas and Hart's argument about judicial discretion in borderline cases, there are important substantive differences. Part of the "creative" and "constitutive" aspect of the judicial decision for Kelsen is the choice among possible sanctions, a choice that even Dworkin saw as an exercise of discretion in the strong sense of that term. R. Dworkin, Taking Rights Seriously 71. The other part of the judicial decision that Kelsen characterized as "clearly constitutive" is "the ascertainment of the conditioning facts". H. Kelsen, General Theory of Law and State 135. For example, a general norm might state: "If a citizen commits murder, that citizen ought to be sentenced to life imprisonment." It still must be determined whether the defendant Roger Smith is a citizen and whether what he did constituted murder before punishment can be imposed under the general norm. By contrast, for Hart, a judge's application of a rule to a particular situation in certain cases could be seen as the creation of a new rule, but in most cases would not be. Hart gave no emphasis here to the fact-finding function, only to whether the facts, once found, fit clearly within the rule's scope. In Dworkin's terminology, Kelsen includes both "weak" and "strong" forms of discretion as constituting judicial norm-creation, while Hart includes only "strong" discretion in his discussion of judicial

The problem with tying the set of legally true propositions to actual court pronouncements is that it seems to discount the role of reason within law. There are standards of correct inference within a legal system (most reflecting general notions of correct inference, though some may be peculiar to legal systems) which participants of a legal system use to argue for particular outcomes in particular cases, to predict how a court will resolve particular cases, and to praise or criticize past court decisions. Within the discourse of most legal systems, it is not nonsensical (though it may often be unjustified) to claim that a particular court decision was wrong. The idea of legal mistake means that there is conceptual space between what a court actually said and what the court should have said.[16]

Ignoring the concept (and the problem) of legal mistake has created difficulties for various legal theories. For example, John Austin ignored the problem of legal mistake in one of his arguments against natural law theory. He posited that if he violated an unjust statute -- one which would not be valid according to a natural law theory -- which carried the death sentence, the natural law argument would not get hem very far:

> if I object to the sentence, that it is contrary to

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legislation.

[16] The going is tricky here, and I am trying to be careful in my wording. To have written (instead of what I did write) that there is conceptual space between what a court actually said and what the law was (at least before the court's decision was handed down) would have been to take sides within the controversial (and subtle) question of when a particular proposition or source is part of the law (as contrasted, say, with not being part of the law despite judges having an obligation to apply it).

> the law of God ... the court of justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity.[17]

The story was meant to be about the difference between legal validity and morality: that a statute could be invalid without being immoral. In fact, at most the story is about the difference between legal validity and political power, or about legal mistake. To see this, we need only modify the story slightly. If the narrator was to be hung for violating a particular statute, it might be equally futile to argue that the statute was not a valid law under the governing rule of recognition (e.g., that it was somehow procedurally deficient), even if that argument was correct. Judges can make mistakes (and even act deliberately contrary to the law).[18] Because of the possibility of legal mistake, Austin was wrong to conflate the fact that an official acted as if a statute was valid law with the statute actually being valid law.[19]

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[17] J. Austin, The Province of Jurisprudence Determined 185 (Library of Ideas ed. 1955), quoted in Hart, "Positivism and the Separation of Law and Morals", 616.

[18] Here, of course, the "can" denotes physical possibility, not authorization.

[19] The connection Austin drew between enforcement and validity is shown by two sentences which occurred slightly before the section quoted above:

> Now, to say that human laws which conflict with the Divine Law are not binding, that is to say, are not laws, is to talk stark nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced by judicial tribunals.

J. Austin, The Province of Jurisprudence Determined 185. I am not, of course, arguing that a workable legal theory could ever make legal validity completely independent of enforcement. Arguably, and this simplifies the matter somewhat, some legal

Woozley equated the set of all true statements within a legal system with some set of propositions declared or decided by judges. To admit the concept of legal mistake is to say directly that it may be that not all judicial conclusions are true statements within a legal system and to say indirectly that there may be some such statements that have never been part of a judicial declaration. The debate then is over what additional elements can be used to justify a claim that a certain proposition is true within a particular legal system (and not just that it should be made true within that system) even though no statute or precedent states it explicitly.[20]

In loosening the connection between the set of legally true propositions and official promulgations, I want to assert both 1) that some judicial statements and decisions do not add to the list of legally true propositions, that is, that there are legal mistakes; and 2) that some propositions are legally true even though never promulgated by the relevant authority. The second assertion is illustrated by Joseph Raz's definition of "legal justification":

> The statement 'It is the law that P' legally justifies the statement 'It is the law that R' just in case 'It is the law that P' is true and there is a set of true statements (legal or non-legal) <Q>, such that <Q> and it is the law that P state a complete reason to believe that R (and <Q> by itself does not state such

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positivists do equate over the long term what officials enforce as law and what the law is. See, e.g., H.L.A. Hart, The Concept of Law 97-107 (discussing "the rule of recognition"). However, only a caricatured form of legal realism would equate in the short term what the law is with whatever officials characterize (or enforce) as law.

[20] See Raz, "Legal Rights", 4 Oxford Journal of Legal Studies 1, 9-12 (1984).

a reason).[21]

Here it may be the case that "it is the law that P" is a judicial pronouncement (that is not challenged as mistaken) or a statute, but the derived "it is the law that R" is not. Most legal practitioners and legal theorists would accept derivations of this kind, but Woozley appeared not to.

As for the first assertion, that not all judicial conclusions about the law add to the set of legally true propositions, consider the situation if two judges within the same jurisdiction promulgated norms with contradictory contents, for example, one saying that book-stores in the jurisdiction could not be open for business on Sundays and the other saying that those same stores could be open for business on Sundays. In this situation, one would believe that even the extreme positivist would have to admit the occurrence of "legal mistake", that one of the judges, even though formally acting within his or her authority, had not added to the set of legally true propositions. The extreme positivist has a difficulty here. On one hand, he cannot claim that both promulgations are legally true without severing all connections between law and norms: it is part of the "grammar" of normative discourse that it makes no sense to say both that one has permission to do X and that one is also prohibited from doing X. On the other hand, if the extreme positivist refers to some principle to justify dismissing one of the two promulgations as mistaken, that admits that the institutional source of a proposition is not the only criterion and not a conclusive criterion for describing the proposition as

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[21] Id., 7-8 (emphasis added).

legally true. The extreme positivist is forced to concede that at least some of the time judicial conclusions about the law do not add to the set of legally true propositions.[22]

C.

I want to consider briefly a matter rarely mentioned in the literature, the scope of "right answers" theories: that is, to what types of legal questions such theories extend to. Dworkin has generally limited his discussions to the question of whether the plaintiff or the defendant in a civil law suit has a right to win. In his earlier works, he specifically allowed that judges have discretion in the strong sense for some of their other decisions: for example, the setting of a prison sentence or the framing of equitable relief.[23] It is not clear why a "right answer" theory should exempt even these areas. Assuming a particular approach to judicial reasoning (for Dworkin, the balance of "fit" and "best light" and the value of integrity)

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[22] A slightly less extreme form of positivism is still possible: someone might argue that among different properly promulgated norms, a legal interpreter may occasionally have to treat some of the promulgations as invalidated, limited, or modified by other promulgations in order to maintain minimal consistency in the legal system's orders. (By minimal consistency, I mean only avoiding actual or potential contradictory contents in the norms. See J.W. Harris, Law and Legal Science 70-83. I do not mean any broader consistency of values and purposes among the various legal norms. Cf. R. Dworkin, Law's Empire 225-258 (discussing the value of "integrity" in interpreting legal rules).) These are merely the principles of non-contradiction and derogation traditionally used in legal analysis. See J.W. Harris, Law and Legal Science 70-83. This concession, the somewhat-extreme positivist would argue, does not entail the further concession that some propositions are legally true despite never having been promulgated by a relevant authority.

[23] See R. Dworkin, Taking Rights Seriously 71.

does yield a right answer as to who should win the lawsuit, it might also do so for other judicial decisions: evidentiary motions, procedural motions, the setting of jury instructions, sentencing, and so on.

Dworkin's discussions on the application of his "right answer" thesis to matters other than civil verdicts were mixed and seem to have changed somewhat over time. In an early work, he argued that the proposition that judges have discretion in the strong sense "must be established affirmatively, on the balance of argument", and that in the case of sentencing and equitable relief judges have reached that decision.[24] I am sceptical that the discretion in these areas was claimed only after it had been "established affirmatively, on the balance of argument" (nor is it entirely clear why the decision should be made by judges rather than, say, legislators). Also, I do not see why this conclusion of discretion would be immune from the same arguments Dworkin used against legal positivist claims for judicial discretion.

Later discussions did seem to assume a wider scope for Dworkin's right answer theory, though he never discussed the question of scope directly. In Law's Empire, he implicitly extended the theory to include determining the appropriate remedy in civil law suits (at least for those cases with particularly wide social consequences).[25] In another discussion, he argued that it followed from the right of the innocent not to be

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[24] Ibid.

[25] R. Dworkin, Law's Empire 389-391 (discussing the appropriate remedy in the desegregation case of Brown v. Board of Education, 349 U.S. 294 (1955)).

convicted of a crime and the right of certain parties to win their civil suits that citizens have the right to have a particular level of accuracy in their trial procedures. He wrote that citizens have a right that the state, in its selection of trial procedures, give the appropriate weight to potential "moral harm" (the injustice to those directly affected due to incorrect verdicts) as against the interest in efficiency.[26]

If theorists do not feel inclined to extend "right answer" theories to judicial decisions other than the judgments in civil suits, it may be because in those other decisions they are confident that though some answers can be labelled as wrong, there is more than one right answer. However, the notion of a "right answer" in sentencing decisions is not so strange that it has no takers. Michael Moore seemed at least somewhat inclined towards such a position. His attempt to give a metaphysically realist analysis of the legal concept of "malice" turns on a judge being able to determine the exact punishment that a particular criminal deserves.[27] In a sense, whoever believes in either a pure retributivist or a pure utilitarian approach to punishment would believe that there is (in principle) a single correct sentence for each offender (after calculating -- however such is done -- either the level of moral turpitude of the act or the best way to maximize utility).[28] The problem has always

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[26] R. Dworkin, A Matter of Principle 72-103 (1985).

[27] Moore, "The Interpretive Turn in Modern Theory: A Turn for The Worse?", 41 Stanford Law Review 871, 886 (1989).

[28] Of course, it may be the case that due to problems with the theory itself, utilitarianism or retributive theory cannot reach unique right answers for the relevant moral-legal questions. See, e.g., J. Raz, The Morality of Freedom 267-366

been how to get the bulky machinery off the ground: in a retributive theory, for example, what will the base of comparison be?, do we focus on objective harm or subjective evil intent?, are mathematics-like comparisons even possible for matters of motivation and harm?, and so on.[29]

One reason right answer theories may be thought of as only applying to judgments is that it is there that the rhetoric of general practice seems best to match a right-answer theory. The argument is that we speak of a litigant having a right to win his suit in a way that we do not speak of the litigant having a right to a particular level of damages or a particular rule of evidence. However, in areas other than civil judgments, even if we do not often speak of a person <u>having a right</u>, we do (at least sometimes) speak of there being <u>a right thing to do</u>: for example, that it is wrong to have rules excluding certain kinds of evidence (<u>e.g.</u>, hypnotically-enhanced testimony[30]) or that the sentence the defendant received was neither too severe nor too lenient. There are subtle and interesting differences between the rhetoric of rights and the rhetoric of "the right thing to do", but the concepts are certainly related[31], and both types of rhetoric would support or encourage a right-answer theory.

(1986) (arguing against consequentialism). However, such disputes are beyond the scope of my project.

[29] <u>See</u> H.L.A. Hart, <u>Punishment and Responsibility</u> 161-163 (1968).

[30] <u>See</u> <u>Rock v. Arkansas</u>, 483 U.S. 44 (1987).

[31] For a discussion of the connections and differences, see J. Finnis, <u>Natural Law and Natural Rights</u> 205-210 (1980).

We should note that in many decisions other than the final judgment, judges' decisions are bound to some degree. By stating that a judge's decision is bound I mean (at a minimum) that if the decision transgressed certain boundaries, it would be reversed by a reviewing court. For some of these decisions, the judges could be said to have "discretion", though it is not (or is not treated by the reviewing courts as being) as limited as Dworkin's "weak sense" of discretion or as broad as his "strong sense" of discretion.[32] Dworkin noted that what he called the "strong sense" of discretion is "not tantamount to license", in that decisions made under such discretion, like all decisions, are still held to "standards of sense and fairness".[33] This, however, is not sufficient to capture the bindingness judges feel in many of their "discretionary" decisions. Dworkin also referred in passing to "that jurisprudential favourite, 'limited discretion'", but dismissed it as merely being where the judge has discretion in the weak sense for part of the decision and discretion in the strong sense for another part.[34] This again fails to capture the way judges and reviewing courts experience and view such decisions.[35]

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[32] See R. Dworkin, Taking Rights Seriously 31-33.

[33] Id., 33.

[34] Id., 32 n.1.

[35] The fact is that the rhetoric (not meant here as a pejorative term) judges use in decisions on procedural or sentencing matters -- decisions which Dworkin tends to characterize as involving strong discretion -- often matches that of judgments in implying that there are a limited range of right answers or a unique right answer. This observation is not meant as dispositive on any issue, only as a caution against accepting (or rejecting) judges' rhetoric as evidence supporting or opposing a "right answer" theory (given that the rhetoric might

An alternative model with some suggestive power is to see some "discretionary" judicial decisions as analogous to the American rules as to when a judge can direct a jury's verdict. "The trial judge allows a case to go to the jury only if the evidence suffices to support a verdict either way."[36] Within a certain range, any decision would be "right" or "acceptable". This model is reproduced in many discussions of the judicial review of actions by administrators or lower court judges. When the standard of review is "deferential" -- for example, the "clearly erroneous" standard and the "abuse of discretion" standard in American law -- the reviewing courts often speak of not "substituting its opinion for the opinion of the trial court", or that even if the reviewing court "might have decided the issue differently", it will still uphold the lower court's decision.[37] A cynical reading of deferential judicial review would view this language as saying to the initial decision-maker: "you can be wrong, as long as you are not far wrong ('clearly erroneous')". A more sympathetic reading would echo the analysis of directed verdicts: within a range of decisions, no decision will be considered wrong.

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be similar in types of case we wish to treat differently regarding the question of "right answers", or different in types of cases we think should be treated the same).

[36] Nesson, "The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts", 98 Harvard Law Review 1357, 1370 (1985) (footnote omitted).

[37] See, e.g., Frank Brisco Co. v. Clark County, 857 F.2d 606, 613 (9th Cir. 1988) ("We cannot simply substitute our judgment for that of the district court to reverse under [the abuse of discretion] standard, but must be left with the definite and firm conviction that the court committed a clear error of judgment in reaching its conclusion after weighing the relevant factors.").

Similar models -- there being incorrect answers, but also a range of correct answers -- may be found in various legal theories. For example, for John Finnis, the translation of the principles of practical reasoning into concrete legal rules often requires an act of implementation (determinatio) that goes beyond simple deduction. Though the legislator's choice is strongly guided, it does involve ("arbitrary" or "judgment") choices among equally correct alternatives.[38] Hans Kelsen similarly implied a certain discretionary range within which a judge acts when the judge "individualizes" or "concretizes" a general norm to apply it to a particular case.[39] For the most part, these "ranges of right answers" do not refer to the extreme situations discussed above, where either a guilty verdict or an innocent verdict might be equally acceptable, but to less dramatic situations, as in the different ways of applying a vague statute or extending a common law rule to a new factual situation.[40]

Regarding whether standards of review are helpful in considering the problem of "right answers", much may turn on how

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[38] J. Finnis, Natural Law and Natural Rights 282-289; Finnis, "On 'The Critical Legal Studies Movement'", 30 American Journal of Jurisprudence 23-26, 37-38 (1985).

[39] See H. Kelsen, General Theory of Law and State 134-136; H. Kelsen, The Pure Theory of Law 230-236; J.W. Harris, Legal Philosophies 68 (1980).

[40] We seem uncomfortable with the idea that two alternatives could be equally justified if the choice between them could have significant consequences for individuals, as would be the case for verdicts in some civil suits. However, there will be many significant consequences in the choice between two equally good co-ordination schemes (for example, two different anti-pollution plans) -- e.g., businesses ruined. other businesses benefitted, and people forced to move -- but here we seem less bothered by the idea that the alternatives may both be "right answers".

one views the difference between the judgment having been "erroneous" and its having been "clearly erroneous" (assuming one finds the distinction sensible at all). The United States Supreme Court once defined the "clearly erroneous" standard as having been met if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[41] What comes to mind are the situations where we recognize that there are good arguments (whether moral arguments, policy considerations, or factual evidence) for more than one possible resolution of a problem or dispute, and while we may choose one conclusion (and thus tentatively conclude that it is "right" and the alternatives "wrong") we understand how other people could arrive at different conclusions. Our lack of certainty can be contrasted with the "definite and firm conviction"[42] that the Supreme Court equated with the "clearly erroneous" standard.

It is then not clear if the considerations of the difference between judgments of "erroneous" and "clearly erroneous" gets us any further towards finding or justifying an alternative to the "one right answer" position. Both responses assume that there are right and wrong answers -- the distinction between the two judgments seems to turn either on the certainty of the reviewing court or on the tenability of the original response -- and the distinction neither advances nor hinders the suggestion that

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[41] United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

[42] Cf. L. Wittgenstein, Philosophical Investigations section 231: "'But surely you can see ....?' That is just the characteristic expression of someone who is under the compulsion of a rule."

there may be more than one correct answer. The distinction is only helpful if we equate the judgment of that a decision was "[merely or not-clearly] erroneous" with the decision having been correct. Let me explain: from the perspective of the original decision-maker, what is important (among other things) is that the decision not be reversed upon appeal. Both judgments that the reviewing court considers correct and those it considers "[merely] erroneous" will be upheld -- and if the decision is upheld, it will be a valid legal norm. From the perspective of the law (the reviewing court considering the original decision, just like the trial judge considering the (possible) verdicts of the jury), both answers would be "right".

Consider a different standard of review: the standard of "substantial evidence" is used in America in reviewing findings of fact by both juries and administrative agencies.[43] If there is adequate support for a factual finding -- the support need not be indubitable or conclusive -- the reviewing court will uphold it. What is significant is what is not said, but what is a background truth of the practice: both in normal trials and in administrative procedures, regarding the most hotly disputed factual questions, there usually is (what would be considered) "substantial evidence" for contrary factual findings. Again, in such situations, if correctness is equated with what will be upheld by the reviewing court, there will be more than one right

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[43] See, e.g., 5 K.C. Davis, Administrative Law Treatise 351 (2nd ed. 1984).

answer.[44]

One final example: American courts review with some deference administrative agencies' decisions regarding what rules to promulgate, and whether to promulgate any rules at all.[45] The example, not coincidentally, looks similar to Finnis' discussion of determinatio: analogous to legislative choices within the limits of natural justice are the agency's choices within the limits of its statutory instructions. Judicial deference here is partly a recognition that the agencies have greater expertise in administrative decisions and partly a recognition that the legislative grant of power implied a certain amount of discretion.[46] For both of these reasons, administrative rule-making is one legal area where it seems most justified (and least paradoxical) to talk about there being a range of correct decisions (while there are also decisions which are legally wrong -- both in the sense of being ultra vires and in the sense that they will/should be invalidated by a reviewing court).

