

# Book Reviews

## Law and Metaphysics

*Wittgenstein on Rules and Private Language.* By Saul Kripke.  
Cambridge, Harvard University Press, 1982. Pp. x, 150. \$15.00.

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There have always been lawyers deeply attracted to philosophical discourse. It is a phenomenon at least as old as Cicero,<sup>1</sup> and extends to the contemporary legal academic in search of an appropriate “fancy citation.”<sup>2</sup> Such lawyers look to philosophy as a way of connecting law with broader questions of morality and truth. They tend to view at least some legal problems as manifestations of more fundamental philosophical questions. They may even look for insight into specific legal issues in the works of the philosophical masters.

There is, however, a countertendency among many lawyers, who view philosophy with attitudes ranging from indifference to hostility. These lawyers emphasize the practical wisdom deeply embedded in the common law tradition, extol the virtues of “experience” over “logic,” and stress the need for lawyers and judges to provide concrete solutions to real problems.<sup>3</sup> Philosophy, it is argued, with its endless debates over first principles and stratospheric levels of abstraction, can provide little insight into the problems faced by real judges and lawyers. This view of law and

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1. “Atticus: You believe, then, that the fundamentals of justice should be deduced not from a praetor’s proclamation, as many now assert, nor from the Twelve Tables of the Law, as our forefathers maintained, but from the innermost depths of philosophy?” 1 CICERO, ON THE LAWS 225 (I. Raubitschek & A. Raubitschek trans. 1948).

2. Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1217 n.51 (1981).

3. O.W. HOLMES, THE COMMON LAW 1 (1881).

philosophy also has a long and honorable history. Its proponents have often been those, like Holmes, with great familiarity and respect for the philosophical tradition.<sup>4</sup>

This essay is a review of a work of philosophy, Saul Kripke's *Wittgenstein on Rules and Private Language*. The book does not deal with law, or even philosophy of law, but would probably be classified as a work on philosophy of language and theories of meaning. Yet it is not only a powerful and provocative book, but it can be of great interest and use to lawyers concerned with the nature of legal knowledge.

Although Kripke's book was not written for lawyers, this review is, and must therefore deal with the two attitudes towards philosophy sketched at the beginning of this essay. Presumably, lawyers who are comfortable applying philosophical concepts to legal issues should be highly receptive to a review which commends a work of contemporary philosophy as providing insight into certain issues of legal theory. As I hope to show, the insights of such philosophically oriented lawyers as to the nature of legal interpretation and the indeterminacy of legal discourse have brought about an academic environment in which books like Kripke's are seen as relevant to lawyers. Yet it is the other category of lawyers, those who emphasize the concrete and autonomous aspects of law, who, I believe, will ultimately find Kripke's work most valuable. For them I hope to show that one of the book's most important contributions is to clarify the extent to which legal discourse, despite its indeterminacy, can constitute an independent and important field of study.

This review has two parts. The first briefly considers the relation between law and philosophy, with particular emphasis on the realist period, and describes how the realists and their predecessors used philosophy to develop and defend their critique of formalism. This part closes with an argument that the reemergence of doubts about current modes of legal explanation and methods of interpretation has created renewed interest in philosophy among lawyers. The second part considers some of the main lines of argument in *Wittgenstein on Rules and Private Language* and

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4. *Id.* It may be rightly observed that Holmes' predilection for experience over logic was itself a reflection of his philosophical position. I am indebted to Professor Shupack for a better and more venerable expression of this view: Chief Justice Coke's response to James I's assertion, based on a claim of philosophical expertise, that as king he had the power to remove cases from the law courts and try them personally.

[T]he King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me [Coke] that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that man can attain to the cognizance of it . . . ."

12 Coke Rep. 64, 65, reprinted in 77 Eng. Rep. 1342, 1343 (1907).

the impact of Kripke's book on current debates about indeterminacy and the possibility of authoritative interpretation in law.

I.

This section begins with an expository technique beloved of both lawyers and philosophers: the analytic distinction. Philosophical writing about law may be roughly divided into two categories. One seeks to understand the interrelationship of legal and moral rules, either by trying to derive morally valid legal rules from broader ethical precepts,<sup>5</sup> or by presenting an account of law which differentiates between the normative force of legal and ethical rules.<sup>6</sup> We can describe all this work under the broad rubric used by Felix Cohen and Morris Raphael Cohen: "law and ethics."<sup>7</sup>

The second category of philosophical writing about law is not centrally concerned with the relation between law and morality, but with the status of law as an independent and valid field of study. Works in this category discuss the ability of legal study to yield valid and accurate knowledge of something called "law," the extent to which that study should involve deductive reasoning, empirical investigation, or some combination thereof, as well as the fundamental reality or unreality of legal concepts. Cohen and Cohen also provide a name for this category of work: "law and metaphysics."<sup>8</sup>

Most lawyers, when they think of legal philosophy at all, tend to equate it with "law and ethics." Most of the celebrated work of recent years, such as that of Rawls,<sup>9</sup> Nozick<sup>10</sup> and Dworkin,<sup>11</sup> falls in that cate-

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5. See I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* (J. Ladd trans. 1965) (part one of I. KANT, *THE METAPHYSICS OF MORALS* (1797)); PLATO, *THE LAWS*.

6. See H.L.A. HART, *THE CONCEPT OF LAW* 151-207 (1961); H. KELSEN, *GENERAL THEORY OF LAW AND STATE* (1945); A. ROSS, *ON LAW AND JUSTICE* (1959). It may strike some as odd to classify these positivists as engaging in "law and ethics" scholarship, when a better account of their scholarly program might be "law and not ethics." Yet undeniably, a significant portion of their scholarly work probes the interrelationship of legal and ethical concepts in their attempt to show that the validity of legal rules does not depend on their ethical content. H.L.A. HART, *supra*, at 181-207; A. ROSS, *supra*, at 29-75 (especially 59-64).

7. M. COHEN & F. COHEN, *READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY* 489 (P. Shuchman 2d ed. 1979).

8. *Id.* at 557. Defining "metaphysics" is a notoriously fruitless endeavor, but the Cohens offered at least three candidates in the introductory note on "law and metaphysics" in the first edition of their book: "the effort of a blind man in a dark room to find a black cat that isn't there," "the stubborn effort to think clearly," and "the bringing to consciousness of what is assumed in all legal argument." M. COHEN & F. COHEN, *READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY* 665 (1st ed. 1951). All three definitions seem acceptable for our purpose, which is simply to differentiate work that deals primarily with ethics from that primarily concerned with the nature of legal knowledge or legal reality. This means that we classify as "metaphysics" much that others would categorize as epistemology, logic, or philosophy of language, as well as much philosophy that would be considered "antimetaphysical" in a narrower sense of that word.

9. J. RAWLS, *A THEORY OF JUSTICE* (1971).

10. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

11. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

gory, and the content of most law school jurisprudence courses emphasizes "law and ethics" issues.<sup>12</sup> This essay, however, is concerned with the issues dealt with by that more elusive form of legal philosophy, "law and metaphysics."

While most thoughtful lawyers will quickly recognize the complex interrelationship of legal and moral concepts that law and ethics seeks to understand, law and metaphysics requires a more fundamental level of doubt and detachment from legal study. It requires a willingness to reject the authority and validity of most current legal scholarship and to reconceive the subject matter of the study of law. It is not surprising, therefore, that law and metaphysics tends to be a subject of limited appeal, which gains attention only during periods of defensiveness and self-doubt within the legal profession.

