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“THE JURISPRUDENCE OF REASONING”

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CALL FOR PAPERS

The field of jurisprudence lies at the nexus of law and politics, the practical and the philosophical. By understanding the theoretical foundations of law, jurisprudence can inform us of the place of legal structures within larger philosophical frameworks. In its inaugural edition, *The Journal Jurisprudence* received many creative and telling answers to the question, “What is Law?” For the second edition, the editors challenged the scholarly and lay communities to inquire into intersection between jurisprudence and economics.

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Correspondence can also be sent to this address. If you are considering submitting an article, you are invited to contact the editor to discuss ideas before authoring a work.

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Alternatively, the Journal is available online at www.jurisprudence.com.au and can be read there free of charge.

EDITORIAL: THE JURISPRUDENCE OF REASONING

As I write my eighth editorial for *Jurisprudence*, I am stuck in purgatory. More correctly, I am in my fifteenth hour of being delayed in Dubai airport due to a snow storm in England. The reasoning of airline staff to delay me for so long defies logic. However, in this vacuum of reason, one has an opportunity to consider “the Jurisprudence of Reason,” the central theme of this issue. Our focus is not the legal philosophy of reasoning, but the various approaches scholar have taken to reasoning in legal philosophy. Unlike airlines, law has reasons for its decisions. Any course of action taken by a legal philosophy, barrister, solicitor or judge, is bound in reason – even if we critique the foundations and approaches taken.

How we, as members of the legal fraternity, reason is basis of all other aspect of law and jurisprudence. The science of jurisprudence, if it so could be called, would be a science of reason. Our three contributors have illustrate the diversity of reasoning taken in law.

Dr. Pier Luigi M. Lucatuorto of the University of Bologna emphasises a very scientific approach built upon the work of Robert Alexy. His article is insightful and, giving the recent resurgence in administrative theory, appropriately timed. Dr Lucatuorto’s work is, undoubtedly, a ground breaking application of a novel method of reasoning in administrative law.

Dr. David M. Finkelstein, who was clerking for the distinguished Judge Rosemary S. Pooler of the U.S. Court of Appeals for the Second Circuit at the time he wrote his article, and who has since accepted a position with the U.S. Department of Justice, offers an exciting article on Wittgenstein contribution to legal theory. His article is of importance to both scholars of law and Wittgenstein. He grounds his article within critical legal studies, and it makes an important advancement upon an ongoing debate.

Professor Edgardo Rotman of the University of Miami reports on how law can be therapeutic – i.e., able to improve the physical and mental health of participants. Building upon the notion of human dignity and continuing through a detailed analysis of the jurisprudence, Professor Rotman displays a detained and original reasoning to reach a conclusion on the validity of the death penalty. This is an important article which contributes to the real-world deliberations.

I have greatly enjoyed curating this issue, after having the supports of two guest editors for this year's issues. Furthermore, I am pleased to report that EBSCO, one of the world's largest and most sophisticated distributors of academic scholarship have partnered with our publishers to extend the reach of *Jurisprudence*. This is an important relationship that allows readers from nearly 90% of American libraries access to the Journal. EBSCO's distribution channels built upon our existing relationships with Gale Cengage and HeinOnline, as well as the reach of our publisher, Elias Clark.

Aron Ping D'Souza*

Editor

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REASONABLENESS IN ADMINISTRATIVE DISCRETION: A FORMAL MODEL

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Abstract. In this article, I argue that administrative discretionary decision-making, achieving a public interest to protect, is an evaluation process that occurs through the reasonable and proportional comparison of several private (secondary) interests conflicting with a single public (primary) interest. I suggest that the dynamics of weighing competing interests are similar to the procedure for balancing constitutional rights. Thus, drawing on Robert Alexy's constitutional balancing model, I propose a model that is applicable to discretionary administrative decisions, in which the outcome of the proportional weighing of secondary interests works as a "moderation factor" for the primary interest. In my model, the outcomes of the discretionary process can be converted into numerical values, simplifying decision consistency so as to make it simple, complete and reasonable at the same time.

Keywords: reasonableness; balancing; administrative discretion; formal model; quantitative method; Robert Alexy

1. REASONABLENESS AND ADMINISTRATIVE DISCRETION

The concept of discretionary decision-making is one of the main issues in administrative law (Galigan, 1986). First, with respect to the historical component of this concept, it should be noted that the term "discretion" has been used (Fletcher, 1996) to indicate the administration's goal of exercising discretionary power without arbitrariness since administrations achieve their purposes by involving all citizens. Wielding this power, the administration can make a choice between all of the compatible solutions in a range, but can also enjoy freedom of choice bounded by the well-known reasonableness principle.

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All of the choices foundational to an administrative act are bounded by the reasonableness principle. This principle expresses the logical relationship that must exist between discretionary decisions and the evaluation of all public and private interests involved in the circumstances of the case. Nonetheless, this evaluation on the one hand requires the maximization of the public interest (since the principle of reasonableness demands that every discretionary decision must be related to a public interest), but on the other hand demands that competing private interests not be totally compromised.

Administrative discretionary decision-making is an evaluation activity (Stewart, 1975; West, 1984): when the administration makes its assessments, it has the freedom to evaluate a fact, giving to every element of the case a degree of importance. Thus, the aim of discretionary power is to set the comparative weights of all of the competing interests, and the administration is bounded by this evaluation. Indeed, the discretionary decision-making process is a *functionalised choice* since the administration's discretionary power has a series of internal limits for the achievement and the satisfaction of social needs.

Furthermore, this *functionalised choice* has been recently involved by the advent of new technologies, which has transformed the administration's evaluation activities, improving the access to information and the organization of the public administration (Johnson and Masri, 2004; Australian ARC, 2004; Frémont, 1994). In particular, noteworthy improvements have been made in automation of administrative decisions, but only with reference to specific areas or specific phases of the administrative activities (De Bruin *et al.*, 2002). Thus, the development of a formal (and, therefore, “computable”) model of reasonableness in administrative decision, as introduced in this paper, may give a stronger enhancement to the reliability of the digital tools supporting the administrative decisions.

2. BALANCING COMPETING INTERESTS

2.1. Theoretical background

Klatt (2007, 518) asserts that discretion has to be anchored in the system of weighing and balancing legal principles. Balancing is an argumentation method used across contemporary constitutional systems to settle conflicts between constitutional principles (Aleinikoff, 1987): when a legal question faces two competing constitutional principles—that is, in a situation where two or more rights may not be fully satisfied at the same time—a Constitutional Court must

decide which principle is most relevant in the case under consideration and look for a weighed (or balanced) solution (Alexy, 2002).

It is possible to characterise the balancing process as containing two main elements. First, it is necessary that there be a conflict between two (or more) principles. For example, one might consider the conflict between the requirement to place health information regarding the dangers of smoking on tobacco products and the economic freedom to sell cigars. Secondly, in order to balance such a conflict, it is necessary to establish an *axiological hierarchy*—that is, a scale of values—between the competing principles. For example, we might assume that the freedom of occupation has a lower value than the protection of customers' health, in which case we would decide according to this preference.

The axiological hierarchy is necessary because the traditional Civil Law criteria of antinomy resolution are inapplicable to constitutional principles: that is, the "*lex superior derogat inferiori*" (a superior statute waives the inferior one) criterion would be inapplicable because constitutional principles are hierarchically at the same level; the "*lex posterior derogat priori*" (a later statute waives the former one) criterion would be impracticable because constitutional principles are part of the same normative act; for the same reason, we cannot apply the "*lex specialis derogat generalis*" (a special statute waives the general one) criterion.

The process of administrative discretionary decision-making demonstrates the evaluation's reasonableness through the motivations of the choice. As mentioned above, the exercise of administrative discretion has as its object a comparison between public and private interests, in the same way as happens in the balancing of competing constitutional principles. In relation to this, it seems appropriate to note that administrative discretionary acts, and more specifically the pursuit of the primary interests, involve a range of interests—in a relationship of mutual tension and conflict—that the administration must take into account in its decision.

Consequently, in its adjudication, the administration must evaluate each interest at stake in order to adopt a reasonable choice according to the axiological hierarchy assumed for a specific situation. In my view, therefore, it is very important to develop a formal theory of discretionary decision-making that, while containing axiological evaluations, can be controlled rationally to allow for an adequate margin of predictability, especially if that happens with technological tools.

In particular, with the introduction of a formal argumentation model with a mathematical outcome we can ensure the control of the reasonableness in

administrative decision-making, facing one of the most important obstacles of the development of digital frameworks supporting the administrative decisions (Helling, 2003).