The discussions in this section were meant to be suggestive, not dispositive, on issues relating to the "right answer" theory. Among the suggestions are that a theory regarding the limits of judicial discretion need not begin and end with the topic of final judgments, and that one can speak -- that at least in the

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[44] This conclusion is slightly paradoxical because here the underlying subject can be the discovery of historical truth -- the facts about what happened -- and we assume that there should only be one right answer for such questions.

[45] See, e.g., 5 id., 332-363.

[46] See, e.g., 5 id., 343-344.

American legal system, practitioners and theorists often do speak -- of there being situations where judges' discretion is substantially bounded and there is more than one correct result. I leave the development of these theories to another time or another person.

My examples were all drawn from the American legal system, and were not meant to describe some (necessary or essential) aspect of all legal systems. I see no reason to believe that either the structural elements I have described (division of functions between judge and jury, review of lower court decisions by appellate courts, and delegation of some legislative and judicial functions to administrative agencies combined with judicial review of administrative actions) or the dynamics within the structure (the criteria of evaluation used within the system that sometimes allow one to speak of there being more than one correct (or "acceptable") answer to a legal question) are present in all other, or even most other, legal systems.

It is my impression that if one were to make a global claim about legal indeterminacy, it would have to be made at the level of language or at the level of rules and rule-application, claiming that because of the nature of one or the other, there would always be cases where there is more than one right answer. There are obvious difficulties for making a global claim about legal determinacy, in that it always seems open to a society to create rules or reviewing processes which incorporate strong discretion for the decision-makers.[47] As it is, most of my

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[47] It is possible that one day someone will put forward an argument that systems which condone strong discretion by their decision-makers, or that are structured in such a way that there

discussions, like most of Dworkin's discussions, have been focused on the practices of and self-understanding within a particular legal system.

D.

The final topic in this short survey on right answer theories is the problem of commensurability. The problem was first raised by John Mackie; he argued that the strength of considerations in favour of two sides of a legal problem "may be imperfectly commensurable, so that neither of the opposing cases is stronger than the other, and yet they are not finely balanced."[48] When we consider the two sides of a legal question which are in rough equipoise, if we then discover minor support for one side in an obscure precedent or statute, that small piece of evidence should in theory make us choose the favoured side. The fact that the evidence often does not have that effect could indicate an incommensurability of factors.[49] Dworkin did not offer a substantial reply to this initial formulation of the problem.[50] On the subject of incommensurability, Dworkin stated merely that his theory "presupposes a conception of morality other than some conception according to which different moral

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are not always unique correct answers to legal problems, are not really "legal systems". However, as I cannot now imagine how such an argument might proceed, I will not now concern myself with it.

[48] Mackie, "The Third Theory of Law", in Ronald Dworkin and Contemporary Jurisprudence 165.

[49] "A Reply by Ronald Dworkin", 272.

[50] His response to Mackie focused on questions of the proper characterization of "fit" and of the role of "fit" within a theory of judicial reasoning. Ibid.

theories are frequently incommensurable."[51]

The challenge was picked up, and elaborated in some detail, by John Finnis. He wrote: "a claim to have found the right answer [in hard legal cases] is senseless, in much the same way as it is senseless to claim to have identified the English novel which meets the two criteria 'shortest and most romantic' (or 'funniest and best', or 'most English and most profound')."[52] According to Dworkin's approach (in both his earlier and later writings), there are two separate criteria for evaluating theories of what the law requires, and "in the absence of any metric which could commensurate the different criteria (the dimensions of fit and inherent moral merit), the instruction to 'balance' (or, earlier, to 'weigh') can legitimately mean no more than bear in mind, conscientiously, all the relevant factors, and choose."[53]

Dworkin's reply to Finnis[54] was that the incommensurability argument remained unproven. Finnis had assumed, but had not shown, that the judgments of "fit" and political-moral soundness were incommensurable. Given that we are all the time making "all things considered" judgments in all sorts of situations which

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[51] Ibid.

[52] Finnis, "On Reason and Authority in Law's Empire", 6 Law and Philosophy 357, 372 (1987) (footnote omitted).

[53] Ibid. Finnis points out that in Law's Empire Dworkin had retreated from his earlier position that "fit" was merely a "threshold" criterion. Id., 372-374. In any event, "[t]his solution was empty, for he identified no criteria ... for locating the threshold beyond which the criterion of soundness would prevail." Id., 373.

[54] Given in lectures at Oxford University, 18 & 25 January & 1 February 1989; 20, 21, & 27 February 1990.

involve disparate criteria, the burden should be on those claiming incommensurability to put forward some argument to support their position.[55] Such an argument would refer to the objectives of the practice or the ideas underlying various criteria to explain why the criteria cannot be made commensurable. After all, Dworkin claimed, even criteria or goods within which Finnis had assumed that commensurable judgments could be made, like friendship[56] and "best plot"[57], can be disaggregated into disparate elements. One friend may be more reliable but not as much fun to be with as another friend; one book's plot may be more believable than that of a second book, but the second book's plot may be more compelling. On what basis do we judge the disparate elements within (subcategories of) a category to be commensurable but the different categories themselves not to be? Finnis had written of there being no single metric to combine two criteria[58] or of their being "no principle by reference to which [one] could criticize as unreasonable or immoral" those who combine the criteria in a different way or with a different result.[59] Dworkin might respond that these points only relate to cases of clear commensurability or clear incommensurability. To put the point another way, Finnis' argument arguably only showed that

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[55] See Kress, "Legal Indeterminacy", 77 California Law Review 283, 335-336 & n. 215 (1989).

[56] J. Finnis, Natural Law and Natural Rights 88.

[57] See Finnis, "On Reason and Authority in Law's Empire", 372.

[58] Id., 374.

[59] J. Finnis, Natural Law and Natural Rights 116.

commensurability in most cases is not demonstrable. However, Dworkin would reply, neither is incommensurability.

In reply to Joseph Raz's discussion on incommensurability[60] and in reference to a judge's perspective on hard cases, Dworkin argued[61] that the fact that we do not now see a reason for preferring one claim (or one decision) over another (and that we may not be able to imagine ever finding such a reason) is different from and does not entail that the alternatives (or the underlying evaluative criteria) are incommensurate. That second step, he argued, requires a further, substantive argument.

To repeat, Dworkin argued that the best evidence we have that "all things considered" judgments can be made -- whether combining various aspects of "best novel", various aspects of "friendship", or the elements of "fit" and "moral worth" -- is that we do make such judgments all the time. The argument strategy is similar to one Dworkin used in support of his "right answer" theory: that the arguments offered for a right answer in particular disputes are the best evidence (if not the only evidence) that can be offered to show that there are right answers to (almost) all legal questions. The underlying argument is that neither his position -- right answers and commensurability -- nor his opponents' position can be proven on a global scale. Each decision or choice must be considered separately, to see whether the relevant criteria can be commensurated and (a related matter) whether there is a unique

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60 J. Raz, The Morality of Freedom 321-366.

61 Given in Lectures at Oxford University, 20 & 27 February 1990.

right answer. This response is not entirely satisfactory. The fact that we make numerous choices involving allegedly incommensurable values may prove that those values were not in fact incommensurable, or it may only prove that a larger percentage of our choice than we might have thought were "arbitrary" (in the sense that we cannot defend the choice we made on the basis that it was superior to the choice(s) we rejected). To those we are not worried about commensurability, the second option seems unlikely; to those who are worried about incommensurability, the first option seems unlikely. The argument remains at a stalemate.

The problem of choice in the face of apparently incommensurable values comes up regularly in the literature on moral decision-making. An interesting example for our purpose is S.L. Hurley's book Natural Reasons, where she put forward a theory of moral choice which is structurally similar to Dworkin's approach to law. Dworkin had argued that judges should decide cases by building a theory of what the law is in the area in question, a theory which would incorporate different values, including fit and moral worth. Hurley argued similarly that an all-things-considered judgment of what ought to be done should be based on the theory that does the best job of displaying coherence among the various values that apply.[62]

Hurley did not claim that the various values that her theory must take into account are commensurable. That judgment, she argued, could only be made after we found the best theory about

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[62] See S.L. Hurley, Natural Reasons 193-196. Hurley explicitly noted the parallels between her work and Dworkin's. See, e.g., id., 201, 212.

the relationship between the values. That theory might turn out to be monistic (like the simpler forms of utilitarianism), in which case the values would be commensurable, or the theory might turn out to be pluralist, in which case the values would not be commensurable.[63] Here, Hurley was distinguishing between "commensurability in the weak sense of merely formal unity" and "commensurability in some more substantial sense"[64]: the weak sense occurs when decisions are made despite the existence of different values; the strong sense occurs when all the different values are reduced to a single value or a function of a particular unit of measure. Values are (always) commensurable in the weak sense for Hurley because the product of our theorizing will be a ranking of alternative actions which does take into account the various values. However, this theorizing does not commensurate the values in the (strong) sense, in that it does not offer a common metric.

At one point in her text, Hurley described the role coherence could play in reaching a legal judgment. The hypothetical case involved resolving a conflict in Contract law between the doctrines (and underlying values of) consideration and estoppel in a situation where the promisor had made a gratuitous promise which induced detrimental reliance in the promisee and which the promisor would reasonably have expected to induce the promisee's reliance. The issue for judgment was, was the promisor under a legal obligation to the promisee?[65]

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63 Id., 260-270.

64 Id., 270.

65 Id., 205-206.

She analyzed the arguments for and against liability, determined how the conflicting arguments had been resolved in various contexts in past cases, and then constructed a theory consistent with past decisions to show under which circumstances a particular argument would prevail. The hypothetical case was then resolved according the theory (concluding that liability does exist).[66]

There are two things to note here. First, Hurley's coherence approach to legal decisions commensurated different practical reasons only in the weaker sense, in that a choice was made which took the various reasons into consideration. Second, what made the ultimate decision the correct one for Hurley was that it was more consistent with past decisions (and the decisions we would reach in hypothetical decisions) than the alternatives.[67] In the example, the problem of commensurability seems to drop out: we bring together and order various values for this choice according to the way we have done so before. However we commensurated (here, in the weak sense) the values before, we shall do so again; it is a kind of "bootstrap argument". The later decisions are "right" if they are consistent with the collection of past decisions (and choices one

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[66] Id., 203-219.

[67] I am simplifying Hurley's position somewhat. For Hurley, "to say a certain alternative ought to be done, all things considered is to say that the theory that does the best job of displaying coherence favours that alternative". Id., 193. I have passed over the step -- the construction/selection of the best theory, which is then used to determine the correct ultimate decision -- that she would consider important, but which I do not believe relevant for my present purposes.

would currently make in hypothetical cases).[68] The question then is, what made those initial decisions -- which ground all later decisions --right. One might answer, "nothing made the initial decisions 'right'; we just chose (choosing for a reason, but allowing that reason would have allowed other decisions[69]), and now we are acting consistently with those past choices because there is a value to acting consistently and a value to acting in accord with who one is (and with how one has been affected by one's past choices)." Leaving aside evaluating the merits of that position, I want only to note that this approach does not so much solve as circumvent the core problem of incommensurability. There is no claim in the abstract that right answers can be given when different values are involved; the approach directs us only to combine the values in a way consistent with the way we have done in the past. There is a "right" or "best" answer only in a derivative or secondary sense of those terms.

The issue of incommensurability is quite difficult, and the arguments in the philosophical literature in the area are still undeveloped (though as the field is growing, there is promise of greater sophistication). I am not able in this short section to give the complexities of the area due consideration. I fear that an attempt to adjudicate the debate between Mackie, Finnis, Raz,

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[68] There may yet be some difficulties filling out the notion of "consistency" here, but I leave that issue aside. Cf. Moore, "Metaphysics, Epistemology and Legal Theory" (Book Review), 60 California Law Review 453, 480-481 (1987) (discussing Dworkin's concept of "fit").

[69] Cf. J. Raz, The Morality of Freedom 339-340 (choosing between incommensurable options).

and Dworkin would be beyond the scope of this paper; I refer those interested to the articles in the field (I offer a non-exhaustive list of major sources in a footnote[70]). However, I thought it important to raise the question of incommensurability and to outline some of the problems in that debate, since it is clearly central to any attempt to defend a "right answer" theory. If the evaluative criteria of Dworkin's theory are incommensurable, then the claim that there are unique right answers to most legal problems must fail. Whether that challenge can be overcome I must leave to others to determine.

There is one more matter I should consider before I go on to other topics. This section and the previous one have suggested that there may be more than one right (or "acceptable") answer to some legal questions, either because the alternative answers are incommensurable, because the legal system is indifferent to how a particular question is resolved, or because

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[70] See Raz, "Mixing Values", Proceedings of the Aristotelian Society, Supplementary Volume 65, 83 (1991); Griffin, "Mixing Values", Proceedings of the Aristotelian Society, Supplementary Volume 65, 101 (1991); M. Stocker, Plural and Conflicting Values 211-277 (1990); S.L. Hurley, Natural Reasons 257-270 (1989); Regan, "Authority and Value: Reflections on Raz's Morality of Freedom", 62 Southern California Law Review 995, 1056-1075 (1989); Raz, "Facing Up: A Reply", 62 Southern California Law Review 1218-1222 (1989); Finnis, "On Reason and Authority in Law's Empire", 6 Law and Philosophy 357, 370-376 (1987); J. Raz, The Morality of Freedom 321-366 (1986); J.M. Finnis, Fundamentals of Ethics 86-94 (1983); Williams, "Conflicts of Values", in B. Williams, Moral Luck 71-82 (1981); Sen, "Plural Utility", 81 Proceedings of the Aristotelian Society 193 (1980-81); Nagel, "The Fragmentation of Value", in T. Nagel, Mortal Questions 128-141 (1979); Wiggins, "Weakness of Will, Commensurability, and the Objects of Deliberation and Desire", 79 Proceedings of the Aristotelian Society 251 (1978-79); Griffin, "Are There Incommensurable Values", 7 Philosophy and Public Affairs 39 (1977); Wiggins, "Truth, Invention and the Meaning of Life", 42 Proceedings of the British Academy 331 (1976); Urmson, "A Defence of Intuitionism", 75 Proceedings of the Aristotelian Society 111 (1974-75).

different responses would be (by the relevant criteria) of equal merit. If this is the case, the question then is, how should the judge (or other decision-maker) decide between the alternative answers? Would flipping a coin be legitimate? (Contrarily, would any procedure other than a random one, like flipping a coin, be legitimate?)

One line of response is that while the duties and principles within past legal actions may not yield a unique answer to particular legal questions, other sets of values or principles could -- or perhaps should -- be applied to make the decision. For example, H.L.A. Hart wrote that there may be "characteristic judicial virtues" which judges can and should use in cases where there is discretion.[71] One could just as easily say, the judge should decide the case as he or she thinks best, all things considered. Under this line of response, the underlying idea is that there is more than one right answer in some legal cases only because the law requires or offers only a limited set of sources, principles, and duties; with the addition of other moral principles, policy considerations, or perhaps aesthetic considerations, there might yet be unique right answers.

A second line of response would be more appropriate for alternatives of equal merit and for incommensurable alternatives. In such cases, decisions should be made (and, arguably, are being made in actual practice) much the same way the people generally decide between incommensurable alternatives: after long

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[71] Hart listed "impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision." H.L.A. Hart, The Concept of Law 200.

consideration of the options, and the reasons for each, the decision-maker slowly begins to identify with one alternative rather than the others.[72] This option thereafter seems right to the decision-maker because it was chosen, even though it remains the case that its superiority to the alternatives cannot be demonstrated (because it is apparent rather than real). Judicial opinions in (arguably) incommensurable cases look much like personal justifications in the analogous situations: conceding that the option(s) not chosen had the advantages of reasons a,b & c; however, because of reasons x, y & z, we (must) conclude for the option we have chosen. Judicial opinions written with that structure are fairly common, and if incommensurable alternatives are involved, it is clear why such opinions persuade only those who are already persuaded.[73]

E.

In his later works, Dworkin offered what he called "an interpretive approach" to law.[74] In Law's Empire, he argued "that legal claims are interpretive judgments and therefore

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[72] See Raz, "Facing Up: A Reply", 1222.

[73] Such opinions are largely honest, in that they express all that could be expressed about why a particular decision was reached in an incommensurable case. They deceive, to the extent they do deceive, only by sometimes implying that the reasons offered required the choice made. I leave to others the question of how useful and how common judicial deception and self-deception is. See, e.g., Altman, "Beyond Candor", 89 Michigan Law Review 296 (1990).

[74] R. Dworkin, Law's Empire, 46-48. This is not to imply that the earlier writings were not interpretative or could not be so characterized. However, only in the later writings was the overall framework of law as an interpretative practice delineated and emphasized.

combine backward- and forward-looking elements; they interpret contemporary legal practice as an unfolding political narrative."[75] According to Dworkin, every time a judge is confronted with a legal problem, he or she should construct a theory of what the law is. That theory must adequately fit the relevant past governmental actions (legislative enactments and judicial decisions)[76], while making the law the best it can be.[77] "Judges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community."[78]

The argument for the "right answer thesis" in the later Dworkin is largely implicit.[79] However, his discussion of "law as integrity" in Law's Empire incorporated by reference the arguments in Taking Rights Seriously that one party to a suit has a pre-existing right to win and that only judicial actions consistent with the "right answer" theory would be properly based on principle rather than policy.[80] Other arguments offered in the later works for there being unique right answers were more

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[75] Id., 225.

[76] Id., 227-228, 245-258.

[77] Id., 52, 143.

[78] Id., 255.

[79] Perhaps it is significant that at the end of Law's Empire, he referred not to there being a "right answer" to a hard case, but a "right way ... to decide a hard case." R. Dworkin, Law's Empire 412.

[80] Id., 244, 439 n.7.

indirect: it is consistent with the rhetoric we (judges, lawyers, and legal theorists) use in legal discourse[81], global scepticism about the possibility of right answers is not tenable[82], and most modern legal systems have sufficient legal sources for subtle judgments to be made about the superiority of one theory of what the law is over all alternatives.[83]

Dworkin admitted that though he believed that there is a right answer to most hard cases, that answer will not be demonstrably right -- that is, its superiority over other answers will not always be demonstrable to the satisfaction of all (or even most) competent lawyers.[84] It is certainly correct that it does not follow from the fact that the right answer to some problem cannot be demonstrated, or from the fact that the problem

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[81] See, e.g., "A Reply by Ronald Dworkin", R. Dworkin, A Matter of Principle 144-145.

There is no easy or obvious way to choose between characterizing law as a descriptive matter, a matter of a core of clearly-present norms which are added to or modified on the margin by judicial legislation (holding to a strong version of the analytical separation between what law is and what it ought to be) and characterizing it as an interpretative matter, a matter where what the law requires can always be answered and determining what the law requires is partly a function of what the law ought to be. Any judicial decision could in principle be characterized in either way. The interpretative theorist offers in support the way lawyers and judges write in terms of what the law requires even in the most difficult cases. See, e.g., R. Dworkin, Law's Empire 37-43. The descriptive theorist offers in support the distinction, deeply ingrained in both legal and public discourse, between "the law the court finds and the law it creates." Raz, "Dworkin: A New Link in the Chain", 117.

[82] See, e.g., R. Dworkin, A Matter of Principle 167-177.

[83] See, e.g., id., 143-144.

[84] See, e.g., R. Dworkin, Taking Rights Seriously 335-338; R. Dworkin, A Matter of Principle 137-142, 153, 162, 171-172.

is a matter of great controversy, that there is no right answer.[85] However, the presence or absence of demonstrability will have important practical consequences. An approach to legal problems that espouses a procedure for finding right answers but offers neither a promise of consensus nor a process for approaching consensus may create divergent pronouncements of what the law is.