There is little question that the zenith of law and metaphysics in America extended from approximately 1910 to 1935. That was, of course, a time of great questioning by many lawyers, and a fundamental redirection of legal scholarship and legal thought. It was a time when philosophically oriented lawyers argued extensively about the validity and reality of law as a field of knowledge. In so doing, they utilized concepts from metaphysics, epistemology, and philosophy of science, and works by philosophers like John Dewey and Morris Raphael Cohen appeared with some frequency in the law reviews.<sup>13</sup>

The role played by philosophy in these debates about legal theory changed as the critique of formal modes of legal discourse became more familiar and widely understood. In the early years, critics like Roscoe Pound and Joseph W. Bingham utilized modern philosophical ideas to discredit as "unscientific" the prevailing deductive mode of legal reasoning and explanation. They proposed instead a new, scientific study of law grounded in pragmatism. Radically empirical, it would study the actions of judges, rather than disembodied legal rules. But this identification of scientific method with strict empiricism was attacked by other lawyers, as well as philosophers like John Dewey and Morris Cohen, who, while sympathetic to the critique of law as a purely deductive study, warned against altogether banishing rules as organizing and justifying principles

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12. Greenawalt, Book Review, 34 J. LEG. EDUC. 740 (1984) (describing "the major subjects now taught in most jurisprudence courses" as issues involving relation of morality and law).

13. See, e.g., Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Cohen, *The Place of Logic in the Law*, 29 HARV. L. REV. 622 (1916); Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926); Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924) [hereinafter *Logical Method and Law*].

in the study of law. By the end of the period, even the most philosophically inclined lawyers had come to the view that philosophy, while it could help clear away some false logic and bad methodologies, could not provide lawyers with an affirmative path to scientific knowledge of law. The result was a new appreciation of the complexity of legal study and the kind of expertise lawyers already possessed, as well as an openness to new approaches to that study.

Pound, in his famous work *Mechanical Jurisprudence*,<sup>14</sup> identified his attack on the emptiness of deductive explanation in law with the attack of pragmatism on older deductive models of scientific thought:

I have referred to mechanical jurisprudence as scientific because those who administer it believe it such. But in truth it is not science at all. We no longer hold anything scientific merely because it exhibits a rigid scheme of deductions from *a priori* conceptions. In the philosophy of to-day, theories are "instruments, not answers to enigmas, in which we can rest."<sup>15</sup>

Pound condemned the prevailing modes of explanation and argument used by judges and lawyers as "empty words" yielding nothing but "arbitrary results."<sup>16</sup> He called instead for a "sociological" jurisprudence,<sup>17</sup> one that would be scientific, in accordance with pragmatism's concept of science: a study that would provide workable and useful solutions for the problems of American society.

Bingham's 1912 article *What Is the Law?*<sup>18</sup> provided an even more extreme critique of the then prevailing view that the appropriate study of law is consideration and analysis of doctrinal rules. Bingham not only argued for a more pragmatic study of law, but also denied the objective existence of any legal rule or principle.<sup>19</sup>

Bingham ridiculed claims that such nonexistent rules or principles

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14. Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

15. *Id.* at 608 (quoting W. JAMES, PRAGMATISM 53 (1907)).

16. *Id.* at 621.

17. Pound, *The Scope and Purpose of Sociological Jurisprudence* (pts. 1 & 3), 24 HARV. L. REV. 591 (1911), 25 HARV. L. REV. 489 (1912).

18. Bingham, *What Is the Law?* (pts. 1 & 2), 11 MICH. L. REV. 1, 109 (1912).

19. Bingham wrote:

A rule or a principle is a connected series of concepts or associations or combinations of concepts. A concept is a psychological phenomenon. It does not exist outside of the mind entertaining it. Without discussing the possible physiological causes and processes of its occurrence, we may postulate as an axiom upon the basis of common knowledge that the idea of X cannot be literally the idea of Y. Figuratively speaking, X can transmit his idea to Y. What occurs, however, is not the passage of the idea to Y, but the formation of a similar one in Y's mind because of the expression which X uses as his means of communication. Principles and rules cannot exist outside of the mind.

*Id.* at 4.

could have an authoritative impact in determining concrete cases. He called the claims "old superstitions" whose "wide-spread persistence in a profession which demands so much acuteness of perception and analytical power is marvelous."<sup>20</sup> He envisioned a science of law based on empirical study of particular judicial decisions. In such a study the rules or principles of law would be causal generalizations about judicial or other legally significant behavior (like the decisions of juries), in much the way, he said, laws in the physical sciences are causal generalizations about the behavior of physical objects.<sup>21</sup>

The writings of Pound and Bingham raised questions that could not be answered within the strict confines of authoritative legal materials or traditional legal discourse of the time. They were questions about the validity of the discourse itself, and the attacks were powered, in large part, by Pound and Bingham's claims that scientific knowledge about the real world could not be validly obtained through traditional legal methods. Although "science," and particularly physics, were the models to which these lawyers aspired, the concept of science they utilized was drawn from the works of philosophers, not physicists. Philosophers of the time had also been deeply impressed by the achievements of the physical sciences, and had sought to develop theories of scientific knowledge that would generalize and explain how such knowledge could be achieved.<sup>22</sup> Pound and Bingham consciously drew on this literature in attacking the unscientific nature of legal discourse.

By making their attack at that level of philosophical abstraction, Pound and Bingham changed the nature of the very discourse they were attacking. While their arguments engendered intense opposition from other legal scholars,<sup>23</sup> in order to be effective, such opponents had to engage the arguments on the same level of philosophical abstraction on which they were made.<sup>24</sup> Law reviews began to contain articles debating the nature of scientific truth, the validity and reality of legal rules, and the causal relationship, if any, between legal rules and judicial decisions. The development of "law and metaphysics" had become possible.

Professional philosophers began to notice the debates in the law schools. In a 1912 speech to the American Philosophical Association, Morris Raphael Cohen praised Pound's article as providing "[t]he most cogent

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20. *Id.* at 17-18.