2.2. *Structural analysis*

According to Alexy (2002), to better understand the structure of balancing, it seems appropriate to mention the difference between the syllogistic application of rules and weighing principles. In the case of a conflict between two rules, the antinomy resolution is “binary”: the result can only be the waiver of the invalid (or the inapplicable) rule and the simultaneous application of the other. For instance, if we are in a museum and we see two signs saying “no smoking” and “smoking is allowed” in the same room, we must apply one of the two rules, and only one. In the case of balancing, we instead reach a decision that raises a competing principle to the partial detriment of the other, but without the latter’s being totally debased. For example, in the case of a conflict between the national defence principle and the right to privacy, we cannot choose to apply one of them, but must *balance* them in relation to the circumstances of the case.

The structural gap that stands out between rules and principles allows one to apply to these rules the logical appeal (syllogism), which entails the identification of an applicable rule (major premise), the qualification of the circumstances according to the foreseen case (minor premise) and the application of the rule. The result is subsumed according to the scheme:

$$(1) \forall x (Tx \rightarrow Rx)$$

$$(2) Ta$$

$$(3) Ra$$

This scheme summarises the *normative syllogism*, which connects a certain legally qualified case to a general and abstract case exemplifying a valid rule. Specifically, the premise (1) states that for any x , if x is T (where T is a predicate or, more generally, a set of properties that characterises a given case), then the legal consequence R applies for x . The premise (2), in turn, expresses the fact that a is a T . The major premise is applied to a , so that R must be true for a .

The application of a principle does not constitute a syllogism but assumes the different argumentative structure of balancing, whose essence consists of a relationship that can be defined as the *law of balancing*:

The greater the degree of non-satisfaction of, or detriment to, one right or principle, the greater must be the importance of satisfying the other (Alexy, 2002, 102).

In applying the law of balancing, Alexy (2003) has proposed a model of balancing principles that follows a scheme divided into three stages: first, we determine the degree of injury to (or non-satisfaction of) the first principle; in the second stage, we establish the importance of satisfying the competing principle; in the third stage, we determine if the importance of satisfying the latter principle justifies the injury to (or the non-satisfaction of) the former.

Alexy observes that the German Constitutional Court frequently justifies its judgments regarding the legitimacy of certain laws by examining the impacts of such laws on principles, and by characterising such impacts as *light*, *medium*, or *serious*. For example, the duty to place health information (regarding the dangers of smoking) on tobacco products was considered to be legitimate because such duty implied a *light* interference with economic freedom, which was outweighed by the need to protect customers' health as heavily endangered by smoking (Alexy, 2003, 437).

Therefore, in the balancing process, there appear quantitative elements (the degree of injury, the extent of importance, etc.) that correspond to the linguistic expressions "*light*", "*medium*" and "*serious*" in the German Constitutional Court legal arguments. According to Alexy (2003), those linguistic expressions can be transformed with numerical values between which we can establish a proportional relationship. So, Alexy proposes a simple method of numerically characterising the impact of legal decisions on relevant values with a triadic (three-grade) model, linking the principles' values to three numerical values—for instance, the geometric sequence 2^0 , 2^1 and 2^2 (that is 1, 2, and 4), so that a light degree has a value of 1, a medium degree a value of 2, and a serious degree a value of 4.

Correspondingly, Alexy recommends the following steps. Firstly, we should qualify the (light, medium or serious) *intensity of interference* (that is, the degree of importance) of two supposed competing principles P_1 and P_2 under the circumstances of the case to be decided, represented with I_1 and I_2 respectively. Secondly, I_1 and I_2 are put in relation by introducing the size $W_{1,2}$ as the *concrete weigh* of P_1 under the circumstances of the case to be balanced with the competing principle P_2 . $W_{1,2}$ is represented as the *quotient* of the two intensities I_1 and I_2 :

$$W_{1,2} = \frac{I_1}{I_2} \quad (1)$$

The $W_{1,2}$ value is the quotient of the intensity of interference with the principle P_1 and the concrete importance of the competing principle P_2 . So the concrete weight can be defined as a quotient in a numerical model that illustrates the structure of balancing. In legal argumentation, it is only analogous to a quotient (Alexy, 2003, 444).

On this basis, in the cases in which the principle P_1 has lesser importance than the principle P_2 , $W_{1,2}$ assumes a value greater than 1:

$$W_{1,2} = \frac{4}{1} = 4 \quad (2)$$

$$W_{1,2} = \frac{4}{2} = 2 \quad (3)$$

$$W_{1,2} = \frac{2}{1} = 2 \quad (4)$$

If P_2 takes precedence over P_1 , $W_{1,2}$ sinks below 1:

$$W_{1,2} = \frac{1}{4} = \frac{1}{4} \quad (5)$$

$$W_{1,2} = \frac{2}{4} = \frac{1}{2} \quad (6)$$

$$W_{1,2} = \frac{1}{2} = \frac{1}{2} \quad (7)$$

In all three stalemate cases, the value of the concrete weight $W_{1,2}$ is the same (namely, 1), so that no principle is able to exercise strength (either positive nor negative) over the competing principle.

Having traced the structural profile of the process of balancing constitutional principles, I look to the corresponding balancing of public and private interests at stake in an administrative discretionary decision-making process.

3. THE “MODERATION FACTOR” THEORY

I argued above that administrative discretion must refer to the specific public interest in question and, in relation, that the law confers to an administration the power to fully satisfy it. With respect to this, I define a public interest as a *dynamic and dialectic entity* determined through a comparison of multiple private interests that have arisen in the context of the case to be decided.

First, the public interest must be identified; this is, namely, the *primary interest* since in the case to be decided, there are involved a number of further private interests that appear as *secondary* in relation to the public interest. In the presence of such a composite reality, the exercise of administrative discretionary power consists of a comparison between the primary interest and all secondary interests. In this sense, administrative discretion is a *comparative weighing* of many secondary interests in relation to a single primary interest (cf. West, 1984, 343).

In my view, the law of balancing, even if it specifically concerns conflicts between constitutional principles, is also fully applicable to the balancing of primary and secondary interests within the administrative decision-making process. More specifically, the secondary interests may be legitimately sacrificed within narrow limits to satisfy the primary (public) interest, so that the secondary interests will be sacrificed—according to the law of balancing—only insofar as the pursuit of the primary interest justifies, in terms of proportionality and reasonableness, the compression of the secondary interests involved under the circumstances of the case to be decided: the greater the importance of the primary interest, the greater must be the sacrifice imposed on the secondary interests involved.

As just noted, this introduces my formal theory of the primary interest “moderation factor”. I argued above that discretionary power consists of a reasonable comparison between the primary interest and secondary interests, and that the administration in its evaluation should pursue the primary interest while sacrificing to the least extent possible the secondary interests connected with it, as in the balancing process for constitutional principles.

My formal model takes as its starting point the aforementioned theory of the “weight formula” by Robert Alexy, borrowing some concepts. Firstly, my theory provides the interaction between the degree of intensity of the primary interest (namely, I_{PI})—which is always high—and the concrete weight (W_{SI}) of the secondary interests (I_{SI}) involved in the case to be decided. As in Alexy’s model, I assign to each element a value according to a progressive triadic geometric scale (namely 1, 2 and 4). Consequently, since the degree of

importance of the primary interest (I_{PI}) is always great, it will receive the highest value on the scale (that is, 4).

Secondly, the evaluation process provides a comparison between different hypothetical outcomes and the choice of the one with the least impact possible on the primary interest.

I argue that the result of the *proportional weight* of all of the secondary interests involved (W_{SI}) is a *moderation factor* for the primary interest. This proportional weight corresponds to the *geometric mean* (since, in this case, the triadic scale is geometric) of all of the values expressed by the degree of intensity of every single secondary interest (I_{SI_x}):

$$W_{SI} = \sqrt[N]{\prod_{x=1}^N I_{SI_x}} = \left(\prod_{x=1}^N I_{SI_x} \right)^{\frac{1}{N}} \quad (8)$$

From this, follows the “formula of moderate primary interest”, which consists of the quotient of I_{PI} and W_{SI} :

$$PI_{mod} = \frac{I_{PI}}{W_{SI}} \quad (9)$$

where PI_{mod} is the primary interest concrete weight, I_{PI} is the degree of intensity of the primary interest (that is, its abstract weight) and W_{SI} is the result of all of the secondary interests’ proportional weight.

In case of multiple primary interests at stake there should be a balance between them, as it happens for the secondary interests (W_{SI}). In that case, the I_{PI} value will become W_{PI} . In this contribution, however, I present my model in a simplified manner, assuming the presence of a single public interest at stake.