Two aspects of Dworkin's theory make it probable that different judges applying it to the same legal question would reach different results. First, given the divergence of moral and political values among persons, how the criterion of moral soundness ("best light") is filled out will vary from one judge to another.[86] This divergence of moral soundness criteria might only result in an occasional divergence in judicial decisions if the criterion of moral soundness played only a small and clearly circumscribed role within the judicial process; in such a situation, only rarely would the judges need to have recourse to the criterion of moral soundness, for the decision would almost always be determined by the other criterion ("fit" with the relevant legal materials). However, a second aspect of Dworkin's theory makes that situation unlikely. Dworkin does not pre-set

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[85] Cf. Moore, "Metaphysics, Epistemology and Legal Theory", 480-483 (arguing that, to be consistent, Dworkin must adopt at least a weak demonstrability thesis: that the right answer would be demonstrable to fully rational persons with full information).

[86] See Mackie, "A Third Theory of Law", 165-166. Cf. Kress, "The Interpretive Turn", 97 Ethics 834, 847 (1987) (arguing that if a Dworkinian judge used some version of conventional morality rather than the judge's own (critical) morality, law would be "more knowable and therefore better at promoting efficient coordination of citizens' lives ... [and it would also be] more coherent").

what level of "fit" a legal theory must have or what weight the criterion of "fit" should have as against moral soundness in judging between two alternative theories.[87] He also does not offer any process or algorithm for ensuring that different judges will treat "fit" similarly in similar cases. If judges give "fit" a small role to play, than differences in moral and political beliefs would more often result in divergent decisions. And if judges have markedly different ideas about the relative importance of "fit" and moral soundness in a particular area of law, a large divergence of results is likely even if the judges otherwise had quite similar political and moral beliefs.

In Dworkin's interpretative approach, where propositions of law are part descriptive and part evaluative[88], there will be as many different "descriptions" of a given legal system as there are persons thinking seriously about that system. In the final analysis, Dworkin's scheme results in there being for each judge that considers a case one right answer. What the right answer is, is "subjective", in the sense that the judge's view of the answer will vary predictably -- if not inevitably -- from one judge to another.[89] Dworkin affirmed this fact[90], but did not

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[87] See R. Dworkin, Law's Empire 240-266; Finnis, "On Reason and Authority in Law's Empire", 370-376.

[88] R. Dworkin, A Matter of Principle 147 ("propositions of law ... are interpretive of legal history, which combines elements of both description and evaluation but is different from both").

[89] See R. Posner, Law and Literature 227-228 (1988). Mackie, "The Third Theory of Law", 165; see also Bix, "Dancing in the Dark: The Philosophical Moves of Ronald Dworkin" (Book Review), 23 Harvard Journal on Legislation 307, 315-320 (1986).

There is a different sense in which the right answer is "objective", at least if one believes (as Dworkin appeared to)

seem to find it troubling.

By contrast, John Finnis pin-pointed exactly what is troubling about a prescription for judicial interpretation that makes it likely that the outcome will vary depending on which judge is presiding: litigants would suffer from "the excruciating sense that if their case had been tried on the same day by the judge next door it probably would have been determined differently."[91] Dworkin might argue that in principle there should be no divergence. After all, that was the whole idea of the right answer theory, that there is a unique correct answer to the vast majority of legal issues. If there is a divergence in actual results, it would have to be, under his approach, because many judge were getting it wrong (perhaps because they were applying an incorrect moral-political theory or an incorrect balancing of that theory with the value of "fit"). If every

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that there is a right or best answer regarding what standard of morality to apply and what level of fit to demand in all cases. However, if as an epistemic matter few judges are likely to discover these truths, and if those few are either unable to demonstrate the truths or unable to persuade their colleagues to adopt those standards, the right answer of theory will be continually swept over by the various and conflicting wrong answers that occur within (and partly constitute) legal practice.

[90] See, e.g., R. Dworkin, A Matter of Principle 17, 162.

[91] Finnis, "On Reason and Authority in Law's Empire", 379 n.35.

Dworkin's response might be that it is far from clear that law would be less predictable or less settled if his prescriptions were followed rather than the positivists' approach -- which, after all, requires discretion or "judicial legislation" in hard cases. The difference here might not be in the result -- different judges offering different responses to the same legal problem -- but in the characterization of the result. The legal positivist judge, unlike the Dworkinian judge, would not claim to be discovering the (pre-determined) right answer.

judge would go through the process "correctly", the argument would go, the problem of divergence would not come up.[92] What this response would miss is the concrete problems of theories that have practical consequences.

If one puts forward a theory about the correct way to interpret ancient (secular) texts, and the theory is such that even if interpreters try to follow it, many are likely to come to erroneous conclusions, then the real-world loss is minimal. If only a few persons are interpreting the texts correctly, and most others are coming up with different (and erroneous) interpretations, the result is unfortunate, but the consequences beyond the world of this discipline would be small. The area of judicial reasoning is different. It is of course of value for judges to come up with the right answers, but there is also a separate and independent value in judges coming up with the same answers. In the next section, I will consider a critique of Dworkin that is based largely on this other consideration.

Dworkin's holistic approach leaves us suspended (as he himself asserted[93]) between description and prescription. No text or past judicial utterance is itself law; such things are

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[92] Dworkin might also remind us that his theory is meant to be a theory of our practice, an interpretation of the American legal system, and it is a commonplace among practitioners and observers that the outcome of cases in this system does depend on (vary with) which judge(s) happen to be presiding. Dworkin's theory can be seen as putting this unfortunate phenomenon in its best possible light: it is not that judges are often biased (e.g., pro-business or anti-government), but that they often hold sincere-but-mistaken beliefs about the correct political-moral theory or the correct weight to be given "fit".

[93] See supra note 88.

nearly law; to be law they must be seen in their best light.[94] No real judge actually gets the interpretation right; it would take a superhuman judge ("Hercules") to discover what the law actually is. It may be that Dworkin's right answer thesis cannot be effectively rebutted directly, but only indirectly. In considering the merits of the conclusion of a right-answer thesis, one's focus must be on the premise which supports that conclusion while leaving the unusual view of law just described: an interpretative and holistic approach to what the law is/what the law requires. That focus will be taken up in the final sections of this chapter.

F.

Robert Cover argued that there is an incongruity -- a lack of "fit", if you will -- between a theory like Dworkin's, that would lead to the law having a different content for different individual judges, and the manner in which many legal systems (in particular, the American system) actually operate. Cover wrote: "there is no set of secondary rules and principles more fundamental than those which make it impossible for any single judge, however Herculean her understanding of the law, ever to have the last word on legal meaning as it affects real cases."[95] In appellate courts, a decision must have the support of a majority of the panel hearing the case, and even if the initial decision is made by a single trial judge, that decision must be

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[94] Cf. R. Dworkin, Taking Rights Seriously 214 ("A citizen's allegiance is to the law, not to any particular person's view of what the law is").

[95] Cover, "Violence and the Word", 1625.

upheld on appeal. The law may speak with a single voice, Cover argued, but this is not a voice derived from "a single coherent and consistent" interpretation of the legal materials, but from a consensus -- or majority view -- often born of compromise among various views of the law.[96] Hence, a theory of judicial interpretation that would provoke diverging individual views of what the law is would fall short, both descriptively and prescriptively.

Dworkin claimed that legal theory is primarily, if not exclusively, the interpretation of a particular legal system. His view was that analysis that applied equally well to all of the many diverse (actual or possible) legal systems would have to be of such generality as to be of little value.[97] A judge (or legal theorist or layman) who followed Dworkin's interpretative approach in determining what the law was on some issue in his or her society would construct a theory that was grounded strongly in the current legal structures and the past political system of that society.[98] Therefore, according to Dworkin himself, part of the evaluation of his approach to law should be how good of an interpretation it gives (or it is) of our own society's practices. Cover was arguing that Dworkin's approach failed at least in its interpretation of and application

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[96] Ibid.; see also Kornhauser & Sager, "Unpacking the Court", 96 Yale Law Journal 82 (1986).

[97] Lecture by Ronald Dworkin at Oxford University, 16 January 1990.

[98] See Dworkin, "Legal Theory and the Problem of Sense", in Issues in Contemporary Legal Philosophy 14-15 (R. Gavison, ed. 1987); cf. R. Dworkin, Law's Empire 72-73 (the role of paradigms in interpreting social practices).

to the American legal system.[99] Dworkin's approach did not offer a good interpretation of the American legal system because it did not fit the actual practice (decision by agreement of many rather than the vision of one) and it discounts the value that lay behind the decisions (which were made in a variety of forums and at many different periods in American history) to establish that structure at all levels of the American legal system.

Cover's argument supported an approach to judicial reasoning in which different judges' description (interpretation) of what the law is would be more likely to converge.[100] He argued that a "right answer" theory should conform not only with our ideas about the nature of language and rules and the nature of law and authority, but also with the specific institutional structures of the particular legal system concerned: for example, the structure and hierarchy of the court system and the relationship between the judiciary and the legislature.

I once heard Cover's approach described as "a complacent-seeming acceptance of judicial horse-trading". This accusation may have some force, but it misses the complexity and subtlety of the position at hand. There is a paradox in the attitude of an American judge which is similar to the paradox of the voter

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[99] However, Cover's criticism did not attack Dworkin at the highest -- most general -- level in Dworkin's hierarchy of interpretations. Cover could agree with Dworkin that law is an interpretative concept and that legal theories are attempts to make particular legal systems the best they can be; his argument worked one level lower: that Dworkin's theory did not in fact offer the best possible interpretation of the American legal system. (I will discuss some criticisms that challenge Dworkin's approach at higher levels of generality later in this chapter.)

[100] For one elaboration and defense of that approach, see Harris, "Unger's Critique of Formalism in Legal Reasoning: Hero, Hercules, and Humdrum", 52 Modern Law Review 42 (1989).

that political theorists discuss.[101] A voter who participates in and accepts a majority-rule system will hope that programme A is adopted or candidate A elected because that voter believes that programme A or candidate A is the best choice among the alternatives; at the same time, the voter also hopes that an alternative (programme B or candidate B) will be adopted if that alternative gets the majority of the votes cast. It is important to note that even though the voter believes that policy decisions should be based on majority rule, he does not determine what position he will advocate (questions of tactics and strategy aside for the moment) based on an evaluation of which position seems most likely to gain a majority. The voter advocates a position because he believes it to be the right position (or the best position among the alternatives available), but he accepts whatever decision gets a majority of the votes in part because he recognizes the value of majority rule. The situation for an American judge is analogous. The judge wants the case in question to be decided a certain way, because he believes that this decision would reflect correct conclusion about the law and the facts. However, the judge also wants the case to be decided according to the majority vote of the panel on which he is sitting (or, if it gets that far, the majority vote of the appellate panel), even if that vote reflects a view of the law or the facts contrary to his own, because he sees a value to that form of decision-making.

Thus, in one sense, the overall structure of the judicial

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[101] See Wollheim, "A Paradox in the Theory of Democracy", in Philosophy, Politics and Society, Second Series, 71-87 (P. Laslett & W.G. Runciman, eds. 1972).

hierarchy is irrelevant to the individual judge's decision-making: the judge should still try to determine what the right answer is, even if that answer will eventually be rejected in favour of another that has greater support. The process of requiring interchange among judges on a panel, review of lower court decisions by higher courts, and panel decisions by majority rule, may affect decision-making in the sense that it makes it more likely that mainstream, conventional views will prevail[102] -- though this need not prevent individual judges (or lawyers) from forcefully advocating more unconventional views. However, the process does weigh against a lawyer or judge claiming that his or her unconventional view describes what the law is even though 1) that view has never been embodied in a judicial opinion, 2) if it were to be put forward by a judge, one could predict that it would be reversed by a reviewing court, and 3) given the current rough consensus among judges and academic commentators, that view is unlikely to be accepted as the correct characterization of the law at any time in the foreseeable future.

In some ways, langauge may work better than voting as an analogy. Consider a person whose task it is to revise an old dictionary or to write a new one. The starting point for the task is the way words are actually used by the relevant population. The dictionary-writer could (and should) dismiss

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[102] It may also make it more likely that the correct outcome will be reached. See Kornhauser & Sager, "Unpacking the Court", 97-99, 116-117. Kornhauser and Sager's conclusions did not depend on any particular view of what getting the right answer in law means, but they did depend on the assumption that each judge would be more likely than not to choose the correct answer if deciding alone. See id., 97 & n.19.

certain usages as wrong, but it is in the nature of language that is term is used in a certain way by enough people for a long enough time, it becomes part of that term's meaning. It just does not make sense to say (e.g.) that the way the vast majority of people have used a term for the past 100 years is wrong. As I noted in Chapter 3, in law as in language there is a tension between authority and consensus: what is right is to some extent determined by experts, but there are also occasions when expertise must defer to practice.

From the discussion of Cover and the earlier discussion of Woozley, it can be seen that I am arguing for a middle position. I criticized Woozley for equating too strongly the set of judicial pronouncements and the set of legally true propositions. In my support of Cover's position against Dworkin, I am accusing Dworkin of not making a strong enough equating between the two.

One problem for Cover's argument is that while it criticizes Dworkin's interpretation of the American legal system, it only gives a partial answer regarding what should be offered as an alternative. To say that consensus is important, without more, makes law (and judging) into an exotic co-ordination game. It is similar to the weakness of the extreme legal realist's analysis that law is merely a prediction of what the courts will do. While such an analysis may be useful enough for a lawyer advising a client, or even for a lower-court judge deciding a routine case, the analysis is useless for the highest court deciding a novel question. There are situations when trying to predict what other people would do cannot help. The same thing happens with a consensus analysis: at least for the highest

court and for novel cases, something more must be added to the analysis. Also, a focus on agreement and consensus, without more, makes it difficult to understand what people who disagree about the nature of legal rights and duties are disagreeing about; in fact, the whole notion of substantive disagreement in law under such an approach become almost meaningless.[103] Cover did not suggest in his article what the additional, non-consensus element in the theory of law should be.[104]

The trick is not just to reach agreement, but also to have an idea of what we are agreeing about. It could be that Cover's critique could fit within a modified Dworkinian view. Under such an approach, judges would still focus on trying to view law as if it expressed a coherent, principled perspective, but the mechanics of deciding individual cases would be altered slightly from Dworkin's prescriptions. Though the same structure of balancing "fit" and moral value could remain in place, either "fit" would have to be transformed to include fit with the current (and likely future) views of other judges or "moral value" would have to be transformed to reflect society's conventional morality rather than the judge's own critical morality[105] (thus making it more likely --though still far from certain -- that particular judges' assessments of moral value will converge).

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[103] Cf. R. Dworkin, Law's Empire 37-44 (offering a similar criticism of "semantic theories" of law).

[104] Nor did Kornhauser and Sager in their article on a similar theme, "Unpacking the Court".

[105] Moore has argued that Dworkin's theory already uses conventional rather than critical morality. See Moore, "Metaphysics, Epistemology and Legal Theory", 457-464.

This discussion hints at a second problem with Cover's critique. Dworkin could concede its force while still maintaining his basic approach to law and to legal theory. Dworkin's response to Cover could be: if you believe that predictability is one of the primary purposes of the American legal system and that consensus is an important value within the system, then a judge working within the system could -- and should -- incorporate an appropriately high emphasis on those values when interpreting the law. The interpretative approach to law and to legal theory is unaffected by claims that particular interpretations do not "fit" the legal system or do not show the system in its best light. The question is whether an effective criticism of Dworkin's approach can be made against a more basic level of his theory. That will be the focus of the final sections of this chapter.

G.

Perhaps Dworkin's approach to legal theory could usefully be re-characterized as guidance to judges as to how they should act in particular circumstances.[106] His theory did not simply advise a (potential or hypothetical) judge what the law is; rather, the theory advised the judge how to make the all-things-considered judgment about how to act when deciding the case: given that legal officials in the past have acted in certain ways, the judge's implied acceptance of the legal system by taking a role in it, the high value of predictability and

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[106] See Raz, "The Problem About the Nature of Law", 21 University of Western Ontario Law Review 203, 210-211 (1983).

consistency in legal matters, and the sometimes-contrary force of other values, and so on, this is how you should decide this case.[107] (The alternative, of course, is the traditional distinction between what the law requires and how particular cases should be decided. This distinction creates conceptual room not only for notions of judicial discretion and judicial legislation, but also for the assertion that judges should decide cases contrary to what the law requires.[108]) Dworkin's discussions, not coincidentally, sometimes resembled discussions of whether there are unique right answers to moral questions. The question he considered is what should I (as judge) do, all things considered -- an only slightly-modified version of a straightforward question of practical reasoning. It is therefore not surprising that Dworkin's most heated arguments in this area have regarded problems and positions that trouble similar positions in moral theory: global scepticism and incommensurability.

That Dworkin's approach is limited in this way may be indicated by the difficulties that result from trying to argue

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[107] Dworkin's discussions about law regularly centred on questions of what a judge in a particular situation ought to do (for example, the problems of judges in wicked legal systems) -- emphasizing that past legal (and political) actions affect that moral decision. See, e.g., "A Reply by Ronald Dworkin", 258-260. While I do not think that Dworkin would necessarily reject the characterization I have offered or see it as a basis for rejecting his approach, the approach's limitations become clear (as I will argue below) in light of his claim that his theory offers a general approach to law, not merely a moral guide for judges.

[108] See Raz, "Dworkin: A New Link in the Chain" (Book Review), 74 California Law Review 1103, 1115-1118 (1986). I should note that Dworkin also wrote about occasions where he thought judges should act contrary to what the law requires. See "A Reply by Ronald Dworkin", 258-260.

that his approach should be adopted by normal citizens as well as by judges. When each citizen is trying to determine "what the law is" through an analysis that includes their own (various) moral theories as well as past official actions, it is difficult to understand either what the purpose of this exercise is or what the purpose of law is thought to be on this conception.[109]

The purpose of the exercise cannot be to determine what the citizen, all things considered, ought to do, for Dworkin's approach gives far too much weight to past official actions for it to be a likely description of how we do make difficult moral choices, or prescription for how we should.[110] (For example, we may have good reasons for ignoring the pronouncements of a wicked legal system, even if those pronouncements are seen in their best light.) If, on the other hand, we take Dworkin's characterization at face value, and the purpose of the citizen's analysis is to determine "what the law is", then we must ask what vision of law and the law's function Dworkin's approach assumed. As I discussed earlier[111], Dworkin's approach carries a high risk that different persons using it will regularly come to substantially different conclusions regarding what the law requires. This is troubling in an obvious way if the

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[109] I think that it was Dworkin's merging of a citizen's views about what the law is with an all-things-considered judgment of what that citizen should do that once tempted Dworkin towards the conceptually muddled conclusion that (it made sense to say that) the legal system should recognize a right to civil disobedience. See R. Dworkin, Taking Rights Seriously 206-222.

[110] Cf. J. Raz, The Morality of Freedom 70-105 (offering one analysis of when a citizen has an obligation to obey the law).

[111] See supra section E.

interpreters are judges; it is troubling in a different way if the interpreters are citizens. If citizens' beliefs about what the law requires vary greatly, then the law will fail in the two functions often ascribed to it by modern legal theorists: guiding behaviour and coordinating social action. For these functions to work, it is better for citizens to predict how the courts will interpret the legal rules[112] rather than acting on the basis of their own readings of those rules (to the extent that the two diverge).[113]

The above arguments depend on two assumptions. First, law's coordination function requires that all concerned understand the instructions in roughly the same way. I assume that citizens (some advised by lawyers) predicting how officials will interpret a rule will come closer to consensus or will reach consensus more often than these same citizens would if each were interpreting the law for himself using Dworkin's "protestant" approach. Second, law's guidance function requires that the rule-maker's intentions not be greatly distorted by the rule-appliers (or by the citizens' prediction of how the rule-appliers will act). I assume that (to use the American example) either the judges will remain largely faithful to the legislature's intentions or the

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[112] See Holmes, "The Path of the Law", 10 Harvard Law Review 457 (1897).