21. Bingham, *Legal Philosophy and the Law*, 9 *ILL. L. REV.* 98, 115-17 (1914).

22. See W. JAMES, *PRAGMATISM* (1907); Dewey, *Beliefs and Realities*, 15 *PHIL. REV.* 113, 115 (1906).

23. Even the charge of "nihilism" was leveled against Bingham. Kocourek, Book Review, 8 *ILL. L. REV.* 138, 138 (1913).

24. See, e.g., *id.*; Bingham, *supra* note 21.

argument for pragmatism or instrumentalism that I know of,"<sup>25</sup> and further remarked that Pound and the pragmatists in the philosophy department of Columbia University seemed unaware of each other, "a significant comment on the efficiency of our modern university organization in the making of knowledge communicable."<sup>26</sup>

Dewey's famous article, *Logical Method and Law*,<sup>27</sup> further illustrates the broad perspective philosophers were able to bring to the critique of law and legal reasoning. Dewey began by observing that he had a particular philosophical axe to grind, that his conception of logic "d[id] not represent the orthodox or the prevailing view."<sup>28</sup> Dewey saw logic as "an empirical and concrete discipline," a study of the way people actually reach useful decisions.<sup>29</sup> He believed that reasoning by syllogism is not unsound but impossible, because "[i]n strict logic, the conclusion does not follow from premises; conclusions and premises are two ways of stating the same thing."<sup>30</sup> Real decisions are reached, Dewey contended, by beginning with conclusions and finding statements of general import, such as rules of law, which may serve as premises. These premises then serve to explain or justify the conclusions previously reached.<sup>31</sup>

Dewey's article supported and generalized the attack on mechanical jurisprudence, but took a more benign view than Pound of the usefulness of traditional legal reasoning. Dewey saw all deductive processes as a means of justifying particular choices, and stated "[i]t is quite conceivable that if no one had ever had to account to others for his decisions, logical operations would never have developed."<sup>32</sup> At that level of generality, Dewey saw much value in legal rules. Not only do they protect judicial decisions from charges of arbitrariness by providing a means of justifying the judge's choice as rational, they also provide "members of the community a reasonable measure of practical certainty of expectation in framing their

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25. Cohen, *Jurisprudence as a Philosophical Discipline*, reprinted in M. COHEN, REASON AND LAW 132-33 (1950).

26. *Id.* at 133. Cohen went on to recommend the study of law to philosophers, and predicted that "philosophy of law even more than the philosophy of mathematics will prove a corrective to that myopic and stingy empiricism, or sensationalism, which cannot conceive anything to be real except sensible entities that have a position in time and space." *Id.* Of course, it was precisely that "myopic" metaphysical position on which Bingham's attack on prevailing legal knowledge was based.

27. *Logical Method and Law*, *supra* note 13, at 17.

28. *Id.* at 18.

29. *Id.* at 19.

30. *Id.* at 23.

31. Thus, unlike Bingham, Dewey finds a use for general statements of legal rules. He says, "it is certain that in judicial decisions the only alternative to arbitrary dicta, accepted by the parties to a controversy only because of the authority or prestige of the judge, is a rational statement which formulates grounds and exposes connecting or logical links." *Id.* at 24.

32. *Id.*

courses of conduct."<sup>33</sup> This practical, as opposed to theoretical, certainty, Dewey saw as a legitimate and attainable goal of law.

Dewey was a more thoroughgoing pragmatist than Pound. He viewed the urge to justify choice and to guide action through general rules, not as an aberration of lawyers, but as a common and potentially useful human impulse. Accordingly, where Pound viewed deductive forms of legal reasoning as faulty and pernicious, Dewey was willing to include them, properly understood, in a broader conception of the study of law.

The rehabilitation of rules and principles in legal reasoning was carried further by Morris Cohen, whose own philosophy of science left a greater role for the "hypothetico-deductive method."<sup>34</sup> As he stated, "the method of beginning with hypotheses and deducing conclusions, and then comparing these conclusions with the factual world, seems to me still the essence of sound scientific method."<sup>35</sup> For Cohen, legal rules were not merely useful but necessary to make sense of legal phenomena, in much the way, he would claim, laws of physics are needed to make sense of physical phenomena. This view directly contradicted those of people like Bingham, who denied the objective reality of anything but particular cases.<sup>36</sup>

Cohen described the "present wave of nominalism in juristic science" as "a reaction by younger men against the *abuse* of abstract principles by an older generation that neglected the adequate factual analysis necessary to make principles properly applicable."<sup>37</sup> Cohen believed not only in the existence of rules, but that judges decide cases in accordance with them. Although well aware of the "element of discretion" in judicial decision-making, Cohen viewed that discretion as constrained by previous cases.<sup>38</sup>

33. *Id.* at 25.

34. M. COHEN, *LAW AND THE SOCIAL ORDER* (1933), *excerpted in* M. COHEN & F. COHEN, *supra* note 7, at 442.

35. *Id.* at 443.

36. *See supra* note 19. Cohen attempted to refute what he called Bingham's "nominalism":

But there is really no good reason for denying that universals as abstract predicates can denote real traits in the objective world, provided we are careful not to view these abstractions as additional things floating ghostwise in an ethereal space. They are rather the universal or repeatable abstract qualities, relations, and transformations which characterize objects and events, and constitute their objective meaning.

Cohen, *Justice Holmes and the Nature of Law*, 31 COLUM. L. REV. 352, 361 (1931).

37. M. COHEN, *LAW AND THE SOCIAL ORDER* (1933), *excerpted in* M. COHEN & F. COHEN, *supra* note 7, at 563.

38. *Id.* at 564.

The difficulty of seeing what rule a given case involves is partly due to the traditional way of talking about the *ratio decidendi* as if a single case by itself could logically determine a rule. Since every individual case can be subsumed under any number of rules of varying generality, it clearly cannot establish any of them. It is only because every case is related more or less to previous cases—no human situation can be altogether unrelated to all previous situations—that a decision on it tends to fix the immediate direction of the stream of legal decision. The relation between decisions and rules may thus be viewed as analogous to that between points and a line.

*Id.* at 564-65.

To those who followed the law and metaphysics literature of the 1920's and 1930's, it was becoming increasingly clear that philosophy could not provide a definitive means to make the law more scientific and certain. Indeed, there was no clear philosophical concept of what scientific knowledge was, or how it could be obtained. The debate among lawyers about the relation of legal rules to individual judicial decisions corresponded to the more abstract discussion among philosophers regarding the relation of particulars and universals.<sup>39</sup>

This insight, though negative, was highly important to legal scholars of the period. It meant that lawyers were free to study law in many different ways, without being subject to attack for failure to conform to a single scientific methodology. There was also an increased awareness that philosophers could provide relatively little insight into the validity or power of legal reasoning. While philosophical argument could reveal certain types of reasoning to be specious, philosophers invariably deferred to the expertise of lawyers in describing the appropriate application of principles and precedents. This helped assure lawyers that they did indeed possess a specialized expertise, which could be studied and developed.

One can see this antiphilosophical approach to legal study developing even in such philosophically oriented lawyers as Hessel Yntema and Felix Cohen. Yntema, in *The Rational Basis of Legal Science*,<sup>40</sup> basically took an agnostic view on the metaphysical debates between Bingham, Morris Cohen, and Mortimer Adler. He argued that the lawyer no more needs a correct theory of knowledge than the physical scientist. "[I]t is yet to be shown that a scientific demonstration is at all validated by the theory of knowledge of the scientist, any more than by his religion or the language in which the results are stated . . ."<sup>41</sup> Yntema was willing to recognize that law, while "referable to experience," can also be a "logical, postulational process."<sup>42</sup> Thus, for Yntema, legal reasoning could proceed at various levels of abstraction. However, all such abstractions ultimately had to be empirically grounded in actual legal decisions: It is the lawyer's expertise in the actual process of legal decisionmaking that provides the raw

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39. In his review of Jerome Frank's *Law and the Modern Mind*, Mortimer Adler attributed to the realists a "one-sided" view of scientific method based on the empirical and pragmatic tradition of "Mill, Pearson, Bridgman, Vaihinger, Barry, Dewey." Adler, *Legal Certainty*, 31 COLUM. L. REV. 91, 92 (1931). He suggested that a very different conception of science was to be found in "Whewall, Cassirer, Poincaré, Duhem, Clifford, Campbell, Meyerson, Eddiston." *Id.* Similarly, the realists' acceptance of Schiller's and Dewey's approach to logic was contrasted with the alternative views of, among others, Keynes, Russell, Lewis, and the language theories of Russell, Whitehead and (early) Wittgenstein. *Id.* at 98-100.