In my view, therefore, the concrete weight of the primary interest, that is, the weight of the primary interest under the circumstances of the hypothetical solution to be adopted, is a numerical value expressed by the quotient of the abstract weight (always severe) of the primary interest’s and the secondary interests’ concrete weight, represented by the geometric mean of the degree of intensity of each secondary interest involved. Hence, across a range of all compatible solutions, the administration must prefer the solution with the lowest “impact” on the public interest—that is, the solution that offers the highest value of the moderate public interest (PI_{mod}).

In other words, assuming a case to be decided, the administration identifies the interests at stake and puts forward several hypothetical solutions that might resolve the problem. In each hypothesis, of course, a secondary interest can assume a different value (but the primary interest is the maximum in each case).

For example, supposing an expropriation procedure, the administration identifies four secondary interests—that is, the interests of the owners of the lands to be expropriated—and finds two possible outcomes, giving to every interest (I_{SI_x}) the corresponding triadic value:

Scenario 1 *Scenario 2*

$$I_{SI_1} = 1 \quad I_{SI_1} = 2$$

$$I_{SI_2} = 4 \quad I_{SI_2} = 1$$

$$I_{SI_3} = 1 \quad I_{SI_3} = 2$$

$$I_{SI_4} = 2 \quad I_{SI_4} = 1$$

As already mentioned, in every decision, the primary interest (I_{PI}) will take the maximum value (namely, with reference to the triadic scale adopted, 4), so that the first hypothetical outcome has the following results:

$$W_{SI} = \left(I_{SI_1} \cdot I_{SI_2} \cdot I_{SI_3} \cdot I_{SI_4} \right)^{\frac{1}{N}} = (1 \cdot 4 \cdot 1 \cdot 2)^{\frac{1}{4}} = \mathbf{1,68} \quad (10)$$

and with $W_{SI} = 1.68$, PI_{mod} is:

$$PI_{mod} = \frac{I_{PI}}{W_{SI}} = \frac{4}{1,68} = \mathbf{2,38} \quad (11)$$

For the second hypothetical decision, instead, it goes:

$$W_{SI} = \left(I_{SI_1} \cdot I_{SI_2} \cdot I_{SI_3} \cdot I_{SI_4} \right)^{\frac{1}{N}} = (2 \cdot 1 \cdot 2 \cdot 1)^{\frac{1}{4}} = \mathbf{1,41} \quad (12)$$

and with $W_{SI} = 1.41$, the value of PI_{mod} in this case is:

$$PI_{\text{mod}} = \frac{I_{PI}}{W_{SI}} = \frac{4}{1,41} = \mathbf{2,83} \quad (13)$$

In my example, therefore, the administration will prefer the second outcome—that is, the solution that proposes a higher value (2.83) for the primary interest than for the other one (2.38).

In this terms, the properties of the geometric mean are more desirable than the properties of any other function, for example, the arithmetic mean. One property, for example, is that this model will prefer scenarios where there is a wider rather than a narrower range of degrees of interference: thus {4,4,1,1,1} is preferred to {2,2,2,2,2} using the geometric mean, whereas the arithmetic mean yields the opposite result.

Supposing now that one is faced with these two hypothetical outcomes:

Scenario 3 *Scenario 4*

$$I_{SI_1} = 4 \quad I_{SI_1} = 1$$

$$I_{SI_2} = 1 \quad I_{SI_2} = 4$$

$$I_{SI_3} = 4 \quad I_{SI_3} = 2$$

$$I_{SI_4} = 2 \quad I_{SI_4} = 4$$

In this case, PI_{mod} has the same value (1.68), so that the administration will not prefer one solution over the other:

$$W_{SI} = \left(I_{SI_1} \cdot I_{SI_2} \cdot I_{SI_3} \cdot I_{SI_4} \right)^{\frac{1}{4}} = (4 \cdot 1 \cdot 4 \cdot 2)^{\frac{1}{4}} = \mathbf{2,38} \quad (14)$$

$$W_{SI} = \left(I_{SI_1} \cdot I_{SI_2} \cdot I_{SI_3} \cdot I_{SI_4} \right)^{\frac{1}{4}} = (1 \cdot 4 \cdot 2 \cdot 4)^{\frac{1}{4}} = \mathbf{2,38} \quad (15)$$

$$PI_{\text{mod}} = \frac{I_{PI}}{W_{SI}} = \frac{4}{2,38} = \mathbf{1,68} \quad (16)$$

In other words, given a number of alternatives that are all abstractly compatible, the administration will choose the solution that will achieve the primary interest

to the greatest extent possible, ensuring its maximisation and at the same time the comparative weighing of all of the secondary interests deserving protection. Therefore, my model should be used to rationally control discretionary decisions as intuitive choices since the reasonableness and proportionality of the weighing process for the interests at stake are subject to judicial review in order to avoid arbitrariness in the administration's choices.

It must be noted that the model set out above is not descriptive of actual administrative reasoning practice: my "moderation factor theory" is a propose of a formal argument scheme of administrative discretionary decision-making. Moreover, my model can be implemented in a computer system to handle very complex situations and a significant number of interests at stake, ensuring at the same time the rational control of the decision.

4. REASONABLENESS AND COMPLETE EVALUATION

It should be noted that the primary public interest must be derived from the principles of the entire normative system, into which the rule giving to an administration the discretionary power of choice is inserted. However, it is wrong to assume that the secondary interests are instead clearly and specifically identified by a single act. Thus, the question is: how should the administration identify the secondary interests that are "moderating" the primary interest?

There is a proportional relationship between the exercise of discretionary power and the completeness of the evaluation of the interests: the more specified are the latter, the more rational are the former. In this way, I suggest that secondary interests should not be assessed by the administration but that must be brought into the administrative decision-making process by the same individuals who hold these private interests. Moreover, a comparison between various interests tends to avoid the total sacrifice of the secondary interests to the exclusive benefit of a primary interest, but this requires that every private interest holder outline his/her reasons in order to make the evaluation as complete and accurate as possible.

Particularly, an administration can build an on-line digital framework to which the holders of the private interest can submit their situation to be evaluated. It seems clear that a hypothetical on-line framework can provide a special protection to citizens, giving the holders of the private interests the opportunity to outline their reasons as fully as possible to the administration, before its decision. The effectiveness of balancing depends on this outlining, which can

be done only by the interests' holders; their participation is an important opportunity to ensure the protection of all of the interests at stake.

In relation to all of the considerations mentioned so far, my model can be useful in the context of the *e-gov* discretionary decision-making process as an instrument to facilitate the complete discussion and evaluation of the interests at stake, both primary and secondary. This could be a tool for ensuring good performance, fairness and reasonableness in administrative discretionary decision-making.

5. CONCLUSION

In this article, I have tried to establish two main theses. The first is that administrative discretion, as a reasonable choice between competing public and private interests, corresponds with the balancing of constitutional principles. Accordingly, an administrative discretionary decision faces a conflict that cannot be solved using any predetermined criteria, and it is necessary to establish an axiological hierarchy between the competing interests.

The second thesis concerns the formal model for the reasonableness of an administrative discretionary decision. Working from Robert Alexy's approach, I introduce a new quantitative method to rationalise weighing alternatives outcomes.

In conclusion, I also argued that my model can provide a framework for better governing competing interests, improving the reasonableness of an administration decision. In this way, we can see the difference between discretion—as a reasonable and balanced choice—and free will.

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

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

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

1. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

2. The Rule-Following Considerations

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

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

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

⁸ *Id.*

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

Central to Wittgenstein's later philosophy is his discussion of following a rule, which is principally contained in the early middle parts of the *Investigations*—roughly §§ 185-242.¹² In these sections Wittgenstein discusses what he characterizes as a skeptical paradox that threatens our ordinary ways of thinking about “understanding, meaning, and thinking.”¹³ He dramatizes this paradox by imagining a student's effort to develop a simple mathematical rule: “starting from zero, add by twos.”¹⁴ Imagine that we begin the series up to 8—that is, we write “2, 4, 6, 8” on the chalkboard—and ask the student to continue. Imagine further that she carries on as expected up until 1000, and thus appears to show that she really has mastered the relevant rule, but that when she reaches 1000 she begins adding by fours. (That is, she writes “... 996, 998, 1000, 1004, 1008 ...” on the chalkboard.) Perhaps we might attempt to correct her by saying something like, “no, after you reach 1000, you're to keep going on as

⁹ *Id.*

¹⁰ *Id.*

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

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

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

¹³ *Investigations* § 81.

¹⁴ *Investigations* § 185.

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

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

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

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

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

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

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

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

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

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

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

¹⁸ *Investigations* § 198.

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

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

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

²¹ *Investigations* § 201.

3. Skepticism

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

²² *Id.* at § 81.

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

²⁴ *Id.* at 8-9.