[113] None of this is to say that there is not a role (and value) for citizens to advocate alternative readings of legal rules, especially those legal rules whose application requires judgments about general moral concepts like "equality" or "due process". See generally Cover, "Nomos and Narrative", 97 Harvard Law Review 4 (1983). The point is that it does not make sense -- descriptively or prescriptively -- to see challenges to the official characterization of legal rules as normal and usual rather than as special and exceptional.

legislature will step in to clarify its prior intentions if and when the judges' reading of those intentions is badly wrong.[114]

H.

The most effective way to evaluate Dworkin's current approach to legal theory is probably to get to the core of the matter: to consider his interpretative attitude to law, which is basic to all his pronouncements in this area.

According to Dworkin, an interpretative attitude towards a practice is warranted if two facts are present: 1) the practice has a purpose "that can be stated independently of just describing the rules that make up the practice"; and 2) the rules or requirements of the practice are sensitive to its purpose, "so that the strict rules must be understood or applied or extended or modified or qualified or limited by that point."[115] Dworkin's justified his application of an interpretative approach to law[116] by the fact that it succeeds where other approaches fail in explaining the significant amount of substantive disagreement that seems to occur within law (i.e., frequent and detailed disagreement about "what the law requires in this

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[114] If these assumptions are incorrect, it will primarily affect the possibility that law can ever act to guide and coordinate action, and only incidentally affect the evaluation of Dworkin's approach. A fuller investigation into the warrant of these assumptions and the consequences if they are unwarranted is beyond the scope of this paper.

[115] R. Dworkin, Law's Empire 47.

[116] Dworkin denied that all practices must be understood in the "constructively interpretative" approach summarized above. Id., 47-48.

case").[117]

One initial difficulty to consider: the possibility that Dworkin's key requirement for an interpretative attitude, as described, is not sufficiently strong to distinguish that approach from a descriptive approach to law. Most legal positivists would not disagree with the idea (or at least would not think it inconsistent with non-interpretative positivism) that legal rules should be "extended ... or qualified or limited" according to some view of the purposes of that particular rule, that doctrinal area, or law in general. This is a weak claim, which could be seen to follow from beliefs that judges legislate on the penumbra, that words must be read in their context, and that legislation is best understood (for the purpose of application) if the problems to which it is responding are kept in mind. None of these claims, individually or jointly, entail an interpretative attitude. I do not think Dworkin believed that this weaker claim was sufficient for an interpretative attitude, though it is a reading his text allowed. At other times, Dworkin made it clear that he had in mind a stronger claim, that substantial portions of a practice are vulnerable to be changed if that would make the practice more consistent with its purpose, and that there may be no aspect of the practice which is immune.[118]

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[117] See id., 3-6, 38-44, 87-90.

[118] For example, Dworkin wrote of the paradigms of practice, "concrete examples any plausible interpretation must fit", R. Dworkin, Law's Empire 72, implying that other aspects of the practice could be rejected for the sake of consistency with the purpose. Further, even a paradigm could be rejected one day if it was found to be inconsistent with the claimed purpose. Id., 72-73. Cf. H. Putnam, "Is Water Necessarily H_2O?", in

It is crucial to ask: what does it mean to say that a practice has a purpose? Courtesy, the example of a practice Dworkin often used, is constituted by a large collection of intricate rules. A legal system is far more complex: it includes not only rules which impose duties on citizens, but also norms which empower citizens or officials to create new rules, higher-level norms which indicate how rules should be interpreted and applied, and an institutional structure through which the whole process operates. Along with this structural complexity, most legal systems also have a very broad scope, covering almost every area of human behaviour. Though it may be possible to discuss the purpose of practices like courtesy with their relatively simple internal structure and relatively limited scope, it is far more difficult to speak of <u>the</u> purpose of a legal system.

Also, with any complex entity about which we might want to talk about purposes and uses, whether this entity be a social practice, a social institution, a human product, or an animal, one must be careful to distinguish attributes which are present <u>because</u> they serve a particular purpose, and attributes, unavoidably there, for which a purpose has been found.[119] When

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<u>Realism with a Human Face</u> 60 (1990) (the defeasibility of paradigms in the analysis of substance-identity).

[119] Gould & Lewontin, "The spandrels of San Marco and the Panglossian paradigm: a critique of the adaptationist programme", 205 <u>Proceedings of the Royal Academy</u>, Series B, 581-598 (1979). The spandrels in St. Mark's Cathedral in Venice work well as a location for mosaics, but they are there not by choice, but as the necessary by-products of mounting a dome on rounded arches. <u>Id.</u>, 581-582. Attributes may be present because they are the structural correlates of other things desired (whether structural in the sense of the spandrels or in living organisms

Dworkin wrote that "[o]ur discussion about law by and large assume ... that the most abstract and fundamental point of legal practice is to guide and constrain the power of government"[120], what was the nature of that claim? Assuming that this is the purpose of law (and leaving aside for the moment questions about "most abstract" and "most fundamental"), within the dichotomy just mentioned, it seems less likely to be an explanation for why legal systems were introduced[121] as it would be an explanation of how some politicians and legal theorists later came to think of (or "use") legal systems.

Further, here Dworkin's own phrasing is confusing: given the general argument, one would think that he was making an interpretative claim ("seeing law in its best light requires us to see its purpose as being ...") but the wording strongly ties the claim to the actual perceptions of participants ("[o]ur discussions about law by and large assume ..."). However, little by way of historical, sociological, or anthropological analysis was then forthcoming. An interpretative argument could side-step all historical questions regarding why certain practices were

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by close genetic linkage with a highly advantageous trait) or because they once served a purpose but circumstances have since changed (but not sufficiently that the attribute is now so negative that the attribute is selected against). Regarding the latter, compare the archaic laws that are almost completely unenforced and ignored, but which do not evoke enough negative pressure to motivate the laws' repeal.

[120] R. Dworkin, Law's Empire 93. In other places in the same text, Dworkin described law not as a constraint on government power, but as a justification of government power. Id., 109, 127. The differences are subtle, but important; however, the issue is beyond the scope of my present discussion.

[121] This is one area where I think analysis in terms of particular legal systems, especially ones as relative "new" as the American legal system, would be unhelpful.

introduced, what intentions various officials had, and what were the perceptions of officials and non-officials at various times.[122] However, it remains to be proven whether an ahistorical approach, without further theoretical supplementation, can sensibly discuss the point or purpose of a complex institution.

In "Law as a Functional Kind"[123], Michael Moore surveyed the broad range of attributes which various theorists have offered as the (necessary or essential) "features" of law, and the even broader range or goals or purposes theorists have attributed to law.[124] In trying to reach his own conclusion regarding what the function or purpose of law might be, he rejected the idea that an object's purposes could be equivalent to a list of its effects.[125] In any event, law, a large and complex institution (or institutional process) within an even larger and more complex society, has a vast number of effects on

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[122] It follows from "natural selection" within Darwinian theory that we cannot speak of individual animals (or whole species) trying to attain or obtain a certain adaptive advantage. Selection works upon the random variations that result from genetic mutation and recombination. So a Darwinian talking about an organism's attribute, unlike someone discussing a human social institution or social practice, cannot speak of its point or purpose in terms of what the originator's intention was, for no conscious intention is at work. The Darwinian, like Michael Moore's functional-kind theorist, discussed below, can only talk of point or purpose in terms of a theory of the larger context (in the case of Darwinian theory, natural selection, and sexual selection). A Dworkinian interpretative approach also avoids dependence on historical intentions, but the question remains (as will be noted below) whether an adequate framework theory has been offered.

[123] Moore, "Law as a Functional Kind", in Natural Law Theories __ (R. George, ed. forthcoming 1991).

[124] Id., __ (manuscript pages 48-52).

[125] Id., __ (man. p. 42).

the society, so it would get us nowhere to equate law's purposes with its effects.

Moore argued that a function or purpose is a particular kind of effect, defined in terms of some larger context: the entity is part of some larger system, which in turn has some overall goal(s); the entity's function is defined by how it serves one (or more) of those goals.[126] This is the method by which one can select among an institution's myriad goals and crown one a "function". However, it implies that the conclusion that (something) is the function or purpose of law can only be made after one has shown (or assumed for the purpose of argument) a moral-political theory about human goods within society. Moore summarized the steps one would have to take before discussing the function or purpose of law, as follows:

> Suppose one has a full theory of the good and the right. And suppose that one has enough of an idea of the structural characteristics of a legal system to sort through that full moral theory and isolate which good(s) are those uniquely achievable through law. One could then hypothesize which of the suggested goals of law is in fact its goal.[127]

Dworkin has not done any of this kind of stage-setting. He has not shown why it would be sensible, and not misleading, to speak of law having a defining purpose.

A different attack on the practice/purpose disaggregation of law can be found in Gerald Postema's writings. Postema argued that law is a social practice not only in the sense that many people are involved, but also in the sense that it is "a collective meaningful activity", that is, "an activity

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126 Id., __ (man. pp. 42-43).

127 Id., __ (man. p. 55).

collectively understood".[128] The point can be discussed at a number of levels. First, and most obviously, a legislator, a judge or an advocate cannot be concerned only with his own interpretation of the law. Even if the legislator need not worry about convincing colleagues or the judge need not worry about a reviewing court, they must concern themselves with how their statements of the law or about the law will be interpreted by other legal actors in the future. In terms of Dworkin's image of the chain novel, each author must be concerned not only with being consistent with the themes and plot subtleties of past authors, but also that the author's own intentions and devices will be clear to the future authors that continue the task; otherwise, the author's efforts will be without consequence.[129]

A different perspective on the same argument can be seen through an analysis of Dworkin's idea of "pre-interpretive" data which must be interpreted. Dworkin is not so brash as to claim that this data is completely value-neutral: "I enclose 'preinterpretive' in quotes because some kind of interpretation is necessary even at this stage. Social rules do not carry

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[128] Postema, "'Protestant' Interpretation and Social Practices", 6 Law and Philosophy 283 (1987).

[129] See id., 310-312. Cf. R. Cover, "Violence and the Word", 1612:

> [The judge's] interpretive act cannot give itself effect. The practice of interpretation requires an understanding of what others will do with such a judicial utterance and, in many instances, an adjustment to that understanding, regardless of how misguided one may think the likely institutional response will be. Failing this, the interpreter sacrifices the connection between understanding what ought to be done and the deed, itself.

identifying labels."[130] The question is how much Dworkin actually gave away with that concession, whether his theory can even survive it. When Dworkin wrote that "some kind of interpretation" was necessary even at the pre-interpretive stage, that interpretation must be different from the interpretation which will be done to that "data" at the second stage, or else no second stage would be needed (or possible). If the data comes already "fully interpreted", then Dworkinian judges would not -- indeed, could not -- disagree about its content.

As Postema pointed out, any discussion of a complex social practice like law will be heavily theory-laden, even at a "pre-interpretive" level. For example, to describe someone as "voting" rather than merely as putting a marked scrap of paper in a box, or as "writing a judicial opinion" rather than merely as scribbling marks on a series of pages, already assumes a theory about what rules and social practices are being followed.[131] Postema wrote:

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[130] R. Dworkin, Law's Empire 66; see also id., 422 n.14.

As Charles Taylor pointed out, the problem in talking about "uninterpreted data" can be traced back at least to Kant's criticism of Humean criticism:

> Plainly we couldn't have experience of the world at all if we had to start with a swirl of uninterpreted data. Indeed, these wouldn't even be "data"; because even this minimal description depends on our distinguishing what is "given" by some objective source from what we merely supply ourselves.

Taylor, "Overcoming Epistemology", in After Philosophy 476 (K. Baynes, J. Bohman & T. McCarthy, eds. 1987) (footnote omitted).

[131] Hans Kelsen made a similar point in his writings about individuals' interpretations of actions as normative when they discuss matters in legal terms. See H. Kelsen, Pure Theory of Law 2-4 (1967). The similarity between Kelsen and Dworkin seemed particularly strong when Dworkin wrote of interpretation

> A regularity of behavior is a regularity only relative to some rule, and for different rules, different regularities. Similarly, practice behavior and its consensus rules are meaningful, i.e., are the actions or rules they are only within the web of the practice as a whole. ... [D]ifferent theories of [a] practice as a whole [will] yield different actions....[132]

Dworkin might respond: if the "raw data" of legal description is in fact theory-laden, we must face an unpleasant dilemma that his approach had avoided. Either we all perceive the material with the same theoretical colouring, in which case our descriptions of law should converge and the theoretical disagreements that actually occur within and about law could not be explained; or that theoretical disagreement is not true disagreement at all. Different theories mean different actions, so the disputants would have been talking about different things.[133]

Meaningful disagreement must be contrasted with merely apparent disagreement, where the parties are actually talking about different things, as when we say different things about "banks" because you are talking about financial institutions while I was talking about the slopes at the side of rivers. Meaningful disagreement is possible only if there is a foundation (or, to change the metaphor, a background) of agreement.[134] The challenge for Postema in establishing an alternative to Dworkin's

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"impos[ing] meaning" on a practice. R. Dworkin, Law's Empire 47 (emphasis omitted).

132 Postema, "'Protestant' Interpretations and Social Practices", 306.

133 See R. Dworkin, Law's Empire 3-15, 31-53.

134 See Davidson, "On the Very Idea of a Conceptual Scheme", in Inquiries into Truth and Interpretation 196-197 (1984).

view was the same as it was for Dworkin (and for Hart before him): in explaining disagreements within the law and about the law, one must posit an underlying area of agreement.[135]

Postema had two responses. First, disagreement may only mean that the subject of the disagreement is complex and/or difficult to know fully. Postema wrote:

> [Interpretations of social practices] are formulations, or successive re-formulations, of shared understandings, proposals for a better understanding of our common activity. This does not entail that all participants must agree about how to understand their practice, but it does imply that one's own understanding be addressed to other participants and be sensitive to their understanding of it.[136]

Second, within a common practice, within "a matrix of collectively meaningful participation"[137], there is always room to "disagree about how best to articulate, formulate, or express this common meaning", disagreements which often come down to questions of emphasis and priority.[138]

If a sharp division between bare legal "data" and one's theory about the nature or purpose of law cannot be upheld, then both the idea behind and the reason for Dworkin's interpretative approach would be undermined. Considerations raised by Postema and Moore show deep and perhaps insuperable, difficulties in the

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[135] See Postema, "'Protestant' Interpretations and Social Practices", 297-299 (Dworkin's view), 315-319 (Postema's view).

[136] Postema, "'Protestant' Interpretations and Social Practices", 312.

[137] Id., 315.

[138] Id., 317.

The Wittgensteinian nature of Postema's critique and alternative position is clear, and there are a number of direct references to Wittgenstein's work in the article. Id., 304 & n.31, 307 n.34, 316 n.49, 318 n.56.

mechanism through which the approach works. The final section in this chapter will criticize a different integral aspect of that approach.

I.

An integral part of Dworkin's approach was his rejection of "conversational interpretation" for social practices, in particular, his rejection of giving priority in interpreting laws to the rule-makers' meaning (intention).[139] It is part of Dworkin's holism about law; particular rules are interpreted in light of other rules, not merely in the usual sense that rules should not be interpreted in such a way that they create contradictory imperatives, or even that similar terms in similar pieces of legislation should be interpreted in similar ways. The holism here is much stronger: that all past legal texts and decisions should be interpreted to be the best they can be, and as though they were the product of a single voice. These aspects of "constructive interpretation" entail a rejection of conversational interpretation. However, as a number of theorists have pointed out, it is difficult to square that rejection with the importance of authority to law, an importance implicitly accepted elsewhere in Dworkin's approach.[140]

Dworkin's judges are to make constitutional clauses, statutes, and past judicial decisions the best they can be. The

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[139] See R. Dworkin, Law's Empire 50-68, 313-354.

[140] See, e.g., Alexander, "Striking Back at the Empire: A Brief Survey of Problems in Dworkin's Theory of Law", 6 Law and Philosophy 419, 424-425 & 425-426 n.14 (1987); Raz, "Dworkin: A New Link in the Chain", 1112-1114, 1118-1119.

question is, why choose these texts rather than randomly selected others, and why worry about how close one's reading is to the usual reading? Why not read the United States Constitution as "Hamlet"?[141] Better yet, why not just read "Hamlet"? The ready answer would be that to act in that way -- either in the choice of texts or their interpretation -- would not "fit" past practices; it would deviate too far from how "law" was practised in the past and how it is understood by officials and lay-persons today.

The problem is that to see that much, but no more, in past practices is to read those practices too superficially. As Dworkin would readily admit, people do not merely act; they act for reasons and according to rules. The reason that American judges refer (and defer) to the United States Constitution is that they believe that the writers of that document (once the document was duly approved) had authority to set standards for the nation. For the same reason, the Constitution is not read as "Hamlet": those writers did not intend the document to be read that way.

As Larry Alexander noted: "Abandoning conversational standards for interpreting the words of canonical rules is morally undesirable because it is morally desirable that legislative bodies have the ability to settle moral controversies through the enactment of canonical rules."[142] Legislators are not like the Oracle at Delphi, such that only the words spoken are important and there are doubts that the speakers themselves

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141 See Raz, "Dworkin: A New Link in the Chain", 1119.

142 Alexander, "Striking Back at the Empire", 424.

actually know the meaning and significance of those words.[143] The words are important as embodying the rule-makers' intentions: whether as resolutions of disputes or as choices among possible co-ordination schemes. It is true, as Alexander conceded, that following the (relatively) concrete intentions of rule-makers may mean ignoring their most abstract intentions (e.g., "to make the morally best choice"), intentions which might approximate the result of a Dworkinian constructive interpretation of the texts. However, at that abstract level of intention -- and with the variety of different readings it would inspire in different judges[144] -- the authorities (and the authoritative sources) would then fail in their function of making (largely) determinate and (largely) settled choices.[145]

As the past few sections have argued, Dworkin's interpretative (holistic) approach fails, even on its own terms.

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143 See Alexander, "Of Two Minds About Law and Minds", 88 Michigan Law Review 2444, 2446-2447 (1990).

144 See the discussion in section E of this chapter.

145 See Alexander, "Striking Back at the Empire", 426 n.14; Alexander, "Of Two Minds About Law and Minds", 2447-2448.

It may at first appear that my criticisms of Dworkin are inconsistent. After first arguing that it is a mistake to claim that law has a particular purpose to which its practices are responsive, I am now arguing that another problem with his approach is that it undermines one of law's purposes. However, it is important to see the difference between my claim and Dworkin's. He claimed that law has a particular purpose, and our understanding of what the law requires may have to be re-formed in order to keep that understanding in line with the purpose. My claim is far weaker: that law is generally understood (in many societies) to serve a number of functions (e.g., resolving moral questions, co-ordinating behaviour, and resolving disputes), and that we should have severe doubts about a theory of law that would disable the legal system from performing any of those functions.

It fails to "fit" our practice -- e.g., the importance of authority and the importance of consensus in our practice -- and it fails on the normative level -- it would disable law from doing many of the tasks we want and expect that institution to perform.

Chapter 5: Michael Moore's Metaphysical Realism

> "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean -- neither more nor less."
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> "The question is," Alice said, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be the master -- that's all."[1]

A.