40. Yntema, *The Rational Basis of Legal Science*, 31 COLUM. L. REV. 925 (1931).

41. *Id.* at 938-39.

42. *Id.* at 928. He was careful to add, however, that it made a significant difference "whether the [logical] propositions are deemed to be sufficiently evidenced and so are stated categorically or are unverified and so are stated hypothetically." *Id.*

material for legal abstraction. Yntema announced that the theory needed for legal science could not be derived from philosophical discourse, but had to be obtained from those familiar with "the realities of law."<sup>43</sup>

Even a lawyer as steeped in philosophy as Felix Cohen used philosophy and philosophical insight in an essentially negative way. In his famous article, *Transcendental Nonsense and the Functional Approach*,<sup>44</sup> he punctured as "nonsense" legal concepts like corporate personality, due process, and fair value, which had been "thingified" by judges and legal scholars to appear to exist in a conceptual universe unrelated to actual experience.<sup>45</sup>

In debunking such concepts, Cohen was, to be sure, following a modern philosophical school that was dismissing much of traditional metaphysics as similar "nonsense."<sup>46</sup> But the point is that Cohen, while highly attuned to current philosophical thought, was also very conscious of the limited usefulness of philosophical discourse to lawyers. To Cohen, philosophy provided a therapeutic agent to dissolve the misconceptions of previous times, but it was lawyers who had to correct those misconceptions with "facts," actual descriptions of how judges act.

Cohen's functional approach to law was one that could be pursued only by lawyers, but only by those lawyers who took an expanded view of their field of inquiry. It viewed law as a social process, and looked to lawyers to discover and elucidate the process by which economic forces, aesthetic ideals, moral principles and social conservatism were molded into judicial decisions and generalized into rules of law. Like Yntema, Cohen did not claim that his was the only valid form of legal science. He noted that his functional approach to law "is largely dependent upon the results of classificatory or taxonomic investigation, genetic or historical research, and analytical inquiries."<sup>47</sup> In short, Cohen's goal was to broaden the nature of legal study by looking at both the social causes and consequences of legal decisions, while not denying the role of more traditional legal scholars in classifying judicial opinions, tracing the genesis of legal doctrines, and analyzing their component parts.

In the fifty years that followed, legal scholarship developed consistently, in many ways, with the vision of Felix Cohen and Yntema. The study of

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43. *Id.* at 934.

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

45. *Id.* at 811, 820-21.

46. Cohen identifies his attack with the attack of logical positivists on traditional problems of philosophy. He quotes approvingly the observation of Wittgenstein that most propositions on philosophical matters "are not false, but senseless." *Id.* at 823 (quoting L. WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* (1922)).

47. *Id.* at 829-30.

law was broadened. Legal rules were often explained or justified in terms of social or economic policies they were assumed to embody.<sup>48</sup> The consequences of judicial opinions were studied, sometimes through empirical research,<sup>49</sup> sometimes through application of economic models,<sup>50</sup> usually with a simple presumption that careful study of judicial opinions would reveal the societal needs such rules addressed and the societal functions they were assumed to serve.<sup>51</sup> At the same time, doctrinal work of various kinds continued as legal scholars analyzed new decisions, synthesized or derived rules from the case law, and distinguished and classified cases according to various taxonomic formulae. These lawyers generally acted under the assumption that their work was expanding and deepening our understanding of the law, as well as providing the knowledge needed to create better laws. Law and metaphysics scholarship, which by its very nature questions those assumptions, largely disappeared.

In the last few years, this picture of legal academia has changed significantly. A new generation of legal scholars, many trained in philosophical discourse, has once again raised fundamental doubts about the established modes of legal explanation and justification. Just as Pound rejected as "arbitrary" justifications of judicial decisions expressed as formal deductions from preexisting legal rules,<sup>52</sup> these scholars reject as "indeterminate" arguments which seek to explain particular decisions in terms of underlying social or economic policies or embodiments of fundamental normative principles.<sup>53</sup> They contend that for any particular decision, counterpolicies and counterprinciples can be found within the legal system to explain and justify the contrary result. These claims cast doubt on the ability of contemporary legal scholarship to explain the law in much the way an earlier generation rejected explanations based on logical deductions from formal rules.<sup>54</sup>

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48. See Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFF. 66 (1972).

49. See generally Black, *The Boundaries of Legal Sociology*, 81 YALE L.J. 1086 (1972) (discussing relation between sociological and legal scholarship).

50. See, e.g., A. POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* (1983).

51. Robert Gordon has referred to this set of assumptions about the relationship of legal rules to society as "functionalism." Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 59 (1984); see Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1028-45 (1981).

52. Pound, *supra* note 14, at 620-21.

53. These claims are most often associated with members of the Critical Legal Studies movement, who have propounded the strongest and most generalized form of the indeterminacy critique. See, e.g., Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983); Gordon, *Critical Legal Histories*, *supra* note 51. Similar critiques regarding the indeterminacy of particular forms of legal explanation may be found in Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591 (1980); Leif, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974).

54. See generally Yablon, *The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation*, 6 CARDOZO L. REV. 917 (1985) (discussing problems of legal explanation raised by Critical Legal Studies theorists).

Related to this critique is the claim that it is impossible to achieve a determinate and authoritative interpretation of legal rules, including the rules set forth in the United States Constitution. Proponents of this view reject the notion that the words of legal materials have fixed and objective meanings; they deny that there is any definitive fact, such as the intention of the drafters, which can provide an authoritative interpretation of a law.<sup>55</sup> Such arguments require lawyers to take positions on a range of issues concerning the nature of language and its relation to knowledge. How do words acquire meaning? Is the truth of a statement determined by its correspondence to some objective reality, some community of interpretation, or is it not susceptible to determination at all?

These are now live issues among legal scholars, some of whom are turning to the works of literary theorists, semioticians, and philosophers of language,<sup>56</sup> just as an earlier generation turned to logicians and philosophers of science. This resurgent questioning of the validity of legal study raises the possibility of a rebirth of law and metaphysics scholarship.

## II.

It is in this context that Saul Kripke's book, *Wittgenstein on Rules and Private Language*,<sup>57</sup> may be seen as relevant and important to contemporary lawyers. It is a powerful philosophical argument about the indeterminacy of rules and all forms of rule interpretation. Kripke demonstrates the impossibility of ever finding determinate criteria by which one can establish that a given action does or does not constitute "following a rule." Yet his argument will provide little support to those who seek to condemn legal interpretation for such indeterminacy. The indeterminacy Kripke demonstrates operates at such a high level of abstraction that it cannot function as a critique of any rule. Rather, the argument reveals a paradox that seems to discredit the very notion of following a rule. Moreover, Kripke suggests that the paradox can only be overcome by integrating its skeptical premises with our understanding of statements about rules and rule-following behavior.