²⁵ *Viz.* [(x,y≤1,000,000)(f(x,y)=x+y) & (x,y>1,000,000)(f(x,y)=5)].

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

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

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

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

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

²⁸ *Rules and Private Language*, at 69.

²⁹ *Id.* at 55.

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

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

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

³³ *Investigations* § 201.

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

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

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

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

3.1 Problems with Skepticism

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

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

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

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

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

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

³⁷ *Investigations* § 201 (emphasis added).

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

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

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

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

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

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

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

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

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

4. Antirealism

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

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

⁴² *Investigations* § 198 (emphasis added).

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

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

⁴⁵ *Id.* at § 23.

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

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

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

⁴⁶ See generally CRISPIN WRIGHT, TRUTH AND OBJECTIVITY (1992).

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

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

⁴⁹ PLATO, EUTHYPHRO, APOLOGY, CRITO (F.J. Church trans., 1987).

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

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

4.1 Problems with Antirealism

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

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

⁵² Radin, *supra* note 35, at 808-09.

⁵³ Arulanantham, *supra* note 34, at 1882 (emphasis added).

⁵⁴ *Id.* at 1866 n.66.

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

An additional problem with euthyphronism is that it implies that the community can't be wrong. As Crispin Wright once said, "the community does not go right or wrong—it just goes."⁵⁶ Understood as an account of semantic rules, Wright's conclusion is counterintuitive. Intuitively, it seems perfectly plausible that Frances could mean *plus* by "plus" even though her community (wrongly) judges her to mean something else. (Perhaps she speaks with a lisp?) Understood as part of a story about the content of *legal* rules, however, it would be even more counterintuitive to suggest that the community can't be wrong.⁵⁷ Consider: if you believe that substantive due process protects sexual autonomy, then you will probably think that the United States courts failed to protect certain fundamental rights between 1986 and 2003.⁵⁸ If you believe that substantive due process does *not* protect such a right, then you will probably think that the courts were right prior to 2003, but wrong thereafter. Either way, it's hard to see why anyone would conclude that a community can't be wrong about the law.

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

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

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

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

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

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

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

4.2 The Textual Basis for the Antirealist Interpretation of Wittgenstein

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

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

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

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

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

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

⁶³ *Id.* at I-143-50.

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

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

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

5. Quietism

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

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

⁶⁴ W.V.O. QUINE, *PHILOSOPHY OF LOGIC* 81 (1970).

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

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

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

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

5.1 Quietism with Respect to the Rule-Following Considerations

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

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

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

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

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

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

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

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

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

⁷³ DENNIS PATTERSON, LAW AND TRUTH 127 (1996).

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

⁷⁵ *Investigations* § 38 (emphasis in the original).

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

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

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

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

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

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

⁷⁹ *Id.* at 198.

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

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

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

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

⁸² http://en.wikipedia.org/wiki/Fender_Stratocaster (visited 8/17/09).

⁸³ http://en.wikipedia.org/wiki/Gibson_Les_Paul (visited 8/17/09).

⁸⁴ http://en.wikipedia.org/wiki/Gibson_Flying_V (visited 8/17/09).

⁸⁵ http://en.wikipedia.org/wiki/Ibanez_Destroyer ("Photo Gallery") (visited 8/17/09).

⁸⁶ http://en.wikipedia.org/wiki/Gibson_ES-175 (visited 8/17/09).

⁸⁷ http://en.wikipedia.org/wiki/Fender_P-Bass (visited 8/17/09).

⁸⁸ http://en.wikipedia.org/wiki/Six_string_bass (visited 8/17/09).

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

5.3 Problems with Quietism

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

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

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

⁹⁰ *Investigations* § 454; see also *id.* at § 432.

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

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

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

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

⁹² JOHN McDOWELL, MIND AND WORLD 40 (1996).

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

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

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

6. Antifoundationalism

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

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

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

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

⁹⁸ I argue against the contrastive theory of meaning on pages 171-85 of my doctoral dissertation, http://etd.library.pitt.edu/ETD/available/etd-02122006-115848/unrestricted/d_finklestein_etd.pdf.

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

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

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

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

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

⁹⁹ *Investigations* § 217.

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

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

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

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

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

7. Conclusion

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

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

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

¹⁰⁴ *Investigations* § 1.

¹⁰⁵ *Id.* § 32.

¹⁰⁶ *Id.* at 230e.

¹⁰⁷ *Id.* at 223e.

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

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

¹⁰⁸ *Id.* at § 242.

¹⁰⁹ *Id.* at § 217; *id.* at §§ 211, 219.

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

¹¹¹ *Investigations* §§ 1, 32.

¹¹² *Id.* at 54(a).

¹¹³ *Id.* at §25; *see also id.* at 174e, 223e.

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

7.1 Wittgenstein’s Relevance to Jurisprudence

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

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

¹¹⁴ *Id.* at § 242.

¹¹⁵ *Id.* at § 81.

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

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

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

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

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

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

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

¹¹⁹ See generally RICHARD A. POSNER, HOW JUDGES THINK (2008).
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**THERAPEUTIC JURISPRUDENCE, THE DEATH PENALTY,
AND THE SIGNIFICANCE OF LIFE**¹

Edgardo Rotman²

Therapeutic jurisprudence is a vast international movement of legal scholars and practitioners aspiring to use law as a therapeutic agent.³ To accomplish this goal, therapeutic jurisprudence focuses on those many aspects of the life of the law that enhance and promote the well-being, as well as the physical and mental health of its participants. Therapeutic jurisprudence also concentrates on detecting the antitherapeutic effects of certain legal norms and institutions in order to expose them and to eventually eliminate or neutralize them through both preventive and reformative action.

The notion of human dignity figures prominently at the center of this therapeutic venture, demanding a minimum of respect for the humanity of defendants caught in the machinery of the criminal justice system and with the view to their successful return to society, however difficult such reintegration may be.⁴

¹ I thank Carolyn Pickard for her invaluable editorial suggestions, and Francisco A. Larios and Victoria Quintana for their intelligent and effective research assistance. I am also grateful to my sister Viviana Zelizer and my brother Leandro Rotman for their helpful comments.

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³ Bruce J. Winick defines therapeutic jurisprudence as the study of law’s healing potential. Bruce J. Winick, Applying the Law Therapeutically in Domestic Violence Cases, 69 UMKC L. REV 33, 33 (2000). On the basic meaning of therapeutic jurisprudence, see Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, in LAW IN A THERAPEUTIC KEY 645, 646 (David B. Wexler & Bruce J. Winick eds., 1996).

⁴ Javier Llobet Rodríguez, DERECHOS HUMANOS Y JUSTICIA PENAL 45 (Heredia: Poder Judicial, Depto. De Artes Gráficas, 2007) explains how the dignity of human being is the principle around which all human rights turn. Stephen J. Wermiel in *Law and Human Dignity: The Judicial Soul of Justice Brennan* indicated that “[t]he concept of human dignity has emerged in the United States in recent decades as an important theoretical and sometimes practical source of individual rights and liberties”, 7*Wm. & Mary Bill of Rts. J.* 223 (1998). This notion, associated with self-respect and autonomy, is also contained in art. 1 of the 1948 Universal Declaration of Human Rights and in the Preamble to the United Nations

Therapeutic jurisprudence has abstained from a clear-cut definition of the term therapeutic, allowing it to encompass a variety of legal areas in which the law can promote the well-being of its subjects.⁵ This overriding concern implies an affirmation of the value of human life. True, criminal punishment is supposed to affect to a certain degree the well-being and autonomy of the criminal offender as a member of society. This is carried out, however, in a manner consistent with the human dignity of the criminal offender and pursuing constructive social goals. None of these requirements are met in the execution of the death penalty.

While it is possible to serve a term of imprisonment in a dignified way, the execution of the death penalty suppresses the very existence of the noun in the expression “human dignity.” The Hungarian Constitutional Court in its 1990 decision declaring the unconstitutionality of capital punishment, held that on the basis of the Hungarian Constitution, “human life and human dignity formed an inseparable unity, having a greater value than other rights,” and thus being an absolute limitation to the criminal power of the State, which has “a primary responsibility to respect and protect.”⁶ The concurring opinion of the Hungarian Constitutional Court Judges Dr. Tamás Lábady and Dr. Ödön Tersztyánszky expressed, “human dignity is the elevating quality of our human existence and value: it is worthy of an unconditional respect, the honor of our human essence. It is an *a priori* value in the same way that life is, and it expresses the human dimension of life. Being a human and human dignity are inseparable from one another. Both are inalienable, immanent, essential properties of man. To be worthy of life means to be worthy of being a human person, and that is why human life and human dignity may in fact not be handled separately.”⁷

Furthermore, the goal of the death penalty is purely negative and does not improve either society or the individual.⁸ The death penalty is the antitherapeutic legal institution *par excellence*. It forecloses any therapeutic

Charter. Art. 1 of the German Constitution states that “[t]he dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority”. Further, Markus Dirk Dubber, in *Toward a Constitutional Law of Crime and Punishment*, has pointed out that the basic concept underlying the Eighth Amendment of the United States Constitution prohibiting cruel and unusual punishment is nothing less than the dignity of man, 55 *Hastings L.J.* 2004, 509, 514.

