

Notes

Breaking the Rules?: Wittgenstein and Legal Realism

Ahilan T. Arulanantham

Recent years have seen a growth of interest in the relationship between the later philosophy of Ludwig Wittgenstein¹ and questions in the philosophy of law.² This interest has compelling historical origins. Professor H.L.A. Hart acknowledged his debt to Wittgenstein in the context of his discussion of legal rules in *The Concept of Law*,³ a book commonly considered to be the first thorough account of legal positivism and perhaps the seminal modern text on jurisprudential theory. More recently, writers from a very different tradition—that of legal realism—have begun to turn to Wittgenstein for inspiration as well.⁴

1. By “later philosophy,” I refer to Wittgenstein’s work after his rejection of the views expressed in his first book, LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO—PHILOSOPHICUS* (C.K. Ogden trans., Routledge 1992) (1922). I refer specifically to LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., MacMillan 3d ed. 1968) (1953) [hereinafter WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*]; and LUDWIG WITTGENSTEIN, *REMARKS ON THE FOUNDATIONS OF MATHEMATICS* (G.H. von Wright et al. eds. & G.E.M. Anscombe trans., MIT Press 1991) (1956) [hereinafter WITTGENSTEIN, *REMARKS*]. The latter was published posthumously and is comprised of a set of notes that Wittgenstein wrote and organized relatively late in his life.

2. See, e.g., WITTGENSTEIN AND LEGAL THEORY (Dennis M. Patterson ed., 1992) (collecting 11 essays on Wittgenstein’s relevance for law); Brian Langille, *Revolution Without Foundation: The Grammar of Scepticism and Law*, 33 MCGILL L.J. 451 (1988) (rejecting the argument that the indeterminacy of language and law can be justified using Wittgenstein’s philosophy); Charles M. Yablon, *Law and Metaphysics*, 96 YALE L.J. 613 (1987) (reviewing SAUL A. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE: AN ELEMENTARY EXPOSITION* (1982)).

3. H.L.A. HART, *THE CONCEPT OF LAW* 249 n.122 (1961); see also P.M.S. Hacker, *Hart’s Philosophy of Law*, in *LAW, MORALITY AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART I* (P.M.S. Hacker & J. Raz eds., 1977) (reviewing the method and substance of Hart’s legal theory).

4. See, e.g., James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985) (developing a method for social and legal theory based on a treatment of critical legal studies); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984) (arguing that traditional legal theory has failed and suggesting an alternative view of legal theory as a form of political activity); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) (arguing that interpretivism and neutral principles fail as theories for interpreting the Constitution).

In particular, several realist scholars have focused on the legal implications of Wittgenstein's sustained treatment of rule following in *Philosophical Investigations*.⁵ There are at least two reasons to think their interest in this topic is important. First, one might expect that a central task of legal theory is to explain how it is that we live our lives guided by legal rules. Learning to bring one's behavior into accord with rules can be understood, on this view, as a central phenomenon of life under law.⁶ Second, an account of law in terms of rules has traditionally been crucial to explaining the legitimacy of the legal system.⁷ As one prominent legal realist puts it, "Determinacy is necessary to the ideology of the rule of law, for both theorists and judges. It is the only way judges can appear to apply the law rather than make it. Determinative rules and arguments are desirable because they restrain arbitrary judicial power."⁸ If law does not guide behavior through rules, such theorists assert, it must guide through unconstrained decisions, leaving people subject to a system governed by the arbitrary whim and caprice of individual judges—an illegitimate system.⁹

Given the importance of legal rules for understanding the legitimacy of the judicial system, I seek to examine the writing of legal theorists who focus on Wittgenstein's treatment of rules. I argue that what appears to be a relatively technical debate about the nature of Wittgenstein's rule-following arguments and their relevance for law actually brings to light deep and important issues in the political theory of legal interpretation. An understanding of Wittgenstein's arguments and their application to law provides insight into a central dispute concerning the legitimacy of the rule of law.

To that end, I am interested in a debate among legal scholars about the use that certain legal realists make of Wittgenstein. James Boyle,¹⁰ Mark Tushnet,¹¹ and Charles Yablon¹² are three prominent theorists from the realist tradition¹³ who use Wittgenstein's rule-following considerations to

5. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 1, §§ 143-242.

6. I owe this point to Jules Coleman. Charles Fried attributes the insight to Lon Fuller. See Charles Fried, *Recent Trends in American Legal Theory*, in *LEGITIMACY/LÉGITIMITÉ* 29, 29 (Athanasios Moulakis ed., 1986) (discussing developments in legal scholarship).

7. There may be those who hold that legitimacy is not a central aspect of jurisprudence. On this view, a conceptual analysis of law is concerned only with what existing law is, and not with "derivative" questions such as how law legitimates legal authority. This Note will be of only marginal interest for those who hold this view.

8. Singer, *supra* note 4, at 12.

9. Even if not crucial to law's legitimacy in an empirical sense, which may rest on public perceptions of the legal system that have little to do with what legal theorists say, an account of legal rule following may still be crucial to any attempt to develop a *theory* of adjudication that legitimates judicial power.

10. Boyle explicitly traces his argument for indeterminacy to Wittgenstein's views on language. See Boyle, *supra* note 4, at 707 n.75.

11. Tushnet uses an example of following a simple mathematical rule, which he owes to Wittgenstein (via Peter Winch). See Tushnet, *supra* note 4, at 822-23. He then applies his example to judges. See *id.*

12. Yablon's whole review attempts to explain how Wittgenstein's arguments, as interpreted by Saul Kripke, challenge traditional ways of viewing legal rules. See Yablon, *supra* note 2, *passim*.

13. I follow Owen Fiss in viewing scholars commonly considered critical legal scholars as part of the realist tradition. See Owen M. Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739, 741 (1982). Like

argue that the law is radically indeterminate.¹⁴ They have been criticized by several commentators, including Brian Langille,¹⁵ Gene Smith,¹⁶ and Andrei Marmor¹⁷ (whom I will call the “anti-realists”).¹⁸ The anti-realists contend that the legal realists fundamentally misunderstand the point of the rule-following arguments. Wittgenstein, they argue, does not argue for the indeterminacy of language or law; rather, he demonstrates that the conclusion that language is indeterminate rests on a mistaken picture of how language operates. In particular, the anti-realists claim that the Wittgensteinian realists are led astray by Saul Kripke’s infamous misreading of Wittgenstein.¹⁹

I believe the anti-realists are right insofar as they claim that Wittgenstein did not argue for the indeterminacy of rules²⁰ in *Philosophical Investigations*. However, it is significant that Wittgenstein’s comments in *Philosophical Investigations* are limited primarily to examples from everyday language use and mathematics.²¹ He does not talk about the law explicitly in these passages, thus leaving open the question of how his theory could be applied to rule following in the legal context.

I believe many of the parties in this debate have failed to consider exactly how we should apply Wittgenstein’s examples of rule following to law. I do

the realists, critical legal scholars believe in the indeterminacy of legal rules. Critical legal scholars have a particular picture of what determines judicial decisions, given that rules do not. For the critical legal scholars, this picture is grounded in a Marxian theory of ideology. See Singer, *supra* note 4, at 22-23. For my purposes, any theorist who believes in the indeterminacy of legal rules is a legal realist.

14. By “indeterminate,” I mean that the facts of a case, together with the relevant legal rules, cannot determine a unique outcome. According to an indeterminacy theorist, it is always true that given a set of facts, the legal rules can be used to justify more than one outcome. A conceptual analysis of law, on this view, will have no substantial explanatory power because multiple conflicting outcomes are equally justifiable given the conceptual apparatus of the legal rules in a particular case. (This is one of the ways in which legal realism and legal positivism are at odds. Many positivists claim to be engaged in a conceptual analysis of law, while many realists hold that such an analysis cannot illuminate how cases are decided.)

15. See Langille, *supra* note 2.

16. See Gene Anne Smith, *Wittgenstein and the Sceptical Fallacy*, in WITTGENSTEIN AND LEGAL THEORY, *supra* note 2, at 157.

17. See Andrei Marmor, *No Easy Cases?*, in WITTGENSTEIN AND LEGAL THEORY, *supra* note 2, at 189.

18. Here I should also mention Brian Bix, *The Application (and Mis-Application) of Wittgenstein’s Rule-Following Considerations to Legal Theory*, in WITTGENSTEIN AND LEGAL THEORY, *supra* note 2, at 209. Bix does not believe that Wittgenstein can be used to justify legal indeterminacy, but he also thinks that Wittgenstein’s use for grounding legal determinacy is limited. See *id.* at 223. His views are discussed in detail below. See *infra* Sections IV.A-B.

19. See KRIPKE, *supra* note 2. The anti-realists take Kripke’s reading to be highly controversial. See, e.g., Langille, *supra* note 2, at 463; Smith, *supra* note 16, at 176 n.63.

20. For present purposes, I define “rule skepticism” as synonymous with the belief in the indeterminacy of rules as defined *supra* note 14. Rule skepticism for Wittgenstein, however, refers to skepticism about any kind of rules, whereas the indeterminacy theorist is committed only to skepticism about legal rules. The Wittgensteinian indeterminacy theorists discussed here believe that legal rules are indeterminate because rules for the use of words in everyday language are indeterminate. However, it is certainly possible to believe that legal rules are indeterminate even though rules for language are not. I believe the most plausible reading of Wittgenstein generates precisely that conclusion.

21. See, e.g., WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 1, §§ 143, 156, 185. There are numerous such examples throughout Wittgenstein’s work.

not deny that many of Wittgenstein's comments on language and mathematics may be fruitfully brought to bear on legal rule following. However, I wish to draw attention to features of language and mathematics (on Wittgenstein's account) that the law does *not* share and that therefore complicate the analogy drawn by legal realists and anti-realists alike. In particular, I wish to draw a distinction between Wittgenstein's critique of rule-based models of meaning and his alternative accounts of how linguistic and mathematical understanding are really possible. I argue that Wittgenstein's general critique poses deep problems for accounts of rule following in the law, but that his alternative accounts of language and mathematics are quite specific to those practices and therefore offer little help for dealing with the deep problems generated by his critique as applied to law. The critique of rule following applies to any practice in which rules generate correctness; in contrast, the alternatives Wittgenstein suggests in *Philosophical Investigations* rely on the specific characteristics of mathematics and language—characteristics that are not easily generalizable to law.

Langille, Smith, and Marmor fail to recognize that Wittgenstein's alternative model of correctness has a very limited range of applicability when they argue that Wittgenstein's work does not justify rule skepticism in law. Thus, in an interesting way, the legal realists' initially misguided use of Wittgenstein proves more compelling than it may have first appeared. While Wittgenstein does not argue, as the realists suggest, for the indeterminacy of language, his arguments against a rule-based understanding of meaning may undermine the determinacy of legal rules.