Kripke's book is an elucidation of an argument he believes appears, in a more cryptic and shortened form, in Wittgenstein's *Philosophical Investi-*

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55. See Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

56. See, e.g., Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Graff, "Keep off the Grass," "Drop Dead," and Other Indeterminacies: A Response to Sanford Levinson, 60 TEX. L. REV. 405 (1982); Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982).

57. S. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE* (1982) [hereinafter by page number only].

gations.<sup>58</sup> As he states in the Preface, Kripke views his role “almost like an attorney presenting a major philosophical argument as it struck me.”<sup>59</sup> While not fully embracing it, Kripke does describe the argument as “major” and “important,” and concedes he found himself troubled by it.<sup>60</sup> Thus the argument in the book is Wittgenstein as perceived by Kripke, and the combination of perhaps the most original and subtle twentieth century philosopher with a very highly regarded contemporary logician and philosopher of language makes for an impressive one-two punch.<sup>61</sup>

Kripke’s argument is about the indeterminacy of rules. It attempts to demonstrate that with respect to any rule and any particular action taken “pursuant to” that rule, it is impossible to state criteria that can authoritatively establish whether the rule is or is not being followed.<sup>62</sup> Such a demonstration might seem unexceptional as applied to such notoriously vague doctrines as due process or the parol evidence rule, but Kripke’s task is more difficult. He is seeking to demonstrate the indeterminacy of the rules of arithmetic.<sup>63</sup>

If I say I understand or “grasp” the rule of addition, it presumably means that I know how to achieve a determinate answer to a large number of mathematical problems that I have never previously considered. As Kripke notes, this is generally what is understood by “grasping” a rule: “[M]y past intentions regarding addition determine a unique answer for indefinitely many new cases in the future.”<sup>64</sup> Kripke then considers such a new case, a problem involving two numbers I have never added before:  $68 + 57$ . The problem is simple, the correct answer obvious: 125.

But Kripke now introduces, as he says, a “bizarre skeptic,”<sup>65</sup> who challenges my result not by alleging that  $68 + 57 = 125$  is incorrect as a proposition of mathematics, but by challenging the assertion that, in arriving at my conclusion, I was following the rule I had previously grasped.

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58. Pp. 1–6 (discussing L. WITTEGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G. Anscombe trans. 1953) [hereinafter *PHILOSOPHICAL INVESTIGATIONS*]). The reworking of arguments made by earlier philosophers is a well-established philosophical tradition. It enables the writer to set forth an argument for analysis and study without endorsing it fully. Probably the most famous examples are the early and middle dialogues of Plato, in which most of the interesting philosophical ideas are presented as the thoughts of Socrates.

59. P. ix. It is interesting that Kripke perceives the ability convincingly to present an argument one does not fully believe as an attribute of the legal rather than the philosophical profession.

60. Pp. viii–ix.

61. Referring to the argument poses a bit of a problem, since it is properly neither Kripke’s nor Wittgenstein’s alone, and constantly referring to “Kripke’s exposition of Wittgenstein’s argument” is a trifle awkward. Kripke, while he believes he is elucidating an argument of Wittgenstein’s, is clearly less interested in supporting that attribution than he is in the validity and coherence of the argument itself. Accordingly, for simplicity’s sake, and with some awareness of inaccuracy, I refer to the argument of the book as Kripke’s.

62. P. 7; see also *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 58, § 201.

63. See pp. 7–8.

64. P. 8.

65. *Id.*

The skeptic proposes instead that the rule I had previously grasped was not addition but "quaddition," a rule which yields the same results as addition for sums up to those involving 57, but which, for sums involving 57, requires that the question be answered 5. Accordingly, by answering the question  $57 + 68$  as 125 rather than 5, I was not following my previously grasped rule of quaddition. I had arrived at an incorrect result, as measured by my prior intention.<sup>66</sup> Of course, the skeptic's argument is crazy and wrong. I know very well that the rule I learned was "addition," not "quaddition," and my knowledge of that rule somehow required me to answer 125 rather than 5. Accordingly, I should be able to demonstrate easily to the skeptic that I previously meant "addition" and not "quaddition."

The problem, Kripke argues, is that I can make no such demonstration. There is no fact that I can cite, whether it is about the world, about my previous behavior, my previous use of language or even my previous intent, which can establish that the rule I previously grasped was "addition," not "quaddition."<sup>67</sup> Notice that Kripke is perfectly willing to allow, as potentially dispositive facts, statements about my previous intent. He is not limiting the inquiry to objectively ascertainable facts.<sup>68</sup> Moreover, since we are talking about *my* intent, rather than that of the drafters or some legislative body, the problems of ascertaining intent are significantly reduced. Nonetheless, the one answer I cannot give is that "by 'addition' I meant that the correct answer to  $57 + 68$  would be 125." The whole premise of what it meant to grasp a rule was that my knowledge of the rule would enable me to determine infinitely many new cases and that  $57 + 68$  was such a new case. If I only know that  $57 + 68 = 125$  because I have already decided that case, I seem to be proceeding by rote memorization and not following a rule at all.<sup>69</sup>

Kripke next considers possible ways out of the dilemma. One possibility is to rephrase the rule in terms of the algorithm for addition. Thus the "proof" of my prior intention with respect to the rule is a statement like: "By 'addition' I meant that for any numbers  $x$  and  $y$ , the correct answer would be the result of  $x$  plus  $y$ ."<sup>70</sup> Such an answer, however, merely rephrases the rule in terms of another rule and does not satisfy the bizarre skeptic, who merely transfers his doubts to the new rule. How do you know, he says, that by "plus" you meant the arithmetical procedure that yields 125 as the result of  $57 + 68$ ? Perhaps you meant "quus," which

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66. Pp. 9-11.

67. P. 11.

68. P. 14.

69. See p. 15.

70. Pp. 15-16.

yields the same result for all sums not involving 57, but in which 57 quus 68 equals 5.<sup>71</sup> Nor will it do to say that by “plus” I meant then what I mean by “plus” now, because I am sure to be faced with the question, how do I know that by “plus” I now mean the rule that yields 125 and not 5 as the sum of 57 plus 68? To answer, “Because that is the answer I have now obtained,” makes the whole justification circular.

Kripke gives considerable attention to another possible response to the skeptic, that what I acquired when I “grasped” the rule of addition was a *disposition* to respond to questions of a certain nature in a certain way. Accordingly, when I learned addition, I acquired the disposition to answer questions of the type  $x + y = ?$  with the sum of  $x$  plus  $y$ , and therefore would have answered  $57 + 68$  as 125.<sup>72</sup>

Such dispositional analysis is, of course, quite familiar to lawyers, particularly those who analyze the legitimacy of judicial decisionmaking in terms of legal process and neutral principles. While such principles are sometimes described as rules of decision yielding determinate results, they are more often analyzed as attitudes or dispositions towards the process of decisionmaking itself. By bringing to the decisionmaking process certain attributes of neutrality, rationality, and deference to prior precedent, it is argued that decisionmakers are able to “follow the rules” even when giving answers to novel legal questions.<sup>73</sup> Similarly, one might argue, someone with the appropriate dispositions of neutrality and rationality towards the process of addition would give the answer 125 to the sum  $57 + 68$ . Giving the answer 5 would reflect another disposition entirely.