Michael Moore has written a number of lengthy articles defending metaphysical realism[2] and urging that legal theory and legal practice be reformed consistent with that philosophical position.[3] I am interested in Moore's work for two reasons:

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[1] L. Carroll, The Annotated Alice: Alice's Adventures in Wonderland & Through the Looking Glass 269 (M. Gardner, annot. 1960) (annotation omitted).

[2] A short note about terminology: Moore claimed that it was a "blunder" for the American Legal Realists to use the term "realism" for their ideas. Moore, "A Natural Law Theory of Interpretation", 287 n.18; Moore, "The Interpretive Turn in Modern Theory: A Turn for the Worse?", 41 Stanford Law Review 871, 872 n.4 (1989). While it is true that the Legal Realists' use of the term is quite different from the way it is used in philosophy (and here, by Moore), I would defend the Legal Realists' choice. The use of the "realism" to refer not to the belief in platonic entities but to a more accurate portrayal of experienced reality and to an avoidance of self-delusion is consistent with the most common uses of the term, not only in daily speech, but also in the fields of art, literature, and politics. (Metaphysical realists often seem to be trading off the two meanings of "realism" by implying -- incorrectly --that metaphysical realism is on the side of common sense. See H. Putnam, The Many Faces of Realism 3-8, 12 (1987).)

Though Moore usually referred to his position as "realism", to prevent confusing his position with the other approaches in both the legal and philosophical literature that carry that label, I will refer to his approach as "metaphysical realism".

[3] Moore, "Law as a Functional Kind", in Readings in Natural Law __ (R. George, ed. forthcoming 1991); Moore, "The Interpretive Turn in Modern Theory: A Turn for the Worse?", 41

first, Wittgenstein's rule-following considerations were directed at metaphysical realism about meaning; and second, Moore's approach has included criticism of both Hart's and Dworkin's ideas about legal determinacy. In the course of discussing Moore's work, I will also find it helpful to discuss in passing some of David Brink's recent work which has also touched on legal determinacy and the role of metaphysical realism in legal theory.

Moore's work has been an attempt to show that metaphysical realism about various areas of discourse is preferable to alternative approaches, and that with this in mind, our ideas about legal theory, constitutional interpretation, and judicial reasoning should be changed. The most effective way to rebut Moore's arguments would be to refute metaphysical realism. However, that task would be too ambitious for a single thesis, let alone a single chapter of a thesis. Therefore, I have set myself a more modest goal. The power of Moore's articles comes from his prima facie showing that approaches to language other than metaphysical realism cannot adequately deal with certain processes (for example, changes in scientific beliefs over time). If I can show that he has underestimated the alternatives to metaphysical realism -- in particular, approaches to language based on the work of the later Wittgenstein -- and if I can show

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Stanford Law Review 871 (1989); Moore, "Do We Have An Unwritten Constitution?", 63 Southern California Law Review 107, 123-137 (1989); Moore, "Authority, Law and Razian Reasons", 62 Southern California Law Review 827, 891-894 (1989); Moore, "Precedent, Induction, and Ethical Generalization", in Precedent in Law 183 (L. Goldstein, ed. 1987); Moore, "Metaphysics, Epistemology and Legal Theory" (Book Review), 60 Southern California Law Review 453 (1987); Moore, "A Natural Law Theory of Interpretation", 58 Southern California Law Review 277 (1985); Moore, "Moral Reality", 1982 Wisconsin Law Review 1061; Moore, "The Semantics of Judging", 54 Southern California Law Review 151 (1981).

that metaphysical realism has problems of its own, than I will have undermined at least somewhat the power of his arguments.

B.

It is worth taking a moment to try to give an overview of the contrasts between metaphysical realism and its alternatives. A difficulty with this task is that many theorists in their attempts to give such an overview have divided up the range of opinion in many different ways. The labels "realist", "platonist", and "metaphysical realist" have been given very different boundaries both by supporters and by opponents. I will offer a small sample of these different overviews in order to give the reader a sense of where the battle lines have been drawn.

In lamenting the lack of clear boundaries in the debate about metaphysical realism, Crispin Wright went so far as to describe realism as "a syndrome, a loose weave of separable presuppositions and attitudes."[4] Wright offered a series of foci around which to consider the realist/anti-realist disputes, though emphasizing the "three distinct species of objectivity"[5]: 1) the objectivity of truth -- that a class of statements may be intelligible even though determining their truth-values is beyond our powers of rational appraisal; 2) the objectivity of meaning -

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[4] C. Wright, Realism, Meaning and Truth 3-4 (1987). He continued, "What have the mathematical platonist, the moral objectivist, and the scientific realist in common?" Cf. Dummett, "Preface", in Truth and Other Enigmas xxi: "As is apparent from the use of the term 'realism' in the two quite different pairs realism/nominalism and realism/phenomenalism, it was already obscure whether the term had a unitary meaning."

[5] C. Wright, Realism, Meaning and Truth 5-8.

- that statements have a truth-value independently of our opinion about their truth value (i.e., they can be "undetectably true"); and 3) the objectivity of judgment -- that the statements have a "'genuinely factual' subject matter"[6]. Wright argued that both the objectivity of meaning and the objectivity of judgment would follow from the objectivity of truth, but that the converse implication probably did not hold.[7]

Wright argued that many of the debates over metaphysical realism have been not about the objectivity of truth but about the objectivity of judgment.[8] Beyond questions of objectivity, Wright discussed two other sets of questions regularly involved in disputes over metaphysical realism: questions of the irreducibility of a class of statements, and questions of ontology (e.g., the reality of mathematical objects).[9]

A somewhat different description of the debates about metaphysical realism was given by Simon Blackburn, who described a metaphysical realists' approach to an area of discourse as follows: 1) the commitments in the area "are capable of strict and literal truth"; 2) "they describe the world"; 3) "they answer to (independent) facts of a particular kind"; and 4) "[t]hese facts are discovered, not created, and they make ontological and

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[6] Wright commented on his own description: "this is a largely unhelpful characterization, [but] notoriously difficult to improve on." Id., 6.

[7] Id., 5-7.

[8] He also offered an interesting explanation for why both Wittgenstein and W.V.O. Quine seem to fit in so poorly in the traditional realist/anti-realist battles: their positions can be seen as raising a different set of issues altogether, issues dealing with the objectivity of meaning. Id., 8.

[9] Id., 8-9.

metaphysical demands."[10] He added that in most, but not all, areas of discourse, a metaphysical realist would also believe that 5) the facts that make the commitments true or false are "mind-independent"; and 6) the commitments in the area are irreducible.[11]

For a third perspective on the realist/anti-realist debate, I return to the main subject of this chapter. Michael Moore offered the following belief-checklist for being a "full-blooded" metaphysical realist about some class of entities: 1) the entities in question exist and this existence is independent of individual minds and community conventions; 2) a correspondence theory of truth; 3) a classical theory of logic; 4) a truth-conditional theory of the meaning of sentences; and 5) a causal-theory of meaning (the Kripke-Putnam theory of reference) for natural kind words.[12]

In the above summaries one can already see the complications and confusions that accompany most discussion within or about the realism/anti-realism[13] debate. First, arguments put forward to

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[10] S. Blackburn, "Options for the World", 4 (unpublished manuscript).

[11] Ibid. For example, a metaphysical realist about psychological ascriptions would not claim mind-independence for those statements. Ibid.

[12] Moore, "The Interpretive Turn in Modern Theory", 878-879.

[13] Another terminological note: "anti-realism" is used in the literature in two different senses. In the broader sense, it means any position opposed to metaphysical realism. In the narrower sense, it is a particular non-realist position (sometimes associated with the work of Michael Dummett). It is in light of the narrower use of the term that a commentator could suggest that Wittgenstein's work was neither realist nor anti-realist. See P.M.S. Hacker, Insight and Illusion, Revised Edition 62-65, 322-335; P.M.S. Hacker, Wittgenstein: Meaning and

support a particular approach seem to imply global claims, that this approach is appropriate (superior to other approaches) for all areas of discourse, when the evidence offered rarely warrants more than a claim about a single area of discourse.[14] Second, there is often a deep ambiguity about the focus of the theorists' claims: whether they are claims about language (what certain words mean), psychology (what people mean when they use certain words)[15], or the world (whether certain kind of entities exist or not). Similarly, purported metaphysically realistic approaches to law sometimes seem to be about language (e.g., that "malice" means one thing rather than another), sometimes about psychology (e.g., that by using a particular term, speakers (or legislators) meant to defer to (future) experts' opinions about that entity), and sometimes about the world (e.g., that certain "moral kinds" or "natural kinds" exist). Obviously, there are many connections between these three categories, and claims of one kind often blur

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Mind 545-546 (1990). However, I will be using the term in the first, broader sense.

[14] Among the areas of discourse that often receive special attention in the philosophical literature, because they involve special problems regarding truth, meaning, or ontology, include mathematical propositions, modal terms, generalizations of natural science, statements concerning the past, statements concerning the future, ethical propositions, subjunctive conditionals (counterfactuals), and descriptions of other people's mental states.

[15] Many theorists refer to speakers' "intentions", which sometimes seem to about individuals' thoughts and sometimes about (perhaps implicit) understandings or conventions within a group. Compare Moore, "A Natural Law Theory of Interpretation", 323 ("Most ordinary speakers intend by their use of the word 'death' to name a natural kind of event whose nature it is the business of science to reveal") with Putnam, "Is Water Necessarily H_2O?", 70 ("a community can stipulate that 'water' is to designate whatever has the same chemical structure or whatever has the same chemical behavior as paradigms X, Y, Z, ..." (emphasis added)).

into claims of another kind.[16] Still, the possibilities for ambiguity and confusion remain, and part of my task will be to clarify the nature of the claims the theorists have made (and those I make in response).

C.

Moore's discussions about language can be summed up in two related assertions: 1) whether we know it or not (and however much some of us may deny it), we intend our words to be understood in a metaphysically realist way; and 2) definitions offered in dictionaries, statutes and elsewhere are merely "conventional glosses on the meaning of words".[17] As for the relationship of language to legal theory, he would probably respond that while language may be ambiguous or have uncertain boundaries, it should not be our focus. For Moore, language is only an imperfect tool for describing reality. We should be concerned with discovering the true nature of (e.g.) virtue, equality and death, not with the changing and uncertain usage patterns of the words "virtue", "equality", and "death".

In discussing Moore, I will focus on one article, "A Natural Law Theory of Interpretation"[18], because in that article he came closest to putting forward a full theory of legal interpretation and judicial reasoning. He characterized his "natural law theory

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16 For example, a metaphysical realist's claim that "cruelty" refers to a particular "moral kind" entails the claim that such "moral kinds" exist.

17 Moore, "A Natural Law Theory of Interpretation", 331.

18 Moore, "A Natural Law Theory of Interpretation", 58 Southern Californian Law Review 277 (1985).

of interpretation" as follows: 1) "there is a right answer to moral questions, a moral reality if your like", and 2) judges should rely on that moral reality in interpreting and applying the law.[18] He also argued that a metaphysically realist theory of meaning extended to evaluative terms (for example, "responsible" and "justice") and natural kind words (for example, "bird" and "death"), and that a metaphysically realist analysis should be used even for terms that are specifically defined within a statute.[19]

My focus in this paper will be on metaphysical realism about meaning (in particular, regarding the meaning of simple descriptive terms) and Wittgenstein's critique of that position. Metaphysical realism regarding other areas of discourse -- e.g., science, mathematics, modal terms, and morality -- involves other issues and its consideration is outside the scope of this paper (though my discussion may touch upon those issues, and, of course, arguments about metaphysical realism regarding one area of discourse, even though not conclusive, have some relevance to the arguments about metaphysical realism in other areas of discourse[20]).

Moore's metaphysically realist theory of meaning is based on the idea that a word "refers to a natural kind of event that occurs in the world and that it is not arbitrary that we possess

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[18] Id., 286; see also Moore, "Moral Reality", 1982 Wisconsin Law Review 1061.

[19] Moore, "A Natural Law Theory of Interpretation", 300-301. In this article, Moore took no position on whether a metaphysically realist theory of meaning be extended to all words. Ibid.

[20] See S. Blackburn, Spreading the Word 145-147.

some symbol to name this thing."[21] Under this approach, our use of a word, and the definition we offer for it, will not necessarily be static, but will change as our understanding of the object, event, or idea to which the term refers changes.[22] Moore offered "conventionalism" as the (disfavoured) alternative to a metaphysically realist theory of meaning[23]: in contrast to metaphysical realism, "[a] conventionalist theory ... regards the relationships between symbols and things to be essentially arbitrary."[24]

One would have thought that one instance in which the judge should not need recourse to any theory of meaning is when the judge must explicate a term the legislature has explicitly defined within a statute. However, Moore gives metaphysical realism a prominent role even here. He gave an example of how a close (in fact, somewhat myopic) reading of a hypothetical statute's definition clause could allow a judge to conclude that a horse with a downy pillow on its back should be considered a bird for the purpose of the statute.[25] The statute defined a

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[21] Moore, "A Natural Law Theory of Interpretation", 294.

[22] Ibid.

[23] Moore's division of theoretical space into only metaphysical realism and conventionalism is contentious and probably, strictly speaking, untenable. Wittgenstein's approach to the philosophy of language, which I will bring forward at various points, rejected both options. See D. Pears, The False Prison, Volume Two, 486-489; cf. S. Blackburn, "Options For the World", 1-16 (unpublished manuscript) (describing and discussing four separate approaches to an area of discourse).

[24] Moore, "A Natural Law Theory of Interpretation", 291-292.

[25] Id., 329-332 (paraphrasing Comment, "Judicial Humour -- Construction of a Statute", 8 Criminal Law Quarterly 137 (1965)).

"bird" as an animal, with two legs, covered with feathers; the horse was an animal, it was covered with feathers, and it had (at least) two legs.[26] Moore's point was that we are vulnerable both to absurd results and to missing the legislature's intention if we treat the statute's stipulative definition on its own. Instead, we must understand that the ordinary meaning and usage of a term and our beliefs about the world provide a background, a context within which we interpret statutory definitions. For Moore, legislative definitions, like conventional definitions, are merely "conventional glosses on the [real or realist] meaning of words" and it may be necessary for judges sometimes "to ignore the [legislative] definition when it runs counter to the true nature of the thing the definition was attempting to pick out."[27]

According to him, one major advantage of metaphysical realism over "conventionalism" in the legal context is the relative inflexibility and immobility of the latter. Moore argued that as our understanding of objects and processes in the world change and improve, "conventionalism" offers neither processes nor justifications for modifying our definitions of words to keep up. "Meaning will 'run out' in our attempt to describe the world."[28] According to Moore, under "conventionalism" any attempt to apply an old term to new circumstances must be characterized as a change of that term's

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[26] Id., 329.

[27] Id., 331.

[28] Id., 293.

meaning.[29] His favourite example to explain and justify his realist theory of meaning was the word "death".[30] People once equated death with the cessation of heart and lung function. Such definitions were occasionally incorporated into statutes (for example, determining when a person's organs could be removed for use in transplant surgery).[31] More recently, doctors have gained the ability to revive some persons whose heart and lungs had stopped (for a short period of time). Moore pointed out that doctors and legislator now tend to equate death with the cessation of brain function or with non-revivability; however, he argued that, contrary to what he claimed that a "conventionalist" must believe, the meaning of "death" has not changed. "Whether a person is really dead or not will be ascertained by applying the best scientific theory we have about what death really is. ... A realist ... believes that there is more to what death is (and thus what 'death' means) than is captured by our current conventions."[32]

Within this area, Moore's argument for his theory of statutory interpretation has some initial plausibility. If the statute authorizing transplants explicitly used the old definition of "death", we would still think it ghastly for a judge to rely on that definition to allow the removal of an organ from a person who could still be revived.[33] For Moore,

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29 Ibid.

30 See id., 293-294, 297-300, 308-309, 322-328, 382.

31 Id., 293, 322-328.

32 Id., 294.

33 Id., 322-325.

statutory definitions in such cases are not stipulations so much as initial estimations subject to change. The legislature "should be held to have the same linguistic intentions as other language users, namely, [metaphysically] realist ones."[34]

However, I do not think that the word -- and the concept of -- "death" is as helpful to Moore's metaphysically realist theory of meaning as he implied. There are two different kinds of challenges that can be brought against his analysis: first, that "death" may not be a single "kind" or a sufficiently unitary "kind" to fit into his analysis[35]; and second, that contrary to Moore's analysis, a "conventionalist" about "death" would not be troubled about the increased ability to resuscitate. I will discuss these two challenges in turn.

The advances in medical knowledge in the past generation have not created a consensual change in the way we think about death. To the contrary, the advances have only led to unending debate and controversy in many realms: politics, medicine ethics, theology, and law. Though more and more persons may now equate death with the complete cessation of brain function (or "higher brain function"), there are still sensible, intelligent observers who insist that those whose brain has ceased to function but who retain heart, lung, and metabolic function (perhaps with the help of "life-support" systems) are still

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[34] Id., 323.

[35] Compare the medical term "shock", which as used by British doctors during the First World War was thought to name a single type, a single kind of injury. Medical research during the Second World War (in which Wittgenstein played a minor role) seemed to show that the term had been used to describe a variety of (probably unrelated) problems. See R. Monk, Ludwig Wittgenstein: The Duty of Genius 444-447, 451-452 (1990).

alive. The consensus Moore assumed and implied does not exist.[36] Medical advances have also left us with a series of intermediate cases: patients in permanent comas, patients in permanent vegetative states, and patients whose brains retain some minimal functioning and who may or may not be able to feel pain or pleasure (doctors cannot tell in many cases). The very active debate in the courts, the legislature and the academic journals as to when medical treatment for such patients can (should) be discontinued and who should make such decisions indicates that scientific advances have muddled rather than clarified the issue of what death -- and life -- mean.[37]

One could argue that the way we have reacted to these medical advances support not a metaphysically realist interpretation of "death", but one based on a criteriological-conventionalist theory of meaning. That is, we associate a list of criteria with a term, and when some of those criteria apply but others do not, then there will no longer be a consensus as

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[36] I do not mean to claim that consensus is important to Moore. As a metaphysical realist, he would not rely on consensus in determining meaning or ontology. However, in this particular discussion, he implied that there was a popular consensus about "death", which reflects the current scientific "best theory" about it. The absence of a consensus on this matter does not by itself disprove metaphysical realism about "death"; it may only mean that our perception of a unified category is partial or flawed, but it may mean that there is no unified category to perceive. The absence of consensus is not inconsistent with metaphysical realism, but it is more consistent with alternative approaches, and it is part of an argument that an approach other than metaphysical realism would be appropriate here.

[37] For an overview of some of the issues in the "right to die" area, see e.g., Cruzan v. Director, Missouri Department of Health, 110 S. Ct. 2841 (1990); N. Cantor, Legal Frontiers of Death and Dying (1987); Bix, Book Review, 18 Seton Hall Law Review 523 (1988).

to whether the term should apply to the new situation.[38] One listing of criteria for life might be: systemic function, lower brain function, higher brain function ("consciousness"), and ability to feel pain and pleasure. In earlier times, these criteria were always present ("life") or absent ("death") together. Advances in medical science have led to there being patients who express almost every possible permutation of these criteria, the absolute terms "life" and "death" thus become less and less helpful, and there is no consensus regarding what alternative characterizations might be appropriate.[39]

Future scientific advances -- ones that are foreseeable, though still far away -- will probably further decrease our ability to think (in a the way Moore would prefer) about life and death as simple and separate. The possibility of transplanting one person's brain (and thus that person's consciousness as well?) into another person's body or of cloning persons undermines our traditional ideas about (continuous and unique) personal identity and about death (qua the cessation of one person's identity).[40] As our confidence diminishes that "life" and "death" represent two unitary areas which are clearly demarcated, Moore's argument that we are (and should be) metaphysical realists about the term "death" becomes less

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[38] See Moore, "A Natural Law Theory of Interpretation", 296; H.L.A. Hart, The Concept of Law 123-124.