⁵ David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, in *LAW IN A THERAPEUTIC KEY* 811, 812 (David B. Wexler & Bruce J. Winick eds., 1996).

⁶ *Decision No. 23/1990: 31 October 1990 on Capital Punishment*, in *CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT* 118 (László Sólyom and Georg Brunner, eds., The University of Michigan Press, 2000).

⁷ *Id.* at 124

⁸ Regarding the false claims of beneficial effects on society, see chapter IV B. on page 689 and following of this article.

communication and excludes its subjects as enemies to be put to death,⁹ irrespective of their human predicament, without any deep reflection of the philosophical, religious, moral and psychological implications of cutting another human being's life short.

Cesare Beccaria formulated in 1764 for the first time the principles of modern criminal punishment in his book *On Crimes and Punishments*.¹⁰ His legal and political philosophy was animated by a double concern, the respect for human dignity and the pursuit of the "good life,"¹¹ which could be translated in therapeutic jurisprudential terms as "well-being." These reasons, again very close to the basic ideas of therapeutic jurisprudence, led him to revolt against the death penalty because he considered it useless, absurd and illegitimate (contrary to the social contract).¹² Moreover, when dealing with capital punishment, Beccaria expressed that "If the passions or the necessities of war have taught us how to shed human blood, the laws, which moderate the conduct of men, should not augment that cruel example, which is all the more baleful when a legal killing is applied with deliberation and formality."¹³

The death penalty's antitherapeutic nature becomes especially evident when physicians take part in the executions. Leading medical associations agree that their participation in the actual execution of the death penalty is against medical ethics. The American Medical Association, for instance, has introduced policies designed to discourage doctors from participating in executions. Other examples include Amnesty International and the World Medical Association. The American College of Physicians, together with Human Rights Watch, the National Coalition to Abolition the Death Penalty, and Physicians for Human Rights, has published a thorough report explaining the importance of the ethical prohibition against physician involvement in executions.¹⁴

⁹ Manuel Cancio Meliá, *Pena de Muerte: Paroxismo del "derecho penal" del enemigo*, in ANUARIO DE DERECHO PENAL 2007: PENA DE MUERTE Y POLÍTICA CRIMINAL (2007).

¹⁰ CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS* (University of Toronto Press 2008) (1764).

¹¹ Alvaro Pires, *Beccaria, l'utilitarisme et la rationalité pénale moderne*, in HISTOIRE DES SAVOIRS SUR LE CRIME ET LA PEINE. TOME II : LA RATIONALITE PENALE ET LA NAISSANCE DE LA CRIMINOLOGIE 83-143 (Christian Debuyst, Françoise Digneffe, Jean Michel Labadie et Alvaro Pires, eds., Les Presses de l'Université de Montréal, Les Presses de l'Université d'Ottawa, De Boeck Université 1998).

¹² *Id.* at 25.

¹³ BECCARIA, *supra* note 126, at 55

¹⁴ BREATH OF TRUST: PHYSICIAN PARTICIPATION IN EXECUTIONS IN THE UNITED STATES (The American College of Physicians; Human Rights Watch; National Coalition to Abolish the Death Penalty; Physicians for Human Rights 1994).

This paper will contrast the destructive nature of the death penalty with a therapeutic orientation in the field of criminal punishment. Furthermore, it will refute all therapeutic claims from capital punishment partisans.

I. Irreparable elimination of life versus therapeutic approach in criminal sentencing

The final and irreparable nature of imposed death contrasts with the flexibility, creativity, and life enhancing nature of a therapeutic approach in criminal sentencing. This contrast is even sharper if one considers that the rigid decision imposing the death penalty may constitute an irreparable mistake. Given that human fallibility is an unavoidable fact, it is not possible to assume with absolute certainty that the death penalty is the result of a fair and just criminal process. In this respect Victor Hugo affirmed, “an irreparable penalty presupposes an infallible jury.”¹⁵ The new developments in DNA evidence have amply demonstrated the ever-present possibility of judicial error in this matter. When the South African Constitutional Court decided about the unconstitutionality of the death penalty in 1995, it expressed: “a level of arbitrariness and the possibility of mistake that might be inescapable, and therefore tolerable in relation to other forms of punishment, burst the parameters of constitutionality when they impact on the deliberate taking of life.”¹⁶

In addition to fallibility, arbitrariness and proneness to abuse are also part of human nature. One cannot therefore presume a fair and just criminal process. Furthermore, such a presumption would become irrevocable after the death of the criminal defendant.

II. The death penalty contravenes the therapeutic mandate of Hippocrates

The Hippocratic principle of first doing no harm¹⁷ is not fully applicable in a punitive situation because legal punishment is supposed to cause some kind of harm. However, a corollary of this principle is to cause the least possible harm, which would be equivalent to applying the least intrusive or the least invasive treatment when there are others available. This idea constitutes the core of modern enlightened criminal law initiated by Cesare Beccaria and is

¹⁵ Cited by M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 621 (Oxford University Press 5th ed. 2007).

¹⁶ S. Makwanyane and Another, 1995 (3) SA 391, 511.

¹⁷ STEVEN H. MILES, THE HIPPOCRATIC OATH AND THE ETHICS OF MEDICINE 143-144 (University Press 2004).

generally known as the principle of *ultima ratio* or of minimal intervention.¹⁸ On this basis, Hugo Bedau concludes that the death penalty ought to be eliminated.¹⁹

The death penalty is the most harmful punishment, socially and individually. From a social viewpoint, it transforms countries which allow it into societies of executioners creating a flawed model for future behavior and acknowledging failure to use methods different from the ones employed by the worst criminals. From an individual viewpoint, except in cases of euthanasia, causing the involuntary death of another is not anymore humane than torture. First, even though in itself the act of executing the death penalty may apparently be painless in certain cases²⁰, the mere expectation of being deprived of one's life is normally extremely painful and inhumane. Part of this inhumanity is the absolute denial of redemption or rehabilitation with all its anti-therapeutic connotations. The family and friends of the convicted also experience considerable more pain than with other forms of punishment because the death penalty eliminates all hope.

The death penalty also differs from the suffering experienced in other forms of punishment by its sharp contrast between the executioner's absolute powers and the condemned's total passivity.²¹ Being completely at the mercy of their executor is a key characteristic of torture victims,²² which has been totally eliminated from the catalogue of punishments in democratic legal systems, as well as in human rights international conventions. The self becomes "not a locus of activity, but rather a point of pure passivity, a vanishing point defined by the direction of the outside forces that have taken on what had been his active powers." ²³ This also makes evident that torture is inherent in the death penalty.

The need to look for a less invasive alternative has led a majority of countries to abandon the death penalty to the point that by December of 2007 there were 91 completely abolitionist countries in the world while another 10 countries had abolished the death penalty only for ordinary

¹⁸ JAVIER LLOBET RODRIQUEZ, CESARE BECCARIA Y EL DERECHO PENAL DE HOY 170 (Editorial Jurídica Continental 2d ed. 2005).

¹⁹ HUGO ADAM BEDAU & PAUL G. CASSELL, DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT 32 (Oxford University Press, 2004).

²⁰ About the dubious medicalization of the death penalty through the lethal injection see Deborah W. Denno, The Lethal Injection Quandary: How medicine has dismantled the death penalty, 76 Fordham L. Rev. 1 (2007).

²¹ HUGO BEDAU, DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT 124 (Northeastern University Press 1987).

²² David Sussman, Defining Torture, 37 Case W. Res. J. Int'l L. 225.