Through the largely negative project of explicating Wittgenstein's critique of rule following and how it is to be applied to law, I also aim to reveal more constructive resources within Wittgenstein's work. An examination of Wittgenstein's considered views on correctness reveals a blueprint for generating a theory that explains legal correctness by focusing on certain characteristics that are fundamental to legal practice. While I do not attempt to provide such a theory here, I hope to point in the direction that such a theory should take, and to describe some of the minimal constraints on any Wittgensteinian legal theory. Thus, through an explication of the proper role for Wittgenstein in the debate about the determinacy of legal rules, I aim to demonstrate the manner in which the realists' critique can be used constructively.

In Part I of this Note, I briefly describe the legal realist project in order to place the Wittgensteinian realists in context. I argue that we should understand the legal realists as (primarily) advancing an argument against the legitimacy of the legal system, not an argument against the predictability of judicial decisions. In Part II, I describe the argument that the Wittgensteinian realists make, using a detailed exposition of Kripke's treatment of Wittgenstein's argument. I then explain how these theorists apply

Wittgenstein's argument to law. In Part III, I describe the account of the anti-realists and explain their claim that the realists fundamentally misunderstand the nature of Wittgenstein's arguments about rule following. In Part IV, I introduce my arguments against the anti-realists. Although I agree that Wittgenstein can be read as an opponent of skepticism in mathematics and language, I argue that the Wittgensteinian solution to mathematical and linguistic indeterminacy cannot be applied to legal indeterminacy.²² In arriving at this conclusion, however, I show that there are resources within Wittgenstein's method that could be helpful in constructing a new, alternative theory of legal correctness. In Part V, I consider how we might construct a Wittgensteinian theory of legal correctness and derive certain constraints that must apply to any such theory.

Before embarking on this heuristic comparison of rule following in mathematics, language, and law, I should clarify what I mean by each of these terms. In general, the examples I use from mathematics deal with very basic mathematical rules, such as the rule for addition or the rule for continuing a series of even numbers. Similarly, when I refer to determinacy "in language," I refer to the presence (or absence) of certainty (in the minds of most speakers and listeners)²³ about the meaning of everyday words and sentences, as in conversation or simple reading.²⁴ When discussing legal determinacy, I have in mind cases (including those at the appellate level) that interpret statutes and the Constitution, as well as commentary on those cases.

Here one might object that I use a shifting baseline for comparison when I compare determinacy in mathematics, language, and law. After all, my examples from mathematics and language involve simple and uncontroversial practices, while my focus in law is on the comparatively complex and abstract use of legal concepts developed by judges and scholars. If I consider addition in math, one might argue, shouldn't I consider something equally straightforward in law, such as the rules about page lengths for briefs or the rules for following speed limits?

This worry rests on a misunderstanding of my project. My aim is not to compare correctness in mathematics and language to correctness in law. A global project of that kind would be beyond my competence. Instead, my goal

22. That is to say, although the realists fail in using Wittgenstein to establish *linguistic* indeterminacy, Wittgenstein's critique of rule following can be applied to challenge the determinacy of *legal* rules.

23. When I refer to certainty "in the minds of" speakers and listeners, I mean "certainty" only in the common sense way in which we think of people being certain about the meaning of phrases they hear or read. I do not intend to take a position in debates about the metaphysics of linguistic understanding or the nature of certainty.

24. The fact that my discussion of determinacy in language is about people's ability to understand each other in everyday conversation and reading should make clear that, for the purposes of this Note, determinacy in law is not simply a subset of determinacy in language. While legal rules are, of course, linguistic rules—by virtue of being made of words and written in sentences—they are different from the sorts of linguistic rules that I aim to use for comparative purposes. Thus, the fact that linguistic rules are determinate does not entail that legal rules are determinate. See *infra* note 48; *infra* Part IV.

is to see what use Wittgenstein's analysis of mathematics and language may have for either supporting or answering a critique posed by the legal realists. The realists ask how judicial decisions can be legitimate if they are not determinate by virtue of a rule-guided system. Wittgenstein (on my reading) offers just such an account: an explanation of how mathematics and language are determinate that does not rely on a rule-guided system.²⁵ My aim is to see if anything in Wittgenstein's account can aid us in answering the realists' question.

I remain agnostic about whether Wittgenstein's account, which focuses on simple mathematical rules and uncontroversial uses of language, can be applied to other more complex areas of mathematics and language. Wittgenstein may not even have intended his account of rule following to be applied to other more complex areas.²⁶ Similarly, I am not interested in an account of legal rule following that explains only the way in which people follow simple everyday laws (such as stop signs). The realists want an account that explains court decisions, not just traffic laws. Whether or not Wittgenstein's account can satisfy their concern is the guide for my discussion.

I. LEGAL REALISM AND LEGITIMACY

Though I am interested only in a subgroup of legal realists (those relying on Wittgenstein), it may be helpful to begin by situating this group in the context of legal realism generally and contextualizing the legal realist project in terms of legal theory more broadly. I take the core of legal realism to be the claim that legal rules do not play a key role in determining the outcome of judicial decisions. In this part, I describe this view and then explain its role in the realist critique of the legal system more broadly. That critique, at least in part, aims to attack the legitimacy of the legal system.

There are very few shared views that actually bind the legal realists together. Nevertheless, all realists appear to discount the importance of legal rules and principles in determining the outcomes of cases and explaining the phenomenon of law generally.²⁷ While there is disagreement about what

25. In fact, his account begins with a criticism of the use of rule-guided systems to explain determinacy. See WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 1, §§ 82-85.

26. Wittgenstein discusses various complex mathematical phenomena extensively in *Remarks on the Foundations of Mathematics*, though it is not clear if he means his remarks about rule following to encompass all of those phenomena. He may have held the view that no single account of correctness in mathematics can explain the varied phenomena that fall under the rubric of that discipline. He hints at this possibility in his discussion of the mathematical use of infinity: "But where is the problem here? Why should I not say that what we call mathematics is a family of activities with a family of purposes?" WITTGENSTEIN, *REMARKS*, *supra* note 1, V—15, at 273.

27. See Brian Leiter, *Legal Realism*, in *CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW* 261, 261 (J. Raz ed., 1996). Where I refer to "realists," I am referring to legal realists. There are other philosophical theses identified with realism more generally, but I am not interested here in the relationship between legal realism and realism in other areas of philosophy. For interesting discussions of realism in metaphysics, see SIMON BLACKBURN, *SPREADING THE WORD: FOUNDATIONS IN THE PHILOSOPHY OF*

“really” explains judicial decisions (candidates include political ideologies, judges’ institutional roles, personalities, and other factors, no two of which are necessarily mutually exclusive),²⁸ legal realists all agree that legal rules alone, when applied to the facts, underdetermine the outcome. As Brian Leiter puts it, “If the law is rationally indeterminate on some point, then legal reasons justify more than one decision on that point: thus we must look to additional factors to find out why the judge decided as he did.”²⁹

It is important to note that legal realists in general do *not* believe that *nothing* determines the outcomes of judicial decisions, so that the result can *never* be predicted.³⁰ Thus, the fact that we know with certainty that a jaywalker will not be capitally punished does not undermine the realists’ thesis. The realists’ point is rather that the legal rules and facts of a case together do not by themselves generate an outcome. An additional component, such as the judge’s ideology, plays a crucial role. (For example, no judge would ever be willing to execute someone for jaywalking, for moral, political, or social reasons.)³¹ Realists might concede that there are “easy” cases (in an epistemic sense) or predictable results that provide strong incentives for parties to settle, but they believe that the reason these results are predictable has to do with the politics or ideology of judges, or with judges’ intuitions about the fairness of the situation. They are not predictable because of the determinate effects of legal rules themselves.³² Thus, the realists deny that the sources of law, in the positivist sense,³³ play a significant role in determining the outcomes of cases.

LANGUAGE (1984); and Quassim Cassam, *Necessity and Externality*, 95 MIND 446 (1986).

28. See Leiter, *supra* note 27, at 261. Other realists provide different accounts of what motivates judicial decisionmaking. For example, Singer emphasizes the structure of legal arguments, legal culture, and capitalist ideology. See Singer, *supra* note 4, at 21-23.

29. Leiter, *supra* note 27, at 267.

30. See Singer, *supra* note 4, at 20-21. This is important because it shows that legal realists cannot really be attacking the determinacy of judicial decisions (i.e., their predictability).

31. Tushnet argues, for example, that judges could rule that the Constitution requires socialism, but that they do not because of their socialization. See Tushnet, *supra* note 4, at 823.

32. The force of “rules themselves” must be explained. If nearly all legal realists concede that judicial decisions are not wholly random, then they believe that there are causal explanations for judicial decisions. The crucial realist point, however, is that legal rules do not occupy an important place in such causal explanations. This distinction is important for those who view the existence of “easy” cases as a problem for legal realists.

If there are certain instances where all judges, lawyers, and legal scholars can predict the outcome of a case before it is decided, doesn’t that prove that the law is determinate? Yes, in the limited sense that it proves that *something* determines such cases, but this does not prove that legal rules are playing the crucial role. For example, someone might look at a very conservative court and predict how it will decide a gay rights case without knowing anything about the state of equal protection or privacy law. In such a case, there may not be legal determinacy, even though there is predictability (which produces an “easy” case). The important sense in which predictability can exist without legal determinacy provides one reason for not explaining realism by reference to belief in “easy” cases, which is essentially an epistemic notion. See *infra* Part IV.

33. While I do not attempt to provide a strict definition of the sources of law in the positivist sense, the positivist’s sources of law are, in general, statutes, regulations, case law, and other material sources, as opposed to social norms, moral principles, and other more idealized sources. See, e.g., HART, *supra* note 3, *passim*. Realists do not necessarily deny that these other sources play a significant role in determining the outcomes of cases. In fact, ideology may be just such a source.