[39] Cf. Severns v. Wilmington Medical Center, 421 A.2d 1334, 1344 (Del. 1980) ("the penumbra where death begins but life, in some form, continues"); In re L.H.R., 321 S.E.2d 716, 722 (Ga. 1984) ("Under these circumstances, we find that the life support system was prolonging her death rather than her life").

[40] See D. Parfit, Reasons and Persons 199-320 (1986).

persuasive.[41]

Moore might argue that underlying the disagreement between the person who believes that life ends when higher brain functions cease and the person who believes that life ends only when all brain functions cease, there is (must be) an underlying agreement. The underlying agreement is that there is a fact of the matter regarding when "death" (the event) occurs, and the only disagreement could be regarding this fact, this truth. The metaphysical realist's response to disagreement is to point out that it is disagreement <u>about some object or entity</u>. That is why metaphysical realism is as compatible with substantial disagreement as it is with consensus, and that is why it can explain conceptual change.

However, an alternative characterization of the dispute is possible. When the argument in newspaper editorials and at the meetings of hospital ethics committees is put in terms of "is this patient really still alive?", the various terms used

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[41] Moore claimed not to be troubled by "more radical ... thought experiments", arguing that they would only serve to refute "deep conventionalism" while supporting metaphysical realism. Regarding a hypothetical situation where the body could die but the mind live on, he responded: "Would we say that no one dies, that there is no such event as death? Or would we say that death has a very different nature than we had thought?" Moore, "A Natural Law Theory of Interpretation", 299-300.

I cannot concur with Moore's response; my reactions certainly do not suddenly become metaphysically realist when I consider his thought experiment. I would have concluded from the hypothetical's facts, 1) that the term "death" was becoming increasingly inadequate (over-burdened and over-stretched), 2) that at the least it has come to describe a family-resemblance group of phenomenon rather than a unitary "natural kind of event", and 3) that "conventionalist" responses of language running out and arbitrary language-choices being required (do we call that phenomenon "death" or not) seem appropriate here. These are hardly metaphysically realist responses (though I cannot be sure how widely shared such responses would be).

("alive", "really alive", "delayed death", "limbo between life and death", etc.) are often only place-markers for positions on difficult ethical questions (for example, "should the patient continue to receive certain forms of treatment despite the fact that she is in a permanent vegetative state?"). The discussion is in terms of "life" and "death" not because of any underlying metaphysical or ontological agreement, but because these are the only terms available and generally understood (at this point) in public discourse. The fact that these terms are used in unconventional ways in the dispute (e.g., "the penumbra where death begins but life ... continues") indicates a dissatisfaction with, not an acceptance of, the usual semantics and metaphysics.

This analysis need not be confined to Moore's example about "death". It is often useful to consider whether labels are being used (in part or in whole) as markers for legal or moral conclusions. For example, disputes regarding whether a particular agreement constitutes a "contract" can often profitably be seen as arguments about whether agreements of this kind should be validated and enforced by the legal system.[42] (Wittgenstein often warned against "one of the great sources of philosophical bewilderment: a substantive makes us look for a thing that corresponds to it."[43] The agreement underlying

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[42] This type of analysis is close to that offered by H.L.A. Hart in his Inaugural Lecture, Definition and Theory in Jurisprudence (1953). I would only note that this type of analysis does not require that one go as far as some have read Hart's lecture as having done, that is, to see legal terms as only being performative utterances. There is conceptual room in the analysis to see terms as also being in part descriptions (or interpretations) of past legal actions.

[43] L. Wittgenstein, The Blue and Brown Books 1.

substantive agreement need not be a thing to be described; it can be a question of how people should act or of what should be done.

Regarding my second set of responses to Moore, his criticism of a conventionalist approach to "death" depends on whether the greater ability to revive patients in certain circumstances has changed the meaning of the term "death"? Moore, the metaphysical realist, does not think so, but I do not see why someone who was not a metaphysical realist would think so either. The disagreement between the legislators of 100 years ago and the legislators of today is not regarding what death is, but when (by what criteria) one could be certain that life has ended.

Moore complicated matters by focusing not on death qua property of an entity that once was alive but is not now, but rather on death as an event, as the moment of transition between an entity's living and non-living state.[44] One problem this focus leaves Moore is how to describe those people whose heart has stopped, who could still be revived, but if resuscitation techniques are not applied quickly will become unable-to-be-revived. Is that person alive during this "transition period", even though none of the normal signs of life (e.g., breathing and pulse) are present? Moore might say that the person is still alive (or, at least, "not dead"), because resuscitation is still possible; death -- the event -- occurs at the point when resuscitation is no longer possible. However, if the final conclusion is that "death (the event) occurs at the point where resuscitation is no longer possible", there is no reason why

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[44] See, e.g., id., 294: "'death' refers to a natural kind of event that occurs in the world" (emphasis added).

"conventionalists" past or present would ever have disagreed; nor need they believe that because that dividing line has changed with medical progress that the meaning (or even the definition) of "death" has changed.

The discovery that some cessations of breathing are only short-term or are reversible is nothing more or less than that. There is a flexibility to language and to meaning which allows it to adopt to minor changes in circumstances without forcing us to come up with wholly new concepts (or to become metaphysical realists). We are allowed to judge whether a slight increase in revivability changes the concept of "death" (either as event or as state of being).[45] We have not yet concluded that the concept has changed (or needs to be changed), but we might well judge differently in the future if we discover (e.g.) that people could be revived after having been frozen for 100 years, or that bodily functions could be maintained indefinitely after all brain functioning had ceased permanently.

Moore insisted that "conventionalism" could not justify such flexibility in the use of language, that under approaches other than metaphysical realism any modification in criteria must constitute a change in the concept. Though there may be theorists who believe that the only alternative to platonism about meanings is equating a term rigidly with certain sufficient and necessary conditions, this is certainly not true for most theorists in the literature, and specifically not true of the

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[45] At the least, we seem to have added the concept "clinically dead" for those whose breathing stops but who are later revived.

later Wittgenstein.[46]

In his discussions of family resemblance, ostensive definitions, and rule-following, Wittgenstein emphasized that how we apply terms depends as much on judgments -- common, shared judgments that can be traced to a common "form of life" -- as it does on reference to set criteria or paradigms.[47] Even though scientific beliefs about these concepts have changed in the last 100 years, a Wittgensteinian need not say that "momentum" or "simultaneity" either refers to something different or has a different meaning now than it did before Einstein's work caused us to rethink these notions. In Putnam's words, it is a matter of recognizing that a word can have a new sense (and new applications) without having a new meaning, and it all depends on people (whether scientists or laymen) "knowing how to go on".[48] Whether a particular novel set of circumstances is sufficiently similar to other events we have called "death" to also carry that label is like the decision whether a particular activity is sufficiently similar to other activities we know as "games" to be called a game.[49] As we saw in chapter 2, these

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[46] See, e.g., L. Wittgenstein, Philosophical Investigations sections 65-88; G.P. Baker & P.M.S. Hacker, Wittgenstein: Meaning and Understanding 315-450.

[47] See L. Wittgenstein, Philosophical Investigations sections 65-74, 208-209, 212- 217, 224-227; G.P. Baker & P.M.S. Hacker, Wittgenstein: Meaning and Understanding 178-184, 320-343; G.P. Baker & P.M.S. Hacker, Wittgenstein: Rules, Grammar and Necessity 165-181.

[48] See Putnam, "Experience and Mathematical Necessity", 19 (unpublished manuscript of lecture given in Oxford, 28 November 1990); S. Cavell, The Claim of Reason 120-122 (1979).

[49] See L. Wittgenstein, Philosophical Investigations sections 65-77 (discussing "game" as a family-resemblance concept).

decisions cannot be ascribed to platonic entities or described as arbitrary choices. They come from people reacting in a certain way, "doing what comes naturally".

The starting point for analysis is that in the contexts of changing beliefs over time or disagreement in beliefs between persons at a particular time, we often assume/believe/act-as-if the subject of the changing beliefs or the disagreement in beliefs was constant. Moore argued that this attitude entails metaphysical realism, that "constant subject" must mean platonic entity. I do not agree; sometimes the term or concept itself can be the "constant subject", mediating between the entities or actions described and our beliefs about them. There is no sharp divide between a change of beliefs about a concept and a change of concepts. The idea of "same concept" is not itself transparent and self-evident.[50] These points might be easier to see in discussions about the nature of "justice", "democracy", "equality", or "the Christian way of life", than they are in Moore's hypothetical situations involving "death". In political and moral discourse, it is equally hard to show either that the disputants are definitely talking about the same thing or that they are definitely not talking about the same thing (e.g., when they disagree about the nature of "justice" or "democracy").[51]

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[50] In much the same way that Wittgenstein argued that the idea of "the same" could not be analyzed separately from the idea of a "rule", see L. Wittgenstein, Philosophical Investigations sections 208, 224, 225, one could argue that the idea of "same concept" cannot be analyzed separately from the way concepts are actually used (at a particular time as well as over time).

[51] A matter which may have been (indirectly) shown by W.B. Gallie's and Ronald Dworkin's discussions about substantive disagreement, discussions summarized supra, in Chapter 2, sections F and G.

As discussed in Chapter 2, attempts to find an agreement about an entity or a paradigm which underlies the disagreement often come up empty. At the same time, we do not then immediately conclude that the disagreement was based only on a misunderstanding.

As the line between change in beliefs and change in concepts in many areas seems to blur upon close inspection, one can be sceptical about the ability to use substantive disagreement as a base for proving (or disproving) metaphysical realism.

D.

In earlier sections, I have argued that Moore has overstated the difficulties of approaches to language and meaning other than metaphysical realism. In this section, I will suggest that he has also overstated the strengths of metaphysical realism.[52] The argument will proceed by summarizing and adapting Ludwig Wittgenstein's criticism of platonist approaches to meaning.[53]

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[52] There are a number of places where Moore seemed to underestimate the philosophical difficulties of a metaphysically realist approach. For example, within a handful of pages in one article, Moore both supported a causal theory of reference/meaning and asserted that causation is itself a natural kind. Moore, "The Interpretive Turn in Modern Theory", 876, 882. As Putnam noted, if meaning and reference are explained by a particular relationship between ourselves or our language and the world (here, causation), there is a problem with describing or understanding that relationship. The relationship must be somehow primitive or a priori, and cannot itself be subject to further explanation by the same relationship without descending into an infinite regress. See Putnam, "Is the Causal Structure of the Physical Itself Something Physical", in Realism with a Human Face 83-90.

[53] My discussion of Wittgenstein's critique follows D. Pears, The False Prison, Volume Two, chapters 16-18; see also Pears, "Rule-Following in Philosophical Investigations", in Wittgenstein in Focus 249-261 (B. McGuinness & R. Haller, eds. 1989).

The platonist[54] claims that the meaning of terms exists out in the world somehow, and our minds are able to grasp the meaning in some way. Understanding a term's meaning is thus equivalent to grasping the platonic entity, which in turn somehow guides our application of the term in a potentially infinite number of circumstances.

The platonist is looking for something in the world which determines what the meaning of particular terms are and how those terms should be applied. Placing meanings out in the world seems to solve many problems: meaning is now constant even in the face of scientific progress or lack of consensus; and evaluations of correctness of meaning and correctness in application seem to be independent of people's beliefs about the object.

Wittgenstein offered the following image for the idea that the rule for applying a term already exists in the world:

> we might imagine rails instead of a rule. And infinitely long rails correspond to the unlimited application of a rule.
>
> ... I no longer have any choice. The rule, once stamped with a particular meaning, traces the lines along which it is to be followed through the whole of space.[55]

Wittgenstein then added: "But if something of this sort really

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[54] "Platonism" refers to certain kinds of metaphysical realism, usually theories whose ontology and epistemology resemble the positions advocated in Plato's dialogues. Sometimes the term is used even more broadly to refer to all forms of metaphysical realism. I am using it in the narrower sense, as Wittgenstein's arguments seemed directed against a particular kind of metaphysical realism. However, as I will argue, attempts to move to a "more defensible" form of metaphysical realism will not necessarily allow the theorist to escape the force of Wittgenstein's critique.

[55] L. Wittgenstein, Philosophical Investigations sections 218-219.

were the case, how would it help?"[56]

Having meanings "in the world" would only help us if there were some way for us to have cognition of, to grasp somehow, those meanings. "Rails laid out to infinity would be useless unless the traveller were locked on to them, and, similarly, complete guidance by rules already laid down in reality would be useless unless there were something in the rule-follower's mind that latched him on to them infallibly."[57]

Even if our minds did internalize some magic image or formula that was said to contain somehow all the applications of a term, it would not be enough. For that image or formula would still need to be interpreted.[58] Images (and the related ostensive definitions), like rule formulations, are not self-interpreting. Their connections to objects, to actual applications, are explained by the way people act and react. The place of natural reactions is illustrated in the following passage from Wittgenstein's lectures:

> For instance: you say to someone "This is red" (pointing); then you tell him "Fetch me a red book"-- and he will behave in a particular way. This is an immensely important fact about us human beings....
>
> Another such fact is that pointing is used and understood in a particular way -- that people react to it in a particular way.
>
> If you have learned a technique of language, and I point to this coat and say to you, "The tailors now call this colour 'Boo'" then you will buy me a coat of this colour.... The point is that one only has to point to something and say, "This is so-and-so", and

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[56] Id., section 219.

[57] D. Pears, The False Prison, Volume Two, 466.

[58] See L. Wittgenstein, Philosophical Investigations sections 139-141; D. Pears, The False Prison, Volume Two 469-473.

> everyone who has been through a certain preliminary training will react in the same way.[59]

Metaphysical realism of this full-blooded platonist type (with meanings equated with platonic entities) is thus shown not to help -- indeed, not to affect -- the language user. Even if we posit the existence of these strange platonic entities, meaning and usage still come down to human judgments and human reactions, not to abstract entities. Moore seemed to avoid Wittgenstein's criticisms by joining his metaphysical realist ontology with a coherence epistemology[60], but he can do so only at the cost of removing the significance of his approach. Once one rejects the claim that we have some direct cognition of the "real", the advantage of metaphysical realism -- in explaining how we actually behave or in prescribing how we should approach problems of meaning -- seems to disappear. If what we are to seek are beliefs that fit in well with our other beliefs and observations, and our sole criterion for accepting a belief is its fit with our other beliefs and observations, then the platonist notions about truth and meaning are empty concepts that do no work. If a theorist writes about judges searching for "the best scientific theory of what death <u>really</u> is like" or "what vehicles <u>really</u> are", the implied reference to "reality" and "[metaphysical] realism" does not affect what the judge should do or think; the term "real" here is a disconnected wheel in the

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[59] L. Wittgenstein, <u>Wittgenstein's Lectures on the Foundations of Mathematics</u> 182 (C. Diamond, ed. 1976).

[60] <u>See</u> Moore, "A Natural Law Theory of Interpretation", 312; Moore, "Precedent, Induction and Ethical Generalization", 197-198.

machinery: it spins but it does no work.[61]

E.

Perhaps Moore's metaphysical realism is not supposed to help us. It is not always clear from Moore's articles how he saw his project, whether as reform or as merely revisionist description. On one hand, he was emphatic that beliefs regarding metaphysical realism make a difference, in the sense that whatever position one takes on metaphysical matters, he claimed, has an effect on practical matters:

> I aim ... to rescue the [metaphysical] debate ... from the criticisms of those who proclaim it either meaningless or irrelevant to any practical concern. ... The metaphysical debate over realism is both meaningful and relevant to practical concerns, in law as elsewhere.[62]

More specifically, he argued that metaphysical realist views will "lead [the believer] to practice law in quite a distinctive way"[63]: interpreting statutes, applying precedents, interpreting the United States Constitution, and even doing legal theory in a way different from the way a "conventionalist" would.[64]

Regarding my chosen focus, metaphysical realism about

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[61] See Patterson, "What Was Realism?", 2 Canadian Journal of Law and Jurisprudence 193, 194-195 (1989) (discussing Brink); Fish, "Dennis Martinez and the Uses of Theory", 96 Yale Law Journal 1773, 1782-1785 (1987) (discussing Moore).

[62] Moore, "The Interpretive Turn in Modern Theory", 873.

[63] Id., 883.

[64] Id., 882-888.

meanings[65], Moore was clear that adherence to it would entail a change of practice and would lead to changes in the outcome of cases:

> Judges should guide their judgments about the ordinary meanings of words by the real nature of the things to which the words refer and not by the conventions governing the ordinary usage of those words ....[66]
>
> [J]udges should use the realist theory of meaning [rather than a "conventionalist" theory] whenever the ordinary meaning of a legal text is relevant.[67]
>
> [T]he realist theory of meaning also seems likely to produce better results in the long run [than a "conventionalist" approach would].[68]

In contrast to this theme of "mend your ways" and "seek truth, not error", there is also a contrary theme, of how we should not be astounded that we "have been speaking [metaphysically realist] prose all along" (no change in action, just in description):

> The respective legislatures using the word "death" in the above statutes should be held to have the same linguistic intentions as other language users, namely, realist ones....[69]
>
> [Most people] fairly expect their courts to give "death" the meaning they themselves would give it: as the name of a natural kind of event about which we can learn all sorts of surprising facts without changing the meaning of the word at all.[70]

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[65] As in other discussions in this chapter, I am bypassing questions regarding the realism/anti-realism debate regarding other areas of discourse. Moore had a great deal to say, for example, about a metaphysically realist approach to morality and moral terms, and how that approach might (or might not) require a change in how judges decide cases. However, such questions are beyond the scope of my project.

[66] Moore, "The Natural Law Theory of Interpretation", 287.

[67] Id., 301.

[68] Id., 325.

[69] Id., 323.

[70] Id., 324.

> [O]ur interpretive practices reveal us to be ... metaphysical realists .... [T]he way we use language in both ordinary speech and in statutes presupposes a realist metaphysics about the hidden nature of natural kinds.[71]

Finally, there is a third theme: that while reforming one's actions and thoughts to Moore's requirements would get one the right answer, it might be that one would be as likely to get there by a different path, perhaps even by intuition.[72] Moore wrote that his thesis aimed "at telling us what is the correct interpretation of a legal text, not what psychological steps judges should go through to reach it."[73]

This is all rather confusing, and probably not entirely consistent. And there is, after all, something strange, something paradoxical, about the whole project. Moore purported to tell us how to understand language, though his project was not the same as the usual theme of such articles, that there is some special way in which legal texts should be understood and interpreted (for example, to always view enactments in light of the problems to which they were responding, to treat judgments as if they were part of chain novels, or to remember that "it is a constitution we are interpreting"). Moore's prescription was (primarily) not of that form: in fact, he often emphasized how the interpretation of legal texts should not differ from that of ordinary texts.[74] However, surely we understand normal words

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[71] Id., 397.

[72] Id., 396 n.218.

[73] Ibid.

[74] See, e.g., id., 323 ("legislatures ... should be held to have the same linguistic intentions as other users").

and sentences (in our own language) well enough, and if we sometimes need assistance, it would be from a dictionary, not a philosophical treatise.