²³ Id. at 229.

crimes. On the other hand, 44 countries that retain the death penalty in law may be regarded as abolitionists *de facto* on the grounds that no executions have been carried out for at least 10 years or an official moratorium was in place on December 31, 2007. There are only 51 actively retentionist countries.²⁴

The European Court of Human Rights in the *Soering* case²⁵ considered that the long exposure to the death row in Virginia amounted to a violation of Article 3 of the European Convention of Human Rights, which prohibits torture and other inhumane or degrading treatment.²⁶ Moreover, it is not necessary to spend a long term in death row to consider the death penalty inhuman and degrading. That is why the death penalty *per se* has been declared unconstitutional in the Republic of South Africa²⁷ and in Hungary. The decision of the Hungarian Constitutional Court was preceded by an opinion of the Minister of Justice considering capital punishment to be unnecessary and inhuman and not justifiable on morals or utilitarian grounds. A crucial part of the decision was finding that right to human life and human dignity are core human rights that form an indivisible whole. The decision of the South African Constitutional Court was based on the circumstance that the death penalty puts an end not only to the right to life itself but also to other personal rights. Another basic argument was the cruelty of the death row expectations. It was important for the decision that the South African constitution recognizes an unqualified right to life. This type of express provision was not considered necessary by the concurring opinion of Judge De Meyer in the *Soering* case, who pointed out that capital punishment “does not reflect the contemporary situation and is now overridden by the development of legal conscience and practice.”²⁸ The totality of the European countries has adhered to protocol 6 of the European Convention of Human Rights, which contains an absolute prohibition of the death penalty.²⁹ Protocol 13 to the Convention took the

²⁴ This list was obtained from ROGER HOOD & CAROLYNE HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 404-413 (Oxford University Press 2008).

²⁵ *Soering v. United Kingdom*, 161 Eur. Ct. H. R. (ser. A) (1989).

²⁶ In Italy where Article 27 of the Constitution prohibits the death penalty, the Constitutional Court decided that the clause of the extradition treaty between the United States and Italy, giving the Minister of Justice discretionary power to decide on the basis of assurances given by the requesting state, was unconstitutional (*Gazzetta Ufficiale, Prima Serie Speciale [Official Gazzette]*, 27, 03.07.1996 / h) Codices (Italian)).

²⁷ S. Makwanyane and Another, 1995 (3) SA 391.

²⁸ Judge De Meyer alludes to international human rights conventions that “clearly reflect the evolution of legal conscience and practice towards the universal abolition of the death penalty.” *Soering*, 161 Eur. Ct. H. R. at 51.

²⁹ All member states of the Council of Europe have signed and ratified Protocol 6, with the exception of Russia who has signed but not yet ratified.

final step: abolishing the death penalty under all circumstances without the possibility of reservation from the parties to the Protocol. In addition, the Lithuanian Constitutional Court, like the European Court of Human Rights, “has deemed the death penalty to be a form of inhuman and degrading treatment.”³⁰ Similarly, both the Lithuanian and Albanian Constitutional Courts have decided against the constitutionality of legislation that permitted the death penalty because it represents an affront to human dignity. The Ukrainian Constitutional Court has added the possibility of judicial error to the argument based on the principle of human dignity.³¹

Although as a general proposition the death penalty has not been totally banished from major international human rights instruments, it is important to point out that these are living instruments which must be interpreted in the light of present day conditions. In the case of Article 3 of the European Convention of Human Rights, the European Court of Human Rights recognized that it “cannot but be influenced by the development of commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.”³² In Western Europe, for example, there is a virtual consensus that the death penalty is, under current circumstances, no longer consistent with regional standards of justice.

Judge Trechsel’s dissenting opinion in the *Soering* decision sharply identified the inhuman nature and thus antitherapeutic essence of the death penalty with the following words: “It may seem surprising that the Convention prohibits inhuman and degrading treatment but permits capital punishment which may be regarded as a clear example of such treatment.”³³

III. The therapeutic value of fairness in sentencing is incompatible with the death penalty

A. Fairness and uncertainty in the death penalty

Fairness in sentencing tends to reduce individual and social conflict and contributes to the awakening of a sense of social responsibility in the criminal offender. A fair sentence is therefore a therapeutic sentence. A fair sentence favors the process of reconciliation between the lawbreaker and the

³⁰ BERTRAND MATHIEU, THE RIGHT TO LIFE 55 (Council of Europe 2006).

³¹ *Id.* at 55. See also PATRICK CAPPS, HUMAN DIGNITY AND THE FOUNDATION OF INTERNATIONAL LAW 106 (Hart Publishing 2009).

³² *Soering*, 161 Eur. Ct. H. R. at 40.

³³ *Id.* at 75.

community, while an unfair sentence is bound to generate antisocial reactions.³⁴

The death penalty's uncertainty makes it intrinsically unfair. We do not know "what dreams may come, when we have shuffled off this mortal coil."³⁵ We cannot understand the real extent of the death penalty because it includes an element of great uncertainty, a premature passage to the "undiscovered country from whose bounds no traveler returns."³⁶ The full consequences of killing a human being, both for the killer and for the killed, remain a mystery. The basic principle of modern democratic justice is **nullum crimen, nulla poena, sine lege**, that is no crime and no punishment without a previous law. This principle has developed to the point of prohibiting not only *ex post facto* punishments, but also those that are uncertain and indeterminate. The ignorance of what lies beyond death makes the death penalty absolutely uncertain and therefore antitherapeutic.

B. Fairness and proportionality in the death penalty

The antitherapeutic unfairness of the death penalty is not diminished by the need to impose extreme punitive responses to acts of extreme criminality. The existence of life imprisonment as ultimate penalty accomplishes this function and makes the atrocity involved in the deliberate killing of other human beings unnecessary. The very idea of imprisonment was introduced by the Quakers of Pennsylvania as a reaction against gruesome corporal punishment and the widespread use of the death penalty for a great majority of offenses.³⁷

Homicide does not require necessarily the death penalty as a fair punitive response. Proportionality in sentencing does not mean direct equivalence between the punishment and the crime, such as in the absurd examples of raping the rapist or stealing from the thief. Imprisonment presents a whole gamut of functional equivalents to the magnitude of the crime in order to justly compensate the offender's culpability. The South African decision about the unconstitutionality of the death penalty expressed that "the right to life is not subject to incremental invasion. Life cannot be diminished for an hour, or a day, or 'for life.' While its enjoyment can be qualified, its existence cannot. Death is totally irreversible. Just as there are no degrees of life, so there are no degrees of death."³⁸ Albert Camus also underscored that

³⁴ EDGARDO ROTMAN, *BEYOND PUNISHMENT: A NEW VIEW ON THE REHABILITATION OF CRIMINAL OFFENDERS* 15 (Greenwood Press, Inc. 1990).

³⁵ Hamlet, Act III, sc. I.

³⁶ Idem.

³⁷ Rotman, *supra* note 150 at 33.

³⁸ S. Makwanyane and Another, 1995 (3) SA 391, 511.

death has no degrees or probabilities, and that both culpability and the body of the executed enter into a definitive rigidity.³⁹

Furthermore, given the nature of international crimes such as war crimes, genocide and crimes against humanity, Robert Sloan indicates that proportionality based on the *lex talionis* principle “would apparently require punishments that contemporary human rights law prohibits.”⁴⁰ He consequently indicates that since no punishment from a crude talionic perspective can fit serious human rights atrocities, justice only demands that more serious crimes should receive stronger disapproval than the less serious ones.⁴¹

Indeed, in the field of international criminal law no punishment can fit the most horrendous international crimes such as slaughter of innocent civilians, systematic rape and genocide. Again, Sloane points out that for purposes of proportionality, the gravity of the harm seldom offers “a particularly helpful metric” as opposed to the individual circumstances of the convicted person.⁴²

Leon Shaskolsky Sheleff has raised the issue of whether there is a certain class of extreme acts that demand capital punishment in the name of the very principle of the sanctity of life that is generally invoked to abolish it. He gives the example of the war criminals convicted during the Nuremberg trials, where he thinks the principle of proportionality should lead to the most severe penalty, which could not be conceived as less than death.⁴³ These ideas have changed through time, however.

The criminalization of the core international crimes brought about a change of paradigm, a moral revolution in which the value of human life and dignity was placed above ideas and ideologies that justified mass murder and other atrocities. The existing impunity of major atrocities such as crimes against humanity, genocide and war crimes ended with the Nuremberg trials and through the evolution of global justice that led to the creation of the International Criminal Court. This evolution culminated with a total rejection of the death penalty, even for the worst offenders, setting up an

³⁹ ALBERT CAMUS in REFLEXIONS SUR LA GUILLOTINE 25 (Editions Gallimard 2002) (1957)

⁴⁰ Robert Sloane, The Expressive Capacity of International Punishment, 43 Stan. J. Int'l L. 53 (2007).

⁴¹ Id.

⁴² Id. at 52.