Here it is useful to recall the two reasons for why someone might be interested in legal rule following.³⁴ If one is interested in an account of how life under law is possible, predictability is enough to provide an explanation for how people can know in advance what behavior will and will not be proscribed by the law, as a practical matter. This does not require that rules play the key causal role in producing judicial outcomes, merely that these outcomes are predictable. Thus, if all one wants are outcomes that are "easy" (i.e., predictable), the realist critique will not be troublesome.³⁵

However, if one is interested in legitimacy, then the determinacy of *legal rules* will be important. To understand this, it is worth briefly reviewing some plausible theories of judicial legitimacy. In general, most theories that explain legitimate government fall under three rubrics. First, there are actual consent theories, whereby government is legitimate because people consent to it, either explicitly³⁶ or tacitly.³⁷ Second, there are theories based on the idea that people would consent to the government under some kind of idealized circumstances, such as if people were perfectly rational.³⁸ Finally, there are theories that fit broadly into the natural law category.³⁹ These theories argue that government should be organized based on principles inherent in the structure of government, human nature, or the world. Thus, all three kinds of theory rely on rules, arising from a source external to any particular government, to make that government legitimate.

On any one of these theories, a legitimate government would be one based on principles derived from either the people's actual consent, idealized consent, or the structure of natural law. For judicial review to be justified under one of these theories, judges must be able to act according to those principles. Take, for example, a very weak consent theory. According to this theory, in a democratic society based on consent, a judge's decision against one party in a court of law is justifiably enforceable only if the party who loses has, at the very least, some good reason to believe that, at least in theory, he or she had a chance to express an opinion⁴⁰ about some of the factors that were crucial in deciding the outcome of the case. For example, if the decision is entirely (or almost entirely) the result of the judge's particular political or personal

34. See *supra* notes 6-7 and accompanying text.

35. For theorists interested in the predictability benefits of the rule of law, see O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); and Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989).

36. See, e.g., ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 16, 106-11 (1975).

37. See, e.g., JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 65 (C.B. Macpherson ed., Hackett Pub'g Co. 1980) (1690).

38. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 17 (1971).

39. See, e.g., JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

40. "Express an opinion" here is perhaps somewhat ambiguous. In a more philosophically technical sense, I mean that people should believe that the political institutions gave them a chance to play a substantial role in determining the content of whatever criteria were used to decide their case—in other words, that they had a chance to play some *causal* role in the decision process.

preferences and the parties had no role in shaping those preferences, then the decision is not legitimate.

A rule-based conception of judicial decisionmaking comports well with this simple democratic picture. Rules are (for the most part) the products of legislatures, chosen by people when they vote,⁴¹ and the loser of a suit should be satisfied by knowing that he or she played a role in choosing the rule that was dispositive in his or her case.⁴² However, if the legal rules had very little to do with the outcome of the decision, the losers may well wonder in what sense their fate comports with democratic principles.

Put another way, if a judge's ideology or acculturation plays a decisive role in determining any given judicial outcome, the law will not appear legitimate to someone who does not share that ideology or acculturation and played no part in producing it. A litigant's chance to change (through voting) the rules "applied" by a judge will be of little use if the judge's ideology determines the litigant's fate. Other theories of legitimacy face a similar dilemma.⁴³ Thus, the realists argue that if ideology or some other force plays the central role in determining how cases are decided, the rule of law cannot be justified. Singer puts the problem quite strongly:

Those of us associated with Critical Legal Studies believe that law is not apolitical and objective: Lawyers, judges, and scholars make highly controversial political choices, but use the ideology of legal reasoning to make our institutions appear natural and our rules appear neutral. . . .

. . . .
 . . . [If legal reasoning is indeed indeterminate, then] the question is whether it is possible to set up a legal system based on the rule of law. If legal reasoning is . . . indeterminate, there are no objective limits on what judges or other governmental officials can do. Thus the goal of constraining government or regulating interpersonal conduct by previously knowable general rules seems impossible.⁴⁴

41. The common law situation is slightly more complicated. There, it is the citizen's ability to create the rule by voting for statutory change that explains the decision's legitimacy.

42. Obviously, this account is too brief to explain many interesting aspects of the role of judicial processes in democracy. Given this formulation, for example, a simple but adequate theory of legitimacy would be to have elected judges who did not decide based on rules. Many states elect rather than appoint their judges. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 689 (1995) (noting that most judgeships are actually elected rather than appointed). Such a solution would have its own problems, however. Elected judges could assuage people's concerns about not having chosen their judges, but such judges could not substitute for the consistency that decisions according to legal principles can provide. Consistency (which can be explained in terms of equality) is another element of democratic fairness that cannot easily be captured without rule-based decisionmaking. Aside from this, a large body of literature criticizes the practice of electing judges. See, e.g., *id.*

43. If the rules are products of some kind of idealized deliberation, then judicial decisionmaking can only be legitimate if judges act according to rules generated by that deliberation; if the rules are dictated by natural law, then judges must base their decisions on those rules.

44. Singer, *supra* note 4, at 5-7. Singer concludes that legal practice can be justified without recourse to this kind of determinacy, see *id.* at 62-63, but his vision of the basis for legal practice is radically different from those endorsed by most theorists seeking to answer the realists.

In this sense, most realists (whether or not they recognize it) attack the basis for the legitimacy of the legal system, not the predictability of legal rules themselves. The challenge for those answering the realists, therefore, is to show one of two things: either that legal rules *do* determine the outcomes of judicial decisions, or that some other force, which can provide the basis for a legitimate legal system, determines the outcomes of those decisions.⁴⁵ I aim to show that Wittgenstein's critique of rule following makes it unlikely that legal rules are determinative, and further that it is unlikely that any "other force" satisfies legitimacy requirements. It is in this sense that my project is sympathetic to the legal realists.

II. KRIPKE AND THE WITTGENSTEINIAN LEGAL REALISTS

While belief in the indeterminacy of rules is central to the realist project generally, my interest for the purposes of this Note centers specifically on those realists who rely on Wittgenstein to ground their belief in the indeterminacy of *legal* rules. James Boyle, Mark Tushnet, and Charles Yablon all utilize a particular account of Wittgenstein's argument in *Philosophical Investigations*—that of Saul Kripke—to cast doubt on the possibility of rule following in law.⁴⁶ Their claim is that Wittgenstein shows that no rule for interpreting a word can ever tell someone how to use it correctly in a given case. These theorists contend that there is no fact one can point to that determines what counts as a correct usage: Nothing fixes the meaning of a

45. At least two other alternative theories of legitimacy could survive the realist critique. First, any theory that allows people to consent to being governed by a group of people, rather than a set of principles, would qualify. With such a theory there would be no need for a connection between rules and outcomes to produce legitimacy. Some might argue that a broadly Aristotelian theory (where people of good character decide what is best) would fit this picture. See, e.g., ARISTOTLE, *THE POLITICS* at bk. 1, ch. 5 (Carnes Lord trans., University of Chicago 1984) (arguing, on one reading, that some individuals are by nature marked for subjection, others for rule). Second, a theory that specified an ideology, politics, or way of behaving that was legitimate, rather than a set of principles, could satisfy the requirement. For example, if judges were to decide based on certain institutional customs, and those customs were legitimate simply by virtue of their being the customs of *that* institution, that would produce legitimacy even given the validity of the realist critique. Needless to say, I do not find strategies of these types persuasive. As Learned Hand once said, "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs." LEARNED HAND, *THE BILL OF RIGHTS* 73 (1958).

46. All three of these theorists appear to be relying on a Kripkean reading. Yablon explicitly cites Kripke. See Yablon, *supra* note 2, at 614 (citing KRIPKE, *supra* note 2). The others seem to take their interpretations of Wittgenstein as uncontroversial. In contrast, anti-realists such as Langille and Smith treat Kripke as a somewhat eccentric interpreter of Wittgenstein. See, e.g., Langille, *supra* note 2, at 491; Smith, *supra* note 16, at 176 n.63. In fact, the truth lies somewhere in between. Kripke's view is undoubtedly considered controversial in some ways; many other prominent theorists, however, have articulated views that could similarly be applied in defense of legal realist forms of indeterminacy. See, e.g., Norman Malcolm, *Wittgenstein on Language and Rules*, 64 *PHILOSOPHY* 5 (1989) (arguing that Wittgenstein's model of rule following does not apply where agreement by a community is lacking); Crispin Wright, *Critical Notice*, 48 *MIND* 289 (1989) (reviewing COLIN MCGINN, *WITTGENSTEIN ON MEANING* (1984)) (criticizing McGinn's interpretation of Wittgenstein).

word.⁴⁷ As a result, all language use exhibits a baseline indeterminacy. This baseline indeterminacy then spills over into all rules built upon language. Language is indeterminate; legal rules are built on (or with) language; therefore legal rules are indeterminate.⁴⁸ If legal rules are indeterminate, they cannot compel judges toward any particular outcome in a given case.

It is worth rehearsing the argument Kripke makes in some detail,⁴⁹ both to get a sense of its intuitive persuasiveness and because inaccuracies in understanding how it is set up create confusion when alternative theories are considered.⁵⁰ Kripke asks us to consider what we think it means to understand the mathematical rule of addition. The basic idea is that if someone were to ask us to add two numbers, we would know the correct response even if we had never considered adding those two numbers before:

One point is crucial to my “grasp” of this rule. Although I myself have computed only finitely many sums in the past, the rule determines my answer for indefinitely many new sums that I have never previously considered. This is the whole point of the notion that in learning to add I grasp a rule: my past intentions regarding addition determine a unique answer for indefinitely many new cases in the future.⁵¹

Kripke then asks us to imagine a computation we are asked to do, 68 plus 57, and the answer we would give, obviously 125.⁵² Kripke emphasizes that we would not give this answer just in cases where we had already considered this particular sum. In fact, it is central to Kripke’s example that we have never previously considered this problem (or, in particular, any addition problem that involved a number as large as 57), because the whole point of addition’s being a *rule* is that we are able to generate the answer in cases that we have not considered previously.

But imagine a “bizarre” skeptic, who thinks that the answer we must give to 68 plus 57 is 5.⁵³ This skeptic believes that we violate the rules for the

47. Throughout this Note, I treat correctness and determinacy as inextricably linked. A theory of how to follow a rule correctly would produce a determinate rule, and a state of legal indeterminacy is one in which there is no unique application of a rule that is correct to the exclusion of others.

48. See Boyle, *supra* note 4, at 707-11 & n.75; Tushnet, *supra* note 4, at 822-23 & n.130; Yablon, *supra* note 2, at 628-33. Of course, it is also possible that legal rules might be indeterminate even though linguistic rules are determinate.

49. Kripke attributes his argument to Wittgenstein, though he is admittedly less than certain about this attribution: “I choose to be so bold as to say: Wittgenstein holds, with the skeptic, that there is no fact as to whether I mean plus or quus.” KRIPKE, *supra* note 2, at 70-71.

50. For example, I believe that Bix misses a crucial aspect of Wittgenstein’s relevance for legal theory in part because he misconceives the problem presented in the rule-following arguments. See *infra* Section IV.B.