Kripke’s discussion, which of course makes no mention of neutral principles, focuses on the distinction between a description and a justification of my action of answering 125 rather than 5. As a description of my behavior, the statement that I am disposed to answer 125 to  $57 + 68$  is entirely accurate, proven by the fact that that is the answer I actually gave. One can even concede that that is in fact the answer I would have given if I had been asked the question anytime since learning the rules of addition. Yet, Kripke says, this answer will not satisfy the bizarre skeptic, who is looking not for a description of how I will respond to the question, but for a justification that my response is the correct one pursuant to the rule. Responding in terms of the individual’s own dispositions can never

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71. P. 16.

72. Pp. 22–23. In describing my disposition by referring to the algorithm of addition, I am not claiming that what I learned was the algorithm itself, which would immediately get us back to the “plus” versus “quus” problem. Rather, I am using the algorithm as shorthand for describing my past disposition. Thus I am assuming, merely for ease of presentation, that we presently agree on the meanings of both “plus” and “quus.”

73. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 10–20 (1959).

provide such a justification, unless one is willing to assume, which most of us are not, that the response the decisionmaker is disposed to give is always the correct response to the rule.<sup>74</sup>

The dispositions of judicial decisionmakers may provide justifications in an entirely different sense. It may be that we value the attitudes of neutrality, rationality, and deference to precedent independently of whether those attitudes achieve the correct result. Or perhaps we are willing to say, unlike Kripke and his bizarre skeptic, that any results achieved through such dispositions are, by that very fact, correct results. Kripke's analysis casts doubt on only one small part of the neutral principle concept of judicial decisionmaking. His argument makes it doubtful that any decision made by a judge pursuant to neutral principles can be justified as a correct response to any preestablished rule.

The problem that Kripke's argument elucidates does not, of course, hinge on any uncertainty or obscurity in the rules involved, or in any contradictions in the rules themselves. The problem is, quite simply, that the rules of arithmetic, like all other rules, are expressed in language. Our ability to understand and be guided by the rule depends on our ability to understand the meaning of the words in which the rule is expressed. Kripke's argument, then, is really an argument about the indeterminacy of language, a skepticism that there is any fact about our past use, intention, or attitude towards a word like "addition" that controls or restricts or limits our future uses of that word.<sup>75</sup>

Thus far, Kripke's argument seems to resemble those of literary theorists and legal academics who deny the existence of any objective meaning in a text. But Kripke's skepticism goes a step further, in that he appears to deny the possibility of any subjective meaning as well. When presented with an occasion to use a word whose meaning I supposedly "know," Kripke's argument maintains that there is no fact, internal or external, that can authoritatively provide the meaning of that word.<sup>76</sup>

Accordingly, as Kripke recognizes, the skeptical argument is not a refutation of the determinacy of rules, but a paradox about the nature of lan-

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74. Pp. 23-24. To illustrate this point, Kripke considers another question,  $57 * 68 = ?$ , where the sign "\*" has no number theoretic function. I can nonetheless give a response to such a question, and hereby answer it with the number 12. Presumably, a descriptive dispositional analysis of my response is quite possible. Because I gave a single determinate answer, it is probable that somewhere in my background or psyche I developed the disposition to answer 12 when asked the question  $57 * 68 = ?$ . The question is of course quite meaningless, and it is impossible for me or anyone else to justify my answer as the correct response to the question. The indisputable fact that I had a disposition to answer 12 does not justify that response as correct. Similarly, my equally indisputable disposition to answer 125 to the question  $57 + 68$  does not justify that response as an instance of following a rule. See p. 24 & n.18.

75. Pp. 43-44.

76. P. 55.

guage itself. We know that words have meaning because we can use them to communicate with others. We know that we can recognize correct and incorrect uses of language and distinguish meaningful sentences from nonsense. We know that the correct answer to  $57 + 68$  is 125, not 5. The paradox is that although we know all this, we cannot demonstrate what it is about the words, or our relation to the words, that provides us with such knowledge.<sup>77</sup>

Kripke compares the skeptical paradox revealed in his argument to Hume's famous skeptical argument about causation.<sup>78</sup> Hume's position can also be described as a paradox in that, while I may assert that two events are causally connected, there is no fact about the two events that I can cite to justify my claim of causation. The "solution" to the paradox is to alter our assumptions about causation to include the skeptical premises of Hume's argument. There is no fact about the occurrence of two events that enables us to demonstrate that they are causally related. Rather, our assertion of a causal connection can be understood as the assertion of an invariable conjunction between certain *types* of events. Our initial assumption that causation is found in the interrelation of particular events was wrong. It is found in generalizations about categories of events.<sup>79</sup>

Kripke uses this discussion to prefigure the solution to his own skeptical paradox. Like Hume's, it will be a "skeptical" solution. It will not refute the skeptical premises of the paradox, but will incorporate those premises into the proposed solution. Although Hume's solution concedes that nothing about the events themselves establishes the causal relation, it nevertheless enables us to continue speaking of causation by understanding causal statements as generalizations about certain categories of events. In much the same way, Kripke's solution will concede that there is no fact about my attitude or intention towards a rule which can demonstrate whether I am following that rule. Indeed, he will argue that we can never speak of a single individual, considered in isolation, as following a rule or as meaning anything. Rather, we can continue to make statements about an individual's meaning or rule following, but understand them as involving not the relation of that individual to a text or rule, but to the behavioral interactions of that individual with the community.<sup>80</sup>

One of the central points of Wittgenstein's later philosophical method was his rejection of the notion that statements in language embodied "truth conditions" that described certain facts about the world and could be proven or falsified by the existence or nonexistence of such facts.

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77. See pp. 60 & n.47, 62.

78. P. 62.

79. Pp. 62, 67-68.

80. Pp. 69, 87-90.

Wittgenstein instead emphasized the way statements were *used* in the linguistic interactions of the community.<sup>81</sup> Rather than try to define the facts that would have to exist to say of a person, "He has a toothache," Wittgenstein would ask under what circumstances it would be appropriate in our language to say "He has a toothache." Although the first question seems like an unanswerable philosophical conundrum (how can anyone ever truly know whether another is feeling pain?), the answer to Wittgenstein's question is accessible to all reasonably competent speakers of the language (if I see someone holding his jaw and grimacing, I am justified in making such a remark).<sup>82</sup>

Wittgenstein's method also enables us to provide an account of such linguistic utterances as "Open the door," "Can I have a quarter?," and "Wow!," all of which have meaning to a speaker of our language, but do not seem to involve any truth or falsifiability conditions.<sup>83</sup> Note that such an account of language and meaning looks at the role words actually play in our language. This inquiry requires reference to a linguistic community, to people who share a common set of responses to language, and who thereby share, in Wittgenstein's famous phrase, a "form of life."<sup>84</sup>

Kripke's skeptical paradox is an elaborate demonstration of the impossibility of providing a set of necessary and sufficient conditions for the truth of the statement "He is following a rule." The argument seeks to demonstrate that there is no fact about the rule or the individual who is trying to follow it that would render such a statement either true or false. The solution to the paradox is not to analyze the problem in terms of truth conditions, but rather to describe the conditions under which one is justified, in our language, in saying that someone is following a rule. Kripke's solution, simply put, is that we are entitled to assert that someone is following a rule when we are able to check his or her response to the rule and determine that it agrees with our own.<sup>85</sup>

For example, we are justified in saying that I am following the rules of addition when I add  $57 + 68$  and get 125 because 125 is the response that other members of the community who are recognized as competent in

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81. PHILOSOPHICAL INVESTIGATIONS, *supra* note 58, §§ 134-142.