⁴³ LEON SHASKOLSKY SHELEFF, ULTIMATE PENALTIES: CAPITAL PUNISHMENT, LIFE IMPRISONMENT, PHYSICAL TORTURE 16-17 (The Ohio State University Press 1987).

influential standard of civilized punishment that may eventually persuade countries that still maintain the death penalty to abolish it.⁴⁴

IV. Rebuttal of the therapeutic effect of the death penalty

A. The death penalty does not save lives.

Those who affirm the deterrent effect of the death penalty attempt to justify the death penalty as a lifesaving mechanism supposedly therapeutic. The deterrent effects of capital punishment are, however, very flimsy and uncertain. There is a classic example of the non-deterrent nature of the death penalty: the pickpockets were more active than ever in the crowds watching the public execution of convicted pickpockets.⁴⁵

Beccaria from a utilitarian viewpoint considered that permanent penal servitude was much more deterrent than the death penalty.⁴⁶

Jack P. Gibbs, prominent expert in the field of deterrence, concluded in 1981 that there was no compelling evidence to prove or disprove the effects of general deterrence; and Elliot Curry referred to recent research pointing at informal sanctions as more deterrent than formal ones.⁴⁷ Hans Göran Franck, in agreement with other long-time experts in the field, notes that most murderers generally do not retain the ability to think rationally at the time of their crimes, and those who carry out well-planned premeditated murders usually believe that they have a chance of getting away with it. Regarding fanatics, political and ideological murderers, they are even less likely to be deterred by the risk of the death penalty. Franck cites a United Nations research group concluding that the death penalty did not have a deterrent effect on drug traffickers.⁴⁸ Neither the preventive effectiveness of

⁴⁴ Edgardo Rotman, *The Influence of International Criminal Law on the Advancement of Prisoners' Rights*, in J.P. TAK & M. JENDLY, *PRISON POLICY AND PRISONERS' RIGHTS* 131-137 (Wolf Legal Publishers: Nijmegen, The Netherlands, 2008)

⁴⁵ Albert Camus refers to a book by Koestler that mentions that at the time in which thieves were executed in England, other thieves exercised their talents within the crowd that surrounded the scaffold. See CAMUS, *supra* note 155, at 20.

⁴⁶ BECCARIA, *supra* note 126, at 53.

⁴⁷ ELLIOT CURRIE, *CONFRONTING CRIME: AN AMERICAN CHALLENGE* 57-58 (Pantheon, 1985). See also EDGARDO ROTMAN, *LEGAL ASPECTS OF CRIME PREVENTION* 33-34 (International Penal and Penitentiary Foundation 1998).

⁴⁸ HANS GÖRAN FRANCK, *THE BARBARIC PUNISHMENT: ABOLISHING THE DEATH PENALTY* 30 (Kluwer Law International 2003).

the death penalty regarding terrorist crimes has been challenged by empirical research in Europe.⁴⁹

In January 2005, Jeffrey Fagan, Professor of Law and Public Health at Columbia Law School, a specialist in econometrics and statistics, testified during hearings on the “Future of Capital Punishment in the State of New York” that studies claiming that executions reduce murders are “fraught with technical and conceptual errors: inappropriate measures of statistical analysis, failures to consider all the relevant factors that drive murder rates, missing data on key variables in key states, the tyranny of a few outlier states and years, and the absence of any direct test of deterrence.”⁵⁰ In a scientific report sponsored by the United States Department of Justice in December 2006, the researchers concluded, “that there is little empirical evidence in favor of the deterrence hypothesis.”⁵¹ In 1988, another report sponsored by the United Nations found no scientific evidence that the death penalty had a higher deterrent effect than lifetime prison.⁵² Other studies show that the use of capital punishment has contributed to a rise in crime, attributing this increase to a “brutalization effect,” similar to that triggered by other violent events.⁵³ One of the greatest criminologists and jurists of all time, Luis Jiménez de Asúa, relying on Freud’s psychoanalytical theories, explained that often feelings of guilt impel murderers who execute their crimes with a subconscious hope of receiving the death penalty.⁵⁴

B. The death penalty does not reinforce social bonds

It is necessary here to address false claims related to Durkheim’s theory that the death penalty would supposedly have therapeutic effects on society by reinforcing social bonds.⁵⁵ Durkheim’s theory of punishment is based on the idea of a collective or common conscience, that is, on the sum of beliefs and

⁴⁹ See studies quoted by Meliá, *supra* note 125, at 77. Meliá cites Ugaz Sanchez Moreno’s assertions that the total lack of relation between the existence of the death penalty and the reduction of crime is the only scientifically and universally demonstrated fact.

⁵⁰ Deterrence and the Death Penalty: A Critical Review of New Evidence: Hearings on the Future of Capital Punishment in the State of New York Testimony to the New York State Assembly Standing Committee on Judiciary and Assembly Standing Committee on Correction, (January 21, 2005) (statement of Jeffrey Fagan, Colum. L. Sch.).

⁵¹ Ethan Cohen-Cole et al., *Reevaluating the Deterrent Effect of Capital Punishment: Model and Date Uncertainty*, in U.S. DEPARTMENT OF JUSTICE, Award No. 2005-IJ-CX-0020.

⁵² HANS GÖRAN FRANCK, *THE BARBARIC PUNISHMENT: ABOLISHING THE DEATH PENALTY* 33 (Kluwer Law International 2003).

⁵³ *Id.* at 33.

⁵⁴ JIMÉNEZ DE ASÚA, *PSICOANÁLISIS CRIMINAL* 240 (Ediciones Depalma 6th ed. 1982).

⁵⁵ Mariangela Travagliati, *Èmile Durkheim e la pena de morte*, in *STUDI DI SOCIOLOGIA* (Sept. – Dec. 2002).

feelings held in common by a social group.⁵⁶ According to this theory, the function of punishment is not only to vindicate the collective conscience injured by the criminal offense, but also to reaffirm the social bonds and feelings of those who have not transgressed social normative codes.⁵⁷ The death penalty would thus be explained by the need to maintain social cohesion. From this proposition, it is possible to draw a false claim that the death penalty is in a social sense therapeutic. The death penalty, in this view, symbolically asserts social values and communicates them emphatically to social actors who have not committed crimes.⁵⁸ This argument relies on Durkheim's idea that "anything that offends or violates the common conscience threatens the solidarity - the very existence - of society,"⁵⁹ and his conclusion that punishment serves to restore and reconstitute social unity.⁶⁰

State imposed cohesion through the imposition of the death penalty would make sense, however, only in primitive forms of society, based on the Durkheimian category of "mechanical solidarity." In these societies individual freedom is suppressed by homogeneous collective thought, that is as Suzanne Keller puts it: "an externally mediated and orchestrated cohesion leading to a collective like-mindedness and lack of individuation."⁶¹ This is also true for authoritarian societies, in which the individual is trampled for the sake of a political or religious ideology, and where the fear to be executed is the key factor to compel cohesion. On the contrary, in more evolved and complex forms of society which allow more individual freedom, reflecting what Durkheim calls "organic solidarity," social cohesion is based on a sense of personal attachment and reciprocal obligations⁶² rather than on forced compliance or the reassurance obtained from the symbolic imposition of capital punishment.

We should therefore distinguish between a genuine togetherness, what Ferdinand Tonnies characterized as "natural cohesion and empathic social bonds,"⁶³ from the coercive and artificial imposition of order through the widespread imposition of the death penalty. Before affirming that unpunished crime breaches the social codes, we must question the

⁵⁶ EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 96 (The Free Press 1964)

⁵⁷ Travagliati, *supra* note 171, at 463.

⁵⁸ *Id.* at 465.

⁵⁹ IRVING M. ZEITLIN, *IDEOLOGY AND THE DEVELOPMENT OF SOCIOLOGICAL THEORY* 264 (Prentice-Hall 4th ed. 1990).

⁶⁰ *Id.*

⁶¹ SUZANNE KELLER, *COMMUNITY: PURSUING THE DREAM, LIVING THE REALITY* 43 (Princeton University Press 2003).

⁶² *Id.* at 43.

⁶³ *Id.* at 44.

underlying assumption of a real social cohesion. In fact, we find a prevailing lack of togetherness in today's societies. Crime, therefore, does not destroy an inexistent social cohesion, but it is often the result of the absence of a sense of togetherness. Crime as a consequence of lack of togetherness is related to a process of general dissolution of old normative codes in many areas of human activities, which insinuates itself in the nineteenth century and gradually strengthened since then. The degree of social cohesion derived from the symbolic application of the death penalty is fragile and superficial, when not totally negligible. It is extremely dubious that the death penalty has any therapeutic effect either on individuals or on society as a whole.

In any event, it is questionable that the fleeting moments of solidarity against the perpetrators of horrendous crimes can in any way reinforce social bonds at a deeper level or have any therapeutic effect whatsoever over the individuals or the society as a whole.