51. KRIPKE, *supra* note 2, at 7-8.

52. See *id.* at 8.

53. See *id.* Kripke does not expect us to find the possibility of such a skeptic believable. The skeptic simply constitutes a dramatic device to present a philosophical problem. He believes this problem has a solution, and that the use of the example helps to clarify the philosophical issues involved. See *id.* at 11-19.

addition function if we give the answer as 125. In fact, says the skeptic, the rule for addition is that for two numbers less than 57 the answer according to the addition function is their sum; for addition involving any numbers equal to or greater than 57, however, the answer given by the addition function is 5.⁵⁴ Kripke refers to this as “quaddition.”⁵⁵ It is important to remember that Kripke’s skeptic does not say merely that *he* understood addition differently, or even just that all previous examples we have considered underdetermine whether addition or quaddition is involved.⁵⁶ Rather, the skeptic claims that we have changed the rules of addition, so that the present usage is inconsistent with the rule we used before. “The sceptic claims (or feigns to claim) that I am now misinterpreting my own previous usage.”⁵⁷ To answer the skeptic, then, I must point to some fact about either myself or the world (either in previous computations I have done or in any thoughts I have had) that can prove that my previous uses of addition were consistent with the answer to this problem being 125 rather than 5. Such a fact would then provide the basis for the meaning of addition and would also provide a justification for why I gave the answer I did.

Unfortunately, there is no such fact. Everything in my past mental history and use of the addition rule is consistent with both quaddition and addition:

Ordinarily, I suppose that, in computing “68+57” as I do, I do not simply make an unjustified leap in the dark. I follow directions I previously gave myself that uniquely determine that in this new instance I should say “125”. What are these directions? By hypothesis, I never explicitly told myself that I should say “125” in this very instance. Nor can I say that I should simply “do the same thing I always did” if this means “compute according to the rule exhibited by my previous examples.” That rule could just as well have been the rule for quaddition (the quus function) as for addition.⁵⁸

Kripke considers several alternative responses that I do not discuss in detail here. For the most part, the skeptical strategy can be repeated

54. Kripke calls the skeptic’s function “quus,” and defines it as:

$$x * y = x + y, \text{ if } x, y < 57 \\ = 5 \text{ otherwise.}$$

Similarly, “quaddition” for the skeptic corresponds to our addition. The skeptic thought that when we first spoke of “plus,” we meant quus. *See id.* at 8-9.

55. *Id.* at 9.

56. Both of these claims follow from the skeptic’s argument. However, to reduce Kripke’s point to this would make the argument an essentially epistemological one (e.g., “How do we know we mean addition?”). Kripke’s point is that this dilemma is also metaphysical: There is no fact that determines that our past usage was addition rather than quaddition. *See id.* at 21. Wright criticizes McGinn for missing this point. *See* Wright, *supra* note 46, at 289. Later, I criticize Bix for the same reason. *See infra* note 113 and accompanying text; *infra* text accompanying note 117.

57. KRIPKE, *supra* note 2, at 9.

58. *Id.* at 10-11.

successfully against all of them.⁵⁹ If we attempt to explain our prior understanding in terms of counting, the skeptic replies with a bizarre interpretation of counting (“quounting”); if by appeal to independence, “quindpendence”; and so on, ad nauseum. Whenever we attempt to provide another rule for interpreting addition, the same indeterminacy about the meaning of addition is transferred to this new rule.⁶⁰

Kripke’s point can be understood in the following way. We might think of correctness in addition (or in any rule following) as a process of matching a given person’s responses with idealized correct ones. There is some ideal answer to the problem 68 plus 57, and a given speaker is correct when his or her response matches the ideal one. Kripke argues that, given our understanding of what it is to grasp a rule, nothing (that is, no previous computation, fact about my mental history, etc.) could fill the role of this ideal response. There is no fact that would make 125 the unique right answer to the problem prior to the problem being posed. The answer cannot be stipulated because the point of following a rule is that the rule actually *generates* answers. But nothing we have ever thought about the rule, and no previous action that we have taken in accordance with it, is inconsistent with the answer to the problem being 5 rather than 125. So the rule as understood prior to this case does not have the resources within it to determine a single correct new response.

Though Kripke’s prime example is from mathematics, his underlying point is about the meaning of rules and is therefore easily generalizable, at least initially, to language and all forms of rule-guided behavior.⁶¹ Thus, someone might in winter begin to ask people to turn on the “blight” and react in confusion when we ask them to turn on the light, because they believe the word “light” only refers to light in the summer. Or, to take an example from

59. Actually, there is one response Kripke discusses that does not fail because of the skeptical strategy. We might try to give an account of the fact about what we meant in terms of our disposition to give a particular response to particular addition problems. We are disposed to answer 125 even before we do, and that is why 125 is the correct answer. Kripke considers this answer in detail. *See id.* at 22-34. Its essential flaw is not that the skeptic can doubt our dispositions, but rather that the disposition does not explain why we are *justified* in giving one answer rather than another. The existence of our disposition only points to the fact that we usually do, in fact, give one answer rather than another, not that we are correct in doing so. Kripke’s treatment of the dispositional account is particularly interesting in light of the attempts by Owen Fiss, Dennis Patterson, and others to provide a Wittgensteinian account of legal rule following using the notion of interpretive communities. *See, e.g.,* Owen Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985); Dennis M. Patterson, *Law’s Pragmatism: Law as Practice and Narrative*, in WITTEGENSTEIN AND LEGAL THEORY, *supra* note 2, at 85. Just as the dispositional account cannot explain why we are justified in giving the response we are disposed to give, recourse to an interpretive community cannot explain why that community, especially when it is fairly small, can legitimate the decisions of judges who are not bound by rules. *See infra* Part V. Justification in Kripke plays a role analogous to legitimacy in legal theory.

60. *See* KRIPKE, *supra* note 2, at 15-17. Kripke’s word choice here was clearly not ideal.

61. As Kripke writes, “Of course, these problems apply throughout language and are not confined to mathematical examples, though it is with mathematical examples that they can be most smoothly brought out.” *Id.* at 19.

Wittgenstein, we could imagine someone who does not apply the color words as we do in particular cases.⁶²

The realists using Wittgenstein make their appearance at this stage. Following the skeptical arguments described above, they claim that language must exhibit a certain baseline indeterminacy grounded in the absence of facts that tell us how to proceed in particular cases.⁶³ If language exhibits this baseline indeterminacy, and legal rules are built on language (and share all of its instability), legal propositions can have no determinative force either. Therefore, the realists conclude, judges are never compelled by rules. As Boyle argues:

On the most basic level [the post-Wittgensteinian] view of language seems to undermine the picture of the neutral interpretive function of the judiciary. . . .

. . . . The formalists had tried to get around the problem that [ethical subjectivism] posed for the legitimacy of the judicial role by covertly relying on another kind of essence—the essential meaning of words. . . . Yet the more closely one looked at law or at language, the more the formalistic idea of interpreting the core meanings of words seemed to fall apart. The realists imagined that we could easily desert a narrow formalism once we realized that there was no real meaning of a word.⁶⁴

Thus, the legal realists use Kripke's version of Wittgenstein's argument to establish their belief in the indeterminacy of legal rules.⁶⁵ Judges are not compelled by legal rules because rules never determine any particular result in a given case. Though judges may justify their decisions by reference to rules, any result can be made to accord or not accord with the rule. Therefore, judges really decide based on their politics, ideologies, class preferences, or something else.⁶⁶ Judges give the rules whatever content they wish after they have

62. See WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 1, § 1.

63. See Boyle, *supra* note 4, at 708 & n.28; Singer, *supra* note 4, at 19; Tushnet, *supra* note 4, at 822-23; Yablon, *supra* note 2, at 628.

64. Boyle, *supra* note 4, at 710-11. Yablon makes a similar argument. See Yablon, *supra* note 2, at 632. Like Boyle, he does not conclude that legal rules are random, but only that legal rules by themselves underdetermine the outcome of judicial decisions, even if we construe them according to their original intent. See *id.* at 633.

65. Of course, the realists would not have to be committed to the view that the indeterminacy of legal rules is contingent upon the indeterminacy of language. The rule-following critique could be applied to legal rules even if linguistic rules exhibited determinacy for some other reason. This is the strategy for which I argue later. See *infra* Part V. I do not claim that the legal realists discussed here would not make this argument. I have presented their arguments as attacks on linguistic determinacy both because that is how they are taken by the anti-realists and because taking these arguments that way provides a helpful entry into the constructive uses of Wittgenstein.

66. Yablon refers to the "social, cooperative, and even political process implicated in discussions about rules." Yablon, *supra* note 2, at 633. One may well wonder here how it is that these social processes could determine decisions given Wittgenstein's rule-following arguments. Why are social processes more determinate than legal rules? The answer to this objection requires a foray into Wittgenstein's theory of

decided, for other reasons, how they want the case to come out.

Further, the realists argue that indeterminacy is not prevalent in just a few extreme cases (which a positivist might explain through discretion⁶⁷), but in all cases.⁶⁸ Given the source of their argument in Kripke's skepticism about rules in general, this is not surprising. If Kripke's argument applies to even the easiest of rules (like addition), the legal realists claim, it surely applies to even the clearest legal rule in the most obvious of cases.

Here, a well-known example from Ronald Dworkin's work is helpful. In *Taking Rights Seriously*,⁶⁹ Dworkin refers to *Riggs v. Palmer*,⁷⁰ a case in which a man who murdered his grandfather sought to inherit under the grandfather's will from his estate. The law regarding wills seemed to indicate clearly that the grandson was the legitimate heir. As the court stated, "[I]t is quite true that statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer."⁷¹ Nevertheless, the court concluded that the basic principle that no one shall profit from his own wrongdoing justified ruling against the murderer in this case.⁷² While Dworkin uses this case to illustrate a distinction between rules and principles,⁷³ legal realists might well point to the case on the grounds that it shows how even the most straightforward application of a rule to a new case can be altered. Because the previous cases can be cited in defense of multiple principles, their relevance to a new case can always be construed in conflicting ways:

There are always a number of justificatory principles available to make sense of case *I* and a number of techniques to select the "true" basis of case *I*. Of course, the opinion in case *I* will articulate a principle that purports to support the result. But the thrust of introductory law courses is to show that the principles offered in opinions are never good enough. And this indefiniteness bedevils—and liberates—not only the commentators and the lawyers

interpretation, which I discuss in detail in Part V. See *infra* notes 138-139 and accompanying text. Briefly, legal rules always require interpretation prior to their application, which creates the indeterminacy described in Wittgenstein's critique. Social and ideological beliefs, however, are driven by a form of understanding more basic than interpretation, and on which interpretation itself depends.