I would venture that Moore's work took this possible response into account, implicitly if not explicitly. It is what accounts for the theme of non-reform -- revisionary description -- in the articles. What remains to be explained then are the prescriptive elements of the articles. One possible explanation for the prescriptive elements is the view, which sometimes surfaced in the articles, that judges, though metaphysical realists in "real life" like the rest of us, are as a group under the delusion that they should follow awkward conventionalist theories when they interpret statutes.[75] Another possible explanation: Moore's arguments had a prescriptive force for those occasions when we (as interpreters and appliers of norms) have to choose between speakers' meaning and words' meaning, and when we have to decide how to treat either after the passage of time (how to treat a rule-makers' comments about entities if popular or expert opinion about those entities has since changed). While these are difficult questions of policy, the notion that a philosophical theory about meaning could settle the matter does not seem tenable.

Moore tried to transform difficult questions of authority and interpretation into a more direct question about semantic content, removing the whole question of speaker's intent by reducing it to a simple function of semantic content. He sought

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[75] See, e.g., Moore, "A Natural Law Theory of Interpretation", 326 n.86, 333-336, 353-358.

to prevent the chasm between speakers' meaning and words' meaning from coming about by talking about speakers' "linguistic intentions" for how their words should be understood, and then positing that everyone's "linguistic intentions" were (a priori?) the same.[76] However, all of this analysis seems powerless to make the chasm disappear: for example, when due to my ignorance of botany I say "lady slipper" when wish to refer to tulips, I would still want to be understood as referring to tulips, even though the reference of the term "lady slipper" itself is different. Our "linguistic intentions" are often to be understood according to what we meant, even when this seems to disagree with what we said. With authority subsumed by semantic content in Moore's analysis, it was then open to him to claim that a rule-maker's term should be interpreted as being equivalent to our best current theory about the entity named. For reasons discussed in the last chapter as well as in this one, it should be clear that the independent claim of authority in law (and the problems it poses for judicial interpretation) cannot be so easily overcome.

Perhaps the reason that it is so unclear whether Moore's metaphysical realist positions are supposed to make a difference is that the whole theoretical machinery worked largely as a diversion or a disguise. The theory was there as an excuse to focus on semantic content and to discount or ignore authoritative intentions.

F.

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[76] See id., 323-324.

Before going on to other topics, I want to mention briefly two criticisms other theorists have made of Moore's work. First, Frederick Schauer has recently argued that Moore's writings should be understood as having been not so much about meaning or metaphysics as about rule application. In applying a 19th century statute which contained the words "death" or "vehicle", Schauer argued, the decision to interpret those words in terms of our current understanding of them rather than the drafters' understanding is simply a choice to interpret the rule according to its purpose rather than according to the meaning of a rule-formulation.[77] Throughout his book, Schauer referred to this as particularistic decision-making, as contrasted with rule-based decision-making. The rule-based approach, accepting the drafters' notions about what the words meant, may lead to some absurd or sub-optimal results, as is the case with all rule-based decision-making (consider the usual hypothetical examples, the statues, emergency vehicles, and cleaning vehicles that seem to be within the scope of the rule "no vehicles in the park"). However, there are here, as elsewhere, all the benefits of staying with rule-based decision-making: predictability, stability, separation of powers, and so on. The "metaphysically realist" approach thus may be better as a matter of policy, but should not be seen as required as a matter of the nature of language or the nature of rules.[78]

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[77] F. Schauer, Playing By the Rules section 9.3.

[78] See ibid. At one point, Moore briefly considered and brushed aside an argument similar to Schauer's. He described a "conventionalist" arguing that a judge would not allow the removal of organs from a patient who was revivable (but "dead" by the criteria of an old authorizing statute) "because all

Whatever the merits of Schauer's argument as a reading of Moore, it hinted at a basic problem with many recent articles on law and interpretation (and law and rhetoric, law and hermeneutics, and law and Wittgenstein). The question of how judges should decide cases cannot be conclusively decided -- it probably cannot be more than slightly furthered -- by a (new and better) theory about meaning or understanding. All the important questions can be answered -- and should be answered -- by a political theory about the appropriate relationships among the rule-makers, the rule-interpreters, and the general public.

This conclusion is supported by the way the same judicial action can be characterized so many different ways. For example, the refusal to allow an outdated statute to justify the removal of organs (for transfer) from a patient who could still be revived could be seen as following the (metaphysically) real meaning of "death" rather than the legislative definition, or as

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judges check ordinary meaning against the purpose of a rule". Moore, "A Natural Law Theory of Interpretation", 328. However, Moore argued, this would require "us[ing] a realist notion of death in formulating the purpose behind the rule." Ibid. At best, this takes the argument too quickly.

A judge in the above hypothetical situation could argue as follows: at the time the statute was enacted, the rule-makers thought that "death" (the event) was a simple boundary between life and "death" (the state of being). Now we know that some patients go through not one, but two "events" before they are dead: first, a point at which most bodily functions cease, but the patient could still (in principle) be revived; and second, the point at which the patient could no longer be revived. Whether we call the first event "death" (as in the original statute) or "clinical death" or something else, it would clearly be contrary to the purpose of the original enactment to allow organ removals before the second event (non-revivability) is reached. Contrary to Moore, this account does not require a metaphysically realist view of "death" (the event), and as there has been no change in beliefs about "death" (the state of being), the question of metaphysical realism about that term does not arise.

the judge refusing to follow the plain meaning of the statute because it would create an extremely unjust or absurd result, or as interpreting the rule's words in terms of the rule's purpose, or as applying the statute in a way which reflects how the rule-makers would have reacted to the situation had they known about it. One's political theory might value above all other things either 1) that a rule's interpretation not be inconsistent with the general public's understanding of the rule, or 2) that the rule-maker's wishes be followed. In either case, it would be appropriate to follow the general public/rule-maker's understanding of what particular term in the rule-formulation meant (in terms of the distinction made used earlier, what they did mean/would have meant in using the term), even if that understanding was wrong or misguided according to one's philosophical (and scientific) theories regarding what the term "actually" means.[79]

The second criticism was that his arguments sometimes seemed to confuse causes with effects, or at least labels with explanations. In one place, he wrote that the legal term "malice" is a "functional kind" whose nature is "whatever makes one properly liable for the punishment fixed for murder [defined

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[79] I do not claim that the authors discussed in this section would necessarily disagree with my position. To the contrary, I think their articles tend to support (explicitly or implicitly) what I am saying. For example, Brink explicitly stated that a proper semantic theory is only one part of a theory of legal interpretation and that the "semantic content" of a statute might be bypassed if it was clear that the rule-makers meant something else by those words. Brink, "Semantics and Legal Interpretation (Further Thoughts)", 2 Canadian Journal of Law and Jurisprudence 181, 186-187 (1989).

as "a killing performed with malice"]".[80] In discussing the idea of right answers to legal problems, he wrote that for a metaphysical realist, "an answer is right when it corresponds to a complex moral fact (which in law includes the institutional facts that further moral facts make important)[81], which seems to translate to nothing more than saying the "right answer" is what a judge gets after properly applying the appropriate standards and balancing techniques. As with the "functional kind" "malice", the metaphysical entity posited ("a complex moral fact") does not guide the reasoning process, it merely decorates it.[82]

G.

> "If, say a chicken began to lay perfectly ordinary walnuts which were planted and grew into walnut trees, I would not wish to refer to this result as the production of a grove of chickens."[83]

There are many parallels between the writings of Michael Moore and those of David Brink, though it is hard to find reference to either in the other's work. Moore has written extensively in law journals, his primary theme often being the

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[80] Moore, "The Interpretive Turn in Modern Theory", 886, 884.

[81] Moore, "Metaphysics, Epistemology and Legal Theory", 480.

[82] Ronald Dworkin's discussions of "right answers" may be subject to a similar criticism, but Dworkin was less insistent that his ideas about "right answers", by themselves, were either guiding judges in their actions or explaining those actions after the fact.

[83] Dupre, "Natural Kinds and Biological Taxa", 90 Philosophical Review 66, 88 (1981).

defense and application of metaphysical realism. Brink has written primarily in philosophy journals, where he has defended his own version of metaphysical realism[84], but he has also written a handful of articles about legal theory and law. His articles about law have not directly promoted a metaphysical realist approach, but have centred on an approach to reference and meaning which is often associated with metaphysical realism.[85] (I will consider this connection later in this chapter.) Finally, his criticism of legal positivism as having being based on "empiricist" semantics is analogous to Moore's criticism of legal positivism as having been based on "conventionalism".

Brink began by arguing that all legal theories explicitly or implicitly relied on a semantic theory, and that the theory upon which most forms of legal positivism relied was wrong.[86] He characterized legal positivism as basing the argument for judicial discretion on the open texture of general terms which in turn was based on a semantic theory which tied a term's meaning and reference to the properties speakers associated with the term.[87] According to Brink's characterization of legal positivism, if people with legal training disagree about the

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[84] See D. Brink, Moral Realism and the Foundations of Ethics (1989).

[85] See Brink, "Legal Theory, Legal Interpretation, and Judicial Review", 17 Philosophy and Public Affairs 105 (1988); Brink, "Semantics and Legal Interpretation (Further Thoughts)", 2 Canadian Journal of Law and Jurisprudence 181 (1989).

[86] Brink, "Legal Theory, Legal Interpretation, and Judicial Review", 111-116.

[87] Id., 112-113.

application of a term to a particular case, then the term's meaning and reference is uncertain in that area and a judge must use discretion in deciding whether the term (and its statute) should apply.[88]

As Brink argued, there are at least two (related) problems with this semantic theory. First, it has trouble explaining disagreement: if two people have different ideas about "mass" or about "due process", the theory would be forced to conclude that these people were in fact talking about different things.[89] Second, the theory cannot distinguish changes in belief from changes in subject matter: that someone's (or some community's) beliefs about "gold" or about "cruelty" can change without the object of those beliefs being different.[90]

As an alternative semantic theory, Brink proffered one which asserts that "the way the world is", rather than our own beliefs, determine the reference[91] of our words.[92] He argued that a

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[88] Id., 112.

[89] Id., 114-116.

[90] Id., 115-116.

[91] For those, like Brink and Putnam, who want to maintain "the traditional semantic theory's claim that meaning determines reference", "the way the world is" would also constitute a large part of a term's meaning. Id., 118.

Some Wittgensteinians would resist a strong connection between meaning and reference, both in the "traditional" version of that connection and in the Brink/Putnam version (where meaning could be said to include knowledge about the referent, even if most speakers do not have that knowledge). See G.P. Baker & P.M.S. Hacker, Language, Sense & Nonsense 221 n. 19 (criticizing Putnam); P.M.S. Hacker, Insight and Illusion, Revised Edition, 247-248. Brink was willing to allow other conceptions of meaning, as long as such approaches did not then insist that meaning determines reference. Brink, "Legal Theory, Legal Interpretation, and Judicial Review", 118.

correct theory of semantics would show that meaning -- or at least reference -- does not depend on users' beliefs about the term, but only on the properties of the object or class of objects to which the term corresponds. Since mere disagreement would no longer justify judicial discretion, he argued, the level of legal indeterminacy would be much smaller if one followed a legal theory based on a correct semantic theory.[93] Our beliefs about particular objects could be mistaken, though the beliefs of authorities and experts will be "our best evidence about what the nature of these referents is."[94] The fact that disagreement would continue means only that there was a risk that judges would occasionally get the matter wrong; it would not justify judges choosing as they liked, assured that any choice they made would be acceptable. A semantic theory of this kind has no difficulty dealing with disagreements about the meaning of words or with the evolution of a term's meaning over time.[95] Our disagreement with our colleagues (and our forebears) about what constitutes "due process" or "cruel punishment" does not come about because we and they are (were) talking about different things, but because we disagree about the ("real") "nature" of the matter in question, and (at least) one of us is (was) wrong about that

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92 Brink, "Legal Theory, Legal Interpretation, and Judicial Review", 117.

93 See id., 120-121.

94 Ibid.

95 Id., 116-119.

nature.[96]

Brink was careful in his claims about and for his alternative semantic theory. First, the theory was said to be derived from the writings of Saul Kripke and Hilary Putnam, but not identical to those writers' theories.[97] Second, he allowed that other semantic theories, perhaps even certain forms of empiricist semantics, might be able to meet his criteria for a proper semantic theory.[98] Third, he allowed that his semantic theory (and the theories of Kripke and Putnam) probably did not

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[96] Cf. R. Dworkin, Law's Empire 11-44 (1986) (on the nature of disagreements in law).

Brink does allow for one type of situation where judicial discretion would be required: where there is agreement about what criteria should be used to determine whether a term applies, but there is disagreement in the application of the criteria to a particular case. Brink, "Semantics and Legal Interpretation (Further Thoughts)", 189. He gives the example of whether an extremely dark charcoal shade should be considered grey or black. He called such cases "borderline" or "fuzzy" cases, though they are far closer to Dworkin's idea of "weak discretion" ("the standards an official must apply cannot be applied mechanically but demand the use of judgment") than they are to Hart's ideas about discretion in borderline cases. Compare ibid. with R. Dworkin, Taking Rights Seriously 31-32 and with H.L.A. Hart, The Concept of Law 123-126.

[97] Brink, "Legal Theory, Legal Interpretation, and Judicial Review", 117-119 & nn.17-18.

At various points in this chapter, I refer to the "Kripke-Putnam" approach to reference (or to semantics or meaning), mostly because Kripke's and Putnam's ideas are often treated as interchangeable in the articles I am discussing (as both Brink and Moore do). However, I must point out two things: 1) while I am familiar with most of Putnam's writings in this area, I am not familiar with Kripke's Naming and Necessity or the secondary literature on that text; and 2) (as may become clearer in later discussions) in recent years, Putnam has distanced himself more and more from Kripke's ideas on these subjects. In particular, see Putnam, "Is Water Necessarily H_2O?", 54-79.

[98] Brink, "Legal Theory, Legal Interpretation, and Judicial Review", 118-119 & n.19; Brink, "Semantics and Legal Interpretation (Further Thoughts)", 182, 185.

entail metaphysical realism.[99]

The major problem with Brink's argument is that it attacked a non-existent adversary. No legal theorist I know advocated either the view of semantics or the view of judicial discretion Brink described. The theorist he used as an example, H.L.A. Hart[100], had a very different view, as I discussed in detail in Chapter 1. In brief, for Hart, judges have discretion in part because rules embody choices made relative to particular situations and circumstances; when the rule must be applied to other situations and circumstances, a fresh choice must be made. This model has its own difficulties, but they are not those described by Brink.

Brink's approach would not help us if we believed that judicial interpretation was largely a matter of implementing (or being "guided by") the choices made by people in authority. That we now use certain words differently than the rule-makers did is interesting, but why should it be relevant to implementing the earlier choices?[101] Brink's response might be that the rule-makers first and foremost wanted to refer to a type or group, and if we now know more about the boundaries and the nature of that type or group, the rule-makers would have wanted the

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[99] Brink, "Semantics and Legal Interpretation (Further Thoughts)", 182-185.

[100] Brink described his argument as being against the view given in Hart's The Concept of Law. E.g., Brink, "Legal Theory, Legal Interpretation, and Judicial Review", 106-107. However, at times, he was less sure that his characterization fit that text. See Brink, "Semantics and Legal Interpretation (Further Thoughts)", 189 n.8.

[101] See Alexander, "Of Two Minds About Law and Minds", 2446-2447.

implementation of their choices to take that additional knowledge into consideration.[102]

Brink does not deny, however, that a rule-maker's "specific intent" may diverge over time with the "semantic content" of the rule, or that sometimes the former should override the latter in implementing the rule.[103] In fact, it appears that Brink has solved little -- other than the rebuttal of a position that no one claimed to hold. At the end of his primary discussion of interpretation, he casually admitted that "meaning and purpose can conflict, and this gives rise to certain interpretive difficulties."[104] We have not travelled very far at all from Hart's picture of rule-application and judicial discretion in The Concept of Law.

A similar point could be made about Moore's approach. Even if one agreed that judicial practices should be reformed in line with Moore's suggestions and one allowed that metaphysical realism requires us to change radically our ideas about meaning in some cases, it still might be the case that adopting Moore's metaphysically realist program would not substantially change the results the courts reach. His prescribed a four-step

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[102] See Brink, "Legal Theory, Legal Interpretation, and Judicial Review", 121-124.

[103] See id., 122-129; Brink, "Semantics and Legal Interpretation (Further Thoughts)", 186-188.

[104] Brink, "Legal Theory, Legal Interpretation, and Judicial Review", 128-129. He noted that this will occur not only in a situation, like one of Moore's hypotheticals, "when the legal provision's meaning is specific and the framer's collateral beliefs are false or questionable", but also in the more common and less controversial case "when the language of a provision is general and the dominant intent is abstract" (as with Hart/Fuller on vehicles in the park). Id., 129.

interpretative scheme for judges was as follows: 1) determine the ordinary meaning of the text; 2) determine "what interpretation is suggested" by precedent; 3) "check[]" ordinary meaning and precedent against "what the judge takes to be the purpose of the provision"; and 4) "check[]" ordinary meaning, precedent, and purpose against "an 'all things considered' value judgment about the best result in this case."[105]

Moore considered but then rejected the idea that his approach to meaning and morality would entail giving precedent no weight. "Even a [metaphysical] realist, who thinks that all interpretation should aim at describing the nature of the moral natural quality named by legal texts, can and should admit that the rule of law virtues are real values too and that, accordingly, how prior courts have decided like cases has some moral force behind it."[106] According to Moore, how much moral force a precedent will have will vary among different areas of law, for predictability and reliance are more important in some areas of law (for example, criminal law) than in others.[107]

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[105] Id., 376.

[106] Moore, "A Natural Law Theory of Interpretation", 372.

[107] Id., 363. The match here with Ronald Dworkin's conclusions about precedent is almost exact. See, e.g., R. Dworkin, Law's Empire 367 ("Law as integrity is sensitive to the different marginal value of certainty and predictability in different circumstances.").

There are a number of other parallels with Dworkin's work. Like Dworkin, Moore rejected, on grounds both of plausibility and value, an "intentionalist" approach to interpretation, Moore, "A Natural Law Theory of Interpretation", 338-358; cf. R. Dworkin, Law's Empire 53-65, 313-337. Also, Moore's worry that deferring to the ordinary meaning of a statute could lead to absurd or unjust consequences leads him to a position with obvious resonance from Dworkin's work: a judge should "construct[] the morally best purpose for a statute, and constru[e] it by

Thus, for a Moorean judge, in common law cases as well as in statutory interpretation cases, the lessons of metaphysical realism must often yield to, or at least be modified by, consistency with past decisions. Moore recognized that within a legal system, the value of getting the meaning of the words right is often balanced against values of consistency, acceptability and justice. The fact that a judge with proper metaphysically realist credentials would interpret (understand) a sentence one way under normal circumstances does not indicate that this judge would (or should) interpret that sentence the same way if the sentence was part of a legal rule the judge was applying. Within Moore's own suggestions about judicial reasoning, metaphysical realism about meanings is only one factor among many in determining how this statute should be applied to this particular fact situation.

H.

> "[A] passage [in Borges] quotes a 'certain Chinese encyclopaedia' in which it is written that 'animals are divided into: (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camelhair brush, (l) et cetera, (m) having just broken the water pitcher, (n) that from a long way off look like flies'."[108]

In the remaining sections of this chapter, I want to

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reference to that purpose." Moore, "A Natural Law Theory of Interpretation", 354. The resonance may be even stronger in Moore, "Precedent, Induction, and Ethical Generalization", in Precedent in Law 210 (L. Goldstein, ed. 1987) ("constructing the most morally coherent account of all common law decisions").

[108] M. Foucault, The Order of Things xv (1970).

consider the Kripke/Putnam approach to semantics and reference more closely (considering general applications as well as possible applications to law and legal theory), in order to see whether that approach entails (and is entailed by) metaphysical realism, as Moore believed it did[109], or whether it is compatible with other views (in particular, whether it is compatible with a Wittgensteinian view).