82. *Cf. id.* §§ 253-257. Wittgenstein makes a similar point in connection with statements about understanding words like "red" that are not definable in terms of other words. Rather than trying to determine what facts must be true of a child who "has learned the meaning of the term 'red,'" we can describe the conditions under which such a statement would be justified in our language. When the child is asked to "bring the red fruit" and she hands you the apple rather than the orange, we are justified in asserting that the child "understands the meaning of the word 'red.'" If, when then asked to select the red flower, she brings the daisy rather than the rose, we would be justified in altering our conclusion. *Id.* §§ 273-274, 380-383.

83. *Id.* §§ 23, 27.

84. *Id.* §§ 19, 241.

85. Pp. 87-96.

following the rules of addition would give. Of course, people do not go around constantly checking each others' addition, but we do continue to check each others' responses in a negative sense. I reject the claim that someone who adds  $57 + 68$  and gets 5 is doing addition because I know that my response (or that of any other competent adder) would be quite different.<sup>86</sup> I reject the claim that someone who moves his rook diagonally is following the rules of chess (although he may *intend* to be following those rules), and I reject the claim that a city that maintains a segregated school system is complying with the Fourteenth Amendment. In each case, my assertion does not rest on the relation between the text of the rule and the individual response, but on my knowledge of the role those words play in the language of my community, in its form of life. It is, for Kripke, the "brute empirical fact that we agree with each other in our responses" that enables us to make such assertions about rule-following behavior.<sup>87</sup>

One can perceive the way in which Kripke's argument speaks quite directly to some current debates in law about the indeterminacy of rules and the way in which legal texts acquire meaning. His argument, like that of the deconstructionists of literary and legal texts, leads to the conclusion that there is no "superlative fact" about the text or its drafter that can provide it with a determinate meaning. Kripke's argument appears to resemble, in some respects, the argument of theorists who look both to the role of the "interpretive community" in providing such meaning and to some version of a conventionalist concept of truth.<sup>88</sup>

Yet Kripke's position, as set forth in his solution to the skeptical paradox, differs significantly from most versions of this argument in important respects. Such arguments often attempt to solve the problem of meaning by asserting that the meaning of a word or the application of a rule is determined by the shared understandings of a particular interpretive community. Such a position still seeks to provide determinate empirical conditions under which statements about meaning will be rendered true or false. It merely looks for truth conditions in the understandings of the community, rather than in the attitudes or past actions of the person who produced the statement. If shared community understandings can be ascertained by, for example, polling competent language speakers, it is still possible to describe statements about the meaning of words or texts as true or false.

Kripke shows, however, that conventionalist arguments that try to provide truth conditions for statements about the word "meaning" are flawed, for precisely the same reason that truth conditions cannot be prescribed

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86. Pp. 94-95.

87. P. 109.

88. See, e.g., Fiss, *supra* note 56; Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984).

for statements about "addition" or "red" or any other word. Such arguments fail to account for the complexity and creativity involved in linguistic utterance. It is certainly possible to make intelligible statements in our language about "meaning" in circumstances where the conventionalist truth conditions are not satisfied, as, for example, when a parent states: "When my one year old says 'bapu,' she means apple."

Kripke's argument, in contrast, does not seek to provide truth conditions for "meaning" or any other word, but is rather concerned with the circumstances under which statements utilizing the term "meaning" may be appropriately asserted in our language. It is a fact about our language that it is generally appropriate to assert that someone understands or knows the meaning of a word when their use of, and responses to the use of, the word are similar to the uses and responses expected of other competent speakers of the language. This is not a statement about the meaning of "meaning," but, in Wittgensteinian terms, a description of the grammar of statements about meaning, of the role these statements play in our language.<sup>89</sup> We do not know how to make sensible statements about meaning because we have polled the members of our interpretive community, but rather because we know how to speak our language.<sup>90</sup>

To lawyers, Kripke's argument is extremely important, but primarily in a negative sense. At one level, it is a powerful refutation of all lawyers who claim there is one "superlative fact"—the most popular candidate these days being the original intent of the drafters—that can provide a determinate meaning to legal rules. Such arguments are usually based on a claim that to interpret a law, lawyers must resort to the original intention of its authors because any other interpretive device is woefully indeterminate.<sup>91</sup> Kripke's argument demonstrates that original intent, even one's own fully knowable original intent, cannot determine any future application of a rule. Accordingly, original intent can provide no more determinate answers to questions of legal interpretation than any other hermeneutic device.<sup>92</sup>

Yet Kripke's argument also provides little support for the claim that the law's inability to provide determinate answers demonstrates the illegitimacy of legal rules or of their application by decisionmakers. Surely the

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89. See PHILOSOPHICAL INVESTIGATIONS, *supra* note 58, § 29.

90. *Id.* § 381.

91. See, e.g., R. BERGER, GOVERNMENT BY JUDICIARY 363-72 (1977) (espousing original intent as basis of constitutional interpretation).

92. It would be possible to rephrase the original intent argument as a Wittgensteinian claim about the use of words in our language. It might be argued that it is only appropriate to speak of "knowing the meaning of a rule" when we have direct knowledge of the intention of the person who wrote the rule. This claim is not refuted by the skeptical paradox (although it may be indirectly refuted by rendering the notion of "direct knowledge" of someone else's intention an incoherent concept), but it does not seem to be a plausible claim about our language.

indeterminacy Kripke has revealed in the rules of addition does not render arithmetic illegitimate, and arithmetic teachers, by marking papers which contain the computation  $57 + 68 = 5$  incorrect, are not unfairly restricting their students' freedom (although they are teaching them a particular language). The philosophical demonstration of the indeterminacy of all rules does not alter the "brute empirical fact" that we continue to speak of rules and continue to distinguish between actions that follow and do not follow a rule. However, it does require us to change our understanding of the notion of rule following, to include a recognition of the social, cooperative, and even political process implicated in discussions about rules.

Probably the most important contribution Kripke's book makes to lawyers is to clarify the ways in which a rule may be indeterminate. His argument requires us to distinguish, in ways that much of the contemporary debate among lawyers does not, between two types of indeterminacy which may characterize rules. The first, which we may call "Kripkean indeterminacy," describes a rule that is indeterminate in that no particular action can ever be justified as following or not following the rule. This is quite different from a rule that is indeterminate in that a competent decisionmaker cannot arrive at a correct application of the rule in response to a particular case. We may call this "causal indeterminacy." The rules of addition provide good examples of rules which are indeterminate in the Kripkean sense (that is what the skeptical paradox demonstrates), yet fully determinate in the causal sense.

Legal rules, of course, may be indeterminate in both senses. Kripkean indeterminacy involves an observation about the nature of language and the theoretical impossibility of justifying future behavior on the basis of past uses of a word. It applies, as Kripke demonstrates, to all rules expressed in language. Causal indeterminacy, in contrast, deals with the inability of a rule to bring about what would be viewed by speakers as a correct and determinate response. Causal indeterminacy involves reference to the behavior of members of a particular linguistic community, and is highly context specific. "Dress appropriately" may be a perfectly understandable rule in certain contexts, giving rise to a single appropriate behavior. In others, it would be woefully indeterminate (in a causal sense).<sup>93</sup>

This distinction may help clarify some of the current debates in legal theory. For example, it sheds some light on the well-known "chain gang" exchange between Ronald Dworkin and Stanley Fish.<sup>94</sup> Dworkin, in

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93. Compare Dewey's distinction between theoretical certainty and practical certainty, *supra* notes 27-33 and accompanying text.

94. Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982) [hereinafter *Law as Interpretation*]; Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982) [hereinafter *Working on the Chain Gang*]; Dworkin, *My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Any More*, in THE POLITICS OF INTER-

seeking to show how rules acquire determinate meaning within a legal context, argues that, as each judge in a chain of precedent decides a concrete case pursuant to a previously announced rule, the freedom of subsequent decisionmakers to act pursuant to that rule is narrowed, much as writers of a story started by someone else have their responses restricted by the preceding paragraphs.<sup>95</sup> Fish rejects this argument, and argues that every judge or writer in the "chain" remains totally free to add whatever he or she likes.<sup>96</sup> Clearly, this debate involves a confusion of the two types of indeterminacy described here. In a causal account of indeterminacy, as a behavioral fact about judges in our society, Dworkin is absolutely right. Judges' responses do tend to be more predictable—and in that sense more constrained—in areas with abundant case law. But Fish is equally right that, in a Kripkean sense, no amount of prior case law can determine or justify a judge's response in the next concrete case.<sup>97</sup>

Kripke's work can be extremely useful in identifying the fallacies of intentionalism and making lawyers more aware of the complexities of any claim about the indeterminacy of rules. But it also indicates that philosophy provides little help to lawyers in dealing with the societally specific rules that are the main subject matter of their study: the conflict between different social practices as manifested in legal disputes. Kripke "solves"

PRETATION 287 (W. Mitchell ed. 1983); Fish, *Wrong Again*, 62 TEX. L. REV. 299 (1983).

95. *Law as Interpretation*, *supra* note 94, at 542-43. Note the similarity of Dworkin's account to Morris Cohen's description of how a chain of precedent could give rise to a rule of law. See *supra* note 38. Dworkin's argument is more ambitious, however, since he is seeking to argue not only descriptively that a chain of precedent may give rise to a causally determinate rule, but also to give a prescriptive account of how judges should properly choose the correct rule out of such a chain.

96. *Working on the Chain Gang*, *supra* note 94, at 553-54. Fish's position is somewhat less clear than Dworkin's, since he claims that every writer in the chain is equally free and equally constrained (by their social perceptions of their own roles). But when Fish asserts that the various writers may disagree about whether the previous text is a satire, a comedy of manners, or a piece of realism, and that such a dispute cannot be resolved "by appealing to that text," it seems obvious that his claim is one of Kripkean indeterminacy.

97. An analogy may be drawn to an example used by both Wittgenstein and Kripke, the numerical series. See pp. 18-20. If I present you with the numerical series 2, 4 and ask you to continue it, you may be unsure as to the behavior requested. 6 seems like an appropriate answer, if you view the series as requiring the addition of 2 to the prior number. Yet 8 is an equally plausible response, since the series is equally compatible with a rule that requires doubling the prior number. However, once we are given a few more numbers in the series, say 2, 4, 6, 8 we "know" the rule and give the "correct" response. Our confidence in the correctness of the answer 10 is so great that we are willing to use such questions on standardized tests to measure a student's "mathematical aptitude."

Yet, in a Kripkean sense, both numerical series are equally indeterminate and neither has a "correct" answer. I can always come up with some possible rule that justifies any answer I choose to give to either series. The rule I am supposed to derive from the latter, more determinate series is "keep adding 2 to the prior number," but I can equally well derive the rule "keep adding 2 to the prior number until you reach 8, then add 151." Accordingly, in a Kripkean sense, 10 and 159 are equally appropriate responses to the latter series. Dworkin's chain gang is like the addition of more numbers to the series. It does indeed limit what we would consider correct behavior by subsequent judges. Yet Fish is also right that, as a purely theoretical matter, there can be no "wrong" response to such a chain. See also R. DWORKIN, *LAW'S EMPIRE* 78-85 (1986) (contrasting "internal" and "external" skepticism).

the skeptical paradox about rules by positing socially recognized norms of behavior, which enable a member of that society to expect and identify certain behavior as “rule following.” This is certainly plausible with respect to addition, and is probably true of the vast majority of behaviors associated with legal rules as well. We drive on the right side of the street, pay our electric bills, refrain from killing each other, and have no trouble describing people who do not engage in one of these expected behaviors as violating the law.

Yet the questions which engage the attention of most lawyers involve those behaviors that, under the prevailing social and linguistic norms, may be appropriately described either as “violating” or “not violating” the law. Such ambiguities are not unique to law, but may be found throughout our language. Is a whale a fish? Is Dr. Jekyll and Mr. Hyde one person or two? Kripke’s book helps us to realize that such ambiguities are not, as many lawyers assume, the result of improperly or inadequately defined words, but that under certain circumstances there is no agreement among competent speakers of the language as to appropriate responses to such well understood words as “fish,” “person,” or “crime.” The existence of such disagreement is as much a “brute empirical fact” as the agreement in our society about the appropriate response to addition. A Kripkean analysis of language, once it recognizes such disagreement, can go no further.

Yet lawyers do go further. They argue over the appropriate response to such words as they occur in particular cases, fully aware that the resolution of such linguistic conundrums will have substantial behavioral consequences. In making such arguments, they put forth contentions about the “meaning” of the words involved, the “intention” of the entity which formulated the rule, the consequences that treating the words a certain way will have in this case and in cases to follow. From a Kripkean point of view, such arguments can never succeed in their supposed purpose of establishing the “correct” interpretation of the rule, yet they do seem to be useful, both to lawyers and judges, in helping to resolve cases. In some way that we do not understand very well, lawyers can use language to change language. More accurately, they can use legal argument to change the responses that actors within the legal system deem “appropriate” in connection with certain legal formulations. Legal discourse and legal practice themselves appear to be important mechanisms in creating or destroying shared understandings in legal language. Change in the dominant understanding of legal language has something to do with the behavior of appellate court judges, but is undoubtedly also influenced by all the other actors in the system, the lawyers, law professors, clerks, and litigants.

Trying to understand how actors within the legal system develop and modify their shared understandings of the appropriate responses to legal

language is a complicated inquiry. It requires consideration of legal language and legal argument and the way both are embedded in the larger set of linguistic behaviors.

Legal argument, like language itself, is open-ended in a somewhat paradoxical way. A skilled advocate can create novel, indeed unanticipated, legal arguments, which are nonetheless coherent and "make sense" as statements about law. Concepts like Brandeis' "right to privacy" or Reich's "new property" can simultaneously invoke and change prevailing legal understandings. It is doubtful that philosophers, who do not "speak" our legal language, and rarely seek to analyze contingent facts about society, can contribute much to understanding the complex and paradoxical nature of legal discourse. Lawyers, however, considering the issues raised by Kripke's book in light of their own experience of the malleability, creativity, and indeterminacy of legal argument, the ease with which arguments about rules are formulated, and the difficulties of persuading judges, should find their understanding of what they do altered, and perhaps enriched.