67. See HART, *supra* note 3, at 124-36, for a discussion of discretion, which Hart describes as the "open texture" in the law, *id.* at 124. A positivist following Hart would hold that in some cases legal rules underdetermine the appropriate outcome, and in these cases judges have discretion. However, in other cases the legal rules fix the outcome and there is no discretion. See *id.* It might not be inconsistent with the central tenets of positivism for a positivist to hold that discretion exists in all cases, but such a positivist would be hard pressed to provide an account of why the rule of law by judges is legitimate. Of course, some positivists may not be interested in such an account.

68. See, e.g., Tushnet, *supra* note 4, at 813.

69. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 23 (1977).

70. 22 N.E. 188 (N.Y. 1889).

71. *Id.* at 189.

72. See *id.* at 190.

73. See DWORKIN, *supra* note 69, at 23.

and judges subsequently dealing with the decision; it equally affects the author of the opinion.⁷⁴

Although the court in *Riggs* referred to a basic principle to justify its departure from the rule, the legal realist would argue that such basic principles could be cited to produce any outcome in any case. Indeterminacy exists even in apparently straightforward decisions.⁷⁵

III. THE ANTI-REALISTS AND A DIFFERENT WITTGENSTEIN

Not all legal scholars interested in Wittgenstein see things as the Wittgensteinian realists do. I focus on three scholars (whom I call the anti-realists) who have a radically different view of Wittgenstein's place in this debate. Langille,⁷⁶ Smith,⁷⁷ and Marmor⁷⁸ all say that the realist understanding of Wittgenstein's argument in *Philosophical Investigations* is entirely misguided. While Wittgenstein did show that a rule-based understanding of language was flawed, the anti-realists argue, he did not believe in the indeterminacy or instability of meaning in general; in fact, that such instability did *not* exist was a premise of Wittgenstein's argument.⁷⁹ Furthermore, the anti-realists contend, Wittgenstein's conclusion was only that a *rule-based* view of language was flawed, not that all language was indeterminate.⁸⁰ In short, Wittgenstein did not defend the sort of skepticism about meaning that the legal realists attribute to him. Instead, the anti-realists argue that Wittgenstein's alternative account of meaning (in language and mathematics) actually provides a basis for understanding how legal discourse *can* be determinate, even in the face of the skeptical uncertainty that he describes as arising on a purely rule-based view.⁸¹

The anti-realists' argument can be reconstructed in the following way:⁸² Wittgenstein saw himself engaged in a project of elucidating our practices, not

74. Tushnet, *supra* note 4, at 811.

75. Lest anyone think that the grandson's action was so egregious that no one could possibly allow him to inherit from his victim, I should note that one of the three judges dissented. See *Riggs*, 22 N.E. at 191 (Gray, J., dissenting).

76. See Langille, *supra* note 2, at 493.

77. See Smith, *supra* note 16, at 179.

78. Marmor does not specifically target the Wittgensteinian realists I described *supra* Part II. However, his exposition of Wittgenstein and his use of Wittgenstein in defense of Hart are clearly inconsistent with the views of the Wittgensteinian realists. See Marmor, *supra* note 17, at 201-07.

79. See, e.g., Marmor, *supra* note 17, at 196-97; Smith, *supra* note 16, at 163-64.

80. See, e.g., Langille, *supra* note 2, at 491; Smith, *supra* note 16, at 168.

81. See Langille, *supra* note 2, at 497; Marmor, *supra* note 17, at 207. Smith does not necessarily believe that Wittgenstein can be used to ground legal determinacy, though she agrees that he cannot be used in defense of skepticism about the determinacy of legal rules. See Smith, *supra* note 16, at 188.

82. Because Wittgenstein wrote in an aphoristic style, touching on subjects and then returning to them again and again, it is very difficult to present his arguments in chronological form. Thus, I have attempted to order them, both here and *infra* Part V. The structure is imposed by me and should not be attributed to Wittgenstein. I take the risk that this may distort his argument or violate the spirit of his enterprise.

reforming them. He did not think philosophers should attempt to correct normal everyday practices.⁸³ Instead, he took the perfectly satisfactory functioning of language and the communication of meaning as a given. Similarly, he accepted that people learn basic mathematical skills (like addition) without difficulty and use those skills without substantial disagreement.⁸⁴ Thus, Wittgenstein's target in the passages on rule following was not meaning itself, but rather a particular rule-based picture of meaning: "It is this *account* of grasping a concept and not, of course, our obvious ability in *some* sense to 'grasp a concept' which Wittgenstein meant to challenge."⁸⁵

The anti-realists agree that the rule-based picture is problematic in roughly the way Kripke described. The rule cannot by itself determine correct applications (because there is no fact of the matter that makes the rule inconsistent with one application and consistent with another). Attempts to clear up this indeterminacy through the use of other rules only lead to an infinite regress of rules. Thus, the rule-based picture cannot explain how meaning is possible. However, this does not prove that meaning is impossible; it only shows that we must reject the rule-based picture.⁸⁶ In its place, Wittgenstein offers an alternative picture, which the realists ignore.⁸⁷ The justification for calling one application of a rule correct resides in the practice or technique of the activity of which the rule is a part. That activity makes up our form of life, and this provides all the justification we need.⁸⁸ As Langille writes:

83. See WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 1, § 124 ("Philosophy may in no way interfere with the actual use of language. . . . It leaves everything as it is.")

84. See, e.g., Smith, *supra* note 16, at 172.

85. *Id.* at 166.

86. Though it is of limited relevance for this discussion, it should be noted that every legal scholar that I have encountered has misunderstood Kripke's conclusion. All of them read Kripke as endorsing skepticism. See, e.g., Langille, *supra* note 2 at 465 n.58; Smith, *supra* note 16, at 179. While Kripke does think that Wittgenstein's arguments show more than just that we should reject a rule-based view of language, he does not endorse the view that there is no correct way to follow a rule (that is, global skepticism). He explicitly rejects the view that skepticism is justified and that truth is determined by community consensus. Instead, he says that what we are warranted in asserting is determined by community consensus, while remaining agnostic about the truth of these matters. See KRIPKE, *supra* note 2, at 111-12.

87. This accusation is grounded in Kripke's emphasis on the first paragraph of § 201 of *Philosophical Investigations* (which poses the skeptical dilemma) while ignoring the second paragraph (which resolves it). See Smith, *supra* note 16, at 163-64. I include Wittgenstein's passage in full:

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

It can be seen that there is a misunderstanding here from the mere fact that in the course of our argument we give one interpretation after another; as if each one contented us at least for a moment, until we thought of yet another standing behind it. What this shews is that there is a way of grasping a rule which is *not* an *interpretation*, but which is exhibited in what we call "obeying the rule" and "going against it" in actual cases.

WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 1, § 201.

88. I remain agnostic about the plausibility of this view in the context of language and mathematics. My argument is that this model of justification does not apply to law, whether or not it works in language and mathematics.

The strong sceptic misses the central message of the *Investigations*, a message which is not destructive of but important for law. More than anything it is the idea of language as an *activity* (not a mental process) which resonates throughout the *Philosophical Investigations*. . . .

. . . [I]n Wittgenstein's world, indeterminacy is not the result because our language has the "determinacy of an activity". Nor is the lesson of the rule-following critique scepticism, but rather, insight into the idea of practice as "bedrock".⁸⁹

On this account of Wittgenstein, it is the community's agreement in judgments that makes our practices stable. Judgments about the right and wrong ways to follow rules are immune from skeptical doubt because there is a settled practice that determines what counts as following a rule correctly. Though we do not appeal to this practice to verify judgments, it is because of this background existence of agreement that settled judgments are possible:⁹⁰ "[A]greement in judgments is a necessary precondition of language, the background 'given' which makes language possible"⁹¹

Unfortunately, this treatment of Wittgenstein's alternative model is hardly more than a sketch. To defend their project thoroughly, one might reasonably expect Langille, Smith, and Marmor to offer an explanation of how the Wittgensteinian alternative is to operate in the context of law. However, none of the leading critics of the realists does this in any detail.⁹² Langille comes the closest, in that he recognizes that further work must be done to apply Wittgenstein to law.⁹³ He claims that scholars have begun to see the Wittgensteinian idea of grounding justification in practice "as central to an understanding of law."⁹⁴ He then references Hart's idea of judges using social rules that must be understood from an internal point of view, and similar theories of community in Fiss and Dworkin.⁹⁵ Langille's treatment neglects

89. Langille, *supra* note 2, at 488 (paraphrasing Gerald Graff, 'Keep off the Grass,' 'Drop Dead,' and Other Indeterminacies: A Response to Sanford Levinson, 60 TEX. L. REV. 405, 408 (1982)). Marmor reaches a similar conclusion: "[T]here is a normative connection between rules and actions, which consists in the fact that there is a custom of using the sign or rule thus and so, and not otherwise. Which is to say that learning how to follow a rule is learning to master a technique." Marmor, *supra* note 17, at 204.

90. It is important to note here that Wittgenstein is not arguing that we rely on background consensus to settle disputes about language use. Rather, the argument is that, in a field (language game) where there is background agreement, these kinds of correctness judgments are possible.

91. Langille, *supra* note 2, at 493.

92. Of course, there are other critics who attempt to construct alternative conceptions of legal determinacy that are Wittgensteinian in spirit. See *infra* Part V.

93. Actually, Bix, who does not defend an alternative view of legal determinacy, quite clearly recognizes the problems of applying Wittgenstein to legal theory. See Bix, *supra* note 18, at 216. However, he conceives of the problem as the difference between "easy" cases (as in mathematics) and "hard" cases (as in law), and therefore does not see the potential for a Wittgensteinian method of analyzing correctness in the law. See *id.* at 252. I discuss Bix in detail below. See *infra* Sections IV.A-B.

94. Langille, *supra* note 2, at 497.

95. See *id.* at 498-99 (citing works including HART, *supra* note 3; FISS, *supra* note 13; and Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982)).

the possibility that Wittgenstein himself may have acknowledged limitations to his theory of justification based on practice. He clearly underestimates the difficulty involved in explicating a theory of legal rule following based on Wittgenstein's alternative account.

Smith does not actually attempt to explain how her schematic descriptions of justification through practice or activity or technique could be applied to law:

[T]he issue of whether [interpretive legal theorists] can give an account of adjudication upon which a theoretical justification for its legitimacy can be based is an issue on which the jury is still out
 . . . The arguments for profound scepticism and linguistic indeterminacy are attempts to defeat all the theoretical justification for legitimacy at one blow. . . . When this argument fails, as it does, the important arguments about legitimacy *remain to be made*⁹⁶

While claiming that the legal realist arguments are not themselves enough to establish that legal rule following is indeterminate, Smith offers no account of how Wittgenstein's theory might be used in aid of this determinacy.