Putnam's argument had been that meanings were not in the mind.[110] What a person means by a word is not some summation of that person's beliefs about the term, or even some consensus within the community about the term. Within an analysis of meaning, according to Putnam, the use of term acts primarily as a pointing, an act of ostension. "What I mean by 'water' is the group/category/kind of thing of what that [pointing to a liquid] is a member."[111] It may then be left to others in the community to discover (and then report) the nature of that kind.

We associate a word with an object, and by that word we mean

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[109] See Moore, "A Natural Law Theory of Interpretation", 292 n.25; see also Moore, "The Interpretive Turn in Modern Theory", 876. As I noted earlier, Brink did not claim a necessary (logical) connection between a Kripke/Putnam approach and metaphysical realism.

[110] See Putnam, "The Meaning of 'Meaning'", in Mind, Language and Reality 227 (1975).

[111] See Pettit & McDowell, "Introduction", in Subject, Thought and Context 4 (P. Pettit & J. McDowell, eds. 1986).

The ostension, the connection of this term with that natural kind, is done by the community. Any particular individual within the community could of course be mistaken as to which liquid "water" was meant to refer.

to refer to that object and all other objects of the same nature.[112] To say that objects are of the same nature is to say that they "have the same composition, or obey the same rules -- indeed, what makes composition important, when it is, is its connection with laws of behavior."[113]

Putnam's purpose had been to attack a theory of meaning which stated: 1) knowing the meaning of a term consists of having a particular psychological state, and 2) meaning, in the sense of intension, determines a term's extension.[114] In particular, he wanted to emphasize the contribution of society and the contribution of the real world to both the intension and the extension of the term. The contribution of society derives from the linguistic division of labour, the contribution of the world from the idea of natural kinds.[115]

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[112] See Putnam, "Reference and Truth", in Realism and Reason 71 (1983): "The extension of 'multiple sclerosis' includes whatever illnesses turn out to be of the same nature as the majority of the 'paradigm' cases of multiple sclerosis; we do not suppose that what the nature is ... is completely known to us in advance."

[113] Id., 74.

[114] Putnam, "The Meaning of 'Meaning'", 215-219. Putnam defined "intension" as "the 'concept' associated with [a] term" and "extension" as "the set of things [a] term is true of". Id., 216-217.

[115] See id., 223-247.

Putnam discussed the idea of "natural kind terms" in an earlier article, "Is Semantics Possible?" A thing which is a member of natural kind 1) "is likely to have certain characteristics"; and 2) "those characteristics, if they are present, [are] likely to be accounted for by some 'essential nature' which the thing shares with other member of the natural kind." Putnam, "Is Semantics Possible?", in Mind, Language and Reality 140. He continued, "What the essential nature is is not a matter of language analysis but of scientific theory construction". Id., 140-141.

After arguing that one could not defend the notion that "meanings were in the head" or that a term's intension determines its extension, Putnam went on to offer an alternative analysis of "meaning", which centred on the term's extension, but which included other elements (e.g., the term's syntactic markers, its semantic markers, and its "stereotype"[116]).[117] I believe this part of Putnam's article should be seen as having a different status than the earlier part (the claims about reference and about the linguistic division of labour), that it should be seen as an optional recommendation rather than a proven conclusion.[118] It is open to someone to agree with Putnam that a term's intension does not determine its extension, yet still believe that meaning should be equated with intension.[119]

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[116] An object's stereotype includes some salient feature or features which objects of that type usually have; a member of a linguistic community must have this stereotype of the object to be considered to have understood the term in question. Putnam, "The Meaning of 'Meaning'", 249-251.

[117] Id., 269.

[118] There is some doubt about the status of even the core elements of Putnam's article. For example, when Putnam argued that a substance in an alternative world which had the same properties of water but a different composition would not be part of the extension of "water", is he making a conceptual point about language, reference or meaning, or was he merely describing a contingent truth about our intuitions and our choices in moments of linguistic uncertainty? See Dupre, "Natural Kinds and Biological Taxa", 70-71. (A Wittgensteinian might argue that the former type of claims always reduce to or are functions of the latter.) The question is what Putnam (or Kripke or any other theorist who takes a similar position) would say to someone who disagreed with their claims, e.g., that the alternative substance that has all the properties of water but a different chemical composition, should not be called "water". See ibid. What would it mean to say that Putnam's position is right and his interlocutor is wrong?

[119] See Brink, "Legal Theory, Legal Interpretation, and Judicial Review", 117.

Similarly, a completely different approach to meaning might be warranted for a different approach to the philosophy of language.

The Wittgensteinian approach offers its particular analysis of meaning because within its approach to language in general, meaning is part of an interlocking complex of training, understanding, and use:

> The meaning of an expression is what one understands when one understands the expression. It is what is explained by an explanation of meaning. An explanation of meaning provides a standard or rule for the correct use of an expression. For one's use of a word is correct, makes sense, when it accords with an appropriate explanation of meaning. A person's understanding of an expression is manifest in his use of it (i.e. whether he does use it in accord with the correct explanation) and in his given correct explanations of it on appropriate occasions. And also, of course, in his responding appropriately to the use of the expression by others.[120]

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[120] P.M.S. Hacker, Insight and Illusion, Revised Edition 247-248. Cf. G.P. Baker & P.M.S. Hacker, Language, Sense & Nonsense 221 n.19 (the Putnam/Kripke approach "ignor[es] the internal relations between meanings and explanations of meaning").

A similar point was made by Michael Dummett. He wrote that the reason we want (contrary to Putnam's position) to maintain a concept of meaning that is connected with knowledge is that "precisely what we want a notion of meaning for is to give an account of what knowledge of a language consists in, of what it is that someone knows when he knows a language or knows some word or fragment of a language." Dummett, "The Social Character of Meaning", in Truth and Other Enigmas 420. Also, Dummett argued, to tie meaning to reference in the way Putnam did would entail the claim "that only chemists, jewellers, etc., fully understood the word 'gold'; and this claim would be resisted by most English speakers." Id., 426.

By contrast, Putnam's "last word" on the dispute might be the following:

> The impossibility of a notion of "meaning" which agrees at all with our preanalytic intuitions about sameness and difference of meaning and which is invariant under belief-fixation dooms the notion to be exactly what it is: a vague but useful way of speaking when (by intuition and by experience) we correlate words and phrases in different languages and

I believe that one can agree both with Putnam's approach to meaning and the Wittgensteinian approach to meaning, though I am not in a position to demonstrate that (nor am I entirely sure what such a demonstration would look like).[121]

I want to examine Brink's approach in light of the notion of "the linguistic division of labour", an idea central to the semantic theory he adopted.[122] The notion involves (roughly) the idea that we defer to other persons, as part of our competence in a language, in our understanding of particular terms. For example, part of the nature of gold is its chemical composition and the way it reacts with other chemicals. However, most speakers of the language, though they are (and are said to be) competent users of the language and (are said to) know the meaning of the word "gold", do not know (amongst other things) these chemical facts. Putnam summarized the linguistic division of labour as follows: "the fact that confirmation procedures for being gold or being aluminum, or being an elm tree, or being David are not the property of every speaker -- the speakers defer to experts for the fixing of reference in a huge number of cases."[123] The idea of a "linguistic division of labour" allows a move from the semantic theory Brink criticized, which

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discourses.

Putnam, "Meaning Holism", in Realism with a Human Face 291.

[121] An argument that may approximate such a demonstration appeared in Dummett, "The Social Character of Meaning", 424-430.

[122] This idea was first proposed by Hilary Putnam in "The Meaning of 'Meaning'", 227-229, which was one of the sources for the semantic theory Brink advocated. See Brink, "Legal Theory, Legal Interpretation, and Judicial Review", 117-118 & nn.17-18.

[123] H. Putnam, Meaning and the Moral Sciences 114 (1978).

emphasizes a convention -- a community consensus -- about what a term means, to theories based on there being a convention about what authority to defer to (in certain circumstances) to determine usage.[124]

In the idea of "the division of linguistic labour", as in the other aspects of the Kripke-Putnam approach to semantics Brink favoured, meaning is analyzed as a two-step rather than a one-step process. Instead of merely considering speakers' beliefs about a concept or an object, we consider speakers as using words to "point to" some object-category, and we ask experts to determine the nature of the object picked out. It is in the discussion of this division of labour that one sees how Putnam's approach is consistent with a Wittgensteinian (or other non-metaphysically realist) approach to language: as long as the Wittgensteinian allows that for some terms part of understanding the term's meaning involves knowing that under certain circumstances one must defer to the opinions of others (experts), the Wittgensteinian has no reason to reject Putnam's approach. That it is a scientist in our society who makes the final judgment regarding which one-celled organisms are "plants" and which are "animals" or that it is an elder of a certain community who makes the final judgment regarding whether a particular form of discipline is "cruel" (and therefore prohibited by that community) does not entail that "animal" or "cruel" refer to

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[124] S. Blackburn, Spreading the Word 130-131. Blackburn offered the following example: "As a group we defer to medical authority in defining what does and does not count as arthritis, and [and using the term "arthritis"] I will be held to have said whatever it tells me I said .... And this is so regardless of my own understanding of what I was doing." Id., 131.

platonic entities. This deference within language is, of course, consistent with platonism, but it is also consistent with a wide range of non-platonist metaphysical theories. Putnam's approach is thus seen as a matter of language use and not (at least not necessarily or primarily) a matter of (metaphysically realist) ontology.

I.

The idea of natural kinds has played an important role in the writings of both Moore and Brink. It is used both as an argument against "conventionalist" or "empiricist" approaches to language, and as a bridge between the semantic and ontological claims of metaphysical realism. In the articles on law under consideration, the idea of natural kinds is a central part of arguments about why judges should not defer to rule-makers' specific intent or to the terms of statutory definitions.[125] In this section, I will offer a brief critical review of the use of "natural kinds" analysis in these articles.

A natural kind term is one whose extension is answerable to the outside world. The same point can be put in a different way: a natural kind term refers to a class of objects, where the boundaries of the class are defined by facts which are independent of us. Objects that are members of a particular natural kind share a single essence or nature. The idea that a term's extension is the group of objects which has the same essence, an essence based on "objective laws" "fixed by the

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[125] See, e.g., Moore, "A Natural Law Theory of Interpretation", 322-358; Brink, "Legal Theory, Legal Interpretation, and Judicial Review", 120-129.

world"[126] seems strongest when discussing terms which refer to chemical elements or chemical compounds. For terms referring to plants and animals, it is actually quite rare for common language to correspond to a non-arbitrary grouping in scientific taxonomy.[127]

It would be an un-obvious, and perhaps unwarranted, extension of the natural kind analysis to apply it to human artifacts. What reason do we have to believe that human creations divide up into clear categories in the same way that the objects of chemistry and biology seem to do? Despite the apparent difficulties, in an early article, Putnam applied natural kind analysis to pencils.[128] Pencils, tables, and other objects of human creation seem less resistant than chemicals or animals to the idea that the term's intension (e.g., the criteria thought necessary and sufficient for the term's application) determine the term's extension. Let us say that "pencil" is defined as "a thin, cylindrical object, which contains graphite to allow it to make marks on paper or similar substances". Putnam would then query, "what would happen if we discovered that all the objects we thought of as pencils turned out to be living objects?"[129] The discovery would affect our beliefs about

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126 Id., 71.

127 See Dupre, "Natural Kinds and Biological Taxa", 73-83.

128 Putnam, "The Meaning of 'Meaning'", 242-244.

129 Ibid.

It is interesting to contrast Putnam's example with the type of example Friedrich Waismann used in discussing "open texture". See Waismann, "Verifiability", Proceedings of the Aristotelian Society, Supplementary Volume 19, 122-126 (1945). What if, instead of discovering that all pencils were living organisms,

pencils and it might cause us to introduce further terms with different criteria (if not all pencils were living, terms like "live pencils" and "inert pencils" might enter the language to label the sub-categories), but I do not see how that could be seen to change the "meaning" -- either the intension or the extension -- of the term "pencil".

It is of some importance that a natural kinds theorist be able to state what is meant by the "same essence" and "same nature" that the different members of the group are said to share. Putnam emphasized composition -- chemical composition for chemical objects, and underlying genetic code for living organisms. Whatever the difficulties with this analysis in these cases[130], the problems are far greater when no source can be immediately identified which assigns objects to their respective categories.

Someone might merely assert that the boundaries of various groups are clear to us, and seem clearly to be independent of linguistic conventions, even though what constitutes the group members' shared essence cannot (yet) be determined. However, it would then be open to an interlocutor to cite Wittgenstein's discussion of family-resemblance concepts.[131] With family-

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we discovered that only once -- or only a small number -- were? I do not think that anything Putnam argued would affect Waismann's conclusion that we would not know what to say here, whether to call these organisms "pencils" or not.

[130] For living organisms, Dupre has pointed out that the genetic variability within a species is sometimes larger than it is between two related species. Dupre, "Natural Kinds and Biological Taxa", 84-85.

[131] See L. Wittgenstein, Philosophical Investigations sections 65-77; G.P. Baker & P.M.S. Hacker, Wittgenstein: Meaning and Understanding 320-343.

resemblance concepts, the category borders seem to be independent of us, but the delimiting of the category one way rather than another may in fact be due to our "form of life" (common human nature or common training): this is just the way we react (the way we "go on"); this is just the way the objects seem to us to group.

One point to keep in mind is that even if one accepts that meaning something often primarily involves "pointing" to some group or category, the community (as well as nature) sometimes plays a part in how "reality" is divided into groups.[132] For example, the fact that the term "arthritis" includes only rheumatoid complaints that affect the joints rather than all rheumatoid complaints is contingent, it could have been otherwise.[133] How our concepts divide up reality is arbitrary, in the sense that one cannot speak about it as "true" or "justified" (or as "more true" or "more justified" than some alternative division).[134] This is Wittgenstein's idea of "the autonomy of grammar".[135]

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[132] Pettit & McDowell, "Introduction", 6-10. For the importance of social interests and arbitrary community choices even in biological classifications, see Dupre, "Natural Kinds and Biological Taxa", 73-83.

[133] Pettit & McDowell, "Introduction", 7-8.

[134] There is also a sense in which grammar is not arbitrary. "The claim that it is arbitrary does not mean that it is capricious, unimportant, or a matter of individual whim. Nor does it mean that we cannot ever give reasons why such-and-such grammatical rules are useful, or that there cannot be reasons why, for rather specialized purposes, we choose to adopt new grammatical structures." P.M.S. Hacker, Insight and Illusion, Revised Edition, 193; see L. Wittgenstein, Zettel section 358.

[135] See P.M.S. Hacker, Insight and Illusion, Revised Edition, 185-206.

In a recent article, Moore distinguished "nominal kinds", where items in a category are connected only by a common label (the items share no common nature), not only from "natural kinds" ("a thing exists in nature as a kind without human contrivance")[136] but also from "functional kinds". Items within the same "functional kind" share the same nature, but that shared nature "is a function and not a structure."[137] The point of talking about "functional kinds" is that it justifies study of the object in question. Moore wrote: "If law were [only] a nominal kind ... then there would be no unified nature to seek in descriptive general jurisprudence."[138] Calling something a functional kind may respond to an academic worry, but it does not seem to have any metaphysical or ontological implications.

Moore cited a Seventh Circuit case where the court defined "mower" as covering the class of things which do what a mower does.[139] In other words, the court treated "mower" as a functional kind.[140] However, that some terms are defined by objects' functions is as consistent with "conventionalism" as it is with metaphysical realism, and we do not need a radical change

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136 Moore, "Law as a Functional Kind", __ (manuscript page 35).

137 Id., __ (man. p. 38).

138 Id., __ (man. p. 35).

139 Matter of Erickson, 815 F.2d 1090, 1092-1094 (7th Cir. 1987), cited in Moore, "Law as a Functional Kind", __ (man. pp. 37-38).

140 Or so Moore implied; the actual opinion reads somewhat differently. It does not (only) use a functional kind analysis. The opinion also discusses legislative purpose, historical context, choice among criteria, and even cost-benefit analysis in the process of interpreting the statutory term. Matter of Erickson, 815 F.2d at 1092-1094.

in our theories of language or judicial reasoning to justify judges sometimes interpreting statutory terms in that way.

Brink offered tried to get around the limitations of traditional natural kinds analysis by offering a broader notion of "natural kinds". His use of the concept would include any "property or universal that figures in laws and explanatory generalizations."[141] The central idea in Brink's modified analysis is that there is a difference between the "real nature" of some object (where such objects could include "institutions, practices, and relations") and "descriptions conventionally associated" with those objects.[142] In the end, it seems like the lesson Brink learned from Kripke and Putnam that he wanted to pass on to judges and legal theorists is that our theory of meaning must be such that we can say that x -- whether x is an individual or a community (at a certain point in time) -- can be wrong in its beliefs about y, with y varying over an unlimited set of entities for Brink (even if not for Putnam). The question is, if we cannot point to a chemical composition or a genetic code or some other basis for believing that an object's "nature" or "essence" exists independent of human interests and human choices, what is the value of using traditional -- or modified -- natural kinds analysis?

When Brink defended the possibility of a metaphysically realist approach to social institutions, practices, and

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141 Brink, "Semantics and Legal Interpretation (Further Thoughts)", 185.

142 Ibid.

relations, he suggested that his might entail only[143]

> (i) those social phenomena are the objects of people's conceptions and so antedate those conceptions;
>
> (ii) people's conceptions about those phenomena can be mistaken about the real nature of the phenomena;
>
> (iii) when people's conceptions of those phenomena are correct it is in virtue of correctly describing the nature of those institutions, practices, and relations.[144]

How much content is in those three requirements depends largely on how much philosophical work is being done by the terms "nature" and "real nature".

J.

If we were to follow one extreme position of the American legal realists and believe that "law is whatever the judges say it is", then Brink's requirements would still be met: law would be an object of people's conceptions and people could be wrong in their descriptions of what law is. However if this kind of weak conceptual separation is all that is required by metaphysical realism, then (as the example indicates) metaphysical realism would be compatible with all sorts of sceptical, nominalist, and anti-realist approaches. If a realist perspective is to be something more than a mere re-characterization of various anti-realist descriptions, if it is going to have metaphysical implications, then the realist philosopher will have to make some ontological claims regarding

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[143] He added, "Whether realism is committed to anything more controversial about the nature of artifacts and social facts ... is unclear." Brink, "Semantics and Legal Interpretation (Further Thoughts)", 184.

[144] Ibid.

the meaning of "nature", "real nature", and "kind".

I see no reason to conclude that Kripke-Putnam semantics requires metaphysical realism or otherwise refutes a Wittgensteinian position. Putnam himself, in later articles, argued against metaphysical realism while reaffirming his earlier ideas about reference; he clearly did not believe that his approach to reference required metaphysical realism.[145] Brink's looser, related approach seemed to offer an even weaker connection with and argument for metaphysical realism.

The debate about the appropriate theory of language goes on, primarily in the philosophical journals, but more and more in the law journals as well. Michael Moore has performed an important task by elaborating for a legal audience the arguments for metaphysical realism and opening the debate about how a change in our theories about language might affect our theories about law. My argument has been that Moore overstated the relative advantages of metaphysical realism, both as a theory of language and as a component of a theory of judicial reasoning. Also, I do not believe that the case has yet been made that even a major change in our theories about language would result in more than occasional changes in the outcome of cases.

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[145] Putnam, "Realism and Reason", in Meaning and the Moral Sciences 123-140 (1978); see also Putnam, "Reference and Truth", 69-86.

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