C. The death penalty is not therapeutic for the victim's family

Criminal sanctions should be based on the degree of the culpability of the offender and not on its impact on the victim's family. The effects of the execution of the death penalty on the family of the victim have been analyzed in depth by Bruce Winick.⁶⁴ Winick explained that in the United States a capital sentence, far from giving closure to the family's grief and anger, typically marks the beginning of a lengthy process, in which family wounds continue to fester. It is true, as he underscores, that the murder of loved ones inevitably provokes shock, anguish, anger and depression. But this is not alleviated by the pre-trial process, the trial itself, and the penalty phase, which Winick characterizes as an unsatisfying appearance. The lengthy legal process reactivates the feelings of panic and anxiety that they experienced at the time of crime. Rather than putting an end to this unfortunate chapter in their lives, the capital process can prolong their nightmare indefinitely. If and when an execution actually occurs, it frequently does not bring the victim's survivors the relief they were seeking or put an end to the long ordeal. Winick concludes that it may actually be more therapeutic for the family if the case is not treated as a capital case.

The mother of a murdered daughter expressed: "When life without parole is imposed upon a convicted killer, it means that! There are no automatic appeals as in death penalty cases. There are no excessive costs and years of new trials and sentencing for the victim's family. It is over! And,

⁶⁴ Bruce Winick, *Determining When Severe Mental Illness Should Disqualify a Defendant From Capital Punishment*, in MENTAL DISORDER AND CRIMINAL LAW: RESPONSIBILITY, PUNISHMENT AND COMPETENCE 45-78 (Robert Shopp et al. eds., 2009).

incarceration for life without parole is far less costly. ...For most of us, the word “closure” is offensive and inappropriate. For a family whose loved one has been taken from them without dignity, there is a giant hole in their lives that can never be filled. It is a false expectation to believe that State-sanctioned killing will fill that void.”⁶⁵ Another mother of a murdered daughter asks herself: “Is it appropriate for us to take a life in order to show value for another one? Must we continue to extend the circle of death and grief in order to say that murder...is simply a value that we cannot accept? ...Somewhere, sometime, the violence has to stop- and I am content to have it stop with me.”⁶⁶

From a therapeutic viewpoint, the emotional and psychological well-being of surviving family members of homicide victims “is more likely to benefit in the long run through services and direct assistance for coping with their grief. There are more constructive ways of confronting grief than holding out hope that the loved one’s killer will be put to death by the State. In that vein, emphasis should be placed on policies and programs that constructively assist surviving family members in coping with the murder of a loved one.”⁶⁷

V. The death penalty and the significance of life

The death penalty should be examined not only from the perspective of the executed but also from the standpoint of those legislators who adopt the death penalty and the judges who have to apply it. These representatives of state power, their constituencies who accept and promote the death penalty, as well as all the protagonists of the practice of the death penalty, unwittingly constitute a society of executioners. Such a momentous decision should give pause to deep reflection on the significance and meaning of life. Most religious traditions have postulated the sacredness or sanctity of human life.⁶⁸ Although this argument cannot be generalized because many do not

⁶⁵ Stanley and Phyllis Rosebluth, *Accidental Death is Fate, Murder is Pure Evil*, in James R. Acker & David R Karp, WOUNDS THAT DO NOT BIND 124 (Carolina Academic Press 2006).

⁶⁶ Linda White, *A Tiger by the Tail: The Mother of a Murder Victim Grapples with the Death Penalty*, in James R. Acker & David R Karp, WOUNDS THAT DO NOT BIND 66 (Carolina Academic Press 2006).

⁶⁷ Charles S. Lanier and Beau Breslin, *Extinguishing the Victims’ Payne or Acquiescing to the “Demon of Error”: Confronting the Role of Victims in Capital Clemency Proceedings*, in James R. Acker & David R Karp, WOUNDS THAT DO NOT BIND 195 (Carolina Academic Press 2006).

⁶⁸ NGAIRE NAFFINE, LAW’S MEANING OF LIFE: PHILOSOPHY, RELIGION, DARWIN AND THE LEGAL PERSON 102 (Hart Publishing 2009) affirms that with “the flourishing of the human rights movement in the second half of the twentieth century and the articulation of human rights in a variety of international documents, there has been a fortification of

share such religious views, it should nevertheless allow for sustained reflection about the enormity of the deliberate killing of human beings in cold-blood implied by the death penalty, and the extent to which the death penalty constitutes an acknowledgement of the failure of dialogue which is a basic trait of humanness. This inhumanity, present in many murderers, is shared by the judicial, administrative or legislative executioner. In this respect, Albert Camus said in 1957, “an execution is not simply death. It is just as different from the deprivation of life as a concentration camp is from prison. It adds to death a premeditated arrangement known to the future victim, a process that is itself a source of moral sufferings more terrible than death. Capital punishment is the most premeditated of murders, to which no criminal’s deed, however calculated, can be compared. For there to be an equivalency, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life.”⁶⁹

A reflective attitude regarding the application of the death penalty should lead to an inquiry into the relationship of the individual life of criminals subject to capital punishment and life in a larger sense, that is, life as the source of all value and meaning, also present in the worst offenders. The exploration into this deeper notion of life includes not only its biological and social aspects but also its cosmic or universal dimension. An inquiry into the death penalty impelled by therapeutic concerns leads to questioning whether one can destroy life without some degree of ethical concern, not even considering religious arguments about its sacredness.

The death penalty aims at the particular life of convicted offenders, as they actually lived it, that is, a narrow, conflicted existence, shaped and constrained by a series of conditioning influences of social, environmental and biological nature. It thus assumes that it is eliminating a petty notion of pure individual life: the “brief candle,” the “walking shadow,” of the “poor player that struts and frets its hour upon the stage and then is heard no more.”⁷⁰ A deeper inquiry into this matter should address the question whether besides the particular life of the individual offender the death penalty unknowingly constitutes a metaphysical negation of life⁷¹ as source

the tendency among lawyers to ascribe inherent (and necessarily pre-legal) spiritual value to human beings.” She also cites bioethicist Leon R. Kass for the proposition that the terms “sanctity of life” and “human dignity” are mutually implicated, as inseparable as the concave and the convex.

⁶⁹ CAMUS, *supra* note 155, at 30

⁷⁰ Macbeth, Act V, sc. v.

⁷¹ To the metaphysical negation of the life of the executed one can oppose the dialectical negation that Hegel characterized as the negation of the negation. A metaphysical

of value and meaning, sacred to many, unfathomable to all. This quest addresses the possibility to perceive life in its larger sense and whether this understanding of the hidden dimension of life would eventually help to stop capital punishment.

In this inquiry, one should also examine the mind of the executioner in a broad sense, that is the legislator, the judge or the voter, and determine to what extent they have dehumanized, demonized, and ultimately excluded certain criminal offenders from the human community. This is the result of an ideology that works under the illusion that these particular criminal offenders should no longer be treated as persons with whom to communicate but as enemies who have to be destroyed, surrendering thus to the illusion of security above and beyond humanity and justice⁷²

The recognition of human life's value and significance is often contingent on each nation's political structure. In authoritarian states, the overriding value protected by their criminal legislation is obedience to the state to which other values or interests are subordinate. In the criminal codes of totalitarian states the most serious crimes are against the state. The subordination of the values of life to the integrity of state power explains the frequent use of the death penalty in such societies. Even crimes against the person are viewed as crimes against the public administration. On the other hand, in liberal democracies heirs of the political traditions of the Enlightenment, the supreme value is the individual human being. The consequent emphasis on human life resulted in a dramatic rejection of the death penalty.

Sadly legislators are seldom aware of the complexity of human violence and aggression based on powerful biological, sociological and anthropological conditionings. The lack of awareness of the origin, dynamics and ramifications of human violence has profound consequences. The oversimplification of human violence through the apparent solution of capital punishment not only reveals criminological ignorance but also the fundamental contradiction that underlies attempting to control violence and murder through the violence of the death penalty.

negation would be the destruction of a grain of wheat, while the dialectical one would be to plant it, that is, preserving it while transcending it (*Aufhebung*). Similarly in the field of criminal punishment, the dialectical negation of the criminal offender would be represented by the rehabilitative project, as opposed to his/her elimination. See Edgardo Rotman, *L'Évolution de la Pensée Juridique sur le but de la Sanction Pénale*, in *Aspects Nouveaux de la Pensée Juridique, Recueil d'Études en Hommage à Marc Ancel* 163 (Pedone, Paris, 1975).

⁷² See Edgardo Rotman, *La Crise de la Politique Criminelle Humaniste à l'Aube du Vingt-et-unième Siècle* in G. KELLENS AND M. DANTINNE, *ONG SCIENTIFIQUES ET POLITIQUES CRIMINELLES* 89-94 (Wolf Legal Publishers: Nijmegen, The Netherlands, 2009).