Marmor's treatment in this respect is the most egregious. He moves directly from his comments on rule following in Wittgenstein to their application in law without considering that there might be important differences between Wittgenstein's theory as applied to language or mathematics and his theory as applied to law.⁹⁷ Thus, while the anti-realists may present a compelling case against skepticism in Wittgenstein's areas of interest (mathematics and language), their arguments do not further the project of applying Wittgenstein to law.

IV. WITTGENSTEIN IN LANGUAGE VERSUS WITTGENSTEIN IN LAW

I do not believe the critics of the realists are entirely misguided. It is certainly plausible to argue that Wittgenstein does not endorse outright skepticism.⁹⁸ However, their position is deeply problematic even if we do not read Wittgenstein as a skeptic. Problems arise when we consider the difference between applying Wittgenstein's methodology to language or mathematics and applying it to law.

A careful analysis of how Wittgenstein's arguments can be applied to law leads to results that, at least initially, favor the legal realists' conclusions. Wittgenstein's arguments against a rule-based picture (which show that a rule-based picture justifies skepticism) apply quite straightforwardly to law.

96. Smith, *supra* note 16, at 188.

97. See Marmor, *supra* note 17, at 207.

98. See, e.g., MCGINN, *supra* note 46, at 25 (criticizing Kripke's interpretation of Wittgenstein as endorsing skepticism).

Consequently, the arguments for why a rule-based picture of language cannot provide linguistic determinacy also give us good reasons to believe that a rule-based picture of law cannot generate legal determinacy. As Kripke made clear,⁹⁹ the arguments for the indeterminacy of meaning guided by rules are general. Just as there is no fact that can definitively settle what someone meant by “plus” in a previous case, there is also no fact about what the rule that two signatures make a valid will meant with respect to this new case (e.g., it may have meant two signatures make a valid will except when the inheritor did wrong to gain inheritance, or something more bizarre, such as the meaning must be different once we enter the age of electronic signatures, so that now a will needs three signatures).

However, the arguments Wittgenstein uses to establish his alternative to a rule-based account of language, which justifies itself as a practice and does not require interpretation, cannot easily be made to work in law.¹⁰⁰ A consideration of the issues involved in assessing the phenomena will make this clear.¹⁰¹

A. *Disagreement*

Some commentators have focused on the fact that Wittgenstein uses examples of rule following where there is no disagreement about how to go on in new cases.¹⁰² In fact, his examples are all ones in which there would be immediate agreement about which response was correct.¹⁰³ In these areas, there is what we might call noncollusive agreement in judgments. Wittgenstein writes, “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. This is part of the framework on which the working of our language is based”¹⁰⁴

This characteristic of Wittgenstein’s examples is important to understanding how his account of correctness might be applied to law, though I do not believe it is ultimately useful for distinguishing law from language

99. See *supra* Part II.

100. The weakest version of this claim is that the application of Wittgenstein’s alternative conception to law requires some argument. The strongest version is that Wittgenstein’s picture simply has no relevance for law. I believe my arguments probably establish something in between. The crucial point is that Marmor, Smith, and Langille do not do the necessary work to prove that Wittgenstein’s ideas can be applied, and also that those who have attempted to do this have failed to provide a satisfactory account. See *infra* Part V.

101. For a good account of the unique characteristics of Wittgenstein’s examples, see Simon Blackburn, *Reply: Rule-Following and Moral Realism*, in WITTGENSTEIN: TO FOLLOW A RULE 163, 170 (Stephen H. Holtzman & Christopher M. Leich eds., 1981).

102. See, e.g., Bix, *supra* note 18, at 217-18; Blackburn, *supra* note 101, at 170.

103. See Bix, *supra* note 18, at 209.

104. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 1, § 240. There are many passages in *Philosophical Investigations* where Wittgenstein stresses the need for background agreement in our mathematical and linguistic practices. For examples, see *id.* §§ 234, 237-238, 241-242.

and mathematics. Recall that on the anti-realists' account of Wittgenstein, it is the community's agreement in judgments (rather than the logical power of rules) that makes our practices stable and immune from skeptical doubt.¹⁰⁵ We can judge the skeptic as wrong because he or she is radically out of step with our way of doing things. However, if there is substantial disagreement within the community already, this type of correctness judgment is impossible. Blackburn explains this problem:

For Wittgenstein is taken to teach us that . . . [c]oming adrift, that is going wrong in a new application of an old term, is not a matter of jumping pre-existent Platonic rails determining which way one ought to go, for there can be no such things. It is a matter of getting out of step, of having an organism that whirls differently from the others. Suppose this is true. If that is the kind of way to see judgments of inconsistency . . . then it follows that they cannot be made when . . . there is no consensus to serve as a background upon which they are based.¹⁰⁶

Thus, Wittgenstein's account of how we follow a rule cannot be applied to contexts where there is substantial disagreement. If there is substantially more disagreement in law than in mathematics or language, then the anti-realist project of applying Wittgenstein's account to law is doomed to failure.

There is certainly intuitive appeal to the idea that there is more disagreement in law than in language or mathematics. At least some disagreement about how cases should be decided is quite common among legal scholars and judges. Moreover, the legal system has been designed with a recognition that disputes are inevitable (hence appellate review, preclusion law designed to minimize inconsistent judgments, etc.). Thus, a certain level of disagreement is recognized as an inevitable part of the legal framework.¹⁰⁷ Even where there is agreement, it is often collusive and therefore not necessarily reflective of genuine agreement. If judges agree *after* they have conferred, this does not prove that they have the sort of shared judgments that we find in mathematics and (perhaps) language.¹⁰⁸

105. See *supra* notes 90-91 and accompanying text.

106. Blackburn, *supra* note 101, at 172.

107. This provides at least one reason for believing that the level of disagreement in the law as applied to deciding cases is qualitatively greater than the level of disagreement existing in the everyday use of language or mathematics. However, the existence of such a qualitative difference is not central to my argument.

108. Whether or not the same sort of shared judgments can be found in the everyday use of ordinary language is a more difficult issue that is beyond the scope of this Note. To the extent that language does exhibit substantial indeterminacy in its everyday use, Wittgenstein's account of how language generates determinacy is problematic. Whether or not this is true, his account cannot be straightforwardly applied to law.

Here, it is worth noting again exactly what fields are being compared. I am not committed to the view that Wittgenstein's account of correctness through shared judgments in mathematics and language is plausible. I am only committed to the weaker claim that, whether or not this account works in those fields,

Brian Bix focuses on comparative levels of disagreement and the difference between “easy” and “hard” cases in his insightful article on the application of Wittgenstein to legal theory.¹⁰⁹ In fact, Bix’s evaluation of the realists using Wittgenstein is very similar to mine.¹¹⁰ He believes that the conclusions realists draw from Wittgenstein’s rule-following considerations are misguided because Wittgenstein’s arguments are meant to apply to contexts where it is “easy” to know what the right answer is, such as math.¹¹¹ Thus, he reads Wittgenstein as having offered an explanation for how correctness operates in “easy” contexts,¹¹² but concludes that Wittgenstein himself has few lessons for how to ground correctness in “hard” contexts.

The first thing to note about this account is that the easy-hard distinction does not seem entirely plausible. Surely, most of us consider some mathematical problems to be quite hard. Conversely, some cases in law are quite easy, which is to say that we think nearly everyone with a legal education could predict how a court would decide them. The initial problem here is that easy and hard are epistemic notions—they have to do with how we *know* what the right answer is—whereas the central problem for the realists is metaphysical. They treat law and mathematics as though they are similar types of phenomena, when in fact they are different, regardless of how we come to know about them.¹¹³

Bix might reply that he did not mean that in mathematics there are no problems that are difficult to solve. Instead, he might say, he meant that in the vast majority of cases competent mathematicians would agree about the answers to easy or difficult problems, or at least would agree about how to determine whether the answers were correct, whereas in law even the most noted theorists entertain sharp disagreements about many important issues.

it does not work in law. However, given that the appropriate comparison is between simple mathematical and linguistic practices (which Wittgenstein uses) and court decisions (which the realists challenge), I believe a good case could be made that there is more disagreement in the legal field.

109. See Bix, *supra* note 18.

110. For example, Bix says of Langille that “Langille makes the significant move [from the grammar of language] to the ‘grammar of law’ without either arguing for the transition or even noting why argument might be needed.” *Id.* at 216.

111. See *id.* at 212 (“Wittgenstein’s discussions on rule-following in *Philosophical Investigations* focused on easy cases, like the mathematical series ‘add 2.’”).

112. Presumably there is little disagreement over how to go on in “easy” cases, so that Bix takes Wittgenstein’s account to apply to cases where there is general agreement.

113. It is unsurprising that Bix treats the issue this way, as he endorses an essentially epistemic understanding of Wittgenstein’s argument in the rule-following considerations. See Bix, *supra* note 18, at 211 n.13 (“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.”). Kripke’s view, to which I am more sympathetic, endorses a metaphysical rather than merely epistemological understanding of Wittgenstein’s argument:

So formulated, the problem may appear to be epistemological—how can anyone know which of these I meant? Given however, that everything in my mental history is compatible both with the conclusion that I meant plus and with the conclusion that I meant quus, it is clear that the sceptical challenge is not really an epistemological one.

KRIPKE, *supra* note 2, at 21.

While this response would represent an advance, it would lead to the unfruitful (though much pursued) strategy of attempting to discern exactly how much disagreement there really is in law. Certainly if one compares disagreement over the simple addition rule to disagreement over the nature of the Fourteenth Amendment's right to privacy, law appears rife with disagreement. However, if one compares interpretations of the speed limit with Fermat's last theorem,¹¹⁴ law does not seem particularly lacking in consensus.

While there may be ways to resolve this debate over levels of disagreement,¹¹⁵ focusing on it misses the crucial lesson for legal theory that Wittgenstein offers. Wittgenstein's account of agreement in mathematics and language cannot be applied to law, regardless of whether or not the level of disagreement in each area is the same. To see this, we must examine Wittgenstein's notion of correctness itself.

B. *Correctness*

In *Philosophical Investigations*, Wittgenstein argues that the concept of correctness in a given field is governed by the characteristics of that field, not by some overarching notion of correctness that can be applied across disciplinary boundaries.¹¹⁶ Bix misses the relevance of this argument for legal theory because he understands Wittgenstein's claim in primarily epistemological terms.¹¹⁷ It is not just, as he says, that "[t]he way we think about easy cases—and about 'correct' and 'incorrect' in easy cases—differs sharply from our thinking in hard cases"¹¹⁸ (though that is undoubtedly true); rather, it is that the way we think about correctness in law must be different from the way we think about correctness in mathematics and language, because

114. Fermat's last theorem may not be the best example to use. While uncertainty concerning the status of Fermat's last theorem existed for a long period of time, it now appears to have been definitively proved. See generally SIMON SINGH, *FERMAT'S ENIGMA* (1997).

115. As I stated at the outset, see *supra* text accompanying notes 23-25, the relevant comparison for the purposes of my argument is between simple mathematical rules and legal cases. Recognition of this difference may help to resolve the debate, though some might still argue that the levels of disagreement between the two are the same. Another way to resolve the debate might be to think about the *nature* of disagreement in both fields—when and how the set of criteria that could be relevant to making the decision in a given case is fixed, as compared to when the criteria for deciding what counts as a solution to a mathematical problem are indeterminate. For example, a case like *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889), shows that extremely malleable concepts such as justice and equity can come into play to alter what appears to be the plain interpretation of a rule in a given case. See *supra* notes 70-75 and accompanying text. Thus, even the speeding rule could prove complicated. The same may not be true for many simple mathematical rules, such as addition. On this account, the possible disagreement in law could run deeper than it does in mathematics.

116. See WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 1, at 224. Although Part I of *Philosophical Investigations* is ordered by section, Part II is ordered by pages only. Therefore, where citations in this Note to *Philosophical Investigations* lack section symbols, they refer to Part II.

117. Bix concludes that theorists reading Wittgenstein for insights into problems in law "find more in Wittgenstein than is actually there." Bix, *supra* note 18, at 223. I believe, however, that Wittgenstein has much to offer legal theory by way of methodological insight.

118. *Id.* at 218.

law is used in unique ways and plays a unique role in our social organization. Even if it were true, as Bix might want to argue, that all cases in law were hard and all in math easy, so that the level of disagreement really was much greater in law, this observation alone would not get at the real issue, which is about how the idea of correctness in law works.¹¹⁹

While my dispute with Bix may seem like a technical, even esoteric, point about the difference between epistemology and metaphysics in Wittgenstein's philosophy, it actually concerns a deep and important issue, one that goes to the most fundamental insights of Wittgenstein's philosophy and his thoughts on philosophical method. In his famous discussion of games early in *Philosophical Investigations*, Wittgenstein states, "Don't think, but look!"¹²⁰ This cryptic admonition occurs in the context of a larger discussion (about the concept of a game) in which he argues that we must reconceptualize our notion of what defines concepts by examining how we use them. We must look at the way the concept is used in order to determine how we define it, rather than bringing a pre-formed notion of what counts as a definition and then applying it to the working concept itself.¹²¹

Wittgenstein's idea here is not restricted to concepts and definitions, but rather is part of the more general method of looking to the characteristics of a particular field to determine the criteria that we should use for evaluating the correctness of judgments in that field. Wittgenstein explains the same idea when discussing a comparison between certainty in mathematics and psychology:

I can be as *certain* of someone else's sensation as of any fact. But this does not make the propositions "He is much depressed", " $25 \times 25 = 625$ ", and "I am sixty years old" into similar instruments. The explanation suggests itself that the certainty is of a different *kind*.— This seems to point to a psychological difference. But the difference is logical.

. . . The kind of certainty is the kind of language-game.¹²²

Correctness in law will be different in kind from correctness in other fields because law is its own "kind of language game," with its own societal functions. Thus, an analysis of whether or not legal judgments can be determinately correct or not must begin with an analysis of certain basic features of legal activity, not a simple transposition onto law of the concept of

119. Similarly, even if the levels of disagreement in law and mathematics were the same, this would not obviate the need for distinct analyses of correctness in both fields, because they are different in so many other ways.

120. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 1, § 66.

121. *See id.*

122. *Id.* at 224. For my purposes, the notion of a "language game" can be understood to refer to a different field, so that correctness judgments will be made based on criteria unique to that field.

correctness that Wittgenstein developed for (certain areas of) mathematics or language. As I have shown, that concept cannot provide the basis for grounding legal determinacy. If we are to reply to the realists, we must attempt to explain correctness in a way that takes account of the distinctive features of the legal language game.¹²³

C. *Justification*

Perhaps the central distinctive feature of the legal language game, at least when compared with Wittgenstein's examples from simple mathematics and everyday language use, concerns the need to provide justifications for why legal decisions come out the way they do. Wittgenstein repeatedly stresses in his discussion of language and mathematics that reasoned justification is not required in those realms. For example, he states: "When someone whom I am afraid of orders me to continue the series, I act quickly, with perfect certainty, and the lack of reasons does not trouble me."¹²⁴ Elsewhere he writes, "When I obey a rule, I do not choose. I obey the rule *blindly*."¹²⁵ Blackburn believes this to be a central aspect of Wittgenstein's view: "The whole stress in Wittgenstein is on the automatic and compelling nature of rule-following."¹²⁶ Thus, Wittgenstein says there is a sort of behavior for which we do not need the kinds of reasons the skeptic demands, because we can behave without explanation.¹²⁷ Furthermore, when faced with a skeptic who does demand reasons in such situations, we are unable to provide them. This point arises in Wittgenstein's example about a student who is unable to continue the series of even numbers.¹²⁸ We can try to teach the student again and again, but at some point, justification runs out. At that moment, "I am inclined to say: 'This is simply what I do.'"¹²⁹ When faced with a skeptic like the one imagined by Wittgenstein, we eventually have nothing to say, and nothing to point to,

123. Another implication of my approach, which takes seriously the idea that legal correctness is importantly unique to law, is that it makes Bix's suggestion for analyzing legal correctness problematic. Bix's attempt to gain insight by looking at other fields with similarly "hard" cases fails to provide a blueprint for a Wittgensteinian investigation into the nature of correctness in law.

124. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 1, § 212.

125. *Id.* § 219.

126. Blackburn, *supra* note 101, at 170.

127. Again, Wittgenstein's model of blind action may not provide an adequate account of higher-level mathematical reasoning or complex linguistic interpretation. The implications of this should be clear. Even if Wittgenstein's model does not plausibly describe justification in mathematics and language, this does not aid those hoping to utilize Wittgenstein's model for law. Alternatively, his model may be appropriate to simple mathematical and linguistic behavior, but not to more complex behavior. This interpretation of Wittgenstein would be consistent with some of his statements about mathematics. *See supra* note 26. Finally, some may hold that the nature of mathematical and linguistic reasoning is fundamentally different in kind from the nature of legal reasoning because the nature of the reflection involved is different, apart from issues of justification. I do not defend that claim here, though it appears initially that this argument may be stronger for mathematics than for language.

128. *See* WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 1, § 185.

129. *Id.* § 217.

that could justify our continuation of the mathematical series in a way that would satisfy him. However, when dealing with uncontroversial processes like the addition rule, we never have a need for such a justification. This way of going on is part of our form of life, and that is enough to justify it for our purposes. Thus, the anti-realists are right to note that Wittgenstein concludes that this appeal to our practices is all the justification we need, *for language and mathematics*. We act without reference to reasons, and when people ask for justifications, it does not bother us that we cannot provide them.

In law, however, most legal theorists and judges would want to provide more than this when asked to justify their account of what constitutes the correct following of a legal rule. Unlike in Wittgenstein's examples, those analyzing judicial decisions *do* typically demand explanations and reasons for those decisions (whereas, on Wittgenstein's view, only misguided philosophers scrutinize an addition problem to see how it could be decided otherwise). With each judicial decision, the coercive authority of the state (in the form of the order to enforce a judgment) is deployed in defense of a particular account of how to follow a rule correctly. To claim that this authority is as arbitrary as the form of life that "we" happen to have would undermine the legitimacy of the legal system (at least at a theoretical level), especially when there is enough disagreement to make one wonder who the "we" is that shares this form of life.¹³⁰

Here, Wittgenstein's demand for a theory of correctness tailored to the unique characteristics of law dovetails neatly with the realists' demand for an account of legal interpretation that can explain how legal decisions are legitimate. Recall that the desire for an account of law that could explain why law was governed by rules rather than people was part of the original interest in explicating legal rule following and one of the basic requirements for answering the realist.¹³¹ The realist seeks a principled reason why people who are unhappy with the outcome of a case should nonetheless accept it. One such reason might be that they played some part in creating the rules that were dispositive in the case's outcome (or at least could have played such a part if their candidate had won). However, if the judge's form of life made the unfortunate outcome inevitable, it is unclear what reason such unhappy people have to believe that the outcome is just.

Thus it should be clear that a simple attempt to apply the Wittgensteinian formula for determinacy in mathematics and language straightforwardly to the legal context is doomed to failure. Correctness in law must be different from correctness in mathematics or language because in law one must provide a justification that explains why a particular outcome is correct and that goes beyond merely stating that it is the way things are done.

130. This is the essence of the realists' critique of the legitimacy of the legal system.

131. *See supra* Part I.

Before turning to the discussion of alternative theories, it is worth noting where we stand, lest all of the above be viewed as a detour. Wittgenstein's arguments against a rule-based understanding of meaning in language and mathematics establish that there can be no fact about a rule that determines how we are to apply it in a new case. This critique applies as well to law as it does to mathematics. Cases like *Riggs*¹³² show that even the most straightforward of rules do not, by themselves, clearly determine the outcomes judges should reach. Wittgenstein did not believe that this conclusion should leave us doubting our own practices of language and mathematics. Instead, he suggested an alternative model for explaining how these practices are determinate. However, this alternative model cannot be used to ground determinacy in law. Legal decisions are not the product of behavior without reflective thought. They must be explained by reference to reasons. In the face of the state's coercive power, people affected by legal decisions and others in the legal community demand substantive justifications for why the state's authority is being deployed against them (or against their wishes). They demand reasons for why cases have come out one way rather than another. These characteristics (and perhaps others) require a unique account of legal rule following.

Thus, it should be clear that the debate about the use of Wittgenstein for or against legal indeterminacy has been won, in a surprising way, by the realists. The anti-realists are right that the initial realist claim, that Wittgenstein showed that all language was indeterminate and therefore that legal language is also indeterminate, rests on a mistaken view about Wittgenstein's theory of linguistic determinacy. However, Wittgenstein *can* be used to argue for *legal* indeterminacy if we believe in a rule-based model of legal decisionmaking. To respond to this, opponents of the realists would have to provide a theory of correctness that was based on the unique characteristics of the law. Much work remains to be done before opponents of the realists can establish such a constructive use of Wittgenstein.

V. A WITTGENSTEINIAN LEGAL THEORY FOR REALISTS?

We began with a challenge posed by the realists: to provide an account of legal decisionmaking that could explain how decisions are legitimate. Traditional rule-based accounts of legal decisionmaking provide a simple explanation for why legal decisions are legitimate,¹³³ but an understanding of Wittgenstein's account of rule following suggests that legal rules cannot play the central role in determining how cases are decided. In the process of

132. *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889).

133. See *supra* Part I. On any of the most common theories of legitimacy, traditional rule-based accounts are sufficient to explain the legitimacy of the legal system.

exploring Wittgenstein's critique, we have attained both a fuller understanding of the scope of Wittgenstein's rule-following arguments, and also a sketch of an alternative method for analyzing legal decisionmaking.

Although the task of constructing a theory of legal decisionmaking is too large to be entertained in this Note, I hope the discussion of Wittgenstein above reveals important constraints on any such theory.¹³⁴ First, a theory of legal correctness must take into account the unique features of law. The discussion in Part IV suggests several such features. At least a certain amount of disagreement over legal judgments is widespread, and institutions for dealing with it show that this disagreement is expected. On the other hand, there are many cases that people generally agree should be decided the same way. Many disputes are settled, presumably in part because the participants are fairly certain about how the case will come out. Thus, at least initially, it appears that in certain situations people are able to make predictions based on legal rules.¹³⁵ Besides these, other features of law will also be important. Unlike ethics,¹³⁶ legal judgment does not appear to arise out of natural reactions all people have, at least initially. There is also a final arbiter of most legal decisions (the Supreme Court). But we think it coherent to criticize the final arbiter on occasion, whereas we do not criticize the final arbiter for empirical judgments (the world). These are the kinds of characteristics that

134. One helpful way of hinting at the appropriate direction is to provide a useful model. Such a model can be drawn from Paul Johnston's excellent book on Wittgenstein's use for ethics. See PAUL JOHNSTON, *WITTGENSTEIN AND MORAL PHILOSOPHY* (1989). Johnston begins with the recognition that ethics and empirical judgment involve fundamentally different kinds of judgment, such that we must not expect the explanations for how empirical judgment functions to aid us in understanding the workings of ethics. See *id.* at 141-43. Empirical judgment is for Johnston what language and mathematics are for our purposes. Because there is a way of independently assessing the correctness of empirical judgments (by reference to the world), theorists have attempted to build ethical theories by constructing something that independently determines the correctness of ethical judgments. Johnston sees this as misguided. See *id.* at 142. Just as models from language and mathematics are incorrectly applied to law, so also the empirical knowledge model is incorrectly applied to ethics. He then analyzes the differences between ethics and empirical judgment and through this analysis arrives at an account of moral concepts. See *id.* at 144-45. On this account, we determine the correct application of moral rules differently from how we determine the correct application of empirical rules.

I describe Johnston's method because it is consonant with Wittgenstein's important insight, described above, that the criteria for correctness in law, as in any other field, must be derived from examining the characteristics of that field. See *supra* text accompanying note 116. Johnston's treatment of ethics provides a useful methodological (not substantive) model for analyzing law.

Finally, I should note here that, although Bix also cites Johnston with approval, see Bix, *supra* note 18, at 222, our uses of Johnston are quite different, and even inconsistent. Bix believes that Johnston has provided an explanation of a Wittgenstein-inspired way of treating certain kinds of "hard" cases, and that this model can be useful in law. See *id.* at 223. I, however, would be hesitant to apply Johnston's treatment of correctness in ethics to law, just as I am hesitant to apply a theory from mathematics to law. Ethics as a field is importantly different from law in many ways, even though "hard" cases exist in both fields.

135. One of the aims of this Note is to show that this fact alone does not demonstrate that legal rules are determinate. Instead, this phenomenon should be one of the resources we use in attempting to construct a theory of legal determinacy.

136. Cf. JOHNSTON, *supra* note 134, at 96 ("[In ethics], the language-game does not consist in rules which we learn; rather, it extends and develops certain natural reactions.").

must be taken into account when constructing a theory of legal correctness.¹³⁷

Second, any theory of legal correctness must not rely on rules, legal or otherwise, to explain how judges decide cases. This is the ultimate implication of Wittgenstein's rule-following critique. If, instead of legal rules, one explains legal decisionmaking in terms of some other kind of rules (such as statutory purposes), the Wittgensteinian problem will repeat itself. What is needed, therefore, is a view that explains how judges make the leap from rule to behavior. To explain this, a brief description of Wittgenstein's views on interpretation may be helpful.¹³⁸ One way of understanding the rule-following critique is as a problem about the infinite regression of rules. When we cannot understand a rule, someone may attempt to help by offering a different, synonymous description of the rule (an interpretation, in Wittgenstein's narrow sense). If this still does not help, another version may be offered. Eventually, most people come to understand the rule. This ultimate understanding does not involve just another set of words, but a set of words that we can comprehend and on which we can base our behavior. If we can never reach this stage of understanding, no amount of synonymous interpretations of the rule will help. In this sense, all interpretation is parasitic upon a more basic way of understanding, which allows us to leap from language to behavior. Of course, this way of understanding does not rule out the need for interpretation in all cases. It may be that we first need interpretation and then need this more basic way of understanding in certain areas of life, especially those more complex areas where reasons are demanded and reflection is involved.¹³⁹

To provide an explanation of how judges actually decide, then, a description of the rules that they use as interpretive guides will not suffice. An explanation of how the gap between interpretation and understanding is filled by judges will be needed. In Wittgenstein's account of rule following in mathematics and language, this work is done by reference to our "form of life," and the way in which we learn the rules of grammar from a young age.¹⁴⁰ A similar account for legal decisionmaking is also needed.

137. The list of characteristics is not meant to be exhaustive. I just hope to point to the kinds of characteristics that a theory sensitive to law's uniqueness must address.

138. Wittgenstein limits the use of "interpretation" to cases where we "substitut[e] . . . one expression of the rule for another." WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 1, § 201. His claim is that at some point we make a leap from words to understanding and action. An interpretation gives us another set of words, but ultimately we must use the set of words as the basis for behavior; no interpretation by itself can provide that basis. *See id.*

139. Another implication of this view is that there is a way of grasping a rule that is not an interpretation. Ironically, this is a strand of Wittgenstein's thought on which anti-realists focus when explaining how the rule-following critique does not apply to legal rules. *See, e.g.*, Smith, *supra* note 16, at 173, 183. I have tried to show that while this form of understanding cannot be used to grasp legal rules without the aid of further interpretation, other more basic decisionmaking procedures, such as a bias built on an ideology, can provide the motivation for understanding without interpretation.

140. *See* WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 1, § 241; *id.* at 226.

The discussion above also suggests a third requirement on any theory of legal correctness. In order to answer the realist challenge and remain true to the law's unique reason-giving function, any such theory must resolve the legitimacy problem. The force that plays the key causal role in determining the outcomes of cases (i.e., the one that fills the gap between rules and outcomes) must be one that can be justified as part of a theory of legal legitimacy. Depending on one's theory of legitimacy, different justifications may be appropriate. It may be that people have to consent to the use of this force, or that people would consent to it behind a veil of ignorance, or that they would consent to it given ideal circumstances for rational deliberation. However, a theory that explains how cases are decided without providing an account of why the decision process is justified is one that will fail to meet the realist challenge.

To get a sense of the strength of this realist demand, it is worth noting that most accounts of judicial decisionmaking that attempt to explain how judges are constrained fail to meet all three requirements. For example, theories based on neutral principles, such as those proposed by Herbert Wechsler¹⁴¹ or Robert Bork,¹⁴² fail to meet the second requirement (that the theory not rely on rules to explain how judges actually decide cases). These theories certainly point in the right direction with respect to the first requirement (that the theory be specifically tailored to the characteristics of law), insofar as they obviously attempt to give an account sensitive to the unique characteristics of law. They also may well meet the third requirement (that the theory justify the exercise of power by judges), insofar as principles that are neutral are seen as legitimate.¹⁴³ However, neutral principles appear to be rules for interpreting legal rules, and not the kind of behavior-guiding forms of life that would serve to fill the gap between rules and outcomes that Wittgenstein's rule-following critique makes necessary.

Theories that focus on interpretive communities and legal acculturation,¹⁴⁴ or the "craft" of legal decisionmaking,¹⁴⁵ are also unlikely to succeed. These theories will again meet the first requirement, as they arise

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

142. See Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

143. For example, Wechsler thinks judges uniquely have to provide reasoned explanations for their decisions. See Wechsler, *supra* note 141, at 15-16. Bork is also clearly interested in a theory that explains why judicial power is legitimate. See Bork, *supra* note 142, at 3, 6. I take no position on whether or not such theories can actually give an account of principles that are neutral and open to legitimation.

144. See, e.g., Lon Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946) (arguing that judges come to see themselves as constrained by virtue of their role as judges). Fiss makes a similar argument. See Fiss, *supra* note 13, at 744-45.

145. See, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 217-23 (1993) (adopting a theory of judicial and legal practice based on an Aristotelian-inspired vision of practical wisdom); KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 121-22 (1960) (describing the "horse-sense" needed to find law appropriate to particular situations).

out of analyses of law rather than by analogy from other disciplines. They will also be more likely than the neutral principle theories to meet the second requirement. Legal culture, the intuitive sense of how a case should come out, and other similar forces may well be the sorts of forces that constitute a legal form of life. However, such theories are very unlikely to meet the third requirement. There is no reason to believe that a legal culture that grows up out of the community of judges¹⁴⁶ would be chosen by people, nor any reason to believe that it would be chosen under ideal circumstances. It is also hard to imagine a theory that could show that this culture was somehow naturally endowed as the legitimate one for determining case outcomes.

While this treatment of the theories of legal interpretation is only schematic and obviously far from exhaustive, some reflection on the requirements that follow from Wittgenstein's thought should make clear that a satisfactory theory of legal decisionmaking will be hard to construct. In particular, although many theories may provide accurate descriptions of how decisions are actually made, in order to answer the realist challenge they will have to explain how judicial decisions are legitimate. I am not entirely skeptical about the possibilities of such an account, but I believe we must accept the possibility that the grounds for determining the correctness of legal judgments may turn out to be produced primarily through an ideology constructed by dominant social groups or the esoteric culture of judges, or in some other way to be the product of forces that cannot serve as the basis for legitimate legal decisions. For the time being, I can only remain agnostic about the possibility of such an account. The legal realists may be wrong, but they remain to be answered.

146. See Fiss, *supra* note 59, at 183.

